Montana Code Annotated

ANNOTATIONS

2024

Labor • Family Law • Minors • Adoption

VOLUME 8

2024
ANNOTATIONS
to the
MONTANA CODE ANNOTATED

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PREFACE TO VOLUME 8
(Annotations — September 2024)

Annotations to this volume include:

Case notes of applicable court decisions through:
- public domain citation 2023 MT 177
- volume 413 Montana Reports page 356
- volume 535 Pacific Reporter (3rd Series) page 1133

Digests of Montana Attorney General's opinions through:
- volume 59 opinion number 1 of the Report and Official Opinions of Attorney General

Amendment notes listed under compiler's comments are intended to explain only amendments made in the year indicated and may not accurately reflect current statutory language because of subsequent amendment.

The annotations are provided as a convenience to the user and are not intended to be an exhaustive compilation of the law under a given statute or in a given area.

TITLE 39
LABOR

CHAPTER 1
DEPARTMENT OF LABOR AND INDUSTRY

Chapter Compiler's Comments

Section Not Codified: Section 41-1606, R.C.M. 1947, transferring powers, duties, and functions from the Department of Agriculture, Labor and Industry to the Department of Labor and Industry, was not codified in the MCA. The section has not been repealed and is still valid law. Citation may be made to sec. 8, Ch. 177, L. 1951.

Part 1
General Provisions

39-1-102. Duties of department.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 393, L. 2023. Amendment effective October 1, 2023.

1997 Amendment: Chapter 467 inserted second sentence concerning investigation and enforcement of discrimination laws; and made minor changes in style. Amendment effective July 1, 1997.

Applicability — Saving Clause: Section 20, Ch. 467, L. 1997, provided: "[This act] does not affect any administrative or judicial proceeding pending or commenced prior to [the effective date of this act] [effective July 1, 1997]. [This act] applies to complaints or proceedings filed on or after [the effective date of this act]."

Case Notes

Claim for Overtime — Jurisdiction of Department of Labor and Industry: The Department of Labor and Industry had jurisdiction to hold a hearing and make a ruling on a heavy equipment operator's claim against his employer for overtime wages because: (1) it has a duty under 39-1-102 to enforce state wage laws affecting Montana citizens; (2) under 39-3-209, it must investigate alleged violations of such laws and institute actions for unpaid wages; (3) it may take assignments of wage claims in trust and maintain any proceeding to enforce the claims; (4) it may enforce the federal Fair Labor Standards Act and institute an action on behalf of an employee to recover overtime wages due and unpaid under that Act; and (5) traditional notions of jurisdiction gave the department jurisdiction, as employer and employee were Montana residents, employer's principal place of business was in Montana, the employment contract was entered into in Montana, and part of the work was performed here. To rule that since part of the work was performed in North Dakota there was no jurisdiction in the department would unduly burden the parties, would lead to an oppressive requirement that they litigate in each state a claim for wages allegedly due for work performed there, and would fractionalize employee's claim to the extent that its pursuit would not be worthwhile. Hoehne v. Sherrodd, Inc., 205 M 365, 668 P2d 232, 40 St. Rep. 1363 (1983), followed in America's Best Contractors, Inc. v. Singh, 2014 MT 70, 374 Mont. 254, 321 P.3d 95.

Attorney General's Opinions

Authority to Issue Subpoenas Duces Tecum: This section does not authorize the Department of Labor and Industry to issue subpoenas duces tecum to compel a public works contractor to transmit time sheets and payroll records of employees engaged in public works contract work to the Department's office. 36 A.G. Op. 90 (1976).

39-1-103. Powers of department.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: Deleted (3) that provided section does not confer on Commissioner authority to interfere with matters under control of Workers' Compensation Division nor does Commissioner have duty to enforce workers' compensation laws, including safety laws. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

Attorney General's Opinions

Authority to Issue Subpoenas Duces Tecum: This section does not authorize the Department of Labor and Industry to issue subpoenas duces tecum to compel a public works contractor to transmit time sheets and payroll records of employees engaged in public works contract work to the Department's office. 36 A.G. Op. 90 (1976).

39-1-104. Cooperation with federal government.

Case Notes

Inclusion of District Construction Allowance in Base Pay for Purposes of Calculating Overtime Pay: Plaintiff employees' union sought a declaratory judgment that the district construction allowance (DCA) paid to eligible state employees should be included in their base pay for purposes of calculating overtime compensation. The District Court found that the DCA should not be included in the base pay and granted summary judgment to defendant state agency. On appeal, the Supreme Court reversed, holding that the District Court erred in granting summary judgment. Defendant did not meet its burden of showing that the DCA fit plainly and unmistakenly within one of the exceptions to the federal Fair Labor Standards Act (FLSA), 29 U.S.C. 201 through 219. The FLSA exceptions are to be narrowly construed against the employer asserting them, and the employer bears the burden of showing that the employee fits within the terms of the exception. All remuneration that does not fall within one of the seven exclusionary clauses of the FLSA must be added into the total compensation received by the employee before the hourly pay rate is determined. In the present case, the expenses at issue were not incurred on the employer's behalf or for its benefit or convenience, but rather the money was reimbursement for normal, everyday expenses incurred by the employee for traveling to and from work and thus could not be excluded from the regular rate as reimbursement for travel expenses under 29 U.S.C. 207(e)(2). Further, the agency could not be relieved of liability under the Portal-to-Portal Act of 1947 (PPA), 29 U.S.C. 251, et seq., because under the PPA, that relief does not extend to an employer if the activity is compensable by either an express provision of a written or nonwritten contract in effect, at the time of the activity, between the employer and the employee, the employee's agent, or the collective bargaining representative, as was the case here. Mont. Pub. Employees Ass'n v. Dept. of Transportation, 1998 MT 17, 287 M 229, 954 P2d 21, 55 St. Rep. 60 (1998).

State Enforcement of FLSA Claim: The Montana Department of Labor is not precluded by 39-3-408 or the Fair Labor Standards Act from seeking enforcement of the FLSA claim of an employee working in Montana, but rather is authorized by 39-3-202, 39-3-211, 29 C.F.R. 515.8, and FLSA to do so. St. v. Holman Aviation Co., 176 M 31, 575 P2d 923 (1978).

CHAPTER 2
THE EMPLOYMENT RELATIONSHIP

Chapter Case Notes

Master-Servant Relationship Between Railroad and Locomotive Service Facility Established by Common Control — Applicability of Federal Employers' Liability Act: Employees of the Livingston Rebuild Center, Inc. (LRC), sought damages under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51, et seq., alleging that they were injured during the course of their employment while nominally employed by LRC, but that LRC was actually the servant of Montana Rail Link, Inc. (MRL), which engaged in the business of common carrier by railroad in interstate commerce. MRL's affirmative defense was that plaintiffs could not recover FELA benefits against LRC because LRC was not a railroad and that they could not recover FELA benefits against MRL because they were not employed by MRL. The issue on appeal was whether the District Court erred when it held that plaintiffs were not employed by a common carrier by railroad for purposes of FELA. As applicable law, the Supreme Court cited Kelley v. S. Pac. Co., 419 US 318, 42 L Ed 2d 498, 95 S Ct 472 (1974). Among the factors typically considered for purposes of determining whether a master-servant relationship exists, the most significant is the degree of control that the alleged master exercises over the work of the alleged servant. In this case, a master-servant relationship was established between MRL and LRC not only by control of business practices through common ownership and directorship, but also through: (1) MRL's direct, frequent, and unique supervision of LRC employees; (2) MRL's at-will acquisition of LRC property, including land exchanges without consideration or for less consideration than full market value, when acquisition was in MRL's self-interest; (3) LRC's dependence on MRL for training, tools, equipment, and parts; and (4) MRL's use of LRC property for its own purposes without compensation, including the common sharing of physical facilities. Based on the master-servant relationship, the LRC employees were also considered employees of MRL at the time that they were injured and were thus covered under FELA. Watts v. Mont. Rail Link, Inc., 1999 MT 18, 293 M 167, 975 P2d 283, 56 St. Rep. 88 (1999).

Reciprocal Duty of Good Faith and Fair Dealing Between Employer and Employee — Character of Employee Relevant to Expectation of Job Security: The Supreme Court applied the holding in Los Angeles Mem. Coliseum Comm'n v. NFL, 791 F2d 1356 (9th Cir. 1986), in finding that the implied covenant of good faith and fair dealing mandated a reciprocal duty in the employment relationship, applicable to both employer and employee. Breach by one party served to negate any breach by the other party, so that neither party was entitled to recovery. This rule applied only narrowly to factual contexts where both breaches concerned the same issue and occurred during one episode of the relationship. In the present case, an employee who breached the covenant could not then complain of unfair dealing by the employer. The District Court improperly excluded evidence of specific misconduct related to the employee's character because the alleged misconduct was relevant to whether the employee had a reasonable expectation of job security and could thus claim protection under the covenant. Barrett v. ASARCO Inc., 234 M 229, 763 P2d 27, 45 St. Rep. 1865 (1988). See also Story v. Bozeman, 259 M 207, 856 P2d 202, 50 St. Rep. 761 (1993), Flanigan v. Prudential Fed. S&L, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986), and Dare v. Mont. Petroleum Mkt. Co., 212 M 274, 687 P2d 1015, 41 St. Rep. 1735 (1984).

Covenant of Good Faith and Fair Dealing as Interfering With Freedom of Religion: The Supreme Court upheld a summary judgment dismissing a wrongful discharge complaint against a religious school that dismissed a teacher without notice or hearing. In holding that denying application of the tort of bad faith in this case did not result in an intrusion into church affairs, the court relied on the standard set out in Wis. v. Yoder, 406 US 205, 32 L Ed 2d 15, 92 S Ct 1526 (1972), that ". . . only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion". The majority of the court felt that the bad faith tort claim did not meet the Yoder standard and that to allow the lawsuit to go forward would impermissibly interfere with the free exercise of religion. Miller v. Catholic Diocese of Great Falls, 224 M 113, 728 P2d 794, 43 St. Rep. 2059 (1986).

Tort of Breach of Duty to Deal Fairly and in Good Faith in Employment Relationship — Punitive Damages Recoverable: Breach of the duty owed to deal fairly and in good faith in the employment relationship is a tort for which punitive damages may be recovered under 27-1-221 if defendant's conduct is sufficiently culpable. Gates v. Life of Montana, 205 M 304, 668 P2d 213, 40 St. Rep. 1287 (1983).

Chapter Law Review Articles

Giggin' in the 21st Century, Ford, 80 Mont. L. Rev. 299 (2019).

Balancing the Rights of the Alcoholic Employee With the Legitimate Concerns of the Employer: Reasonable Accommodation vs. Undue Hardship, Sullivan, 46 Mont. L. Rev. 401 (1985).

Part 1
General Provisions

39-2-101. Employment defined.

Case Notes

Summary Judgment on Breach of Contract Affirmed — Wrongful Discharge Claim Reversed for Determination of Whether Claimant Was Employee or Independent Contractor: Tvedt brought a claim for breach of contract, wrongful termination, and indemnification of expenses, alleging that defendant group had breached the covenant of good faith and fair dealing, waived the at-will clauses in their employment agreement, and mischaracterized Tvedt as an independent contractor, rather than an employee. Defendant group moved for summary judgment and filed a contingent counterclaim stating that in the event that Tvedt was found to be defendant group's employee, then defendant group's obligation to pay Tvedt the contract value should cease and all payments made to Tvedt should be returned. The District Court determined that Tvedt was not an employee and granted summary judgment to defendant group on all claims, and Tvedt appealed. The Supreme Court affirmed summary judgment on the breach of covenant issue because Tvedt was given adequate notice of termination, defendant group was exercising the specific language of the at-will termination provision of the contract, and Tvedt did not demonstrate that defendant group had waived the right to enforce that provision. However, the court reversed summary judgment on the wrongful discharge claim because the District Court incorrectly applied defendant group's novation argument and because genuine issues of fact remained whether Tvedt was an employee or independent contractor and whether a manager's agreement that recognized Tvedt individually was in effect at the time of termination. Remand was ordered because the District Court never considered whether Tvedt was entitled to relief for wrongful discharge as a matter of law and, if so, whether the claim for indemnification was appropriate. Tvedt v. Farmers Ins. Group of Co., 2004 MT 125, 321 M 263, 91 P3d 1 (2004).

Statute of Limitations Applicable to Claims Involving Employment Relationship With No Written Contract: Because the employment relationship is contractual in nature, the applicable statute of limitations for claims involving employment relationships with no written contract is 5 years. Thus, for purposes of receiving unpaid wages, an employee may bring a claim any time within 5 years of the date the claim accrues. Craver v. Waste Management Partners of Bozeman, 265 M 37, 874 P2d 1, 51 St. Rep. 268 (1994), applied, as to claims for payment of wages that are due on the last day of employment, but not wages that become due after the last day of employment, in Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999).

Temporary Employment — No Recall Rights: A labor agreement provided that an employee would not have recall rights under a seniority clause unless he was employed for 6 continuous months. A union employee was hired to temporarily replace an injured permanent employee and worked for a period 2 days short of 6 months. The injured employee returned but worked only 3 days. Twenty days later, the union employee was rehired for a period 1 day short of 6 months. The employer then hired a permanent employee to replace the union employee, who contended the contract was violated by the employer's failure to recall him for the permanent position. Recall rights were not earned by the union employee under the contract because the position fell short of 6 months on both occasions. The 20-day break in employment represented a substantial break in service; therefore, the employment was not continuous or renewable. Local 1334 v. Great Falls, 233 M 432, 760 P2d 99, 45 St. Rep. 1611 (1988).

Covenant of Good Faith and Fair Dealing Implied in All Employment Situations: It is well settled that the implied covenant of good faith and fair dealing exists in all employment situations and that although the duty arises out of the employment relationship, it exists apart from, and in addition to, any terms agreed to by the parties. Malloy v. Judge's Foster Home Program, Inc., 229 M 317, 746 P2d 1073, 44 St. Rep. 1996 (1987); Gates v. Life of Mont. Ins. Co., 205 M 304, 668 P2d 213, 40 St. Rep. 1287 (1983).

Duty to Provide Safe Working Place — Railroad Employee: In a case brought by an employee injured while working for a subsidiary of a railroad, the Supreme Court held that the plaintiff was owed the duty to provide him with a safe place to work. Noting that giving the jury information about the subsidiaries might well have been highly prejudicial to the defendant railroad, the Supreme Court nonetheless felt obliged to consider it in this case. The plaintiff was working directly in the operations of the railroad in every sense of the word. The railroad would not be absolved of the responsibility to provide a safe place to work for employees who are technically employed by a subsidiary corporation but whose employment is directly related to the operations of a railroad. Closeness of the businesses of the parent and subsidiary companies was a factor in the court's conclusion that both corporations owed the duty to provide the plaintiff with a safe place to work. Reynolds v. Burlington N., 190 M 383, 621 P2d 1028, 37 St. Rep. 1883 (1980).

Attorney General's Opinions

Termination of Payments in Lieu of Participation in Group Health Plan for Nonunion County Employee: The Board of County Commissioners may terminate payments in lieu of participation in a group health plan for a nonunion county employee only if termination is consistent with the county's employment agreement with the employee. 51 A.G. Op. 11 (2005).

39-2-102. What belongs to employer.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Employee Work Product — Employer Not Entitled to Work Product When Separate Contract Exists Regarding Matters Related to But Outside Scope of Employment Contract: An agreement between an employer and an employee provided that, independently of the employee's regular duties, the employee would develop a software application for use by the employer. The employer later argued that the contract was not supported by legally sufficient consideration because the employer already owned all of the employee's work product by virtue of the employer-employee relationship. The Supreme Court disagreed, finding that the agreement constituted a separate contract and the development of the application was outside the employee's regular duties. Assoc. Management Serv., Inc. v. Ruff, 2018 MT 182, 392 Mont. 139, 424 P.3d 571.

Customer Lists: Where names and addresses of milk route customers were not confidential and were readily accessible, route salesman who terminated his employment with a dairy and returned his list of customers but remembered their names and addresses would not be enjoined from soliciting them as customers for a competing dairy. Best Dairy Farms, Inc. v. Houchen, 152 M 194, 448 P2d 158 (1968).

Commissions Earned: Where the bank's president performed services in negotiating a loan in the course of his employment, the bank was entitled to receive the commission earned in negotiating the loan. Sullivan v. Mountain, 117 M 224, 160 P2d 477 (1945).

39-2-104. Mandatory leave of absence for employees holding public office.

Compiler's Comments

Saving Clause: Section 5, Ch. 185, L. 2009, was a saving clause.

Effective Date: Section 6, Ch. 185, L. 2009, provided that this section is effective April 9, 2009.

Source — Reorganization and Recodification: Chapter 185, L. 2009, repealed former section 2-18-620 and replaced it with this section, making this section applicable to all employers, not just public employers. The sections are virtually identical.

Part 2

General Obligations of Employers

39-2-205. Short title.

Compiler's Comments

Severability: Section 10, Ch. 521, L. 1997, was a severability clause.

39-2-206. Definitions.

Compiler's Comments

2011 Amendment: Chapter 315 in definition of employee in (a)(iii)(A) at end inserted "or public health", inserted (a)(iii)(B) relating to driving a motor vehicle, in (a)(iii)(C) substituted "involving a fiduciary responsibility" for "fiduciary position", and in (b) at end inserted "who serves on the governing body of a local government"; in definition of employer inserted (b) relating to a local government governing body; inserted definition of governing body; inserted definition of local government; and made minor changes in style. Amendment effective May 6, 2011.

Preamble: The preamble attached to Ch. 315, L. 2011, provided: "WHEREAS, employers who are concerned about public and workplace safety have increasingly faced issues associated with employees and potential employees who are approved for or associated with the medical use of marijuana; and

WHEREAS, clarifications are necessary to affirm employers' rights in the hiring and termination process, drug testing, and other issues related to the medical use of marijuana in an employee's course and scope of employment."

2005 Amendment: Chapter 177 in definition of sample after "specimen" inserted "a breath test, or oral fluid obtained in a minimally invasive manner and determined to meet the reliability and accuracy criteria accepted by laboratories for the performance of drug testing that is used" and after "substance or" deleted "a breath alcohol test to determine the presence of"; and made minor changes in style. Amendment effective October 1, 2005.

Severability: Section 10, Ch. 521, L. 1997, was a severability clause.

39-2-207. Qualified testing program.

Compiler's Comments

2005 Amendment: Chapter 177 in (1) in second sentence after "procedures" inserted "for samples that are covered by 49 CFR, part 40" and inserted third sentence providing that for samples not covered by federal regulations, qualified testing program must contain chain-of-custody and other procedural requirements at least as stringent as those contained in federal regulations and requiring the testing methodology to be cleared by federal food and drug administration; in (4) after "part 40" inserted language requiring collection, transport, and confirmation testing of nonurine samples to be as stringent as federal requirements in requiring split specimens, requiring transport to testing facility under chain of custody, and requiring confirmation of all screened positive results using mass-spectrometry technology; and made minor changes in style. Amendment effective October 1, 2005.

Severability: Section 10, Ch. 521, L. 1997, was a severability clause.

39-2-208. Qualified testing program — allowable types — procedures.

Compiler's Comments

Severability: Section 10, Ch. 521, L. 1997, was a severability clause.

39-2-209. Employee's right of rebuttal.

Compiler's Comments

2005 Amendment: Chapter 177 in second sentence before "split" deleted "urine". Amendment effective October 1, 2005.

Severability: Section 10, Ch. 521, L. 1997, was a severability clause.

39-2-210. Limitation on adverse action.

Compiler's Comments

2021 Amendment: Chapter 576 in (1) near beginning substituted "16-12-108" for "50-46-320". Amendment effective January 1, 2022.

Severability: Section 113, Ch. 576, L. 2021, was a severability clause.

2011 Amendment — Code Commissioner Instruction: Chapter 315 at beginning inserted exception clause. Amendment effective May 6, 2011.

Pursuant to sec. 38(3), Ch. 419, L. 2011, the Code Commissioner in exception clause substituted "50-46-320" for "50-46-205".

Preamble: The preamble attached to Ch. 315, L. 2011, provided: "WHEREAS, employers who are concerned about public and workplace safety have increasingly faced issues associated with employees and potential employees who are approved for or associated with the medical use of marijuana; and

WHEREAS, clarifications are necessary to affirm employers' rights in the hiring and termination process, drug testing, and other issues related to the medical use of marijuana in an employee's course and scope of employment."

Severability: Section 10, Ch. 521, L. 1997, was a severability clause.

39-2-211. Confidentiality of results.

Compiler's Comments

Severability: Section 10, Ch. 521, L. 1997, was a severability clause.

39-2-215. Public employer policy on support of women and breastfeeding — unlawful discrimination.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

39-2-216. Private place for nursing mothers.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

Source: Section 39-2-217 and this section are based upon Illinois Public Act 92-0068.

39-2-217. Break time for nursing mothers.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

Source: Section 39-2-216 and this section are based upon Illinois Public Act 92-0068.

39-2-221. Reporting of violence against health care employee.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

Termination: Section 4, Ch. 516, L. 2023, provided that this section terminates June 30, 2025.

Part 3
General Prohibitions on Employers

39-2-301. Unlawful for employer to require employee to pay cost of medical examination as condition of employment.

Attorney General's Opinions

Responsibility for Cost of Required Medical Examination — School Bus Drivers: School bus contractors and school districts which employ school bus drivers are not responsible for paying the cost of the medical examination required under 20-10-103 for certification of school bus drivers. 41 A.G. Op. 69 (1986).

Responsibility for Cost of Required Physician's Certificate — Teachers: School districts are not responsible for paying the cost of the physician's certificate required under 20-4-104 for the certification of teachers. 41 A.G. Op. 69 (1986).

39-2-303. Deception as to character of employment, conditions of work, or existence of labor dispute prohibited.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-2-304. Lie detector tests prohibited.

Compiler's Comments

1997 Amendment: Chapter 521 near beginning, after "require", deleted "as a condition for employment or continuation of employment" and at end inserted "as a condition for employment or continuation of employment"; deleted (1)(b) and (1)(c) that read: "(b) as a condition for employment, a person to submit to a blood or urine test, except for employment in:

(i) hazardous work environments;

(ii) jobs the primary responsibility of which is security, public safety, or fiduciary responsibility; or

(iii) jobs involving the intrastate commercial transportation of persons or commodities by a commercial motor carrier or an employee subject to driver qualification requirements; and

(c) as a condition for continuation of employment, an employee to submit to a blood or urine test, except when:

(i) the employer has reason to believe that the employee's faculties are impaired on the job as a result of alcohol consumption or illegal drug use;

(ii) the employer has reason to believe that an employee may have contributed to a work-related accident that causes death or personal injury or property damage in excess of $1,500; or

(iii) drug testing is being conducted at an employee's regular biennial physical for employment in jobs involving the intrastate commercial motor carrier transportation of persons or commodities"; deleted (2) through (6) that read: "(2) Prior to the administration of a drug or alcohol test, the person, firm, corporation, or other business entity or its representative shall adopt the written testing procedure that is provided in 49 CFR, part 40, and make it available to all persons subject to testing.

(3) The person, firm, corporation, or other business entity or its representative shall provide a copy of drug or alcohol test results to the person tested and provide the person with the opportunity, at the expense of the person requiring the test, to obtain a confirmatory test of the blood or urine by an independent laboratory selected by the person tested. The person tested must be given the opportunity to rebut or explain the results of either test or both tests. In the case of an accident referred to in subsection (1)(c)(ii), the tests may not be delayed, but the person, firm, corporation, or other business entity or its representative shall, as soon as possible, make a written finding as to whether the act or failure to act is believed to be a direct or proximate cause of the accident and shall provide the tested employee with a copy of the finding. The written record of a blood or urine test of an employee who is required to submit to testing pursuant to subsection (1)(c)(ii) and whose acts or failure to act is subsequently found not to be the direct or proximate cause of a work-related accident must be removed from the employee's work record and be destroyed.

(4) Adverse action may not be taken against a person tested under subsections (1)(b), (1)(c), (2), and (3) if the person tested presents a reasonable explanation or medical opinion indicating that the results of the test were not caused by alcohol consumption or illegal drug use.

(5) A person who violates this section is guilty of a misdemeanor.

(6) As used in this section:

(a) "commercial motor carrier" has the meaning provided in 61-1-320 and in 69-12-101; and

(b) "intrastate" means commerce or trade that is begun, carried on, and completed wholly in this state."

Severability: Section 10, Ch. 521, L. 1997, was a severability clause.

1995 Amendments: Chapter 358 in (6)(a), at end, inserted reference to 61-1-320; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 445 inserted (1)(c)(ii) concerning employee contributing to work-related accident; in (3) inserted third and fourth sentences concerning tests when employee allegedly contributed to work-related accident; and made minor changes in style. Amendment effective April 14, 1995.

1991 Amendment: Inserted (1)(b)(iii) allowing blood and urine testing of employees and job applicants involved in intrastate commercial transportation of persons or commodities; in (1)(c), near end after "drug use", inserted exception clause; near middle of (2), after "procedure", inserted "that is provided in 49 CFR, part 40"; deleted former (2)(a) through (2)(f) outlining provisions required of a testing procedure (see 1989 MCA for text); inserted (6) defining commercial motor carrier and intrastate; and made minor changes in style. Amendment effective April 20, 1991.

1987 Amendment: Inserted (1)(b) through (4) (see 1987 Session Law for text); and deleted former (2) that read: "(2) This section shall not apply to public law enforcement agencies."

Case Notes

Employee Lie Detector Test Ban — Excepting Law Enforcement Agencies — Equal Protection Violated: Provision that public law enforcement agencies are not covered by law forbidding private and public employers from requiring a lie detector test as a condition of employment or continued employment violates the right of employees of law enforcement agencies to equal protection under the state constitution. (Provision deleted by sec. 1, Ch. 482, L. 1987.) Strict scrutiny test was not applied because the proper foundation for it was not laid. However, even under the rational basis test, the provision must fail because there is no expressed purpose for the classification on the face of the statute or in the statute's legislative history; thus the provision is overbroad and vague on its face. The court would have no trouble finding a rational relationship to a legitimate governmental interest had the Legislature provided any evidence that the provision was applied only to police officers in view of their positions of high public trust and integrity; however, a statute specifically excluding police from a general statutory protection for all other employees would probably not survive a sustained strict scrutiny test attack. Oberg v. Billings, 207 M 277, 674 P2d 494, 40 St. Rep. 2034 (1983).

39-2-306. Employment of persons under 18 years of age as bartenders prohibited.

Attorney General's Opinions

Legal Age for Serving Alcoholic Beverages: A person who is 18 years old may be employed as a bartender, waiter, or waitress to serve customers purchasing alcoholic beverages at retail. 38 A.G. Op. 15 (1979).

39-2-307. Employer access limited regarding personal social media account of employee or job applicant — conditions for exceptions — employer retaliation prohibited — penalties.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 361, L. 2023. Amendment effective October 1, 2023.

Effective Date: Section 3, Ch. 263, L. 2015, provided that this section is effective on passage and approval. Approved April 23, 2015.

39-2-313. Discrimination prohibited for use of lawful product during nonworking hours — exceptions.

Compiler's Comments

2021 Amendment: Chapter 576 in (1) at end inserted "and marijuana"; in (3)(a) after "use of a lawful product" deleted "including the use of marijuana for a debilitating medical condition as defined in 50-46-302"; and made minor changes in style. Amendment effective January 1, 2022.

Severability: Section 113, Ch. 576, L. 2021, was a severability clause.

2011 Amendment — Code Commissioner Instruction: Chapter 315 in (3)(a) near end inserted reference to use of marijuana. Amendment effective May 6, 2011.

Pursuant to sec. 38(1), Ch. 419, L. 2011, in (3)(a) the Code Commissioner substituted "use of marijuana for a debilitating medical condition" for "medical use of marijuana".

Pursuant to sec. 38(3), Ch. 419, L. 2011, in (3)(a) the Code Commissioner substituted "50-46-302" for "50-46-102".

Preamble: The preamble attached to Ch. 315, L. 2011, provided: "WHEREAS, employers who are concerned about public and workplace safety have increasingly faced issues associated with employees and potential employees who are approved for or associated with the medical use of marijuana; and

WHEREAS, clarifications are necessary to affirm employers' rights in the hiring and termination process, drug testing, and other issues related to the medical use of marijuana in an employee's course and scope of employment."

Part 4
General Obligations of Employees

39-2-401. Duties of gratuitous employee.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Statutory Definition of Good Cause Applicable — No New Standard Adopted: In asserting her wrongful discharge claim, Miller contended that a new standard of good cause be adopted based on whether: (1) the employee satisfied the general obligations of an employee described in this section; (2) the employer followed industry standards of progressive discipline; and (3) the employer exercised bad faith. The Supreme Court declined to adopt the suggested standard, opting instead for the statutory definition in 39-2-903. Based on its extensive findings, including those that Miller failed to implement new procedures and delayed completing tasks, the District Court correctly concluded that Miller's termination was reasonably based on job-related grounds and that, in light of the fact that the employer followed the express written provisions of its personnel policies, dismissal was proper. Miller v. Citizens St. Bank, 252 M 472, 830 P2d 550, 49 St. Rep. 422 (1992).

39-2-402. Duties of employee for reward.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-2-403. Duties of employee for own benefit.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Separate Contract — Employee Not Bound to Prioritize Employer's Interest Regarding Independent Contract: While 39-2-403 and 39-2-409 generally impose a duty on an employee to protect and prioritize the employer's interest over any employee interest in a similar business, that general duty does not preclude, limit, or impair the right and ability of an employer and employee to separately contract regarding matters related to but outside the scope of the employment contract. Assoc. Management Serv., Inc. v. Ruff, 2018 MT 182, 392 Mont. 139, 424 P.3d 571.

39-2-404. Employee shall obey employer.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Termination of "At Will" Employment Not a Breach of Covenant of Good Faith and Fair Dealing — Beliefs and Requests of Employer Held and Made in Good Faith: Plaintiff, general manager of a health club, sued the corporation owning the club and its principal shareholder for lost wages and profits when plaintiff was terminated from his position. The District Court held for defendants. The Supreme Court affirmed, holding that the record of plaintiff's deficient management of the health club gave its owner fair and honest reasons to terminate plaintiff's employment. The requests made by defendants were reasonable, and plaintiff's failure to comply, along with other evidence of poor management, justified the termination. Scott v. Eagle Watch Inv., Inc., 251 M 191, 828 P2d 1346, 48 St. Rep. 1136 (1991).

39-2-405. Employee shall conform to usage.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-2-406. Degree of skill required.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-2-407. Duty to account.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-2-408. Duty of employee regarding items received on account of employer.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

39-2-409. Preference to be given to employer's business.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Separate Contract — Employee Not Bound to Prioritize Employer's Interest Regarding Independent Contract: While 39-2-403 and 39-2-409 generally impose a duty on an employee to protect and prioritize the employer's interest over any employee interest in a similar business, that general duty does not preclude, limit, or impair the right and ability of an employer and employee to separately contract regarding matters related to but outside the scope of the employment contract. Assoc. Management Serv., Inc. v. Ruff, 2018 MT 182, 392 Mont. 139, 424 P.3d 571.

39-2-410. Responsibility of employee for substitute.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

39-2-411. Surviving employee.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 5
Termination of Employment

Part Case Notes

Human Rights Bureau Upheld — Nurse Dishonest — Privacy Breaches — Sufficient Evidence for Termination: The District Court did not err in upholding the Human Rights Bureau's decision that the petitioner nurse was properly terminated by the respondent clinic. As meticulously analyzed by the hearing officer, the petitioner's termination was consistent with personnel actions taken against other clinic employees who engaged in privacy breaches and were dishonest in the clinic's investigation. The Supreme Court concluded that the petitioner's lying to the clinic during its internal investigation was in and of itself sufficient evidence to support her termination from employment. Thus, the clinic's reasons for discharging the petitioner were not completely unworthy of credence. Regardless of whether her prior discipline and investigative interactions with the clinic or her removal of a surgery schedule from clinic premises were protected activities, the District Court did not err in upholding the hearing officer's conclusion that the petitioner was properly terminated by the clinic for her dishonesty. Bollinger v. Billings Clinic, 2019 MT 42, 394 Mont. 338, 434 P.3d 885.

Claimant Judicially Estopped From Claiming Wrongful Discharge Following Settlement of Occupational Disease Claim Based on Same Employment: In 1997 and 1998, Vogel filed workers' compensation claims, contending that injuries received on the job required surgeries. Defendant accepted liability for the injuries. Between 1998 and 2002, Vogel continued to have problems performing his job, and Vogel's employment was terminated in May 2002. In June 2002, Vogel filed an occupational disease claim, and in October 2002, Vogel filed a wrongful discharge claim. During the ensuing 2 years, no action was taken on the wrongful discharge case, but Vogel settled the occupational disease claim, stating that starting in 1999, he suffered job-related injuries that rendered him physically unable to continue his work with defendant. When Vogel later pursued the wrongful discharge claim, defendant argued judicial estoppel, asserting that having represented in the occupational disease claim that he was unable to perform his time-of-injury job, Vogel was precluded from later arguing entitlement to wrongful discharge damages resulting from loss of the same job. Ahe District Court agreed and granted summary judgment to defendant, and on appeal, the Supreme Court affirmed. Applying the elements of judicial estoppel set out in Fiedler v. Fiedler, 266 M 133, 879 P2d 675 (1994), the court held that all four elements were met and that the District Court had correctly ruled that judicial estoppel applied and properly granted summary judgment. Vogel v. Intercontinental Truck Body, Inc., 2006 MT 131, 332 M 322, 137 P3d 573 (2006).

Failure to Establish Elements of Prima Facie Retaliation Case — Partial Summary Judgment Proper: The elements of a prima facie case under Title VII of the federal Civil Rights Act of 1964 are: (1) the plaintiff engaged in a protected activity; (2) thereafter, the employer took an adverse employment action against the plaintiff; and (3) a causal link existed between the protected activity and the employer's action. In cases under Title 49, ch. 2, commonly known as the Montana Human Rights Act, elements of a prima facie retaliation case generally consist of proof that the charging party was qualified for employment, was engaged in a protected activity, and was subjected to adverse action, as well as proof of a causal connection or other circumstances raising a reasonable inference that the charging party was treated differently because of the protected activity. In the present case, the Supreme Court applied the three-prong burden-shifting test for summary judgment motions in disparate treatment cases set forth in Heiat v. E. Mont. College, 275 M 322, 912 P2d 787 (1996), to evaluate whether Rolison's complaint constituted a prima facie case. Rolison established the protected activity element of a prima facie case by filing a gender discrimination case that the employer was aware of. However, Rolison failed to raise a genuine issue of material fact regarding the adverse employment action of the retaliation claim, thus failing the Heiat test for a prima facie case, so partial summary judgment for the employer on the state and federal discrimination claims was proper. Rolison v. Bozeman Deaconess Health Serv., Inc., 2005 MT 95, 326 M 491, 111 P3d 202 (2005). See also Wrighten v. Metropolitan Hosp., Inc., 726 F2d 1346 (9th Cir. 1984), and Beaver v. Dept. of Natural Resources and Conservation, 2003 MT 287, 318 M 35, 78 P3d 857 (2003).

"Class of One" Equal Protection Law Not Established at Time of Discharge From Public Employment — Saucier Test — Official Entitled to Qualified Immunity: Losleben was terminated from state employment in 1999, and following an unsuccessful grievance, Losleben filed a complaint in District Court, alleging that his former supervisors violated his right to equal protection by engaging in a vindictive and spiteful campaign to terminate his employment. Two supervisors were subsequently dismissed from the suit, and the District Court granted the third supervisor qualified immunity, concluding that Losleben's equal protection claim for a "class of one" was not clearly established at the time of the alleged misconduct. Losleben appealed. Traditionally, a person bringing an equal protection claim must show intentional discrimination because of membership in a particular class, not merely that the person was treated unfairly as an individual. However, in Village of Willowbrook v. Olech, 528 US 562 (2000), the U.S. Supreme Court concluded that an equal protection claim may be brought by a claimant as a "class of one" even though the claimant is not a member of a traditionally recognized protected class. The court subsequently held in Saucier v. Katz, 533 US 194 (2001), that a two-part test is to be applied in determining whether state officials are entitled to qualified immunity: (1) when taken in a light most favorable to the party asserting injury, do the facts alleged show that an official's conduct violated a constitutional right; and (2) if so, was the right clearly established at the time that it was allegedly infringed. The District Court in this case erred by not applying the first step of the Saucier test, but because only the qualified immunity issue was certified to the Supreme Court, it was assumed that a constitutional violation could have occurred, so the

Supreme Court proceeded to the second step of the Saucier analysis. The law in effect when Losleben was terminated in 1999, prior to Olech, did not recognize an equal protection "class of one" claim, so any equal protection right held by Losleben at that time was not well enough established to impute knowledge of it to Losleben's supervisor. Thus, the District Court properly granted the supervisor qualified immunity and dismissed the supervisor from the case. Losleben v. Oppedahl, 2004 MT 5, 319 M 269, 83 P3d 1271 (2004).

Termination of Police Officer Affirmed — Right of Employer to Compel Answers to Employment-Related Questions — Due Process: Wolny appealed his termination as a Bozeman police officer for inappropriate use of force, making inconsistent statements, and failing to orally answer followup questions. The Supreme Court noted that Wolny was entitled to fundamental due process rights, including notice, an explanation of the evidence against him, and an opportunity to respond. However the court found that the officer's due process rights were not violated. The Police Commission properly considered the testimony of witnesses, correctly held that Wolny was insubordinate for failing to orally answer questions that were reasonably related to Wolny's fitness to perform duties or to his job performance, properly excluded the disciplinary history of other police officers, and adequately complied with its progressive discipline policy despite the fact that Wolny's personnel file was not offered as evidence. Wolny v. Bozeman, 2001 MT 166, 306 M 137, 30 P3d 1085 (2001), following In re Raynes, 215 M 484, 698 P2d 856 (1985), Boreen v. Christensen, 267 M 405, 884 P2d 761 (1994), and In re Termination of Abbey v. Billings Police Comm'n, 268 M 354, 886 P2d 922 (1994).

Federal Law Applying to Collective Bargaining Agreement Preempts Claim of Violation of Covenant of Good Faith and Fair Dealing — Common-Law Claim for Retaliatory Discharge Not Preempted: Winslow was fired from his job with Montana Rail Link, where he had been employed under a collective bargaining agreement, and brought an action in District Court. In his complaint, Winslow included claims for violation of the covenant of good faith and fair dealing and common-law retaliatory discharge. The District Court dismissed both claims. The Supreme Court affirmed the dismissal of the claim for violation of the covenant of good faith and fair dealing, citing Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720 (1992), for the proposition that such a claim is preempted by federal law because the covenant arises out of the employment contract and that that contract, in the case of a collective bargaining agreement, is governed by federal law. However, the Supreme Court reversed the District Court on dismissal of the common-law wrongful discharge claim, citing Foster for the proposition that a common-law claim, because it does not depend upon interpretation of the employment contract, is an independent claim and is not preempted by the federal Railway Labor Act. Winslow v. Mont. Rail Link, Inc., 2000 MT 292, 302 M 289, 16 P3d 992, 57 St. Rep. 1238 (2000).

Employment Contingent on Adherence to Teachings of Roman Catholic Church—Discrimination Statutes Inapplicable: Until her termination in 1993, Parker-Bigback was employed by St. Labre School, which is operated by the St. Labre Indian School Education Association, an institution based on the teachings and beliefs of the Roman Catholic Church. Parker-Bigback filed a complaint with the Montana Commission for Human Rights, alleging that she was discriminated against because her termination was based on marital status or sex discrimination. The school maintained that Parker-Bigback's position was eliminated to establish a personnel department, which Parker-Bigback contended was simply a pretext for terminating her employment based on her lifestyle of cohabiting with a man who was not her husband. However, one condition of Parker-Bigback's employment was an agreement to adhere to the moral and religious teachings and beliefs of the Roman Catholic Church and to not engage in any personal conduct or lifestyle contrary to church policies. Thus, it made no difference whether Parker-Bigback was married or single—if she cohabited with someone of the opposite sex to whom she was not married, she would be at variance with church teachings in violation of her contract. Therefore, this was not a case about marital status or gender, but rather about conduct Parker-Bigback agreed to avoid as a condition of employment. Nothing in Art. II, sec. 4, Mont. Const., or 49-2-303 prohibits discrimination based on conduct, nor was any authority offered to persuade the Supreme Court that Parker-Bigback's conduct involved a right of such high order that it would overcome the school's right to freely exercise its religion through its employment practices. Even if she was terminated for cohabitation, her rights to be free from discrimination were not involved, so her employment discrimination case was properly dismissed by summary judgment for the school. Parker-Bigback v. St. Labre School, 2000 MT 210, 301 M 16, 7 P3d 361, 57 St. Rep. 823 (2000). See also Miller v. Catholic Diocese of Great Falls, 224 M 113, 728 P2d 794 (1986).

Burden-Shifting Analysis in Employment Discrimination Cases — Pretext for Discrimination: Under the rationale in Tex. Dept. of Community Affairs v. Burdine, 450 US 248, 67 L Ed 2d 207, 101 S Ct 1089 (1981) (citing McDonnell Douglas Corp. v. Green, 411 US 792, 36 L Ed 2d 668, 93 S Ct 1817 (1973)), according to the U.S. Supreme Court's burden-shifting analysis employed in discrimination cases, once a plaintiff has proved a prima facie case of employment discrimination by a preponderance of the evidence, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant was not the true reason, but rather was a pretext for discrimination, and under St. Mary's Honor Ctr. v. Hicks, 509 US 502, 125 L Ed 2d 407, 113 S Ct 2742 (1993), the reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real reason. At this point, the burden merges with the ultimate burden of persuading the court that the plaintiff has been a victim of intentional discrimination. The plaintiff succeeds either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. The Montana Supreme Court held in Kenyon v. Stillwater County, 254 M 142, 835 P2d 742 (1992), that in order to survive a motion for summary judgment, the plaintiff has the initial burden to adduce facts that, if believed, support a reasonable inference that the plaintiff was denied an employment opportunity and, if the employer rebuts the inference of discrimination with evidence of legitimate, nondiscriminatory reasons, to demonstrate with specific facts that the employer's explanation is a pretext. This places the plaintiff, as nonmoving party in the summary judgment context, in the peculiar position of having to prove the case to survive the defendant's summary motion. The Kenyon requirements are thus overruled and the Burdine analysis adopted for employment discrimination cases. The plaintiff is required to raise an inference of pretext as opposed to proving pretext, so the burden is more aligned with the general requirement of raising a genuine issue of material fact to survive the motion for summary judgment. Heiat v. E. Mont. College, 275 M 322, 912 P2d 787, 53 St. Rep. 162 (1996), overruling Kenyon v. Stillwater County, 254 M 142, 835 P2d 742 (1992). Heiat was followed in Mysse v. Martens, 279 M 253, 926 P2d 765, 53 St. Rep. 1139 (1996), Clark v. Eagle Sys., Inc., 279 M 279, 927 P2d 995, 53 St. Rep. 1150 (1996), and Rolison v. Bozeman Deaconess Health Serv., Inc., 2005 MT 95, 326 M 491, 111 P3d 202 (2005).

Material Question of Value of Profit Share Granted Employee as Element of Termination Agreement — Summary Judgment Improper: Employee signed an employment termination agreement that provided in part for a distribution to him of a share of company profits, both prior to and after the termination of employment. Any issue of profit distributions prior to termination was barred by a waiver of claims. However, a question of material fact regarding the calculation of and disproportionate nature of the profit sharing distribution after termination was sufficient to preclude summary judgment because the amount to be paid was unknown to both parties at the time of termination. Somersille v. Columbia Falls Aluminum Co., 255 M 101, 841 P2d 483, 49 St. Rep. 904 (1992).

Unsigned Contract for Five-Year Term as Resulting in "At Will" Employment — Basis for Termination: Plaintiff, general manager of a health club, sued the corporation owning the club and its principal shareholder for lost wages and profits when plaintiff was terminated from his position. The District Court held for defendants. The Supreme Court affirmed, holding that because a written agreement drafted by the parties had never been signed, the agreement was invalid and not binding upon the parties. Therefore, plaintiff's employment was for an unspecified term, or employment "at will", and the plaintiff could be terminated at will, without the defendant employer following the termination provisions of the unsigned agreement. Scott v. Eagle Watch Inv., Inc., 251 M 191, 828 P2d 1346, 48 St. Rep. 1136 (1991).

Evidence of Other Than Economic Motives for Firing — Sufficiency of Jury Issue Upheld: In an unlawful discharge action, the employer claimed on appeal that the employee offered insufficient evidence to show that his firing was motivated other than by the economic motives claimed by the employer. The Supreme Court held that the present case was unlike Cecil v. Cardinal Drilling Co., 244 M 405, 797 P2d 232 (1990), cited by the employer for the proposition that the employee must produce evidence of other motives. The court distinguished Cecil, stating that that case was decided under the Wrongful Discharge From Employment Act, which authorizes a nonprobationary employee to be fired for good cause. In Cecil, the plaintiff had insufficient evidence to defeat a motion for summary judgment, while in this case the court found that there was evidence from which the jury could conclude that the employer had noneconomic motives for firing the plaintiff. Kizer v. Semitool, Inc., 251 M 39, 824 P2d 229, 48 St. Rep. 1115 (1991).

Negligent Reduction in Force and Negligent Breach of Covenant of Good Faith and Fair Dealing — Jury Instructions Upheld: In a wrongful discharge case arising prior to the Wrongful Discharge From Employment Act, the employer appealed to the Supreme Court, claiming that the District Court's jury instructions improperly authorized the jury to find that the employer's reduction in force was negligently carried out and that the covenant of good faith and fair dealing could be breached negligently. The Supreme Court held that the employer's reliance on Heltborg v. Modern Mach., 244 M 24, 795 P2d 954 (1990), was misplaced and that the court had previously held in other cases that negligence could form the basis for a wrongful discharge action. Because there was evidence that the employer was negligent in following its personnel policies handbook and in investigating its claims of inefficiency by its employee, the Supreme Court held that the jury instructions were properly given. Kizer v. Semitool, Inc., 251 M 39, 824 P2d 229, 48 St. Rep. 1115 (1991).

Covenant of Good Faith and Fair Dealing Inapplicable to Lateral Transfer: Following the rationale set out in Frigon v. Morrison-Maierle, Inc., 233 M 113, 760 P2d 57, 45 St. Rep. 1344 (1988), the Supreme Court found it inappropriate to apply the covenant of good faith and fair dealing to a termination following the refusal of an employee to accept a lateral transfer of employment. Finstad v. Mont. Power Co., 241 M 10, 785 P2d 1372, 47 St. Rep. 39 (1990).

Refusal to Accept Lateral Transfer — Failure to Prove Constructive Discharge: Plaintiff, employed by the Montana Power Company (MPC) for 22½ years, was stationed in Cut Bank as a field engineer. Despite the urging of his MPC supervisor, he refused to accept a transfer to Butte when MPC closed the Cut Bank office and his employment ended. Plaintiff alleged constructive discharge; MPC contended he chose to terminate rather than accept the transfer. The Supreme Court examined the facts and determined that plaintiff failed to present any evidence that he was actually or constructively discharged, but rather that he refused to accept what amounted to a lateral transfer without a change in job responsibilities, earnings, or benefits. Finstad v. Mont. Power Co., 241 M 10, 785 P2d 1372, 47 St. Rep. 39 (1990).

Occasional Compliments From Employer — No Expectation of Job Security: During her year-long employment, plaintiff received compliments on her work from persons other than her employer and occasional compliments from her employer, but her immediate supervisor was continually critical of her performance. The implied covenant of good faith and fair dealing did not arise in this situation because the employer gave plaintiff no reasonable expectation of job security. Objective manifestations of job security must come from the employer, not from persons outside the work place, in order to establish an expectation of job security. Karell v. Am. Cancer Soc'y, 239 M 168, 779 P2d 506, 46 St. Rep. 1593 (1989).

Employer Action or Inaction — Question of Fact in Constructive Discharge: The Supreme Court relied on the explanation of the constructive discharge doctrine set out in Snell v. Mont.-Dak. Util. Co., 198 M 56, 643 P2d 841 (1982), in holding that it is a question of fact whether by action or inaction an employer has rendered working conditions so oppressive that resignation is the only reasonable alternative. Niles v. Big Sky Eyewear, 236 M 455, 771 P2d 114, 46 St. Rep. 504 (1989), followed in Kestell v. Heritage Health Care Corp., 259 M 518, 858 P2d 3, 50 St. Rep. 919 (1993).

Discharge From Employment — Injury to Be Expected — Intentional Conduct Exclusion Applied: Employee claimed he was intentionally fired for refusing to violate Montana law, resulting in emotional and mental injury. The employer tendered the suit to National Surety Corporation, which refused to defend on grounds that the policy did not provide coverage for an occurrence of this sort. The District Court agreed, and the Supreme Court affirmed on the basis that the claimed injury fell outside the definition of "occurrence". Although an intentional act may constitute an occurrence when the alleged injury was not the expected or intended result of the conduct, here there was no injury alleged that could not be expected to flow from the termination. Therefore, the intentional conduct exclusion was properly applied. Daly Ditches Irrigation District v. Nat'l Sur. Corp., 234 M 537, 764 P2d 1276, 45 St. Rep. 2112 (1988), distinguishing Lindsay Drilling v. USF&G, 208 M 91, 676 P2d 203 (1984); Millers Mut. Ins. Co. v. Strainer, 204 M 162, 663 P2d 338 (1983); and NW. Nat'l Cas. Co. v. Phalen, 182 M 448, 597 P2d 720 (1979). See also Mary & Alice Ford Nursing Home v. Fireman's Ins., 446 N.Y.S.2d 599 (1982), Commercial Union Ins. Co. v. Superior Court, 242 Cal. Rptr. 454, 196 Cal. App. 3d 1205 (1987), and Employers Mut. Cas. Co. v. Fisher Builders, Inc., 2016 MT 91, 383 Mont. 187, 371 P.3d 375.

"Constructive Discharge" Construed: As outlined in Pittman v. Hattiesburg Municipal Separate School District, 644 F2d 1071 (5th Cir. 1981), constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. The federal District Court found that plaintiff could

prove constructive discharge and breach of the covenant of good faith and fair dealing if it was shown that a supervisor's intentional conduct caused plaintiff's mental breakdown, leading to loss of plaintiff's job. Oedewaldt v. J.C. Penney Co., Inc., 687 F. Supp. 517, 45 St. Rep. 1366 (D.C. Mont. 1988). But see Frigon v. Morrison-Maierle, Inc., 233 M 113, 760 P2d 57, 45 St. Rep. 1344 (1988), wherein the Montana Supreme Court declined to recognize the doctrine of constructive discharge beyond discrimination cases and held that the covenant of good faith and fair dealing applied only in cases of employee termination.

Covenant of Good Faith and Fair Dealing Applicable Only to Employee Termination: The assertion that breach of the covenant of good faith and fair dealing is a separate tort from wrongful discharge is correct. However, the covenant is applicable only in cases of employee termination. When there was no express termination and there were insufficient facts to establish constructive discharge, summary dismissal of a charge of breach of the covenant was affirmed. Frigon v. Morrison-Maierle, Inc., 233 M 113, 760 P2d 57, 45 St. Rep. 1344 (1988).

Insufficient Claim of Constructive Discharge: Plaintiff's claims that she was forced to resign because of negative comments by her supervisors and denial of a raise, along with comments by fellow employees that they would leave rather than continue in plaintiff's position, did not constitute genuine issues of material fact to indicate constructive discharge. The doctrine of constructive discharge has not been recognized beyond discrimination cases. Plaintiff's subjective judgment that her working conditions had become intolerable was insufficient to meet the high burden of proof required to prove constructive discharge. Frigon v. Morrison-Maierle, Inc., 233 M 113, 760 P2d 57, 45 St. Rep. 1344 (1988).

Circumstances Warranting Good Faith Discharge — Claim Not Stating Public Concern — Summary Judgment Proper: An employee was issued reprimands, notices of corrective discipline, and notices of punitive discipline but still failed to perform assigned duties or correct job inadequacies. He had the chance to rebut charges of incompetency but chose not to do so. He had the right of grievance but failed to exercise it. His claim of wrongful discharge did not state a public policy concern, but rather was a personal matter. The Supreme Court declined to interfere with the employer's right to manage its affairs and hire employees who will perform their jobs so long as there is a standard of discipline and the employer abides by it in good faith. Summary dismissal of the wrongful discharge claim was proper. Belcher v. Dept. of State Lands, 228 M 352, 742 P2d 475, 44 St. Rep. 1591 (1987).

Firing Not Due to Economic Necessity: There was sufficient evidence presented to rebut the employer's claim that the employee plaintiff was discharged because of economic necessity, thus supporting submission of the case to the jury based on breach of the implied covenant of good faith and fair dealing. Kerr v. Gibson's Prod. Co. of Bozeman, Inc., 226 M 69, 733 P2d 1292, 44 St. Rep. 462 (1987).

Alleged Violations of Collective Bargaining Agreement Preempted by Federal Labor Law: Although a collective bargaining agreement did not specifically address standards to be applied in a situation where an employee was discharged, tort claims alleging negligence and breach of good faith were substantially dependent on terms in the contract establishing wage schedules, union representation, and adherence to a grievance and arbitration procedure. In determining that summary judgment was proper, the Supreme Court cited Allis-Chalmers v. Lueck, 471 US 202, 85 L Ed 2d 206, 105 S Ct 1904 (1985), and reasoned that preemption of the tort claims by federal law was necessary to ensure a unified body of labor contract law and to preserve the central role of arbitration in labor disputes. Smith v. Mont. Power Co., 225 M 166, 731 P2d 924, 44 St. Rep. 124 (1987). See also Anderson v. TW Corp., 228 M 1, 741 P2d 397, 44 St. Rep. 1293 (1987), where it was held that a party may not avoid the preemptive effect of federal labor law when a dispute involves an interpretation of a union contract by pleading in tort and that vacation pay is one item preempted by operation of federal law. But see Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720, 49 St. Rep. 638 (1992), which relied on Lingle v. Norge Div. of Magic Chef, Inc., 486 US 399, 100 L Ed 2d 410, 108 S Ct 1877 (1988), to partially overrule Brinkman v. St., 224 M 238, 729 P2d 1301 (1986), and subsequent cases, including Smith, to the extent that a state law claim is preempted by federal law only when its resolution requires construing the collective bargaining agreement, even if the state law analysis involves the same factual considerations as the contractual determination under the collective bargaining agreement of whether the employee was discharged for just cause. Foster was followed in Hanley v. Safeway Stores, Inc., 254 M 379, 838 P2d 408, 49 St. Rep. 755 (1992), Miller v. Glacier County, 257 M 422, 851 P2d 401, 50 St. Rep. 339 (1993), and Winslow v. Mont. Rail Link, Inc., 2000 MT 292, 302 M 289, 16 P3d 992, 57 St. Rep. 1238 (2000).

Explicit Contractual Provision Giving Greater Protection Than Implied Covenant of Good Faith and Fair Dealing — No Application of Covenant: Where a collective bargaining agreement provided explicitly that employees could be discharged "only for just cause", the Supreme Court declined to imply the covenant of good faith and fair dealing to the employment relationship since the contractual agreement provided greater protection than the implied covenant. Such a covenant generally applies to "at will" employment contracts. Brinkman v. St., 224 M 238, 729 P2d 1301, 43 St. Rep. 2163 (1986). See also Riley v. Warm Springs St. Hosp., 229 M 518, 748 P2d 455, 44 St. Rep. 2183 (1987).

Covenant of Good Faith and Fair Dealing as Interfering With Freedom of Religion: The Supreme Court upheld a summary judgment dismissing a wrongful discharge complaint against a religious school that dismissed a teacher without notice or hearing. In holding that denying application of the tort of bad faith in this case did not result in an intrusion into church affairs, the court relied on the standard set out in Wis. v. Yoder, 406 US 205, 32 L Ed 2d 15, 92 S Ct 1526 (1972), that ". . . only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion". The majority of the court felt that the bad faith tort claim did not meet the Yoder standard and that to allow the lawsuit to go forward would impermissibly interfere with the free exercise of religion. Miller v. Catholic Diocese of Great Falls, 224 M 113, 728 P2d 794, 43 St. Rep. 2059 (1986).

Verdict of Zero Damages — No Abuse of Discretion: In a wrongful termination suit against newspaper, reporter Dawson appealed a District Court award of zero damages after the jury found in his favor on the issues of liability and proximate cause. The Supreme Court affirmed, ruling that although the newspaper had breached its duty of good faith and fair dealing and was the proximate cause of Dawson's damages, the reporter had three other sources of income and had failed to mitigate his damages by accepting comparable journalism work. Thus, the jury was justified in awarding zero damages. Dawson v. The Billings Gazette, 223 M 415, 726 P2d 826, 43 St. Rep. 1838 (1986).

Evidence of Wrongful Discharge — Submission to Jury: The Supreme Court, following its decision in Dare v. Mont. Petroleum Mkt. Co., 212 M 274, 687 P2d 1015, 41 St. Rep. 1735 (1984), found that respondent's 28 years of employment gave her a secure and objective basis for believing that if her work was satisfactorily performed, her employment would continue. The court noted that, from evidence presented, the jury could have found that appellants had no fair and honest cause for discharge and in fact had ulterior motives. A case for jury deliberation was presented on the issue of wrongful termination. Flanigan v. Prudential Fed. S&L Ass'n, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986).

Support for Termination — No Use of After-Acquired Evidence: After-acquired evidence that had not been examined for the purpose of making a termination decision could not be used to support termination at time of trial and was properly excluded by the trial court. Flanigan v. Prudential Fed. S&L Ass'n, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986).

Wrongfully Terminated Employee to Seek Work — Inferior Employment Not Mandated: A wrongfully terminated employee has a duty to reasonably seek and maintain other employment but has no duty to mitigate damages by accepting inferior employment from a former employer. Flanigan v. Prudential Fed. S&L Ass'n, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986).

Severance Pay — Interpretation of Termination: Plaintiff was a data processing manager for Hoerner Waldorf Corporation. In 1977, Hoerner Waldorf merged with Champion International Corporation. Champion adopted a severance pay policy for salaried employees of either corporation whose employment was terminated as a result of the merger. Champion offered plaintiff a position at a salary equal to that he was receiving. Plaintiff felt the new position was not of the same status and refused the offer. Plaintiff contended he was entitled to severance pay. The Supreme Court held that the severance pay policy was based on termination because of the merger. The court found that because of the job offer and under the authority of Towne v. Towne, 117 M 453, 159 P2d 352 (1945), plaintiff was not terminated and was not entitled to severance pay. Linz v. Champion Int'l Corp., 208 M 99, 675 P2d 979, 41 St. Rep. 198 (1984).

Wrongful Discharge: A person under an employment contract terminable at will may have an action for wrongful discharge only when a public policy is violated by his discharge. Examples of when such an action may lie include discharge for refusal to commit perjury, assertion of right to workers' compensation benefits, and refusal of sexual relations. Keneally v. Orgain, 186 M 1, 606 P2d 127, 37 St. Rep. 154 (1980).

Refusal to Participate in Sterilization: Once a discharged hospital employee had established that her discharge was brought about in substantial part by her refusal to participate in a sterilization, it then became the burden of the hospital to prove by a preponderance of the evidence that it would have discharged the employee even if she had not exercised her right of refusal. Swanson v. St. John's Lutheran Hosp., 182 M 414, 597 P2d 702, 36 St. Rep. 1075 (1979).

Burden of Proof: Employer, who introduced evidence of drinking, hangovers, and other matters in an effort to establish cause for discharge but whose superintendent testified as to employee's good work and that employer instructed him to tell employee that employer did not have any more work, was running out of money, and could not carry a crew through the winter, failed to establish that employee's discharge was for "good cause". Ameline v. Pack & Co., 157 M 301, 485 P2d 689 (1971), distinguished in Myers v. Dept. of Agriculture, 232 M 286, 756 P2d 1144, 45 St. Rep. 1056 (1988).

Section Not Applicable to Avoid Workers' Compensation Coverage: Plaintiff was working in an underground mine when a fire broke out. Plaintiff was trapped in the mine because the mine operator blocked an exit. Plaintiff argued that his employment relation ceased when he abandoned his work to seek safety from the fire and therefore he was not covered by the Workers' Compensation Act. The plaintiff based his right to terminate his employment on 39-2-505 (now repealed). The court held that the section is not applicable. Wirta v. N. Butte Min. Co., 64 M 279, 210 P 332 (1922).

Part Law Review Articles

Survey: Good Faith and Fair Dealing: An Analysis of Recent Cases, Hubble, 48 Mont. L. Rev. 193 (1987).

Balancing the Rights of the Alcoholic Employee With the Legitimate Concerns of the Employer: Reasonable Accommodation vs. Undue Hardship, Sullivan, 46 Mont. L. Rev. 401 (1985).

39-2-501. Termination of employment generally.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Seasonal Employee Subject to Probationary Period Every Season — Policy Manual Supported Conclusion That Employee Was on Probation When Terminated: The District Court properly granted summary judgment dismissing the plaintiff employee's claims for wrongful discharge. The plaintiff was a winter seasonal employee for the employer ski resort during each of the winter seasons from 2003 to 2014. The employer hired the plaintiff for the 2014-2015 winter season, which was set to begin in November and to end in April, depending on the weather. According to the employer, the plaintiff was angry because he did not get hired for another position and he expressed his anger to other employees in a manner that the employer found insubordinate and inappropriate. Consequently, the employer terminated the employee before the end of the ski season. On appeal, the Supreme Court affirmed the District Court's dismissal of the action, reasoning that a seasonal rehire is clearly a new employee for all purposes, including for the purposes of the probationary period. As applied, the employer defined the period of probationary employment in the employee handbook as the first 6 months of employment, and the plaintiff was still on probation when the employer terminated his employment 4 months later. Dundas v. Winter Sports, Inc., 2017 MT 269, 389 Mont. 223, 410 P.3d 177.

Contract Action Not Applicable When Contract Terms Not Fulfilled — Wrongful Discharge Claim Dismissed as Untimely: Zier signed an agreement that he would become president of defendant bank when the bank obtained a contingent charter from the division of banking and when the bank received federal approval for operation. Zier began working for the bank in a different capacity, but neither contingency occurred, so Zier was not offered the president position and was subsequently discharged from employment. Zier filed a breach of contract action, but the bank argued that the contract claim was actually a claim for wrongful discharge. The District Court agreed with the bank and dismissed the claim because Zier failed to bring the action within 1 year as required under 39-2-911. Zier appealed, but the Supreme Court affirmed. The bank was not liable for breach of contract because the conditions of the agreement did not occur, so the District Court properly refused to consider the claim under a contract theory and correctly considered the claim as a wrongful discharge claim. Zier's failure to bring the claim within the 1-year statute of limitations warranted dismissal. Zier v. Hancock, 2008 MT 255, 345 M 89, 189 P3d 1189 (2008). See also Kneeland v. Luzenac America, Inc., 1998 MT 136, 289 M 201, 961 P2d 725 (1998).

Termination of Employment for Legitimate Business Reasons Insufficient Basis for Judgment as Matter of Law: As set out in Kneeland v. Luzenac Am., Inc., 1998 MT 136, 289 M 201, 961 P2d 725, 55 St. Rep. 541 (1998), a motion for judgment as a matter of law may be granted only if it appears that a party could not prevail upon any view of the evidence, including legitimate references that can be drawn from the evidence, and there is a complete absence of any evidence to warrant submission to a jury. In this case, an employer maintained that its employee was terminated for legitimate business reasons and evidence existed to support that contention, but that did not constitute a sufficient basis for judgment as a matter of law in light of other evidence submitted by the employee tending to show that the termination was not for legitimate business reasons. Denial of the motion for judgment as a matter of law was proper. Braulick v. Hathaway Meats, Inc., 1999 MT 57, 294 M 1, 980 P2d 1, 56 St. Rep. 241 (1999).

Nonstatutory Exceptions to At-Will Termination: Aside from statutory enactments, Montana courts have recognized four exceptions to the right of at-will employers to terminate employees: (1) the discharge violates public policy; (2) the discharge breaches an express or implied promise of job security; (3) the discharge breaches the implied covenant of good faith and fair dealing; and (4) negligent discharge. Prout v. Sears, Roebuck & Co., 236 M 152, 772 P2d 288, 46 St. Rep. 257 (1989), followed in Kittelson v. Archie Cochrane Motors, Inc., 248 M 512, 813 P2d 424, 48 St. Rep. 535 (1991).

39-2-502. Termination by death or incapacity of employer.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Employment Contract — Interpretation — Deduction of Payments Under Previous Contract: Appellant's contract of employment with Ollie May Vestal was terminated by her death. After her death he entered into a new employment contract with the personal representative of her estate. Payments made under the original contract may not be deducted from payments due under the second contract of employment even if payments made under the original contract were greater than the stated amount. Heintz v. Vestal, 185 M 232, 605 P2d 606, 37 St. Rep. 99 (1980).

Part 6
Master and Servant

39-2-601. Servant defined.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Injured Independent Contractor — No Duty of Safety Imposed on Employer — Loaned Servant Doctrine Argument Rejected: The plaintiff, an independent contractor, was injured on a worksite while helping another contractor move a wall. On a summary judgment motion, the District Court determined that the Montana Occupational Safety and Health Act does not create a duty of safety running from an employer to an independent contractor. The Supreme Court affirmed, reasoning that the plain language of the statute excludes an independent contractor from the definition of "employee". Additionally, the plaintiff's claim that he was an employee under the loaned servant doctrine was rejected because he was responsible for his own work and hours. McDonald v. Ponderosa Enterprises, Inc., 2015 MT 160, 379 Mont. 379, 352 P.3d 14.

Master-Servant Relationship Between Railroad and Locomotive Service Facility Established by Common Control — Applicability of Federal Employers' Liability Act: Employees of the Livingston Rebuild Center, Inc. (LRC), sought damages under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51, et seq., alleging that they were injured during the course of their employment while nominally employed by LRC, but that LRC was actually the servant of Montana Rail Link, Inc. (MRL), which engaged in the business of common carrier by railroad in interstate commerce. MRL's affirmative defense was that plaintiffs could not recover FELA benefits against LRC because LRC was not a railroad and that they could not recover FELA benefits against MRL because they were not employed by MRL. The issue on appeal was whether the District Court erred when it held that plaintiffs were not employed by a common carrier by railroad for purposes of FELA. As applicable law, the Supreme Court cited Kelley v. S. Pac. Co., 419 US 318, 42 L Ed 2d 498, 95 S Ct 472 (1974). Among the factors typically considered for purposes of determining whether a master-servant relationship exists, the most significant is the degree of control that the alleged master exercises over the work of the alleged servant. In this case, a master-servant relationship was established between MRL and LRC not only by control of business practices through common ownership and directorship, but also through: (1) MRL's direct, frequent, and unique supervision of LRC employees; (2) MRL's at-will acquisition of LRC property, including land exchanges without consideration or for less consideration than full market value, when acquisition was in MRL's self-interest; (3) LRC's dependence on MRL for training, tools, equipment, and parts; and (4) MRL's use of LRC property for its own purposes without compensation, including the common sharing of physical facilities. Based on the master-servant relationship, the LRC employees were also considered employees of MRL at the time that they were injured and were thus covered under FELA. Watts v. Mont. Rail Link, Inc., 1999 MT 18, 293 M 167, 975 P2d 283, 56 St. Rep. 88 (1999).

Independent Contractor Distinguished: An operator of a wrecker service, called by highway construction company and taking direction from employee of highway construction company in righting a trailer, was for the time an employee of the company and not an independent contractor, and his widow was entitled to compensation under the Workmen's Compensation Act (now Workers' Compensation Act). Under the facts stated, he submitted himself to the direction of the employer as to details and means, and the rule that an advance agreement as to price for service to obtain a certain result without regard to length of time indicates relationship of independent contractor, was inapplicable. Grief v. Indus. Accident Fund, 108 M 519, 93 P2d 961 (1939).

39-2-602. Term of hiring.

Case Notes

Denial of Tort Claims Affirmed — Evidence Relating to Contract Claim and Damages Properly Admitted — Special Relationship Contract Damages Unavailable: The plaintiff accepted a job offer by the defendant, a health clinic. Before the plaintiff began her new job but after she informed her employer she was leaving, the defendant informed the plaintiff that it would not be employing her. The plaintiff sued, alleging breach of contract, breach of the covenant of good faith and fair dealing, and promissory estoppel. In a subsequent action to Great Falls Clinic v. 8th Judicial District Court, 2016 MT 245, 385 Mont. 95, 381 P.3d 550, the District Court denied the plaintiff's motion for partial summary judgment that sought to establish a "special relationship" in which the plaintiff sought damages for emotional distress, loss of enjoyment of life, embarrassment, anxiety, and punitive damages. The District Court denied the plaintiff's request to amend her complaint to add additional tort claims in addition to holding that the only issue to be tried was the damages for the breach of contract. At trial, the jury awarded contract damages. On appeal and cross-appeal, the Supreme Court held that the District Court properly determined that the only claim to be tried was the damages for breach of contract, that the elements to demonstrate a contract involving a special relationship were not met, that evidence of the plaintiff's contract expectations were relevant to the determination of expectancy damages, that efforts by the plaintiff's counsel to admit evidence not germane to the contract claim did not ultimately prejudice the jury, that the plaintiff presented sufficient evidence that her damages were appropriate and reasonably incurred, and that the denial of a jury instruction that the contract term was only for a year under 39-2-602 was proper. Warrington v. Great Falls Clinic, LLP, 2019 MT 111, 395 Mont. 432, 443 P.3d 369.

Bar to Recovering Unpaid Wages: When the appellant's original complaint was filed on June 13, 1972, 27-2-202 barred him from recovering any unpaid wages due prior to June 13, 1964, because the Statute of Limitations on such an employment contract commenced at the end of each payday for services performed during the pay period. Weston v. Mont. Highway Comm'n, 186 M 46, 606 P2d 150, 37 St. Rep. 236 (1980).

Implied Contract for Services — Statute of Limitations — Month-by-Month Accrual: The Statute of Limitations on an implied contract for services is 5 years under 27-2-202. The statute begins to run when an enforceable claim accrues. Section 39-2-602(2) creates the presumption that an employee is hired on a month-by-month basis. The statute therefore begins to run on each month's wages as that month's wages become due. Pope v. Keefer, 180 M 454, 591 P2d 206, 36 St. Rep. 366 (1979).

Reimbursement of Expenses: This section is broad enough to cover reimbursement of expenses incurred by the employee, and employee's claim for reimbursement accrued monthly in the absence of any other understanding. Cartwright v. Joyce, 155 M 478, 473 P2d 515 (1970).

Monthly Employment: Where the salary of an extra deputy in the County Clerk's office had been fixed at a monthly rate, her employment is presumed to have been from month to month, under this section terminable at the end of each monthly period and such employment was therefore of a temporary and not of a permanent character. Farrell v. Yellowstone County, 68 M 313, 218 P 559 (1923).

39-2-605. Servant to pay over without demand.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-2-606. When servant may be discharged.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 7
General Liability Arising From Employment Relationship

Part Case Notes

Certified Question — Respondeat Superior Doctrine — Employer Vicarious Liability — Law Enforcement Officers' Scope of Employment — Use of Authority as On-Duty Officer to Sexually Assault Person Being Investigated for Crime — Sexual Intercourse in Exchange for Not Being Charged for Crime — Sexual Assault Not Outside Scope of Employment as Matter of Law — Restatement (Second) of Agency 229 Adopted. L.B. v. U.S., 2022 MT 166, 409 Mont. 505, 515 P.3d 818.

Negligent Management Claim Not Preempted by Federal Law: The plaintiff, a long-time railroad employee who was covered by a collective bargaining agreement (CBA), sued the railroad after being dismissed following a train collision. The plaintiff's claims included a claim of negligent management pursuant to 39-2-703 (now repealed). The case was removed from state to federal District Court. The District Court granted summary judgment in favor of the defendant based on its conclusion that all of his claims were preempted by the Railway Labor Act, a federal law. The plaintiff appealed to the Ninth Circuit Court of Appeals, arguing that because his negligent management claim arose independent of the CBA, the Act did not preempt his state law claim of negligent mismanagement. The Ninth Circuit agreed. Although it affirmed dismissal of all of the plaintiff's other claims, it reversed and remanded the case for consideration of his state law claim and the related punitive damages claim. Wolfe v. BNSF Ry. Co., 749 F3d 859 (9th Cir. 2014).

Negligent Mismanagement Claim Improperly Dismissed for Lack of Subject Matter Jurisdiction — Statute Not Limited to Personal Injury or Preempted by Federal Law: Winslow brought an action against his employer, Montana Rail Link, under 39-2-703 (now repealed) for mismanaging its investigation of his injury, alleging that the mismanagement lead to his dismissal from his job. The District Court held that 39-2-703 was intended to apply only to personal injuries caused by coworkers and that Winslow's cause of action under 39-2-703 was preempted in any event by the Wrongful Discharge From Employment Act (WDEA). The Supreme Court held that the District Court's interpretation was overly restrictive because there was nothing in the language of 39-2-703 that prevented its application to the mismanagement of the investigation of Winslow's injuries. The Supreme Court also held that although a claim involving dismissal of an employee covered by a collective bargaining agreement (CBA), as Winslow was, could not be brought under the WDEA, Winslow's action was not brought to enforce his CBA, because his complaint made no mention of the CBA, but was brought under state law, giving an independent cause of action, and was therefore not preempted by the federal Railway Labor Act. Winslow v. Mont. Rail Link, Inc., 2000 MT 292, 302 M 289, 16 P3d 992, 57 St. Rep. 1238 (2000). On remand, defendant argued that Winslow I (id.) did not precisely consider whether 39-2-703 provided Winslow with a statutory mismanagement cause of action and thus could not be considered stare decisis on the issue. The Supreme Court disagreed. The issue of whether 39-2-703 provided Winslow with a statutory cause of action was sufficiently addressed in Winslow I to serve the purposes of law of the case, and the Supreme Court declined to revisit the issue. Because Winslow's claims were premised on state law, denial of defendant's motion for summary judgment based on federal preemption was proper. Additionally, defendant failed to raise the preemption issue until years after the litigation commenced, so denial of the preemption defense was proper on the basis of waiver. Winslow v. Mont. Rail Link, Inc., 2005 MT 217, 328 M 260, 121 P3d 506 (2005). See also Haux v. Mont. Rail Link, Inc., 2004 MT 233, 322 M 456, 97 P3d 540 (2004), and Wolfe v. BNSF Ry. Co., 749 F3d 859 (9th Cir. 2014).

Statutory Cause of Action for Railroad Mismanagement — Complaint Dismissed for Failure to Meet Statute of Limitations for Filing Statutory Claim: Haux's employment with defendant was terminated December 27, 1999, and Haux filed a complaint on October 10, 2002, asserting that the termination was negligent and malicious and part of defendant's general business practice of firing employees without cause, constituting mismanagement. The District Court found that 39-2-703 (now repealed) does not create a cause of action for mismanagement and granted defendant's motion for summary dismissal, and Haux appealed. The Supreme Court held that a plain reading of 39-2-703 does in fact create a cause of action for mismanagement, so the District Court erred in dismissing the action on those grounds. However, dismissal was still proper because Haux's action for mismanagement was barred when Haux failed to meet the 2-year statute of limitations for filing the statutory claim. Thus, dismissal was affirmed because the right result was reached for the wrong reason. Haux v. Mont. Rail Link, Inc., 2004 MT 233, 322 M 456, 97 P3d 540 (2004), following Winslow v. Mont. Rail Link, Inc., 2000 MT 292, 302 M 289, 16 P3d 992 (2000), and distinguishing Dillon v. Great N. Ry., 38 M 485, 100 P 960 (1909), Johnson v. Butte & Superior Copper Co., 41 M 158, 108 P 1057 (1910), Beeler v. Butte & London Copper Dev. Co., 41 M 465, 110 P 528 (1910), and Melzner v. Raven Copper Co., 47 M 351, 132 P 552 (1913).

Limited Application of Nondelegable Duty Exception to Respondeat Superior Doctrine: Application of the nondelegable duty exception to the respondeat superior doctrine is limited to instances of safety in which the subject matter is inherently dangerous. The Supreme Court declined to modify the presently accepted version of the doctrine by adopting the exception, set out in section 214 of Restatement (Second) of Agency, that a master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance or duty to a servant or other person is subject to liability to others for harm caused to them by the failure of the agent to perform the duty. Noting that there are several reasons for and against extending the liability of an employer when an intentional tort is committed only because or by virtue of the employment situation, the court opted to leave adoption of such a major doctrinal change to the Legislature. Maguire v. St., 254 M 178, 835 P2d 755, 49 St. Rep. 688 (1992).

Inappropriateness of Court Involvement in Decisions Regarding Employment in Managerial or Confidential Positions: Following purchase of a business by a new owner, the executive manager, who was a long-time employee of the former owner, was replaced by the new owner's long-time faithful employee. Such an action was the new owner's policy when purchasing businesses. The former executive manager brought a wrongful discharge suit. The Supreme Court declined to determine whether the replacement constituted a legitimate job-related reason, noting that it is inappropriate for courts to become involved in the day-to-day employment decisions of business when those decisions involve employees who occupy sensitive managerial or confidential positions. However, a company's interest in protecting its investment and in running its business as it sees fit is not as strong when applied to lower echelon employees and may be outweighed by the employees' interest in continued, secure employment. Buck v. Billings Mont. Chevrolet, Inc., 248 M 276, 811 P2d 537, 48 St. Rep. 431 (1991), followed in Kestell v. Heritage Health Care Corp., 259 M 518, 858 P2d 3, 50 St. Rep. 919 (1993), McConkey v. Flathead Elec. Co-op, 2005 MT 334, 330 M 48, 125 P3d 1121 (2005), Sullivan v. Cont. Constr. of Mont., LLC, 2013 MT 106, 370 Mont. 8, 299 P.3d 832, and Buckley v. W. Mont. Community Mental Health Center, 2021 MT 82, 403 Mont. 524, 485 P.3d 1211, and distinguished in Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999).

Duty to Provide Safe Workplace — Liability of Immediate Corporate Employer: The statutory duty to provide a safe workplace is generally owed only by the immediate corporate employer. A complaint against a parent/grandparent corporation was properly dismissed when claimant failed to show: (1) that the subsidiary was a mere agent or alter ego of the parent company; (2) a sharing of day-to-day business activities between the corporations; (3) that the parent corporation had an independent duty to provide a safe workplace through a direct relationship of physical operations; or (4) that the corporate cloak was used to defeat public convenience, justify wrong, perpetrate fraud, or defend crime. Hando v. PPG Indus., Inc., 236 M 493, 771 P2d 956, 46 St. Rep. 532 (1989).

Reciprocal Duty of Good Faith and Fair Dealing Between Employer and Employee — Character of Employee Relevant to Expectation of Job Security: The Supreme Court applied the holding in Los Angeles Mem. Coliseum Comm'n v. NFL, 791 F2d 1356 (9th Cir. 1986), in finding that the implied covenant of good faith and fair dealing mandated a reciprocal duty in the employment relationship, applicable to both employer and employee. Breach by one party served to negate any breach by the other party, so that neither party was entitled to recovery. This rule applied only narrowly to factual contexts where both breaches concerned the same issue and occurred during one episode of the relationship. In the present case, an employee who breached the covenant could not then complain of unfair dealing by the employer. The District Court improperly excluded evidence of specific misconduct related to the employee's character because the alleged misconduct was relevant to whether the employee had a reasonable expectation of job security and could thus claim protection under the covenant. Barrett v. ASARCO Inc., 234 M 229, 763 P2d 27, 45 St. Rep. 1865 (1988). See also Story v. Bozeman, 259 M 207, 856 P2d 202, 50 St. Rep. 761 (1993), Flanigan v. Prudential Fed. S&L, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986), and Dare v. Mont. Petroleum Mkt. Co., 212 M 274, 687 P2d 1015, 41 St. Rep. 1735 (1984).

Negligence in Selection of Contractor — Employer Liability: In an action involving a fertilizer salesman, the Supreme Court applied the general rule of section 411, Restatement (Second) of Torts, which provides that an employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor to do work that involves a risk of physical harm unless it is skillfully and carefully done. Gurnsey v. Conklin Co., Inc., 230 M 42, 751 P2d 151, 45 St. Rep. 1 (1988).

Failure of Alter Ego and Principal/Agency Theories in Proving Duty of Parent Company to Provide Safe Workplace — No Separate Liability for Injury Covered by Subsidiary's Workers' Compensation: Plaintiff was an employee of a subsidiary company and argued that the subsidiary was so controlled by the parent company that the corporate cloak should be cast aside allowing suit against the parent company. The Supreme Court found no suggestion that the parent company was engaged directly in the business of the subsidiary or that the parent company was an operating entity engaged in operating its business at the place of injury. There was no indication that the subsidiary was used as a subterfuge to defeat public convenience, justify wrong, or perpetuate fraud; therefore, summary judgment was not precluded by the alter ego or principal/agency theory. Further, the subsidiary had discharged its responsibility for plaintiff by securing workers' compensation insurance, with the result that neither the parent company nor its subsidiary would be separately subject to liability for the injury which was covered by workers' compensation. Thornock v. Pack River Management Co., 227 M 524, 740 P2d 1119, 44 St. Rep. 1284 (1987).

Negligent Hiring and Negligent Entrustment: Insurer's agent participated in a Dillon rodeo, went to a barbecue at his Dillon home, and then went drinking in Dillon bars. While driving home in a vehicle he leased from a service company that was a wholly owned subsidiary of and had a common board of directors with insurer, he struck plaintiff, who sued insurer for negligent hiring and service company for negligent entrustment of the vehicle to agent. Insurer and service company sought summary judgment. That one to whom a vehicle is entrusted is licensed does not alone negate a finding of negligent entrustment. Since the record showed agent had at least once before been in an accident while intoxicated and it was alleged service company knew or should have known the agent had a propensity to drive while intoxicated, there was a material question of fact whether service company breached the duty not to entrust a vehicle to an incompetent driver, and summary judgment as to the service company was denied. Insurer's motion for summary judgment on the negligent hiring issue was denied, the court stating that it could find no Montana case on the negligent hiring doctrine. The questions of whether insurer should have foreseen that it was hiring a dangerous driver, that it was negligent in hiring the agent, and that the negligence proximately caused plaintiff's injuries were considered to be questions of fact not properly disposed of on summary judgment. The court also indicated that whether agent was acting within the scope of his employment at the time of the accident was not an issue. Vollmer v. Bramlette, 594 F. Supp. 243, 41 St. Rep. 1964 (D.C. Mont. 1984).

Respondeat Superior — Accident Caused by Insurance Agent: Defendant insurance company's agent participated in a Dillon rodeo, went to a barbecue at his Dillon home, and in the evening consumed alcohol at several Dillon bars. On the way home from the bars, he struck plaintiff while driving an auto the agent leased from insurer's wholly owned service company, which had a common board of directors with insurer. Plaintiff sued defendants under respondeat superior. There was evidence agent sold insurance as a result of participating in group recreational and social activities. Summary judgment for insurer was refused because there was a fact question as to whether agent's activities during the night in question were within the course and scope of his work as an insurance agent. However, summary judgment was granted in favor of the service company as there was no evidence that agent was acting as the agent of the service company at the time of the accident. Vollmer v. Bramlette, 594 F. Supp. 243, 41 St. Rep. 1964 (D.C. Mont. 1984).

Availability of Affirmative Defenses to Railroad — Absolute Liability: Plaintiff was employed by a subsidiary of Burlington Northern and was injured in an accident involving Burlington's railroad cars. The Supreme Court decided the federal Safety Appliance Act applied despite the fact the railroad cars involved in the accident were on a siding where loading operations were handled by the subsidiary. Noting that the U.S. Supreme Court has declared that the question of whether a railroad can assert contributory negligence or assumption of risk as defenses in a case involving a nonrailroad employee depends entirely on state law, the Supreme Court cited its 1966 holding that, where the theory of absolute liability applies, liability is established when it is proved that a statute has been violated and there is a proximate cause connection between the violation and the resulting injuries. Proximate cause in a case under the Safety Appliance Act is decided using the definition that prevails under state law. Comparing the 1966 case under the Scaffolding Act with this case, the Supreme Court denied the defendant the two defenses. The Supreme Court also noted that railroad employees are entitled to a more liberal standard imposing liability than nonrailroad employees. Reynolds v. Burlington N., 190 M 383, 621 P2d 1028, 37 St. Rep. 1883 (1980).

Duty to Provide Safe Working Place — Railroad Employee: In a case brought by an employee injured while working for a subsidiary of a railroad, the Supreme Court held that the plaintiff was owed the duty to provide him with a safe place to work. Noting that giving the jury information about the subsidiaries might well have been highly prejudicial to the defendant railroad, the Supreme Court nonetheless felt obliged to consider it in this case. The plaintiff was working directly in the operations of the railroad in every sense of the word. The railroad would not be absolved of the responsibility to provide a safe place to work for employees who are technically employed by a subsidiary corporation but whose employment is directly related to the operations of a railroad. Closeness of the businesses of the parent and subsidiary companies was a factor in the court's conclusion that both corporations owed the duty to provide the plaintiff with a safe place to work. Reynolds v. Burlington N., 190 M 383, 621 P2d 1028, 37 St. Rep. 1883 (1980).

Stipulation of Dismissal of Action Against Police Officer as Applying to City and County Under "Respondeat Superior" Doctrine: A man fleeing from police officers was shot by one of them. The man later entered into a stipulation for dismissal with prejudice of the claim against the officer, but later the city and county, also defendants in the suit, were denied their motions for dismissal with prejudice. The Montana Supreme Court held that a stipulation of dismissal with prejudice of a defendant is tantamount to a judgment on the merits; and accordingly, such a dismissal with prejudice is res judicata as to every issue reasonably raised by the pleadings. Under the doctrine of respondeat superior, an employer defendant's liability is vicarious or derivative and does not arise until an employee acts negligently within the scope of his employment. A dismissal with prejudice of a claim against an employee is equivalent to a finding that the employee was not negligent. Under the doctrine of respondeat superior, such a dismissal of an employee operates to exonerate the employer. The Supreme Court will look at the dismissal with prejudice on its face and will not look behind the words "with prejudice". State ex rel. Havre v. District Court, 187 M 181, 609 P2d 275, 37 St. Rep. 552 (1980).

Employee Defined:

In an action brought under 39-2-703 (now repealed) by a freight conductor against his employer, where it appeared that plaintiff, during the entire time when away from his home terminal was subject to be called on duty and required to be within call, and though not required to do so under his contract of employment was nevertheless expected to occupy the caboose of his train at night, was in the discharge of his duties when injured in a collision while asleep in the caboose standing on a sidetrack. He did not occupy the position of a mere licensee even though his pay had for the time being ceased and would not begin again until he was called on duty. Pryor v. Bishop, 234 F 9 (7th Cir. 1916); Moyse v. N. Pac. Ry., 41 M 272, 108 P 1062 (1910). See Hollenback v. Stone & Webster Eng'r Corp., 46 M 559, 129 P 1058 (1913).

While 39-2-703 (now repealed) has to do exclusively with those persons who sustain toward each other the relation of master and servant, it does not undertake to define who those persons are, but merely imposes certain rights and liabilities upon them, leaving it to the courts to determine when persons have assumed the relation. Moyse v. N. Pac. Ry., 41 M 272, 108 P 1062 (1910).

Nature of Action: An action under 39-2-704 (now repealed) is not a "purely statutory action". Melzner v. Raven Copper Co., 47 M 351, 132 P 552 (1913).

Purpose: The purpose and effect of 39-2-704 (now repealed) is declared in Melzner v. Raven Copper Co., 47 M 351, 132 P 552 (1913); Beeler v. Butte & London Copper Dev. Co., 41 M 465, 110 P 528 (1910); and Thurman v. Pittsburg & Mont. Copper Co., 41 M 141, 108 P 588 (1910).

Action Survives: Under 39-2-703 (now repealed) the right of action accruing to an injured employee survived in case of his death, and could be prosecuted to judgment by his representative, whether such employee had commenced action in his lifetime or not. Melzner v. N. Pac. Ry., 46 M 277, 127 P 1002 (1912); Dillon v. Great N. Ry., 38 M 485, 100 P 960 (1909).

Beneficiaries in Death Cases: If a person is injured while employed by a railroad company engaged in interstate commerce and subsequently dies of his injuries, a right of action survives to his personal representative, for the benefit of certain named beneficiaries, and the proper party plaintiff is the personal representative of the decedent. The right of recovery, however, is determinable by the provisions of the Federal Employers' Liability Act which impliedly supersedes all state statutes on the subject. Melzner v. N. Pac. Ry., 46 M 277, 127 P 1002 (1912).

Pleading:

Where the negligence of a fellow servant is relied upon, the injured servant must declare upon the statute and cannot recover in a common-law action. Kinsel v. N. Butte Min. Co., 44 M 445, 120 P 797 (1912).

In an action to recover damages for personal injuries brought under 39-2-704 (now repealed), plaintiff made out a prima facie case upon which to go to the jury upon the question whether a timber which, in falling, produced the injury, was caused to fall by a shift boss of defendant company and whether such person occupied the position of shift boss. Johnson v. Butte & Superior Copper Co., 41 M 158, 108 P 1057 (1910).

Where a servant relies for recovery for personal injuries on a special statute creating a liability on the part of the master where none existed before, he must set forth in ordinary and concise language a statement of facts showing his right to recover under that statute. Thurman v. Pittsburg & Mont. Copper Co., 41 M 141, 108 P 588 (1910).

Fellow Servant Doctrine Abolished:

Section 39-2-703 (now repealed) enlarges the common-law liability of persons or corporations operating railroads. Cunningham v. NW. Improvement Co., 44 M 180, 119 P 554 (1911).

Section 39-2-703 (now repealed) abolishes the fellow servant rule. Moyse v. N. Pac. Ry., 41 M 272, 108 P 1062 (1910).

Statute of Limitations: An action brought under 39-2-704 (now repealed) to recover damages for injuries to a mine employee does not fall within the category of those founded "upon a liability created by statute", mentioned in the Statute of Limitations as being barred unless brought within 2 years. Beeler v. Butte & London Copper Dev. Co., 41 M 465, 110 P 528 (1910).

Survival: Under the express provision of 39-2-704 (now repealed), the right of action to recover damages for injuries to a mine employee, alleged to have been caused by the negligence of a fellow servant, survives to and may be prosecuted and maintained by the heirs or personal representatives of the deceased. Beeler v. Butte & London Copper Dev. Co., 41 M 465, 110 P 528 (1910).

"Shift Boss": The term "shift boss", as used in 39-2-704 (now repealed), means a master workman who directs the operations of a set of men who work in turn with other sets. Johnson v. Butte & Superior Copper Co., 41 M 158, 108 P 1057 (1910).

Allegations of Complaint:

Where a servant relies for recovery of damages for personal injuries upon the provisions of either of the fellow servant acts, creating a liability on the part of the master where none existed before their enactment, he must set forth in ordinary and concise language a statement of facts showing his right to recover under such special statute. Thurman v. Pittsburg & Mont. Copper Co., 41 M 141, 108 P 588 (1910); Miley v. N. Pac. Ry., 41 M 51, 108 P 5 (1910); Kelly v. N. Pac. Ry., 35 M 243, 88 P 1009 (1907). See Beeler v. Butte & London Copper Dev. Co., 41 M 465, 110 P 528 (1910); Kinsel v. N. Butte Min. Co., 44 M 445, 120 P 797 (1912); Melzner v. Raven Copper Co., 47 M 351, 132 P 552 (1913); Kirk v. Smith, 48 M 489, 138 P 1088 (1914).

Under either of the fellow servant acts, a complaint, in an action by a switchman against a railway company for personal injuries alleging that "the defendant company so carelessly and negligently managed, operated, and ran" a train of cars as to seriously injure him, was insufficient, in the absence of an allegation that recovery was sought on account of the negligence of one for whose fault the statute imposes a liability on the master, to admit proof showing that plaintiff's injuries were brought about by the careless and negligent acts of the engineer in charge of the train in question. Kelly v. N. Pac. Ry., 35 M 243, 88 P 1009 (1907).

Instantaneous Death: The provisions of 39-2-703 (now repealed) constitute a survival statute and do not create a new cause of action in favor of the heirs for damages sustained by them by reason of the death of the deceased. In an action brought by the heirs of a railroad employee to recover damages for the alleged killing of deceased, the agreed statement of facts showed that his death in a collision was instantaneous. There could not be any survival of an action in the heirs since the wrong and the death of decedent was coincident in point of time, no cause of action ever accrued in his favor, and therefore none could survive in the heirs. Dillon v. Great N. Ry., 38 M 485, 100 P 960 (1909).

Constitutionality:

Section 39-2-703 (now repealed) constitutes a valid exercise of legislative power. Lewis v. N. Pac. Ry., 36 M 207, 92 P 469 (1907).

The general purpose of Ch. 83, L. 1903, being to protect railroad employees in their particularly hazardous employment cannot be held to violate the Equal Protection of the Law Clause of the United States Constitution. Under the rule of statutory construction where the general purpose of a statute has been ascertained, general words may be restricted to a particular meaning, or those of a restricted meaning expanded so as to embrace the general purpose and effectuate it. The expression "railway corporation", found in 39-2-703 (now repealed), includes all persons, both individual and corporate, engaged in operating railways. Lewis v. N. Pac. Ry., 36 M 207, 92 P 469 (1907).

39-2-701. Indemnification of employee.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Failure to Notify of Challenge to Right to Indemnification Prior to Settlement — Indemnification for Wage Loss and Medical Benefits Required: Plaintiff's employee Salazar was injured while a passenger on defendant's transportation service, and Salazar's care was managed by plaintiff's federally approved wellness program. Salazar agreed to drop claims against plaintiff and the contractor that provided the transportation service, and plaintiff then cross-claimed for indemnification from the contractor. The contractor was subsequently ordered to indemnify plaintiff for part of the settlement, and the contractor appealed, seeking equitable relief. The Supreme Court affirmed. The program administrator failed to request an independent medical examination to separate the work-related claims from claims related to the accident, which arguably increased the contractor's risk of loss beyond what the contractor agreed to indemnify, but the contractor failed to notify plaintiff prior to settlement that the contractor would challenge plaintiff's right to indemnification, so the contractor did not come to court with clean hands and could not avail itself of the equitable relief of discharge from the obligation to indemnify plaintiff. Mont. Rail Link v. CUSA PRTS, LLC, 2009 MT 432, 354 M 101, 222 P3d 1021 (2009). See also Seifert v. Seifert, 173 M 501, 568 P2d 155 (1977), and Cowan v. Cowan, 2004 MT 68, 320 M 332, 87 P3d 443 (2004).

Sole Exception to Employer Indemnification — Waiver of Public Benefit of Indemnification by Employment Contract Inappropriate: The only exception to the requirement that an employer indemnify its employees, as required in this section, is that an employer is not bound to indemnify an employee for losses suffered in consequence of the ordinary risks of the business. In the present case, the employer argued that indemnification could be waived under 1-3-204 if the parties agreed to a different relationship pursuant to the employment contract. However, under 1-3-204, the waiver of statutory rights is not allowable if the waiver violates public policy. Distinguishing several cases related to the waiver of private benefits, the Supreme Court held that indemnification of an employee for expenses incurred in the discharge of the employee's duties is a form of employee compensation similar to the payment of overtime compensation and minimum wage and constitutes an expression of public policy. Thus, even though this section is not accompanied by an express statement of public policy or an express prohibition of contracts that waive the right to indemnify, waiver of the indemnification provisions by contract would, in this instance, result in forfeiture of a valuable right guaranteed as a public benefit to all Montana employees and therefore is not allowed. Rothwell v. Allstate Ins. Co., 1999 MT 50, 293 M 393, 976 P2d 512, 56 St. Rep. 203 (1999).

Employer Not Indispensable Party to Negligence Action Against Employee — Dismissal Improper: Johnson injured Mohl in a vehicle accident while Johnson was an employee of U-Haul. The trial court held that complete relief could not be granted without U-Haul being joined as a party, presumably for purposes of indemnity, and that because the statute of limitations had run against U-Haul, the action should be dismissed because of the inability to join U-Haul as an indispensable party. The Supreme Court disagreed that as employer and potential indemnitor, U-Haul was an indispensable party to the negligence suit against the employee Johnson. There was no need for an indemnity action to be resolved simultaneously with the negligence claim because the indemnity suit would arise out of and be subsequent to the negligence claim. Because the underlying negligence case had not been decided, an indemnity claim against U-Haul had not yet arisen and the statute of limitations had not yet begun to run. Dismissal of the suit constituted reversible error, and the case was remanded for continuation of the trial. Mohl v. Johnson, 275 M 167, 911 P2d 217, 53 St. Rep. 96 (1996).

Negligence as Proper Basis for Recovery — Wrongful Discharge: A negligence claim and a claim for breach of implied covenant of good faith and fair dealing may arise out of the same occurrence, include the same facts, and only involve different theories of law; therefore, negligence is a proper basis for recovery in wrongful termination cases. Flanigan v. Prudential Fed. S&L Ass'n, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986), following Crenshaw v. Bozeman Deaconess Hosp., 213 M 488, 693 P2d 487, 41 St. Rep. 2251 (1984).

Reimbursement of Expenses Not Payment of "Wages" — Penalty for Failure to Pay Wages Inapplicable: In an action by the plaintiff to recover payment of expenses due to the plaintiff under an oral contract providing for reimbursement of his actual expenses, the trial court did not err in holding the penalty for unpaid wages inapplicable to the plaintiff's claim. The reimbursement to the plaintiff of actual expenses is not a "wage", as defined by 39-3-201, but an "indemnification of employee" referred to in this section. There is no statutory penalty for the failure of an employer to indemnify an employee for expenditures covered by that section. Johnston v. K & T Mfg., Inc., 191 M 458, 625 P2d 66, 38 St. Rep. 392 (1981).

Assumption of Risk — Knowledge of Prior Injury: Employee with prior back injury who neither informed his employer of his previous injury, nor refused to lift 500-pound tire without additional help, assumed the risk of the resultant additional injury to his back. McLaughlin v. Ballard, 156 M 181, 478 P2d 281 (1970).

Voluntarily Remaining in the Face of the Danger — Assumption of Risk: Where master, in an action against him for injuries sustained by a servant during course of employment, introduced evidence tending to show that the servant had actual or implied knowledge of the dangerous condition but voluntarily remained in the face of the danger, and that the injury resulted as a usual and probable consequence of the dangerous condition, refusal of the trial court to instruct the jury properly on assumption of risk deprived defendant of a possible defense and was prejudicial error. Wollan v. Lord, 142 M 498, 385 P2d 102 (1963).

Risk Assumed in Improper Use of Equipment: Where an experienced miner was employed to dig a well and was killed by a bucket used for hoisting the dirt falling upon him, its fall being caused by the hook attached to the bucket bail becoming detached in hoisting because improperly adjusted to the bail by him, the court's holding that he assumed the risk from the use of the hook, which was so simple in construction that it did not require a mechanic to understand it or the exercise of science or skill to adjust it, was correct. Miller v. Granite County Power Co., 66 M 368, 213 P 604 (1923).

Assumption of Added Risk Beyond Ordinary Risks: An employee who, with knowledge of the defective machinery with which he is required to work, continues in the employment upon assurance by the employer that the defect would be repaired, may do so for a reasonable length of time without assuming the added risk, unless the danger is so great that a reasonably prudent man would not have continued to work. Grant v. Nihill, 64 M 420, 210 P 914 (1922).

Assumption of Ordinary Risk Presumed:

By his act of entering into the service of his master the servant assumes all the usual and ordinary risks attendant upon his employment, not including risks arising from the negligence of the master, and he assumes these also if he knows of the defects from which they arise and appreciates the dangers which flow from them. Grant v. Nihill, 64 M 420, 210 P 914 (1922).

The servant assumes the ordinary risks of his employment, but such assumption of risk implies knowledge by the servant or his having the means of knowledge, and his appreciation of the danger. Morelli v. Twohy Bros. Co., 54 M 366, 170 P 757 (1918).

A servant is conclusively presumed to have assumed the ordinary risks of the employment. This is a part of his contract of service. Beyond this he does not assume any risk, except by express agreement, or where the circumstances are such that he must be presumed to have done so from the fact that he continued in the employment, though the extraordinary danger was known to him, or was so obvious that he must be presumed to have had knowledge of it. Schroder v. Mont. Iron Works, 38 M 474, 100 P 619 (1909).

Application to Personal Injury Cases — Jury Instruction: This section is directly applicable to cases arising between master and servant on account of personal injuries sustained by the latter in the course of his employment, and an instruction embodying it is properly submitted to the jury. Wallace v. Chicago, Milwaukee & Pudget Sound Ry., 52 M 345, 157 P 955 (1916); John v. N. Pac. Ry., 42 M 18, 111 P 632 (1910); Hardesty v. Largey Lumber Co., 34 M 151, 86 P 29 (1906).

Defective Machinery: In an action for personal injuries alleged to have been sustained by plaintiff, a laundry employee, while working on a patently defective mangle, the evidence, in view of this section, did not preclude defendant from offering any defense though he did not use ordinary care in furnishing ordinarily safe machinery. Fotheringill v. Washoe Copper Co., 43 M 485, 117 P 86 (1911); Osterholm v. Boston & Mont. Consol. Copper & Silver Min. Co., 40 M 508, 107 P 499 (1910); Coulter v. Union Laundry Co., 34 M 590, 87 P 973 (1906). See Leary v. Anaconda Copper Min. Co., 36 M 157, 92 P 477 (1907).

Degree of Care: A master owes the same duty to his servant that a carrier owes to an unpaid passenger; that is, to exercise ordinary care for his safety. John v. N. Pac. Ry., 42 M 18, 111 P 632 (1910).

Res Ipsa Loquitur: Where the doctrine of the maxim "res ipsa loquitur" may be invoked to raise a presumption of want of care, it is want of ordinary care to which reference is made. John v. N. Pac. Ry., 42 M 18, 111 P 632 (1910).

Personal Injuries: This section is directly applicable to cases arising between master and servant on account of personal injuries sustained by the latter in the course of his employment. John v. N. Pac. Ry., 42 M 18, 111 P 632 (1910); Hardesty v. Largey Lumber Co., 34 M 151, 86 P 29 (1906).

39-2-702. Liability of employee for negligence.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Section Not Codified: Section 41-106, R.C.M. 1947, was not codified in the MCA because it is redundant with 39-2-704. The section has not been repealed and is still valid law. Citation may be made to sec. 2, Ch. 83, L. 1903.

39-2-710. Legal protections in relation to employing individuals with criminal records.

Compiler's Comments

Effective Date: Section 3, Ch. 319, L. 2017, provided: "[This act] is effective July 1, 2017."

Part 8
Blacklisting and Protection of Discharged Employees

39-2-801. Employee to be furnished on demand with reason for discharge.

Compiler's Comments

1999 Amendment: Chapter 573 in (1) at beginning of second sentence inserted exception clause; inserted (2) requiring that a written demand include notice of potential litigation; inserted (3) regarding response to the demand; and made minor changes in style. Amendment effective May 5, 1999.

Effective Date — Applicability: Section 4, Ch. 573, L. 1999, provided: "[This act] is effective on passage and approval [approved May 5, 1999] and applies to employment-related information disclosed on or after [the effective date of this act]."

Case Notes

Statute Specific to Teachers Controls: The plaintiff argued that his firing should be set aside on the basis that he was not given a statement for his discharge as required by this section. The Supreme Court ruled that the section of law relied on by the plaintiff applied generally to employees in general commerce and that the specific statute relating to termination of teachers was controlling. Harris v. Bailey, 244 M 279, 798 P2d 96, 47 St. Rep. 1622 (1990).

39-2-802. Protection of discharged employees.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Probationary Employee Owed Duty of Good Faith and Fair Dealing — No Conflict With "At-Will" Statute: The court held that the "at-will" statute is very much alive. The Gates I decision does not preempt the statute. There is no legitimate precedent for an exception for probationary employees. Therefore, Crenshaw, even as a probationary employee, was owed a duty of good faith under the mandate of Gates I. This requirement of good faith and fair dealing does not conflict with 39-2-503 (now repealed) but merely supplements it. Employers can still terminate untenured employees at will and without notice. They simply may not do so in bad faith or unfairly without becoming liable for damages. The hospital's notification to the Bozeman Job Service of Crenshaw's unsatisfactory work performances deprived her of employment in the local medical community. This and other acts of the hospital were acts of bad faith in breach of implied covenant of good faith and fair dealing under Gates I. Crenshaw v. Bozeman Deaconess Hosp., 213 M 488, 693 P2d 487, 41 St. Rep. 2251 (1984).

39-2-803. Blacklisting prohibited.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

No Preemption by National Labor Relations Act: The National Labor Relations Act does not preempt a state court's jurisdiction to enforce this section. Under the terms of this section, blacklisting constitutes tortious conduct giving rise to a civil remedy, and when the action is in tort, distinct from any contractual remedy an employee may have under a collective bargaining agreement, there is no significant threat to the collective bargaining process and no alteration of the economic relationship between the employer and employee that the National Labor Relations Act was intended to preserve, and hence no preemption. Malquist v. Foley, 220 M 176, 714 P2d 995, 43 St. Rep. 270 (1986).

Probationary Employee Owed Duty of Good Faith and Fair Dealing — No Conflict With "At-Will" Statute: The court held that the "at-will" statute is very much alive. The Gates I decision does not preempt the statute. There is no legitimate precedent for an exception for probationary employees. Therefore, Crenshaw, even as a probationary employee, was owed a duty of good faith under the mandate of Gates I. This requirement of good faith and fair dealing does not conflict with 39-2-503 (now repealed) but merely supplements it. Employers can still terminate untenured employees at will and without notice. They simply may not do so in bad faith or unfairly without becoming liable for damages. The hospital's notification to the Bozeman Job Service of Crenshaw's unsatisfactory work performances deprived her of employment in the local medical community. This and other acts of the hospital were acts of bad faith in breach of implied covenant of good faith and fair dealing under Gates I. Crenshaw v. Bozeman Deaconess Hosp., 213 M 488, 693 P2d 487, 41 St. Rep. 2251 (1984).

Part 9
Wrongful Discharge From Employment

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CONSTRUCTIVE DISCHARGE

Plan, Prior to Wrongful Discharge Act's Effective Date, to Terminate Employee — Not Breach of Implied Covenant of Good Faith and Fair Dealing Exempting Employee From Act: An employee could not successfully argue that because, prior to the Wrongful Discharge From Employment Act's effective date, the employer had a plan to terminate him, the implied covenant of good faith and fair dealing existing prior to the Act's effective date applied and the Act's remedies limitation did not apply to him. The covenant is not breached until termination of employment, which in this case occurred after the Act's effective date. Sullivan v. Sisters of Charity of Providence of Mont., 268 M 71, 885 P2d 488, 51 St. Rep. 1193 (1994).

Wrongful Discharge Based on Actions Arising From Failure to Pay Fraudulent Claim: Substantial evidence supported a $33,230 wrongful discharge action jury verdict in favor of the assistant manager of the State Tort Claims Division, who resigned after 16 years of state employment, was earning about $30,000 a year when he resigned, and claimed he was constructively discharged by intolerable working conditions created by his state agency employers. He contended he was harassed, treated unfairly, and finally demoted for his actions involving a fraudulent claim submitted to his Department, which he refused but was subsequently ordered to pay. Weber v. St., 253 M 148, 831 P2d 1359, 49 St. Rep. 397 (1992).

Constructive Discharge — Test: A valid procedural due process claim based on constructive discharge requires that there be employer conduct motivated by a desire to avoid subjecting its actions to the scrutiny of a termination-related hearing. Doohan v. Bigfork School District No. 38, 247 M 125, 805 P2d 1354, 48 St. Rep. 121 (1991).

Refusal to Accept Lateral Transfer — Failure to Prove Constructive Discharge: Plaintiff, employed by the Montana Power Company (MPC) for 22½ years, was stationed in Cut Bank as a field engineer. Despite the urging of his MPC supervisor, he refused to accept a transfer to Butte when MPC closed the Cut Bank office and his employment ended. Plaintiff alleged constructive discharge; MPC contended he chose to terminate rather than accept the transfer. The Supreme Court examined the facts and determined that plaintiff failed to present any evidence that he was actually or constructively discharged, but rather that he refused to accept what amounted to a lateral transfer without a change in job responsibilities, earnings, or benefits. Finstad v. Mont. Power Co., 241 M 10, 785 P2d 1372, 47 St. Rep. 39 (1990).

Employer Action or Inaction — Question of Fact in Constructive Discharge: The Supreme Court relied on the explanation of the constructive discharge doctrine set out in Snell v. Mont.-Dak. Util. Co., 198 M 56, 643 P2d 841 (1982), in holding that it is a question of fact whether by action or inaction an employer has rendered working conditions so oppressive that resignation is the only reasonable alternative. Niles v. Big Sky Eyewear, 236 M 455, 771 P2d 114, 46 St. Rep. 504 (1989), followed in Kestell v. Heritage Health Care Corp., 259 M 518, 858 P2d 3, 50 St. Rep. 919 (1993).

"Constructive Discharge" Construed: As outlined in Pittman v. Hattiesburg Municipal Separate School District, 644 F2d 1071 (5th Cir. 1981), constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. The federal District Court found that plaintiff could prove constructive discharge and breach of the covenant of good faith and fair dealing if it was shown that a supervisor's intentional conduct caused plaintiff's mental breakdown, leading to loss of plaintiff's job. Oedewaldt v. J.C. Penney Co., Inc., 687 F. Supp. 517, 45 St. Rep. 1366 (D.C. Mont. 1988). But see Frigon v. Morrison-Maierle, Inc., 233 M 113, 760 P2d 57, 45 St. Rep. 1344 (1988), wherein the Montana Supreme Court declined to recognize the doctrine of constructive discharge beyond discrimination cases and held that the covenant of good faith and fair dealing applied only in cases of employee termination.

CONTRACT ISSUES

Plaintiff Not Employee at Time of Breach of Contract — Wrongful Discharge from Employment Act Inapplicable: The plaintiff signed a contract for employment with the defendant, a health clinic, and quit her current job. Three days before she was to start working for the defendant, it notified her that it would not hire her. The plaintiff filed claims against the defendant for breach of contract, promissory estoppel, and breach of the covenant of good faith and fair dealing. The defendant claimed that the Wrongful Discharge from Employment Act (WDEA) applied and that it precluded her claims. The District Court concluded that the WDEA did not apply, and the defendant petitioned the Supreme Court for a writ of supervisory control to determine whether the District Court had made a serious mistake of law. The Supreme Court accepted the petition and affirmed the District Court, holding that the WDEA did not apply in this case because the plaintiff was not an employee at the time the defendant breached its contract. Great Falls Clinic v. 8th Judicial District Court, 2016 MT 245, 385 Mont. 95, 381 P.3d 550, followed in Warrington v. Great Falls Clinic, LLP, 2019 MT 111, 395 Mont. 432, 443 P.3d 369.

Jurisdiction of Montana Courts Over Wrongful Discharge Case Involving Montana Citizen When Montana Law Applies — Dismissal for Lack of Jurisdiction Reversed: Plaintiff was a Montana resident hired by a Florida corporation, which was operated out of Oklahoma, to lay fiber optic cable throughout the country. While working in Indiana, plaintiff had a dispute with a supervisor and was fired. Plaintiff brought an action in Montana, claiming a violation of the Wrongful Discharge From Employment Act. The District Court held that under 39-2-912, the Montana courts lacked subject matter jurisdiction and dismissed the claim. On appeal, the Supreme Court reversed. Even though plaintiff never signed a written employment contract, the court held that a contract provision may be broad enough to indicate that an entire contract be governed by the laws of the state governing the particular provision. The fact that the defendant corporation paid income taxes, unemployment insurance premiums, and wages in Montana indicated an intent to be governed by Montana law. The court also concluded that under sections 187 and 188 of Restatement (Second) of Conflict of Laws (1971), the local law of the state with the most significant relationship to the transaction applies to questions of contract interpretation absent an effective choice of law by the parties. Plaintiff was considered a Montana resident despite the fact that employment required travel to other states, and the court concluded that it was appropriate to apply the Wrongful Discharge From Employment Act to the case even though the Act does not expressly provide for extraterritorial jurisdiction. Montana courts have subject matter jurisdiction in cases involving a Montana resident when Montana law applies, so plaintiff's case should not have been dismissed for lack of subject matter jurisdiction. Burchett v. MasTec N. America, Inc., 2004 MT 177, 322 M 93, 93 P3d 1247 (2004). See also Dailey v. Transitron Electronic Corp., 475 F2d 12 (5th Cir. 1973), and Harrington v. Energy West, Inc., 2015 MT 233, 380 Mont. 298, 356 P.3d 441.

Summary Judgment on Breach of Contract Affirmed — Wrongful Discharge Claim Reversed for Determination of Whether Claimant Was Employee or Independent Contractor: Tvedt brought a claim for breach of contract, wrongful termination, and indemnification of expenses, alleging that defendant group had breached the covenant of good faith and fair dealing, waived the at-will clauses in their employment agreement, and mischaracterized Tvedt as an independent contractor, rather than an employee. Defendant group moved for summary judgment and filed a contingent counterclaim stating that in the event that Tvedt was found to be defendant group's employee, then defendant group's obligation to pay Tvedt the contract value should cease and all payments made to Tvedt should be returned. The District Court determined that Tvedt was not an employee and granted summary judgment to defendant group on all claims, and Tvedt appealed. The Supreme Court affirmed summary judgment on the breach of covenant issue because Tvedt was given adequate notice of termination, defendant group was exercising the specific language of the at-will termination provision of the contract, and Tvedt did not demonstrate that defendant group had waived the right to enforce that provision. However, the court reversed summary judgment on the wrongful discharge claim because the District Court incorrectly applied defendant group's novation argument and because genuine issues of fact remained whether Tvedt was an employee or independent contractor and whether a manager's agreement that recognized Tvedt individually was in effect at the time of termination. Remand was ordered because the District Court never considered whether Tvedt was entitled to relief for wrongful discharge as a matter of law and, if so, whether the claim for indemnification was appropriate. Tvedt v. Farmers Ins. Group of Co., 2004 MT 125, 321 M 263, 91 P3d 1 (2004).

Contract to Arbitrate Not Formed by Employee Handbook and Employee's Acknowledgment — Ambiguous Arbitration Provisions: When Hubner began working for defendant communications company, she signed an acknowledgment in an employee handbook that contained an arbitration provision. The arbitration clause provided that all controversies would be subject to binding arbitration, but the clauses in the handbook specified that the handbook did not constitute a contract of employment or create any relationship other than an employment-at-will relationship. When Hubner's employment was subsequently terminated, she brought a state claim for wrongful discharge, and defendant moved for a summary disposition compelling arbitration pursuant to 27-5-115. The District Court agreed with Hubner that there was no agreement to arbitrate and denied the motion, so defendant appealed. Defendant argued that because the arbitration clause was separable, it could be independently enforced. A state contract law defense that goes to the entire contract rather than specifically to an arbitration clause does not defeat a motion to compel arbitration; however, when a defense is aimed directly at the arbitration provision rather than the entire contract, state law contract defenses may be applied to hold that no enforceable agreement to arbitrate was made. Further, acceptance or consent by the party against whom a contract is sought to be enforced is required before a contract is enforceable. The language in the handbook was ambiguous and construed against the drafter. The ambiguity prevented Hubner from knowing and accepting that she was agreeing to binding arbitration by signing the handbook. Thus, no contract to arbitrate was formed by virtue of the handbook and Hubner's acknowledgment, even when the arbitration provision was considered separately from the rest of the handbook. The District Court was affirmed. Hubner v. Cutthroat Communications, Inc., 2003 MT 333, 318 M 421, 80 P3d 1256 (2003).

EVIDENTIARY MATTERS

Undisputed Relevant Material Facts — No Abuse of Discretion to Deny Evidentiary Hearing on Subject Matter Jurisdiction: The plaintiff was an Ohio resident who worked for the defendant, a company whose principal place of business was Montana. After he was terminated, the plaintiff filed a wrongful discharge suit against the defendant in Montana. The defendant filed a motion to dismiss for lack of subject matter jurisdiction, which the District Court granted. On appeal, the plaintiff argued that the District Court erred in granting the motion without holding an evidentiary hearing. The Supreme Court disagreed because the most relevant facts for resolving the motion, that is, where the plaintiff entered into his employment agreement and where he performed his employment, were not in dispute. Therefore, the Supreme Court concluded the District Court did not abuse its discretion in ruling on the motion without holding an evidentiary hearing. Harrington v. Energy West, Inc., 2015 MT 233, 380 Mont. 298, 356 P.3d 441.

Hearsay Statements — Business Judgment: Nothing prohibits a business from relying on hearsay statements when it makes a business judgment regarding terminating an employee. Sullivan v. Cont. Constr. of Mont., LLC, 2013 MT 106, 370 Mont. 8, 299 P.3d 832.

Lack of Evidence That Termination Was for Other Than Good Cause: Following a heated argument with a supervisor, Becker was terminated from employment and subsequently brought a wrongful discharge action, asserting that the termination was unlawful because there was not good cause for the termination. The District Court granted the employer's summary judgment motion to dismiss the case because Becker had presented no evidence that the termination occurred for anything other than good cause. On appeal, the Supreme Court affirmed. Becker's behavior was disruptive of the employer's operations in violation of company policy, and Becker presented no evidence that the reason for termination was false, whimsical, arbitrary, or capricious. Becker v. Rosebud Operating Serv., Inc., 2008 MT 285, 345 M 368, 191 P3d 435 (2008).

Evidence Tending to Support Discharge for Reasons Other Than Stated in Discharge Letter Held Irrelevant: Galbreath injured his knee, neck, and head while working for Golden Sunlight Mines, Inc. (GSM), and took a 3-month medical leave of absence. GSM later accepted liability for Galbreath's injuries. Upon Galbreath's attempt to return to work, GSM terminated his employment, claiming that Galbreath had failed to provide documentation of the reason for his absence. The District Court admitted evidence that Galbreath was terminated for reasons other than stated in the discharge letter. Citing Swanson v. St. John's Lutheran Hosp., 182 M 414, 597 P2d 702 (1979), the Supreme Court held that in a wrongful discharge action, the only reason for discharge that the District Court could consider was the reason stated in the discharge letter. The Supreme Court held that other reasons were irrelevant and that evidence supporting the other reasons should have been excluded. Galbreath v. Golden Sunlight Mines, Inc., 270 M 19, 890 P2d 382, 52 St. Rep. 58 (1995), followed in McGillen v. Plum Creek Timber Co., 1998 MT 193, 290 M 264, 964 P2d 18, 55 St. Rep. 808 (1998), and Bean v. Bd. of Labor Appeals, 1998 MT 222, 290 M 496, 965 P2d 256, 55 St. Rep. 927 (1998). See also Smith v. Charter Communications, Inc., 2023 MT 92, 412 Mont. 292, 529 P.3d 871, holding that the Galbreath rule had not been superseded by 1999 statutory amendments.

Newly Disclosed Evidence Wrongfully Withheld by Employer and Showing Wrongful Discharge: The trial court, in which a wrongful discharge plaintiff was granted a $70,000 jury verdict for damages, properly granted a new trial on the issue of damages on the basis that documents in the employer's files, requested by the plaintiff and not produced by the employer, but anonymously mailed to the plaintiff after the trial, showing that the employer had planned for some time to terminate the plaintiff, would have affected the damages award had they been available for the trial. Sullivan v. Sisters of Charity of Providence of Mont., 268 M 71, 885 P2d 488, 51 St. Rep. 1193 (1994).

Admissibility of Job Performance Evidence in Wrongful Discharge Suit: Weber claimed District Court error in admitting statements and exhibits involving his job performance, including performance appraisals; allegedly prejudicial testimony raising the inference that his claim was frivolous; and testimony appealing to the self-interest of the jurors as taxpayers. However, Weber himself introduced evidence of his diligent work habits, and it was not error to allow the state to introduce statements and exhibits to rebut that evidence. The job performance evidence was not character evidence; was not self-serving, remote, opinion testimony of a lay witness (his boss); and was not a disallowable prior consistent statement. Absent an abuse of discretion in admitting the evidence, Weber's motion for a new trial was properly denied. Weber v. St., 253 M 148, 831 P2d 1359, 49 St. Rep. 397 (1992).

Evidence of Other Than Economic Motives for Firing — Sufficiency of Jury Issue Upheld: In an unlawful discharge action, the employer claimed on appeal that the employee offered insufficient evidence to show that his firing was motivated other than by the economic motives claimed by the employer. The Supreme Court held that the present case was unlike Cecil v. Cardinal Drilling Co., 244 M 405, 797 P2d 232 (1990), cited by the employer for the proposition that the employee must produce evidence of other motives. The court distinguished Cecil, stating that that case was decided under the Wrongful Discharge From Employment Act, which authorizes a nonprobationary employee to be fired for good cause. In Cecil, the plaintiff had insufficient evidence to defeat a motion for summary judgment, while in this case the court found that there was evidence from which the jury could conclude that the employer had noneconomic motives for firing the plaintiff. Kizer v. Semitool, Inc., 251 M 39, 824 P2d 229, 48 St. Rep. 1115 (1991).

GOOD FAITH AND FAIR DEALING

No Claim for Wrongful Termination Apart From Either Contract or Wrongful Discharge Act: Solle claimed that her employer violated the common-law duty of good faith and fair dealing by failing to renew her employment contract when she had a reasonable expectation that a renewal would be offered. Solle's employer moved to compel arbitration, the motion was granted, and Solle appealed. Under Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989), claims for wrongful termination from tort or express or implied contract are no longer viable under Montana law. Rather, 39-2-913 explicitly preempts all common-law remedies but bars only tort and contract claims that are "for discharge". A threshold determination in cases alleging wrongful termination is whether the parties' relationship is governed by a written contract for a specific term or whether it falls under the provisions of the Wrongful Discharge From Employment Act, which applies to noncontract situations. Solle's employment was covered by a written contract containing an arbitration clause, and her claim for breach of the implied covenant of good faith and fair dealing was inextricably intertwined with and based upon her termination from employment. Although breach of a contract is not a prerequisite to breach of the implied covenant of good faith and fair dealing, the covenant arises out of a contractual relationship between the parties, and a breach of the covenant is a breach of the contract. Solle's contract was silent as to whether there was an obligation on the employer's part to renew the contract or on Solle's part to accept a renewal offer, so Solle argued that the failure to include such a provision indicated the employer's intent not to cover a claim like this under the arbitration clause. The Supreme Court disagreed and proceeded to treat the dispute as arising out of the employment contract. Solle was not allowed to maintain a wrongful termination claim apart from either the contract or the Wrongful Discharge From Employment Act. Solle's contract contained a provision that any unresolved dispute would be subject to arbitration, but the arbitration clause did not explicitly provide that it would govern issues concerning contract nonrenewal. Nevertheless, the contract governed Solle's employment, termination, and postemployment relationship and did not explicitly exclude disputes arising after contract termination. The presumption favors arbitrability, and the District Court did not err in holding that Solle's claim was subject to arbitration. Solle v. W. St. Ins. Agency, Inc., 2000 MT 96, 299 M 237, 999 P2d 328, 57 St. Rep. 391 (2000). See also Nolde Bros., Inc. v. Bakery & Confectionery Workers Union, 430 US 243, 51 L Ed 2d 300, 97 S Ct 1067 (1977), and Marsden v. Blue Cross & Blue Shield of Mont., 2012 MT 306, 368 Mont. 34, 291 P.3d 1229.

Plan, Prior to Part's Effective Date, to Terminate Employee — Not Constructive Discharge Exempting Employee From Part: Documents in the employer's possession prior to this part's effective date and showing a plan to terminate the employee did not constitute a constructive discharge, either under this part or under the law in effect prior to this part's effective date. Therefore, the employee, who was terminated after this part took effect, could not successfully argue that his discharge occurred before this part's effective date and that he was thus not limited by this part to the remedies in this part. Sullivan v. Sisters of Charity of Providence of Mont., 268 M 71, 885 P2d 488, 51 St. Rep. 1193 (1994).

Negligent Reduction in Force and Negligent Breach of Covenant of Good Faith and Fair Dealing — Jury Instructions Upheld: In a wrongful discharge case arising prior to the Wrongful Discharge From Employment Act, the employer appealed to the Supreme Court, claiming that the District Court's jury instructions improperly authorized the jury to find that the employer's reduction in force was negligently carried out and that the covenant of good faith and fair dealing could be breached negligently. The Supreme Court held that the employer's reliance on Heltborg

v. Modern Mach., 244 M 24, 795 P2d 954 (1990), was misplaced and that the court had previously held in other cases that negligence could form the basis for a wrongful discharge action. Because there was evidence that the employer was negligent in following its personnel policies handbook and in investigating its claims of inefficiency by its employee, the Supreme Court held that the jury instructions were properly given. Kizer v. Semitool, Inc., 251 M 39, 824 P2d 229, 48 St. Rep. 1115 (1991).

Violation of Company Policy Resulting in Termination — No Breach of Implied Covenants in Employment Relationship: Employee admittedly took $350 from the checkstand till and used these company funds to finance his Nevada gambling trip, repaying the funds 16 days later. His employment was terminated for violation of company policy. Because the employer based the discharge on a fair and honest reason, employee's subsequent claim of breach of the implied covenant of good faith and fair dealing, negligent infliction of emotional distress, and negligence was properly summarily dismissed because there was no basis for the claim and no genuine issue of material fact existed. Majerus v. Skaggs Alpha Beta, Inc., 245 M 58, 799 P2d 1053, 47 St. Rep. 1693 (1990), following Niles v. Weissman & Sons, Inc., 241 M 230, 786 P2d 662, 47 St. Rep. 240 (1990).

Reciprocal Duty of Good Faith and Fair Dealing Between Employer and Employee — Character of Employee Relevant to Expectation of Job Security: The Supreme Court applied the holding in Los Angeles Mem. Coliseum Comm'n v. NFL, 791 F2d 1356 (9th Cir. 1986), in finding that the implied covenant of good faith and fair dealing mandated a reciprocal duty in the employment relationship, applicable to both employer and employee. Breach by one party served to negate any breach by the other party, so that neither party was entitled to recovery. This rule applied only narrowly to factual contexts where both breaches concerned the same issue and occurred during one episode of the relationship. In the present case, an employee who breached the covenant could not then complain of unfair dealing by the employer. The District Court improperly excluded evidence of specific misconduct related to the employee's character because the alleged misconduct was relevant to whether the employee had a reasonable expectation of job security and could thus claim protection under the covenant. Barrett v. ASARCO Inc., 234 M 229, 763 P2d 27, 45 St. Rep. 1865 (1988). See also Story v. Bozeman, 259 M 207, 856 P2d 202, 50 St. Rep. 761 (1993), Flanigan v. Prudential Fed. S&L, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986), and Dare v. Mont. Petroleum Mkt. Co., 212 M 274, 687 P2d 1015, 41 St. Rep. 1735 (1984).

Covenant of Good Faith and Fair Dealing Applicable Only to Employee Termination: The assertion that breach of the covenant of good faith and fair dealing is a separate tort from wrongful discharge is correct. However, the covenant is applicable only in cases of employee termination. When there was no express termination and there were insufficient facts to establish constructive discharge, summary dismissal of a charge of breach of the covenant was affirmed. Frigon v. Morrison-Maierle, Inc., 233 M 113, 760 P2d 57, 45 St. Rep. 1344 (1988).

Covenant of Good Faith and Fair Dealing as Interfering With Freedom of Religion: The Supreme Court upheld a summary judgment dismissing a wrongful discharge complaint against a religious school that dismissed a teacher without notice or hearing. In holding that denying application of the tort of bad faith in this case did not result in an intrusion into church affairs, the court relied on the standard set out in Wis. v. Yoder, 406 US 205, 32 L Ed 2d 15, 92 S Ct 1526 (1972), that ". . . only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion". The majority of the court felt that the bad faith tort claim did not meet the Yoder standard and that to allow the lawsuit to go forward would impermissibly interfere with the free exercise of religion. Miller v. Catholic Diocese of Great Falls, 224 M 113, 728 P2d 794, 43 St. Rep. 2059 (1986).

JURISDICTION

Undisputed Relevant Material Facts — No Abuse of Discretion to Deny Evidentiary Hearing on Subject Matter Jurisdiction: The plaintiff was an Ohio resident who worked for the defendant, a company whose principal place of business was Montana. After he was terminated, the plaintiff filed a wrongful discharge suit against the defendant in Montana. The defendant filed a motion to dismiss for lack of subject matter jurisdiction, which the District Court granted. On appeal, the plaintiff argued that the District Court erred in granting the motion without holding an evidentiary hearing. The Supreme Court disagreed because the most relevant facts for resolving the motion, that is, where the plaintiff entered into his employment agreement and where he performed his employment, were not in dispute. Therefore, the Supreme Court concluded the District Court did not abuse its discretion in ruling on the motion without holding an evidentiary hearing. Harrington v. Energy West, Inc., 2015 MT 233, 380 Mont. 298, 356 P.3d 441.

Jurisdiction of Montana Courts Over Wrongful Discharge Case Involving Montana Citizen When Montana Law Applies — Dismissal for Lack of Jurisdiction Reversed: Plaintiff was a Montana resident hired by a Florida corporation, which was operated out of Oklahoma, to lay fiber optic cable throughout the country. While working in Indiana, plaintiff had a dispute with a supervisor and was fired. Plaintiff brought an action in Montana, claiming a violation of the Wrongful Discharge From Employment Act. The District Court held that under 39-2-912, the Montana courts lacked subject matter jurisdiction and dismissed the claim. On appeal, the Supreme Court reversed. Even though plaintiff never signed a written employment contract, the court held that a contract provision may be broad enough to indicate that an entire contract be governed by the laws of the state governing the particular provision. The fact that the defendant corporation paid income taxes, unemployment insurance premiums, and wages in Montana indicated an intent to be governed by Montana law. The court also concluded that under sections 187 and 188 of Restatement (Second) of Conflict of Laws (1971), the local law of the state with the most significant relationship to the transaction applies to questions of contract interpretation absent an effective choice of law by the parties. Plaintiff was considered a Montana resident despite the fact that employment required travel to other states, and the court concluded that it was appropriate to apply the Wrongful Discharge From Employment Act to the case even though the Act does not expressly provide for extraterritorial jurisdiction. Montana courts have subject matter jurisdiction in cases involving a Montana resident when Montana law applies, so plaintiff's case should not have been dismissed for lack of subject matter jurisdiction. Burchett v. MasTec N. America, Inc., 2004 MT 177, 322 M 93, 93 P3d 1247 (2004). See also Dailey v. Transitron Electronic Corp., 475 F2d 12 (5th Cir. 1973), and Harrington v. Energy West, Inc., 2015 MT 233, 380 Mont. 298, 356 P.3d 441.

Failure to Raise Issue of Arbitrator's Authority in Arbitration or District Court as Waiver of Right to Object to Arbitrator's Ruling on Appeal: Dahl brought a wrongful discharge action against Fred Meyer, Inc. The parties agreed to arbitration and chose an arbitrator. Prior to the hearing, the arbitrator determined that because the complaint alleged a motive for the discharge, it was intended to state a cause of action under ERISA (29 U.S.C. 1001, et seq.), requiring exclusive federal court jurisdiction, so arbitration was dismissed. By failing to raise the issue of whether the arbitrator lacked authority to decide that the issue was preempted by federal law, failing to contest the basis of the arbitrator's decision, and failing to object to the motion in District Court to confirm the arbitrator's award through a motion to vacate, Dahl waived the right to object to the ruling on appeal. Dahl v. Fred Meyer, Inc., 1999 MT 285, 297 M 28, 993 P2d 6, 56 St. Rep. 1149 (1999). See also St. Farm v. Cabs, Inc., 751 P2d 61 (Colo. 1988).

Loss of District Court Jurisdiction When Wrongful Discharge Claim Submitted to Arbitration — Leave to Amend Complaint Denied: Dahl brought a wrongful discharge action against Fred Meyer, Inc. The parties agreed to arbitration and chose an arbitrator. Prior to the hearing, the arbitrator dismissed the arbitration on grounds that federal law applied. Dahl did not object to the District Court's confirmation of the arbitrator's decision but did move for leave to amend the complaint to remove the federal implications. However, the District Court lost jurisdiction when the parties agreed to arbitration, at which point the court had authority only to confirm, modify and confirm, or vacate and remand for hearing pursuant to 27-5-311 through 27-5-314, but not the authority to allow Dahl to amend the complaint. Dahl v. Fred Meyer, Inc., 1999 MT 285, 297 M 28, 993 P2d 6, 56 St. Rep. 1149 (1999). See also Ensey v. Mini Mart, Inc., 2013 MT 94, 369 Mont. 476, 300 P.3d 1144.

PREEMPTION

How State Law Preempted by Federal Law: The Montana Supreme Court recognizes three ways in which federal law may preempt state law. First, Congress may include a preemption clause in a federal statute that expressly provides that state law may not apply in the area governed by the federal statute. Second, federal law may supersede state law when a state law actually conflicts with a federal law. This conflict preemption occurs either when one cannot comply with both federal and state law or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Third, Congress may imply its intent to preempt state law in a particular area when regulation of the area is so comprehensive that it is reasonable to conclude that Congress intended to occupy the field and leave no room for supplementary state regulation. In analyzing whether preemption has occurred, the Supreme Court starts with the presumption that the historic powers of the states were not to be superseded by federal law unless that was the clear and manifest purpose of Congress. Fenno v. Mtn. W. Bank, 2008 MT 267, 345 M 161, 192 P3d 224 (2008). See also Favel

v. Am. Renovation & Constr. Co., 2002 MT 266, 312 M 285, 59 P3d 412 (2002), and Vitullo v. Int'l Bd. of Elec. Workers, Local 206, 2003 MT 219, 317 M 142, 75 P3d 1250 (2003).

Wrongful Discharge of Bank Officer Whistleblower Not Preempted by Federal Law: A bank officer was dismissed after blowing the whistle on a bank's lending practices. The officer filed a state wrongful discharge claim. The bank argued that federal law in 12 U.S.C. 24 (Fifth) and 12 U.S.C. 1831j(a)(1) preempted the state claim. The District Court agreed and granted summary judgment for the bank. The officer appealed and the Supreme Court reversed. Preemption cannot shield a bank from tort liability for dismissing an employee in violation of a state public policy that is consistent with the purpose of federal statutes, nor may a bank avail itself of the federal "at pleasure" provision unless one cannot comply with both state and federal law or the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The state retaliatory discharge provision comports with the purpose of the federal whistleblower statute and does not present an obstacle to the federal law, nor does a conflict exist between the policies of the state and federal law, because both laws protect employees who take steps in their employment to promote the enforcement of laws and regulations. Fenno v. Mtn. W. Bank, 2008 MT 267, 345 M 161, 192 P3d 224 (2008), following Tiede v. CorTrust Bank, N.A., 748 NW 2d 748 (S. Dak. 2008). See also Favel v. Am. Renovation & Constr. Co., 2002 MT 266, 312 M 285, 59 P3d 412 (2002).

Wrongful Discharge Act Preempted by Federal Labor-Management Reporting and Disclosure Act: Vitullo was an assistant business manager with a union local. When Vitullo decided to run for the position of business manager, he was informed that it was a conflict and his employment was terminated. Vitullo then sued the union local for wrongful discharge in violation of 39-2-904. The District Court concluded that the state claim was preempted by the federal Labor-Management Reporting and Disclosure Act of 1959 and summarily dismissed the claim, so Vitullo appealed. In determining whether the state claim was preempted, the Supreme Court applied Dukes v. Sirius Constr., Inc., 2003 MT 152, 316 M 226, 73 P3d 781 (2003), concluding that a state law that interfered with the longstanding practice of union patronage was not only contrary to the purpose of the federal law, but directly conflicted with the democratic process that the federal law sought to protect. Courts have recognized that the ability of elected union officials to select their own administrators is an integral part of ensuring that union administrators are responsive to the will of union members. The union's constitution recognized the ability of a business manager to choose staff, and a state law that interfered with that ability frustrated the goals and objectives of the federal law. Thus, to the extent that the Montana Wrongful Discharge From Employment Act interferes with the constitutional appointment authority of elected union officers, it conflicts with the Labor-Management Reporting and Disclosure From Employment Act and is preempted. Summary dismissal was affirmed. Vitullo v. Int'l Bhd. of Elec. Workers, Local 206, 2003 MT 219, 317 M 142, 75 P3d 1250 (2003). See also Finnegan v. Leu, 456 US 431 (1982).

Federal Law Applying to Collective Bargaining Agreement Preempts Claim of Violation of Covenant of Good Faith and Fair Dealing — Common-Law Claim for Retaliatory Discharge Not Preempted: Winslow was fired from his job with Montana Rail Link, where he had been employed under a collective bargaining agreement, and brought an action in District Court. In his complaint, Winslow included claims for violation of the covenant of good faith and fair dealing and common-law retaliatory discharge. The District Court dismissed both claims. The Supreme Court affirmed the dismissal of the claim for violation of the covenant of good faith and fair dealing, citing Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720 (1992), for the proposition that such a claim is preempted by federal law because the covenant arises out of the employment contract and that that contract, in the case of a collective bargaining agreement, is governed by federal law. However, the Supreme Court reversed the District Court on dismissal of the common-law wrongful discharge claim, citing Foster for the proposition that a common-law claim, because it does not depend upon interpretation of the employment contract, is an independent claim and is not preempted by the federal Railway Labor Act. Winslow v. Mont. Rail Link, Inc., 2000 MT 292, 302 M 289, 16 P3d 992, 57 St. Rep. 1238 (2000).

Discharge of Paper Tester Preempted by National Labor Relations Act — "Garmon" Doctrine Applied: Plaintiff, a paper tester for Stone Container Corporation (Stone), filed suit in state court, alleging that Stone's termination was without good cause in violation of Montana's Wrongful Discharge From Employment Act. Stone successfully removed the action to federal court where the District Court granted summary judgment for Stone, finding plaintiff's claim preempted by the National Labor Relations Act (NLRA). On appeal, the Ninth Circuit Court affirmed and applied the preemption holding in San Diego Bldg. Trades Council v. Garmon, 359 US 236 (1959), ruling that plaintiff's claim alleging a violation of a collective bargaining agreement, after the agreement's expiration but before negotiations to reopen have reached impasse, is preempted under the NLRA. Bassette v. Stone Container Corp., 25 F3d 757 (9th Cir. 1994).

Proof of Retaliatory Discharge — Claim Outside Context of Collective Bargaining Agreement Not Preempted by Federal Law: To prove retaliatory discharge involving sexual harassment, it must be shown that: (1) the employee was discharged; (2) the employee was subjected to sexual harassment during the course of employment; and (3) the employer's motivation for the discharge was to retaliate for the employee's resistance to the sexual harassment. When this factual inquiry does not turn on the meaning of any term of a collective bargaining agreement, the wrongful discharge claim is considered independent of the agreement for purposes of preemption under federal law. Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720, 49 St. Rep. 638 (1992), following Lingle v. Norge Div. of Magic Chef, Inc., 486 US 399, 100 L Ed 2d 410, 108 S Ct 1877 (1988), and followed in Miller v. Glacier County, 257 M 422, 851 P2d 401, 50 St. Rep. 339 (1993).

Action Under Wrongful Discharge From Employment Act Preempted by National Labor Relations Act: After the National Labor Relations Board found that plaintiff's termination from Stone Container Corporation (Stone) was not in retaliation for union activity, plaintiff filed an action under the state Wrongful Discharge From Employment Act. The District Court denied Stone's motion for summary judgment. The Ninth Circuit Court reversed and applied the holding in Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n, 427 US 132, 49 L Ed 2d 396, 96 S Ct 2548 (1976), ruling that plaintiff's action under the Wrongful Discharge From Employment Act was preempted by the National Labor Relations Act. The incidental effect of allowing plaintiff to pursue his action under the Wrongful Discharge From Employment Act after contract expiration, but prior to a bargaining impasse, is the type of entanglement the Ninth Circuit Court sought to avoid in Machinists. Barnes v. Stone Container Corp., 942 F2d 689 (9th Cir. 1991).

Employment Contract Within Scope of Federal Arbitration Act: Because the employment contract at issue in this case fell within the ambit of the federal Arbitration Act, a stay of proceedings was proper in plaintiff employee's suit seeking damages under several theories arising out of plaintiff's termination. Gibson, Jr., Inc. v. James Graff Communications, Inc., 239 M 335, 780 P2d 1131, 46 St. Rep. 1727 (1989).

SUMMARY JUDGMENT

Seasonal Employee Subject to Probationary Period Every Season — Policy Manual Supported Conclusion That Employee Was on Probation When Terminated: The District Court properly granted summary judgment dismissing the plaintiff employee's claims for wrongful discharge. The plaintiff was a winter seasonal employee for the employer ski resort during each of the winter seasons from 2003 to 2014. The employer hired the plaintiff for the 2014-2015 winter season, which was set to begin in November and to end in April, depending on the weather. According to the employer, the plaintiff was angry because he did not get hired for another position and he expressed his anger to other employees in a manner that the employer found insubordinate and inappropriate. Consequently, the employer terminated the employee before the end of the ski season. On appeal, the Supreme Court affirmed the District Court's dismissal of the action, reasoning that a seasonal rehire is clearly a new employee for all purposes, including for the purposes of the probationary period. As applied, the employer defined the period of probationary employment in the employee handbook as the first 6 months of employment, and the plaintiff was still on probation when the employer terminated his employment 4 months later. Dundas v. Winter Sports, Inc., 2017 MT 269, 389 Mont. 223, 410 P.3d 177.

Managerial Position — Greater Discretion in Termination Decision — Summary Judgment for Employer Proper: The District Court did not err in ruling on summary judgment that the defendant county had good cause to terminate the plaintiff's employment as human resources director given that she held a managerial position, which gave the defendant greater discretion in its termination decision. As the person in charge of human services, the plaintiff was a key player in the management team, entrusted with confidential employee information and counted on to keep the workplace running smoothly. The plaintiff failed to respond with material and substantial evidence to raise genuine issues of material fact as to whether the defendant county had legitimate business reasons for discharging her employment. Bird v. Cascade County, 2016 MT 345, 386 Mont. 69, 386 P.3d 602. See also Buckley v. W. Mont. Community Mental Health Center, 2021 MT 82, 403 Mont. 524, 485 P.3d 1211.

Issue Preclusion and Claim Preclusion Barring Pursuit of WDEA Claim After Police Commission Decision Upheld on Review: Plaintiff, an 8-year veteran with the Cut Bank police department, was terminated from his position by the mayor after being observed apparently sleeping in his patrol car while on duty. Pursuant to 7-32-4155, the plaintiff appealed his termination to the city's Police Commission, which concluded that substantial evidence supported the mayor's decision to terminate the plaintiff's employment. The plaintiff then filed suit in the District Court, asserting a claim under the Wrongful Discharge From Employment Act (WDEA) and in the alternative seeking judicial review of the Commission's decision. The District Court affirmed the Commission's decision and, following a bench trial, entered a judgment under the WDEA that the plaintiff's discharge was not wrongful. The plaintiff appealed and the city cross-appealed, asserting that litigation of the WDEA claim was barred by issue preclusion and claim preclusion after the District Court upheld the Commission's decision. The Supreme Court determined that each element of a four-element test for issue and claim preclusion was satisfied and that the procedural safeguards in the Commission proceedings provided the plaintiff a full and fair opportunity to litigate his termination. Thus, the plaintiff was barred by principles of issue and claim preclusion from relitigating the same or redundant claims. Rooney v. Cut Bank, 2012 MT 149, 365 Mont. 375, 286 P.3d 241.

Claimant Judicially Estopped From Claiming Wrongful Discharge Following Settlement of Occupational Disease Claim Based on Same Employment: In 1997 and 1998, Vogel filed workers' compensation claims, contending that injuries received on the job required surgeries. Defendant accepted liability for the injuries. Between 1998 and 2002, Vogel continued to have problems performing his job, and Vogel's employment was terminated in May 2002. In June 2002, Vogel filed an occupational disease claim, and in October 2002, Vogel filed a wrongful discharge claim. During the ensuing 2 years, no action was taken on the wrongful discharge case, but Vogel settled the occupational disease claim, stating that starting in 1999, he suffered job-related injuries that rendered him physically unable to continue his work with defendant. When Vogel later pursued the wrongful discharge claim, defendant argued judicial estoppel, asserting that having represented in the occupational disease claim that he was unable to perform his time-of-injury job, Vogel was precluded from later arguing entitlement to wrongful discharge damages resulting from loss of the same job. The District Court agreed and granted summary judgment to defendant, and on appeal, the Supreme Court affirmed. Applying the elements of judicial estoppel set out in Fiedler v. Fiedler, 266 M 133, 879 P2d 675 (1994), the court held that all four elements were met and that the District Court had correctly ruled that judicial estoppel applied and properly granted summary judgment. Vogel v. Intercontinental Truck Body, Inc., 2006 MT 131, 332 M 322, 137 P3d 573 (2006).

Summary Judgment on Breach of Contract Affirmed — Wrongful Discharge Claim Reversed for Determination of Whether Claimant Was Employee or Independent Contractor: Tvedt brought a claim for breach of contract, wrongful termination, and indemnification of expenses, alleging that defendant group had breached the covenant of good faith and fair dealing, waived the at-will clauses in their employment agreement, and mischaracterized Tvedt as an independent contractor, rather than an employee. Defendant group moved for summary judgment and filed a contingent counterclaim stating that in the event that Tvedt was found to be defendant group's employee, then defendant group's obligation to pay Tvedt the contract value should cease and all payments made to Tvedt should be returned. The District Court determined that Tvedt was not an employee and granted summary judgment to defendant group on all claims, and Tvedt appealed. The Supreme Court affirmed summary judgment on the breach of covenant issue because Tvedt was given adequate notice of termination, defendant group was exercising the specific language of the at-will termination provision of the contract, and Tvedt did not demonstrate that defendant group had waived the right to enforce that provision. However, the court reversed summary judgment on the wrongful discharge claim because the District Court incorrectly applied defendant group's novation argument and because genuine issues of fact remained whether Tvedt was an employee or independent contractor and whether a manager's agreement that recognized Tvedt individually was in effect at the time of termination. Remand was ordered because the District Court never considered whether Tvedt was entitled to relief for wrongful discharge as a matter of law and, if so, whether the claim for indemnification was appropriate. Tvedt v. Farmers Ins. Group of Co., 2004 MT 125, 321 M 263, 91 P3d 1 (2004).

Statements of Intent to File Grievance Not Considered Formal Grievance — Failure to Exhaust Administrative Remedies Warranting Summary Judgment: Offerdahl was notified by a supervisor that, based on complaints of inappropriate behavior toward a subordinate employee and the Department's investigation of the complaints, Offerdahl's employment would be terminated. Following a pretermination hearing that Offerdahl did not attend, his employment was terminated on September 15. He was notified of his right to respond or pursue a grievance in accordance with the state's grievance policy, which required that a formal grievance be filed within

15 working days after the grievable event. On September 19, Offerdahl sent the Department a letter indicating that he would not attend any other termination hearings and that he intended to follow the grievance procedure as directed in the September 15 letter. Offerdahl eventually mailed a written grievance on October 7 that was filed on October 8, but the grievance was denied as untimely. Offerdahl appealed to the District Court, but the court granted the state's motion for summary judgment on grounds that Offerdahl had failed to exhaust administrative remedies. Offerdahl appealed, but the Supreme Court affirmed. Neither Offerdahl's oral statement to another Department employee that he intended to file a grievance, nor the September 19 letter of intent to file a grievance, met the requirements of a formal grievance. Offerdahl was required by the policy to file a formal grievance by October 6, but his grievance was not filed until October 8. Thus, Offerdahl's failure to timely pursue administrative remedies for termination of his employment barred pursuit of the claim, and the motion for summary judgment was properly granted. Offerdahl v. Dept. of Natural Resources and Conservation, 2002 MT 5, 308 M 94, 43 P3d 275 (2002).

Employment Contingent on Adherence to Teachings of Roman Catholic Church—Discrimination Statutes Inapplicable: Until her termination in 1993, Parker-Bigback was employed by St. Labre School, which is operated by the St. Labre Indian School Education Association, an institution based on the teachings and beliefs of the Roman Catholic Church. Parker-Bigback filed a complaint with the Montana Commission for Human Rights, alleging that she was discriminated against because her termination was based on marital status or sex discrimination. The school maintained that Parker-Bigback's position was eliminated to establish a personnel department, which Parker-Bigback contended was simply a pretext for terminating her employment based on her lifestyle of cohabiting with a man who was not her husband. However, one condition of Parker-Bigback's employment was an agreement to adhere to the moral and religious teachings and beliefs of the Roman Catholic Church and to not engage in any personal conduct or lifestyle contrary to church policies. Thus, it made no difference whether Parker-Bigback was married or single—if she cohabited with someone of the opposite sex to whom she was not married, she would be at variance with church teachings in violation of her contract. Therefore, this was not a case about marital status or gender, but rather about conduct Parker-Bigback agreed to avoid as a condition of employment. Nothing in Art. II, sec. 4, Mont. Const., or 49-2-303 prohibits discrimination based on conduct, nor was any authority offered to persuade the Supreme Court that Parker-Bigback's conduct involved a right of such high order that it would overcome the school's right to freely exercise its religion through its employment practices. Even if she was terminated for cohabitation, her rights to be free from discrimination were not involved, so her employment discrimination case was properly dismissed by summary judgment for the school. Parker-Bigback v. St. Labre School, 2000 MT 210, 301 M 16, 7 P3d 361, 57 St. Rep. 823 (2000). See also Miller v. Catholic Diocese of Great Falls, 224 M 113, 728 P2d 794 (1986).

Federal Court Wrongful Discharge Case — Dismissal on Summary Judgment Held Res Judicata as to State Court Claims: Hollister brought an action under 42 U.S.C. 1983 in federal District Court, seeking damages for being wrongfully discharged from her position with Rosebud County. The federal District Court held that Hollister did not have a sufficient property interest in her job to support an action based upon a denial of substantive due process of law and section 1983. The federal District Court therefore granted the defendant's motion for summary judgment. Hollister then filed a motion for relief from judgment in the federal District Court, pointing out that the Montana Supreme Court had since noted in Boreen v. Christiansen, 267 M 405, 884 P2d 761 (1994), that the federal District Court had misapprehended the law in her wrongful discharge suit. The state District Court dismissed, holding that it was barred, but the federal court would not reverse itself. Hollister then refiled her section 1983 claim in state District Court, but that court dismissed, holding that the federal District Court opinion was res judicata as to her section 1983 claim. The Supreme Court affirmed, noting that an identical situation occurred in Mills v. Lincoln County, 262 M 283, 864 P2d 1265 (1993). In that case, the Montana Supreme Court had also held a federal District Court opinion to be res judicata as to claims in state District Court, even though the state law had changed in the meantime. Hollister v. Forsythe, 277 M 23, 918 P2d 665, 53 St. Rep. 524 (1996).

Failure to Raise Summary Judgment Proof and Statute of Frauds Issues in District Court: An employer's claims that an employee failed to present a prima facie case for summary judgment purposes and that alleged oral representations of the employer as to job compensation and benefits were barred by the statute of frauds would not be considered on appeal because they were not raised in District Court. Beasley v. Semitool, Inc., 258 M 258, 853 P2d 84, 50 St. Rep. 522 (1993).

Employment Termination Agreement Constituting Relinquishment of Potential Claims — Summary Judgment Proper: Employee signed an employment termination agreement that provided in part for termination, compensation, medical insurance for himself and his wife, and a waiver of claims wherein both parties voluntarily waived and relinquished future employment-related claims and released one another from "all actions, suits, debts, agreements, obligations, costs, expenses and other liabilities" related to the employment relationship. Summary judgment on an employment-related claim brought 1 year after the agreement was entered was proper in light of employee's failure to raise any issue of material fact with regard to execution of the valid and enforceable termination agreement. Somersille v. Columbia Falls Aluminum Co., 255 M 101, 841 P2d 483, 49 St. Rep. 904 (1992).

Material Question of Value of Profit Share Granted Employee as Element of Termination Agreement — Summary Judgment Improper: Employee signed an employment termination agreement that provided in part for a distribution to him of a share of company profits, both prior to and after the termination of employment. Any issue of profit distributions prior to termination was barred by a waiver of claims. However, a question of material fact regarding the calculation of and disproportionate nature of the profit sharing distribution after termination was sufficient to preclude summary judgment because the amount to be paid was unknown to both parties at the time of termination. Somersille v. Columbia Falls Aluminum Co., 255 M 101, 841 P2d 483, 49 St. Rep. 904 (1992).

MISCELLANEOUS

New Agreement Sent to All Employees Not Waiver of Disciplinary Action Against Plaintiff: The plaintiff, an insurance salesperson, was under investigation for violating the company's zero tolerance policy regarding distribution of unauthorized marketing materials when she received an updated employment agreement that was sent to all employees as a matter of course. The Supreme Court rejected the plaintiff's argument that the new agreement constituted the company's "waiver" of its good cause to terminate her employment because sending the new agreement was not an unequivocal manifestation of the company's intentional or voluntary relinquishment of its right to terminate the plaintiff for violating the zero tolerance policy. Kuszmaul v. Sterling Life Ins. Co., 2012 MT 154, 365 Mont. 390, 282 P.3d 665.

Pursuit in Court of Certain Wrongful Discharge Claims Precluded by Collective Bargaining Agreement — Claims of Deceit and Emotional Distress Not Precluded: Klein was suspended with pay from her position as a probation and parole officer, and following a meeting with Department of Corrections officials and a Department investigation, Klein's employment was terminated on grounds that she had obstructed and interfered with a police investigation. Klein filed a grievance with the Department, stating that she was fired without just cause and seeking reinstatement in her former position, back pay, and benefits. The grievance was arbitrated in Klein's favor, but before entry of the arbitrator's final decision, Klein filed suit in District Court, alleging: (1) violation of due process: (2) Department deceit through willful misrepresentation of the purpose of the meeting with Department officials; (3) negligent investigation of the incident by the Department; and (4) negligent infliction of severe emotional distress caused by the Department's actions throughout the affair. The District Court concluded that the terms of the collective bargaining agreement required Klein to exhaust all remedies through arbitration and that because those remedies had not been exhausted, Klein was prohibited from litigating the dispute. Klein appealed, and the Supreme Court affirmed in part and reversed in part. The court affirmed dismissal of claims 1 and 3 on grounds that judicial pursuit of the claims was precluded by the terms of the collective bargaining agreement and that Klein had addressed those issues through arbitration. However, the court reversed the dismissal of claims 2 and 4 because those issues were not contemplated in or precluded by the collective bargaining agreement and because those claims were not barred by the Wrongful Discharge From Employment Act and were wholly independent from any rights or remedies related to Klein's discharge that were previously addressed in the grievance process. Therefore, the issues of Department deceit and emotional distress were remanded to the District Court for further proceedings. Klein v. St., 2008 MT 189, 343 M 520, 185 P3d 986 (2008). See also Lueck v. United Parcel Serv., 258 M 2, 851 P2d 1041 (1993), and Winchester v. Mountain Line, 1999 MT 134, 294 M 517, 982 P2d 1024 (1999).

Counsel's Comments on Employee Handbook Implying Employment At Will Cured by Court Admonishment — No Grounds for New Trial: During closing arguments, defense counsel showed the jury a page from defendant's employee handbook that implied that plaintiff could be fired at will. Plaintiff contended that counsel's comments deprived her of a fair trial because Montana is not an at-will employment state. The Supreme Court disagreed. The handbook was entered into evidence by stipulation, and the jury had been shown the page during both direct and cross-examination without objection. Further, when plaintiff objected to presentation of the page during closing, the trial court cured any error by admonishing the jury to disregard the paragraph in question because it did not reflect Montana law. Denial of plaintiff's motion for a new trial based on counsel's comments was therefore not an abuse of discretion. Bailey v. Beartooth Communications Co., 2004 MT 128, 321 M 305, 92 P3d 1 (2004), distinguishing Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

"Class of One" Equal Protection Law Not Established at Time of Discharge From Public Employment — Saucier Test — Official Entitled to Qualified Immunity: Losleben was terminated from state employment in 1999, and following an unsuccessful grievance, Losleben filed a complaint in District Court, alleging that his former supervisors violated his right to equal protection by engaging in a vindictive and spiteful campaign to terminate his employment. Two supervisors were subsequently dismissed from the suit, and the District Court granted the third supervisor qualified immunity, concluding that Losleben's equal protection claim for a "class of one" was not clearly established at the time of the alleged misconduct. Losleben appealed. Traditionally, a person bringing an equal protection claim must show intentional discrimination because of membership in a particular class, not merely that the person was treated unfairly as an individual. However, in Village of Willowbrook v. Olech, 528 US 562 (2000), the U.S. Supreme Court concluded that an equal protection claim may be brought by a claimant as a "class of one" even though the claimant is not a member of a traditionally recognized protected class. The court subsequently held in Saucier v. Katz, 533 US 194 (2001), that a two-part test is to be applied in determining whether state officials are entitled to qualified immunity: (1) when taken in a light most favorable to the party asserting injury, do the facts alleged show that an official's conduct violated a constitutional right; and (2) if so, was the right clearly established at the time that it was allegedly infringed. The District Court in this case erred by not applying the first step of the Saucier test, but because only the qualified immunity issue was certified to the Supreme Court, it was assumed that a constitutional violation could have occurred, so the Supreme Court proceeded to the second step of the Saucier analysis. The law in effect when Losleben was terminated in 1999, prior to Olech, did not recognize an equal protection "class of one" claim, so any equal protection right held by Losleben at that time was not well enough established to impute knowledge of it to Losleben's supervisor. Thus, the District Court properly granted the supervisor qualified immunity and dismissed the supervisor from the case. Losleben v. Oppedahl, 2004 MT 5, 319 M 269, 83 P3d 1271 (2004).

In-House Counsel Not Precluded From Bringing Wrongful Discharge From Employment Claim Even if Proof of Claim Requires Disclosure of Confidential Information: Burkhart was hired as in-house counsel for Semitool, Inc. (Semitool). Following his discharge from employment, Burkhart sued Semitool for wrongful discharge. The District Court concluded that even though Burkhart had a right to protection against wrongful discharge, Semitool also had a right to protection of its trade secrets and that because the rights conflicted, the attorney-client privilege must prevail. The court dismissed Burkhart's claim on grounds that he was precluded from bringing an employment claim because, as staff counsel hired to provide legal advice or services, proof of the claim would require disclosure of confidential matters. Burkhart maintained on appeal that the Wrongful Discharge From Employment Act applied to any employee and that there was no exclusion for attorneys. Semitool argued that because Art. VII, sec. 2, Mont. Const., gives the Supreme Court sole authority to regulate the conduct of lawyers, the Act is unconstitutional to the extent that it interferes with that authority. Semitool also cited Campbell v. Bozeman Investors of Duluth, 1998 MT 204, 290 M 374, 964 P2d 41 (1998), for the "universal rule" that clients may fire lawyers at any time, for any reason, with or without cause and that for that reason, application of the Act to the employment relationship of staff attorneys and the client employer was not proper. In a case of first impression, the Supreme Court examined two lines of cases from other jurisdictions that appeared to support either conclusion. The court then concluded that the reasoning and analysis in Gen. Dynamics Corp. v. Superior Court, 876 P2d 487 (Calif. 1994), and its progeny were the more sound and realistic approach. The holding in Campbell does not create an absolute right to discharge an attorney with complete impunity no matter the form of the attorney-client relationship. The universal rule does not apply in an attorney-client relationship in which the attorney is the employee of the client because in that context, the client has avoided the traditional relationship and granted the attorney protections that do not apply to independent contractors, but do apply to employees, including the Wrongful Discharge From Employment Act. Further, although Art. VII, sec. 2, Mont. Const., gives the Supreme Court sole authority to regulate the conduct of lawyers, the court does not have sole authority to regulate employer conduct. The Act pertains solely to employer conduct and does not implicate the conduct of lawyers in the practice of law, and thus, it is not an unconstitutional encroachment on the court's authority for the Act to apply to lawyers as employees or employers. Further, Rule 1.6 of the Montana Rules of Professional Conduct contemplates that a lawyer may reveal confidential attorney-client information to the extent that the lawyer reasonably believes necessary to establish an employment-related claim against an employer who is also a client. Thus, the plain language of the Wrongful Discharge From Employment Act requires courts to recognize an in-house counsel's right to pursue and maintain an action for wrongful discharge, and those claims are within the contemplation of the rules of professional conduct for attorneys. A lawyer does not forfeit rights simply because confidential information must be used to prove them, nor may a client gain the right to cheat the lawyer by imparting confidences. Burkhart v. Semitool, Inc., 2000 MT 201, 300 M 480, 5 P3d 1031, 57 St. Rep. 785 (2000). See also Doe v. A Corp., 709 F2d 1043 (5th Cir. 1983).

No Claim for Wrongful Termination Apart From Either Contract or Wrongful Discharge Act: Solle claimed that her employer violated the common-law duty of good faith and fair dealing by failing to renew her employment contract when she had a reasonable expectation that a renewal would be offered. Solle's employer moved to compel arbitration, the motion was granted, and Solle appealed. Under Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989), claims for wrongful termination from tort or express or implied contract are no longer viable under Montana law. Rather, 39-2-913 explicitly preempts all common-law remedies but bars only tort and contract claims that are "for discharge". A threshold determination in cases alleging wrongful termination is whether the parties' relationship is governed by a written contract for a specific term or whether it falls under the provisions of the Wrongful Discharge From Employment Act, which applies to noncontract situations. Solle's employment was covered by a written contract containing an arbitration clause, and her claim for breach of the implied covenant of good faith and fair dealing was inextricably intertwined with and based upon her termination from employment. Although breach of a contract is not a prerequisite to breach of the implied covenant of good faith and fair dealing, the covenant arises out of a contractual relationship between the parties, and a breach of the covenant is a breach of the contract. Solle's contract was silent as to whether there was an obligation on the employer's part to renew the contract or on Solle's part to accept a renewal offer, so Solle argued that the failure to include such a provision indicated the employer's intent not to cover a claim like this under the arbitration clause. The Supreme Court disagreed and proceeded to treat the dispute as arising out of the employment contract. Solle was not allowed to maintain a wrongful termination claim apart from either the contract or the Wrongful Discharge From Employment Act. Solle's contract contained a provision that any unresolved dispute would be subject to arbitration, but the arbitration clause did not explicitly provide that it would govern issues concerning contract nonrenewal. Nevertheless, the contract governed Solle's employment, termination, and postemployment relationship and did not explicitly exclude disputes arising after contract termination. The presumption favors arbitrability, and the District Court did not err in holding that Solle's claim was subject to arbitration. Solle v. W. St. Ins. Agency, Inc., 2000 MT 96, 299 M 237, 999 P2d 328, 57 St. Rep. 391 (2000). See also Nolde Bros., Inc. v. Bakery & Confectionery Workers Union, 430 US 243, 51 L Ed 2d 300, 97 S Ct 1067 (1977), and Marsden v. Blue Cross & Blue Shield of Mont., 2012 MT 306, 368 Mont. 34, 291 P.3d 1229.

Ninth Circuit Court — Wrongful Discharge Claim Valid Even if Employer Acted Under Mistaken Fact Interpretation — Proof of Employer Bad Faith Irrelevant: A Delta Airlines' employee was terminated after she intentionally submitted payroll records with three incorrect entries that allowed her to collect $250 in unearned wages. The employee filed suit, alleging wrongful discharge. Delta moved for a directed verdict, arguing that the employee had failed to present any evidence that Delta's reasons for termination were a pretext and not the honest reason. When the District Court awarded the employee $60,000 in damages for wrongful discharge, Delta appealed, claiming that Montana's Wrongful Discharge From Employment Act does not provide a cause of action when the employer acted in good faith, but rather when the discharge is based on mistaken facts. Citing the Montana Supreme Court decisions Morton v. M-W-M, Inc. 263 M 245, 868 P2d 576 (1994), and Howard v. Conlin Furniture No. 2, Inc. 272 M 433, 901 P2d 116 (1995), the Ninth Circuit Court affirmed the District Court decision, ruling that the employee was not required to prove that Delta acted in bad faith because the issue was irrelevant to whether Delta was mistaken about the facts surrounding the dismissal. Marcy v. Delta Airlines, 166 F3d 1279 (9th Cir. 1999), distinguished in Sullivan v. Cont. Constr. of Mont., LLC, 2013 MT 106, 370 Mont. 8, 299 P.3d 832.

New Trial on Damages for Employer's Failure to Disclose Files Helping Employee's Wrongful Discharge Case: In a wrongful discharge action, an employee was properly granted a new trial on the issue of damages (he had been awarded $70,000 by a jury) as a sanction against the hospital-employer, which failed to give him discovery documents relevant to and favoring the employee on issues of the hospital's liability and employee's damages. The employee was anonymously sent the documents after the trial. Sullivan v. Sisters of Charity of Providence of Mont., 268 M 71, 885 P2d 488, 51 St. Rep. 1193 (1994).

Sanction of $5,500 Against Employer for Failure to Disclose Files Showing Wrongful Discharge: The trial court, in which a wrongful discharge plaintiff was granted a $70,000 jury verdict for damages, properly sanctioned the employer by granting the plaintiff $5,500 for amounts expended for work on summary judgment and, after the verdict, on the basis that documents in the employer's files were requested by the plaintiff and not produced by the employer. The documents, which were anonymously mailed to the plaintiff after the trial, showed that the employer had planned for some time to terminate the plaintiff. The documents would have affected the damages award had they been available for the trial. Sullivan v. Sisters of Charity of Providence of Mont., 268 M 71, 885 P2d 488, 51 St. Rep. 1193 (1994).

Pleading Three Separate Causes Under One Set of Facts: An employee set forth all factual allegations, followed by separate statements of three causes of action: wrongful discharge, breach of express and implied contract, and breach of the covenant of good faith and fair dealing. All of the factual allegations were essentially incorporated into each cause. An employee sufficiently indicated the intent to plead the causes as separate and independent. Mere joinder of alternative or inconsistent claims does not require dismissal of an otherwise legitimate claim, nor does the Wrongful Discharge From Employment Act limit a claimant's right to plead an independent cause of action in conjunction with a claim under the Act. Beasley v. Semitool, Inc., 258 M 258, 853 P2d 84, 50 St. Rep. 522 (1993), distinguished in Kulm v. Mont. St. Univ.-Bozeman, 285 M 328, 948 P2d 243, 54 St. Rep. 1175 (1997).

Termination Agreement — No Undue Influence or Economic Duress: Employee who signed an employment termination agreement contended that his wife's illness created emotional distress and increased financial demands, enhanced his need to remain in the community, increased his demand on the company group health insurance plan, and enhanced the need to avoid further stress on his family, all of which imposed undue influence on him to sign the agreement. The undue influence claim necessarily included an argument of economic duress. After considering the facts, including claimant's voluntary signing of the agreement by his free will and after reading and understanding the terms of the agreement, his claims were insufficient to meet the tests of undue influence or economic duress. Somersille v. Columbia Falls Aluminum Co., 255 M 101, 841 P2d 483, 49 St. Rep. 904 (1992), following Horgan v. Indus. Design Corp., 657 P2d 751 (Utah 1982), and Hoven v. First Bank (N.A.)-Billings, 244 M 229, 797 P2d 915 (1990).

Issue for Appeal — Not Preserved by Failure to Object Dismissal Not Res Judicata: An employee sued her employer a second time, alleging damages for wrongful discharge, violation of constitutional rights, and infliction of emotional distress. The District Court held that the employee conceded that the wrongful discharge and emotional distress claims were barred by the Wrongful Discharge From Employment Act. The Supreme Court held that those two claims were not properly before the Supreme Court, inasmuch as they were not properly preserved for appeal, but that retrial of the issues was not barred by the doctrine of res judicata. Dagel v. Manzer, 251 M 176, 823 P2d 874, 48 St. Rep. 1166 (1991).

Lack of Standing to Raise Constitutional Issues Absent Wrongful Discharge: A jury found that plaintiffs were not discharged wrongfully. On appeal, plaintiffs raised numerous issues regarding the constitutionality of the Wrongful Discharge From Employment Act, contending that the Act violated the right of trial by jury and the Montana Constitution's privileges and immunities clause, equal protection clause, impairment of contracts clause, and due process clause. The Supreme Court, citing Jones & Harriot v. Judge, 176 M 251, 577 P2d 846 (1978), and Stelling v. Rivercrest Ranches, Inc., 224 M 313, 730 P2d 388 (1986), found that plaintiffs lacked standing to challenge the constitutionality of the Act because consideration of the issues was rendered moot by the jury verdict, resulting in no adverse effect on plaintiffs by the challenged statutes. Allmaras v. Yellowstone Basin Properties, 248 M 477, 812 P2d 770, 48 St. Rep. 519 (1991).

Inappropriateness of Court Involvement in Decisions Regarding Employment in Managerial or Confidential Positions: Following purchase of a business by a new owner, the executive manager, who was a long-time employee of the former owner, was replaced by the new owner's long-time faithful employee. Such an action was the new owner's policy when purchasing businesses. The former executive manager brought a wrongful discharge suit. The Supreme Court declined to determine whether the replacement constituted a legitimate job-related reason, noting that it is inappropriate for courts to become involved in the day-to-day employment decisions of business when those decisions involve employees who occupy sensitive managerial or confidential positions. However, a company's interest in protecting its investment and in running its business as it sees fit is not as strong when applied to lower echelon employees and may be outweighed by the employees' interest in continued, secure employment. Buck v. Billings Mont. Chevrolet, Inc., 248 M 276, 811 P2d 537, 48 St. Rep. 431 (1991), followed in Kestell v. Heritage Health Care Corp., 259 M 518, 858 P2d 3, 50 St. Rep. 919 (1993), McConkey v. Flathead Elec. Co-op, 2005 MT 334, 330 M 48, 125 P3d 1121 (2005), Sullivan v. Cont. Constr. of Mont., LLC, 2013 MT 106, 370 Mont. 8, 299 P.3d 832, and Buckley v. W. Mont. Community Mental Health Center, 2021 MT 82, 403 Mont. 524, 485 P.3d 1211, and distinguished in Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999).

Constitutionality of Wrongful Discharge Law: Title 39, ch. 2, part 9, the Wrongful Discharge From Employment Act, does not wrongfully deprive an individual falling within its purview of the right to full legal redress within the meaning of Art. II, sec. 16, Mont. Const. The Act does not deny full legal redress or a speedy remedy; it simply defines what constitutes the facts that must be established to obtain remedy and redress in the context of wrongful discharge. No fundamental right to a particular cause of action, remedy, or redress is constitutionally created, and for the court to derive such a right would violate the separation of powers by preventing the Legislature and the people through the initiative process from restricting or modifying the common law relative to injuries of person, property, or character. Rather, Art. II, sec. 16, guarantees only a right to access to courts to seek a remedy for wrongs recognized by common law or statutory authority. No one has a vested interest in any rule of common law. The Legislature may alter common-law causes of action to promote legitimate state interests and may alter or abrogate causes of action sounding in tort. Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989), overruling Pfost v. St., 219 M 206, 713 P2d 495, 42 St. Rep. 1957 (1985), White v. St., 203 M 363, 661 P2d 1272, 40 St. Rep. 507 (1983), and Corrigan v. Janney, 192 M 99, 626 P2d 838, 38 St. Rep. 545 (1981).

Wrongful Discharge Law Limitations on Damages Not Violative of Equal Protection Guarantee — Relation to Legitimate State Interests: The Supreme Court applied the rational basis test in determining whether provisions of the Wrongful Discharge From Employment Act, Title 39, ch. 2, part 9, which prohibit recovery of noneconomic damages and punitive damages, violated the constitutional guarantee of equal protection. The court found that the Act survived scrutiny because it was rationally related to legitimate state interests, including: (1) promoting the financial interests of businesses in the state or potentially in the state to improve economic conditions; (2) limiting employers' liability for wrongful discharge through restrictions on recovery; (3) providing greater certainty in defining an employer's duties by recalling a contract law limitation on damages for pain and suffering; (4) providing a reasonably just substitute for the common-law causes it abrogates; (5) bettering prior common-law provisions for recovery by allowing claims for prejudgment interest; and (6) allowing some recovery for wrongful discharges that would otherwise deny retirement benefits. Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989), overruling Pfost v. St., 219 M 206, 713 P2d 495, 42 St. Rep. 1957 (1985), White v. St., 203 M 363, 661 P2d 1272, 40 St. Rep. 507 (1983), and Corrigan v. Janney, 192 M 99, 626 P2d 838, 38 St. Rep. 545 (1981).

Immunity of Judge, County, and Its Commissioners, for Discharge of Judge's Predecessor's Personal Secretary: Historically, judges have enjoyed absolute immunity for judicial acts, a doctrine which is codified in 2-9-112 and which provides that a member of the judiciary is immune from suit for damages arising from his lawful discharge of an official duty associated with judicial actions of the court. This doctrine clothes District Courts with inherent and statutory powers to do all that is necessary to render their jurisdiction effective. The public policy of judicial immunity safeguards principled and independent decisionmaking. A judge's personal secretary occupies a distinct and unique status among District Court employees, and it is not a violation of public policy for a newly elected or appointed District Court Judge to discharge his predecessor's secretary and select his own. The lower court's dismissal, on the basis of judicial immunity under 2-9-112, of dismissed secretary's action alleging violation of her right to due process, breach of implied covenant of good faith and fair dealing, and wrongful discharge, was proper. Since the discharge was a judicial act, the codefendant county and County Commissioners cannot be held liable because they are expressly immunized under the provision of 2-9-112 that governmental units are immune from suits for acts or omissions of the judiciary. Mead v. McKittrick, 223 M 428, 727 P2d 517, 43 St. Rep. 1886 (1986), distinguished, with regard to applicability of judicial immunity to bar a grievance hearing regarding the suspension by a Justice of the Peace of a court manager who was not a key employee, in Clark v. Dussault, 265 M 479, 878 P2d 239, 51 St. Rep. 642 (1994).

Part Law Review Articles

Resolving Employee Discharge Disputes Under the Montana Wrongful Discharge Act (MWDA), Discharge Claims Arising Apart from the MWDA, and Practice and Procedure Issues in the Context of a Discharge Case, Corbett, 66 Mont. L. Rev. 329 (2005).

The First Decade of Judicial Interpretation of the Montana Wrongful Discharge From Employment Act, Robinson, 57 Mont. L. Rev. 375 (1996).

Montana's Employment Protection: A Comparative Critique of Montana's Wrongful Discharge From Employment Act in Light of the United Kingdom's Unfair Dismissal Law, Bennett, 57 Mont. L. Rev. 115 (1996).

Tonack v. Montana Bank: Preemption, Interpretation, and Older Employees Under Montana's Wrongful Discharge From Employment Act, Regan, 56 Mont. L. Rev. 585 (1995).

Montana's Wrongful Discharge From Employment Act: The Views of the Montana Bar, Bierman, Vinton, & Youngblood, 54 Mont. L. Rev. 367 (1993).

Interpreting Montana's Pathbreaking Wrongful Discharge From Employment Act: A Preliminary Analysis, Bierman & Youngblood, 53 Mont. L. Rev. 53 (1992).

Montana Employment Law and the 1987 Wrongful Discharge From Employment Act: A New Order Begins, Schramm, 51 Mont. L. Rev. 94 (1990).

Survey: Good Faith and Fair Dealing: An Analysis of Recent Cases, Hubble, 48 Mont. L. Rev. 193 (1987).

39-2-901. Short title.

Case Notes

State Constitution — No Guarantee of Fundamental Right to Particular Cause of Action: In response to a motion by the plaintiff in a wrongful discharge case, the lower court ruled that the Wrongful Discharge From Employment Act was unconstitutional because it limited the plaintiff's right to full legal redress. The Supreme Court overruled the lower court stating that in Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989), it had ruled that there is no constitutional guarantee to a particular cause of action, and therefore the Legislature may alter common-law causes of action, remedies, and redress. Johnson v. St., 238 M 215, 776 P2d 1221, 46 St. Rep. 1214 (1989).

39-2-902. Purpose.

Compiler's Comments

2001 Amendment: Chapter 583 deleted former second sentence that read: "Except as limited in this part, employment having no specified term may be terminated at the will of either the employer or the employee on notice to the other for any reason considered sufficient by the terminating party." Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 583, L. 2001, provided: "WHEREAS, in Whidden v. John S. Nerison, Inc., 1999 MT 110, 294 Mont. 346, 981 P.2d 271 (1999), the Montana Supreme Court held that the at-will employment statute, section 39-2-503, MCA, had been impliedly repealed by the Wrongful Discharge From Employment Act, Title 39, chapter 2, part 9, MCA."

Case Notes

Compliance With Employment Grievance Policy Required Despite Possibility of Adverse Outcome: Plaintiff failed to initiate a formal grievance based on speculation that the administrator might issue an adverse decision. Citing Mtn. Water Co. v. Dept. of Public Service Regulation, 2005 MT 84, 326 M 416, 110 P3d 20 (2005), the Supreme Court held that the mere possibility of an adverse outcome did not render the administrative process futile or excuse plaintiff from complying with defendant's employment grievance policy before instituting a wrongful discharge suit. Summary judgment for defendant was proper given plaintiff's failure to exhaust administrative remedies prior to filing a claim in District Court. Russell v. Masonic Home of Mont., Inc., 2006 MT 286, 334 M 351, 147 P3d 216 (2006), followed in Hathaway v. Zoot Enterprises, Inc., 2021 MT 292, 406 Mont. 239, 498 P.3d 204.

Employee Required to Exhaust Administrative Remedies Prior to Filing Wrongful Discharge Claim — Dismissal of Claim With Prejudice Proper: Haynes filed a grievance with defendant employer, but was told that the grievance was filed late and did not comply with employer's internal grievance policy, so Haynes filed a wrongful discharge claim. The District Court dismissed Haynes's claim without prejudice pending completion of the internal grievance policy, and the employer appealed. Haynes asserted that he voluntarily resigned, and thus the grievance policy did not apply. The Supreme Court noted that if Haynes left employment voluntarily, then he had no wrongful discharge claim at all, but if Haynes was constructively discharged, then grievance procedures clearly applied. The Supreme Court held that there was no question that Haynes was constructively discharged because of an intolerable work environment, so the grievance policy applied, and Haynes was required to exhaust administrative remedies in a timely manner. Haynes failed to do so. Therefore, the Supreme Court remanded with instructions to dismiss Haynes's complaint with prejudice. Haynes v. Shodair Children's Hosp., 2006 MT 128, 332 M 286, 137 P3d 518 (2006), followed in Russell v. Masonic Home of Mont., Inc., 2006 MT 286, 334 M 351, 147 P3d 216 (2006).

Jurisdiction of Montana Courts Over Wrongful Discharge Case Involving Montana Citizen When Montana Law Applies — Dismissal for Lack of Jurisdiction Reversed: Plaintiff was a Montana resident hired by a Florida corporation, which was operated out of Oklahoma, to lay fiber optic cable throughout the country. While working in Indiana, plaintiff had a dispute with a supervisor and was fired. Plaintiff brought an action in Montana, claiming a violation of the Wrongful Discharge From Employment Act. The District Court held that under 39-2-912, the Montana courts lacked subject matter jurisdiction and dismissed the claim. On appeal, the Supreme Court reversed. Even though plaintiff never signed a written employment contract, the court held that a contract provision may be broad enough to indicate that an entire contract be governed by the laws of the state governing the particular provision. The fact that the defendant corporation paid income taxes, unemployment insurance premiums, and wages in Montana indicated an intent to be governed by Montana law. The court also concluded that under sections 187 and 188 of Restatement (Second) of Conflict of Laws (1971), the local law of the state with the most significant relationship to the transaction applies to questions of contract interpretation absent an effective choice of law by the parties. Plaintiff was considered a Montana resident despite the fact that employment required travel to other states, and the court concluded that it was appropriate to apply the Wrongful Discharge From Employment Act to the case even though the Act does not expressly provide for extraterritorial jurisdiction. Montana courts have subject matter jurisdiction in cases involving a Montana resident when Montana law applies, so plaintiff's case should not have been dismissed for lack of subject matter jurisdiction. Burchett v. MasTec N. America, Inc., 2004 MT 177, 322 M 93, 93 P3d 1247 (2004). See also Dailey v. Transitron Electronic Corp., 475 F2d 12 (5th Cir. 1973), and Harrington v. Energy West, Inc., 2015 MT 233, 380 Mont. 298, 356 P.3d 441.

No Claim for Wrongful Termination Apart From Either Contract or Wrongful Discharge Act: Solle claimed that her employer violated the common-law duty of good faith and fair dealing by failing to renew her employment contract when she had a reasonable expectation that a renewal would be offered. Solle's employer moved to compel arbitration, the motion was granted, and Solle appealed. Under Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989), claims for wrongful termination from tort or express or implied contract are no longer viable under Montana law. Rather, 39-2-913 explicitly preempts all common-law remedies but bars only tort and contract claims that are "for discharge". A threshold determination in cases alleging wrongful termination is whether the parties' relationship is governed by a written contract for a specific term or whether it falls under the provisions of the Wrongful Discharge From Employment Act, which applies to noncontract situations. Solle's employment was covered by a written contract containing an arbitration clause, and her claim for breach of the implied covenant of good faith and fair dealing was inextricably intertwined with and based upon her termination from employment. Although breach of a contract is not a prerequisite to breach of the implied covenant of good faith and fair dealing, the covenant arises out of a contractual relationship between the parties, and a breach of the covenant is a breach of the contract. Solle's contract was silent as to whether there was an obligation on the employer's part to renew the contract or on Solle's part to accept a renewal offer, so Solle argued that the failure to include such a provision indicated the employer's intent not to cover a claim like this under the arbitration clause. The Supreme Court disagreed and proceeded to treat the dispute as arising out of the employment contract. Solle was not allowed to maintain a wrongful termination claim apart from either the contract or the Wrongful Discharge From Employment Act. Solle's contract contained a provision that any unresolved dispute would be subject to arbitration, but the arbitration clause did not explicitly provide that it would govern issues concerning contract nonrenewal. Nevertheless, the contract governed Solle's employment, termination, and postemployment relationship and did not explicitly exclude disputes arising after contract termination. The presumption favors arbitrability, and the District Court did not err in holding that Solle's claim was subject to arbitration. Solle v. W. St. Ins. Agency, Inc., 2000 MT 96, 299 M 237, 999 P2d 328, 57 St. Rep. 391 (2000). See also Nolde Bros., Inc. v. Bakery & Confectionery Workers Union, 430 US 243, 51 L Ed 2d 300, 97 S Ct 1067 (1977), and Marsden v. Blue Cross & Blue Shield of Mont., 2012 MT 306, 368 Mont. 34, 291 P.3d 1229.

39-2-903. Definitions.

Compiler's Comments

2021 Amendment: Chapter 117 in definition of good cause in introductory clause substituted "any reasonable job-related grounds for an employee's dismissal" for "reasonable job-related grounds for dismissal", in (a) at beginning substituted "the employee's failure" for "a failure", in (b) at beginning substituted "the employee's disruption" for "disruption", inserted (c) regarding the employee's material or repeated violation of an express provision of written policies, and in (d) after "legitimate business" substituted "reasons determined by the employer while exercising the employer's reasonable business judgment" for "reason"; inserted definition of leave of absence; and made minor changes in style. Amendment effective March 31, 2021.

Severability: Section 9, Ch. 117, L. 2021, was a severability clause.

1993 Amendment: Chapter 193 in definition of good cause inserted second sentence pertaining to the legal use of a lawful product off the employer's premises during nonworking hours.

Case Notes

No Genuine Issue of Material Fact — Termination from Employment for Unprofessional Conduct Proper: In a case with affirmative facts showing that an employee repeatedly engaged in unprofessional conduct and conduct in violation of employer policies and failed to provide explanation or justification for the infractions, the court properly found reasonable job-related grounds for termination based on a failure to adequately perform job duties or on another legitimate business reason. Further, with regard to the allegation that termination was in violation of personnel policy, the employee failed to provide a citation or analysis of any specific employer policy alleged to have been violated. Speer v. Dept. of Corrections, 2020 MT 45, 399 Mont. 67, 458 P.3d 1016.

Managerial Position — Greater Discretion in Termination Decision — Summary Judgment for Employer Proper: The District Court did not err in ruling on summary judgment that the defendant county had good cause to terminate the plaintiff's employment as human resources director given that she held a managerial position, which gave the defendant greater discretion in its termination decision. As the person in charge of human services, the plaintiff was a key player in the management team, entrusted with confidential employee information and counted on to keep the workplace running smoothly. The plaintiff failed to respond with material and substantial evidence to raise genuine issues of material fact as to whether the defendant county had legitimate business reasons for discharging her employment. Bird v. Cascade County, 2016 MT 345, 386 Mont. 69, 386 P.3d 602. See also Buckley v. W. Mont. Community Mental Health Center, 2021 MT 82, 403 Mont. 524, 485 P.3d 1211.

No Error in Upholding State Employee Discharge on Summary Judgment — Good Cause for Termination Based on Undisputed Facts: The District Court did not err by granting summary judgment to a state agency and by ruling as a matter of law that a state employee was terminated for good cause. Although certain facts were in dispute, there was no dispute that the employee repeatedly failed to report to work after a dispute with her immediate supervisor, refused to attend two meetings to discuss her concerns, and failed to obtain an excused absence. The undisputed facts established that the employee failed to satisfactorily perform job duties, causing disruption of the state agency's operation, and therefore constituted reasonable job-related grounds for dismissal. Davis v. St., 2015 MT 264, 381 Mont. 59, 357 P.3d 320.

Constructive Discharge Upheld Despite Error in Admission of Evidence: Admission of evidence of the settlement amount in another employment case against the same defendant was in error. Since there was only one other employment case against this defendant, evidence of the settlement amount did not demonstrate a habitual pattern, and the danger of prejudice exceeded the probative value. However, in light of the other evidence presented by the plaintiff and the damage limitations in the Wrongful Discharge from Employment Act, the court concluded that introducing the settlement amount of a separate employment claim did not significantly alter the result of the trial. Harrell v. Farmers Educ. & Co-op Union, 2013 MT 367, 373 Mont. 92, 314 P.3d 920.

Transfer of Employee Based on Evaluation — Loss of Seniority and Reinstatement of Probationary Period — Summary Judgment in Favor of Employer Improper: To prevent layoffs, Plum Creek transferred 25 employees from its Columbia Falls mill to other facilities. In order to determine which employees to transfer, Plum Creek conducted written pretransfer evaluations that assessed the employees' attendance and disciplinary records and factored in their work skills. Based on his evaluation, the plaintiff, who had been at the Columbia Falls mill for 18 years, was selected to be transferred. As a result of the transfer, the plaintiff lost his seniority, was placed on a 90-day probationary period, and was reassigned as a plugger operator, a job in which he had no experience. The plaintiff was then terminated within the probationary period for failure to perform and brought a claim under the Wrongful Discharge From Employment Act, alleging that his pretransfer evaluation contained inaccuracies that wrongly led to his transfer. Although Plum Creek admitted that there were inaccuracies in the plaintiff's evaluation, the District Court granted summary judgment to Plum Creek based on its conclusion that Plum Creek had good cause to discharge the plaintiff. On appeal, the Supreme Court reversed, holding that conflicting inferences could be drawn from which a reasonable person could conclude that Plum Creek violated its written personnel policy by not conducting the plaintiff's pretransfer evaluation in a consistent manner. Williams v. Plum Creek Timber Co., Inc., 2011 MT 271, 362 Mont. 368, 264 P.3d 1090.

Lack of Evidence That Termination Was for Other Than Good Cause: Following a heated argument with a supervisor, Becker was terminated from employment and subsequently brought a wrongful discharge action, asserting that the termination was unlawful because there was not good cause for the termination. The District Court granted the employer's summary judgment motion to dismiss the case because Becker had presented no evidence that the termination occurred for anything other than good cause. On appeal, the Supreme Court affirmed. Becker's behavior was disruptive of the employer's operations in violation of company policy, and Becker presented no evidence that the reason for termination was false, whimsical, arbitrary, or capricious. Becker v. Rosebud Operating Serv., Inc., 2008 MT 285, 345 M 368, 191 P3d 435 (2008).

Contract Action Not Applicable When Contract Terms Not Fulfilled — Wrongful Discharge Claim Dismissed as Untimely: Zier signed an agreement that he would become president of defendant bank when the bank obtained a contingent charter from the division of banking and when the bank received federal approval for operation. Zier began working for the bank in a different capacity, but neither contingency occurred, so Zier was not offered the president position and was subsequently discharged from employment. Zier filed a breach of contract action, but the bank argued that the contract claim was actually a claim for wrongful discharge. The District Court agreed with the bank and dismissed the claim because Zier failed to bring the action within 1 year as required under 39-2-911. Zier appealed, but the Supreme Court affirmed. The bank was not liable for breach of contract because the conditions of the agreement did not occur, so the District Court properly refused to consider the claim under a contract theory and correctly considered the claim as a wrongful discharge claim. Zier's failure to bring the claim within the 1-year statute of limitations warranted dismissal. Zier v. Hancock, 2008 MT 255, 345 M 89, 189 P3d 1189 (2008). See also Kneeland v. Luzenac America, Inc., 1998 MT 136, 289 M 201, 961 P2d 725 (1998).

Proper Calculation of Damages Through Comparison of New and Prior Wages to Determine Lost Wages: To calculate damages for lost wages in Hager's wrongful discharge suit against J.C. Billion, Inc. (Billion), Hager subtracted the salary from his new job from the amount on a tax form submitted during discovery indicating his annual salary at Billion. Billion asserted that because Hager failed to submit into evidence the actual tax form, the jury was precluded from properly assessing damages for lost wages. The Supreme Court noted that this section does not restrict a lost wage calculation to amounts obtained directly from tax documents, but rather allows calculation based on amounts that would have been reported. Hager could not submit a tax form from Billion because he no longer worked there. Hager's testimonial evidence regarding the gross amount of wages that would have been reported by Billion constituted substantial credible evidence to support the damage award, and the Supreme Court affirmed the award. Hager v. J.C. Billion, Inc., 2008 MT 167, 343 M 353, 184 P3d 340 (2008).

Wrongful Discharge Jury Instruction Referring to Employer's Personnel Policy Proper: At a wrongful discharge trial, Hager testified regarding the employer's failure to follow its written personnel policy. When settling jury instructions, the employer objected to reference to the employee handbook on grounds that compliance with the written personnel policy had no application to Hager's case. The District Court disagreed and submitted a jury instruction that referred to the employee handbook. On appeal, the Supreme Court affirmed. The trial court's instructions properly stated the applicable law in light of the trial evidence and the court did not abuse its discretion by giving a wrongful discharge instruction that referred to the employer's violation of its written personnel policy. Hager v. J.C. Billion, Inc., 2008 MT 167, 343 M 353, 184

P3d 340 (2008). See also Williams v. Plum Creek Timber Co., Inc., 2011 MT 271, 362 Mont. 368, 264 P.3d 1090.

No Contractual Definition of Cause — Discretionary Termination of Professional Sports Team Coach Related to Legitimate Business Needs Warranted: Cole was fired as a professional hockey coach because of the team's poor performance. Cole's 5-year employment agreement contained a clause, drafted by Cole, providing that if Cole was terminated without cause, he would receive 1 year's salary and a bonus. Although the contract did not contain a definition of cause, the District Court found that the termination was without cause. The Supreme Court disagreed. Applying de novo review of the District Court's summary judgment to interpret the employment contract terms in their ordinary and popular sense and construing any uncertainty in the contract language against Cole, who drafted it, the Supreme Court held that discharging the coach of a poorly performing professional sports team was a discretionary decision related to the legitimate needs of the business and constituted cause, so the employer had a legitimate business reason to terminate the coach. Thus, Cole was not entitled to recover under the contract. Cole v. Valley Ice Garden, LLC, 2005 MT 115, 327 M 99, 113 P3d 275 (2005).

Failure to Prove Agency — Summary Judgment on Nonliability for Constructive Discharge by Alleged Agent Improper: Plaintiff sued defendant corporation American Music Co. (AMC) for constructive discharge based on individual defendant Kelman's tortious interference with plaintiff and AMC's business relationship. Kelman founded AMC and then transferred ownership to his daughters but remained a creditor of AMC and owned the building where the business was located. Plaintiff cited numerous instances of Kelman's intimidating and threatening behavior in the office, contending that Kelman's actions and AMC's failure to control Kelman impaired plaintiff's ability to function normally at work and resulted in plaintiff's constructive discharge. Kelman moved for summary judgment on grounds that Kelman was an agent of AMC and thus was privileged from claims of tortious interference. The District Court agreed and granted summary judgment to Kelman and AMC. On appeal, the Supreme Court reversed. Kelman was not employed by AMC and thus was not an actual agent, nor did ostensible agency exist because AMC never caused any third person to believe that Kelman was an AMC agent. Absent an agency relationship between Kelman and AMC, Kelman's claimed privilege from suit failed. In addition, constructive discharge is usually a question of fact for the trier of fact to decide and is not subject to summary judgment. Plaintiff presented sufficient evidence to create a question of fact whether a reasonable person would have felt forced to resign, so the grant of summary judgment to AMC was also reversible error. Bellanger v. Am. Music Co., 2004 MT 392, 325 M 221, 104 P3d 1075 (2004).

Corporate Pay Cuts Not Considered Effective Termination — Good Cause Justifying Employee's Termination: Marvin was a member of a corporate partnership with his brothers in a farm and ranch operation. The other corporation members decided to cut their monthly salaries, including Marvin's, from $500 to $50. Marvin was subsequently fired for failure to perform reasonable farming duties, and following Marvin's discharge, the other members restored their salaries and satisfied the arrearages. Marvin filed a wrongful discharge complaint, asserting that the pay cuts constituted a breach of the employment agreement and effectively terminated his employment well before he received formal notice of his discharge. The complaint was dismissed, and Marvin appealed, but the Supreme Court affirmed. The pay cuts were justified for legitimate economic reasons and affected all the partners equally, and Marvin could not argue that the cuts effectively terminated his employment because he remained in the active employ of the corporation after the cuts. Further, there was reasonable job-related good cause for Marvin's termination because he refused to perform duties assigned to him. Therefore, the wrongful discharge claim was properly dismissed. Pankratz Farms, Inc. v. Pankratz, 2004 MT 180, 322 M 133, 95 P3d 671 (2004).

Sufficient Evidence to Create Question of Fact Whether Employee Satisfactorily Performed Job — Summary Dismissal of Wrongful Discharge Suit in Error: The District Court granted a motion by employer Plum Creek Manufacturing, L.P. (Plum Creek), for summary judgment on employee Andrews' wrongful discharge claim, concluding that although the discharge issue was a question of fact for a jury, even if a discharge had occurred, Plum Creek had good cause for the dismissal. The court declined to use the discharge element as a basis for granting the motion for summary judgment. Andrews argued on appeal that she was either actually or constructively discharged and maintained that any inadequacy on her part was a result of Plum Creek's failure to train her, define procedures, and appropriately supervise and evaluate her in her job. Plum Creek asserted that it had reasonable job-related grounds for dismissing Andrews based on economic grounds and Andrews' failure to satisfactorily perform job duties, regardless of who was at fault for that failure. The Supreme Court noted that District Courts may not adjudicate questions of fact on motions for summary judgment. There was conflicting evidence regarding the admission of failure to perform job duties and regarding performance of job duties, and it was the function of a jury, not the court, to weigh the evidence. Andrews presented sufficient evidence to create a question of fact whether she had satisfactorily performed her job, and the District Court should have allowed the jury to decide if good cause existed to discharge Andrews. Granting of the motion for summary dismissal was erroneous, and the Supreme Court remanded for further proceedings. Andrews v. Plum Creek Mfg., L.P., 2001 MT 94, 305 M 194, 27 P3d 426 (2001).

Wrongful Discharge From Employment Act Superseding and Impliedly Repealing At-Will Employment Provisions: Section 39-2-904(2) provides that a discharge is wrongful only if the discharge was not for good cause and the employee had completed the probationary period of employment. However, under 39-2-503 (now repealed), a nonprobationary at-will employee may be discharged without good cause. The sections clearly conflict. Exercising its power to impliedly repeal conflicting legislation, the Supreme Court held that because the plain meaning of 39-2-904 is that a nonprobationary employee may not be discharged without good cause, the provisions of that section have effectively eliminated the at-will employment provisions and thus supersede and impliedly repeal 39-2-503 (now repealed). Because the good cause requirement applies to an employee upon completion of probation, the employer must define the probationary period at the onset of the employment relationship and has the burden of showing that the probationary period was in effect at the time of a discharge. Whidden v. John S. Nerison, Inc., 1999 MT 110, 294 M 346, 981 P2d 271, 56 St. Rep. 456 (1999), overruling Medicine Horse v. Trustees, Big Horn County School District No. 27, 251 M 65, 823 P2d 230, 48 St. Rep. 1074 (1991).

Termination of Employment for Legitimate Business Reasons Insufficient Basis for Judgment as Matter of Law: As set out in Kneeland v. Luzenac Am., Inc., 1998 MT 136, 289 M 201, 961 P2d 725, 55 St. Rep. 541 (1998), a motion for judgment as a matter of law may be granted only if it appears that a party could not prevail upon any view of the evidence, including legitimate references that can be drawn from the evidence, and there is a complete absence of any evidence to warrant submission to a jury. In this case, an employer maintained that its employee was terminated for legitimate business reasons and evidence existed to support that contention, but that did not constitute a sufficient basis for judgment as a matter of law in light of other evidence submitted by the employee tending to show that the termination was not for legitimate business reasons. Denial of the motion for judgment as a matter of law was proper. Braulick v. Hathaway Meats, Inc., 1999 MT 57, 294 M 1, 980 P2d 1, 56 St. Rep. 241 (1999).

Refusal to Bifurcate Wrongful Discharge Claim From Employer's Counterclaim Proper: Jarvenpaa argued that his employer's counterclaim against him for recovery of retirement benefits should have been bifurcated from his wrongful discharge claim because the counterclaim unnecessarily invited evidence of his election to retire and the retirement benefits that he received, which prejudicially persuaded the jury to find that the discharge was fair instead of wrongful. However, evidence of the retirement election was helpful to the jury to make a well-informed decision, including whether the employer acted with malice, and was relevant to the wrongful discharge action. Therefore, the District Court did not err in refusing to bifurcate the issues for separate trial. Jarvenpaa v. Glacier Elec. Co-op, Inc., 1998 MT 306, 292 M 118, 970 P2d 84, 55 St. Rep. 1261 (1998).

Newspaper Advertisement Not Considered Legitimate Use of Lawful Product: McGillen contended that he was improperly discharged from employment for placing a false newspaper advertisement for sale of a truck and listing his supervisor's name and phone number with instructions to call late at night. McGillen argued that under this section, a newspaper advertisement is a lawful product and that his use of the advertisement, on his own time and outside the workplace, could not be used as grounds for dismissal. The District Court properly held that a newspaper advertisement does not fit the definition of lawful product, within the context of this section, which is intended to protect an employee from discharge for the use of a lawful product, such as food, beverages, and tobacco, that is legally consumed off the employer's premises. McGillen v. Plum Creek Timber Co., 1998 MT 193, 290 M 264, 964 P2d 18, 55 St. Rep. 808 (1998).

No Wrongful Discharge Without Complete Severance of Employment: Clark sued for wrongful discharge on the basis that his employer demoted him from terminal manager to utility person. The Supreme Court held that there must be a complete termination of employment to claim wrongful discharge. In Clark's case, he reported to work the next day for the utility position. Clark v. Eagle Sys., Inc., 279 M 279, 927 P2d 995, 53 St. Rep. 1150 (1996), distinguishing Howard v. Conlin Furniture No. 2, Inc., 272 M 433, 901 P2d 116 (1995), in which plaintiff refused to accept a new position with a substantial pay cut.

Employee to Rely on More Than Mere Speculation to Overcome Employer's Claim That Discharge Based on Good Cause: Mysse alleged that she was fired by the county as a driver for senior citizens as a scapegoat to make up for the county's improvident purchase of a bus to transport senior citizens. The Supreme Court held that the evidence showed that Mysse had been fired for refusing to establish a set schedule and refusing to drive the bus and that her allegations were mere speculation and did not defeat the county's claim that she had been discharged for good cause. Mysse v. Martens, 279 M 253, 926 P2d 765, 53 St. Rep. 1139 (1996), followed in Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999), and distinguished in Marcy v. Delta Airlines, 166 F3d 1279 (9th Cir. 1999).

Failure to Report to Work — Discharge for Cause: Walker contended that he was constructively discharged from work with Montana Power Company (MPC) because of MPC's failure to accommodate him by removing him from a hostile work environment, citing Martinell v. Mont. Power Co., 268 M 292, 886 P2d 421 (1994). However, Walker's supervisors testified that they had informed him that they had placements available other than working with the individuals about whom Walker had complained. The Supreme Court was not persuaded that Martinell controlled in this case, holding that Walker's discharge from MPC's employ was for good cause, namely Walker's failure to report to work after the expiration of an 11-month series of medical leave and personal leave. Walker v. Mont. Power Co., 278 M 344, 924 P2d 1339, 53 St. Rep. 943 (1996).

Termination From Managerial Position and Refusal to Accept Lesser Position Constituting Discharge From Employment: Howard was absolutely and finally terminated from his managerial position, after which he was offered a functionally different and substantially inferior position with the same employer. This was not a lateral transfer or minor change in job description. Howard's refusal to accept an offer of a lesser position at best affected his duty to mitigate his damages. The termination constituted a discharge from employment under the provisions of this part and raised a question of fact as to whether the discharge was made with good cause. It was reversible error for the trial court to dismiss Howard's complaint on the assumption that the termination was a constructive discharge based on reasonable grounds for demotion. Howard v. Conlin Furniture No. 2, Inc., 272 M 433, 901 P2d 116, 52 St. Rep. 814 (1995).

"Retire or Be Fired" as Involuntary Discharge — Summary Judgment Improperly Granted: Jarvenpaa was retired by Glacier Electric Cooperative in a letter that gave him the choice of retiring "voluntarily" or being terminated. After expressing in writing his displeasure with the choice being offered, Jarvenpaa retired and then sued Glacier Electric, alleging wrongful discharge. The Supreme Court held that the District Court improperly found that Jarvenpaa's retirement was not involuntary and improperly granted summary judgment for Glacier Electric. The Supreme Court cited federal age discrimination cases in holding that the choice given Jarvenpaa was no choice at all and emphasized that the amount of retirement benefits received by Jarvenpaa was relevant to damages but not determinative of whether his termination was voluntary. Jarvenpaa v. Glacier Elec. Co-op, Inc., 271 M 477, 898 P2d 690, 52 St. Rep. 582 (1995). On remand, the jury decided that Jarvenpaa was not wrongfully discharged and awarded Glacier Electric its counterclaim to collect money that Jarvenpaa received for early retirement, plus interest. Although Jarvenpaa had the right to pursue the constructive discharge as wrongful, he was not entitled to keep the early retirement benefits after it was determined that the discharge was not wrongful. The two scenarios under which Jarvenpaa could keep the retirement benefits were: (1) if he in fact retired, which he did not do; or (2) if he was wrongfully discharged, in which case he could have applied his early retirement benefits as an offset against any wrongful discharge damages that he was awarded. Neither scenario occurred; thus, the District Court did not err in denying Jarvenpaa's motion for summary judgment on the counterclaim. Jarvenpaa v. Glacier Elec. Co-op, Inc., 1998 MT 306, 292 M 118, 970 P2d 84, 55 St. Rep. 1261 (1998).

Cause of Action by Nonprobationary Employee if Discharge Not for Good Cause: An employee who has completed the employer's probationary period has a valid ground for maintaining a cause of action against the employer if the discharge was not based on good cause, which is defined as reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. Koepplin v. Zortman Min., Inc., 267 M 53, 881 P2d 1306, 51 St. Rep. 880 (1994).

Good Cause — Sufficient Evidence of Wrongful Discharge to Preclude Directed Verdict: Evidence that employee was performing a job satisfactorily when discharged provided a possible motive for termination for other than good cause, warranting submission of a wrongful discharge claim to the jury and precluding a directed verdict. Guertin v. Moody's Mkt., Inc., 265 M 61, 874 P2d 710, 51 St. Rep. 407 (1994), following Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303 (1986).

Termination Not in Furtherance of Legitimate Reduction in Staff: Kestell presented evidence that his employer's ostensible reasons for replacing him were false, arbitrary, or capricious and unrelated to the needs of the business and therefore did not constitute legitimate business reasons under this section. The District Court thus did not err in denying the employer's motions for directed verdict and judgment N.O.V. on Kestell's wrongful discharge claim. Kestell v. Heritage Health Care Corp., 259 M 518, 858 P2d 3, 50 St. Rep. 919 (1993), followed in Koepplin v. Zortman Min., Inc., 267 M 53, 881 P2d 1306, 51 St. Rep. 880 (1994).

Definition of "Discharge" Proper in Light of Circumstances of Case: Employer contended error in the giving of a definition of discharge as termination of employment, including resignation and failure to recall or rehire, rather than giving the full statutory definition provided in this section. However, the instruction included the types of discharge that were supported by the evidence in the case, as presented by both parties, and failure to give the entire statutory definition was not an abuse of discretion. Arnold v. Boise Cascade Corp., 259 M 259, 856 P2d 217, 50 St. Rep. 784 (1993), followed in Kneeland v. Luzenac America, Inc., 1998 MT 136, 289 M 201, 961 P2d 725, 55 St. Rep. 541 (1998).

Statutory Definition of Good Cause Applicable — No New Standard Adopted: In asserting her wrongful discharge claim, Miller contended that a new standard of good cause be adopted based on whether: (1) the employee satisfied the general obligations of an employee described in 39-2-401; (2) the employer followed industry standards of progressive discipline; and (3) the employer exercised bad faith. The Supreme Court declined to adopt the suggested standard, opting instead for the statutory definition in this section. Based on its extensive findings, including those that Miller failed to implement new procedures and delayed completing tasks, the District Court correctly concluded that Miller's termination was reasonably based on job-related grounds and that, in light of the fact that the employer followed the express written provisions of its personnel policies, dismissal was proper. Miller v. Citizens St. Bank, 252 M 472, 830 P2d 550, 49 St. Rep. 422 (1992).

Evidence of Other Than Economic Motives for Firing — Sufficiency of Jury Issue Upheld: In an unlawful discharge action, the employer claimed on appeal that the employee offered insufficient evidence to show that his firing was motivated other than by the economic motives claimed by the employer. The Supreme Court held that the present case was unlike Cecil v. Cardinal Drilling Co., 244 M 405, 797 P2d 232 (1990), cited by the employer for the proposition that the employee must produce evidence of other motives. The court distinguished Cecil, stating that that case was decided under the Wrongful Discharge From Employment Act, which authorizes a nonprobationary employee to be fired for good cause. In Cecil, the plaintiff had insufficient evidence to defeat a motion for summary judgment, while in this case the court found that there was evidence from which the jury could conclude that the employer had noneconomic motives for firing the plaintiff. Kizer v. Semitool, Inc., 251 M 39, 824 P2d 229, 48 St. Rep. 1115 (1991).

Trends in Crude Oil Prices as Legitimate Business Reason for Reductions in Force: Economic conditions constitute a legitimate business reason to engage in reductions in force. Flanigan v. Prudential Fed. S&L Ass'n, 221 M 419, 720 P2d 257 (1986), held that employers should not be foreclosed from engaging in legitimate reductions in force necessary to maintain the economic vitality of the company. Absent an offer of any other motive or reason for termination, summary judgment was proper based on a company's reliance on trends in the price of crude oil as a legitimate reason for terminating an employee. Cecil v. Cardinal Drilling Co., 244 M 405, 797 P2d 232, 47 St. Rep. 1673 (1990).

Insufficient Claim of Constructive Discharge: Plaintiff's claims that she was forced to resign because of negative comments by her supervisors and denial of a raise, along with comments by fellow employees that they would leave rather than continue in plaintiff's position, did not constitute genuine issues of material fact to indicate constructive discharge. The doctrine of constructive discharge has not been recognized beyond discrimination cases. Plaintiff's subjective judgment that her working conditions had become intolerable was insufficient to meet the high burden of proof required to prove constructive discharge. Frigon v. Morrison-Maierle, Inc., 233 M 113, 760 P2d 57, 45 St. Rep. 1344 (1988).

39-2-904. Elements of wrongful discharge.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 361, L. 2023. Amendment effective October 1, 2023.

2021 Amendment: Chapter 117 in (1)(c) near beginning after "the employer" inserted "materially", after "personnel policy" inserted "prior to the discharge", and at end inserted provision regarding deprivation of the employee for a fair and reasonable opportunity to remain in a position of employment; deleted former (2)(b) that read: "(b) If an employer does not establish a specific probationary period or provide that there is no probationary period prior to or at the time of hire, there is a probationary period of 6 months from the date of hire"; inserted (3) regarding broadest discretion of employer to discharge any managerial or supervisory employee; and made minor changes in style. Amendment effective March 31, 2021.

Severability: Section 9, Ch. 117, L. 2021, was a severability clause.

2001 Amendment: Chapter 583 inserted (2) authorizing employer or employee to terminate employment at will on notice to the other for any or no reason and establishing 6-month probationary period from date of hire if no specific probation period established; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 583, L. 2001, provided: "WHEREAS, in Whidden v. John S. Nerison, Inc., 1999 MT 110, 294 Mont. 346, 981 P.2d 271 (1999), the Montana Supreme Court held that the at-will employment statute, section 39-2-503, MCA, had been impliedly repealed by the Wrongful Discharge From Employment Act, Title 39, chapter 2, part 9, MCA."

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APPLICATION OF ACT

No District Court Jurisdiction to Grant Summary Judgment When Dispute Subject to Arbitration: A condition of Burkhart's employment agreement with Semitool, Inc. (Semitool), was that employment disputes would be subject to Montana law and the Uniform Arbitration Act. After 8 months of employment, Burkhart was terminated. He later brought suit against Semitool, alleging that: (1) he had been terminated without good cause; (2) his termination was in retaliation for his refusal to violate public policy; (3) Semitool's opposition to his application for unemployment benefits was without probable cause and motivated by malice; and (4) representations made to him prior to employment were deceptive and motivated by malice, contained misrepresentations, and included false advertisements concerning the kind or character of the employment. In its answer, Semitool demanded arbitration, and Burkhart accepted the arbitration offer on the first two issues. The parties agreed that because trade secrets were involved, the record would be sealed and hearings closed to the public to avoid disclosure of confidential information. Semitool then moved to dismiss for failure to state a claim or, alternatively, to compel arbitration of all four claims. The District Court converted the motion to dismiss into a motion for summary judgment and held a hearing to discuss both motions, after which it granted summary judgment to Semitool and dismissed all four claims. The court determined that because proof of the allegations in the complaint would require disclosure of confidential attorney-client matters and because violation of the attorney-client privilege prejudiced the public interest, that prejudice was a proper ground upon which to invalidate the arbitration agreement. Burkhart appealed. On appeal, the Supreme Court cited 39-2-914 and Ratchye v. Lucas, 1998 MT 87, 288 M 345, 957 P2d 1128 (1998), as controlling. Once an offer to arbitrate has been accepted, neither the District Court nor the parties have a right to continue the lawsuit. The exception relating to the public interest pertains to the validity of the arbitration agreement, not to the merits of the underlying dispute. Thus, the District Court erred in deciding the merits of the issues because it lacked jurisdiction to do so once the parties agreed to arbitrate. Summary judgment was reversed and the claims were remanded for arbitration. Burkhart v. Semitool, Inc., 2000 MT 201, 300 M 480, 5 P3d 1031, 57 St. Rep. 785 (2000). See also Ensey v. Mini Mart, Inc., 2013 MT 94, 369 Mont. 476, 300 P.3d 1144.

Management Staff of State Workers' Compensation Fund Covered by Wrongful Discharge Act: Section 39-71-2317, providing that management staff of the state workers' compensation fund "serves at the pleasure of the executive director", does not exempt the State Fund from the Wrongful Discharge From Employment Act; it only means that the executive director may hire and retain management staff at the director's choice without interference from the State Fund's board of directors. MacMillan v. St. Comp. Ins. Fund, 285 M 202, 947 P2d 75, 54 St. Rep. 1112 (1997).

No Wrongful Discharge Without Complete Severance of Employment: Clark sued for wrongful discharge on the basis that his employer demoted him from terminal manager to utility person. The Supreme Court held that there must be a complete termination of employment to claim wrongful discharge. In Clark's case, he reported to work the next day for the utility position. Clark v. Eagle Sys., Inc., 279 M 279, 927 P2d 995, 53 St. Rep. 1150 (1996), distinguishing Howard v. Conlin Furniture No. 2, Inc., 272 M 433, 901 P2d 116 (1995), in which plaintiff refused to accept a new position with a substantial pay cut.

Act Inapplicable to Term Contracts: The Wrongful Discharge From Employment Act is inapplicable to a written contract of employment for a specific term. As previously held in Leland v. Heywood, 197 M 491, 643 P2d 578 (1982), an employer has the discretion to not renew a specific term contract without a showing of good cause. Farris v. Hutchinson, 254 M 334, 838 P2d 374, 49 St. Rep. 717 (1992), distinguishing Portable Embryonics v. J.P. Genetics, 248 M 242, 810 P2d 1197 (1991).

No Wrongful Discharge Action — Police Officers Never Fired: Two police officers brought an action for wrongful discharge against the city. The Supreme Court affirmed the lower court's granting of a summary judgment dismissing their suit. The court held that the officers had never been taken before the police commission as required by law and therefore they had never been legally discharged and accordingly could not bring an action for wrongful discharge. McCracken v. Chinook, 242 M 21, 788 P2d 892, 47 St. Rep. 501 (1990).

CONTRACTUAL ISSUES

Business Manager Documents Not Considered Written Contract for Employment — Discharge of Permanently Employed School Business Manager Without Cause Wrongful: Cromwell was hired as a classified school district employee. According to the classified employee handbook, Cromwell was considered a permanent employee following a 6-month probationary period in 1999. In 2001, the school district adopted a new classified employee policy that provided that new classified employees would be employed under annual contracts for specified terms within the meaning of 39-2-912, which exempted the new employment agreements from the requirements of the Wrongful Discharge From Employment Act (WDEA). In 2003, the school district decided not to renew Cromwell's contract, and she was terminated from employment. Cromwell filed a wrongful discharge claim. The school district contended that Cromwell's employment agreement did not fall within the scope of the WDEA because business manager documents signed by Cromwell and the school district constituted written agreements for specified terms under 39-2-912. Cromwell asserted that the business manager documents were not written agreements for specified terms, but merely represented agreements concerning Cromwell's salary. The District Court concluded that Cromwell was wrongfully discharged, and the school district appealed, but the Supreme Court affirmed. The business manager documents did not explicitly state a term of employment, and Cromwell had attained status as a permanent employee and the accompanying protection of the WDEA. Therefore, Cromwell could be discharged only for good cause under this section. Given the ambiguous language of the business manager documents and the school district's admission that Cromwell was not terminated for cause, the District Court properly concluded that Cromwell was wrongfully discharged. Cromwell v. Victor School District No. 7, 2006 MT 171, 333 M 1, 140 P3d 487 (2006).

Failure to Renew One-Year Teaching Contract — Covenant of Good Faith and Fair Dealing and Due Process Property Right Not Violated: Failure to renew a professor's teaching contract was not a breach of the covenant of good faith and fair dealing and did not violate due process by depriving the professor of a property interest in employment. The contract stated that it was for 1 year and had a specific ending date, and there was no evidence of a justifiable expectation of employment after the year ended. Schaal v. Flathead Valley Community College, 272 M 443, 901 P2d 541, 52 St. Rep. 905 (1995).

Act Inapplicable to Term Contracts: The Wrongful Discharge From Employment Act is inapplicable to a written contract of employment for a specific term. As previously held in Leland v. Heywood, 197 M 491, 643 P2d 578 (1982), an employer has the discretion to not renew a specific term contract without a showing of good cause. Farris v. Hutchinson, 254 M 334, 838 P2d 374, 49 St. Rep. 717 (1992), distinguishing Portable Embryonics v. J.P. Genetics, 248 M 242, 810 P2d 1197 (1991).

EMPLOYER'S PERSONNEL POLICIES

Violation of Company Policy — Motion to Dismiss — No Error: A company policy required employees using a controlled substance to immediately notify management if the substance "may have adverse effect on their ability to perform their job safely and efficiently". After the plaintiff was randomly selected for a drug and alcohol urine test, the plaintiff informed his supervisor he had been prescribed medical marijuana and would likely test positive for tetrahydrocannabinol (THC). He was terminated after the drug test identified THC in his system, and he filed an action alleging wrongful discharge from employment. The company's policy only allowed an employee to continue working subject to a management determination, not an employee determination, about whether the employee posed a threat to safety after ingesting a controlled substance, and the District Court did not err in granting the defendant's motion to dismiss because the employee failed to notify the employer about the controlled substance. Barthel v. Barretts Minerals Inc., 2021 MT 232, 405 Mont. 345, 496 P.3d 541.

No Genuine Issue of Material Fact — Termination from Employment for Unprofessional Conduct Proper: In a case with affirmative facts showing that an employee repeatedly engaged in unprofessional conduct and conduct in violation of employer policies and failed to provide explanation or justification for the infractions, the court properly found reasonable job-related grounds for termination based on a failure to adequately perform job duties or on another legitimate business reason. Further, with regard to the allegation that termination was in violation of personnel policy, the employee failed to provide a citation or analysis of any specific employer policy alleged to have been violated. Speer v. Dept. of Corrections, 2020 MT 45, 399 Mont. 67, 458 P.3d 1016.

Transfer of Employee Based on Evaluation — Loss of Seniority and Reinstatement of Probationary Period — Summary Judgment in Favor of Employer Improper: To prevent layoffs, Plum Creek transferred 25 employees from its Columbia Falls mill to other facilities. In order to determine which employees to transfer, Plum Creek conducted written pretransfer evaluations that assessed the employees' attendance and disciplinary records and factored in their work skills. Based on his evaluation, the plaintiff, who had been at the Columbia Falls mill for 18 years, was selected to be transferred. As a result of the transfer, the plaintiff lost his seniority, was placed on a 90-day probationary period, and was reassigned as a plugger operator, a job in which he had no experience. The plaintiff was then terminated within the probationary period for failure to perform and brought a claim under the Wrongful Discharge From Employment Act, alleging that his pretransfer evaluation contained inaccuracies that wrongly led to his transfer. Although Plum Creek admitted that there were inaccuracies in the plaintiff's evaluation, the District Court granted summary judgment to Plum Creek based on its conclusion that Plum Creek had good cause to discharge the plaintiff. On appeal, the Supreme Court reversed, holding that conflicting inferences could be drawn from which a reasonable person could conclude that Plum Creek violated its written personnel policy by not conducting the plaintiff's pretransfer evaluation in a consistent manner. Williams v. Plum Creek Timber Co., Inc., 2011 MT 271, 362 Mont. 368, 264 P.3d 1090.

Wrongful Discharge Jury Instruction Referring to Employer's Personnel Policy Proper: At a wrongful discharge trial, Hager testified regarding the employer's failure to follow its written personnel policy. When settling jury instructions, the employer objected to reference to the employee handbook on grounds that compliance with the written personnel policy had no application to Hager's case. The District Court disagreed and submitted a jury instruction that referred to the employee handbook. On appeal, the Supreme Court affirmed. The trial court's instructions properly stated the applicable law in light of the trial evidence and the court did not abuse its discretion by giving a wrongful discharge instruction that referred to the employer's violation of its written personnel policy. Hager v. J.C. Billion, Inc., 2008 MT 167, 343 M 353, 184 P3d 340 (2008).

Possible Arbitrary Application of "Grazing" Policy — Judgment as Matter of Law Reversible Error: Johnson was terminated for violating Costco's zero tolerance "If you didn't buy it, don't eat it" grazing policy after taking a bite of a salvage Danish pastry. Johnson brought a wrongful discharge suit alleging that: (1) Costco did not have good cause for the termination; (2) the reason for the termination was actually a pretext for Costco's desire to terminate long-term, higher paid employees to save money; and (3) Costco violated the express provisions of its own personnel policy. The District Court granted judgment as a matter of law for Costco on all issues, and Johnson appealed. The Supreme Court affirmed on the pretext and personnel policy issues for lack of evidence, but reversed on the good cause issue because another employee who had been observed in violation of the grazing policy after Johnson's termination had not been discharged, so a jury might have concluded that the grazing policy was applied arbitrarily with regard to Johnson. Johnson v. Costco Wholesale, 2007 MT 43, 336 M 105, 152 P3d 727 (2007).

No Employer Policy Requirement That Disciplinary Procedure Be Progressive: A discharge is wrongful if an employer violates the express provisions of its own written employment policy, but an employer has discretion to form an appropriate disciplinary procedure within the express language of its policy, which may or may not include a progressive disciplinary procedure. Here, absent a progressive disciplinary policy, plaintiff raised no genuine issue of fact as to whether the employer's disciplinary policy was violated, so summary judgment for the employer was proper. McConkey v. Flathead Elec. Co-op, 2005 MT 334, 330 M 48, 125 P3d 1121 (2005). See also Kuszmaul v. Sterling Life Ins. Co., 2012 MT 154, 365 Mont. 390, 282 P.3d 665, in which an insurance company was not required to use progressive discipline when an employee handbook allowed for a range of disciplinary actions based on the severity and circumstances of individual cases, a separate zero tolerance policy provided for immediate termination, and the court found that the plaintiff's breach of the zero tolerance policy constituted a significant infraction, Baumgart v. St., 2014 MT 194, 376 Mont. 1, 332 P.3d 225, and Buckley v. W. Mont. Community Mental Health Center, 2021 MT 82, 403 Mont. 524, 485 P.3d 1211.

Discharge of Promoted Employee With Good Record Who Said "Fuck This" and Walked Out of Meeting With Bosses: An employee had no prior disciplinary problems, performed her duties well, and had been promoted, and her employer had said that her prospects of continued employment were excellent. She repeatedly sought and finally got a meeting with her bosses to determine her responsibilities in the new position and whom she should answer to. She was told that she was being removed from the position and put back in her original position. She said "fuck this", left the meeting, and left the resort, which she was working at, without picking up a radio that had fallen to the ground. She was immediately dismissed for unprofessional conduct and abusive language. The employee handbook allowed immediate discharge, depending on the circumstances, for, among other things, insubordination, use of abusive or threatening language, discourtesy, rudeness, or other inappropriate behavior. The handbook required consideration of the events preceding the meeting. Summary judgment for the employer was in error and was reversed. Arnold v. Yellowstone Mtn. Club, LLC, 2004 MT 284, 323 M 295, 100 P3d 137 (2004).

Counsel's Comments on Employee Handbook Implying Employment At Will Cured by Court Admonishment — No Grounds for New Trial: During closing arguments, defense counsel showed the jury a page from defendant's employee handbook that implied that plaintiff could be fired at will. Plaintiff contended that counsel's comments deprived her of a fair trial because Montana is not an at-will employment state. The Supreme Court disagreed. The handbook was entered into evidence by stipulation, and the jury had been shown the page during both direct and cross-examination without objection. Further, when plaintiff objected to presentation of the page during closing, the trial court cured any error by admonishing the jury to disregard the paragraph in question because it did not reflect Montana law. Denial of plaintiff's motion for a new trial based on counsel's comments was therefore not an abuse of discretion. Bailey v. Beartooth Communications Co., 2004 MT 128, 321 M 305, 92 P3d 1 (2004), distinguishing Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

Expert Testimony Regarding Existence of Personnel Policy Properly Limited: One of Jarvenpaa's goals at trial was to establish that the employer had a written personnel policy so that, once established, it could be argued through expert testimony that the policy was violated, resulting in Jarvenpaa's wrongful discharge. Concerned that it was the jury's duty to decide whether the employer had established an actual written personnel policy, the District Court limited expert testimony to the identification of common management standards and a discussion of whether management standards were evident in the materials supplied by the employer's management consultant. The court concluded that there was a lack of foundation to allow the expert to testify to anything further. The court then instructed the jury that a wrongful discharge occurs when an employer violates its own written personnel policy. It was not error to limit the expert testimony, and when coupled with the jury instruction, the court allowed Jarvenpaa to sufficiently present his theory. No reversible error occurred. Jarvenpaa v. Glacier Elec. Co-op, Inc., 1998 MT 306, 292 M 118, 970 P2d 84, 55 St. Rep. 1261 (1998), distinguishing Kearney v. KXLF Communications, Inc., 263 M 407, 869 P2d 772, 51 St. Rep. 119 (1994).

Repeated Violations of Policy Not to Allow Visiting Friends in Secure Area of Juvenile Detention Facility: A juvenile detention officer had visiting friends in a secure area and was orally told not to by a supervisor. He continued to have visiting friends in a secure area after staffers were told not to at a meeting and after receiving a memo prohibiting it. On de novo review of summary judgment for the employer in a wrongful discharge proceeding, the court determined that there was no genuine issue of material fact and that, as a matter of law, the policy violations were reasonable, job-related grounds for dismissal. Fenger v. Flathead County, 277 M 507, 922 P2d 1183, 53 St. Rep. 823 (1996).

Existence of Express Provision of Personnel Policy Question for Jury: Kearney sued KXLF for wrongful discharge and for damages for uncompensated overtime. The District Court directed a verdict for KXLF on the issue of whether KXLF violated its own written personnel policy because there was no policy regarding annual evaluation of employees contained in KXLF's employee handbook. However, an expert for Kearney testified that such a policy existed because other employees were evaluated using a reprinted form and because a supervisor had issued a memorandum calling for evaluations. The Supreme Court concluded that because reasonable persons could conclude from this evidence that a written policy existed, the District Court erred in directing a verdict for KXLF on this issue. Kearney v. KXLF Communications, Inc., 263 M 407, 869 P2d 772, 51 St. Rep. 119 (1994). See also Williams v. Plum Creek Timber Co., Inc., 2011 MT 271, 362 Mont. 368, 264 P.3d 1090.

Restaurant Employee Fired After Taking Second Job at Another Restaurant While on Vacation: A Burger King assistant manager was fired. Defendant's motion for summary judgment in the wrongful discharge proceeding claimed that plaintiff requested vacation to tend to her family and used it to work at the Black Angus, that she was thus dishonest, and that the Black Angus was a Burger King competitor. Burger King permitted moonlighting with a noncompetitor. Summary judgment for defendant was reversed because plaintiff raised issues as to whether her vacation request was made according to Burger King policy, whether she had misled Burger King to obtain vacation time to work at a second, new job, and whether her two employers were competitors. Morton v. M-W-M, Inc., 263 M 245, 868 P2d 576, 51 St. Rep. 39 (1994).

Questions of Proper Adherence to Personnel Policies as Precluding Summary Judgment on Issue of Wrongful Discharge: The existence of a genuine issue of material fact regarding personnel policies in effect at the time of an employee's alleged wrongful discharge, coupled with denial of the employee's opportunity to enter into evidence written personnel policies purported to be in effect at the time of discharge, effectively denied the employee a hearing on the issue and precluded summary dismissal of the employee's wrongful discharge claim. Kenyon v. Stillwater County, 254 M 142, 835 P2d 742, 49 St. Rep. 673 (1992).

Statutory Definition of Good Cause Applicable — No New Standard Adopted: In asserting her wrongful discharge claim, Miller contended that a new standard of good cause be adopted based on whether: (1) the employee satisfied the general obligations of an employee described in 39-2-401; (2) the employer followed industry standards of progressive discipline; and (3) the employer exercised bad faith. The Supreme Court declined to adopt the suggested standard, opting instead for the statutory definition in 39-2-903. Based on its extensive findings, including those that Miller failed to implement new procedures and delayed completing tasks, the District Court correctly concluded that Miller's termination was reasonably based on job-related grounds and that, in light of the fact that the employer followed the express written provisions of its personnel policies, dismissal was proper. Miller v. Citizens St. Bank, 252 M 472, 830 P2d 550, 49 St. Rep. 422 (1992).

Effect of Employee Handbook Not Addressed in Summary Judgment — Remand: Discharged employee contended at trial that he was discharged in violation of the conditions of the company's own employee handbook. The trial court completely dismissed the case by summary judgment without addressing the issue of the language of the handbook. The Supreme Court found evidence of facts that indicated a possibility of a cause of action for the employee and remanded for further proceedings to first determine the effect of the language of the handbook and then determine whether an offer of alternative employment was made in good faith. Buck v. Billings Mont. Chevrolet, Inc., 248 M 276, 811 P2d 537, 48 St. Rep. 431 (1991).

Violation of Company Policy Resulting in Termination — No Breach of Implied Covenants in Employment Relationship: Employee admittedly took $350 from the checkstand till and used these company funds to finance his Nevada gambling trip, repaying the funds 16 days later. His employment was terminated for violation of company policy. Because the employer based the discharge on a fair and honest reason, employee's subsequent claim of breach of the implied covenant of good faith and fair dealing, negligent infliction of emotional distress, and negligence was properly summarily dismissed because there was no basis for the claim and no genuine issue of material fact existed. Majerus v. Skaggs Alpha Beta, Inc., 245 M 58, 799 P2d 1053, 47 St. Rep. 1693 (1990), following Niles v. Weissman & Sons, Inc., 241 M 230, 786 P2d 662, 47 St. Rep. 240 (1990).

Violation of Personnel and Public Policies — No Genuine Issue of Material Fact: Plaintiff in a wrongful discharge action alleged a public policy violation by employer in not adhering to the employee discipline procedure outlined in its personnel policy. However, plaintiff failed to show that employer had violated its alternative discipline procedure, and summary judgment for employer was proper because there was no genuine issue of material fact indicating a public policy violation by employer. Rupnow v. Polson, 234 M 66, 761 P2d 802, 45 St. Rep. 1734 (1988). See also Sullivan v. Cont. Constr. of Mont., LLC, 2013 MT 106, 370 Mont. 8, 299 P.3d 832.

FACTUAL MATTERS

Undisputed Facts Established Good Cause for Termination — Summary Judgment Upheld. Shepherd v. St., 2023 MT 99, 412 Mont. 330, 529 P.3d 1285.

Certified Question From Federal Court to Supreme Court on Evidence of Employee Misconduct Not Included in Termination Letter — Galbreath Rule Not Superseded by 1999 Statutory Amendments. Smith v. Charter Communications, Inc., 2023 MT 92, 412 Mont. 292, 529 P.3d 871.

Managerial Position — Greater Discretion in Termination Decision — Summary Judgment for Employer Proper: The District Court did not err in ruling on summary judgment that the defendant county had good cause to terminate the plaintiff's employment as human resources director given that she held a managerial position, which gave the defendant greater discretion in its termination decision. As the person in charge of human services, the plaintiff was a key player in the management team, entrusted with confidential employee information and counted on to keep the workplace running smoothly. The plaintiff failed to respond with material and substantial evidence to raise genuine issues of material fact as to whether the defendant county had legitimate business reasons for discharging her employment. Bird v. Cascade County, 2016 MT 345, 386 Mont. 69, 386 P.3d 602. See also Buckley v. W. Mont. Community Mental Health Center, 2021 MT 82, 403 Mont. 524, 485 P.3d 1211.

Motion for Entry of Judgment Improperly Denied — Employee's Sexual Harassment Precluded Absence of Good Cause — Verdict Reversed: The plaintiff filed a wrongful discharge case against the city after he was fired as police chief. Following a jury verdict in the plaintiff's favor, the District Court denied the city's motion for entry of judgment as a matter of law in its favor. The city appealed to the Supreme Court, which reversed the jury verdict. The Supreme Court also remanded the matter for the District Court to enter judgment in the city's favor based on its conclusion that the uncontested evidence showed the plaintiff had sexually harassed an employee and therefore he could not establish that the city had lacked "good cause" to terminate his employment. Reinlasoder v. Colstrip, 2016 MT 175, 384 Mont. 143, 376 P.3d 110.

District Court Correctly Concluded That Fired Employee Was Entitled to Trial on Claim of Termination Without Good Cause: Based on the evidence before the court, reasonable parties could disagree regarding inferences drawn from the report of the independent investigator. Although the employer had greater discretion to terminate because the plaintiff was a managerial employee, the plaintiff was entitled to a trial on the merits. Moe v. Butte-Silver Bow County, 2016 MT 103, 383 Mont. 297, 371 P.3d 415.

No Error in Upholding State Employee Discharge on Summary Judgment — Good Cause for Termination Based on Undisputed Facts: The District Court did not err by granting summary judgment to a state agency and by ruling as a matter of law that a state employee was terminated for good cause. Although certain facts were in dispute, there was no dispute that the employee repeatedly failed to report to work after a dispute with her immediate supervisor, refused to attend two meetings to discuss her concerns, and failed to obtain an excused absence. The undisputed facts established that the employee failed to satisfactorily perform job duties, causing disruption of the state agency's operation, and therefore constituted reasonable job-related grounds for dismissal. Davis v. St., 2015 MT 264, 381 Mont. 59, 357 P.3d 320.

Satisfactory Performance Evaluations — Budget Mismanagement — No Question of Fact: Plaintiff claimed her satisfactory performance evaluations presented sufficient evidence to create a question of fact as to whether she was discharged for good cause. Although the plaintiff received satisfactory or better performance evaluations over 8 years and regardless of whether the defendant articulated other, insufficient reasons for the plaintiff's discharge, the defendant employer presented evidence that the plaintiff failed to appropriately manage her budget. Because the evidence supported nonpretextual reasons for the defendant's discharge, the Supreme Court affirmed summary judgment for the defendant employer on this issue. Baumgart v. St., 2014 MT 194, 376 Mont. 1, 332 P.3d 225.

Lack of Evidence That Termination Was for Other Than Good Cause: Following a heated argument with a supervisor, Becker was terminated from employment and subsequently brought a wrongful discharge action, asserting that the termination was unlawful because there was not good cause for the termination. The District Court granted the employer's summary judgment motion to dismiss the case because Becker had presented no evidence that the termination occurred for anything other than good cause. On appeal, the Supreme Court affirmed. Becker's behavior was disruptive of the employer's operations in violation of company policy, and Becker presented no evidence that the reason for termination was false, whimsical, arbitrary, or capricious. Becker v. Rosebud Operating Serv., Inc., 2008 MT 285, 345 M 368, 191 P3d 435 (2008).

Wrongful Discharge Claim Not Premised on Discrimination Not Precluded by Dismissal of Employment Discrimination Claim — Summary Dismissal of Wrongful Discharge Claim Improper: Plaintiff filed a wrongful discharge from employment claim and an employment discrimination claim. The Department of Labor and Industry found no grounds for the discrimination claim, and the District Court subsequently granted defendant summary judgment on both claims, finding that the exclusive remedy provisions of Montana employment discrimination law precluded the wrongful discharge claim. Plaintiff appealed on grounds that dismissal of the discrimination claim did not preclude the wrongful discharge claim and that genuine issues of material fact existed in support of the wrongful discharge claim. The Supreme Court agreed on both issues. Discrimination can occur without a wrongful discharge and vice versa. When a plaintiff charges discrimination but fails to demonstrate a prima facie case warranting recovery, dismissal of the discrimination claim does not preclude a wrongful discharge claim that is not based on underlying claims of discrimination. In this case, plaintiff raised genuine issues of material fact regarding the legitimacy of the proffered reasons for his discharge that were outside the scope of discrimination, and it was error for the District Court to summarily dismiss the wrongful discharge claim. The case was remanded for trial on the wrongful discharge claim. Vettel-Becker v. Deaconess Medical Center of Billings, Inc., 2008 MT 51, 341 M 435, 177 P3d 1034 (2008), followed, with regard to a claim in tort, in Saucier v. McDonald's Restaurants of Mont., 2008 MT 63, 342 M 29, 179 P3d 481 (2008). See also Tonack v. Mont. Bank of Billings, 258 M 247, 854 P2d 326 (1993), Arthur v. Pierre Ltd., 2004 MT 303, 323 M 453, 100 P3d 987 (2004), and Selensky-Foust v. Mercer, 2022 MT 97, 408 Mont. 488, 510 P.3d 78.

No Complete Absence of Credible Evidence to Support Jury Award of Damages in Wrongful Discharge Case — Denial of Motion for Judgment as Matter of Law Proper: A jury awarded Casiano damages for wrongful discharge from employment. Defendant employer moved for judgment as a matter of law or a new trial on grounds that the damage award was based on the assumption that Casiano would have remained employed for 4 years had he not been wrongfully discharged, while uncontroverted evidence at trial showed that Casiano would have been laid off with all other hourly employees at the end of a particular construction project. Casiano asserted that contradictory evidence was presented regarding whether employment would have continued after the project was completed. In its order, the District Court agreed with defendant, but nevertheless denied the motion because it could not be said that there was a complete absence of credible evidence to support the jury's verdict. The Supreme Court agreed and affirmed. Casiano v. Greenway Enterprises, Inc., 2002 MT 93, 309 M 358, 47 P3d 432 (2002).

Sufficient Evidence to Create Question of Fact Whether Employee Satisfactorily Performed Job — Summary Dismissal of Wrongful Discharge Suit in Error: The District Court granted a motion by employer Plum Creek Manufacturing, L.P. (Plum Creek), for summary judgment on employee Andrews' wrongful discharge claim, concluding that although the discharge issue was a question of fact for a jury, even if a discharge had occurred, Plum Creek had good cause for the dismissal. The court declined to use the discharge element as a basis for granting the motion for summary judgment. Andrews argued on appeal that she was either actually or constructively discharged and maintained that any inadequacy on her part was a result of Plum Creek's failure to train her, define procedures, and appropriately supervise and evaluate her in her job. Plum Creek asserted that it had reasonable job-related grounds for dismissing Andrews based on economic grounds and Andrews' failure to satisfactorily perform job duties, regardless of who was at fault for that failure. The Supreme Court noted that District Courts may not adjudicate questions of fact on motions for summary judgment. There was conflicting evidence regarding the admission of failure to perform job duties and regarding performance of job duties, and it was the function of a jury, not the court, to weigh the evidence. Andrews presented sufficient evidence to create a question of fact whether she had satisfactorily performed her job, and the District Court should have allowed the jury to decide if good cause existed to discharge Andrews. Granting of the motion for summary dismissal was erroneous, and the Supreme Court remanded for further proceedings. Andrews v. Plum Creek Mfg., L.P., 2001 MT 94, 305 M 194, 27 P3d 426 (2001).

Direct Evidence of Discriminatory Intent — Standard of Proof — Heiat Criteria Applicable to Cases Involving Circumstantial Evidence: The summary judgment burdens of proof discussed in Heiat v. E. Mont. College, 275 M 322, 912 P2d 787 (1996), are not limited only to cases of sex discrimination brought under federal law, but rather apply in all types of discrimination cases whether based on federal or state law. However, the Heiat test is confined to use in cases in which discriminatory intent can only be proved by circumstantial evidence. In a direct evidence case, one in which the parties do not dispute the reason for the employer's action but only whether that action is illegal discrimination, the standard is that the employer must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief. That method of proof, as set out in ARM 24.9.610(5), is the proper test in cases in which the plaintiff presents direct evidence of discrimination. Traditional summary judgment principles apply to direct evidence discrimination cases, requiring the moving party to establish that no material issues of fact exist and that the movant is entitled to judgment as a matter of law. If the employer is the moving party, the employer has the burden of showing that no issues of material fact remain and that plaintiff cannot prove a prima facie case of discrimination as a matter of law. Reeves v. Dairy Queen, Inc., 1998 MT 13, 287 M 196, 953 P2d 703, 55 St. Rep. 44 (1998), clarified and followed in Hafner v. Conoco, Inc., 1999 MT 68, 293 M 542, 977 P2d 330, 56 St. Rep. 277 (1999).

Discharge for Reporting Apparent Crimes at Place of Employment: An auto dealer employee reported apparent illegal drug activities by several dealership employees to state authorities and at their request agreed to continue to provide such information and to attempt to purchase illegal drugs. There was no evidence that he was to be paid for this. He was fired 6 days later, allegedly because, as stated in a recorded phone call he made to his boss, he was "a [expletive deleted] snitch and we don't want you around here . . . . Every time we make a move, you call the [expletive deleted] FBI." Several weeks later, he was paid $40 for the information provided. Summary judgment for the employer in a wrongful discharge action thwarted the very purpose of the statute, which provides that a discharge in retaliation for reporting a violation of public policy is a wrongful discharge, and was reversed, although denial of employee's motion for summary judgment was affirmed because employer alleged reasons that if proved would support employee's dismissal. The case was remanded to determine whether the discharge was for good cause or for reporting a violation of public policy. Krebs v. Ryan Oldsmobile, 255 M 291, 843 P2d 312, 49 St. Rep. 1016 (1992), followed in Motarie v. N. Mont. Joint Refuse Disposal District, 274 M 239, 907 P2d 154, 52 St. Rep. 1209 (1995).

PREEMPTION

Wrongful Discharge of Bank Officer Whistleblower Not Preempted by Federal Law: A bank officer was dismissed after blowing the whistle on a bank's lending practices. The officer filed a state wrongful discharge claim. The bank argued that federal law in 12 U.S.C. 24 (Fifth) and 12 U.S.C. 1831j(a)(1) preempted the state claim. The District Court agreed and granted summary judgment for the bank. The officer appealed and the Supreme Court reversed. Preemption cannot shield a bank from tort liability for dismissing an employee in violation of a state public policy that is consistent with the purpose of federal statutes, nor may a bank avail itself of the federal "at pleasure" provision unless one cannot comply with both state and federal law or the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The state retaliatory discharge provision comports with the purpose of the federal whistleblower statute and does not present an obstacle to the federal law, nor does a conflict exist between the policies of the state and federal law, because both laws protect employees who take steps in their employment to promote the enforcement of laws and regulations. Fenno v. Mtn. W. Bank, 2008 MT 267, 345 M 161, 192 P3d 224 (2008), following Tiede v. CorTrust Bank, N.A., 748 NW 2d 748 (S. Dak. 2008). See also Favel v. Am. Renovation & Constr. Co., 2002 MT 266, 312 M 285, 59 P3d 412 (2002).

Wrongful Discharge Act Preempted by Federal Labor-Management Reporting and Disclosure Act: Vitullo was an assistant business manager with a union local. When Vitullo decided to run for the position of business manager, he was informed that it was a conflict and his employment was terminated. Vitullo then sued the union local for wrongful discharge in violation of this section. The District Court concluded that the state claim was preempted by the federal Labor-Management Reporting and Disclosure Act of 1959 and summarily dismissed the claim, so Vitullo appealed. In determining whether the state claim was preempted, the Supreme Court applied Dukes v. Sirius Constr., Inc., 2003 MT 152, 316 M 226, 73 P3d 781 (2003), concluding that a state law that interfered with the longstanding practice of union patronage was not only contrary to the purpose of the federal law, but directly conflicted with the democratic process that the federal law sought to protect. Courts have recognized that the ability of elected union officials to select their own administrators is an integral part of ensuring that union administrators are responsive to the will of union members. The union's constitution recognized the ability of a business manager to choose staff, and a state law that interfered with that ability frustrated the goals and objectives of the federal law. Thus, to the extent that the Montana Wrongful Discharge From Employment Act interferes with the constitutional appointment authority of elected union officers, it conflicts with the Labor-Management Reporting and Disclosure From Employment Act and is preempted. Summary dismissal was affirmed. Vitullo v. Int'l Bhd. of Elec. Workers, Local 206, 2003 MT 219, 317 M 142, 75 P3d 1250 (2003). See also Finnegan v. Leu, 456 US 431 (1982).

Discharge of Paper Tester Preempted by National Labor Relations Act — "Garmon" Doctrine Applied: Plaintiff, a paper tester for Stone Container Corporation (Stone), filed suit in state court, alleging that Stone's termination was without good cause in violation of Montana's Wrongful Discharge From Employment Act. Stone successfully removed the action to federal court where the District Court granted summary judgment for Stone, finding plaintiff's claim preempted by the National Labor Relations Act (NLRA). On appeal, the Ninth Circuit Court affirmed and applied the preemption holding in San Diego Bldg. Trades Council v. Garmon, 359 US 236 (1959), ruling that plaintiff's claim alleging a violation of a collective bargaining agreement, after the agreement's expiration but before negotiations to reopen have reached impasse, is preempted under the NLRA. Bassette v. Stone Container Corp., 25 F3d 757 (9th Cir. 1994).

Proof of Retaliatory Discharge — Claim Outside Context of Collective Bargaining Agreement Not Preempted by Federal Law: To prove retaliatory discharge involving sexual harassment, it must be shown that: (1) the employee was discharged; (2) the employee was subjected to sexual harassment during the course of employment; and (3) the employer's motivation for the discharge was to retaliate for the employee's resistance to the sexual harassment. When this factual inquiry does not turn on the meaning of any term of a collective bargaining agreement, the wrongful discharge claim is considered independent of the agreement for purposes of preemption under federal law. Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720, 49 St. Rep. 638 (1992), following Lingle v. Norge Div. of Magic Chef, Inc., 486 US 399, 100 L Ed 2d 410, 108 S Ct 1877 (1988), and followed in Miller v. Glacier County, 257 M 422, 851 P2d 401, 50 St. Rep. 339 (1993), and, with respect to sexual discrimination, Pike v. Burlington N. RR Co., 273 M 390, 903 P2d 1352, 52 St. Rep. 1005 (1995).

PROBATIONARY EMPLOYEE

Seasonal Employee Subject to Probationary Period Every Season — Policy Manual Supported Conclusion That Employee Was on Probation When Terminated: The District Court properly granted summary judgment dismissing the plaintiff employee's claims for wrongful discharge. The plaintiff was a winter seasonal employee for the employer ski resort during each of the winter seasons from 2003 to 2014. The employer hired the plaintiff for the 2014-2015 winter season, which was set to begin in November and to end in April, depending on the weather. According to the employer, the plaintiff was angry because he did not get hired for another position and he expressed his anger to other employees in a manner that the employer found insubordinate and inappropriate. Consequently, the employer terminated the employee before the end of the ski season. On appeal, the Supreme Court affirmed the District Court's dismissal of the action, reasoning that a seasonal rehire is clearly a new employee for all purposes, including for the purposes of the probationary period. As applied, the employer defined the period of probationary employment in the employee handbook as the first 6 months of employment, and the plaintiff was still on probation when the employer terminated his employment 4 months later. Dundas v. Winter Sports, Inc., 2017 MT 269, 389 Mont. 223, 410 P.3d 177.

Probationary Period Commences When Employee Starts Work: Blehm was discharged by the defendant hospital. Blehm argued that the probationary period had run because it commenced on the day the offer of employment was accepted. The Supreme Court disagreed and pointed out that for a period of time after accepting the offer Blehm was still employed by another hospital. The Supreme Court held that the probationary period commences on the day the employee actually starts to work. Blehm v. St. John's Lutheran Hospital, Inc., 2010 MT 258, 358 Mont. 300, 246 P.3d 1024.

Right to Terminate Employment for Any Reason During Probationary Period — No Common-Law Exception for Refusal to Violate Public Policy: Blehm was found to have been discharged during the probationary employment period. Blehm argued that the Supreme Court should recognize an exception to the right to terminate for any or no reason during the probationary period based upon a common-law exception that an employee could not be discharged for refusing to violate public policy. The Supreme Court stated that the Wrongful Discharge From Employment Act specifically excluded common-law remedies and that the purpose of either party being able to terminate an employment relationship during the probationary period for any or no reason would be undermined by creating a common-law exception. Blehm v. St. John's Lutheran Hospital, Inc., 2010 MT 258, 358 Mont. 300, 246 P.3d 1024.

Discretion of Mayor to Discharge Law Enforcement Officer Within Probationary Period — Officer's Right to Wrongful Discharge Claim Following Probationary Period: When the Legislature enacted the Wrongful Discharge From Employment Act, it did not remove a mayor's discretion under 7-32-4113 to review an officer's probationary period and determine whether a probationary law enforcement officer be recommended for permanent employment. Therefore, subsections (1) and (3) (now (1)(a) and (1)(c)) of this section do not apply as a matter of law to give a probationary officer grounds for wrongful discharge. However, once the officer has completed the probationary period in 7-32-4113 and is appointed, the protections in the Act apply and the officer may bring a wrongful discharge from employment claim. Ritchie v. Ennis, 2004 MT 43, 320 M 94, 86 P3d 11 (2004).

Extension of Firefighter's Probationary Employment — No Wrongful Discharge Within Probationary Period: Hunter was a probationary firefighter with the city of Great Falls. Hunter's probationary status was extended beyond the initial 6-month period and subjected to monthly review. Based on the review, Hunter was terminated from employment. Hunter filed a grievance for wrongful discharge and sought relief under 42 U.S.C. 1983. The District Court summarily dismissed both claims, and Hunter appealed, contending that the District Court erred in finding that Hunter was not entitled to relief under the Wrongful Discharge From Employment Act or federal law because of the ongoing status as a probationary employee. The Supreme Court affirmed. The Legislature did not set a maximum probationary period for firefighters. Thus, the city was entitled to extend Hunter's status as a probationary employee, and the city met its burden of showing that a probationary period was in effect at the time of Hunter's discharge. As a probationary employee, Hunter was not entitled to relief under state or federal law, and the District Court properly dismissed Hunter's claims. Hunter v. Great Falls, 2002 MT 331, 313 M 231, 61 P3d 764 (2002), distinguishing Whidden v. John S. Nerison, Inc., 1999 MT 110, 294 M 346, 981 P2d 271 (1999), and Hobbs v. Thompson Falls, 2000 MT 336, 303 M 140, 15 P3d 418 (2000).

Confirmation of Police Officer After Completion of Probationary Period — No Denial Without Good Cause: Hobbs argued that the lower court erred in dismissing his suit against the city of Thompson Falls for terminating him without cause because the parties agreed that he had completed his probationary period and this section states that an employee completing a probationary period may be terminated only for good cause. The city argued that 7-32-4113 extends the probationary period for 30 days because it states that upon completion of a probationary period, an officer's appointment must be confirmed by the city's governing body within 30 days. The Supreme Court held that Hobbs could be discharged only for good cause because the only way to reconcile the two statutes was to interpret them to mean that an officer's employment upon completion of the probationary period was subject to confirmation by the city's governing body. However, because the officer was beyond the probationary period during that 30-day time, the officer's confirmation could be denied only upon a showing of good cause. Hobbs v. Thompson Falls, 2000 MT 336, 303 M 140, 15 P3d 418, 57 St. Rep. 1432 (2000), distinguishing Schend v. Thorson, 170 M 5, 549 P2d 809 (1976).

Cause of Action by Nonprobationary Employee if Discharge Not for Good Cause: An employee who has completed the employer's probationary period has a valid ground for maintaining a cause of action against the employer if the discharge was not based on good cause, which is defined as reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. Koepplin v. Zortman Min., Inc., 267 M 53, 881 P2d 1306, 51 St. Rep. 880 (1994).

MISCELLANEOUS

Termination for Cause Proper — Sufficient Credible Evidence: An employee with a long history of documented workplace issues who was terminated for cause subsequently sued the former employer. On cross-motions for summary judgment, the District Court ruled in favor of the former employer. On appeal, the Supreme Court affirmed, explaining that the former employer presented sufficient credible evidence as to the reasons for termination that were legitimate business reasons constituting good cause. The court further explained that the former employee failed to submit evidence creating a dispute as to any material fact that the reasons were false, whimsical, or merely a pretext. Putnam v. Cent. Mont. Medical Center, 2020 MT 65, 399 Mont. 241, 460 P.3d 419.

Managerial Position — Greater Discretion in Termination Decision — Summary Judgment for Employer Proper: The District Court did not err in ruling on summary judgment that the defendant county had good cause to terminate the plaintiff's employment as human resources director given that she held a managerial position, which gave the defendant greater discretion in its termination decision. As the person in charge of human services, the plaintiff was a key player in the management team, entrusted with confidential employee information and counted on to keep the workplace running smoothly. The plaintiff failed to respond with material and substantial evidence to raise genuine issues of material fact as to whether the defendant county had legitimate business reasons for discharging her employment. Bird v. Cascade County, 2016 MT 345, 386 Mont. 69, 386 P.3d 602. See also Buckley v. W. Mont. Community Mental Health Center, 2021 MT 82, 403 Mont. 524, 485 P.3d 1211.

Punitive Damage Award Upheld — Evidence That Employee Was Retaliated Against for Refusal to Violate Public Policy: A case was properly submitted to the jury when evidence established that the plaintiff was retaliated against for failing to waive his right to overtime and vacation, insisting on fair pay for his work, and challenging employer practices that the plaintiff believed were unfair to female employees. Harrell v. Farmers Educ. & Co-op Union, 2013 MT 367, 373 Mont. 92, 314 P.3d 920.

Employee Must Show Termination Was for Refusal to Violate Public Policy in Order to Claim Punitive Damages: The plaintiff in a wrongful discharge action argued that the District Court had erred in not allowing him to amend his complaint to claim punitive damages. The Supreme Court disagreed, stating that the District Court had granted the defendant's motion for summary judgment, finding that the plaintiff had not been fired for refusing to violate public policy, and that punitive damages could be claimed only upon a showing that the termination was for refusing to violate public policy. Cartwright v. Scheels All Sports, Inc., 2013 MT 158, 370 Mont. 369, 310 P.3d 1080.

No Award of Damages for Wrongful Discharge Based on Failure to Diligently Seek New Employment — Reversible Error: The District Court correctly found that Cromwell was wrongfully discharged from a job as a school district business manager, but the court declined to award any damages because Cromwell did not exercise reasonable diligence in finding new employment. However, once a finding of wrongful discharge was made, the burden shifted from Cromwell to the school district to plead a lack of reasonable diligence in finding new employment as an affirmative defense, and the school district presented no witnesses to support its contention. Cromwell testified that instead of full-time employment with the school district, she took a job working fewer hours for less pay than the previous employment and had to travel 35 miles from home in order to work. This fact, in the absence of evidence by the school district that Cromwell failed to exercise diligence in finding employment, supported an award of damages, and the Supreme Court reversed for findings and conclusions regarding an appropriate amount of damages based on the trial record. Cromwell v. Victor School District No. 7, 2006 MT 171, 333 M 1, 140 P3d 487 (2006).

In-House Counsel Not Precluded From Bringing Wrongful Discharge From Employment Claim Even if Proof of Claim Requires Disclosure of Confidential Information: Burkhart was hired as in-house counsel for Semitool, Inc. (Semitool). Following his discharge from employment, Burkhart sued Semitool for wrongful discharge. The District Court concluded that even though Burkhart had a right to protection against wrongful discharge, Semitool also had a right to protection of its trade secrets and that because the rights conflicted, the attorney-client privilege must prevail. The court dismissed Burkhart's claim on grounds that he was precluded from bringing an employment claim because, as staff counsel hired to provide legal advice or services, proof of the claim would require disclosure of confidential matters. Burkhart maintained on appeal that the Wrongful Discharge From Employment Act applied to any employee and that there was no exclusion for attorneys. Semitool argued that because Art. VII, sec. 2, Mont. Const., gives the Supreme Court sole authority to regulate the conduct of lawyers, the Act is unconstitutional to the extent that it interferes with that authority. Semitool also cited Campbell v. Bozeman Investors of Duluth, 1998 MT 204, 290 M 374, 964 P2d 41 (1998), for the "universal rule" that clients may fire lawyers at any time, for any reason, with or without cause and that for that reason, application of the Act to the employment relationship of staff attorneys and the client employer was not proper. In a case of first impression, the Supreme Court examined two lines of cases from other jurisdictions that appeared to support either conclusion. The court then concluded that the reasoning and analysis in Gen. Dynamics Corp. v. Superior Court, 876 P2d 487 (Calif. 1994), and its progeny were the more sound and realistic approach. The holding in Campbell does not create an absolute right to discharge an attorney with complete impunity no matter the form of the attorney-client relationship. The universal rule does not apply in an attorney-client relationship in which the attorney is the employee of the client because in that context, the client has avoided the traditional relationship and granted the attorney protections that do not apply to independent contractors, but do apply to employees, including the Wrongful Discharge From Employment Act. Further, although Art. VII, sec. 2, Mont. Const., gives the Supreme Court sole authority to regulate the conduct of lawyers, the court does not have sole authority to regulate employer conduct. The Act pertains solely to employer conduct and does not implicate the conduct of lawyers in the practice of law, and thus, it is not an unconstitutional encroachment on the court's authority for the Act to apply to lawyers as employees or employers. Further, Rule 1.6 of the Montana Rules of Professional Conduct contemplates that a lawyer may reveal confidential attorney-client information to the extent that the lawyer reasonably believes necessary to establish an employment-related claim against an employer who is also a client. Thus, the plain language of the Wrongful Discharge From Employment Act requires courts to recognize an in-house counsel's right to pursue and maintain an action for wrongful discharge, and those claims are within the contemplation of the rules of professional conduct for attorneys. A lawyer does not forfeit rights simply because confidential information must be used to prove them, nor may a client gain the right to cheat the lawyer by imparting confidences. Burkhart v. Semitool, Inc., 2000 MT 201, 300 M 480, 5 P3d 1031, 57 St. Rep. 785 (2000). See also Doe v. A Corp., 709 F2d 1043 (5th Cir. 1983).

Ninth Circuit Court — Wrongful Discharge Claim Valid Even if Employer Acted Under Mistaken Fact Interpretation — Proof of Employer Bad Faith Irrelevant: A Delta Airlines' employee was terminated after she intentionally submitted payroll records with three incorrect entries that allowed her to collect $250 in unearned wages. The employee filed suit, alleging wrongful discharge. Delta moved for a directed verdict, arguing that the employee had failed to present any evidence that Delta's reasons for termination were a pretext and not the honest reason. When the District Court awarded the employee $60,000 in damages for wrongful discharge, Delta appealed, claiming that Montana's Wrongful Discharge From Employment Act does not provide a cause of action when the employer acted in good faith, but rather when the discharge is based on mistaken facts. Citing the Montana Supreme Court decisions Morton v. M-W-M, Inc. 263 M 245, 868 P2d 576 (1994), and Howard v. Conlin Furniture No. 2, Inc. 272 M 433, 901 P2d 116 (1995), the Ninth Circuit Court affirmed the District Court decision, ruling that the employee was not required to prove that Delta acted in bad faith because the issue was irrelevant to whether Delta was mistaken about the facts surrounding the dismissal. Marcy v. Delta Airlines, 166 F3d 1279 (9th Cir. 1999), distinguished in Sullivan v. Cont. Constr. of Mont., LLC, 2013 MT 106, 370 Mont. 8, 299 P.3d 832.

Wrongful Discharge From Employment Act Superseding and Impliedly Repealing At-Will Employment Provisions: Prior to the amendment of this section and the repeal of 39-2-503, former subsection (2) of this section provided that a discharge is wrongful only if the discharge was not for good cause and the employee had completed the probationary period of employment. However, under 39-2-503 (now repealed), a nonprobationary at-will employee may be discharged without good cause. The sections clearly conflict. Exercising its power to impliedly repeal conflicting legislation, the Supreme Court held that because the plain meaning of this section is that a nonprobationary employee may not be discharged without good cause, the provisions of that section have effectively eliminated the at-will employment provisions and thus supersede and impliedly repeal 39-2-503 (now repealed). Because the good cause requirement applies to an employee upon completion of probation, the employer must define the probationary period at the onset of the employment relationship and has the burden of showing that the probationary period was in effect at the time of a discharge (2001 amendments to this section established a default 6-month probationary period). Whidden v. John S. Nerison, Inc., 1999 MT 110, 294 M 346, 981 P2d 271, 56 St. Rep. 456 (1999), overruling Medicine Horse v. Trustees, Big Horn County School District No. 27, 251 M 65, 823 P2d 230, 48 St. Rep. 1074 (1991).

Introduction of Postdischarge Evidence to Substantiate Reasons for Discharge: Jarvenpaa contended that evidence pertaining to reasons why he was discharged should have been limited to what was contained in a letter written to him by the employer and to what occurred before the letter was written and that evidence acquired after his discharge should not have been introduced. The District Court properly exercised its discretion in allowing the postdischarge evidence because the employer did not offer the evidence as collateral reasons for the discharge, but rather to substantiate the reasons given in the letter, which was relevant to the question of whether the discharge was wrongful. The jury was also properly instructed to consider only reasons asserted by the employer at the time of discharge. Jarvenpaa v. Glacier Elec. Co-op,

Inc., 1998 MT 306, 292 M 118, 970 P2d 84, 55 St. Rep. 1261 (1998), distinguishing Swanson v. St. John's Lutheran Hosp., 182 M 414, 597 P2d 702, 36 St. Rep. 1075 (1979), Flanigan v. Prudential Fed. S&L Ass'n, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986), and Galbreath v. Golden Sunlight Mines, Inc., 270 M 19, 890 P2d 382 (1995).

Direct Evidence of Discriminatory Intent — Standard of Proof — Heiat Criteria Applicable to Cases Involving Circumstantial Evidence: The summary judgment burdens of proof discussed in Heiat v. E. Mont. College, 275 M 322, 912 P2d 787 (1996), are not limited only to cases of sex discrimination brought under federal law, but rather apply in all types of discrimination cases whether based on federal or state law. However, the Heiat test is confined to use in cases in which discriminatory intent can only be proved by circumstantial evidence. In a direct evidence case, one in which the parties do not dispute the reason for the employer's action but only whether that action is illegal discrimination, the standard is that the employer must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief. That method of proof, as set out in ARM 24.9.610(5), is the proper test in cases in which the plaintiff presents direct evidence of discrimination. Traditional summary judgment principles apply to direct evidence discrimination cases, requiring the moving party to establish that no material issues of fact exist and that the movant is entitled to judgment as a matter of law. If the employer is the moving party, the employer has the burden of showing that no issues of material fact remain and that plaintiff cannot prove a prima facie case of discrimination as a matter of law. Reeves v. Dairy Queen, Inc., 1998 MT 13, 287 M 196, 953 P2d 703, 55 St. Rep. 44 (1998), clarified and followed in Hafner v. Conoco, Inc., 1999 MT 68, 293 M 542, 977 P2d 330, 56 St. Rep. 277 (1999).

Fundamental Constitutional Right to Pursue Employment — Termination for Refusal to Abide by Invalid Rule Wrongful: Wadsworth, a real estate appraiser, sued the Department of Revenue for wrongful discharge from employment after being dismissed by the Department for failing to comply with the Department's conflict of interest rule. The rule prohibited Department employees from engaging in independent fee appraisals and other activities during off-duty hours. A jury found that Wadsworth was wrongfully discharged and awarded damages. On appeal, the state argued that the District Court erred by referring questions of law to the jury for determination. The Supreme Court held that it was harmless error for the District Court to submit to the jury the question of whether the right Wadsworth asserted was a constitutionally protected right and, if constitutionally protected, whether it was a fundamental right and, if it was a fundamental right, whether the state provided a compelling interest for infringing upon it. The Supreme Court concluded that the opportunity to pursue employment is a fundamental right as a necessary incident to the fundamental right to pursue life's basic necessities. Applying a strict scrutiny analysis, the court held that the state failed to demonstrate a compelling interest for the conflict of interest rule restricting Wadsworth's ability to pursue employment opportunities and thus pursue life's basic necessities. The state's termination of Wadsworth in retaliation for refusal to abide by a rule that was in contravention of the constitution violated the Wrongful Discharge From Employment Act. Wadsworth v. St., 275 M 287, 911 P2d 1165, 53 St. Rep. 146 (1996).

Termination From Managerial Position and Refusal to Accept Lesser Position Constituting Discharge From Employment: Howard was absolutely and finally terminated from his managerial position, after which he was offered a functionally different and substantially inferior position with the same employer. This was not a lateral transfer or minor change in job description. Howard's refusal to accept an offer of a lesser position at best affected his duty to mitigate his damages. The termination constituted a discharge from employment under the provisions of this part and raised a question of fact as to whether the discharge was made with good cause. It was reversible error for the trial court to dismiss Howard's complaint on the assumption that the termination was a constructive discharge based on reasonable grounds for demotion. Howard v. Conlin Furniture No. 2, Inc., 272 M 433, 901 P2d 116, 52 St. Rep. 814 (1995).

Threats by Employee Against Management — Discharge Not Wrongful: Despite employee's contention that his statements to company management were not threats, the proper emphasis was whether they were heard as threats, not whether they were intended as threats. Given the District Court's characterization of the threats as shocking and outrageous and the conclusion that no employer has to tolerate threats and abuse of that nature, the employee's threat, when viewed in the context of the case, was at least insubordination justifying immediate termination under the employer's personnel policy. The conduct was disruptive to the workplace, and the employer had the right to serve its own legitimate business interest by discharging the employee under the circumstances. Koepplin v. Zortman Min., Inc., 267 M 53, 881 P2d 1306, 51 St. Rep. 880 (1994).

Good Faith Considerations Improperly Considered in Context of Age Discrimination Claim: The District Court granted summary judgment to employer on an age discrimination claim, concluded that immunity under 2-9-111 did not apply, and then went on to grant summary judgment to the employer on a wrongful discharge claim based on its determination that the employee was terminated for good cause, as defined in 39-2-903. The good cause discussion and conclusion followed immediately upon the court's consideration of the employer's long-term dissatisfaction with the employee's work performance in the context of the age discrimination claim. The motion for summary judgment and supporting arguments on the wrongful discharge claim differed significantly from those relating to the age discrimination claim, and the good cause issue as it related to the wrongful discharge claim was not raised or argued by either party. By granting summary judgment on an issue not before it, the court effectively denied Kenyon notice and an opportunity to be heard on the issue. The case was remanded. Kenyon v. Stillwater County, 254 M 142, 835 P2d 742, 49 St. Rep. 673 (1992), overruled, with regard to plaintiff's burden to adduce facts that, if believed, support a reasonable inference that plaintiff was denied an employment opportunity and, if the employer rebuts the inference of discrimination with evidence of legitimate, nondiscriminatory reasons, to demonstrate with specific facts that the employer's explanation is a pretext, in Heiat v. E. Mont. College, 275 M 322, 912 P2d 787, 53 St. Rep. 162 (1996).

Conclusory Allegations of Fraud Insufficient to Justify Punitive Damage Award: Plaintiff maintained in a conclusory fashion that because the original reasons given for his discharge later turned out to be false, the employer had engaged in fraud warranting the award of punitive damages. However, plaintiff never reported or refused to violate public policy and was therefore precluded from obtaining punitive damages under this section. Buck v. Billings Mont. Chevrolet, Inc., 248 M 276, 811 P2d 537, 48 St. Rep. 431 (1991).

Attorney General's Opinions

Termination of Payments in Lieu of Participation in Group Health Plan for Nonunion County Employee: The Board of County Commissioners may terminate payments in lieu of participation in a group health plan for a nonunion county employee only if termination is consistent with the county's employment agreement with the employee. 51 A.G. Op. 11 (2005).

39-2-905. Remedies.

Compiler's Comments

2021 Amendment: Chapter 117 in (1) near beginning of second sentence inserted "derived from any new kind, nature, or type of work, hire, contractor status, or employment that did not exist at the time of discharge" and near end of second sentence inserted "from the work, hire, contractor status, or employment"; inserted (2) regarding verdict or award in favor of discharged employee and district court deduction of payments, compensation, and benefits from the amount awarded for lost wages; and made minor changes in style. Amendment effective March 31, 2021.

Severability: Section 9, Ch. 117, L. 2021, was a severability clause.

2001 Amendment: Chapter 583 in (2) at end substituted "39-2-904(1)(a)" for "39-2-904(1)"; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 583, L. 2001, provided: "WHEREAS, in Whidden v. John S. Nerison, Inc., 1999 MT 110, 294 Mont. 346, 981 P.2d 271 (1999), the Montana Supreme Court held that the at-will employment statute, section 39-2-503, MCA, had been impliedly repealed by the Wrongful Discharge From Employment Act, Title 39, chapter 2, part 9, MCA."

1993 Amendment: Chapter 442 inserted third sentence of (1) requiring deduction from interim earnings any reasonable amount expended regarding new employment prior to deduction of interim earnings from lost wages.

Case Notes

Federal Willful Loss of Earnings Doctrine and Common Law Inconsistent With State Law — District Court Erroneously Granted Employer Summary Judgment on Damages Element Based on Employee's Failure to Seek Employment to Mitigate Damages — Employer Bears Burden of Proving Comparable Employment Was Available and Amount That Could Have Been Earned. Timpano v. Cent. Mont. District Six Human Resources Dev. Council, 2022 MT 169, 409 Mont. 536, 516 P.3d 655.

Punitive Damage Award Upheld — Evidence That Employee Was Retaliated Against for Refusal to Violate Public Policy: A case was properly submitted to the jury when evidence established that the plaintiff was retaliated against for failing to waive his right to overtime and vacation, insisting on fair pay for his work, and challenging employer practices that the plaintiff believed were unfair to female employees. Harrell v. Farmers Educ. & Co-op Union, 2013 MT 367, 373 Mont. 92, 314 P.3d 920.

Employee Must Show Termination Was for Refusal to Violate Public Policy in Order to Claim Punitive Damages: The plaintiff in a wrongful discharge action argued that the District Court had erred in not allowing him to amend his complaint to claim punitive damages. The Supreme Court disagreed, stating that the District Court had granted the defendant's motion for summary judgment, finding that the plaintiff had not been fired for refusing to violate public policy, and that punitive damages could be claimed only upon a showing that the termination was for refusing to violate public policy. Cartwright v. Scheels All Sports, Inc., 2013 MT 158, 370 Mont. 369, 310 P.3d 1080.

Wrongful Discharge Claim Not for Sum Certain Subject to Default by Clerk of Court: Plaintiff filed a wrongful discharge claim requesting $140,000 in damages and other relief deemed just or proper. The amount apparently represented a combination of 4 years of plaintiff's salary and claimed weekly bonuses. After defendant failed to respond to the claim, the Clerk of District Court entered a default judgment in favor of plaintiff for a sum certain. Defendant subsequently sought to vacate the judgment on grounds that the award was incapable of being calculated to a sum certain. The District Court rejected the motion after determining that the amount was capable of being made certain. On appeal, the Supreme Court reversed. Neither plaintiff's proposed aggregate total damages nor the fact that plaintiff's affidavit attested to such a sum automatically converted the claim to a sum certain. A mere estimate of damages does not constitute a sum certain. Although an employee alleging wrongful discharge may recover lost wages for a period not to exceed 4 years, the District Court never addressed whether plaintiff had undertaken efforts to find a new job with reasonable diligence, and this failure overlooked the question of fact that reasonably could have lowered the amount to which plaintiff would be entitled. The contingencies that were not considered with regard to defendant employer's obligation to pay bonuses and the lack of exploration into plaintiff's diligence in finding a replacement job rendered the default judgment a mere estimate of potential damages. Thus, the District Court slightly abused its discretion in refusing to set aside the default under the good cause standard of former Rule 55(c), M.R.Civ.P. (now superseded), and the case was remanded to allow defendant to file an answer. Bryden v. Lakeside Ventures, LLC, 2009 MT 320, 352 M 452, 218 P3d 61 (2009), following Hoyt v. Eklund, 249 M 307, 815 P2d 1140 (1991).

No Award of Damages for Wrongful Discharge Based on Failure to Diligently Seek New Employment — Reversible Error: The District Court correctly found that Cromwell was wrongfully discharged from a job as a school district business manager, but the court declined to award any damages because Cromwell did not exercise reasonable diligence in finding new employment. However, once a finding of wrongful discharge was made, the burden shifted from Cromwell to the school district to plead a lack of reasonable diligence in finding new employment as an affirmative defense, and the school district presented no witnesses to support its contention. Cromwell testified that instead of full-time employment with the school district, she took a job working fewer hours for less pay than the previous employment and had to travel 35 miles from home in order to work. This fact, in the absence of evidence by the school district that Cromwell failed to exercise diligence in finding employment, supported an award of damages, and the Supreme Court reversed for findings and conclusions regarding an appropriate amount of damages based on the trial record. Cromwell v. Victor School District No. 7, 2006 MT 171, 333 M 1, 140 P3d 487 (2006).

Award of Zero Damages — Jury Verdict Supported by Substantial Evidence: Tyner sued the county for wrongful discharge and alleged violation of Tyner's civil rights. Tyner claimed that he was fired because he had run against one of the County Commissioners in the recent election and because he had criticized the handling of a county contract. The District Court granted a directed verdict on the alleged civil rights violations. The jury also found that Tyner was wrongfully discharged and awarded zero damages. The Supreme Court held that there was sufficient evidence to justify a zero damage award and that the jury verdict was supported by substantial evidence. Tyner was not entitled to a new trial. Tyner v. Park County, 271 M 355, 897 P2d 202, 52 St. Rep. 507 (1995).

Part-Time Employee Fired After Taking Second, Full-Time Job — Mitigation of Damages: It was error to find that a part-time Burger King employee fired shortly after she took a second job at the Black Angus mitigated any wrongful discharge damages by working full-time at the Black Angus and earning more than she earned at Burger King. It was also error to find that defendant was entitled to summary judgment because employee suffered no damages. The work hours at the two places were presumably compatible, so she could have worked both jobs. Therefore, she suffered the loss of her Burger King earnings. Morton v. M-W-M, Inc., 263 M 245, 868 P2d 576, 51 St. Rep. 39 (1994).

Determination of Lost Wages and Benefits — Award Not Excessive: The jury was instructed in the exact language of this section and charged with determining the amount of lost wages and fringe benefits after deducting interim earnings in an amount the employee could have earned with reasonable diligence. The jury did not abuse its discretion in applying the statutory criteria, and the amount arrived at was not considered excessive as a matter of law. Kestell v. Heritage Health Care Corp., 259 M 518, 858 P2d 3, 50 St. Rep. 919 (1993).

Employee Testimony Regarding Damages — No Error: The District Court allowed employee Arnold to testify as to his approximate losses in wages and benefits due to his wrongful discharge and allowed Arnold's counsel to present a written summary of the alleged damages on summation. Arnold's estimates were substantiated by personal records and knowledge of what the benefits were worth, and it was not error to consider Arnold competent to testify. It was an abuse of discretion, in light of the jury's ability to weigh the evidence and arrive at its own damage assessment, to allow counsel's use of damage estimates during summation when the figures were not totally unsubstantiated by evidence. Arnold v. Boise Cascade Corp., 259 M 259, 856 P2d 217, 50 St. Rep. 784 (1993).

Award of Damages for Lost Wages and Benefits as Discretionary: The amount of damages recoverable for lost wages and benefits under subsection (1) of this section is discretionary rather than mandatory, and a jury instruction to that effect was proper. Weber v. St., 253 M 148, 831 P2d 1359, 49 St. Rep. 397 (1992), distinguishing Bascom v. Carpenter, 126 M 129, 246 P2d 223 (1952), and Lamb v. Missoula Imports, 230 M 183, 748 P2d 965 (1988).

Private Attorney General Doctrine Inapplicable to Case in Which Recovery Sought for Personal Losses for Wrongful Discharge: As part of his wrongful discharge claim, Weber sought to apply the private attorney general doctrine, which allows the prevailing party to receive an award of costs and attorney fees when the government fails to enforce interests significant to its citizens. In seeking to apply the doctrine, Weber focused on the egregious conduct surrounding an inflated agency claim, which he was ordered by his superiors to pay, rather than on the conduct that led to his wrongful discharge. The Supreme Court held that the private attorney general exception did not apply because Weber's claim was brought to reimburse him for losses due to his wrongful discharge rather than as a vehicle to reimburse the state for fraudulent claims. Weber v. St., 253 M 148, 831 P2d 1359, 49 St. Rep. 397 (1992).

Pre-Act Claim for Damages Improperly Disallowed: The District Court improperly disallowed plaintiff's wrongful discharge claim for damages for pain and suffering, emotional distress, and punitive damages that arose from an employment-related harassment incident that occurred prior to enactment of this section. Dagel v. Great Falls, 250 M 224, 819 P2d 186, 48 St. Rep. 919 (1991), followed in Kulm v. Mont. St. Univ.-Bozeman, 285 M 328, 948 P2d 243, 54 St. Rep. 1175 (1997).

Wrongful Discharge Law Limitations on Damages Not Violative of Equal Protection Guarantee — Relation to Legitimate State Interests: The Supreme Court applied the rational basis test in determining whether provisions of the Wrongful Discharge From Employment Act, Title 39, ch. 2, part 9, which prohibit recovery of noneconomic damages and punitive damages, violated the constitutional guarantee of equal protection. The court found that the Act survived scrutiny because it was rationally related to legitimate state interests, including: (1) promoting the financial interests of businesses in the state or potentially in the state to improve economic conditions; (2) limiting employers' liability for wrongful discharge through restrictions on recovery; (3) providing greater certainty in defining an employer's duties by recalling a contract law limitation on damages for pain and suffering; (4) providing a reasonably just substitute for the common-law causes it abrogates; (5) bettering prior common-law provisions for recovery by allowing claims for prejudgment interest; and (6) allowing some recovery for wrongful discharges that would otherwise deny retirement benefits. Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989), overruling Pfost v. St., 219 M 206, 713 P2d 495, 42 St. Rep. 1957 (1985), White v. St., 203 M 363, 661 P2d 1272, 40 St. Rep. 507 (1983), and Corrigan v. Janney, 192 M 99, 626 P2d 838, 38 St. Rep. 545 (1981).

Offset of Jury Award — Pretrial Agreement: Parties agreed prior to trial that any amount awarded by the jury for lost wages would be offset by the amount of the grievance panel award and the amount of unemployment benefits received. Therefore, the District Court properly reduced a jury award of $850 by the grievance panel award of $671.05 and unemployment compensation of $178.95. Myers v. Dept. of Agriculture, 232 M 286, 756 P2d 1144, 45 St. Rep. 1056 (1988).

Law Review Articles

Boldly Into the Fog: Limiting Rights of Recovery for Infliction of Emotional Distress, Cox & Shott, 53 Mont. L. Rev. 197 (1992).

39-2-910. Probationary period.

Compiler's Comments

Effective Date: Section 10, Ch. 117, L. 2021, provided: "[This act] is effective on passage and approval." Approved March 31, 2021.

Severability: Section 9, Ch. 117, L. 2021, was a severability clause.

39-2-911. Limitation of actions.

Compiler's Comments

2021 Amendment: Chapter 117 in (3) near middle of first sentence substituted "14 days of the date of the discharge" for "7 days of the date of the discharge", at end of first sentence substituted "in writing or electronically of the existence of the internal procedures" for "of the existence of such and supply the discharged employee with a copy of them", inserted second sentence regarding timeframe for employee to initiate procedures, and inserted third sentence regarding procedures being considered provided to the employee; inserted (4) regarding civil action service of process for wrongful discharge no later than 6 months after filing the complaint, court dismissal without prejudice after 6-month period, and continuance of the 1-year period of limitations for a civil action; and made minor changes in style. Amendment effective March 31, 2021.

Severability: Section 9, Ch. 117, L. 2021, was a severability clause.

Case Notes

Written Policies Provided to Terminated Employee Also Serve as Notice of Those Policies — Failure to Follow Internal Grievance Process Because of Possibility of Adverse Reaction Does Not Render Process Futile: Contrary to the plaintiff's arguments, the employer's policies in the handbook given to the plaintiff clearly stated that they applied to terminations. The written copy of the policy document also served to provide notice to the plaintiff of the policies contained within it, and the mere possibility of an adverse outcome from compliance with the company's internal grievance policy did not render the process futile. Since the plaintiff did not justify why the Wrongful Discharge from Employment Act's internal grievance requirements should not apply to him, the Supreme Court affirmed the District Court's holding that the plaintiff's failure to pursue the company's internal grievance process precluded his wrongful discharge case as a matter of law. Hathaway v. Zoot Enterprises, Inc., 2021 MT 292, 406 Mont. 239, 498 P.3d 204.

Tolling Provision Not Limited to 120 Days When Administrative Procedure Not Exhausted — Appeal Timely Filed: The plaintiff was terminated from her position with the Montana Department of Corrections and advised that there was an administrative grievance procedure available. She filed a grievance on the same day. About 13 months later, a final administrative decision was issued recommending that the plaintiff's grievance be denied. The plaintiff filed an appeal in District Court 26 days later. The Department of Corrections argued that the claim was time-barred, and the District Court dismissed the case as untimely. On appeal, the Supreme Court held that under 39-2-911, an employee may elect to file a court appeal 90 days after the administrative appeal is initiated or the employee may elect to toll the statutory limitation period until the conclusion of the administrative proceeding if longer than 90 days. The plaintiff chose the latter course and therefore her appeal was timely filed. The Supreme Court reversed and remanded the case. Shepherd v. State ex rel. Dept. of Corrections, 2021 MT 70, 403 Mont. 425, 483 P.3d 518.

Statute of Limitations — Lawsuit Against Municipality — No Tolling for Filing Notice of Claim With Local Government: The city of Dillon terminated an employee. Nearly 1 year later, the employee filed a notice of claim with the city, including an unfiled complaint that alleged wrongful termination. Several weeks later, the city responded to deny the claims. The former employee filed the complaint in District Court less than a week later, a little more than a year after the termination. The former employee prevailed in District Court. On appeal, the city argued that the action had been time-barred due to the 1-year statute of limitations under the Wrongful Discharge from Employment Act. The Supreme Court agreed, finding that the 120-day tolling provision in 2-9-301(2) applies only to claims against the state, not against political subdivisions. There is no requirement to file the notice of claim with a municipal government prior to initiating a lawsuit, and, correspondingly, there is no provision allowing for tolling of the statute of limitations while a municipality responds. The District Court's order was reversed and remanded for entry of judgment in favor of the city. Turner v. Dillon, 2020 MT 83, 399 Mont. 481, 461 P.3d 122.

Contract Action Not Applicable When Contract Terms Not Fulfilled — Wrongful Discharge Claim Dismissed as Untimely: Zier signed an agreement that he would become president of defendant bank when the bank obtained a contingent charter from the division of banking and when the bank received federal approval for operation. Zier began working for the bank in a different capacity, but neither contingency occurred, so Zier was not offered the president position and was subsequently discharged from employment. Zier filed a breach of contract action, but the bank argued that the contract claim was actually a claim for wrongful discharge. The District Court agreed with the bank and dismissed the claim because Zier failed to bring the action within 1 year as required under 39-2-911. Zier appealed, but the Supreme Court affirmed. The bank was not liable for breach of contract because the conditions of the agreement did not occur, so the District Court properly refused to consider the claim under a contract theory and correctly considered the claim as a wrongful discharge claim. Zier's failure to bring the claim within the 1-year statute of limitations warranted dismissal. Zier v. Hancock, 2008 MT 255, 345 M 89, 189 P3d 1189 (2008). See also Kneeland v. Luzenac America, Inc., 1998 MT 136, 289 M 201, 961 P2d 725 (1998).

Transportation Department Personnel Grievance Statutory Procedure Not "Written Internal Procedure" for Purposes of Extending Time Limitation for Filing Under WDEA: Campanella was fired by the Department of Transportation on July 16, 2003. Campanella filed a grievance regarding the discharge with the Board of Personnel Appeals under 2-18-1001 (now repealed). Campanella later filed a wrongful termination complaint under the Wrongful Discharge From Employment Act (WDEA) in District Court on November 12, 2004. The District Court dismissed Campanella's WDEA complaint on the grounds that it was time-barred because it was filed beyond the 1-year limitation period in this section and determined that Campanella was not entitled to the 120-day extension under the statute for a claimant who had first contested a discharge by pursuing written internal procedures of the employer. The Supreme Court upheld the dismissal and determined that the Department personnel grievance procedure under 2-18-1001 was not the employer's written internal procedure. The court based its interpretation of 2-18-1001 on the statute's language requiring that a complainant exhaust all other administrative remedies before filing under 2-18-1001. The court determined that by use of this language, the Legislature intended that these other remedies be the mandatory internal procedures for Department employees, and therefore, the statutory procedure could not be the written internal procedures of the employer contemplated under the WDEA. Campanella v. Dept. of Transportation, 2007 MT 2, 335 M 212, 156 P3d 1 (2007).

Compliance With Employment Grievance Policy Required Despite Possibility of Adverse Outcome: Plaintiff failed to initiate a formal grievance based on speculation that the administrator might issue an adverse decision. Citing Mtn. Water Co. v. Dept. of Public Service Regulation, 2005 MT 84, 326 M 416, 110 P3d 20 (2005), the Supreme Court held that the mere possibility of an adverse outcome did not render the administrative process futile or excuse plaintiff from complying with defendant's employment grievance policy before instituting a wrongful discharge suit. Summary judgment for defendant was proper given plaintiff's failure to exhaust administrative remedies prior to filing a claim in District Court. Russell v. Masonic Home of Mont., Inc., 2006 MT 286, 334 M 351, 147 P3d 216 (2006), followed in Hathaway v. Zoot Enterprises, Inc., 2021 MT 292, 406 Mont. 239, 498 P.3d 204.

Claimant Judicially Estopped From Claiming Wrongful Discharge Following Settlement of Occupational Disease Claim Based on Same Employment: In 1997 and 1998, Vogel filed workers' compensation claims, contending that injuries received on the job required surgeries. Defendant accepted liability for the injuries. Between 1998 and 2002, Vogel continued to have problems performing his job, and Vogel's employment was terminated in May 2002. In June 2002, Vogel filed an occupational disease claim, and in October 2002, Vogel filed a wrongful discharge claim. During the ensuing 2 years, no action was taken on the wrongful discharge case, but Vogel settled the occupational disease claim, stating that starting in 1999, he suffered job-related injuries that rendered him physically unable to continue his work with defendant. When Vogel later pursued the wrongful discharge claim, defendant argued judicial estoppel, asserting that having represented in the occupational disease claim that he was unable to perform his time-of-injury job, Vogel was precluded from later arguing entitlement to wrongful discharge damages resulting from loss of the same job. The District Court agreed and granted summary judgment to defendant, and on appeal, the Supreme Court affirmed. Applying the elements of judicial estoppel set out in Fiedler v. Fiedler, 266 M 133, 879 P2d 675 (1994), the court held that all four elements were met and that the District Court had correctly ruled that judicial estoppel applied and properly granted summary judgment. Vogel v. Intercontinental Truck Body, Inc., 2006 MT 131, 332 M 322, 137 P3d 573 (2006).

Employee Required to Exhaust Administrative Remedies Prior to Filing Wrongful Discharge Claim — Dismissal of Claim With Prejudice Proper: Haynes filed a grievance with defendant employer, but was told that the grievance was filed late and did not comply with employer's internal grievance policy, so Haynes filed a wrongful discharge claim. The District Court dismissed Haynes's claim without prejudice pending completion of the internal grievance policy, and the employer appealed. Haynes asserted that he voluntarily resigned, and thus the grievance policy did not apply. The Supreme Court noted that if Haynes left employment voluntarily, then he had no wrongful discharge claim at all, but if Haynes was constructively discharged, then grievance procedures clearly applied. The Supreme Court held that there was no question that Haynes was constructively discharged because of an intolerable work environment, so the grievance policy applied, and Haynes was required to exhaust administrative remedies in a timely manner. Haynes failed to do so. Therefore, the Supreme Court remanded with instructions to dismiss Haynes's complaint with prejudice. Haynes v. Shodair Children's Hosp., 2006 MT 128, 332 M 286, 137 P3d 518 (2006), followed in Russell v. Masonic Home of Mont., Inc., 2006 MT 286, 334 M 351, 147 P3d 216 (2006).

Failure to Provide Terminated Employee With Written Copy of Internal Grievance Procedure — Summary Judgment Properly Denied: Casiano's employment with defendant was terminated, and Casiano filed a complaint alleging that the discharge was wrongful. Defendant moved for summary judgment on grounds that Casiano failed to exhaust defendant's internal grievance procedures as required in this section. The District Court denied the motion and the Supreme Court affirmed, citing Eadus v. Wheatland Mem. Hosp., 279 M 216, 926 P2d 752 (1996), for the holding that an employer may not avail itself of the defense in subsection (2) of this section if the employer fails both to notify the discharged employee of its internal grievance procedures and to provide the employee a written copy of the procedures within 7 days of the discharge. Here, it was undisputed that defendant orally notified Casiano of the procedures on the day of the discharge, but failed to provide a written copy of the procedures within 7 days. Because defendant did not comply with the notice provisions, Casiano was not required to exhaust the grievance procedures prior to filing the wrongful discharge action. Casiano v. Greenway Enterprises, Inc., 2002 MT 93, 309 M 358, 47 P3d 432 (2002).

Statements of Intent to File Grievance Not Considered Formal Grievance — Failure to Exhaust Administrative Remedies Warranting Summary Judgment: Offerdahl was notified by a supervisor that, based on complaints of inappropriate behavior toward a subordinate employee and the Department's investigation of the complaints, Offerdahl's employment would be terminated. Following a pretermination hearing that Offerdahl did not attend, his employment was terminated on September 15. He was notified of his right to respond or pursue a grievance in accordance with the state's grievance policy, which required that a formal grievance be filed within 15 working days after the grievable event. On September 19, Offerdahl sent the Department a letter indicating that he would not attend any other termination hearings and that he intended to follow the grievance procedure as directed in the September 15 letter. Offerdahl eventually mailed a written grievance on October 7 that was filed on October 8, but the grievance was denied as untimely. Offerdahl appealed to the District Court, but the court granted the state's motion for summary judgment on grounds that Offerdahl had failed to exhaust administrative remedies. Offerdahl appealed, but the Supreme Court affirmed. Neither Offerdahl's oral statement to another Department employee that he intended to file a grievance, nor the September 19 letter of intent to file a grievance, met the requirements of a formal grievance. Offerdahl was required by the policy to file a formal grievance by October 6, but his grievance was not filed until October 8. Thus, Offerdahl's failure to timely pursue administrative remedies for termination of his employment barred pursuit of the claim, and the motion for summary judgment was properly granted. Offerdahl v. Dept. of Natural Resources and Conservation, 2002 MT 5, 308 M 94, 43 P3d 275 (2002).

Employer To Comply With Statutory Notification Requirements: Eadus sued Wheatland Memorial Hospital for wrongful discharge. The lower court granted the hospital a summary judgment, dismissing Eadus's claim on the basis that she had not fully exhausted the internal grievance procedures established by the hospital prior to filing suit. The Supreme Court reversed, holding that although Eadus had not availed herself of the grievance procedures, state law required the hospital to notify Eadus within 7 days of discharge of the existence of grievance procedures and to supply her with a copy of the written procedures regardless of the fact that a copy had been supplied to her in the past. Eadus v. Wheatland Mem. Hosp., 279 M 216, 926 P2d

752, 53 St. Rep. 1122 (1996), distinguishing Hoffman v. Town Pump, Inc., 255 M 415, 843 P2d 756, 49 St. Rep. 1044 (1992).

Pay for Accrued Vacation — No Extension of Termination Date: Redfern was discharged at the end of his shift on October 24, 1992, and on October 26, 1992, received his termination pay, which included pay for 5 days of accrued vacation time. On October 29, 1993, Redfern filed an action against Montana Muffler for wrongful discharge. The lower court dismissed the case on the basis that the statutory 1-year period to file the action had passed. On appeal, Redfern argued that the employment relationship had not completely terminated until the 5 days of accrued vacation time had run and that therefore he had until October 30 or 31 to file. The Supreme Court held that under this section, Redfern's termination date for employment was clearly October 24, 1992, and that any vacation benefit had been earned prior to that time. Redfern v. Mont. Muffler, 271 M 333, 896 P2d 455, 52 St. Rep. 470 (1995), distinguishing Allison v. Jumping Horse Ranch, Inc., 255 M 410, 843 P2d 753 (1992).

Statute of Limitations Tolled by Renewal Statute for One Year After Appeal: Hollister was dismissed from her job with the Rosebud County Attorney's Office in 1991 and filed a complaint in federal court the same year, alleging federal and state claims. In 1992, the United States District Court dismissed the complaint and Hollister appealed to the Ninth Circuit Court of Appeals. In 1994, the Ninth Circuit Court of Appeals affirmed, and in the same year, Hollister filed a complaint in Rosebud County District Court. The Rosebud County District Court dismissed, holding that the claims were barred by the 1-year statute of limitations under this section and by the 3-year statute of limitations under 27-2-204. Citing Glass v. Basin & Bay St. Min. Co., 34 M 88, 85 P 746 (1906), the Supreme Court held that the word "terminated" in 27-2-407 includes ultimate termination after final appellate action. For this reason, the Supreme Court held that Hollister's complaint was timely filed. Hollister v. Forsythe, 270 M 91, 889 P2d 1205, 52 St. Rep. 90 (1995).

Statute of Limitations Not Running When Discharge Did Not Occur: Employer claimed employee's wrongful discharge claim was barred for failure to file within 1 year of discharge. The jury found that the employee was placed on temporary curtailment leave and was never formally discharged. As the question was one of fact within the province of the jury, the Supreme Court affirmed, holding that the statute of limitations did not apply when the employee had not quit employment and the employer had not taken the necessary steps to effectuate an involuntary termination within 1 year of the wrongful discharge action. Arnold v. Boise Cascade Corp., 259 M 259, 856 P2d 217, 50 St. Rep. 784 (1993).

Failure to Exhaust Internal Procedures — Directed Verdict for Employer — Employee's Right to Exhaust and Then Refile Suit: An employer was granted a directed verdict against employee who knew of, but failed to exhaust, internal grievance procedures and who sued for constructive discharge on the day he quit. In an amended order, the court granted the employer attorney fees denied in the original order and did not make a determination as to whether employee could refile his claim after exhausting the internal procedures, though in the original order the court had granted the employee that right. The issue was not briefed by the parties on appeal, and therefore employee would be allowed to refile upon completion of the internal procedures. Hoffman v. Town Pump, Inc., 255 M 415, 843 P2d 756, 49 St. Rep. 1044 (1992).

Precluding Employer Notification of Internal Procedures by Suing on Day of Discharge: Employee filed a wrongful constructive discharge complaint the same day that he terminated his employment. He had failed to use and exhaust employer's internal grievance procedures, which he had prior knowledge of and had used before. He was not excused from use of the procedures before filing the action by the fact that employer did not notify him of them and give him a copy as required by this section because filing suit on the day of termination prevented employer from notifying him of the procedures and giving him a copy before the action was filed. The directed verdict for employer was proper. Hoffman v. Town Pump, Inc., 255 M 415, 843 P2d 756, 49 St. Rep. 1044 (1992), distinguished in Eadus v. Wheatland Mem. Hosp., 279 M 216, 926 P2d 752, 53 St. Rep. 1122 (1996).

When Statute of Limitations Begins to Run: On July 12, 1988, ranch owner informed ranch manager that his employment was to be terminated because the owner thought the manager was "burned out" on ranching and would "jump ship" and start an outfitting business. The owner asked the manager to stay until October 1, 1988, to assist and train the new manager. The manager did so and filed a wrongful discharge action on September 29, 1989. The owner claimed that the "1 year after the date of discharge" statute of limitations period had passed. The Supreme Court held that a statute of limitations does not begin to run until all the elements of a cause of action are in existence, that an element in this case is damages, that damages did not occur until the manager no longer earned his salary and benefits, and that lost salary and benefits occurred on October 1, 1988, upon complete severance of the employment relationship, which is when the statute of limitations began to run. Allison v. Jumping Horse Ranch, Inc., 255 M 410, 843 P2d 753, 49 St. Rep. 1039 (1992).

Wrongful Discharge Law Limitations on Damages Not Violative of Equal Protection Guarantee — Relation to Legitimate State Interests: The Supreme Court applied the rational basis test in determining whether provisions of the Wrongful Discharge From Employment Act, Title 39, ch. 2, part 9, which prohibit recovery of noneconomic damages and punitive damages, violated the constitutional guarantee of equal protection. The court found that the Act survived scrutiny because it was rationally related to legitimate state interests, including: (1) promoting the financial interests of businesses in the state or potentially in the state to improve economic conditions; (2) limiting employers' liability for wrongful discharge through restrictions on recovery; (3) providing greater certainty in defining an employer's duties by recalling a contract law limitation on damages for pain and suffering; (4) providing a reasonably just substitute for the common-law causes it abrogates; (5) bettering prior common-law provisions for recovery by allowing claims for prejudgment interest; and (6) allowing some recovery for wrongful discharges that would otherwise deny retirement benefits. Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989), overruling Pfost v. St., 219 M 206, 713 P2d 495, 42 St. Rep. 1957 (1985), White v. St., 203 M 363, 661 P2d 1272, 40 St. Rep. 507 (1983), and Corrigan v. Janney, 192 M 99, 626 P2d 838, 38 St. Rep. 545 (1981).

Issue of Material Facts as to Plaintiff's Mental Illness — Tolling of Statute of Limitations: In a case involving a cause of action that arose prior to the enactment of this section, the plaintiff, through his guardian ad litem, filed a complaint against his former employer alleging wrongful discharge and claiming that the 3-year statute of limitations was tolled due to the plaintiff's mental illness. The complaint was filed nearly 8 years after the plaintiff was discharged, and the trial court, upon the employer's summary judgment motion, subsequently dismissed the complaint as untimely filed. In response to the employer's contention that the plaintiff's pursuit of other benefit claims demonstrates an absence of mental illness, the Supreme Court held that that is an issue to be decided at trial, not on a motion for summary judgment. It is not an issue that is susceptible to resolution based on written affidavits without the benefit of cross-examination in court. Therefore, the matter was remanded because there is a material issue of fact concerning the plaintiff's mental condition that precludes summary judgment. Bestwina v. Village Bank, 235 M 329, 767 P2d 338, 46 St. Rep. 27 (1989).

39-2-912. Exemptions.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 15, Ch. 685, L. 2023. Amendment effective October 1, 2023.

Severability: Section 42, Ch. 685, L. 2023, was a severability clause.

2021 Amendment: Chapter 117 inserted (2) regarding contract for a specific term containing a probationary period and an automatic renewal clause; and made minor changes in style. Amendment effective March 31, 2021.

Severability: Section 9, Ch. 117, L. 2021, was a severability clause.

1997 Amendment: Chapter 472 in (1), near end, substituted "disability" for "handicap"; and made minor changes in style.

Case Notes

Issue Preclusion and Claim Preclusion Barring Pursuit of WDEA Claim After Police Commission Decision Upheld on Review: Plaintiff, an 8-year veteran with the Cut Bank police department, was terminated from his position by the mayor after being observed apparently sleeping in his patrol car while on duty. Pursuant to 7-32-4155, the plaintiff appealed his termination to the city's Police Commission, which concluded that substantial evidence supported the mayor's decision to terminate the plaintiff's employment. The plaintiff then filed suit in the District Court, asserting a claim under the Wrongful Discharge From Employment Act (WDEA) and in the alternative seeking judicial review of the Commission's decision. The District Court affirmed the Commission's decision and, following a bench trial, entered a judgment under the WDEA that the plaintiff's discharge was not wrongful. The plaintiff appealed and the city cross-appealed, asserting that litigation of the WDEA claim was barred by issue preclusion and claim preclusion after the District Court upheld the Commission's decision. The Supreme Court determined that each element of a four-element test for issue and claim preclusion was satisfied and that the procedural safeguards in the Commission proceedings provided the plaintiff a full and fair opportunity to litigate his termination. Thus, the plaintiff was barred by principles of issue and claim preclusion from relitigating the same or redundant claims. Rooney v. Cut Bank, 2012 MT 149, 365 Mont. 375, 286 P.3d 241.

Former MDOT Employee's Preclusion From WDEA — Failure to Establish Similarly Situated Classes — No Violation of Equal Protection: An employee of the Montana Department of Transportation (MDOT) who was demoted, and later resigned, filed a claim of constructive discharge under the Wrongful Discharge From Employment Act (WDEA) in District Court instead of filing a grievance with the Board of Personnel Appeals (BOPA), as required by 2-18-1001 (now repealed). The District Court granted summary judgment in favor of the MDOT on the discharge claim based on its conclusion that the BOPA procedure was the employee's exclusive remedy and therefore he was precluded from filing a claim under the WDEA. The employee argued that precluding him from filing a claim under the WDEA violated his equal protection rights, claiming his denial to pursue a WDEA claim was arbitrarily based on his being a former MDOT employee. The Supreme Court affirmed the District Court's ruling, concluding that the employee neither articulated consistent class definitions nor demonstrated that the classes were similarly situated and thus failed to support his violation of equal protection argument. Kershaw v. Dept. of Transportation, 2011 MT 170, 361 Mont. 215, 257 P.3d 358.

Term Contract With At-Will Provision Not Exempt From Wrongful Discharge Act: An employee hired under a 3-year term contract, which also included an at-will provision in which the company could terminate the agreement without cause, was terminated after 6 months of employment. The employee filed a wrongful termination claim, which the District Court dismissed. The Supreme Court reversed. An employment contract for a specific term that also allows an employer to terminate an employee without cause is not a written contract for a specific term under the Wrongful Discharge From Employment Act. Brown v. Yellowstone Club Operations, LLC, 2011 MT 155, 361 Mont. 124, 255 P.3d 205.

Contract Action Not Applicable When Contract Terms Not Fulfilled — Wrongful Discharge Claim Dismissed as Untimely: Zier signed an agreement that he would become president of defendant bank when the bank obtained a contingent charter from the division of banking and when the bank received federal approval for operation. Zier began working for the bank in a different capacity, but neither contingency occurred, so Zier was not offered the president position and was subsequently discharged from employment. Zier filed a breach of contract action, but the bank argued that the contract claim was actually a claim for wrongful discharge. The District Court agreed with the bank and dismissed the claim because Zier failed to bring the action within 1 year as required under 39-2-911. Zier appealed, but the Supreme Court affirmed. The bank was not liable for breach of contract because the conditions of the agreement did not occur, so the District Court properly refused to consider the claim under a contract theory and correctly considered the claim as a wrongful discharge claim. Zier's failure to bring the claim within the 1-year statute of limitations warranted dismissal. Zier v. Hancock, 2008 MT 255, 345 M 89, 189 P3d 1189 (2008). See also Kneeland v. Luzenac America, Inc., 1998 MT 136, 289 M 201, 961 P2d 725 (1998).

No Wrongful Discharge Claim When Employment for Specific Term: Plaintiff physician signed a 1-year employment contract with defendant medical center that provided that the employment terms could be extended or renewed by mutual agreement in writing. Although the initial contract expired, plaintiff continued to work by oral agreement for 2 more years. The parties then signed an addendum to the initial contract that set an employment expiration date 6 months later. Plaintiff received a letter 5 days before the expiration date, terminating the employment on the expiration date. Plaintiff filed a wrongful discharge suit, alleging that the termination was unlawful. Defendant moved for summary judgment on grounds that because the addendum provided a specific term of employment, plaintiff had no wrongful discharge claim. The District Court granted summary judgment for defendant, and plaintiff appealed, but the Supreme Court affirmed. A claim for relief that is predicated on discharge from employment is barred if the employment is for a specific term under a written contract and that term has expired. In this case, the addendum constituted a ratification of the original agreement that constituted a contract for a specific term of employment, and by executing the addendum, the parties ratified the original agreement calling for employment for a specific term. The fact that the termination date was stated in the contract recitals did not void the date, because the recitals were consideration for the agreement and the parties intended that the recitals be part of the agreement. Plaintiff's argument that because he did not read the addendum he should not be held to its terms was also without merit because one who executes a contract is presumed to know its contents. Stowers v. Community Medical Center, Inc., 2007 MT 309, 340 M 116, 172 P3d 1252 (2007).

District Court Unable to Look Beyond Complaint to Determine Whether BOPA Grievance Procedure Precludes Complaint Under WDEA: Campanella was fired by the Department of Transportation on July 16, 2003. Campanella filed a grievance regarding the discharge with the Board of Personnel Appeals under 2-18-1001 (now repealed). Campanella later filed a wrongful termination complaint under the Wrongful Discharge From Employment Act (WDEA) in District Court on November 12, 2004. The District Court rejected the Department's argument that Campanella's discharge was exempt from the WDEA because the grievance procedure under 2-18-1001 is a state statute providing a grievance procedure and remedy for contesting the dispute under this section. The District Court concluded that determining whether this grievance procedure qualified to exempt the claim first required an affirmative determination that the court could not make without looking beyond the complaint and that such a finding could not yet be made. The Supreme Court agreed and took no position on this issue. Campanella v. Dept. of Transportation, 2007 MT 2, 335 M 212, 156 P3d 1 (2007).

Business Manager Documents Not Considered Written Contract for Employment — Discharge of Permanently Employed School Business Manager Without Cause Wrongful: Cromwell was hired as a classified school district employee. According to the classified employee handbook, Cromwell was considered a permanent employee following a 6-month probationary period in 1999. In 2001, the school district adopted a new classified employee policy that provided that new classified employees would be employed under annual contracts for specified terms within the meaning of this section, which exempted the new employment agreements from the requirements of the Wrongful Discharge From Employment Act (WDEA). In 2003, the school district decided not to renew Cromwell's contract, and she was terminated from employment. Cromwell filed a wrongful discharge claim. The school district contended that Cromwell's employment agreement did not fall within the scope of the WDEA because business manager documents signed by Cromwell and the school district constituted written agreements for specified terms under this section. Cromwell asserted that the business manager documents were not written agreements for specified terms, but merely represented agreements concerning Cromwell's salary. The District Court concluded that Cromwell was wrongfully discharged, and the school district appealed, but the Supreme Court affirmed. The business manager documents did not explicitly state a term of employment, and Cromwell had attained status as a permanent employee and the accompanying protection of the WDEA. Therefore, Cromwell could be discharged only for good cause under 39-2-904. Given the ambiguous language of the business manager documents and the school district's admission that Cromwell was not terminated for cause, the District Court properly concluded that Cromwell was wrongfully discharged. Cromwell v. Victor School District No. 7, 2006 MT 171, 333 M 1, 140 P3d 487 (2006).

No Award of Damages for Wrongful Discharge Based on Failure to Diligently Seek New Employment — Reversible Error: The District Court correctly found that Cromwell was wrongfully discharged from a job as a school district business manager, but the court declined to award any damages because Cromwell did not exercise reasonable diligence in finding new employment. However, once a finding of wrongful discharge was made, the burden shifted from Cromwell to the school district to plead a lack of reasonable diligence in finding new employment as an affirmative defense, and the school district presented no witnesses to support its contention. Cromwell testified that instead of full-time employment with the school district, she took a job working fewer hours for less pay than the previous employment and had to travel 35 miles from home in order to work. This fact, in the absence of evidence by the school district that Cromwell failed to exercise diligence in finding employment, supported an award of damages, and the Supreme Court reversed for findings and conclusions regarding an appropriate amount of damages based on the trial record. Cromwell v. Victor School District No. 7, 2006 MT 171, 333 M 1, 140 P3d 487 (2006).

Failure of Teacher to Exhaust Grievance Procedures Required Under Unambiguous Contract — Estoppel Inapplicable Absent Factual Representation of Material Fact — Summary Judgment Proper: When Wurl's speech-language pathology contract was not renewed, Wurl brought an action against the school district alleging that termination procedures were not followed pursuant to a collectively bargained master agreement and also brought claims for wrongful discharge and due process violations. The parties disagreed whether the master agreement applied because Wurl was not certified. The District Court found that the master agreement did not apply and granted summary judgment to the school district, and Wurl appealed. The Supreme Court found that the language of the employment contract unambiguously incorporated the entirety of the master agreement by reference, so the District Court erred in holding otherwise. Wurl also contended that because the District Superintendent had stated that the master agreement did not apply, collateral estoppel should bar the district from asserting that Wurl failed to go through the collectively bargained grievance procedure. On this point, the Supreme Court disagreed. The superintendent's statement was a legal interpretation rather than a factual representation of a material fact, so Wurl failed to prove the first required element of collateral estoppel, and the district was therefore allowed to argue that Wurl's claims should be barred by failure to exhaust the grievance procedure. Because the master agreement applied and Wurl failed to implement the mandatory grievance procedure, Wurl's claims were barred. The Supreme Court affirmed the summary judgment. Wurl v. Polson School District No. 23, 2006 MT 8, 330 M 282, 127 P3d 436 (2006), following Elk Park Ranch, Inc. v. Park County, 282 M 154, 935 P2d 1131 (1997).

Jurisdiction of Montana Courts Over Wrongful Discharge Case Involving Montana Citizen When Montana Law Applies — Dismissal for Lack of Jurisdiction Reversed: Plaintiff was a Montana resident hired by a Florida corporation, which was operated out of Oklahoma, to lay fiber optic cable throughout the country. While working in Indiana, plaintiff had a dispute with a supervisor and was fired. Plaintiff brought an action in Montana, claiming a violation of the Wrongful Discharge From Employment Act. The District Court held that under this section, the Montana courts lacked subject matter jurisdiction and dismissed the claim. On appeal, the Supreme Court reversed. Even though plaintiff never signed a written employment contract, the court held that a contract provision may be broad enough to indicate that an entire contract be governed by the laws of the state governing the particular provision. The fact that the defendant corporation paid income taxes, unemployment insurance premiums, and wages in Montana indicated an intent to be governed by Montana law. The court also concluded that under sections 187 and 188 of Restatement (Second) of Conflict of Laws (1971), the local law of the state with the most significant relationship to the transaction applies to questions of contract interpretation absent an effective choice of law by the parties. Plaintiff was considered a Montana resident despite the fact that employment required travel to other states, and the court concluded that it was appropriate to apply the Wrongful Discharge From Employment Act to the case even though the Act does not expressly provide for extraterritorial jurisdiction. Montana courts have subject matter jurisdiction in cases involving a Montana resident when Montana law applies, so plaintiff's case should not have been dismissed for lack of subject matter jurisdiction. Burchett v. MasTec N. America, Inc., 2004 MT 177, 322 M 93, 93 P3d 1247 (2004). See also Dailey v. Transitron Electronic Corp., 475 F2d 12 (5th Cir. 1973), and Harrington v. Energy West, Inc., 2015 MT 233, 380 Mont. 298, 356 P.3d 441.

Collective Bargaining Agreement Not Considered Contract of Adhesion: When plaintiff filed a wrongful discharge claim, defendant pointed out that the employment was covered by a union collective bargaining agreement (CBA) and that this section precludes an employee covered by a CBA from seeking relief under the Wrongful Discharge From Employment Act. At argument in District Court on defendant's motion for summary judgment, plaintiff argued that the CBA was a contract of adhesion. The District Court held that the CBA was not a contract of adhesion and granted summary judgment, and on appeal the Supreme Court agreed. A contract of adhesion is a contract with terms dictated by one contracting party to another party who has no voice in the contract's formulation, and such contracts are unenforceable if they are not within the reasonable expectations of the weaker party or if they are unduly oppressive, unconscionable, or against public policy. Because CBAs arise only after a public employer and a union representative have bargained collectively and in good faith, it cannot be said that one party dictates the terms of a CBA to another, so a CBA cannot be considered a contract of adhesion. The court noted that under Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 M 123, 54 P3d 1 (2002), a contract of adhesion may also be found in cases when an contract arbitration provision is presented on a standardized form without the opportunity for negotiation. Arbitration provisions are also negotiated in a CBA rather than dictated by standardized form, so Kloss did not apply. Summary judgment was affirmed. LaFournaise v. Mont. Developmental Center, 2003 MT 240, 317 M 283, 77 P3d 202 (2003).

Preclusion of Wrongful Discharge Suit by Collective Bargaining Agreement Not Unconstitutional Impediment to Access to Courts: When plaintiff filed a wrongful discharge claim, defendant pointed out that the employment was covered by a union collective bargaining agreement (CBA) and that subsection (2) of this section precludes an employee covered by a CBA from seeking relief under the Wrongful Discharge From Employment Act. Plaintiff argued that if she was precluded from bring a wrongful discharge claim solely because her employment was covered by a CBA, then this section unconstitutionally violated her access to courts, full redress, and a jury trial. However, constitutionality of a statute is presumed unless the person challenging it proves unconstitutionality beyond a reasonable doubt. Here, plaintiff presented nothing to overcome the presumption of constitutionality. Plaintiff's argument concerning lack of legal redress also failed because a possible action against the union was still available. LaFournaise v. Mont. Developmental Center, 2003 MT 240, 317 M 283, 77 P3d 202 (2003).

Negligent Mismanagement Claim Improperly Dismissed for Lack of Subject Matter Jurisdiction — Statute Not Limited to Personal Injury or Preempted by Federal Law: Winslow brought an action against his employer, Montana Rail Link, under 39-2-703 (now repealed) for mismanaging its investigation of his injury, alleging that the mismanagement lead to his dismissal from his job. The District Court held that 39-2-703 was intended to apply only to personal injuries caused by coworkers and that Winslow's cause of action under that section was preempted in any event by the Wrongful Discharge From Employment Act (WDEA). The Supreme Court held that the District Court's interpretation was overly restrictive because there was nothing in the language of 39-2-703 that prevented its application to the mismanagement of the investigation of Winslow's injuries. The Supreme Court also held that although a claim involving dismissal of an employee covered by a collective bargaining agreement (CBA), as Winslow was, could not be brought under the WDEA, Winslow's action was not brought to enforce his CBA, because his complaint made no mention of the CBA, but was brought under state law, giving an independent cause of action, and was therefore not preempted by the federal Railway Labor Act. Winslow v. Mont. Rail Link, Inc., 2000 MT 292, 302 M 289, 16 P3d 992, 57 St. Rep. 1238 (2000). On remand, defendant argued that Winslow I (id.) did not precisely consider whether 39-2-703 provided Winslow with a statutory mismanagement cause of action and thus could not be considered stare decisis on the issue. The Supreme Court disagreed. The issue of whether 39-2-703 provided Winslow with a statutory cause of action was sufficiently addressed in Winslow I to serve the purposes of law of the case, and the Supreme Court declined to revisit the issue. Because Winslow's claims were premised on state law, denial of defendant's motion for summary judgment based on federal preemption was proper. Additionally, defendant failed to raise the preemption issue until years after the litigation commenced, so denial of the preemption defense was proper on the basis of waiver. Winslow v. Mont. Rail Link, Inc., 2005 MT 217, 328 M 260, 121 P3d 506 (2005). See also Haux v. Mont. Rail Link, Inc., 2004 MT 233, 322 M 456, 97 P3d 540 (2004).

No Claim for Wrongful Termination Apart From Either Contract or Wrongful Discharge Act: Solle claimed that her employer violated the common-law duty of good faith and fair dealing by failing to renew her employment contract when she had a reasonable expectation that a renewal would be offered. Solle's employer moved to compel arbitration, the motion was granted, and Solle appealed. Under Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989), claims for wrongful termination from tort or express or implied contract are no longer viable under Montana law. Rather, 39-2-913 explicitly preempts all common-law remedies but bars only tort and contract claims that are "for discharge". A threshold determination in cases alleging wrongful termination is whether the parties' relationship is governed by a written contract for a specific term or whether it falls under the provisions of the Wrongful Discharge From Employment Act, which applies to noncontract situations. Solle's employment was covered by a written contract containing an arbitration clause, and her claim for breach of the implied covenant of good faith and fair dealing was inextricably intertwined with and based upon her termination from employment. Although breach of a contract is not a prerequisite to breach of the implied covenant of good faith and fair dealing, the covenant arises out of a contractual relationship between the parties, and a breach of the covenant is a breach of the contract. Solle's contract was silent as to whether there was an obligation on the employer's part to renew the contract or on Solle's part to accept a renewal offer, so Solle argued that the failure to include such a provision indicated the employer's intent not to cover a claim like this under the arbitration clause. The Supreme Court disagreed and proceeded to treat the dispute as arising out of the employment contract. Solle was not allowed to maintain a wrongful termination claim apart from either the contract or the Wrongful Discharge From Employment Act. Solle's contract contained a provision that any unresolved dispute would be subject to arbitration, but the arbitration clause did not explicitly provide that it would govern issues concerning contract nonrenewal. Nevertheless, the contract governed Solle's employment, termination, and postemployment relationship and did not explicitly exclude disputes arising after contract termination. The presumption favors arbitrability, and the District Court did not err in holding that Solle's claim was subject to arbitration. Solle v. W. St. Ins. Agency, Inc., 2000 MT 96, 299 M 237, 999 P2d 328, 57 St. Rep. 391 (2000). See also Nolde Bros., Inc. v. Bakery & Confectionery Workers Union, 430 US 243, 51 L Ed 2d 300, 97 S Ct 1067 (1977), and Marsden v. Blue Cross & Blue Shield of Mont., 2012 MT 306, 368 Mont. 34, 291 P.3d 1229.

Recovery Under Both Wrongful Discharge Act and Federal ADEA Barred: The Montana Wrongful Discharge From Employment Act provides that it does not apply to a discharge subject to any other state or federal statute providing a remedy. A discharged bank employee could not recover under both the wrongful discharge act and the federal Age Discrimination in Employment Act. Concurrent claims may be filed under the wrongful discharge act and under any other state or federal statutes, but if the plaintiff obtains an affirmative determination under the other statutes, the wrongful discharge claim no longer applies. The Supreme Court declined to follow two recent Montana federal District Court cases allowing concurrent actions based on separate and distinct factual predicates, and to the extent that this conclusion changes the holding in Deeds v. Decker Coal Co., 246 M 220, 805 P2d 1270 (1990), the opinion in that case is modified. In this case, the claims were made in the same action, and once it was determined that the federal Age Discrimination in Employment Act was violated, the wrongful discharge act did not apply. Tonack v. Mont. Bank of Billings, 258 M 247, 854 P2d 326, 50 St. Rep. 518 (1993), followed in Schultz v. Stillwater Min. Co., 277 M 154, 920 P2d 486, 53 St. Rep. 662 (1996), and Campanella v. Dept. of Transportation, 2007 MT 2, 335 M 212, 156 P3d 1 (2007).

Act Inapplicable to Term Contracts: The Wrongful Discharge From Employment Act is inapplicable to a written contract of employment for a specific term. As previously held in Leland v. Heywood, 197 M 491, 643 P2d 578 (1982), an employer has the discretion to not renew a specific term contract without a showing of good cause. Farris v. Hutchinson, 254 M 334, 838 P2d 374, 49 St. Rep. 717 (1992), distinguishing Portable Embryonics v. J.P. Genetics, 248 M 242, 810 P2d 1197 (1991).

Statutory Exemption Prematurely Applied — Proceedings Stayed Pending NLRB Action: Employees discharged for allegedly engaging in strike misconduct filed unfair labor practice charges with the National Labor Relations Board (NLRB), claiming the discharges were retaliatory measures based on union activities. The District Court found the wrongful discharge action was exempt under this section. As of the date of appeal, the NLRB had yet to file a complaint. The Supreme Court held that the District Court was premature in its ruling because no state or federal statute providing a procedure or remedy for contesting the dispute had yet taken effect exempting the dispute nor were the employees exempted by way of a collective bargaining agreement. To ensure the employees a forum, the cause was remanded to the District Court with proceedings stayed pending NLRB action. Deeds v. Decker Coal Co., 246 M 220, 805 P2d 1270, 47 St. Rep. 1902 (1990).

Law Review Articles

Tonack v. Montana Bank: Preemption, Interpretation, and Older Employees Under Montana's Wrongful Discharge From Employment Act, Regan, 56 Mont. L. Rev. 585 (1995).

39-2-913. Preemption of common-law remedies.

Case Notes

Contract Action Not Applicable When Contract Terms Not Fulfilled — Wrongful Discharge Claim Dismissed as Untimely: Zier signed an agreement that he would become president of defendant bank when the bank obtained a contingent charter from the division of banking and when the bank received federal approval for operation. Zier began working for the bank in a different capacity, but neither contingency occurred, so Zier was not offered the president position and was subsequently discharged from employment. Zier filed a breach of contract action, but the bank argued that the contract claim was actually a claim for wrongful discharge. The District Court agreed with the bank and dismissed the claim because Zier failed to bring the action within 1 year as required under 39-2-911. Zier appealed, but the Supreme Court affirmed. The bank was not liable for breach of contract because the conditions of the agreement did not occur, so the District Court properly refused to consider the claim under a contract theory and correctly considered the claim as a wrongful discharge claim. Zier's failure to bring the claim within the 1-year statute of limitations warranted dismissal. Zier v. Hancock, 2008 MT 255, 345 M 89, 189 P3d 1189 (2008). See also Kneeland v. Luzenac America, Inc., 1998 MT 136, 289 M 201, 961 P2d 725 (1998).

No Wrongful Discharge Claim When Employment for Specific Term: Plaintiff physician signed a 1-year employment contract with defendant medical center that provided that the employment terms could be extended or renewed by mutual agreement in writing. Although the initial contract expired, plaintiff continued to work by oral agreement for 2 more years. The parties then signed an addendum to the initial contract that set an employment expiration date 6 months later. Plaintiff received a letter 5 days before the expiration date, terminating the employment on the expiration date. Plaintiff filed a wrongful discharge suit, alleging that the termination was unlawful. Defendant moved for summary judgment on grounds that because the addendum provided a specific term of employment, plaintiff had no wrongful discharge claim. The District Court granted summary judgment for defendant, and plaintiff appealed, but the Supreme Court affirmed. A claim for relief that is predicated on discharge from employment is barred if the employment is for a specific term under a written contract and that term has expired. In this case, the addendum constituted a ratification of the original agreement that constituted a contract for a specific term of employment, and by executing the addendum, the parties ratified the original agreement calling for employment for a specific term. The fact that the termination date was stated in the contract recitals did not void the date, because the recitals were consideration for the agreement and the parties intended that the recitals be part of the agreement. Plaintiff's argument that because he did not read the addendum he should not be held to its terms was also without merit because one who executes a contract is presumed to know its contents. Stowers v. Community Medical Center, Inc., 2007 MT 309, 340 M 116, 172 P3d 1252 (2007).

No Claim for Wrongful Termination Apart From Either Contract or Wrongful Discharge Act: Solle claimed that her employer violated the common-law duty of good faith and fair dealing by failing to renew her employment contract when she had a reasonable expectation that a renewal would be offered. Solle's employer moved to compel arbitration, the motion was granted, and Solle appealed. Under Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488, 46 St. Rep. 1058 (1989), claims for wrongful termination from tort or express or implied contract are no longer viable under Montana law. Rather, this section explicitly preempts all common-law remedies but bars only tort and contract claims that are "for discharge". A threshold determination in cases alleging wrongful termination is whether the parties' relationship is governed by a written contract for a specific term or whether it falls under the provisions of the Wrongful Discharge From Employment Act, which applies to noncontract situations. Solle's employment was covered by a written contract containing an arbitration clause, and her claim for breach of the implied covenant of good faith and fair dealing was inextricably intertwined with and based upon her termination from employment. Although breach of a contract is not a prerequisite to breach of the implied covenant of good faith and fair dealing, the covenant arises out of a contractual relationship between the parties, and a breach of the covenant is a breach of the contract. Solle's contract was silent as to whether there was an obligation on the employer's part to renew the contract or on Solle's part to accept a renewal offer, so Solle argued that the failure to include such a provision indicated the employer's intent not to cover a claim like this under the arbitration clause. The Supreme Court disagreed and proceeded to treat the dispute as arising out of the employment contract. Solle was not allowed to maintain a wrongful termination claim apart from either the contract or the Wrongful Discharge From Employment Act. Solle's contract contained a provision that any unresolved dispute would be subject to arbitration, but the arbitration clause did not explicitly provide that it would govern issues concerning contract nonrenewal. Nevertheless, the contract governed Solle's employment, termination, and postemployment relationship and did not explicitly exclude disputes arising after contract termination. The presumption favors arbitrability, and the District Court did not err in holding that Solle's claim was subject to arbitration. Solle v. W. St. Ins. Agency, Inc., 2000 MT 96, 299 M 237, 999 P2d 328, 57 St. Rep. 391 (2000). See also Nolde Bros., Inc. v. Bakery & Confectionery Workers Union, 430 US 243, 51 L Ed 2d 300, 97 S Ct 1067 (1977), and Marsden v. Blue Cross & Blue Shield of Mont., 2012 MT 306, 368 Mont. 34, 291 P.3d 1229.

Claims Inextricably Intertwined With Termination Preempted by WDEA: A university professor who took a job with the understanding that the job would last up to 4 years sued when the position was terminated after 1 year. The professor alleged fraud and negligent representation. The District Court granted the defendants' summary judgment motion. The Supreme Court held that the Wrongful Discharge From Employment Act does not bar all tort or contract claims arising in the employment context, but only those claims for damages caused by an asserted wrongful discharge. The professor would have no claim except for the termination, and therefore, the claims were inextricably intertwined with and based upon the termination and were preempted by the Act. Kulm v. Mont. St. Univ.-Bozeman, 285 M 328, 948 P2d 243, 54 St. Rep. 1175 (1997).

Claim for Breach of Implied Covenant of Good Faith and Fair Dealing Barred by Statute: Mysse sued Rosebud County for wrongful discharge and also alleged that her firing violated the implied covenant of good faith and fair dealing. The Supreme Court held that her claim for breach of the covenant was not distinct from her claim for wrongful discharge and therefore was barred by the Montana Wrongful Discharge From Employment Act, which was the exclusive remedy in the present instance. Mysse v. Martens, 279 M 253, 926 P2d 765, 53 St. Rep. 1139 (1996).

Independent Contract Claim for Failure to Abide by Representations as to Stock Options, Bonuses, Raises, and Advancement Not Barred: In this section's provision that "no claim for discharge may arise from tort or express or implied contract", "claim for discharge" does not encompass all claims that an employee may have against the employer. It only includes those claims for damages caused by wrongful discharge. The provision does not bar all tort or contract claims merely because they arise in the employment context; therefore, an employee who resigned could sue for the employer's alleged failure to abide by its representations as to stock options, bonuses, raises, and advancement opportunities. Beasley v. Semitool, Inc., 258 M 258, 853 P2d 84, 50 St. Rep. 522 (1993), followed in Mysse v. Martens, 279 M 253, 926 P2d 765, 53 St. Rep. 1139 (1996), and Kneeland v. Luzenac America, Inc., 1998 MT 136, 289 M 201, 961 P2d 725, 55 St. Rep. 541 (1998), and distinguished in Kulm v. Mont. St. Univ.-Bozeman, 285 M 328, 948 P2d 243, 54 St. Rep. 1175 (1997).

When Actionable Cause for Termination Arises: On June 16, 1987, Martin was told her position was to be terminated as of July 17, 1987. After receiving notice, Martin discovered the position had not been eliminated but was to be filled by the company's new president's personal secretary from his former job. Martin filed suit alleging wrongful discharge, breach of the implied covenant of good faith and fair dealing, and negligence. On July 1, 1987, the Wrongful Discharge From Employment Act became effective. The District Court held that the Act precluded Martin's claims for breach of the implied covenant and negligence because the claim had not fully accrued until the date of termination. On appeal, Martin conceded that the claim for negligence was properly dismissed in light of Heltborg v. Modern Mach., 244 M 24, 795 P2d 954 (1990), but disputed dismissal of the breach of covenant claim, contending that a cause of action begins at the time of breach, which in this case occurred upon receipt of the notice of termination, and that all decisions made leading to the discharge occurred prior to notification. The Supreme Court, citing Del. St. College v. Ricks, 449 US 250, 66 L Ed 2d 431, 101 S Ct 498 (1980), and Chardon v. Fernandez, 454 US 6, 70 L Ed 2d 6, 102 S Ct 28 (1981), agreed with Martin that the cause of action accrued upon notice of termination and held that it was the decision to terminate and the act thereupon that caused the end result. It was at that point that legal redress could first be sought. Martin v. Special Resource Management, Inc., 246 M 181, 803 P2d 1086, 47 St. Rep. 2319 (1990), followed in Walch v. Univ. of Mont., 260 M 496, 861 P2d 179, 50 St. Rep. 1186 (1993), distinguishing Allison v. Jumping Horse Ranch, Inc., 255 M 410, 843 P2d 753 (1992).

Governmental Immunity Not Affected by Wrongful Discharge From Employment Act: The Supreme Court held that a county board of health was an agent of the County Commissioners and therefore covered by state law creating governmental immunity. The court also held that there was no intent by the Legislature when it passed the Wrongful Discharge From Employment Act to create remedies when earlier immunity statutes denied recovery. Burgess v. Lewis & Clark City-County Bd. of Health, 244 M 275, 796 P2d 1079, 47 St. Rep. 1619 (1990).

39-2-914. Arbitration.

Compiler's Comments

1993 Amendment: Chapter 442 at beginning of (1) substituted "A party may make a written offer to arbitrate" for "Under a written agreement of the parties" and at end, after "part", deleted "may be resolved by final and binding arbitration as provided in this section"; and deleted former (4) that read: "(4) A party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in an action under this part is entitled as an element of costs to reasonable attorney fees incurred subsequent to the date of the offer."

Case Notes

Contract to Arbitrate Not Formed by Employee Handbook and Employee's Acknowledgment — Ambiguous Arbitration Provisions: When Hubner began working for defendant communications company, she signed an acknowledgment in an employee handbook that contained an arbitration provision. The arbitration clause provided that all controversies would be subject to binding arbitration, but the clauses in the handbook specified that the handbook did not constitute a contract of employment or create any relationship other than an employment-at-will relationship. When Hubner's employment was subsequently terminated, she brought a state claim for wrongful discharge, and defendant moved for a summary disposition compelling arbitration pursuant to 27-5-115. The District Court agreed with Hubner that there was no agreement to arbitrate and denied the motion, so defendant appealed. Defendant argued that because the arbitration clause was separable, it could be independently enforced. A state contract law defense that goes to the entire contract rather than specifically to an arbitration clause does not defeat a motion to compel arbitration; however, when a defense is aimed directly at the arbitration provision rather than the entire contract, state law contract defenses may be applied to hold that no enforceable agreement to arbitrate was made. Further, acceptance or consent by the party against whom a contract is sought to be enforced is required before a contract is enforceable. The language in the handbook was ambiguous and construed against the drafter. The ambiguity prevented Hubner from knowing and accepting that she was agreeing to binding arbitration by signing the handbook. Thus, no contract to arbitrate was formed by virtue of the handbook and Hubner's acknowledgment, even when the arbitration provision was considered separately from the rest of the handbook. The District Court was affirmed. Hubner v. Cutthroat Communications, Inc., 2003 MT 333, 318 M 421, 80 P3d 1256 (2003).

Failure of Employer to Respond to Arbitration Request — Waiver of Right to Arbitrate: The employment agreement between Firestone and Oasis Telecommunications, Data and Records, Inc. (Oasis), contained a dispute resolution clause providing that if a disagreement arose, the parties would negotiate in good faith, and that if they did not reach a solution within 30 days of the first written notice, then upon a 30-day notice by either party, the issue would be submitted to arbitration. Oasis terminated Firestone's employment on May 8, 2000. On May 18, Firestone requested arbitration. On June 7, Firestone submitted a list of potential arbitrators to Oasis for consideration, and requested a response within 10 days. Oasis never responded until August 11, after Firestone had filed federal suit against Oasis on July 7 (which was dismissed for lack of subject matter jurisdiction), and had filed virtually the same suit in state court on August 1, alleging Oasis's breach of the employment contract and the implied covenant of good faith and fair dealing. Oasis moved to compel arbitration on August 25, but the District Court denied the motion, so Oasis appealed. The Supreme Court affirmed. When the District Court denied Oasis's request to compel arbitration, the court impliedly found that Oasis's failure to respond constituted waiver of its right to arbitrate the dispute. The Supreme Court applied the factors in Downey v. Christensen, 251 M 386, 825 P2d 557 (1992), in deciding whether a waiver occurred. The factors require the party asserting waiver to demonstrate: (1) knowledge of the existing right to compel arbitration; (2) acts inconsistent with the right to arbitrate the dispute; and (3) prejudice to the party resisting arbitration. The existence of the first factor was undisputed because Oasis did not dispute knowledge of the right to arbitrate. Regarding the second factor, the May 18 notice commenced the 30-day period prescribed by the employment agreement, but Oasis did not deliver a response until well after the expiration of the 30-day period, and that indifference to Firestone's request constituted an act inconsistent with the right to arbitrate the dispute. Regarding the third factor, when Oasis failed to respond to the arbitration request, Firestone had no alternative other than to commence District Court proceedings, was subjected to unnecessary delay, and incurred court costs and fees that could otherwise have been avoided, so Firestone was prejudiced by Oasis's inaction. Therefore, the Downey factors were met, and Oasis's failure to respond to a request for arbitration within the period set out in the employment contract constituted waiver of the right to compel arbitration. Firestone v. Oasis Telecommunications, Data & Records, Inc., 2001 MT 297, 307 M 469, 38 P3d 796 (2001). See also Holm-Sutherland Co., Inc. v. Shelby, 1999 MT 150, 295 M 65, 982 P2d 1053 (1999).

No District Court Jurisdiction to Grant Summary Judgment When Dispute Subject to Arbitration: A condition of Burkhart's employment agreement with Semitool, Inc. (Semitool), was that employment disputes would be subject to Montana law and the Uniform Arbitration Act. After 8 months of employment, Burkhart was terminated. He later brought suit against Semitool, alleging that: (1) he had been terminated without good cause; (2) his termination was in retaliation for his refusal to violate public policy; (3) Semitool's opposition to his application for unemployment benefits was without probable cause and motivated by malice; and (4) representations made to him prior to employment were deceptive and motivated by malice, contained misrepresentations, and included false advertisements concerning the kind or character of the employment. In its answer, Semitool demanded arbitration, and Burkhart accepted the arbitration offer on the first two issues. The parties agreed that because trade secrets were involved, the record would be sealed and hearings closed to the public to avoid disclosure of confidential information. Semitool then moved to dismiss for failure to state a claim or, alternatively, to compel arbitration of all four claims. The District Court converted the motion to dismiss into a motion for summary judgment and held a hearing to discuss both motions, after which it granted summary judgment to Semitool and dismissed all four claims. The court determined that because proof of the allegations in the complaint would require disclosure of confidential attorney-client matters and because violation of the attorney-client privilege prejudiced the public interest, that prejudice was a proper ground upon which to invalidate the arbitration agreement. Burkhart appealed. On appeal, the Supreme Court cited this section and Ratchye v. Lucas, 1998 MT 87, 288 M 345, 957 P2d 1128 (1998), as controlling. Once an offer to arbitrate has been accepted, neither the District Court nor the parties have a right to continue the lawsuit. The exception relating to the public interest pertains to the validity of the arbitration agreement, not to the merits of the underlying dispute. Thus, the District Court erred in deciding the merits of the issues because it lacked jurisdiction to do so once the parties agreed to arbitrate. Summary judgment was reversed and the claims were remanded for arbitration. Burkhart v. Semitool, Inc., 2000 MT 201, 300 M 480, 5 P3d 1031, 57 St. Rep. 785 (2000). See also Ensey v. Mini Mart, Inc., 2013 MT 94, 369 Mont. 476, 300 P.3d 1144.

Failure to Raise Issue of Arbitrator's Authority in Arbitration or District Court as Waiver of Right to Object to Arbitrator's Ruling on Appeal: Dahl brought a wrongful discharge action against Fred Meyer, Inc. The parties agreed to arbitration and chose an arbitrator. Prior to the hearing, the arbitrator determined that because the complaint alleged a motive for the discharge, it was intended to state a cause of action under ERISA (29 U.S.C. 1001, et seq.), requiring exclusive federal court jurisdiction, so arbitration was dismissed. By failing to raise the issue of whether the arbitrator lacked authority to decide that the issue was preempted by federal law, failing to contest the basis of the arbitrator's decision, and failing to object to the motion in District Court to confirm the arbitrator's award through a motion to vacate, Dahl waived the right to object to the ruling on appeal. Dahl v. Fred Meyer, Inc., 1999 MT 285, 297 M 28, 993 P2d 6, 56 St. Rep. 1149 (1999). See also St. Farm v. Cabs, Inc., 751 P2d 61 (Colo. 1988).

Loss of District Court Jurisdiction When Wrongful Discharge Claim Submitted to Arbitration — Leave to Amend Complaint Denied: Dahl brought a wrongful discharge action against Fred Meyer, Inc. The parties agreed to arbitration and chose an arbitrator. Prior to the hearing, the arbitrator dismissed the arbitration on grounds that federal law applied. Dahl did not object to the District Court's confirmation of the arbitrator's decision but did move for leave to amend the complaint to remove the federal implications. However, the District Court lost jurisdiction when the parties agreed to arbitration, at which point the court had authority only to confirm, modify and confirm, or vacate and remand for hearing pursuant to 27-5-311 through 27-5-314, but not the authority to allow Dahl to amend the complaint. Dahl v. Fred Meyer, Inc., 1999 MT 285, 297 M 28, 993 P2d 6, 56 St. Rep. 1149 (1999). See also Ensey v. Mini Mart, Inc., 2013 MT 94, 369 Mont. 476, 300 P.3d 1144.

Arbitration Improperly Remanded to Arbitrator for Reconsideration of Damages — Rationally Derived Arbitration Remedy to Be Upheld on Review: The District Court remanded a wrongful discharge case to the arbitrator for reconsideration of damages. The employee contended that the District Court could not enter judgment for the amended award because the case should not have been remanded and because the arbitrator did not have authority to amend the award. The employer contended that the arbitrator exceeded his powers when he made the first award and that the District Court properly gave the arbitrator authority to vacate portions of the first award pursuant to 27-5-312. However, the exceeding of power by an arbitrator is not one of the provisions in 27-5-217 pursuant to which an arbitrator may modify or correct an award. When the arbitrator granted the employer's motion to vacate portions of the original damage award, he exceeded his statutory authority. Further, the District Court was without authority to vacate or modify the award except for the statutory bases set forth in 27-5-312 and 27-5-313. If the remedy fashioned by the arbitrator is rationally derived from the arbitration agreement, it will be upheld. The Supreme Court remanded for judgment in the amount of the original arbitration award. Nelson v. Livingston Rebuild Center, Inc., 1999 MT 116, 294 M 408, 981 P2d 1185, 56 St. Rep. 486 (1999).

No Duty of Employer to Arbitrate After Failure of Employee to Comply With Grievance Policy: The District Court properly found that a community college had no obligation to arbitrate nonrenewal of a professor's teaching contract and that a claim for breach of an employment contract should be dismissed. The professor failed to comply with the college's grievance policy when he did not submit his grievance on the required form and did not seek the allowed further review when his letter of grievance was not answered by the college president, to whom it was submitted. Schaal v. Flathead Valley Community College, 272 M 443, 901 P2d 541, 52 St. Rep. 905 (1995).

Wrongful Discharge Arbitration Award — No Judicial Review on Merits: Plaintiffs, hired to manage a pawnshop, filed a wrongful discharge action, claiming that defendant unilaterally reduced salaries. The parties agreed to arbitrate the dispute, and plaintiffs were subsequently awarded damages for wrongful discharge. The District Court confirmed the award despite defendant's motion to vacate the award on the basis of evident partiality or manifest disregard of the law. On appeal, the Supreme Court affirmed, ruling that judicial review of an arbitration award is strictly limited by statute and that the District Court did not abuse its discretion in refusing to review the merits of the award. May v. First Nat'l Pawn Brokers, Ltd., 269 M 19, 887 P2d 185, 51 St. Rep. 1367 (1994), modified in Geissler v. Sanem, 285 M 411, 949 P2d 234, 54 St. Rep. 1218 (1997), which adopted the manifest disregard of the law standard on arbitration appeals.

No Agreement — No Fees: In a case decided prior to the 1993 amendment to this section, the court determined that an award of attorney fees was improper because no agreement to arbitrate existed between the parties. Town Pump sent a written offer to arbitrate to Hoffman, who rejected the offer. Hoffman v. Town Pump, Inc., 255 M 415, 843 P2d 756, 49 St. Rep. 1044 (1992), followed in Kearney v. KXLF Communications, Inc., 263 M 407, 869 P2d 772, 51 St. Rep. 119 (1994).

Monetary Limit on Employment Dispute as Precluding Arbitration: A labor agreement, which contained a provision that any grievance involving a monetary issue in excess of $500 was subject to arbitration only if mutually agreed upon, was properly relied on by the District Court in excusing an employer from arbitrating a claim in excess of $500. Local 1334 v. Great Falls, 233 M 432, 760 P2d 99, 45 St. Rep. 1611 (1988).

39-2-915. Effect of rejection of offer to arbitrate.

Case Notes

Appeal Filed Within Four Days of Final Judgment Timely: Plaintiff prevailed on a wrongful discharge claim and also claimed that defendant abused discovery. A few days following judgment, plaintiff filed for attorney fees and for sanctions against defendant for discovery abuses. The District Court held that sanctions would be addressed after trial. Defendant filed various posttrial motions, which were subsequently considered denied because the District Court failed to rule on them within 60 days. Two days later, the court approved plaintiff's requested fees and costs in securing judgment, but did not address fees and costs that plaintiff requested as sanctions, and 35 days later, plaintiff requested a ruling on discovery sanctions. Five days later, the court held a hearing on sanctions and awarded plaintiff fees and costs as discovery sanctions. Defendant appealed. Plaintiff asserted that the appeal should be dismissed as untimely because it was filed more than 30 days after defendant's posttrial motions were denied. However, even though the court held during trial that defendant would be liable for sanctions, there was no final judgment on sanctions until the court actually awarded plaintiff fees and costs as discovery sanctions, and defendant's filing of the appeal within 4 days of final judgment on that issue was timely. Harding v. Garcia, 2007 MT 120, 337 M 274, 159 P3d 1083 (2007).

No Reciprocal Right to Attorney Fees When No Contract Formed — Prevailing Party Under Wrongful Discharge From Employment Act Not Entitled to Attorney Fees Absent Written Offer to Arbitrate: Under this section, a party is not entitled to attorney fees under the Wrongful Discharge From Employment Act unless that party makes a written offer to arbitrate that is refused and that party prevails in the action. Here, a probationary law enforcement officer made an offer to arbitrate with the town on a wrongful discharge claim, but the town prevailed in the action without making an arbitration offer. The town subsequently claimed a reciprocal right to attorney fees under 28-3-704, asserting that the officer's request to arbitrate qualified as an obligation in the nature of a contract that granted the town the same rights as the officer. The Supreme Court disagreed. To hold that this section provided the town a reciprocal right to attorney fees would defeat the statutory element that rewards the making of an arbitration offer and allow a party that refuses to arbitrate to claim attorney fees. Further, if an offer to arbitrate is not accepted and no arbitration occurs, no contract is formed upon which a right to reciprocal fees can be based under 28-3-704. Denial of the town's request for reciprocal fees was properly denied. Ritchie v. Ennis, 2004 MT 43, 320 M 94, 86 P3d 11 (2004).

Failure to Respond to Arbitration Request — Motion to Compel Arbitration Not Considered Frivolous or Abusive: An employer failed to timely respond to an employee's request for arbitration, and subsequently moved to compel arbitration. When the District Court denied the employer's motion to compel, the employee sought attorney fees and costs pursuant to former Rule 11, M.R.Civ.P. (now superseded), contending that the employer's lack of response and motion to compel arbitration created an unnecessary delay and needlessly increased the costs of litigation. The District Court denied the request for fees and costs, and the employee appealed. The Supreme Court found nothing in the record suggesting that the employer's motion to compel was frivolous or amounted to abusive litigation tactics. Although the employer's indifference did suffice to waive the right to compel arbitration, it did not rise to the level of conduct interposed for an improper purpose as required for former Rule 11 sanctions, so denial of attorney fees and costs was affirmed. Firestone v. Oasis Telecommunications, Data & Records, Inc., 2001 MT 297, 307 M 469, 38 P3d 796 (2001).

Failure to Comply With Immediate Notice Requirements Precluding Consideration of Constitutional Issue on Appeal: Haider filed a wrongful discharge action against her former employer. During negotiations, Haider offered to submit the case to arbitration, but the employer refused to arbitrate. The matter went to a jury, which awarded Haider $44,995.26. After a subsequent evidentiary hearing, the District Court determined that Haider was the prevailing party and awarded her $15,000 in attorney fees pursuant to this section. The employer filed a notice of appeal seeking to challenge the constitutionality of this section and, nearly 3 months later, filed its notice of challenge to the constitutionality of the statute pursuant to former Rule 38, M.R.App.P. (now superseded). The employer failed to comply both with the immediate notice requirement of former Rule 38 that was in effect in 1997 when the action arose, and with the contemporaneous notice requirement of the rule in effect since October 1, 1997. Because notice was not timely, the Supreme Court was precluded from reaching the constitutional challenge and dismissed the appeal with prejudice. Haider v. Frances Mahon Deaconess Hosp., 2000 MT 32, 298 M 203, 994 P2d 1121, 57 St. Rep. 138 (2000).

Bond for Costs on Appeal May Not Include Attorney Fees: When allowed by law, attorney fees that a party incurs on appeal may be recovered by that party if that party prevails on appeal. This section provides that if a party in a wrongful discharge proceeding declines an offer to arbitrate and then loses in court, the party that offered to arbitrate is entitled to reasonable attorney fees incurred after the offer was made, including those incurred on appeal. However, for purposes of determining the amount of a bond or security under former Rule 6, M.R.App.P. (now superseded), a District Court may not include anticipated attorney fees for the future defense of an appeal as part of the anticipated costs on appeal. Moore v. Imperial Hotels Corp., 285 M 188, 948 P2d 211, 54 St. Rep. 1104 (1997).

Part 10

Closure of or Layoff at Governmental Facility

Part Compiler's Comments

Effective Date: Section 5, Ch. 757, L. 1991, provided that this part is effective July 1, 1991.

39-2-1004. Adoption of rules.

Compiler's Comments

1991 Statement of Intent: The statement of intent attached to Ch. 757, L. 1991, provided: "A statement of intent is required for this bill because [section 4] [39-2-1004] grants the department of labor and industry the authority to develop rules for assisting employers in meeting their obligations under [section 3] [39-2-1003]. It is intended that the rules address, at a minimum:

(1) notification procedures when a closure or retrenchment decision is made by an employer; and

(2) guidelines for developing the written impact statement."

Part 15

Microchip Implantation

Part Compiler's Comments

Effective Date: This part is effective October 1, 2019.

CHAPTER 3

WAGES AND WAGE PROTECTION

Chapter Case Notes

Consideration of Payments on Collateral Obligations Proper: In a wage dispute, the employer argued that the Department of Labor and Industry lacked authority to make findings concerning certain payments the employer made to the employee on the basis that the payments were for unreimbursed loans and wages earned in other states. The Supreme Court affirmed, concluding that the Department acted within its jurisdiction in considering the payments because the payments were relevant in determining the amount the employer owed for work the employee performed in Montana. America's Best Contractors, Inc. v. Singh, 2014 MT 70, 374 Mont. 254, 321 P.3d 95.

Fair Labor Standards Act — Award of Attorney Fees Without Contemporaneous Time Records Discouraged But Affirmed: The District Court awarded Tacke attorney fees after Tacke prevailed on a claim under the federal Fair Labor Standards Act (FLSA). Defendant employer asserted that the award was improper because Tacke's counsel was not required to provide contemporaneous time records to justify the award. The Supreme Court agreed that it was Tacke's burden to provide evidence that the claimed fees were reasonable but noted that the District Court concluded that evidence in the case, coupled with the court's personal knowledge of the case, validated the reasonableness of the hours that Tacke submitted. The Supreme Court declined to adopt a per se rule regarding the issue but strongly urged counsel to keep and provide contemporaneous time records in support of attorney fee requests in fee-shifting cases, and encouraged District Courts to look askance at requests not so supported. Nevertheless, in this case the District Court conducted a careful review of the fee issue, exercised conscientious judgment, and did not err in evaluating the evidence or abuse its discretion in approving the fee award. Thus, in this instance the attorney fee award was affirmed absent contemporaneous time records. Tacke v. Energy W., Inc., 2010 MT 39, 355 Mont. 243, 227 P.3d 601.

Employee Paid on Commission Basis Covered Under Wage Protection Act: By definition in 39-3-201, wages are any money due an employee from an employer, including earned commissions. Noting substantial amendment to state wage protection policy since McBride v. School District, 88 M 110, 290 P 252 (1930), the Supreme Court held that the present underlying policy and provisions of Montana's wage protection statutes are sufficiently broad to cover employees who are paid on a commission basis and that an employer who fails to pay an earned commission is subject to 39-3-206, including a penalty based on the amount of wages due and unpaid. Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999), following Como v. Rhines, 198 M 279, 645 P2d 948 (1982).

Part 1
General Provisions

39-3-102. Compensation of employee dismissed for cause.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Case Notes

Conflicting Testimony — Good Cause Not Shown: Employer, who introduced evidence of drinking, hangovers, and other matters in an effort to establish cause for discharge, but whose superintendent testified as to employee's good work and that employer instructed him to tell employee that employer did not have any more work, was running out of money, and could not carry a crew through the winter, failed to establish that employee's discharge was for "good cause". Ameline v. Pack & Co., 157 M 301, 485 P2d 689 (1971), distinguished in Myers v. Dept. of Agriculture, 232 M 286, 756 P2d 1144, 45 St. Rep. 1056 (1988).

39-3-103. Compensation of employee leaving for cause.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 2
Payment of Wages

Part Administrative Rules

Title 24, chapter 16, subchapter 30, ARM General hours worked — overtime compensation — wage payment.

Title 24, chapter 16, subchapter 40, ARM Complaints — claims — decisions — appeals.

Part Case Notes

Wage Claim Default — Request to Reconsider Properly Denied — Statutory Presumption of Delivery Properly Applied: The plaintiff's former employee filed a wage claim. After the plaintiff neither responded to the wage claim nor filed an appeal by the deadline, the Department of Labor and Industry issued an order for default against the plaintiff. The plaintiff then requested a redetermination of the wage claim, which the Department denied. The plaintiff appealed to the District Court and requested judicial review. The District Court found that the calculation of the wage and attorney fees award was proper. On appeal to the Supreme Court, the plaintiff argued that it had not been properly notified of the wage claim because no evidence existed that a notice letter had been sent to it. The Supreme Court nevertheless affirmed, ruling that the District Court had properly applied the statutory presumption of delivery. Griz One Firefighting v. St., 2020 MT 285, 402 Mont. 115, 475 P.3d 739.

Overtime Wage Dispute — Employer's Failure to Keep Truck Driver's Hours — Hearings Examiner's Shifting of Burden of Proof Improper: The plaintiff sued his employer, a trucking company, alleging that they made an oral contract guaranteeing him approximately $60,000 per year and that he was owed unpaid overtime wages. On remand from the Supreme Court in Arlington v. Miller's Trucking, Inc., 2012 MT 89, 364 Mont. 534, 277 P.3d 1198, the hearings examiner found that there was no oral agreement, the plaintiff made it difficult for the employer to record his hours, and that the plaintiff's claimed overtime hours were not credible. On appeal, the Supreme Court upheld the dismissal of the $60,000 per year claim. However, the Supreme Court reversed the unpaid wage denial, holding that the burden to maintain employee records falls on the employer, that the employee bears a light burden of production in the employer's failure to maintain records, and that uncontroverted evidence supported part of the plaintiff's overtime claims. Arlington v. Miller's Trucking, Inc., 2015 MT 68, 378 Mont. 324, 343 P.3d 1222.

Consideration of Payments on Collateral Obligations Proper: In a wage dispute, the employer argued that the Department of Labor and Industry lacked authority to make findings concerning certain payments the employer made to the employee on the basis that the payments were for unreimbursed loans and wages earned in other states. The Supreme Court affirmed, concluding that the Department acted within its jurisdiction in considering the payments because the payments were relevant in determining the amount the employer owed for work the employee performed in Montana. America's Best Contractors, Inc. v. Singh, 2014 MT 70, 374 Mont. 254, 321 P.3d 95.

Exemption Raised in Written Responses to Wage Claim Sufficient to Put Plaintiff on Notice of Affirmative Defense: The plaintiff worked as a manager for the defendant's automotive services and repair facility for approximately 17 months. Several months after the plaintiff resigned, he filed a claim for overtime pay with the Department of Labor and Industry (Department). At the subsequent administrative hearing, the hearings officer found that the plaintiff was a salesperson of automotive services and thus was not entitled to overtime pay under the exemption found in 39-3-406 and in 29 U.S.C. 213(b). On petition for judicial review, the plaintiff argued that the defendant had waived the exemption defense by not timely raising the issue. The District Court disagreed and held the defendant had not waived the defense. On appeal, the plaintiff argued that he was surprised and prejudiced by the defendant's affirmative defense and that the defense was waived because the defendant failed to raise it immediately prior to or during the administrative hearing. The Supreme Court affirmed the District Court's ruling, noting that the defendant had asserted the salesperson exemption in its written response to the plaintiff's original wage claim and in its response to the Department's request for clarification regarding the plaintiff's day-to-day duties. The Supreme Court determined that the correspondence demonstrated that the defendant had raised the exemption defense early in the proceedings and had clearly put the plaintiff on notice that it would rely on this affirmative defense. Thompson v. J.C. Billion, Inc., 2013 MT 20, 368 Mont. 299, 294 P.3d 397.

Statutory Discrimination and Wage Claims Not Clearly Covered in Collective Bargaining Agreement — Arbitration Not Required Prior to Filing in District Court: When the terms of a collective bargaining agreement did not clearly and unmistakably cover plaintiffs' statutory discrimination and wage claims, arbitration of the claims pursuant to the agreement was not required as a precondition to filing suit in District Court. Edwards v. Cascade County Sheriff's Dept., 2009 MT 451, 354 M 307, 223 P3d 893 (2009), following Wright v. Universal Maritime Serv. Corp., 525 US 70 (1998).

Allowance for Suspension Without Pay Contained in Policies Covered by Employment Manual — Suspension Proper: A doctor was suspended without pay by a health care facility for failing to sign outstanding warrants. The doctor contended that the suspension was improper because the employment contract allowed for suspension without pay only under specific circumstances, none of which were present in this case. However, the employment contract also contained a provision requiring the doctor to follow the facility policies and procedures, and that reference clearly incorporated the facility's employment manual into the employment contract. The employment contract was not inconsistent with the employment manual, nor was the disciplinary procedure used by the facility to suspend the doctor inconsistent with the employment contract. Thus, the District Court correctly held that the doctor was properly suspended without pay and that the suspension did not violate the employment contract. The doctor's claim for wages during the suspension also failed absent evidence of the hours worked and the ability to calculate the value of those hours. Marias Healthcare Serv., Inc. v. Turenne, 2001 MT 127, 305 M 419, 28 P3d 491 (2001).

Employee Paid on Commission Basis Covered Under Wage Protection Act: By definition in 39-3-201, wages are any money due an employee from an employer, including earned commissions. Noting substantial amendment to state wage protection policy since McBride v. School District, 88 M 110, 290 P 252 (1930), the Supreme Court held that the present underlying policy and provisions of Montana's wage protection statutes are sufficiently broad to cover employees who are paid on a commission basis and that an employer who fails to pay an earned commission is subject to 39-3-206, including a penalty based on the amount of wages due and unpaid. Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999), following Como v. Rhines, 198 M 279, 645 P2d 948 (1982).

Vacation Leave — Leave Collectible as Wages — Divestment of Leave by Employer's Condition Subsequent Held Unlawful — Board of Personnel Appeals Reversed: After Langager went to work for Crazy Creek Products (CCP), CCP distributed an employee handbook that Langager felt changed the terms of her oral contract regarding earning and using paid vacation days. Langager therefore filed an action against CCP to recover her wages earned but not paid for 2 weeks of vacation that she had taken. CCP argued that the vacation leave was not actually earned unless an employee complied with all of the conditions provided in its employee handbook. The new policy contained in the handbook required that Langager be present to work the day before and the day after using her paid vacation leave, which Langager was unable to do because she left employment with CCP and therefore did not return to work the day following her vacation. The Supreme Court held that the new policy contained in the handbook could be applied to Langager. Relying upon 23 A.G. Op. 151 (1949), and Morris v. C.C. Communications Corp., 175 M 23, 571 P2d 1163 (1977), the Supreme Court held that vacation leave that has been earned and is due and owing must be considered to be like wages that are due to an employee and is subject to the same statutes as wages. The Supreme Court said that Langager had fulfilled all of the conditions for the leave to be due and owing to her and that the legal question was therefore whether CCP could by a condition subsequent deny Langager vacation leave that was due and owed to her. Noting the inherent inconsistency of a policy under which an employee may not earn vacation leave until the vacation has come to an end, the Supreme Court held that Langager's leave could not be denied by a condition that would divest her of vacation leave that she had already accrued. In re Wage Claim of Langager v. Crazy Creek Products, Inc., 1998 MT 44, 287 M 445, 954 P2d 1169, 55 St. Rep. 169 (1998).

Option of Wage Claimant to Seek Administrative Remedies or File Directly in District Court: A wage claimant who desires to recover wages allegedly due may, pursuant to this part, either seek administrative remedies through the Department of Labor and Industry or file a claim directly in District Court to collect unpaid wages, statutory penalties, and attorney fees. Stanley v. Holms, 267 M 316, 883 P2d 837, 51 St. Rep. 1082 (1994). See also Boegli v. Glacier Mtn. Cheese Co., 238 M 426, 777 P2d 1303 (1989).

Meaning of Provision for Bonus if "Competition" Is Beaten: A contract between television station and a news editor/reporter that provided for a bonus if the station led its competitors meant that the station had to lead both competitors in the city. No bonus was due when the station led one but not the other. Berry v. KRTV Communications, Inc., 262 M 415, 865 P2d 1104, 50 St. Rep. 1617 (1993).

Failure to File Written Request for Hearing on Wage Claims — Waiver of Right to Contest Amount: The District Court did not abuse its discretion in granting a default judgment on a claim for unpaid wages when defendant employers failed to file a written request for an administrative hearing to explain the claims, thereby waiving their right to later contest the claim amounts. State ex rel. Vetch v. Hulman, 225 M 327, 732 P2d 843, 44 St. Rep. 275 (1987).

Procedural, Not Substantive, Provisions of Wage Payment Law Applicable to Minimum Wage Claims: Plaintiffs filed claims against their former employer, school district, for violation of Minimum Wage and Overtime Compensation Act (MWOCA), now codified in Title 39, ch. 3, part 4. Section 41-2306, R.C.M. 1947 (now 39-3-407), provided that MWOCA claims were to be enforced in accordance with the Montana Wage Payment Act (WPA), (now codified at Title 39, ch. 3, part 5). The District Court found that plaintiffs were entitled to payment of back wages from the school district. However, the court denied plaintiffs' claim for statutory penalty and attorney fees, ruling that the school district was not an "employer" within the meaning of WPA. Plaintiffs appealed, claiming that WPA provisions are to be used only for the purpose of providing a mechanism for the enforcement of MWOCA, that the substantive provisions of WPA are not applicable to a MWOCA claim, and that the court should have used the broad definition of "employer" found in MWOCA to assess a penalty and attorney fees against the school district. The Supreme Court reversed the District Court and ruled that the plain meaning of the statute indicated that it was the Legislature's intent to incorporate the remedial portions of the WPA only and that the substantive provisions of the MWOCA, including its definition of "employer", applied in this case. Sink v. School District, 199 M 352, 649 P2d 1263, 39 St. Rep. 1448 (1982).

Breach of a Contract to Employ — Measure of Damages: Rhines entered into an employment contract with Como, but after Como moved his family from Minnesota to Missoula, Rhines refused to give him a job. In a suit brought for breach of the contract, the Supreme Court held that the District Court improperly applied Title 39, ch. 3, part 2, in awarding damages. That part requires an employee to perform work for an employer. Since Como never performed any work for Rhines, the correct measure of damages should be the amount provided for by 27-1-311. Como v. Rhines, 198 M 279, 645 P2d 948, 39 St. Rep. 932 (1982).

39-3-201. Definitions.

Compiler's Comments

2011 Amendment: Chapter 12 in definition of employee inserted exception; and made minor changes in style. Amendment effective October 1, 2011.

1999 Amendment: Chapter 442 deleted definition of board that read: ""Board" means the board of personnel appeals provided for in 2-15-1705"; and made minor changes in style. Amendment effective April 23, 1999.

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 28, Ch. 442, L. 1999, was a severability clause.

1995 Amendment: Chapter 479 in definition of wages, in (a) after "gratuities", substituted "that are covered by section 3402(k) and service charges that are covered by section 3401 of the Internal Revenue Code of 1954, as amended and applicable on January 1, 1983, received by employees for services rendered by them to patrons of premises or businesses licensed to provide food, beverage, or lodging" for "of any kind" and inserted (b) defining service charge; and made minor changes in style. Amendment effective April 15, 1995.

Applicability: Section 5, Ch. 479, L. 1995, provided that this act applies to contracts entered into on or after April 15, 1995.

1989 Amendment: Inserted definitions of Board and Department; and made minor changes in phraseology. Amendment effective July 1, 1989.

Applicability: Section 9, Ch. 554, L. 1989, provided: "[This act] applies to all wage claims filed with the department after July 1, 1989."

Case Notes

Condition Precedent — Sick Leave Payout Upon 25 Years of Service — No Compensation Prior to 25 Years of Service: A hospital discontinued a policy whereby it paid employees for their sick leave after 25 years of service. Employees with less than 25 years of service sued the hospital alleging violations of Title 39, ch. 3. The District Court granted the hospital summary judgment, concluding that the policy did not constitute deferred compensation or wages under Montana law. The plaintiffs appealed. The Supreme Court affirmed, agreeing that the completion of 25 years of service was a condition precedent and therefore the benefit did not accrue until the employee had actually completed 25 years of service. Chipman v. NW. Healthcare Corp., 2014 MT 15, 373 Mont. 360, 317 P.3d 182.

Employment Contract Providing for Payment of Percentage of Personal Time Affirmed: Upon McConkey's termination from employment, the employer paid McConkey cash amounting to 95% of accrued personal time. McConkey contended that because the personal time qualified as wages, he was entitled to be paid for all personal time accrued at 100%. The District Court properly concluded that personal time does not automatically qualify as wages; however, an employer is obligated to pay for earned but unused personal time to the extent that the employer obligated itself under the conditions of employment. In this case, the payment of 95% of personal time was a condition of employment that McConkey accepted, so the employer was obligated to pay only 95%, and the remaining 5% did not constitute wages for which McConkey had to be compensated. McConkey v. Flathead Elec. Co-op, 2005 MT 334, 330 M 48, 125 P3d 1121 (2005). See also In re Wage Claim of Langager v. Crazy Creek Products, Inc., 1998 MT 44, 287 M 445, 954 P2d 1169 (1998).

Failure to Raise Statute of Limitations Defense in Original Pleadings — Defense Waived: A doctor filed wage claims against a health care facility in 1999 as a counterclaim against the facility's claim against the doctor for failing to sign outstanding warrants in 1997. The facility then claimed that the doctor was time-barred for failing to raise the wage claim within the statute of limitations in 39-3-207. The District Court concurred and held that the doctor's claim was not timely filed. On appeal, the doctor asserted that the facility could not first raise the statute of limitations defense in its posttrial memorandum because a statute of limitations defense is an affirmative defense that must be raised in the original pleadings. The Supreme Court agreed. The facility failed to raise the issue in its original pleadings and was thus barred from raising the defense on appeal. Marias Healthcare Serv., Inc. v. Turenne, 2001 MT 127, 305 M 419, 28 P3d 491 (2001).

Employee Paid on Commission Basis Covered Under Wage Protection Act: By definition in this section, wages are any money due an employee from an employer, including earned commissions. Noting substantial amendment to state wage protection policy since McBride v. School District, 88 M 110, 290 P 252 (1930), the Supreme Court held that the present underlying policy and provisions of Montana's wage protection statutes are sufficiently broad to cover employees who are paid on a commission basis and that an employer who fails to pay an earned commission is subject to 39-3-206, including a penalty based on the amount of wages due and unpaid. Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999), following Como v. Rhines, 198 M 279, 645 P2d 948 (1982).

Shareholders, Owners, and Directors With Proprietary Interest — Considered Employees for Wage Collection Purposes: Two persons who were shareholders, owners, and directors of a professional corporation, which was a separate legal entity, and who entered into employment contracts that specifically provided that their relationship with the corporation was that of employer and employee were correctly determined to be employees for the purpose of collection of wages under Montana wage payment law. Hoven, Vervick, & Amrine, P.C. v. Comm'r of Labor, 237 M 525, 774 P2d 995, 46 St. Rep. 1024 (1989).

"Work" and "Employment" Defined: The definition of "employ" in this section is identical to that in the Fair Labor Standards Act (FLSA). The Montana Supreme Court adopted for purposes of this section the interpretation given by the United State Supreme Court to the FLSA, holding that "work" or "employment" means physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer. Phillips v. Lake County, 222 M 42, 721 P2d 326, 43 St. Rep. 1046 (1986).

Reimbursement of Expenses Not Payment of "Wages" — Penalty for Failure to Pay Wages Inapplicable: In an action by the plaintiff to recover payment of expenses due to the plaintiff under an oral contract providing for reimbursement of his actual expenses, the trial court did not err in holding the penalty for unpaid wages inapplicable to the plaintiff's claim. The reimbursement to the plaintiff of actual expenses is not a "wage", as defined by this section, but an "indemnification of employee", referred to in 39-2-701. There is no statutory penalty for the failure of an employer to indemnify an employee for expenditures covered by that section. Johnston v. K & T Mfg., Inc., 191 M 458, 625 P2d 66, 38 St. Rep. 392 (1981).

Bonus: Yearly bonus of percentage of gross income of veterinary clinic was part of the wages of a veterinary employee. Hammill v. Young, 168 M 81, 540 P2d 971 (1975).

Schoolteachers: The Legislature in enacting this section did not intend that the act (Title 39, ch. 3, part 2) should apply to a school district as employer and a teacher as employee receiving a fixed compensation, and therefore the court properly struck out of the complaint of a teacher in her action for breach of contract an allegation that plaintiff was entitled to the 5% penalty. McBride v. School District, 88 M 110, 290 P 252 (1930). See also Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999), in which it was held that the underlying policy and provisions of Montana's wage protection statutes are sufficiently broad to cover employees who are paid on a commission basis.

Attorney General's Opinions

Unlawful Deductions From Wages: An employer cannot withhold his employee's wages and apply them toward damages caused by employee negligence, unauthorized mileage, costs of retrieving abandoned property, and liability insurance; notwithstanding the fact that the employee contractually agreed to deduction. 36 A.G. Op. 17 (1975).

Law Review Articles

Giggin' in the 21st Century, Ford, 80 Mont. L. Rev. 299 (2019).

39-3-202. Rulemaking power of commissioner.

Administrative Rules

Title 24, chapter 16, subchapter 75, ARM Wage claims.

Case Notes

State Enforcement of FLSA Claim: The Montana Department of Labor is not precluded by 39-3-408 or the Fair Labor Standards Act from seeking enforcement of the FLSA claim of an employee working in Montana, but rather is authorized by 39-3-202, 39-3-211, 29 C.F.R. 515.8, and FLSA to do so. St. v. Holman Aviation Co., 176 M 31, 575 P2d 923 (1978).

39-3-203. Employer to notify employee on written demand as to rate of wages and date of paydays.

Case Notes

Agricultural Labor: Since this section excludes agricultural labor from the operation of the act (Ch. 11, L. 1919), the provision of 39-3-214 for a reasonable attorney's fee to be taxed as costs does not apply in action by ranch hand to recover wages, and attorney's fee was properly disallowed. Gahagan v. Gugler, 100 M 599, 52 P2d 150 (1935).

Attorney General's Opinions

Unlawful Deductions From Wages: An employer cannot withhold his employee's wages and apply them toward damages caused by employee negligence, unauthorized mileage, costs of retrieving abandoned property, and liability insurance; notwithstanding the fact that the employee contractually agreed to deduction. 36 A.G. Op. 17 (1975).

39-3-204. Payment of wages generally.

Compiler's Comments

2009 Amendment: Chapter 26 in (1) at end of first sentence after "payable" inserted "except as provided in 39-3-205" and near end of second sentence after "employment or" substituted "as otherwise" for "other deductions"; and made minor changes in style. Amendment effective March 20, 2009.

2003 Amendment: Chapter 301 in (1) near beginning of first sentence after "provided in" substituted "subsections (2) and (3)" for "subsection (4)"; deleted former (2) and (3) that read: "(2) If at the time of payment of wages any employee is absent from the regular place of labor, the employee is entitled to payment at any time thereafter.

(3) Provisions of this section do not apply to any professional, supervisory, or technical employee who by custom receives wages earned at least once monthly"; inserted (3) providing that if an employee submits a timesheet after the employer's established deadline for processing employee timesheets for a particular time period and the employer does not pay the employee within the 10-day period, the employer may pay the employee the wages due in the ensuing pay period, that an employer may not withhold payment of the employee's wages beyond the next ensuing pay period, and that if there is not an established time period or time when wages are due and payable, the pay period is presumed to be semimonthly in length; and made minor changes in style. Amendment effective April 14, 2003.

Effective Date — Applicability: Section 2, Ch. 301, L. 2003, provided: "[This act] is effective on passage and approval [approved April 14, 2003] and applies to timesheets filed on or after [the effective date of this act]."

1993 Amendment: Chapter 134 in (1), at beginning, inserted exception clause; inserted (4) allowing payment of wages by electronic funds transfer or similar means; and made minor changes in style.

Case Notes

Selective Reliance on Extrinsic Evidence Improper: The city of Billings appealed the District Court's judgment regarding the collective bargaining agreements and payment of "longevity" wage benefits to a class of current and retired officers and members of the Montana Public Employees Association-Billings Police. The Supreme Court reversed, finding that the District Court erred in holding that the collective bargaining agreements were unambiguous and by selectively relying on extrinsic evidence favoring the officers, and remanded the case for further proceedings. Watters v. Billings, 2017 MT 211, 388 Mont. 376, 404 P.3d 379.

Class Certification for Wage and Hour Claim Denied — No Abuse of Discretion Where Impractibility Not Established: The plaintiffs, who were employees of subcontractors for the defendant, filed a wage and hour claim against the defendant claiming that they were underpaid for their work. The plaintiffs identified 28 employees who were underpaid and sought class certification under Rule 23, M.R.Civ.P. (Title 25, ch. 20). The District Court considered the four prerequisites for class certification: numerosity, commonality, typicality, and adequacy of representation. The plaintiffs claimed that the relatively small size of their claims made individual claims impracticable; however, the District Court disagreed and denied class action certification. On appeal, the Supreme Court affirmed, ruling that the plaintiffs had failed to prove the impracticality of joining the 28 employees and that the District Court had therefore not abused its discretion in denying class certification. Morrow v. Monfric, Inc., 2015 MT 194, 380 Mont. 58, 354 P.3d 558.

Applicability of 55% Penalty Absent Evidence of Similarity of Previous Wage Claim: This section allows assessment of a 55% penalty against an employer who fails to pay wages due within 10 days. Rule 24.16.7556, ARM, provides that if special circumstances warrant, a penalty of up to 100% may be assessed, including an employer failing to provide requested information or an employer's violation of similar wage and hour statutes within 3 years of the filing of a wage claim. A hearings officer noted gaps in information provided by the employer, and the District Court assessed a 110% penalty based on the hearings officer's observation. On appeal, the Supreme Court noted the absence of substantial credible evidence that the information was falsified or intentionally misleading, and the claimants thus failed to show that the employer failed to provide requested information or failed to cooperate in investigation of the wage claim. Further, there was no substantial credible evidence that the claim was similar to a previous successful wage claim. Therefore, the Supreme Court reversed the 110% penalty and held that the 55% penalty was appropriate. Clouse v. Lewis & Clark County, 2008 MT 271, 345 M 208, 190 P3d 1052 (2008). See also Kuhr v. Billings, 2007 MT 201, 338 M 402, 168 P3d 615 (2007), and Watters v. Billings, 2017 MT 211, 388 Mont. 376, 404 P.3d 379.

Admissibility of Employment Separation Agreement to Support Pretextual Termination: West sued his employer for failure to pay commissions due to West for the sale of the employer's resort property after West's employment was terminated. At trial, the District Court allowed into evidence a separation agreement that the employer had proposed prior to West's termination. The employer asserted that admission of the separation agreement was error under Rule 408, M.R.Ev. (Title 26, ch. 10), because the rule prohibits admissibility of offers of compromise. However, the rule does not require exclusion of compromises that are offered for another purpose. Here, the settlement agreement was offered to support West's argument that his firing was pretextual, rather than to prove the employer's liability or the invalidity of the claim. The District Court did not err in allowing the separation agreement for a purpose other than an offer of compromise. West v. The Club at Spanish Peaks, LLC, 2008 MT 183, 343 M 434, 186 P3d 1228 (2008). See also In re Estate of Stukey, 2004 MT 279, 323 M 241, 100 P3d 114 (2004).

Ambiguous Employment Contract — Question of Parties' Intent Properly Submitted to Jury: West's employment contract contained two different provisions regarding how West would be compensated in the event of termination of employment. The District Court construed the ambiguous clauses against the employer who drafted the contract and submitted the issue to the jury. On appeal by the employer, the Supreme Court examined the contract language and affirmed. The employment agreement was ambiguous on the issue of whether West would be paid trailing commissions or bonuses if West were terminated for cause, so the District Court did not err in ordering that the parties' intent on the issue be submitted to the jury. West v. The Club at Spanish Peaks, LLC, 2008 MT 183, 343 M 434, 186 P3d 1228 (2008), following Eschenbacher v. Anderson, 2001 MT 206, 306 M 321, 34 P3d 87 (2001).

Penalties Not Applicable for Failure to Pay Trailing Commissions Owed to Terminated Employee — Not Covered Under Wage Act: The District Court awarded plaintiff the statutory penalty under 39-3-204 owed for defendant's wrongful withholding of plaintiff's trailing commissions after plaintiff's employment was terminated. Defendant argued that the penalty was inappropriate because it applied only to present, not former, employees. The Supreme Court agreed and reversed the award. Section 39-3-204 does not allow a former employee to recover a penalty under the wage protection laws unless those wages were due and payable while that person was still an employee. Additionally, because an award of attorney fees to plaintiff was calculated in part on the improper award of statutory penalties under the wage protection laws, the issue of attorney fees was also remanded for recalculation. West v. The Club at Spanish Peaks, LLC, 2008 MT 183, 343 M 434, 186 P3d 1228 (2008). See also Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818 (1999).

Failure to Assess Required Minimum Penalty — Remand: After finding the city of Billings liable for firefighters' wages for all hours worked and for leave time, the District Court assessed a penalty on the city in the amount of 8.45% of the unpaid wages, and the firefighters appealed. The Supreme Court noted that the amount of penalty to be imposed is not discretionary. Pursuant to the administrative rules of the Department of Labor and Industry, the penalty must be 15%, 55%, or 110% of the wages owed, depending on the circumstances. Although the firefighters argued that the penalty should have been 110%, the Supreme Court found that sufficient grounds did not exist for imposition of the maximum penalty, but did hold that the District Court erred by not assessing the required 55% minimum penalty, with a reduction to 15% if the city paid the wages and penalty in a time period specified by the District Court. The case was remanded for assessment of the appropriate penalty. Kuhr v. Billings, 2007 MT 201, 338 M 402, 168 P3d 615 (2007).

Employment Contract Providing for Payment of Percentage of Personal Time Affirmed: Upon McConkey's termination from employment, the employer paid McConkey cash amounting to 95% of accrued personal time. McConkey contended that because the personal time qualified as wages, he was entitled to be paid for all personal time accrued at 100%. The District Court properly concluded that personal time does not automatically qualify as wages; however, an employer is obligated to pay for earned but unused personal time to the extent that the employer obligated itself under the conditions of employment. In this case, the payment of 95% of personal time was a condition of employment that McConkey accepted, so the employer was obligated to pay only 95%, and the remaining 5% did not constitute wages for which McConkey had to be compensated. McConkey v. Flathead Elec. Co-op, 2005 MT 334, 330 M 48, 125 P3d 1121 (2005). See also In re Wage Claim of Langager v. Crazy Creek Products, Inc., 1998 MT 44, 287 M 445, 954 P2d 1169 (1998).

Allowance for Suspension Without Pay Contained in Policies Covered by Employment Manual — Suspension Proper: A doctor was suspended without pay by a health care facility for failing to sign outstanding warrants. The doctor contended that the suspension was improper because the employment contract allowed for suspension without pay only under specific circumstances, none of which were present in this case. However, the employment contract also contained a provision requiring the doctor to follow the facility policies and procedures, and that reference clearly incorporated the facility's employment manual into the employment contract. The employment contract was not inconsistent with the employment manual, nor was the disciplinary procedure used by the facility to suspend the doctor inconsistent with the employment contract. Thus, the District Court correctly held that the doctor was properly suspended without pay and that the suspension did not violate the employment contract. The doctor's claim for wages during the suspension also failed absent evidence of the hours worked and the ability to calculate the value of those hours. Marias Healthcare Serv., Inc. v. Turenne, 2001 MT 127, 305 M 419, 28 P3d 491 (2001).

Deduction of Cost of Educational Workshop and Supplies From Wages Affirmed: A doctor who was employed by a health care facility attended an educational workshop, and the facility subsequently deducted $200 of the cost of the workshop and supplies from the doctor's compensation, which the doctor maintained was error. The District Court determined that the deduction was proper, and the Supreme Court affirmed. The District Court was in the better position to observe the witnesses and judge their credibility, and the Supreme Court declined to second guess the decision. Marias Healthcare Serv., Inc. v. Turenne, 2001 MT 127, 305 M 419, 28 P3d 491 (2001).

Failure to Provide Sufficient Evidence That Employee Not Fully Compensated: A doctor claimed that a health care facility did not pay full compensation owing under an employment contract, that monthly income was miscalculated, and that a cost of living increase was not included in the base salary. As evidence of underpayment, the doctor provided payment stubs representing a portion of the monthly compensation. However, the District Court held that the doctor presented incomplete evidence by which to determine whether the doctor was underpaid in terms of the total monthly compensation package. The Supreme Court agreed. The compensation provisions were intentionally flexible for tax purposes and designed to benefit the doctor by withholding certain claims from paychecks. The doctor presented no evidence as to the appropriate or required monthly level of compensation, accounting for Social Security, workers' compensation or other withholding, or the favorable tax benefits that would adequately demonstrate whether the health care facility provided adequate compensation. Marias Healthcare Serv., Inc. v. Turenne, 2001 MT 127, 305 M 419, 28 P3d 491 (2001).

Corporation Not to Retroactively Take Back Wage Obligations: Once a corporation obligated itself to pay annual wages, it could not retroactively, by action of a different board of directors, take back what had become the obligation of the corporation. Hoven, Vervick, & Amrine, P.C. v. Comm'r of Labor, 237 M 525, 774 P2d 995, 46 St. Rep. 1024 (1989).

Statutory Wage Protection Inapplicable to Future Wages: Plaintiff alleged wrongful termination of employment and sought compensation for wages he would have collected had he not been discharged. The District Court properly granted partial summary judgment on plaintiff's wage claim after holding that the lost wages did not constitute "wages" within the meaning of the wage statutes. The protection granted under the statutes applies to labor or services actually performed or completed, as distinguished from labor or services to be performed in the future. Myers v. Dept. of Agriculture, 232 M 286, 756 P2d 1144, 45 St. Rep. 1056 (1988).

Wage Protection Act Not Applicable: Plaintiff university professor's summer appointments were consideration supporting his early retirement contract. He was not expected to perform any services other than those normally required of a tenured professor nor did he perform any services. As he performed no labor during the summer appointments, this section does not apply. His employment contract is not covered by the Montana Wage Protection Act. Julian v. Mont. St. Univ., 229 M 362, 747 P2d 196, 44 St. Rep. 2046 (1987).

Percentage of Wages Withheld at Employee's Request — Acceptable Practice: Neither this section nor public policy prohibits an employee from voluntarily requesting that a certain percentage of his wages be set aside for payment at a later date. Christiansen v. Taylor Bros., Inc., 225 M 318, 732 P2d 841, 44 St. Rep. 268 (1987).

Employment Contract — Interpretation — Deduction of Payments Under Previous Contract: Appellant's contract of employment with Ollie May Vestal was terminated by her death. After her death he entered into a new employment contract with the personal representative of her estate. Payments made under the original contract may not be deducted from payments due under the second contract of employment even if payments made under the original contract were greater than the stated amount. Heintz v. Vestal, 185 M 232, 605 P2d 606, 37 St. Rep. 99 (1980).

Professional Employee:

Although veterinarian who worked in a clinic was a professional person, he was an employee within the meaning of this act. Hammill v. Young, 168 M 81, 540 P2d 971 (1975).

The professional employee exclusion of this act applies only to the requirement of bimonthly payment of wages, and not to parts of the act pertaining to the penalty and attorney fee provisions. Hammill v. Young, 168 M 81, 540 P2d 971 (1975).

"Labor": One who acted as watchman, messenger, and general repairman, performed "labor" within the meaning of this section, requiring physical exertion rather than mental, and therefore was entitled to maintain an action to recover wages. Britt v. Cotter Butte Mines, 108 M 174, 91 P2d 403 (1939).

Pleadings: Where pleadings did not show nature of labor performed by plaintiff suing for wages, and for the first time in the record the nature of the services as coming within this section appeared in the memorandum of costs, and later in the bill of exceptions to the court's ruling on costs, this constituted a prima facie showing and was sufficient until overturned. Swanson v. Gnose, 106 M 262, 76 P2d 643 (1938).

Schoolteacher: A schoolteacher is not a laborer within the meaning of this section. McBride v. School District, 88 M 110, 290 P 252 (1930).

Attorney General's Opinions

Montana Law Not Applicable to Workers Covered by Fair Labor Standards Act: State and local government employees who are covered by the federal Fair Labor Standards Act of 1938 (FLSA) are not subject to the provisions of the Montana minimum wages and maximum hours law (Title 39, ch. 3, part 4) and therefore may reach agreement with their employers to receive compensatory time in lieu of cash overtime in accordance with FLSA amendments in 1985. 41 A.G. Op. 58 (1986).

Unlawful Deductions From Wages: An employer cannot withhold his employee's wages and apply them toward damages caused by employee negligence, unauthorized mileage, costs of retrieving abandoned property, and liability insurance; notwithstanding the fact that the employee contractually agreed to deduction. 36 A.G. Op. 17 (1975).

39-3-205. Payment of wages when employee separated from employment prior to payday — exceptions.

Compiler's Comments

2009 Amendment: Chapter 26 in (1) at beginning inserted exception clause; in (3)(b) substituted "7 business days" for "7 days"; in (3)(b)(i) in two places substituted reference to 30-day filing period for reference to 15-day filing period; and made minor changes in style. Amendment effective March 20, 2009.

1997 Amendment: Chapter 209 substituted current text concerning payment of all unpaid wages upon separation of employee from employment for former text (see 1997 Session Law for former text).

1989 Amendment: In (1) substituted reference to subsections (2) and (3) for reference to subsection (2); in (2) inserted exception clause; inserted (3) relating to a stay of the payment of final wages due an employee who has committed theft of his employer's property; and made minor changes in phraseology.

Case Notes

Penalties Not Applicable for Failure to Pay Trailing Commissions Owed to Terminated Employee — Not Covered Under Wage Act: The District Court awarded plaintiff the statutory penalty under 39-3-204 owed for defendant's wrongful withholding of plaintiff's trailing commissions after plaintiff's employment was terminated. Defendant argued that the penalty was inappropriate because it applied only to present, not former, employees. The Supreme Court agreed and reversed the award. Section 39-3-204 does not allow a former employee to recover a penalty under the wage protection laws unless those wages were due and payable while that person was still an employee. Additionally, because an award of attorney fees to plaintiff was calculated in part on the improper award of statutory penalties under the wage protection laws, the issue of attorney fees was also remanded for recalculation. West v. The Club at Spanish Peaks, LLC, 2008 MT 183, 343 M 434, 186 P3d 1228 (2008). See also Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818 (1999).

Family Member Exclusion Inapplicable to Claim for Unpaid Back Wages — One Hundred Ten Percent Penalty Applied — Attorney Fees and Costs Properly Awarded: Greta worked for her husband's broadcasting company as a traffic system manager, initially working without hourly wages or a salary. About 10 months after her employment began, her husband offered Greta a monthly salary and agreed that Greta should be paid retroactively to the first day on which she started working, preparing a memorandum of understanding to that effect. The M.O.U. also provided that Greta be repaid for the 10-month period according to a mutually agreeable schedule. Greta continued to work several months at salary, but the marriage began to dissolve, and she left her position without receiving any back wages. The company eventually made some payments, but Greta ultimately sued for unpaid wages plus penalties under the wage protection statutes. The District Court granted Greta summary judgment on the issue of whether unpaid wages were owed and, after trial, ordered the company to pay Greta the amount still owing. However, the court declined to award the maximum 110% penalty, establishing a 55% penalty instead and awarding Greta her attorney fees and costs. Both parties appealed. The company claimed that the penalty and fees should not have been awarded because, as a family member, Greta's employment relationship was excluded under 39-3-406. However, that exception applies to the minimum wage and overtime provisions of the employment relationship, not to the failure to timely pay wages, which is governed by this section. Once Greta became a salaried employee, she was entitled to the rights and remedies afforded to all employees under state law. Therefore, the District Court properly determined that back wages were owing. However, under ARM 24.16.7551, an employer who pays some or all of a contested wage may be relieved in whole or in part of paying a penalty, unless the employer has previously violated similar wage and hour statutes within 3 years prior to the date of the filing of the wage claim. The District Court erred in not taking judicial notice of the administrative rule. Because the company had been the subject of at least three prior wage claims by other employees, the special circumstances of the rule applied, so the 110% penalty, as a matter of law, applied to the back wages owed to Greta at the time of her separation from employment. Thus, the Supreme Court vacated the 55% award and directed a 110% award from that date. Further, the District Court's award of attorney fees and costs was based on substantial evidence and was proper under 39-3-214, including Greta's attorney fees incurred on appeal. Reier Broadcasting Co. v. Reier, 2000 MT 120, 299 M 463, 1 P3d 940, 57 St. Rep. 504 (2000).

Employee Paid on Commission Basis Covered Under Wage Protection Act: By definition in 39-3-201, wages are any money due an employee from an employer, including earned commissions. Noting substantial amendment to state wage protection policy since McBride v. School District, 88 M 110, 290 P 252 (1930), the Supreme Court held that the present underlying policy and provisions of Montana's wage protection statutes are sufficiently broad to cover employees who are paid on a commission basis and that an employer who fails to pay an earned commission is subject to 39-3-206, including a penalty based on the amount of wages due and unpaid. Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999), following Como v. Rhines, 198 M 279, 645 P2d 948 (1982).

Payment of Commissions Owed on Last Day of Employment and Not Paid Within Three Days After Termination: Delaware was entitled to commissions when a project was completed and the employer received payment for the work; however, some commissions became due after Delaware's last day of employment. This section provides a rule regarding payment of wages that are due on the last day of employment, but does not provide a rule regarding wages that become due after the last day of employment. The employer could thus be penalized for violating this section for commissions due on the last day of employment that were not paid within 3 days of termination, but could not be penalized pursuant to 39-3-206 or this section for commissions that became due after separation from employment. Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999), clarifying Craver v. Waste Management Partners of Bozeman, 265 M 37, 874 P2d 1 (1994).

Proposed Instruction on Preparation of Employment Termination Check Properly Rejected: The appellant argued that the lower court erred in rejecting the appellant's proposed instruction setting out for the jury the fact that state law required an employee to be paid immediately upon separation. The Supreme Court disagreed on the basis that the plaintiff had argued that the check had been made out before his meeting with management, demonstrating that the decision to fire him had been made prior to any hearing. The Supreme Court held that the instruction would mislead and confuse the jury and that each side had the opportunity during trial to argue the significance of the check being made out prior to the hearing. Barrett v. Asarco, 245 M 196, 799 P2d 1078, 47 St. Rep. 1980 (1990).

Statutory Wage Protection Inapplicable to Future Wages: Plaintiff alleged wrongful termination of employment and sought compensation for wages he would have collected had he not been discharged. The District Court properly granted partial summary judgment on plaintiff's wage claim after holding that the lost wages did not constitute "wages" within the meaning of the wage statutes. The protection granted under the statutes applies to labor or services actually performed or completed, as distinguished from labor or services to be performed in the future. Myers v. Dept. of Agriculture, 232 M 286, 756 P2d 1144, 45 St. Rep. 1056 (1988).

39-3-206. Penalty for failure to pay wages at times specified in law.

Compiler's Comments

1993 Amendment: Chapter 134 in (1), near end, increased penalty from 100% to 110% of wages due and unpaid; deleted former (2) that read: "(2) The employer shall also pay the employee annualized interest on the unpaid wages from the date the wages were due. The interest must be calculated by the department and compounded annually, but the annualized rate may not be less than 2 percentage points a year above the prime rate of major New York banks on the date of settlement"; in (2), after "wages due", deleted "including interest"; and made minor changes in style.

1991 Amendment: In (1), in second sentence after "employer", substituted "to the employee in an amount not to exceed 100%" for "and become due such employee as follows: a sum equivalent to the fixed amount of 5%" and after "unpaid" deleted "shall be assessed for each day, except Sundays and legal holidays, upon which such failure continues after the day upon which such wages were due, except that such failure shall not be deemed to continue more than 20 days after the date such wages were due"; inserted (2) requiring payment of annualized interest; inserted (3) clarifying that payment of full amount of wages, plus interest, is required when a violation occurs; and made minor changes in style. Amendment effective July 1, 1991.

Applicability: Section 8, Ch. 490, L. 1991, provided: "[This act] applies to all wage claims filed with the department of labor and industry on or after July 1, 1991."

Case Notes

Lookback Period: In a wage claim suit, a police union argued for a lookback period governed by 7-32-4121 while the city argued for one governed by 39-3-207. The Supreme Court agreed with the city, noting that the police brought their claim under Title 39, and not 7-32-4121. The Supreme Court remanded for consideration of the issue based on 39-3-207 and for consideration of penalties if the city is found to owe unpaid wages. Watters v. Billings, 2019 MT 255, 397 Mont. 428, 451 P.3d 60.

Overtime Wage Dispute — Employer's Failure to Keep Truck Driver's Hours — Hearings Examiner's Shifting of Burden of Proof Improper: The plaintiff sued his employer, a trucking company, alleging that they made an oral contract guaranteeing him approximately $60,000 per year and that he was owed unpaid overtime wages. On remand from the Supreme Court in Arlington v. Miller's Trucking, Inc., 2012 MT 89, 364 Mont. 534, 277 P.3d 1198, the hearings examiner found that there was no oral agreement, the plaintiff made it difficult for the employer to record his hours, and that the plaintiff's claimed overtime hours were not credible. On appeal, the Supreme Court upheld the dismissal of the $60,000 per year claim. However, the Supreme Court reversed the unpaid wage denial, holding that the burden to maintain employee records falls on the employer, that the employee bears a light burden of production in the employer's failure to maintain records, and that uncontroverted evidence supported part of the plaintiff's overtime claims. Arlington v. Miller's Trucking, Inc., 2015 MT 68, 378 Mont. 324, 343 P.3d 1222.

Penalties Not Applicable for Failure to Pay Trailing Commissions Owed to Terminated Employee — Not Covered Under Wage Act: The District Court awarded plaintiff the statutory penalty under 39-3-204 owed for defendant's wrongful withholding of plaintiff's trailing commissions after plaintiff's employment was terminated. Defendant argued that the penalty was inappropriate because it applied only to present, not former, employees. The Supreme Court agreed and reversed the award. Section 39-3-204 does not allow a former employee to recover a penalty under the wage protection laws unless those wages were due and payable while that person was still an employee. Additionally, because an award of attorney fees to plaintiff was calculated in part on the improper award of statutory penalties under the wage protection laws, the issue of attorney fees was also remanded for recalculation. West v. The Club at Spanish Peaks, LLC, 2008 MT 183, 343 M 434, 186 P3d 1228 (2008). See also Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818 (1999).

County Attorney Not Considered County Employee for Purposes of Assessing Penalty for Failure to Pay Wages: County Attorney Oster successfully sued a county for underpayment of wages. The District Court held that because Oster was a county employee, Oster was also entitled to damages, costs, and attorney fees pursuant to penalty provisions of this section. Applying the rationale in Geiger v. Dept. of Revenue, 260 M 294, 858 P2d 1250 (1993), the Supreme Court held that in light of the fact that Oster was an elected official with ultimate accountability to the people of the county, Oster did not work for the county as a hired employee and thus was not a county employee within the meaning of Title 39. The award of a penalty, costs, and attorney fees was reversed. Oster v. Valley County, 2006 MT 180, 333 M 76, 140 P3d 1079 (2006).

Sufficient Allegations for Pursuit of State Claim for Violation of Federal Wage Standards Absent Remedy Under Federal Davis-Bacon Act: Plaintiff construction workers on a public works project brought a state action against a school district for alleged violation of wage standards established by the federal Davis-Bacon Act. The District Court held that before the workers could maintain a private cause of action in state court, the four-part test in St. Medical Oxygen & Supply, Inc. v. Am. Medical Oxygen Co., 230 M 456, 750 P2d 1085 (1988), must be met. The first prong requires a showing that the Davis-Bacon Act created a federal right in favor of plaintiffs. The District Court held that it did but then found that because there was no indication in the Act that Congress intended to create a remedy against the owner of the project and that implying such a remedy was inconsistent with the Act, a state action could not be maintained. The Supreme Court disagreed and reversed. Absent both a federal wage provision and a federal contracting party, the workers could invoke no federal regulatory remedy under 40 U.S.C. 3142(a), so a state court action was logical for pursuit of a remedy. Because the workers were not seeking a remedy under the Act, analysis under St. Medical Oxygen was unnecessary and inappropriate.

The allegations in the workers' state claim were sufficient to survive the school district's claim for dismissal and to vest the District Court with subject matter jurisdiction, so the case was remanded to allow the workers to proceed with their negligence and breach of contract action against the school district. Herrmann v. Wolf Point School District, 2004 MT 10, 319 M 231, 84 P3d 20 (2004). See also Favel v. Am. Renovation & Constr. Co., 2002 MT 266, 312 M 285, 59 P3d 412 (2002).

Applicability of State Wage Protection Laws to Private Action by State Employees Not Covered by Federal Fair Labor Standards Act: Sixteen highway patrol officers filed federal and state wage claims. A hearings examiner found that the claims were governed by the federal Fair Labor Standards Act of 1938 (FLSA), rather than by Montana law. The U.S. Supreme Court subsequently issued its decision in Alden v. Maine, 527 US 706 (1999), and the patrol moved to dismiss on grounds that under Alden, sovereign immunity barred the wage claims. The motion was denied, and the parties appealed to the Bureau of Personnel Appeals (BPA), which reversed the hearings examiner's holding and concluded that neither the hearings examiner nor the BPA had jurisdiction to consider the issue of sovereign immunity. The parties then appealed to District Court, and the court held that because Montana had not waived sovereign immunity from suit pursuant to the FLSA and Alden, the officers were not covered by the FLSA as contemplated by 39-3-408, so their state wage claim was incorrectly dismissed and the officers were entitled to pursue the wage claim under Montana law. Following certification, the case was appealed to the Supreme Court, which, without addressing the sovereign immunity issue, affirmed the District Court's conclusion that the officers had a state claim because they were not covered by the FLSA. It makes no difference whether a Montana employer is excluded from the protection of the FLSA by its terms or as the result of a judicial decision and to hold otherwise would defeat the policy behind the state wage payment laws set forth in 39-3-401. As a result of Alden, the primary enforcement mechanism of the FLSA to allow the right to bring a private wage claim against an employer for monetary damages has been taken from the people whom it was intended to protect, creating a de facto exclusion of the officers in this case from full FLSA protection. Without the right of private action, the right to fair wages cannot be enforced in the manner contemplated by Congress and the Montana Legislature. Because the officers were not covered by the FLSA, the District Court properly concluded that provisions of the state wage payment laws applied. (See the 2001 amendments to 39-3-408, which expressly covered state employees.) In re Wage Claim of Babinecz v. Mont. Highway Patrol, 2003 MT 107, 315 M 325, 68 P3d 715 (2003). See also Plouffe v. Farm & Ranch Equip. Co., 174 M 313, 570 P2d 1106 (1977), Berry v. KRTV Communications, Inc., 262 M 415, 865 P2d 1104 (1993), and Kearney v. KXLF Communications, Inc., 263 M 407, 869 P2d 772 (1994).

Failure to Provide Sufficient Evidence That Employee Not Fully Compensated: A doctor claimed that a health care facility did not pay full compensation owing under an employment contract, that monthly income was miscalculated, and that a cost of living increase was not included in the base salary. As evidence of underpayment, the doctor provided payment stubs representing a portion of the monthly compensation. However, the District Court held that the doctor presented incomplete evidence by which to determine whether the doctor was underpaid in terms of the total monthly compensation package. The Supreme Court agreed. The compensation provisions were intentionally flexible for tax purposes and designed to benefit the doctor by withholding certain claims from paychecks. The doctor presented no evidence as to the appropriate or required monthly level of compensation, accounting for Social Security, workers' compensation or other withholding, or the favorable tax benefits that would adequately demonstrate whether the health care facility provided adequate compensation. Marias Healthcare Serv., Inc. v. Turenne, 2001 MT 127, 305 M 419, 28 P3d 491 (2001).

Failure to Raise Statute of Limitations Defense in Original Pleadings — Defense Waived: A doctor filed wage claims against a health care facility in 1999 as a counterclaim against the facility's claim against the doctor for failing to sign outstanding warrants in 1997. The facility then claimed that the doctor was time-barred for failing to raise the wage claim within the statute of limitations in 39-3-207. The District Court concurred and held that the doctor's claim was not timely filed. On appeal, the doctor asserted that the facility could not first raise the statute of limitations defense in its posttrial memorandum because a statute of limitations defense is an affirmative defense that must be raised in the original pleadings. The Supreme Court agreed. The facility failed to raise the issue in its original pleadings and was thus barred from raising the defense on appeal. Marias Healthcare Serv., Inc. v. Turenne, 2001 MT 127, 305 M 419, 28 P3d 491 (2001).

Family Member Exclusion Inapplicable to Claim for Unpaid Back Wages — One Hundred Ten Percent Penalty Applied — Attorney Fees and Costs Properly Awarded: Greta worked for her husband's broadcasting company as a traffic system manager, initially working without hourly wages or a salary. About 10 months after her employment began, her husband offered Greta a monthly salary and agreed that Greta should be paid retroactively to the first day on which she started working, preparing a memorandum of understanding to that effect. The M.O.U. also provided that Greta be repaid for the 10-month period according to a mutually agreeable schedule. Greta continued to work several months at salary, but the marriage began to dissolve, and she left her position without receiving any back wages. The company eventually made some payments, but Greta ultimately sued for unpaid wages plus penalties under the wage protection statutes. The District Court granted Greta summary judgment on the issue of whether unpaid wages were owed and, after trial, ordered the company to pay Greta the amount still owing. However, the court declined to award the maximum 110% penalty, establishing a 55% penalty instead and awarding Greta her attorney fees and costs. Both parties appealed. The company claimed that the penalty and fees should not have been awarded because, as a family member, Greta's employment relationship was excluded under 39-3-406. However, that exception applies to the minimum wage and overtime provisions of the employment relationship, not to the failure to timely pay wages, which is governed by 39-3-205. Once Greta became a salaried employee, she was entitled to the rights and remedies afforded to all employees under state law. Therefore, the District Court properly determined that back wages were owing. However, under ARM 24.16.7551, an employer who pays some or all of a contested wage may be relieved in whole or in part of paying a penalty, unless the employer has previously violated similar wage and hour statutes within 3 years prior to the date of the filing of the wage claim. The District Court erred in not taking judicial notice of the administrative rule. Because the company had been the subject of at least three prior wage claims by other employees, the special circumstances of the rule applied, so the 110% penalty, as a matter of law, applied to the back wages owed to Greta at the time of her separation from employment. Thus, the Supreme Court vacated the 55% award and directed a 110% award from that date. Further, the District Court's award of attorney fees and costs was based on substantial evidence and was proper under 39-3-214, including Greta's attorney fees incurred on appeal. Reier Broadcasting Co. v. Reier, 2000 MT 120, 299 M 463, 1 P3d 940, 57 St. Rep. 504 (2000).

Employee Paid on Commission Basis Covered Under Wage Protection Act: By definition in 39-3-201, wages are any money due an employee from an employer, including earned commissions. Noting substantial amendment to state wage protection policy since McBride v. School District, 88 M 110, 290 P 252 (1930), the Supreme Court held that the present underlying policy and provisions of Montana's wage protection statutes are sufficiently broad to cover employees who are paid on a commission basis and that an employer who fails to pay an earned commission is subject to this section, including a penalty based on the amount of wages due and unpaid. Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999), following Como v. Rhines, 198 M 279, 645 P2d 948 (1982).

Payment of Commissions Owed on Last Day of Employment and Not Paid Within Three Days After Termination: Delaware was entitled to commissions when a project was completed and the employer received payment for the work; however, some commissions became due after Delaware's last day of employment. Section 39-3-205 provides a rule regarding payment of wages that are due on the last day of employment, but does not provide a rule regarding wages that become due after the last day of employment. The employer could thus be penalized for violating 39-3-205 for commissions due on the last day of employment that were not paid within 3 days of termination, but could not be penalized pursuant to 39-3-205 or this section for commissions that became due after separation from employment. Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999), clarifying Craver v. Waste Management Partners of Bozeman, 265 M 37, 874 P2d 1 (1994).

Option of Wage Claimant to Seek Administrative Remedies or File Directly in District Court: A wage claimant who desires to recover wages allegedly due may, pursuant to Title 39, ch. 3, part 2, either seek administrative remedies through the Department of Labor and Industry or file a claim directly in District Court to collect unpaid wages, statutory penalties, and attorney fees. Stanley v. Holms, 267 M 316, 883 P2d 837, 51 St. Rep. 1082 (1994). See also Boegli v. Glacier Mtn. Cheese Co., 238 M 426, 777 P2d 1303 (1989).

Penalties Accruing for Wage Law Violation: Employees who file wage claims within the 18-month period described in 39-3-207 are entitled to receive penalties not to exceed 100% (prior to 1993 amendment of this section) of unpaid wages for a period of 5 years prior to the filing of the complaint plus annualized interest on the unpaid wages. Craver v. Waste Management Partners of Bozeman, 265 M 37, 874 P2d 1, 51 St. Rep. 268 (1994), applied, as to claims for payment of wages that are due on the last day of employment, but not wages that become due after the last day of employment, in Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999).

Failure to Pay Wage Rates Prescribed in Contract — Employer Liable for Penalties: Contractors appealed from a District Court order, arguing that because wage rates were not adopted in compliance with administrative procedures, inclusion constituted an illegal provision in the contract with which contractors were not required to comply. The Supreme Court held that contractors were legally bound to pay the wage rates agreed to by all parties and contained in a voluntarily executed contract. Lix v. Kenney, 246 M 426, 804 P2d 391, 48 St. Rep. 23 (1991).

Penalties, Fees, and Costs Improper Where Wage Statutes Inapplicable: Plaintiff found to have no claim to future lost wages under the wage statutes was also not eligible for award of penalties, fees, and costs pursuant to 39-3-214 or this section. Myers v. Dept. of Agriculture, 232 M 286, 756 P2d 1144, 45 St. Rep. 1056 (1988).

Statutory Wage Protection Inapplicable to Future Wages: Plaintiff alleged wrongful termination of employment and sought compensation for wages he would have collected had he not been discharged. The District Court properly granted partial summary judgment on plaintiff's wage claim after holding that the lost wages did not constitute "wages" within the meaning of the wage statutes. The protection granted under the statutes applies to labor or services actually performed or completed, as distinguished from labor or services to be performed in the future. Myers v. Dept. of Agriculture, 232 M 286, 756 P2d 1144, 45 St. Rep. 1056 (1988).

Deputy Sheriffs' Retroactive Overtime — Conflict of Laws: Since deputies' award of retroactive overtime compensation was grounded in federal rather than state law, the state laws relating to penalties, interest, attorney fees, and costs did not apply. Phillips v. Lake County, 222 M 42, 721 P2d 326, 43 St. Rep. 1046 (1986).

Public Works Project — No Prevailing Wage Provision — Penalties Upheld: The trial court, having found a new building lease to be a sales contract, and thus a public works contract, properly imposed penalties for the city's failure to include a prevailing wage rate provision in the public works contract. This section provides that if an employer on a public works project is delinquent, his obligation to pay prevailing wages includes a civil penalty. Section 18-2-403 provides that if a provision for the payment of the prevailing wage rate is not included by the public contracting body in the contract with the contractor, then the obligation to pay the prevailing wage is on the public contracting agency. While 18-2-403 is silent as to shifting penalties, the Supreme Court found that an interpretation of 18-2-403 allowing civil penalties against the contracting agency accords with the underlying purpose of 18-2-403 to serve as a deterrent. Hunter v. Bozeman, 216 M 251, 700 P2d 184, 42 St. Rep. 784 (1985).

Breach of a Contract to Employ — Measure of Damages: Rhines entered into an employment contract with Como, but after Como moved his family from Minnesota to Missoula, Rhines refused to give him a job. In a suit brought for breach of the contract, the Supreme Court held that the District Court improperly applied Title 39, ch. 3, part 2, in awarding damages. That part requires an employee to perform work for an employer. Since Como never performed any work for Rhines, the correct measure of damages should be the amount provided for by 27-1-311. Como v. Rhines, 198 M 279, 645 P2d 948, 39 St. Rep. 932 (1982).

County Not Exempt From Penalty: There is no law exempting the county employer from having to pay a penalty for failure to pay overtime. This section makes no exceptions for failure to pay wages, and the Supreme Court will not create an exception by holding either that the employer was acting in good faith or that the employee had not properly followed the procedure for processing a claim against the employer. Rosebud County v. Roan, 192 M 252, 627 P2d 1222, 38 St. Rep. 639 (1981).

Reimbursement of Expenses Not Payment of "Wages" — Penalty for Failure to Pay Wages Inapplicable: In an action by the plaintiff to recover payment of expenses due to the plaintiff under an oral contract providing for reimbursement of his actual expenses, the trial court did not err in holding the penalty for unpaid wages inapplicable to the plaintiff's claim. The reimbursement to the plaintiff of actual expenses is not a "wage", as defined by 39-3-201, but an "indemnification of employee", referred to in 39-2-701. There is no statutory penalty for the failure of an employer to indemnify an employee for expenditures covered by that section. Johnston v. K & T Mfg., Inc., 191 M 458, 625 P2d 66, 38 St. Rep. 392 (1981).

Compromise of Penalty — Presumption in Favor of Agency Action: Where the appellant filed a wage claim with the respondent and, after a hearing on his claim and voluntary payment by the employer of a portion of the back wages, was awarded the remainder of the back wages plus a penalty assessed on those back wages not voluntarily paid, the court did not err in dismissing the appellant's petition for judicial review of the amount of penalty assessed. Under 39-3-211 and the wage claim form filed by the appellant, the respondent has the authority to compromise any claim for the purpose of avoiding lengthy litigation, which the respondent did because a portion of the wage claim was voluntarily paid. A rebuttable presumption exists that the order of the respondent is correct and the appellant submitted no evidence to overcome the presumption. Thornton v. Comm'r of Dept. of Labor & Industry, 190 M 442, 621 P2d 1062, 37 St. Rep. 2026 (1980).

Complaint Filed Within Eighteen Months After Accrual of Action: Penalties are properly awarded where the complaint is filed within 18 months following the accrual of the action. The court rejects the defendant's argument that the 18-month period must be computed from the filing of the complaint and any claimed penalty for wages owing prior to the filing is lost. Pope v. Keefer, 180 M 454, 591 P2d 206, 36 St. Rep. 366 (1979).

Professional Employee: Veterinarian who was employed in a clinic was entitled to the statutory penalty for nonpayment of his bonus, since the exclusion of professional employees applies only to the requirement of bimonthly payment of wages. Hammill v. Young, 168 M 81, 540 P2d 971 (1975).

Instructions to Jury: An instruction relative to the penalties accruing to employees by reason of the failure of their employer to pay semimonthly wages when due, in the language of this section and 39-3-204, was properly given in an action to recover wages. Meister v. Farrow, 109 M 1, 92 P2d 753 (1939).

39-3-207. Period within which employee may recover wages and penalties.

Compiler's Comments

1999 Amendment: Chapter 442 in (1) inserted reference to wages and at end after "39-3-206" substituted "by filing a complaint within 180 days of default or delay in the payment of wages" for "which have accrued to him at any time within 18 months succeeding such default or delay in the payment of such wages"; inserted (2) establishing 2-year time period; inserted (3) establishing 3-year time period; and made minor changes in style. Amendment effective April 23, 1999.

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 28, Ch. 442, L. 1999, was a severability clause.

Applicability: Section 30, Ch. 442, L. 1999, provided that this section applies to claims accruing on or after April 23, 1999.

Case Notes

Lookback Period: In a wage claim suit, a police union argued for a lookback period governed by 7-32-4121 while the city argued for one governed by 39-3-207. The Supreme Court agreed with the city, noting that the police brought their claim under Title 39, and not 7-32-4121. The Supreme Court remanded for consideration of the issue based on 39-3-207 and for consideration of penalties if the city is found to owe unpaid wages. Watters v. Billings, 2019 MT 255, 397 Mont. 428, 451 P.3d 60.

Gap of Several Months Between Employment for Same Employer — Wage Recovery Limited to Wages Earned After Reemployment: The claimant, an exotic dancer, entered into an independent contractor agreement with an establishment. A couple of months later, she moved out of state for several months. Not long after she returned to Montana and started working at the establishment again, she filed a claim for wages against the establishment, arguing that she had been its employee and not an independent contractor. An administrative hearings officer agreed that she was an employee and awarded her back wages, but only those earned since her return to the state. She appealed the decision to the District Court, arguing that she should have been awarded wages earned before her move, and the District Course affirmed the decision of the hearings officer. The claimant then appealed to the Supreme Court, which affirmed the calculation of damages, finding that the claimant's employment terminated when she moved and therefore she was entitled to only those wages earned after her reemployment. In re Wage Claim of Mays, 2019 MT 219, 397 Mont. 248, 448 P.3d 1096.

Overtime Wage Dispute — Employer's Failure to Keep Truck Driver's Hours — Hearings Examiner's Shifting of Burden of Proof Improper: The plaintiff sued his employer, a trucking company, alleging that they made an oral contract guaranteeing him approximately $60,000 per year and that he was owed unpaid overtime wages. On remand from the Supreme Court in Arlington v. Miller's Trucking, Inc., 2012 MT 89, 364 Mont. 534, 277 P.3d 1198, the hearings examiner found that there was no oral agreement, the plaintiff made it difficult for the employer to record his hours, and that the plaintiff's claimed overtime hours were not credible. On appeal, the Supreme Court upheld the dismissal of the $60,000 per year claim. However, the Supreme Court reversed the unpaid wage denial, holding that the burden to maintain employee records falls on the employer, that the employee bears a light burden of production in the employer's failure to maintain records, and that uncontroverted evidence supported part of the plaintiff's overtime claims. Arlington v. Miller's Trucking, Inc., 2015 MT 68, 378 Mont. 324, 343 P.3d 1222.

Failure to Timely File Underlying Wage Claim — Summary Judgment Proper: Jensen began work as a fiscal programmer for the Department of Transportation in 1985, and until 2007, Jensen's position was supervisory, exempting Jensen from entitlement to overtime compensation. In 2007 the position was reclassified, entitling Jensen to overtime compensation. Jensen filed a complaint on February 19, 2008, alleging that reclassification of the position actually began in 1998, so Jensen was entitled to overtime reimbursement during the 9½-year period from 1998 to 2007 when the reclassification took effect. The District Court disagreed and granted summary judgment for the state, and Jensen appealed, but the Supreme Court affirmed. The established rule is that a wage claim under 39-3-207 accrues when the employer's duty to pay an employee matures and the employer fails to pay the employee. In this case, the last date on which the Department failed to pay Jensen for overtime was June 20, 2007, but Jensen did not file a complaint within 180 days of that date as statutorily required. Because the complaint was not timely filed, summary judgment for the Department was appropriate. Jensen v. St., 2009 MT 246, 351 M 443, 214 P3d 1227 (2009). See also Harrell v. Farmers Educ. & Co-op Union, 2013 MT 367, 373 Mont. 92, 314 P.3d 920.

Calculation of Longevity Using Minimum Base Annual Salary Rather Than Statutory Minimum Allowed: County deputies had a collective bargaining agreement that calculated the base salary for longevity using the percentage of salary that each deputy earned as the base salary of their respective rank. Citing 7-4-2510, the county unilaterally changed the minimum base salary to reflect the lowest possible compensation allowed under 7-4-2508, rather than to reflect each deputy's assigned rank within the department's rank structure, and the deputies protested. Following administrative hearings, the District Court used a rank-based minimum salary rather than the department's minimum salary to determine longevity. The county appealed, but the Supreme Court affirmed. Nothing in 7-4-2510 prevented the county from using a rank-based minimum base annual salary, and it was improper for the county to depart from the terms of the collective bargaining agreement to change to the more limited definition of minimum base annual salary. Clouse v. Lewis & Clark County, 2008 MT 271, 345 M 208, 190 P3d 1052 (2008).

"Repeated Violations" Defined: This section allows a successful claimant to recover past wages for 3 years if an employer has committed repeated violations, but "repeated violations" is not defined. The employer in this case argued that the federal definition should be applied to Montana law rather than the plain meaning rule of statutory construction. The federal definition provides that an employer's violation of minimum wage or overtime law is "repeated" if: (1) an employer has previously violated the law and has received notice from a responsible official of

the violation; or (2) a court or other tribunal has made a finding that the employer has previously violated the law. The Supreme Court held that to apply the federal definition would require additional language in this section to explain the implicit necessity of receiving advance notice of a violation. The court declined to insert what was omitted, and instead adopted the plain meaning of "repeated violations" as more than one violation. Clouse v. Lewis & Clark County, 2008 MT 271, 345 M 208, 190 P3d 1052 (2008).

Failure to Raise Statute of Limitations Defense in Original Pleadings — Defense Waived: A doctor filed wage claims against a health care facility in 1999 as a counterclaim against the facility's claim against the doctor for failing to sign outstanding warrants in 1997. The facility then claimed that the doctor was time-barred for failing to raise the wage claim within the statute of limitations in this section. The District Court concurred and held that the doctor's claim was not timely filed. On appeal, the doctor asserted that the facility could not first raise the statute of limitations defense in its posttrial memorandum because a statute of limitations defense is an affirmative defense that must be raised in the original pleadings. The Supreme Court agreed. The facility failed to raise the issue in its original pleadings and was thus barred from raising the defense on appeal. Marias Healthcare Serv., Inc. v. Turenne, 2001 MT 127, 305 M 419, 28 P3d 491 (2001).

Payment of Commissions Owed on Last Day of Employment and Not Paid Within Three Days After Termination: Delaware was entitled to commissions when a project was completed and the employer received payment for the work; however, some commissions became due after Delaware's last day of employment. Section 39-3-205 provides a rule regarding payment of wages that are due on the last day of employment, but does not provide a rule regarding wages that become due after the last day of employment. The employer could thus be penalized for violating 39-3-205 for commissions due on the last day of employment that were not paid within 3 days of termination, but could not be penalized pursuant to 39-3-205 or 39-3-206 for commissions that became due after separation from employment. Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999), clarifying Craver v. Waste Management Partners of Bozeman, 265 M 37, 874 P2d 1 (1994).

Penalties Accruing for Wage Law Violation: Employees who file wage claims within the 18-month period (see 1999 amendment) described in this section are entitled to receive penalties not to exceed 100% (prior to 1993 amendment of 39-3-206) of unpaid wages for a period of 5 years prior to the filing of the complaint plus annualized interest on the unpaid wages. Craver v. Waste Management Partners of Bozeman, 265 M 37, 874 P2d 1, 51 St. Rep. 268 (1994), applied, as to claims for payment of wages that are due on the last day of employment, but not wages that become due after the last day of employment, in Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999).

Statute of Limitations in Minimum Wage Dispute — Tolling When: In a case relating to wage claims assigned to the Department of Labor and Industry, the Supreme Court held that the District Court was correct in holding that a 5-year Statute of Limitations governs a minimum wage dispute. (See 1999 amendment.) However, the finding that the Statute of Limitations was not tolled by the administrative actions of the Department was held incorrect. Intermountain Deaconess Home v. St., 191 M 309, 623 P2d 1384, 38 St. Rep. 272 (1981), following Pope v. Keefer, 180 M 454, 591 P2d 206, 36 St. Rep. 366 (1979).

Administrative Action — Tolls Running of Limitation: In the administrative enforcement of the minimum hours and wages law (Title 39, ch. 3, part 4) when the Department of Labor and Industry acts on its own initiative, the letter by the Department to the employer informing him that various employees were owed additional wages is the equivalent of filing a civil complaint under Pope v. Keefer, 180 M 454, 591 P2d 206 (1979), and thus at that time the 18-month limitation tolled for determining the status of penalties. St. v. Wilson, 189 M 52, 614 P2d 1066, 37 St. Rep. 1393 (1980).

Time Limit for Commencing Enforcement: This section does not prohibit a penalty for wages that became due and unpaid more than 18 months prior to the start of the action to collect the penalty; rather, it allows for the collection of penalties, continually assessed under 39-3-206, if the action is commenced within 18 months following the accrual of the action under 39-3-205. (See 1999 amendment.) St. v. Wilson, 189 M 52, 614 P2d 1066, 37 St. Rep. 1393 (1980).

Complaint Filed Within Eighteen Months After Accrual of Action: Penalties are properly awarded where the complaint is filed within 18 months following the accrual of the action. (See 1999 amendment.) The court rejects the defendant's argument that the 18-month period must be computed from the filing of the complaint and any claimed penalty for wages owing prior to the filing is lost. Pope v. Keefer, 180 M 454, 591 P2d 206, 36 St. Rep. 366 (1979).

39-3-208. Contracts in violation of part void.

Compiler's Comments

1993 Amendment: Chapter 134 near beginning, after "between", substituted "an employer and an employee" for "any person, partnership, or corporation and any party in his or its employ" and in two places, after "penalty", deleted "and interest"; and made minor changes in style.

1991 Amendment: In two places, after "penalty", inserted "and interest" and near end deleted reference to 5% penalty; and made minor change in style. Amendment effective July 1, 1991.

Applicability: Section 8, Ch. 490, L. 1991, provided: "[This act] applies to all wage claims filed with the department of labor and industry on or after July 1, 1991."

Case Notes

Stage Fees Assessed to Exotic Dancers Impermissible Income Withholdings or Deductions: Several exotic dancers who were employed at a lounge filed wage complaints, alleging that the lounge improperly withheld stage fees. Stage fees were characterized as rent paid by the dancers for use of the stage and a dressing room, and in return the dancers were allowed to keep all tips and dance fees received from customers. The lounge claimed that the dancers were independent contractors and that payment of stage fees was agreed to as part of the employment contract. The Department of Labor and Industry concluded that the dancers were employees and that they were entitled to payment of past wages and stage fees. The District Court affirmed the agency determination but adjusted the amounts due to the dancers. The lounge appealed, but the Supreme Court affirmed. The rental agreements were void under 39-3-208 because the agreements circumvented applicable wage laws, and the stage fees constituted impermissible kick-backs under ARM 24.16.1507 (now repealed). The court also cited 25 A.G. Op. 11 (1953) for the holding that generally an employer may not withhold wages due to an employee except for room, board, or incidentals, so the stage fees also amounted to unreasonable withholdings or deductions from income earned by the dancers. In re Wage Claims of Smith, 2009 MT 180, 351 M 12, 209 P3d 228 (2009).

Wage Claims Precluded by Separation and Release Agreement — Summary Judgment Proper: Plaintiffs were terminated from employment with defendant and signed a separation and release agreement that released defendant from all claims related to the employment and termination. Plaintiffs then sued defendant for wrongful discharge, breach of contract, breach of the implied covenant of good faith and fair dealing, contract interference, and tortious conduct. Defendant requested and was granted summary judgment based on relinquishment of claims in the separation and release agreement, and plaintiffs appealed, asserting that the agreement was void under this section. The Supreme Court affirmed. Plaintiffs' affidavit in response to defendant's summary judgment motion made general allegations regarding both wage and hour violations and insufficient consideration, but despite the fact that plaintiffs had over 2 years to do so, the affidavit did not set forth specific facts to support either claim. Absent proof of the existence of any genuine issue of material fact regarding the validity of the agreement, summary judgment was proper. Old Elk v. Healthy Mothers, Healthy Babies, Inc., 2003 MT 167, 316 M 320, 73 P3d 795 (2003), following Morales v. Tuomi, 214 M 419, 693 P2d 532 (1985).

Option of Wage Claimant to Seek Administrative Remedies or File Directly in District Court: A wage claimant who desires to recover wages allegedly due may, pursuant to Title 39, ch. 3, part 2, either seek administrative remedies through the Department of Labor and Industry or file a claim directly in District Court to collect unpaid wages, statutory penalties, and attorney fees. Stanley v. Holms, 267 M 316, 883 P2d 837, 51 St. Rep. 1082 (1994). See also Boegli v. Glacier Mtn. Cheese Co., 238 M 426, 777 P2d 1303 (1989).

Employment Contract Prior to 1975: This section cannot be applied as a remedy for an employment contract denying overtime compensation that was executed prior to 1975, because until that year the state was specifically excluded from the class of employers covered by the payment of wages law. Additionally, the 6-month limit to apply this remedy, then applicable, was not adhered to. Weston v. Mont. Highway Comm'n, 186 M 46, 606 P2d 150, 37 St. Rep. 236 (1980).

39-3-209. Commissioner of labor to investigate violations and institute actions for unpaid wages.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Consideration of Payments on Collateral Obligations Proper: In a wage dispute, the employer argued that the Department of Labor and Industry lacked authority to make findings concerning certain payments the employer made to the employee on the basis that the payments were for unreimbursed loans and wages earned in other states. The Supreme Court affirmed, concluding that the Department acted within its jurisdiction in considering the payments because the payments were relevant in determining the amount the employer owed for work the employee performed in Montana. America's Best Contractors, Inc. v. Singh, 2014 MT 70, 374 Mont. 254, 321 P.3d 95.

Stage Fees Assessed to Exotic Dancers Impermissible Income Withholdings or Deductions: Several exotic dancers who were employed at a lounge filed wage complaints, alleging that the lounge improperly withheld stage fees. Stage fees were characterized as rent paid by the dancers for use of the stage and a dressing room, and in return the dancers were allowed to keep all tips and dance fees received from customers. The lounge claimed that the dancers were independent contractors and that payment of stage fees was agreed to as part of the employment contract. The Department of Labor and Industry concluded that the dancers were employees and that they were entitled to payment of past wages and stage fees. The District Court affirmed the agency determination but adjusted the amounts due to the dancers. The lounge appealed, but the Supreme Court affirmed. The rental agreements were void under 39-3-208 because the agreements circumvented applicable wage laws, and the stage fees constituted impermissible kick-backs under ARM 24.16.1507 (now repealed). The court also cited 25 A.G. Op. 11 (1953) for the holding that generally an employer may not withhold wages due to an employee except for room, board, or incidentals, so the stage fees also amounted to unreasonable withholdings or deductions from income earned by the dancers. In re Wage Claims of Smith, 2009 MT 180, 351 M 12, 209 P3d 228 (2009).

Employer Properly Denied Attorney Fees in Defending Against Wage Claimant's Retirement Bonus Claim: The court correctly determined that a retirement bonus claim was more in the nature of a gratuity than earned compensation so it was proper to deny the employer's attorney fees. Talon Plumbing & Heating, Inc. v. Dept. of Labor & Industry, 2008 MT 376, 346 M 499, 198 P3d 213 (2008).

Remedies Cumulative: On the question of whether plaintiffs who were denied overtime compensation under 39-3-405 must seek relief exclusively from the Commissioner of Labor under this chapter, the Supreme Court held that the clear and unambiguous language of 39-3-408 provides for cumulative remedies. Therefore, resort to the Commissioner of Labor was not plaintiffs' exclusive option. The court reversed a dismissal that was based on plaintiffs' failure to exhaust administrative remedies. Boegli v. Glacier Mtn. Cheese Co., 238 M 426, 777 P2d 1303, 46 St. Rep. 1389 (1989).

Designation of Hearing Officer's Order as Final: The Commissioner of Labor and Industry is charged with the responsibility of investigating wage claims and holding hearings under Montana wage payment law, and under 2-15-112, the Commissioner may delegate these functions to a subordinate employee. Therefore, statute and Department rule clearly allow the decision of an appointed hearing examiner to be a final order. Hoven, Vervick, & Amrine, P.C. v. Comm'r of Labor, 237 M 525, 774 P2d 995, 46 St. Rep. 1024 (1989).

Scope of Review of Administrative Decision — Wage Claim: Chagnon brought a wage claim against the Hardy Construction Company before the Department of Labor and Industry. A hearing was held, after which the Department dismissed the claim. On judicial review, the District Court reversed the Department and awarded wages, penalties, costs, and attorney fees. On appeal, the Supreme Court found that there was sufficient evidence before the hearings officer to support his dismissal of the claim. The District Court committed error in reversing the Department order. The District Court cannot properly substitute its own judgment for that of the agency. Chagnon v. Hardy Constr. Co., 208 M 420, 680 P2d 932, 41 St. Rep. 441 (1984).

Claim for Overtime — Jurisdiction of Department of Labor and Industry: The Department of Labor and Industry had jurisdiction to hold a hearing and make a ruling on a heavy equipment operator's claim against his employer for overtime wages because: (1) it has a duty under 39-1-102 to enforce state wage laws affecting Montana citizens; (2) under 39-3-209, it must investigate alleged violations of such laws and institute actions for unpaid wages; (3) it may take assignments of wage claims in trust and maintain any proceeding to enforce the claims; (4) it may enforce the federal Fair Labor Standards Act and institute an action on behalf of an employee to recover overtime wages due and unpaid under that Act; and (5) traditional notions of jurisdiction gave the department jurisdiction, as employer and employee were Montana residents, employer's principal place of business was in Montana, the employment contract was entered into in Montana, and part of the work was performed here. To rule that since part of the work was performed in North Dakota there was no jurisdiction in the department would unduly burden the parties, would lead to an oppressive requirement that they litigate in each state a claim for wages allegedly due for work performed there, and would fractionalize employee's claim to the extent that its pursuit would not be worthwhile. Hoehne v. Sherrodd, Inc., 205 M 365, 668 P2d 232, 40 St. Rep. 1363 (1983), followed in America's Best Contractors, Inc. v. Singh, 2014 MT 70, 374 Mont. 254, 321 P.3d 95.

Department of Labor Not Limited to Investigation — "State" Claims No Justification for Restraining Order: The Supreme Court held incorrect the District Court's finding that the Department of Labor and Industry had only investigatory wage enforcement powers. The alleged but unproven hours incurred by an employer's having to defend "state" wage claims did not alone threaten the employer's rights sufficiently to justify court-ordered restraint of the Department. Further, the Department is required not only to inquire diligently into the validity of wage claims but to determine their validity in a hearing. Intermountain Deaconess Home v. St., 191 M 309, 623 P2d 1384, 38 St. Rep. 272 (1981).

Wage Claim Action — Department Power to Initiate: The Department of Labor and Industry has the authority to bring an action for violation of the Montana minimum wage and overtime compensation law (Title 39, ch. 3, part 4) even though no complaint was filed by any of the defendant's wage earners, such a complaint being unnecessary under this section as provided by 39-3-407. St. v. Wilson, 189 M 52, 614 P2d 1066, 37 St. Rep. 1393 (1980).

39-3-210. Investigative powers of commissioner of labor.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Designation of Hearing Officer's Order as Final: The Commissioner of Labor and Industry is charged with the responsibility of investigating wage claims and holding hearings under Montana wage payment law, and under 2-15-112, the Commissioner may delegate these functions to a subordinate employee. Therefore, statute and Department rule clearly allow the decision of an appointed hearing examiner to be a final order. Hoven, Vervick, & Amrine, P.C. v. Comm'r of Labor, 237 M 525, 774 P2d 995, 46 St. Rep. 1024 (1989).

Department of Labor Not Limited to Investigation — "State" Claims No Justification for Restraining Order: The Supreme Court held incorrect the District Court's finding that the Department of Labor and Industry had only investigatory wage enforcement powers. The alleged but unproven hours incurred by an employer's having to defend "state" wage claims did not alone threaten the employer's rights sufficiently to justify court-ordered restraint of the Department. Further, the Department is required not only to inquire diligently into the validity of wage claims but to determine their validity in a hearing. Intermountain Deaconess Home v. St., 191 M 309, 623 P2d 1384, 38 St. Rep. 272 (1981).

Duty of Labor Commissioner: After taking assignment of unpaid wages, the Commissioner of Labor has a clear legal duty to hold a hearing on the matter since the Montana Department of Labor and Industry in its administrative code has charged the Labor Standards Division with the duty of enforcing Montana labor laws, and the determination of the Commissioner, to be judicially enforceable, must be made pursuant to a hearing. Burgess v. Softich, 167 M 70, 535 P2d 178 (1975).

39-3-211. Commissioner of labor to take wage assignments.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Administrative Rules

Title 24, chapter 16, subchapter 75, ARM Wage claims.

Case Notes

Stage Fees Assessed to Exotic Dancers Impermissible Income Withholdings or Deductions: Several exotic dancers who were employed at a lounge filed wage complaints, alleging that the lounge improperly withheld stage fees. Stage fees were characterized as rent paid by the dancers for use of the stage and a dressing room, and in return the dancers were allowed to keep all tips and dance fees received from customers. The lounge claimed that the dancers were independent contractors and that payment of stage fees was agreed to as part of the employment contract. The Department of Labor and Industry concluded that the dancers were employees and that they were entitled to payment of past wages and stage fees. The District Court affirmed the agency determination but adjusted the amounts due to the dancers. The lounge appealed, but the Supreme Court affirmed. The rental agreements were void under 39-3-208 because the agreements circumvented applicable wage laws, and the stage fees constituted impermissible kick-backs under ARM 24.16.1507 (now repealed). The court also cited 25 A.G. Op. 11 (1953) for the holding that generally an employer may not withhold wages due to an employee except for room, board, or incidentals, so the stage fees also amounted to unreasonable withholdings or deductions from income earned by the dancers. In re Wage Claims of Smith, 2009 MT 180, 351 M 12, 209 P3d 228 (2009).

Remedies Cumulative: On the question of whether plaintiffs who were denied overtime compensation under 39-3-405 must seek relief exclusively from the Commissioner of Labor under this chapter, the Supreme Court held that the clear and unambiguous language of 39-3-408 provides for cumulative remedies. Therefore, resort to the Commissioner of Labor was not plaintiffs' exclusive option. The court reversed a dismissal that was based on plaintiffs' failure to exhaust administrative remedies. Boegli v. Glacier Mtn. Cheese Co., 238 M 426, 777 P2d 1303, 46 St. Rep. 1389 (1989).

Department of Labor Not Limited to Investigation — "State" Claims No Justification for Restraining Order: The Supreme Court held incorrect the District Court's finding that the Department of Labor and Industry had only investigatory wage enforcement powers. The alleged but unproven hours incurred by an employer's having to defend "state" wage claims did not alone threaten the employer's rights sufficiently to justify court-ordered restraint of the Department. Further, the Department is required not only to inquire diligently into the validity of wage claims but to determine their validity in a hearing. Intermountain Deaconess Home v. St., 191 M 309, 623 P2d 1384, 38 St. Rep. 272 (1981).

Compromise of Penalty — Presumption in Favor of Agency Action: Where the appellant filed a wage claim with the respondent and, after a hearing on his claim and voluntary payment by the employer of a portion of the back wages, was awarded the remainder of the back wages plus a penalty assessed on those back wages not voluntarily paid, the court did not err in dismissing the appellant's petition for judicial review of the amount of penalty assessed. Under this section and the wage claim form filed by the appellant, the respondent has the authority to compromise any claim for the purpose of avoiding lengthy litigation, which the respondent did because a portion of the wage claim was voluntarily paid. A rebuttable presumption exists that the order of the respondent is correct and the appellant submitted no evidence to overcome the presumption. Thornton v. Comm'r of Dept. of Labor & Industry, 190 M 442, 621 P2d 1062, 37 St. Rep. 2026 (1980).

State Enforcement of FLSA Claim: The Montana Department of Labor is not precluded by 39-3-408 or the Fair Labor Standards Act from seeking enforcement of the FLSA claim of an employee working in Montana, but rather is authorized by 39-3-202, this section, 29 C.F.R. 515.8, and FLSA to do so. St. v. Holman Aviation Co., 176 M 31, 575 P2d 923 (1978).

Refusal to Hold Hearing: Commissioner of Labor did not have discretion to ignore wage claim or reject it without a hearing and without making a proper determination. Burgess v. Softich, 167 M 70, 535 P2d 178 (1975).

Compromise Not a Defense: Employer may not compromise minimum wage claims with employees and then establish that compromise as a defense to proceedings seeking enforcement of minimum wage laws. Failure of Commissioner of Labor to obtain assignments of wage claims from all employees was not fatal to his authority to act on their behalf, and nonassigned claims could not be settled by employees themselves. State ex rel. Neiss v. District Court, 162 M 324, 511 P2d 979 (1973).

39-3-212. Court enforcement of administrative decision.

Compiler's Comments

1999 Amendment: Chapter 442 in first sentence of (1) after "officer" deleted "if the decision is not appealed to the board, or a decision of the board"; in (2) after "decision of the" substituted "department or the hearings officer" for "board"; and made minor changes in style. Amendment effective April 23, 1999.

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 28, Ch. 442, L. 1999, was a severability clause.

1995 Amendment: Chapter 90 inserted (2) concerning judicial review; and made minor changes in style. Amendment effective March 9, 1995.

1991 Amendment: At beginning inserted reference to Department default order. Amendment effective July 1, 1991.

Applicability: Section 8, Ch. 490, L. 1991, provided: "[This act] applies to all wage claims filed with the department of labor and industry on or after July 1, 1991."

1989 Amendment: Substituted first sentence relating to enforcement by application for a court order for former language that read: "A determination by the commissioner of labor and industry made after a hearing as provided for in parts 2 and 4 of this chapter may be enforced by application by the commissioner to a district court for an order or judgment enforcing the determination if the time provided to initiate judicial review by the employer has passed"; and at end substituted "administrative decision" for "commissioner's determination". Amendment effective July 1, 1989.

Applicability: Section 9, Ch. 554, L. 1989, provided: "[This act] applies to all wage claims filed with the department after July 1, 1989."

Case Notes

Service by Department of Labor and Industry — Rule Exception — Service Alternatives Required: The Department of Labor and Industry applied to the District Court for enforcement of judgment against a business in an unpaid wage claim and did not serve the business under Rule 4, M.R.Civ.P. (Title 25, ch. 20), contending that applications for enforcement of judgment do not require service under 39-3-212 and 39-3-216. The District Court disagreed and entered an order denying petition for judgment. The Department filed a writ of supervisory control with the Supreme Court. On appeal, the Supreme Court agreed with the Department and granted the petition, explaining that the Department is not required to serve the respondent business in accordance with Rule 4 when filing an application for enforcement of judgment in a District Court pursuant to 39-3-212(1) but must give the employer notice under one of the service alternatives prescribed in Rule 5(b), M.R.Civ.P. Dept. of Labor and Industry v. 13th Judicial District Court, 2020 MT 164, 400 Mont. 320, 466 P.3d 517.

Remedies Cumulative: On the question of whether plaintiffs who were denied overtime compensation under 39-3-405 must seek relief exclusively from the Commissioner of Labor under this chapter, the Supreme Court held that the clear and unambiguous language of 39-3-408 provides for cumulative remedies. Therefore, resort to the Commissioner of Labor was not plaintiffs' exclusive option. The court reversed a dismissal that was based on plaintiffs' failure to exhaust administrative remedies. Boegli v. Glacier Mtn. Cheese Co., 238 M 426, 777 P2d 1303, 46 St. Rep. 1389 (1989).

Attorney Fees for Administrative Hearing Properly Denied: Where the appellant filed a wage claim with the respondent for wages due to the appellant and after a hearing was awarded back wages due plus a penalty, the court did not err in denying the appellant's prayer for attorney fees. Section 39-3-214, when read in conjunction with this section, makes clear that attorney fees must be awarded to a claimant only if he must bring a "suit at law" to collect his wages and obtains a "judgment" for that purpose. In this case, no suit was brought and no judgment was obtained. However, attorney fees for appeal to the Supreme Court were awarded. Thornton v. Comm'r of Dept. of Labor & Industry, 190 M 442, 621 P2d 1062, 37 St. Rep. 2026 (1980).

39-3-213. Disposition of wages.

Compiler's Comments

2019 Amendment: Chapter 185 in (1) near end substituted "a custodial fund" for "an agency fund". Amendment effective July 1, 2019.

2011 Amendment: Chapter 12 in (1) in first sentence near beginning substituted "may deposit" for "shall deposit" and near middle inserted "with respect to wages deposited into the fund". Amendment effective October 1, 2011.

2007 Amendment: Chapter 46 in (2) near middle after "treasurer" substituted "to be stale-dated" for "for cancellation". Amendment effective October 1, 2007.

2005 Amendment: Chapter 14 in (1) in first and second sentences substituted "wage collection fund" for "private purpose trust fund" and inserted third sentence providing that wage collection fund is an agency fund; and made minor changes in style. Amendment effective March 15, 2005.

2001 Amendments — Composite Section: Chapter 7 in (2) near middle after "more than" substituted "6 months" for "1 year". Amendment effective October 1, 2001.

Chapter 34 in (1) in two places substituted "private purpose trust fund" for "expendable trust fund". Amendment effective July 1, 2001.

1995 Amendments: Chapter 5 in (1), in two places, substituted reference to expendable trust fund for reference to agency fund; and made minor changes in style. Amendment effective January 26, 1995.

Chapter 325 in (1), at beginning after "commissioner of labor", deleted "and industry"; in (2) substituted "state treasurer" for "state auditor"; and made minor changes in style. Amendment effective July 1, 1995.

Retroactive Applicability: Section 11, Ch. 5, L. 1995, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to July 1, 1994."

39-3-214. Court costs and attorney fees.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Award of Attorney Fees for Wage Claim Proper — General Allegation of Duplicative Work Unsubstantiated: The plaintiff's former employee filed a successful wage claim against the plaintiff, and the District Court awarded him attorney fees. The plaintiff appealed, claiming that the fee award was excessive because, it alleged, much of the work by the plaintiff's attorney was duplicative. The Supreme Court affirmed, noting that the plaintiff had not offered any evidence that the work was duplicative. Griz One Firefighting v. St., 2020 MT 285, 402 Mont. 115, 475 P.3d 739.

Mandatory Award of Attorney Fees for Employee Who Prevails on Wage Claim:

A wage claimant was properly awarded his attorney fees by the District Court for defending and ultimately prevailing in his wage claim. Talon Plumbing & Heating, Inc. v. Dept. of Labor & Industry, 2008 MT 376, 346 M 499, 198 P3d 213 (2008).

This section provides that a judgment in favor of plaintiff in an action for unpaid wages must include all costs that were reasonably necessary to enter or maintain the wage claim, including attorney fees. The mandatory statutory language and the Legislature's intent to make an employee who prevails in a wage claim whole required that plaintiff in this case recover attorney fees incurred to defend a judgment for wages on appeal. Dias v. Healthy Mothers, Healthy Babies, Inc., 2002 MT 323, 313 M 172, 60 P3d 986 (2002).

Successful Wage Claimant Entitled to All Costs: Billings firefighters prevailed in their claim against the city for wages for all hours worked and for leave time and requested costs of $60,154.72. Pursuant to 25-10-201, the District Court limited recovery of costs to filing and service fees, postage, photocopies, and long-distance telephone calls and awarded $3,972.98. On appeal, the Supreme Court noted that 25-10-201 applies an exclusive list of costs that may be taxed to an opponent unless the case is taken out of its operation by a more specialized statute, by stipulation of the parties, or by court rule. A wage claim case is covered by this section, a more specialized statute that requires an award of all costs reasonably incurred with the proceeding, so 25-10-201 did not apply. Thus, the case was remanded for an award of all reasonable costs incurred in the litigation pursuant to this section. Kuhr v. Billings, 2007 MT 201, 338 M 402, 168 P3d 615 (2007), distinguishing Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818 (1999).

Expert Testimony Not Required in Determination of Attorney Fees: As the prevailing party, defendant was entitled to attorney fees. Plaintiff contended that the amount of fees could not be determined to be reasonable without expert testimony to support the claim. The Supreme Court disagreed. Although courts have used expert testimony to support the reasonableness of attorney fees in some cases, expert testimony is not required in all cases. Here, among other factors, the District Court based its decision on the amount at stake and the quality of legal services rendered, and it was not an abuse of discretion for the court to award fees without expert testimony. The Supreme Court affirmed. In re Wage Claim of Ramsey v. Yellowstone Neurosurgical Associates, P.C., 2005 MT 317, 329 M 489, 125 P3d 1091 (2005).

Liquidated Damages for Failure to Pay Overtime Warranted Absent Showing That Employer Acted in Good Faith and With Reasonable Grounds in Paying Wages — Fees and Costs of Appeal Allowed to Employee: The federal Fair Labor Standards Act provides that employees who are not paid overtime may recover liquidated damages in the amount of unpaid wages in addition to the unpaid wages. In this case, Winkler was awarded liquidated damages, and the employer appealed on grounds that it paid Winkler's wages in good faith and had reasonable grounds to believe that it did not violate the Act, so liquidated damages were not warranted under 29 U.S.C. 260. The Supreme Court applied the test in Walton v. United Consumers Club, Inc., 786 F2d 303 (7th Cir. 1986), to determine what constitutes good faith and reasonable grounds. The Walton standard is whether, when objectively viewed through the lens of the tort law reasonable person standard, the employer acted in good faith and had reasonable grounds for believing that the employer's act or omission did not violate the Act. The hearings officer found that, based on the entire record, the employer failed to present sufficient evidence of good faith and reasonable grounds, and the Supreme Court declined to substitute its judgment for that of the agency as to the weight of the evidence on the factual question. Winkler was also entitled to court costs and attorney fees for appeal as the prevailing party under 39-3-214 and 29 U.S.C. 216(b). Key W., Inc. v. Winkler, 2004 MT 186, 322 M 184, 95 P3d 666 (2004).

Sufficient Allegations for Pursuit of State Claim for Violation of Federal Wage Standards Absent Remedy Under Federal Davis-Bacon Act: Plaintiff construction workers on a public works project brought a state action against a school district for alleged violation of wage standards established by the federal Davis-Bacon Act. The District Court held that before the workers could maintain a private cause of action in state court, the four-part test in St. Medical Oxygen & Supply, Inc. v. Am. Medical Oxygen Co., 230 M 456, 750 P2d 1085 (1988), must be met. The first prong requires a showing that the Davis-Bacon Act created a federal right in favor of plaintiffs. The District Court held that it did but then found that because there was no indication in the Act that Congress intended to create a remedy against the owner of the project and that implying such a remedy was inconsistent with the Act, a state action could not be maintained. The Supreme Court disagreed and reversed. Absent both a federal wage provision and a federal contracting party, the workers could invoke no federal regulatory remedy under 40 U.S.C. 3142(a), so a state court action was logical for pursuit of a remedy. Because the workers were not seeking a remedy under the Act, analysis under St. Medical Oxygen was unnecessary and inappropriate. The allegations in the workers' state claim were sufficient to survive the school district's claim for dismissal and to vest the District Court with subject matter jurisdiction, so the case was remanded to allow the workers to proceed with their negligence and breach of contract action against the school district. Herrmann v. Wolf Point School District, 2004 MT 10, 319 M 231, 84 P3d 20 (2004). See also Favel v. Am. Renovation & Constr. Co., 2002 MT 266, 312 M 285, 59 P3d 412 (2002).

Remand for Recalculation of Attorney Fees Pursuant to Percentage of Amount of Gross Recovery if Party Prevails on Appeal: The District Court held that a contingency fee arrangement provided reasonable attorney fees in plaintiffs' wage claim, and the Supreme Court affirmed. However, the fee agreement also called for fees in the amount of 40% of the gross recovery if plaintiffs prevailed on appeal. Because the District Court did not take into account the possible 40% recovery in its initial fee analysis, the Supreme Court remanded for consideration of the appeal aspect of the fee agreement. Cochran v. St., 2003 MT 318, 318 M 282, 80 P3d 423 (2003).

Failure to Prevail in Wage Claim — Attorney Fees Not Payable:

The plain meaning of this section is to provide an employee who wins a judgment for wages due against an employer a vehicle by which to receive attorney fees and be made whole. When employees are unsuccessful in asserting wage and hour claims, attorney fees and costs may not be recovered. Old Elk v. Healthy Mothers, Healthy Babies, Inc., 2003 MT 167, 316 M 320, 73 P3d 795 (2003). See also Glaspey v. Workman, 234 M 374, 763 P2d 666 (1988), and Harrell v. Farmers Educ. & Co-op Union, 2013 MT 367, 373 Mont. 92, 314 P.3d 920.

Neither a doctor nor a health care facility was wholly successful in their claims and counterclaims in a wage dispute. Thus, the doctor could not be considered the prevailing party and was not entitled to attorney fees as a successful wage claimant under this section. Marias Healthcare Serv., Inc. v. Turenne, 2001 MT 127, 305 M 419, 28 P3d 491 (2001).

Family Member Exclusion Inapplicable to Claim for Unpaid Back Wages — One Hundred Ten Percent Penalty Applied — Attorney Fees and Costs Properly Awarded: Greta worked for her husband's broadcasting company as a traffic system manager, initially working without hourly wages or a salary. About 10 months after her employment began, her husband offered Greta a monthly salary and agreed that Greta should be paid retroactively to the first day on which she started working, preparing a memorandum of understanding to that effect. The M.O.U. also provided that Greta be repaid for the 10-month period according to a mutually agreeable schedule. Greta continued to work several months at salary, but the marriage began to dissolve, and she left her position without receiving any back wages. The company eventually made some payments, but Greta ultimately sued for unpaid wages plus penalties under the wage protection statutes. The District Court granted Greta summary judgment on the issue of whether unpaid wages were owed and, after trial, ordered the company to pay Greta the amount still owing. However, the court declined to award the maximum 110% penalty, establishing a 55% penalty instead and awarding Greta her attorney fees and costs. Both parties appealed. The company claimed that the penalty and fees should not have been awarded because, as a family member, Greta's employment relationship was excluded under 39-3-406. However, that exception applies to the minimum wage and overtime provisions of the employment relationship, not to the failure to timely pay wages, which is governed by 39-3-205. Once Greta became a salaried employee, she was entitled to the rights and remedies afforded to all employees under state law. Therefore, the District Court properly determined that back wages were owing. However, under ARM 24.16.7551, an employer who pays some or all of a contested wage may be relieved in whole or in part of paying a penalty, unless the employer has previously violated similar wage and hour statutes within 3 years prior to the date of the filing of the wage claim. The District Court erred in not taking judicial notice of the administrative rule. Because the company had been the subject of at least three prior wage claims by other employees, the special circumstances of the rule applied, so the 110% penalty, as a matter of law, applied to the back wages owed to Greta at the time of her separation from employment. Thus, the Supreme Court vacated the 55% award and directed a 110% award from that date. Further, the District Court's award of attorney fees and costs was based on substantial evidence and was proper under this section, including Greta's attorney fees incurred on appeal. Reier Broadcasting Co. v. Reier, 2000 MT 120, 299 M 463, 1 P3d 940, 57 St. Rep. 504 (2000).

Attorney Fees in Wage Protection Case Treated as Costs — Filing of Memorandum of Costs Subject to Statutory Time Limit: A party in a wage protection case seeking attorney fees pursuant to this section must comply with statutes governing the taxing of costs, including 25-10-501, which requires that a memorandum of costs be filed within 5 days after the return of a jury verdict. Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999), distinguishing Schillinger v. Brewer, 215 M 333, 697 P2d 919 (1985).

Verdict Less Than Offer of Judgment Not Rationale for Claim as Successful Party — Attorney Fees Denied: Defendant claimed that the award of attorney fees to plaintiff was in error because plaintiff could not be considered the successful party because the jury's verdict did not exceed defendant's offer of judgment and that if plaintiff could thus not be considered the successful party, defendant must be considered so and attorney fees properly awarded to defendant. An offer of judgment in an amount greater than the jury's verdict is a factor that the trial court should consider when determining which party is the successful or prevailing party for the purpose of awarding attorney fees. However, in the present case, it was unclear from the record whether defendant offered to have judgment taken against it on plaintiff's unpaid wage claim or wrongful discharge claim. Because the offer of judgment was ambiguous, it was immaterial to determining which party prevailed in the trial, and the trial court did not err in denying defendant's request for attorney fees. Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999).

One-Third Contingent-Fee Agreement — Award as Reasonable Attorney Fees: The plaintiffs sought attorney fees pursuant to a contingent-fee agreement. The Supreme Court held that an award equal to the amount of fees due under a contingent-fee agreement could be assessed as reasonable attorney fees after considering the following factors: (1) the novelty and difficulty of the legal and factual issues involved; (2) the time and labor required to perform the legal service properly; (3) the character and importance of the litigation; (4) the result secured by the attorney; (5) the experience, skill, and reputation of the attorney; (6) the fees customarily charged for similar legal services at the time and place where the services were rendered; (7) the ability of the client to pay for the legal services rendered; and (8) the risk of no recovery. In the case before it, the court held that an award equal to the full amount paid under the contingent-fee agreement would constitute reasonable attorney fees. Stimac v. St., 248 M 412, 812 P2d 1246, 48 St. Rep. 488 (1991), followed in Van Riper v. Ford New Holland, Inc., 261 M 206, 862 P2d 47, 50 St. Rep. 1289 (1993), and Cochran v. St., 2003 MT 318, 318 M 282, 80 P3d 423 (2003).

Attorney Fee Amount in Discretion of Judge: The amount a party may be awarded in attorney fees under this section is within the trial court's discretion. An attorney fee that exceeds the amount in controversy is not per se excessive. Glaspey v. Workman, 234 M 374, 763 P2d 666, 45 St. Rep. 1983 (1988), followed in Cochran v. St., 2003 MT 318, 318 M 282, 80 P3d 423 (2003), and Kuhr v. Billings, 2007 MT 201, 338 M 402, 168 P3d 615 (2007).

Penalties, Fees, and Costs Improper Where Wage Statutes Inapplicable: Plaintiff found to have no claim to future lost wages under the wage statutes was also not eligible for award of penalties, fees, and costs pursuant to 39-3-206 or this section. Myers v. Dept. of Agriculture, 232 M 286, 756 P2d 1144, 45 St. Rep. 1056 (1988).

Statutory Wage Protection Inapplicable to Future Wages: Plaintiff alleged wrongful termination of employment and sought compensation for wages he would have collected had he not been discharged. The District Court properly granted partial summary judgment on plaintiff's wage claim after holding that the lost wages did not constitute "wages" within the meaning of the wage statutes. The protection granted under the statutes applies to labor or services actually performed or completed, as distinguished from labor or services to be performed in the future. Myers v. Dept. of Agriculture, 232 M 286, 756 P2d 1144, 45 St. Rep. 1056 (1988).

Fees Available in Action to Pierce Corporate Veil to Collect Wages: This section provides attorney fees to a plaintiff in an action to pierce the corporate veil where that action was necessary to recover and collect on a previous judgment awarded him on a wage claim action. As such, the action to pierce the corporate veil was a continuation of the wage claim action. Glaspey v. Workman, 230 M 307, 749 P2d 1083, 45 St. Rep. 226 (1988). The award of attorney fees incurred on appeal was proper when the employee was successful in the appeal of his wage claim action. Glaspey v. Workman, 234 M 374, 763 P2d 666, 45 St. Rep. 1983 (1988).

Deputy Sheriffs' Retroactive Overtime — Conflict of Laws: Since deputies' award of retroactive overtime compensation was grounded in federal rather than state law, the state laws relating to penalties, interest, attorney fees, and costs did not apply. Phillips v. Lake County, 222 M 42, 721 P2d 326, 43 St. Rep. 1046 (1986).

Appellant Entitled to Attorney Fees Despite Intervention by Commissioner: Claimant employed counsel to prosecute a wage claim. The hearing officer granted the claim, and plaintiffs filed a petition for judicial review in District Court. The Commissioner of Labor intervened, and both his counsel and claimant's counsel appeared on the matter. The District Court upheld the hearing officer but denied claimant's request for attorney fees on the ground that separate representation was not necessary to dispose of the case. The Supreme Court reversed and held that claimant was entitled to attorney fees for the proceedings in District Court but not for the administrative hearing. The court determined that the necessity to enter the suit at law triggers the attorney fees, not the necessity of hiring a lawyer. Huber v. Comm'r of Labor & Indus., 220 M 335, 715 P2d 440, 43 St. Rep. 413 (1986).

Suit at Law Construed: An administrative hearing is not a "suit at law", and a "determination" made by the commissioner is not a "judgment". Therefore, it would be improper to award fees to any party for services rendered at the administrative agency level. Attorney fees are properly awarded at both the District Court and Supreme Court levels of the proceeding. Chagnon v. Hardy Constr. Co., 208 M 420, 680 P2d 932, 41 St. Rep. 441 (1984).

Failure to Obtain Judgment — Fees and Costs Inapplicable to Reimbursement of Expenses: In an action by the plaintiff to recover payment of expenses due to him under an oral contract providing for reimbursement of actual expenses, the trial court did not err in refusing plaintiff's request for attorney fees and costs, as the amounts sought to be recovered by the plaintiff are not "wages", within the meaning of 39-3-201(5). Because the plaintiff did not receive a judgment against the defendant, he has not satisfied the statutory requirements for payment of attorney fees and costs. Johnston v. K & T Mfg., Inc., 191 M 458, 625 P2d 66, 38 St. Rep. 392 (1981).

Attorney Fees for Administrative Hearing Properly Denied: Where the appellant filed a wage claim with the respondent for wages due to the appellant, and after a hearing was awarded back wages due plus a penalty, the court did not err in denying the appellant's prayer for attorney fees. This section, when read in conjunction with 39-3-212, makes clear that attorney fees must be awarded to a claimant only if he must bring a "suit at law" to collect his wages and obtains a "judgment" for that purpose. In this case, no suit was brought and no judgment was obtained. However, attorney fees for appeal to the Supreme Court were awarded. Thornton v. Comm'r of Dept. of Labor & Industry, 190 M 442, 621 P2d 1062, 37 St. Rep. 2026 (1980). See also Glaspey v. Workman, 234 M 374, 763 P2d 666, 45 St. Rep. 1983 (1988).

Real Estate Transaction — No Fees: This statute does not support an award of reasonable posttrial attorney fees for costs incurred as the result of defendant's posttrial motions and appeal in a case involving purchase of property on a promissory note. Flemmer v. Ming, 190 M 403, 621 P2d 1038, 37 St. Rep. 1916 (1980).

Employee Status Based on Implied Contract: Plaintiffs were managers of a bar under an expressed contract that provided that they would receive the bar revenues in excess of the operating and fixed costs of the operation. The expressed contract was revoked and they became employees as a result of representations by the defendant that they would receive reasonable compensation. As employees under the implied contract, they were entitled to attorneys' fees under this section. McNulty v. Bewley Corp., 182 M 260, 596 P2d 474, 36 St. Rep. 1110 (1979).

Attorney Fees Award — Disposition: Attorney fees awarded on appeal of Fair Labor Standards Act claim must be paid into the Cascade County General Fund and not given to the County Attorney as private attorney fees because Cascade County is in excess of 30,000 people, prohibiting profits by the County Attorney from private practice of law. St. v. Holman Aviation Co., 176 M 31, 575 P2d 923 (1978).

Failure to File Memorandum: In an action for wages, where a motion to strike a memorandum of costs was granted upon the ground that the memorandum had not been filed within the time provided by 25-10-501, all items of cost in the action, including attorney's fee, failed and the judgment was required to be corrected by striking the item of the attorney's fee and other costs. Wilson v. Wininger, 136 M 120, 345 P2d 374 (1959).

Assignee's Right to Attorney Fee: The right to include a reasonable attorney's fee where an employee is forced to bring suit to recover wages due is statutory, and the assignment of the wage claim carries with it the right to recover a reasonable attorney's fee. However, where 39 claims are established in one suit, the attorney's fee should not amount to as much as it would have been if 39 individual suits had been brought. (See 70-1-520.) Meister v. Farrow, 109 M 1, 92 P2d 753 (1939).

Constitutionality: This section is not invalid as violating the Due Process of Law Clause of either the state or federal constitution (Art. III, sec. 27, 1889 Mont. Const.), nor as denying to either party the equal protection of the law. Britt v. Cotter Butte Mines, 108 M 174, 91 P2d 403 (1939).

Quantum Meruit: The fact that plaintiff was suing on quantum meruit for the reasonable value of his services rather than for a lump sum, did not deprive him of the right to have his attorneys' fees taxed as costs against defendant upon rendition of judgment in his favor under this section. Britt v. Cotter Butte Mines, 108 M 174, 91 P2d 403 (1939).

Express Provision of Law: Under the rule provided by 25-10-201, that costs are not allowable unless expressly authorized by statute, the provision of this section for reasonable attorney's fee in favor of successful party, is an "express provision of law" for the allowance of costs. Swanson v. Gnose, 106 M 262, 76 P2d 643 (1938).

Limitation of Actions: The provision of 39-3-207 declaring that an employee may recover the penalties provided by 39-3-206 at any time within 6 months after default or delay in payment of wages, does not affect the provision of this section relating to including a reasonable attorney's fee. In the instant case the action was brought about 3 years after plaintiff's employment ceased, it was the duty of the District Court to allow a reasonable attorney's fee as a proper and legal cost item. Swanson v. Gnose, 106 M 262, 76 P2d 643 (1938).

Pleading and Proof: In an action to recover wages due, the plaintiff is entitled to a reasonable attorney's fee as a part of the costs without being required to either plead or prove such item. Swanson v. Gnose, 106 M 262, 76 P2d 643 (1938); Gardiner v. Eclipse Grocery Co., 72 M 540, 234 P 490 (1925).

Agricultural Labor: Attorney's fee was not allowable in suit for wages of a general ranch hand, coming under the exception as to agricultural labor provided in 39-3-203. Gahagan v. Gugler, 100 M 599, 52 P2d 150 (1935).

39-3-215. Authority of county attorney.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-3-216. Mediation — hearing.

Compiler's Comments

1999 Amendment: Chapter 442 inserted (2) concerning department mediation of disputed contested case; and in (4) substituted "an aggrieved party requests a rehearing or initiates judicial review, pursuant to Title 2, chapter 4, part 7, by filing a petition in district court within 30 days of the date of mailing of the hearings officer's decision" for "further review is initiated pursuant to 39-3-217 within 15 days after the decision is mailed to each party's last-known address. The period may be extended by the board for good cause." Amendment effective April 23, 1999.

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 28, Ch. 442, L. 1999, was a severability clause.

Applicability: Section 30, Ch. 442, L. 1999, provided that this section applies to claims accruing on or after April 23, 1999.

1995 Amendment: Chapter 90 near beginning of (1) and (2), after "wage claim", substituted "is valid" for "exists"; at end of first sentence of (1), after "wages due", substituted "and for any penalty assessed pursuant to 39-3-206" for "and owing"; and inserted third sentence in (2) that read: "The hearing may be conducted by telephone or by videoconference." Amendment effective March 9, 1995.

Applicability: Section 12, Ch. 90, L. 1995, provided: "[Sections 2, 3, 6, 7, and 9] [2-18-1002, 2-18-1012, 39-3-216, 39-3-217, now repealed, and 39-31-105] apply to hearings or appeals requested on or after [the effective date of this act]." Effective March 9, 1995.

1993 Amendment: Chapter 134 in (2), near beginning after "exists", substituted "the department shall mail the determination to the parties at the last-known address of each party. If a party appeals the department's determination within 15 days after the determination is mailed by the department, a" for "and if it fails to settle the claim with the parties, it shall cause the matter to be brought to a hearing before a department hearings officer. The", in second sentence, after "except that", inserted "service need not be made as prescribed for civil actions in the district court and", and inserted third sentence requiring the Department to provide relief by rule for a person who does not receive the determination by mail.

1991 Amendment: Inserted (1) allowing entry and enforcement of a default order if a claim exists on an unappealed determination. Amendment effective July 1, 1991.

Applicability: Section 8, Ch. 490, L. 1991, provided: "[This act] applies to all wage claims filed with the department of labor and industry on or after July 1, 1991."

Effective Date: Section 8, Ch. 554, L. 1989, provided that this section is effective July 1, 1989.

Applicability: Section 9, Ch. 554, L. 1989, provided: "[This act] applies to all wage claims filed with the department after July 1, 1989."

Administrative Rules

Title 24, chapter 16, subchapter 75, ARM Wage claims.

Case Notes

Failure to Exhaust Administrative Remedies in Adjudicating Particular Issue — Lack of Jurisdiction for Judicial Review: Art hired Mason as a personal care attendant for Art's elderly mother. After the mother died, Mason filed a claim for unemployment benefits and a separate claim for unpaid overtime. Art contested both claims on grounds that Mason was an independent contractor. A compliance specialist determined that Mason was an employee, and that decision was affirmed in Workers' Compensation Court. However, the court stated that it lacked jurisdiction to decide issues regarding the overtime claim, so that claim went back to the administrative process. A second compliance specialist found that Art owed Mason overtime pay, but Art moved to suspend the administrative appeals process pending judicial review. The District Court dismissed the appeal for lack of jurisdiction, and Art appealed. The Supreme Court affirmed. By failing to pursue an administrative appeal of the compliance specialists' determinations with the Hearings Bureau and then with the Board of Personnel Appeals, Art failed to exhaust all administrative remedies as required by 2-4-702, so the District Court's dismissal based on lack of jurisdiction was correct. Art v. Dept. of Labor and Industry, 2002 MT 327, 313 M 197, 60 P3d 958 (2002).

39-3-218. Tip pools allowed — requirements — prohibitions — compulsory charges distinguished.

Compiler's Comments

Effective Date: Section 3, Ch. 379, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 3, 2021.

Part 3

Reciprocal Agreement for Collection of Wages Act

Part Law Review Articles

Giggin' in the 21st Century, Ford, 80 Mont. L. Rev. 299 (2019).

Part 4

Minimum Wage and Overtime Compensation

Part Administrative Rules

Title 24, chapter 16, ARM Wages and hours.

Title 24, chapter 16, subchapter 30, ARM General hours worked — overtime compensation — wage payment.

Title 24, chapter 16, subchapter 40, ARM Complaints — claims — decisions — appeals.

Part Case Notes

Overtime Wage Dispute — Employer's Failure to Keep Truck Driver's Hours — Hearings Examiner's Shifting of Burden of Proof Improper: The plaintiff sued his employer, a trucking company, alleging that they made an oral contract guaranteeing him approximately $60,000 per year and that he was owed unpaid overtime wages. On remand from the Supreme Court in Arlington v. Miller's Trucking, Inc., 2012 MT 89, 364 Mont. 534, 277 P.3d 1198, the hearings examiner found that there was no oral agreement, the plaintiff made it difficult for the employer to record his hours, and that the plaintiff's claimed overtime hours were not credible. On appeal, the Supreme Court upheld the dismissal of the $60,000 per year claim. However, the Supreme Court reversed the unpaid wage denial, holding that the burden to maintain employee records falls on the employer, that the employee bears a light burden of production in the employer's failure to maintain records, and that uncontroverted evidence supported part of the plaintiff's overtime claims. Arlington v. Miller's Trucking, Inc., 2015 MT 68, 378 Mont. 324, 343 P.3d 1222.

Fair Labor Standards Act — Award of Attorney Fees Without Contemporaneous Time Records Discouraged But Affirmed: The District Court awarded Tacke attorney fees after Tacke prevailed on a claim under the federal Fair Labor Standards Act (FLSA). Defendant employer asserted that the award was improper because Tacke's counsel was not required to provide contemporaneous time records to justify the award. The Supreme Court agreed that it was Tacke's burden to provide evidence that the claimed fees were reasonable but noted that the District Court concluded that evidence in the case, coupled with the court's personal knowledge of the case, validated the reasonableness of the hours that Tacke submitted. The Supreme Court declined to adopt a per se rule regarding the issue but strongly urged counsel to keep and provide contemporaneous time records in support of attorney fee requests in fee-shifting cases, and encouraged District Courts to look askance at requests not so supported. Nevertheless, in this case the District Court conducted a careful review of the fee issue, exercised conscientious judgment, and did not err in evaluating the evidence or abuse its discretion in approving the fee award. Thus, in this instance the attorney fee award was affirmed absent contemporaneous time records. Tacke v. Energy W., Inc., 2010 MT 39, 355 Mont. 243, 227 P.3d 601.

Fair Labor Standards Act — Award of Liquidated Damages Despite Lack of Willful Withholding of Overtime Compensation: A jury awarded Tacke liquidated damages after Tacke prevailed on a claim under the federal Fair Labor Standards Act (FLSA) asserting that the defendant employer owed overtime wages for the time Tacke was incorrectly classified as an exempt employee. The employer contended that the award was improper given that the jury found that the employer did not act willfully in withholding overtime. The Supreme Court disagreed. The FLSA provides for liquidated damages when an employer wrongfully withholds overtime compensation, and to avoid an award, the employer must show that the withholding action was in good faith and that the employer had reasonable grounds to believe that its action was not a violation of the FLSA. Prior to a showing of the employer's good faith and reasonable grounds, a court has no discretion to mitigate the employer's statutory liability for liquidated damages, and even if the employer meets this substantial burden, the District Court may still award liquidated damages at its discretion. Tacke v. Energy W., Inc., 2010 MT 39, 355 Mont. 243, 227 P.3d 601.

Fair Labor Standards Act — Question Whether Employee Qualified for Administrative Exemption — Summary Judgment Precluded: Tacke brought a claim under the federal Fair Labor Standards Act (FLSA) asserting that the defendant employer owed overtime wages for the time Tacke was incorrectly classified as an exempt employee. The employer moved for summary judgment on grounds that Tacke provided no facts establishing that Tacke fell outside the administrative exemption, but the motion was denied. On appeal, the Supreme Court held that Tacke presented testimony establishing, if true, that Tacke did not meet the requisite elements for an administrative exemption. The testimony was sufficient to raise a genuine issue of material fact, precluding summary judgment. Denial of summary judgment was affirmed. Tacke v. Energy W., Inc., 2010 MT 39, 355 Mont. 243, 227 P.3d 601. See also Arlington v. Miller's Trucking, Inc., 2012 MT 89, 364 Mont. 534, 277 P.3d 1198, reversing agency and District Court conclusion that the employee was exempt from overtime pay under the FLSA, and Arlington v. Miller's Trucking, Inc., 2015 MT 68, 378 Mont. 324, 343 P.3d 1222.

Procedural, Not Substantive, Provisions of Wage Payment Law Applicable to Minimum Wage Claims: Plaintiffs filed claims against their former employer, school district, for violation of Minimum Wage and Overtime Compensation Act (MWOCA), now codified in Title 39, ch. 3, part 4. Section 41-2306, R.C.M. 1947 (now 39-3-407), provided that MWOCA claims were to be enforced in accordance with the Montana Wage Payment Act (WPA), (now codified at Title 39, ch. 3, part 5). The District Court found that plaintiffs were entitled to payment of back wages from the school district. However, the court denied plaintiffs' claim for statutory penalty and attorney fees, ruling that the school district was not an "employer" within the meaning of WPA. Plaintiffs appealed, claiming that WPA provisions are to be used only for the purpose of providing a mechanism for the enforcement of MWOCA, that the substantive provisions of WPA are not applicable to a MWOCA claim, and that the court should have used the broad definition of "employer" found in MWOCA to assess a penalty and attorney fees against the school district. The Supreme Court reversed the District Court and ruled that the plain meaning of the statute indicated that it was the Legislature's intent to incorporate the remedial portions of the WPA only and that the substantive provisions of the MWOCA, including its definition of "employer", applied in this case. Sink v. School District, 199 M 352, 649 P2d 1263, 39 St. Rep. 1448 (1982).

39-3-401. Declaration of policy.

Case Notes

Applicability of State Wage Protection Laws to Private Action by State Employees Not Covered by Federal Fair Labor Standards Act: Sixteen highway patrol officers filed federal and state wage claims. A hearings examiner found that the claims were governed by the federal Fair Labor Standards Act of 1938 (FLSA), rather than by Montana law. The U.S. Supreme Court subsequently issued its decision in Alden v. Maine, 527 US 706 (1999), and the patrol moved to dismiss on grounds that under Alden, sovereign immunity barred the wage claims. The motion was denied, and the parties appealed to the Bureau of Personnel Appeals (BPA), which reversed the hearings examiner's holding and concluded that neither the hearings examiner nor the BPA had jurisdiction to consider the issue of sovereign immunity. The parties then appealed to District Court, and the court held that because Montana had not waived sovereign immunity from suit pursuant to the FLSA and Alden, the officers were not covered by the FLSA as contemplated by 39-3-408, so their state wage claim was incorrectly dismissed and the officers were entitled to pursue the wage claim under Montana law. Following certification, the case was appealed to the Supreme Court, which, without addressing the sovereign immunity issue, affirmed the District Court's conclusion that the officers had a state claim because they were not covered by the FLSA. It makes no difference whether a Montana employer is excluded from the protection of the FLSA by its terms or as the result of a judicial decision and to hold otherwise would defeat the policy behind the state wage payment laws set forth in this section. As a result of Alden, the primary enforcement mechanism of the FLSA to allow the right to bring a private wage claim against an employer for monetary damages has been taken from the people whom it was intended to protect, creating a de facto exclusion of the officers in this case from full FLSA protection. Without the right of private action, the right to fair wages cannot be enforced in the manner contemplated by Congress and the Montana Legislature. Because the officers were not covered by the FLSA, the District Court properly concluded that provisions of the state wage payment laws applied. (See the 2001 amendments to 39-3-408, which expressly covered state employees.) In re Wage Claim of Babinecz v. Mont. Highway Patrol, 2003 MT 107, 315 M 325, 68 P3d 715 (2003). See also Plouffe v. Farm & Ranch Equip. Co., 174 M 313, 570 P2d 1106 (1977), Berry v. KRTV Communications, Inc., 262 M 415, 865 P2d 1104 (1993), and Kearney v. KXLF Communications, Inc., 263 M 407, 869 P2d 772 (1994).

39-3-402. Definitions.

Compiler's Comments

1995 Amendments: Chapter 206 inserted (4)(b) defining livestock to include ostriches, rheas, and emus; and made minor changes in style.

Chapter 479 in definition of wage, in (b) after "tips", substituted "or gratuities that are covered by section 3402(k) or service charges that are covered by section 3401 of the Internal Revenue Code of 1954, as amended and applicable on January 1, 1983, received by employees for services rendered by them to patrons of premises or businesses licensed to provide food, beverage, or lodging" for "received by an employee as a gratuity for service" and inserted (c) defining service charge; and made minor changes in style. Amendment effective April 15, 1995.

Applicability: Section 14, Ch. 206, L. 1995, provided: "[This act] applies to tax years beginning after December 31, 1995."

Section 5, Ch. 479, L. 1995, provided that this act applies to contracts entered into on or after April 15, 1995.

1991 Amendment: In (7), in last sentence after "include", inserted "the cost to the employer of providing meals or a meal allowance to the employee or"; and made minor changes in style. Amendment effective March 29, 1991.

1987 Amendment: Inserted last sentence of (7) excluding tips from definition of wage.

Case Notes

Ranch Hand at State Research Ranch: Plaintiff was a beef herdsman at the Gerwin Research Farm, a part of the Agricultural Research Station of Montana State University (now Montana State University—Bozeman). He fed and watered cattle, helped deliver calves, maintained fences, assisted with artificial insemination, and maintained herd management records. He was a "farm worker" working on a "farm or ranch" for purposes of 39-3-402 and 39-3-405. He was also a person employed in agriculture for purposes of 39-3-406(2). On both grounds, he was not covered by the overtime compensation requirement of 39-3-405. The definition of "farm or ranch" in 39-3-402 does not require that the employer be a farm or ranch or even be primarily engaged in farming or ranching. It focuses on the activities at the work situs, and the Gerwin Research Farm fits within that definition. Terry v. Bd. of Regents, 220 M 214, 714 P2d 151, 43 St. Rep. 304 (1986).

39-3-403. Rulemaking authority.

Compiler's Comments

1995 Amendment: Chapter 90 after first sentence deleted: "Such regulations shall take effect upon publication by the commissioner. Any person who is aggrieved by an administrative regulation may obtain a hearing before the commissioner upon filing written protest with the commissioner, who shall thereupon set such matter for hearing in the county of residence of such protestant within 30 days after receipt of such protest. After such hearing, the commissioner shall promulgate such further administrative regulations as the evidence produced at said hearing shall justify"; and made minor changes in style. Amendment effective March 9, 1995.

Administrative Rules

Title 24, chapter 16, ARM Wages and hours.

39-3-404. Minimum wage.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: At end of (1) substituted reference to minimum wage determined by the Commissioner for "(a) at least $3.05 an hour after September 30, 1985, and before October 1, 1986;

(b) at least $3.35 an hour on October 1, 1986, and thereafter"; and at end of (2)(b) substituted "shall not be less than $635 a month beginning January 1, 1990" for "shall not be less than the following rates:

(i) $575 a month for the first year from July 1, 1981;

(ii) $635 a month for the second year from July 1, 1981, and thereafter". Amendment effective January 1, 1990.

1985 Amendment: In (1) substituted language setting minimum wage at $3.05 from October 1, 1985, to September 30, 1986, and $3.35 thereafter for "Except as may otherwise be provided pursuant to this part, every employer shall pay to each of his employees wages at a rate not less than provided in subsections (1)(a) and (1)(b), save and except for farm workers as herein defined:

(a) $2.50 an hour for the first year from July 1, 1981;

(b) $2.75 an hour for the second year from July 1, 1981, and thereafter."

1981 Amendment: Increased minimum wage from $1.80 to $2.50 in subsection (1)(a), from $2.00 to $2.75 in subsection (1)(b), from $420 to $575 in subsection (2)(b)(i), and from $460 to $635 in subsection (2)(b)(ii); changed year from 1975 to 1981 throughout section.

Administrative Rules

ARM 24.16.502 Coverage not dependent on method of compensation.

ARM 24.16.503 Coverage not dependent on place of work.

Title 24, chapter 16, subchapter 10, ARM Hours worked.

ARM 24.16.2513 Payments other than cash.

ARM 24.16.2581 Veterans' subsistence allowance.

Title 24, chapter 16, subchapter 55, ARM Requirements of bona fide profit-sharing plan or trust.

Title 24, chapter 16, subchapter 61, ARM Records to be kept by employer.

Case Notes

State Remedy and State Court Enforcement of Contract Wages Required by Federal Davis-Bacon Act: The District Court had subject matter jurisdiction of state contract law claims against a contractor and subcontractors by workers hired to build housing on Malmstrom Air Force base under a contract between the contractor and the Air Force. The workers claimed that they were not paid the prevailing wages required by the federal Davis-Bacon Act. The defendants claimed that there was no private right of action and that the workers had not exhausted their federal administrative remedies. The evidence showed that the workers extensively used the administrative remedies, taking all proper steps to attempt to administratively resolve the dispute. The workers were not seeking to enforce the Davis-Bacon Act labor standards; they sought to enforce a contract that includes wages required by the Act, a subtle but important distinction. The Act does not preempt the workers' right to a state enforcement action, using state remedies, under the facts of this case. That right is in keeping with Montana's longstanding policy and constitutional guarantee in Art. II, sec. 16, Mont. Const., of citizens' access to Montana courts when they are aggrieved. As third-party beneficiaries of the contract, the workers have the right to sue in state court to enforce the contract under state law. Favel v. Am. Renovation & Constr. Co., 2002 MT 266, 312 M 285, 59 P3d 412 (2002).

Family Member Exclusion Inapplicable to Claim for Unpaid Back Wages — One Hundred Ten Percent Penalty Applied — Attorney Fees and Costs Properly Awarded: Greta worked for her husband's broadcasting company as a traffic system manager, initially working without hourly wages or a salary. About 10 months after her employment began, her husband offered Greta a monthly salary and agreed that Greta should be paid retroactively to the first day on which she started working, preparing a memorandum of understanding to that effect. The M.O.U.

also provided that Greta be repaid for the 10-month period according to a mutually agreeable schedule. Greta continued to work several months at salary, but the marriage began to dissolve, and she left her position without receiving any back wages. The company eventually made some payments, but Greta ultimately sued for unpaid wages plus penalties under the wage protection statutes. The District Court granted Greta summary judgment on the issue of whether unpaid wages were owed and, after trial, ordered the company to pay Greta the amount still owing. However, the court declined to award the maximum 110% penalty, establishing a 55% penalty instead and awarding Greta her attorney fees and costs. Both parties appealed. The company claimed that the penalty and fees should not have been awarded because, as a family member, Greta's employment relationship was excluded under 39-3-406. However, that exception applies to the minimum wage and overtime provisions of the employment relationship, not to the failure to timely pay wages, which is governed by 39-3-205. Once Greta became a salaried employee, she was entitled to the rights and remedies afforded to all employees under state law. Therefore, the District Court properly determined that back wages were owing. However, under ARM 24.16.7551, an employer who pays some or all of a contested wage may be relieved in whole or in part of paying a penalty, unless the employer has previously violated similar wage and hour statutes within 3 years prior to the date of the filing of the wage claim. The District Court erred in not taking judicial notice of the administrative rule. Because the company had been the subject of at least three prior wage claims by other employees, the special circumstances of the rule applied, so the 110% penalty, as a matter of law, applied to the back wages owed to Greta at the time of her separation from employment. Thus, the Supreme Court vacated the 55% award and directed a 110% award from that date. Further, the District Court's award of attorney fees and costs was based on substantial evidence and was proper under 39-3-214, including Greta's attorney fees incurred on appeal. Reier Broadcasting Co. v. Reier, 2000 MT 120, 299 M 463, 1 P3d 940, 57 St. Rep. 504 (2000).

Commissioned Employees — Minimum Wage and Overtime Compliance: When an employer paid employees on a commission basis, the Department of Labor and Industry did not err in requiring that the employees must be compensated in compliance with the minimum wage and overtime compensation laws. To determine whether an employee's regular pay meets minimum wage standards, his total compensation each week is divided by his total hours worked. To comply with the requirements of this section and 39-3-405, the employer must agree with his employees to pay the stated commission or the minimum wage plus overtime, whichever is greater. St. v. Wilson, 189 M 52, 614 P2d 1066, 37 St. Rep. 1393 (1980).

Wage Claim Action — Department Power to Initiate: The Department of Labor and Industry has the authority to bring an action for violation of the Montana minimum wage and overtime compensation law (Title 39, ch. 3, part 4) even though no complaint was filed by any of the defendant's wage earners, such a complaint being unnecessary under 39-3-209 as provided by 39-3-407. St. v. Wilson, 189 M 52, 614 P2d 1066, 37 St. Rep. 1393 (1980).

Dependent: Pope was not a dependent of Keefer even though he lived with Keefer and Keefer provided all of his support. The fair inference is that the support was given not because Pope was a dependent in any customary sense but in exchange for the work he performed. Pope is therefore not a person excluded under 39-3-406 and is entitled to the minimum wage provided by this section. Pope v. Keefer, 180 M 454, 591 P2d 206, 36 St. Rep. 366 (1979).

Handicapped Worker: A person who has an I.Q. of 80 but who is not so mentally impaired as to be unable to engage in competitive, gainful employment within a limited range of possibilities is not a handicapped worker within the meaning of 39-3-406. Such an individual is entitled to the minimum wage provided by this section. Pope v. Keefer, 180 M 454, 591 P2d 206, 36 St. Rep. 366 (1979).

Minimum Wages and Hours Act Not Preempted: The Fair Labor Standards Act does not preempt the subject of wage, hour, or overtime regulation to the exclusion of Montana minimum wages and hours law. Plouffe v. Farm & Ranch Equip. Co., 174 M 313, 570 P2d 1106 (1977). See also Berry v. KRTV Communications, Inc., 262 M 415, 865 P2d 1104, 50 St. Rep. 1617 (1993).

Attorney General's Opinions

Hours of Labor and Compensation: An agency of state government may permit an employee to work more than 8 hours in any workday, but overtime need only be paid for hours worked in excess of 40 hours in any one workweek, and paid days off for annual leave, legal holidays, jury duty, and military leave are not counted as hours worked in computing weekly overtime. 37 A.G. Op. 16 (1977).

39-3-405. Overtime compensation.

Compiler's Comments

2001 Amendment: Chapter 71 inserted (4) requiring consistent application of overtime provisions to employment of firefighters and law enforcement officers; and made minor changes in style. Amendment effective March 20, 2001.

Case Notes

Overtime Wage Dispute — Employer's Failure to Keep Truck Driver's Hours — Hearings Examiner's Shifting of Burden of Proof Improper: The plaintiff sued his employer, a trucking company, alleging that they made an oral contract guaranteeing him approximately $60,000 per year and that he was owed unpaid overtime wages. On remand from the Supreme Court in Arlington v. Miller's Trucking, Inc., 2012 MT 89, 364 Mont. 534, 277 P.3d 1198, the hearings examiner found that there was no oral agreement, the plaintiff made it difficult for the employer to record his hours, and that the plaintiff's claimed overtime hours were not credible. On appeal, the Supreme Court upheld the dismissal of the $60,000 per year claim. However, the Supreme Court reversed the unpaid wage denial, holding that the burden to maintain employee records falls on the employer, that the employee bears a light burden of production in the employer's failure to maintain records, and that uncontroverted evidence supported part of the plaintiff's overtime claims. Arlington v. Miller's Trucking, Inc., 2015 MT 68, 378 Mont. 324, 343 P.3d 1222.

Substantial Evidence Sufficient to Support Jury Verdict Under Fair Labor Standards Act: Plaintiffs, police officers employed by the defendant town, alleged that the town's on-call policy was so restrictive that they could not engage in personal activities between shifts. The plaintiffs claimed that under the Fair Labor Standards Act, they should be compensated for the time they spent on call, but a jury decided in favor of the town. On appeal, the Supreme Court concluded that there was sufficient substantial evidence to support the jury's verdict because the plaintiffs' on-call time, although restricted, was spent primarily for their own personal benefit. Stubblefield v. W. Yellowstone, 2013 MT 78, 369 Mont. 322, 298 P.3d 419.

Denial of Leave to Present Additional Evidence — Abuse of Discretion: A truck driver filed a wage claim with the Department of Labor and Industry against his employer, a trucking company, claiming that he was owed base and overtime wages. During discovery, the employee sought employment contracts of the trucking company. After the company refused to produce the contracts, the employee requested that the Department's Hearings Bureau issue a subpoena. The Bureau ignored the request, and a hearings officer dismissed the employee's claim. The employee then filed petitions for District Court review and for leave to present additional evidence. The District Court affirmed the hearings officer's decision and denied the request to present additional evidence. On appeal, the Supreme Court reversed, concluding that the hearings officer had acted arbitrarily and capriciously and that the District Court had abused its discretion by not allowing additional evidence. The court remanded the matter to the District Court to allow the employee to secure and present the contracts. Arlington v. Miller's Trucking, Inc., 2012 MT 89, 364 Mont. 534, 277 P.3d 1198. See also Arlington v. Miller's Trucking, Inc., 2015 MT 68, 378 Mont. 324, 343 P.3d 1222.

Fair Labor Standards Act — Award of Attorney Fees Without Contemporaneous Time Records Discouraged But Affirmed: The District Court awarded Tacke attorney fees after Tacke prevailed on a claim under the federal Fair Labor Standards Act (FLSA). Defendant employer asserted that the award was improper because Tacke's counsel was not required to provide contemporaneous time records to justify the award. The Supreme Court agreed that it was Tacke's burden to provide evidence that the claimed fees were reasonable but noted that the District Court concluded that evidence in the case, coupled with the court's personal knowledge of the case, validated the reasonableness of the hours that Tacke submitted. The Supreme Court declined to adopt a per se rule regarding the issue but strongly urged counsel to keep and provide contemporaneous time records in support of attorney fee requests in fee-shifting cases, and encouraged District Courts to look askance at requests not so supported. Nevertheless, in this case the District Court conducted a careful review of the fee issue, exercised conscientious judgment, and did not err in evaluating the evidence or abuse its discretion in approving the fee award. Thus, in this instance the attorney fee award was affirmed absent contemporaneous time records. Tacke v. Energy W., Inc., 2010 MT 39, 355 Mont. 243, 227 P.3d 601.

Fair Labor Standards Act — Award of Liquidated Damages Despite Lack of Willful Withholding of Overtime Compensation: A jury awarded Tacke liquidated damages after Tacke prevailed on a claim under the federal Fair Labor Standards Act (FLSA) asserting that the defendant employer owed overtime wages for the time Tacke was incorrectly classified as an exempt employee. The employer contended that the award was improper given that the jury found that the employer did not act willfully in withholding overtime. The Supreme Court disagreed. The FLSA provides for liquidated damages when an employer wrongfully withholds overtime compensation, and to avoid an award, the employer must show that the withholding action was in good faith and that the employer had reasonable grounds to believe that its action was not a violation of the FLSA. Prior to a showing of the employer's good faith and reasonable grounds, a court has no discretion to mitigate the employer's statutory liability for liquidated damages, and even if the employer meets this substantial burden, the District Court may still award liquidated damages at its discretion. Tacke v. Energy W., Inc., 2010 MT 39, 355 Mont. 243, 227 P.3d 601.

Fair Labor Standards Act — Question Whether Employee Qualified for Administrative Exemption — Summary Judgment Precluded: Tacke brought a claim under the federal Fair Labor Standards Act (FLSA) asserting that the defendant employer owed overtime wages for the time Tacke was incorrectly classified as an exempt employee. The employer moved for summary judgment on grounds that Tacke provided no facts establishing that Tacke fell outside the administrative exemption, but the motion was denied. On appeal, the Supreme Court held that Tacke presented testimony establishing, if true, that Tacke did not meet the requisite elements for an administrative exemption. The testimony was sufficient to raise a genuine issue of material fact, precluding summary judgment. Denial of summary judgment was affirmed. Tacke v. Energy W., Inc., 2010 MT 39, 355 Mont. 243, 227 P.3d 601. See also Arlington v. Miller's Trucking, Inc., 2012 MT 89, 364 Mont. 534, 277 P.3d 1198, reversing agency and District Court conclusion that the employee was exempt from overtime pay under the FLSA, and Arlington v. Miller's Trucking, Inc., 2015 MT 68, 378 Mont. 324, 343 P.3d 1222.

Agency Rejection and Order for Modification of Conclusions of Law Regarding Employee's Entitlement to Overtime Pay Proper — Correct Standard of Review Applied: Winkler filed an overtime wage claim, and a state compliance specialist awarded Winkler the entire amount plus a 15% statutory penalty. A state hearings officer found that Winkler was not entitled to overtime. The Board of Personnel Appeals reversed the hearings officer, and the District Court affirmed the Board. The employer appealed on grounds that the Board and the District Court erroneously substituted their judgment for the findings of fact of the hearings officer, but the Supreme Court found no abuse of discretion and affirmed. Under the federal Fair Labor Standards Act, to avoid paying overtime, an employer has the burden of proving that the employee fits plainly and unmistakably within the Act's exemption requirements. The Board concluded that the hearings officer failed to show that Winkler was exempt, and the District Court agreed. Thus, the Board and the court did not modify the findings of the hearings officer in violation of 2-4-704, but did comply with 2-4-621 in rejecting and ordering a modification of the hearings officer's conclusions of law. Further, the Board and the District Court applied the correct standard of review set out in Moran v. Shotgun Willies, Inc., 270 M 47, 889 P2d 1185 (1995), in holding that the hearings officer's findings were based on competent substantial evidence that Winkler did not agree to work for a set number of hours each week. Key W., Inc. v. Winkler, 2004 MT 186, 322 M 184, 95 P3d 666 (2004).

Liquidated Damages for Failure to Pay Overtime Warranted Absent Showing That Employer Acted in Good Faith and With Reasonable Grounds in Paying Wages — Fees and Costs of Appeal Allowed to Employee: The federal Fair Labor Standards Act provides that employees who are not paid overtime may recover liquidated damages in the amount of unpaid wages in addition to the unpaid wages. In this case, Winkler was awarded liquidated damages, and the employer appealed on grounds that it paid Winkler's wages in good faith and had reasonable grounds to believe that it did not violate the Act, so liquidated damages were not warranted under 29 U.S.C. 260. The Supreme Court applied the test in Walton v. United Consumers Club, Inc., 786 F2d 303 (7th Cir. 1986), to determine what constitutes good faith and reasonable grounds. The Walton standard is whether, when objectively viewed through the lens of the tort law reasonable person standard, the employer acted in good faith and had reasonable grounds for believing that the employer's act or omission did not violate the Act. The hearings officer found that, based on the entire record, the employer failed to present sufficient evidence of good faith and reasonable grounds, and the Supreme Court declined to substitute its judgment for that of the agency as to the weight of the evidence on the factual question. Winkler was also entitled to court costs and attorney fees for appeal as the prevailing party under 39-3-214 and 29 U.S.C. 216(b). Key W., Inc. v. Winkler, 2004 MT 186, 322 M 184, 95 P3d 666 (2004).

Employee Who Spent Eighty Percent of Time on Nonmanagerial Work Considered Manager Exempt From Overtime Requirements: Showers sued Kemp for unpaid wages allegedly owed for Showers' work as a chef. The Board of Personnel Appeals found that Kemp owed $5,820.15 in unpaid overtime, and the District Court affirmed. On appeal, Kemp maintained that Showers was employed in an executive capacity under 29 U.S.C. 213(a)(1) and was thus exempt from the overtime provisions of the Fair Labor Standards Act. The Supreme Court considered the factors in 29 CFR 541.103 in determining whether Showers' primary duty was management: (1) time spent performing managerial duties; (2) the relative importance of the employee's managerial duties as compared with other duties; (3) the frequency with which the employee exercises discretionary powers; (4) the employee's relative freedom from supervision; and (5) the relationship between the employee's salary and wages paid to subordinates for the nonexempt work performed by the employee. Generally, an employee who spends 50% or more of time in management would have management as the primary duty, but time is not the sole test. An employee may spend less than 50% of time on management and still be considered a manager if other factors support that conclusion. Here, Showers spent only 20% of her time performing managerial work and 80% of her time cooking, but the managerial duties were more important than her other duties because they needed to be done so that her subordinates could work and so the kitchen could operate successfully. Further, Showers frequently exercised discretionary powers by making weekly, if not daily, decisions concerning operation of the kitchen, was relatively, if not totally, free from supervision, and was compensated better than her subordinates. Although exemptions from the Fair Labor Standards Act are to be narrowly construed against the employer asserting the exemption and the employer has the burden of proving that the employee fits plainly and unmistakably within the terms of the exemption, the Supreme Court found that, considering the other factors in the federal regulations, Showers was an exempt employee whose primary duty was management, even though she spent 80% of her time performing nonmanagerial work. Kemp v. Bd. of Personnel Appeals, 1999 MT 255, 296 M 319, 989 P2d 317, 56 St. Rep. 1015 (1999).

Inclusion of District Construction Allowance in Base Pay for Purposes of Calculating Overtime Pay: Plaintiff employees' union sought a declaratory judgment that the district construction allowance (DCA) paid to eligible state employees should be included in their base pay for purposes of calculating overtime compensation. The District Court found that the DCA should not be included in the base pay and granted summary judgment to defendant state agency. On appeal, the Supreme Court reversed, holding that the District Court erred in granting summary judgment. Defendant did not meet its burden of showing that the DCA fit plainly and unmistakenly within one of the exceptions to the federal Fair Labor Standards Act (FLSA), 29 U.S.C. 201 through 219. The FLSA exceptions are to be narrowly construed against the employer asserting them, and the employer bears the burden of showing that the employee fits within the terms of the exception. All remuneration that does not fall within one of the seven exclusionary clauses of the FLSA must be added into the total compensation received by the employee before the hourly pay rate is determined. In the present case, the expenses at issue were not incurred on the employer's behalf or for its benefit or convenience, but rather the money was reimbursement for normal, everyday expenses incurred by the employee for traveling to and from work and thus could not be excluded from the regular rate as reimbursement for travel expenses under 29 U.S.C. 207(e)(2). Further, the agency could not be relieved of liability under the Portal-to-Portal Act of 1947 (PPA), 29 U.S.C. 251, et seq., because under the PPA, that relief does not extend to an employer if the activity is compensable by either an express provision of a written or nonwritten contract in effect, at the time of the activity, between the employer and the employee, the employee's agent, or the collective bargaining representative, as was the case here. Mont. Pub. Employees Ass'n v. Dept. of Transportation, 1998 MT 17, 287 M 229, 954 P2d 21, 55 St. Rep. 60 (1998).

Impermissible Wage Computation Scheme — Lack of Employee-Employer Agreement: Most Montana employers must compute wages based on Montana's Constitution and statutes providing for an 8-hour workday rather than on the provisions of the federal Fair Labor Standards Act of 1938 (FLSA). The FLSA provides a floor under which a state's hourly pay scheme cannot descend, but states are free to give greater benefits to their workers. Under this section, an employer is generally required to pay employees who work over 40 hours a week 1½ times their regular hourly wage for overtime hours worked. In the present case, in order to determine regular pay, the employer divided fixed pay by the total number of hours an employee worked. While permissible under federal law, this pay scheme is not permissible as applied to most employment relationships in Montana. The pay scheme was also a violation of wage laws because the employer and employees did not mutually agree to its use, in violation of ARM 24.16.2512(2)(e) (now repealed). Craver v. Waste Management Partners of Bozeman, 265 M 37, 874 P2d 1, 51 St. Rep. 268 (1994), followed in Lewis v. B&B Pawnbrokers, Inc., 1998 MT 302, 292 M 82, 968 P2d 1145, 55 St. Rep. 1243 (1998).

Overtime for TV News Editor/Reporter Not Covered by Federal Law: Since the overtime pay section of the federal Fair Labor Standards Act of 1938 specifically exempted a TV news editor/reporter from overtime pay, he was not covered by the federal Act for purposes of the provision in 39-3-408 that this part does not apply to employees covered by the federal Act. Therefore, he is covered by this part's overtime pay provisions and is entitled to overtime pay for past work because this part does not exempt him from overtime provisions. Berry v. KRTV Communications, Inc., 262 M 415, 865 P2d 1104, 50 St. Rep. 1617 (1993), followed in Kearney v. KXLF Communications, Inc., 263 M 407, 869 P2d 772, 51 St. Rep. 119 (1994).

Remedies Cumulative: On the question of whether plaintiffs who were denied overtime compensation under this section must seek relief exclusively from the Commissioner of Labor under this chapter, the Supreme Court held that the clear and unambiguous language of 39-3-408 provides for cumulative remedies. Therefore, resort to the Commissioner of Labor was not plaintiffs' exclusive option. The court reversed a dismissal that was based on plaintiffs' failure to exhaust administrative remedies. Boegli v. Glacier Mtn. Cheese Co., 238 M 426, 777 P2d 1303, 46 St. Rep. 1389 (1989).

Trucking Dispatcher as Administrative Employee — Overtime Denied: Evidence of a trucking dispatcher's customary exercise of discretion and judgment was sufficiently credible to support the conclusion that he acted in an administrative capacity and was not eligible for overtime compensation. Dennis v. Tomahawk Serv., Inc., 235 M 378, 767 P2d 346, 46 St. Rep. 69 (1989).

Deputy Sheriffs' Overtime and On-Call Time Before and After "Garcia Decision": This section relates to overtime compensation generally, while 7-4-2507 through 7-4-2509 specifically address the salary and overtime compensation of Deputy Sheriffs. Therefore, under the rule that the specific statute governs over the general, this section does not apply to Deputy Sheriffs. Furthermore, 7-4-2507 provides that 7-4-2508 through 7-4-2510 govern if they conflict with any other law. Under 7-4-2509, payment of overtime for time worked beyond the regularly scheduled work period is not mandatory and lies in the discretion of the Board of County Commissioners. Since this section does not apply to the deputies, the Fair Labor Standards Act (FLSA) and Garcia v. San Antonio Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985), set the threshold (171 hours per 28-day work period) above which the deputies must be paid overtime, retroactive to April 15, 1985, the date Garcia was decided; it could not be argued that the FLSA intended that the lower of the FLSA and the 39-3-405 (160 hours) threshold for a 28-day period should be used to determine when overtime begins. The deputies' claim for compensation for on-call time was another claim for overtime, and payment for on-call time prior to Garcia was in the discretion of the County Commissioners. On-call time since Garcia did not constitute work under a United States Supreme Court test that for FLSA purposes work is physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer. Phillips v. Lake County, 222 M 42, 721 P2d 326, 43 St. Rep. 1046 (1986).

Deputy Sheriffs' Retroactive Overtime — Conflict of Laws: Since deputies' award of retroactive overtime compensation was grounded in federal rather than state law, the state laws relating to penalties, interest, attorney fees, and costs did not apply. Phillips v. Lake County, 222 M 42, 721 P2d 326, 43 St. Rep. 1046 (1986).

Ranch Hand at State Research Ranch: Plaintiff was a beef herdsman at the Gerwin Research Farm, a part of the Agricultural Research Station of Montana State University (now Montana State University—Bozeman). He fed and watered cattle, helped deliver calves, maintained fences, assisted with artificial insemination, and maintained herd management records. He was a "farm worker" working on a "farm or ranch" for purposes of 39-3-402 and 39-3-405. He was also a person employed in agriculture for purposes of 39-3-406(2). On both grounds, he was not covered by the overtime compensation requirement of 39-3-405. The definition of "farm or ranch" in 39-3-402 does not require that the employer be a farm or ranch or even be primarily engaged in farming or ranching. It focuses on the activities at the work situs, and the Gerwin Research Farm fits within that definition. Terry v. Bd. of Regents, 220 M 214, 714 P2d 151, 43 St. Rep. 304 (1986).

Public Policy Against Waiver of Overtime — Estoppel: Though employee allegedly failed to report overtime hours and inform employer that he expected overtime pay, his nonassertion of his right under state and federal law to overtime pay did not constitute a waiver of the right or estop him from bringing a claim for it. Laws intended to protect the public in general cannot be waived privately by either implication or agreement, and laws establishing the right to overtime pay are among such laws. The court did not refer to Celmer v. Schmitt, 198 M 271, 645 P2d 946, 39 St. Rep. 925 (1982), which appears to have a contrary holding. Hoehne v. Sherrodd, Inc., 205

M 365, 668 P2d 232, 40 St. Rep. 1363 (1983), followed in Lewis v. B&B Pawnbrokers, Inc., 1998 MT 302, 292 M 82, 968 P2d 1145, 55 St. Rep. 1243 (1998). Lewis also overruled Celmer to the extent that it conflicted with Hoehne.

Farm Worker: Schmitt hired Celmer to work in his livestock, grain, and meat production business at a salary of $1,000 per month plus a rent and meat allowance. After Celmer quit without giving notice, he filed a claim for compensation for overtime he worked during his employment. The court rejected Celmer's claim because: (1) the employment contract excluded overtime payment because Celmer was compensated by salary and allowance for rent and meat, and (2) Celmer was an agricultural employee. In any event, an employee is estopped from claiming overtime compensation if he failed to report the overtime or to inform his employer that he expected compensation until he sued after quitting. Celmer v. Schmitt, 198 M 271, 645 P2d 946, 39 St. Rep. 925 (1982).

Claim for Overtime Pay at End of Employment Valid: A county is not relieved of liability for overtime pay on the grounds that an employee did not file an overtime pay claim for each pay period and did not claim any overtime until the end of his employment with the county. Rosebud County v. Roan, 192 M 252, 627 P2d 1222, 38 St. Rep. 639 (1981).

Overtime Wage Claim Valid — No Express Mandate to Work Overtime: Employers may not arbitrarily deny overtime on the basis that the employer did not expressly order the employee to work overtime. A rule to the contrary would reject many legitimate overtime wage claims such as the one here where the employee's overtime work was an effort to fulfill the terms of his employment rather than an attempt to create his own employment contract and where the employer knew that the employee worked overtime and did not direct the employee to stop working overtime. Rosebud County v. Roan, 192 M 252, 627 P2d 1222, 38 St. Rep. 639 (1981).

Two-Part Test in Qualifying an Employee as an Executive for the Purposes of Overtime Wage: In order to qualify an employee as an "executive" for the purposes of denying the employee overtime wage compensation, the test under the administrative rules is "whether the employee's duties 'include the customary and regular direction of the work of two or more other employees therein'", and in addition, whether the employee customarily and regularly supervised at least two full-time employees or the equivalent. Both rules defining the test must be met, and where the employee supervised two employees, one of which did not work for him full time, the employee does not meet the requirement of being an "executive". Rosebud County v. Roan, 192 M 252, 627 P2d 1222, 38 St. Rep. 639 (1981).

Commissioned Employees — Minimum Wage and Overtime Compliance: When an employer paid employees on a commission basis, the Department of Labor and Industry did not err in requiring that the employees must be compensated in compliance with the minimum wage and overtime compensation laws. To determine whether an employee's regular pay meets minimum wage standards, his total compensation each week is divided by his total hours worked. To comply with the requirements of 39-3-404 and this section, the employer must agree with his employees to pay the stated commission or the minimum wage plus overtime, whichever is greater. St. v. Wilson, 189 M 52, 614 P2d 1066, 37 St. Rep. 1393 (1980).

Time Limitation on Penalty — Tolled by Agency Enforcement: Failure to pay overtime results in the penalty at 39-3-206 as provided by 39-3-407. Section 39-3-206 states that the penalty is assessed for the entire period of time that the wages remain unpaid, except Sundays and legal holidays. The penalty may be enforced only if a complaint is filed or the Department of Labor and Industry acts to enforce the law within the 18-month limitation of 39-3-207 following the accrual of the action. St. v. Wilson, 189 M 52, 614 P2d 1066, 37 St. Rep. 1393 (1980).

Wage Claim Action — Department Power to Initiate: The Department of Labor and Industry has the authority to bring an action for violation of the Montana minimum wage and overtime compensation law (Title 39, ch. 3, part 4) even though no complaint was filed by any of the defendant's wage earners, such a complaint being unnecessary under 39-3-209 as provided by 39-3-407. St. v. Wilson, 189 M 52, 614 P2d 1066, 37 St. Rep. 1393 (1980).

Minimum Wages and Hours Act Not Preempted: The Fair Labor Standards Act does not preempt the subject of wage, hour, or overtime regulation to the exclusion of Montana minimum wages and hours law. Plouffe v. Farm & Ranch Equip. Co., 174 M 313, 570 P2d 1106 (1977). See also Berry v. KRTV Communications, Inc., 262 M 415, 865 P2d 1104, 50 St. Rep. 1617 (1993).

Public Officers and Employees: Provisions of this act and the provision dictating that County Commissioners fix the salaries of deputies (7-4-2502) are in conflict and the special act prevails over the general provisions of this act. Because a maximum is provided by 7-4-2502, the time-and-a-half for overtime hours in excess of 40 hours per week is unenforceable. Billings v. Smith, 158 M 197, 490 P2d 221 (1971).

Attorney General's Opinions

Montana Law Not Applicable to Workers Covered by Fair Labor Standards Act: State and local government employees who are covered by the federal Fair Labor Standards Act of 1938 (FLSA) are not subject to the provisions of the Montana minimum wages and maximum hours law (Title 39, ch. 3, part 4) and therefore may reach agreement with their employers to receive compensatory time in lieu of cash overtime in accordance with FLSA amendments in 1985. 41 A.G. Op. 58 (1986).

Four-Day Workweek: Local law enforcement agencies may, with the consent of affected employees, schedule a 40-hour workweek consisting of 4 consecutive 10-hour days. 38 A.G. Op. 83 (1980).

Hours of Labor and Compensation: An agency of state government may permit an employee to work more than 8 hours in any workday, but overtime need only be paid for hours worked in excess of 40 hours in any one workweek, and paid days off for annual leave, legal holidays, jury duty, and military leave are not counted as hours worked in computing weekly overtime. 37 A.G. Op. 16 (1977).

39-3-406. Exclusions.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 477, L. 2023. Amendment effective July 1, 2023.

2019 Amendment: Chapter 234 inserted (1)(r) concerning postsecondary students receiving free or reduced university housing in exchange for assistance with implementation of student housing programs; and made minor changes in style. Amendment effective May 1, 2019.

Termination Provision Repealed: Section 1, Ch. 142, L. 2017, and sec. 5, Ch. 217, L. 2017, repealed sec. 11, Ch. 241, L. 2013, and sec. 1, Ch. 136, L. 2015, which terminated the Ch. 241, L. 2013, amendments to this section December 31, 2017. Effective October 1, 2017.

2015 Amendments — Composite Section: Chapter 86 inserted (2)(y) concerning exemption related to employees of an air carrier. Amendment effective March 5, 2015.

Chapter 161 in (2)(p) in first clause substituted "mentally ill or disordered" for "mentally ill or defective". Amendment effective April 1, 2015.

Chapter 279 inserted (1)(q) concerning employees of seasonal nonprofit establishments; and made minor changes in style. Amendment effective April 23, 2015.

Extension of Termination Date: Section 1, Ch. 136, L. 2015, amended sec. 11, Ch. 241, L. 2013, by extending the termination date imposed by Ch. 241 to December 31, 2017. Effective March 27, 2015.

2013 Amendments — Composite Section: Chapter 150 in (1)(j) inserted "a computer systems analyst, computer programmer, software engineer, network administrator, or other similarly skilled computer employee who earns not less than $27.63 an hour pursuant to 29 CFR 541.400 or 541.402" and inserted "an individual employed". Amendment effective October 1, 2013.

Chapter 241 in (2)(u) inserted "outfitter's assistant"; and made minor changes in style. Amendment effective September 1, 2013, and terminates August 31, 2015.

2011 Amendment: Chapter 12 in (1)(j) at end substituted "pursuant to 29 CFR 541.500" for "as defined in 29 CFR 541.5". Amendment effective October 1, 2011.

2005 Amendment: Chapter 36 in (2)(n) substituted "sheriff's office" for "sheriff's department". Amendment effective October 1, 2005.

2003 Amendments — Composite Section: Chapter 54 in (1)(l) after "establishments or" substituted "assisted living" for "personal-care". Amendment effective October 1, 2003.

Chapter 83 in (1)(p) after "provide" deleted "live-in", after "29 CFR 552.6" inserted "or respite care", and at end inserted clause providing limited exemption to person providing service when person is employed by family member or legal guardian. Amendment effective October 1, 2003.

2001 Amendments — Composite Section: Chapter 22 in (1)(j) inserted "or in an outside sales capacity, as defined in 29 CFR 541.5"; deleted former (1)(m) that referred to outside salespersons or marketing representatives primarily engaged in marketing products or services in the food distribution industry; deleted former (2)(d) that referred to outside salespersons primarily employed in selling newspaper advertising; in (2)(d) near middle after "farm implements" deleted "or replacement parts" and near end after "implements" deleted "or replacement parts" and before "ultimate purchasers" deleted "wholesalers or"; deleted former (2)(g) that referred to outside salespersons primarily engaged in selling office supplies, equipment, and computers; and made minor changes in style. Amendment effective February 19, 2001.

Chapter 71 inserted (2)(x) providing that 39-3-405 does not apply to a state or other government employee employed on an occasional basis in a capacity other than the employee's regular occupation; and made minor changes in style. Amendment effective March 20, 2001.

1999 Amendment: Chapter 179 inserted (1)(q) excluding persons providing live-in companionship for the aged or infirm. Amendment effective March 25, 1999.

1997 Amendments: Chapter 2 inserted (2)(y) exempting employees of the consolidated Legislative Branch. Amendment effective January 27, 1997.

Chapter 42 in (2)(a) substituted "49 U.S.C. 31502" for "49 U.S.C. 304"; in (2)(b) inserted reference to 49 U.S.C. 10501 and 49 U.S.C. 60501; in (2)(v), after "section 206 of the Fair Labor Standards Act of 1938", inserted "(29 U.S.C. 206)"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 193 in (2)(e), after "farm implements", inserted "or replacement parts", after "implements" inserted "or replacement parts", and before "ultimate" inserted "wholesalers or"; and made minor changes in style.

Chapter 472 in (1)(f) substituted "persons with disabilities" for "handicapped workers".

Chapter 515 inserted (1)(o) relating to a person in a welfare work program with a public or private employer under Title 53 and within the scope of the employment skills activities authorized by that title; and inserted (1)(p) relating to a licensed foster parent providing care without wage compensation to fewer than seven children in the foster parent's residence. Amendment effective May 2, 1997.

Saving Clause: Section 4, Ch. 515, L. 1997, was a saving clause.

1995 Amendments: Chapter 48 inserted (1)(n) excluding direct sellers; and made minor changes in style. Amendment effective February 9, 1995.

Chapter 114 inserted (2)(w) concerning a person employed by a licensed outfitter. Amendment effective March 13, 1995.

Chapter 382 inserted (2)(x) concerning employees employed as radio announcers, news editors, or chief engineers; and made minor changes in style. Amendment effective April 12, 1995.

1993 Amendments — Composite Section: Chapter 95 in (1)(j), after "defined", deleted "and delimited"; inserted (1)(m) excluding certain outside salespersons or marketing representatives employed in selling or marketing products or services in the food distribution industry; and made minor changes in style. Amendment effective March 16, 1993.

Chapter 405 inserted (2)(v) relating to a retail employee with a pay rate exceeding 1½ times the federal minimum hourly rate and more than half of whose compensation for at least 1 month is from commissions; and made minor changes in style.

A style change in (2)(k) was slightly different in the two chapters. The codifier chose the more appropriate of the two.

1991 Amendment: Inserted (2)(g) exempting an outside salesman employed in selling office supplies and equipment from coverage under overtime compensation statute; and made minor changes in style.

1987 Amendments: Chapter 175 inserted (2)(g) excluding commission and contract salesmen of broadcast advertising.

Chapter 353 inserted (2)(d) excluding commission and contract outside salesmen of newspaper advertising.

Chapter 650 inserted (1)(l) excluding lodging establishment and personal care facility resident managers who live in the establishment or facility.

1985 Amendment: Inserted (2)(r) excluding department of public safety employees.

1983 Amendments: Chapter 375 inserted (2)(p) excluding certain firefighters.

Chapter 562 inserted (2)(q) excluding certain police officers.

Chapter 640 inserted (2)(n) excluding certain government employees; and inserted (2)(o) excluding certain health care workers.

1981 Amendment: Inserted (2)(m) excluding certain Sheriff's Department employees.

Case Notes

Exemption Raised in Written Responses to Wage Claim Sufficient to Put Plaintiff on Notice of Affirmative Defense: The plaintiff worked as a manager for the defendant's automotive services and repair facility for approximately 17 months. Several months after the plaintiff resigned, he filed a claim for overtime pay with the Department of Labor and Industry (Department). At the subsequent administrative hearing, the hearings officer found that the plaintiff was a salesperson of automotive services and thus was not entitled to overtime pay under the exemption found in 39-3-406 and in 29 U.S.C. 213(b). On petition for judicial review, the plaintiff argued that the defendant had waived the exemption defense by not timely raising the issue. The District Court disagreed and held the defendant had not waived the defense. On appeal, the plaintiff argued that he was surprised and prejudiced by the defendant's affirmative defense and that the defense was waived because the defendant failed to raise it immediately prior to or during the administrative hearing. The Supreme Court affirmed the District Court's ruling, noting that the defendant had asserted the salesperson exemption in its written response to the plaintiff's original wage claim and in its response to the Department's request for clarification regarding the plaintiff's day-to-day duties. The Supreme Court determined that the correspondence demonstrated that the defendant had raised the exemption defense early in the proceedings and had clearly put the plaintiff on notice that it would rely on this affirmative defense. Thompson v. J.C. Billion, Inc., 2013 MT 20, 368 Mont. 299, 294 P.3d 397.

Federal Regulation in Conflict With Federal Statute — Plain Language of Statute Controlling: As part of his overtime wage claim, the plaintiff asserted that because he was a salesperson of automotive services rather than vehicles, he was not covered by the exemption for salespeople, parts people, or mechanics employed by a business primarily engaged in the business of selling vehicles under 39-3-406 or under 29 U.S.C. 213(b). The plaintiff relied on 29 CFR 779.372(c)(1), issued by the U.S. Department of Labor, which defined a salesman as an employee primarily engaged in making sales or obtaining orders for sale of vehicles. However, the District Court disagreed with the plaintiff and held that this regulation conflicted with the statute it purported to interpret because it failed to recognize that the federal statute exempts a salesperson engaged in either selling or servicing vehicles. On appeal, the Supreme Court used traditional rules of statutory construction and determined that under step one of the analysis in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 US 837 (1984), the statutory language in 29 U.S.C. 213(b) spoke directly to the issue of whether a salesperson engaged in servicing vehicles is exempt from overtime compensation laws. The Supreme Court held that the regulation conflicted with the statute, rendering the regulation ineffective, and upheld the District Court's conclusion that the plaintiff was not entitled to overtime pay because he was exempted under 39-3-406 and 29 U.S.C. 213(b). Thompson v. J.C. Billion, Inc., 2013 MT 20, 368 Mont. 299, 294 P.3d 397.

Denial of Leave to Present Additional Evidence — Abuse of Discretion: A truck driver filed a wage claim with the Department of Labor and Industry against his employer, a trucking company, claiming that he was owed base and overtime wages. During discovery, the employee sought employment contracts of the trucking company. After the company refused to produce the contracts, the employee requested that the Department's Hearings Bureau issue a subpoena. The Bureau ignored the request, and a hearings officer dismissed the employee's claim. The employee then filed petitions for District Court review and for leave to present additional evidence. The District Court affirmed the hearings officer's decision and denied the request to present additional evidence. On appeal, the Supreme Court reversed, concluding that the hearings officer had acted arbitrarily and capriciously and that the District Court had abused its discretion by not allowing additional evidence. The court remanded the matter to the District Court to allow the employee to secure and present the contracts. Arlington v. Miller's Trucking, Inc., 2012 MT 89, 364 Mont. 534, 277 P.3d 1198. See also Arlington v. Miller's Trucking, Inc., 2015 MT 68, 378 Mont. 324, 343 P.3d 1222.

Fair Labor Standards Act — Question Whether Employee Qualified for Administrative Exemption — Summary Judgment Precluded: Tacke brought a claim under the federal Fair Labor Standards Act (FLSA) asserting that the defendant employer owed overtime wages for the time Tacke was incorrectly classified as an exempt employee. The employer moved for summary judgment on grounds that Tacke provided no facts establishing that Tacke fell outside the administrative exemption, but the motion was denied. On appeal, the Supreme Court held that Tacke presented testimony establishing, if true, that Tacke did not meet the requisite elements for an administrative exemption. The testimony was sufficient to raise a genuine issue of material fact, precluding summary judgment. Denial of summary judgment was affirmed. Tacke v. Energy W., Inc., 2010 MT 39, 355 Mont. 243, 227 P.3d 601. See also Arlington v. Miller's Trucking, Inc., 2012 MT 89, 364 Mont. 534, 277 P.3d 1198, reversing agency and District Court conclusion that the employee was exempt from overtime pay under the FLSA, and Arlington v. Miller's Trucking, Inc., 2015 MT 68, 378 Mont. 324, 343 P.3d 1222.

Failure to Timely File Underlying Wage Claim — Summary Judgment Proper: Jensen began work as a fiscal programmer for the Department of Transportation in 1985, and until 2007, Jensen's position was supervisory, exempting Jensen from entitlement to overtime compensation. In 2007 the position was reclassified, entitling Jensen to overtime compensation. Jensen filed a complaint on February 19, 2008, alleging that reclassification of the position actually began in 1998, so Jensen was entitled to overtime reimbursement during the 9 ½-year period from

1998 to 2007 when the reclassification took effect. The District Court disagreed and granted summary judgment for the state, and Jensen appealed, but the Supreme Court affirmed. The established rule is that a wage claim under 39-3-207 accrues when the employer's duty to pay an employee matures and the employer fails to pay the employee. In this case, the last date on which the Department failed to pay Jensen for overtime was June 20, 2007, but Jensen did not file a complaint within 180 days of that date as statutorily required. Because the complaint was not timely filed, summary judgment for the Department was appropriate. Jensen v. St., 2009 MT 246, 351 M 443, 214 P3d 1227 (2009).

Constitutional Provision Regarding Work Day Not Applicable to Firefighters Under Collective Bargaining Agreement: The provision in Art. XII, sec. 2, Mont. Const., that guarantees an 8-hour workday is not self-executing in that the permissive language in the section allows the Legislature to change the maximum period of 8 hours for certain professions, such as firefighters working pursuant to a collective bargaining agreement. Thus, firefighters in this case ineffectively argued that the constitutional guarantee applied when their collective bargaining agreement was for a 27-day work cycle that included working 24-hour shifts and sometimes more than 40 hours a week. Kuhr v. Billings, 2007 MT 201, 338 M 402, 168 P3d 615 (2007).

No Error in Finding Hourly, Rather Than Annual, Wage Agreement Applicable: A collective bargaining agreement between firefighters and the city of Billings was disputed when the firefighters alleged that the city failed to pay for all hours worked and for leave time. The District Court determined that the contract was an hourly wage contract and that the firefighters were entitled to unpaid wages and leave time. The city asserted that the agreement was an annual salary contract and that the hourly wage provisions did not apply. The Supreme Court examined the agreement and affirmed. Despite the mention of an annual base salary, the contract listed and clearly provided for actual hourly wages, and there was no basis for treating the contract as an annual salary contract. It would have been illogical to provide an actual hourly wage but not pay for each hour worked. Thus, the District Court did not err in concluding that the firefighters were entitled to unpaid wages and leave time. Kuhr v. Billings, 2007 MT 201, 338 M 402, 168 P3d 615 (2007).

Agency Rejection and Order for Modification of Conclusions of Law Regarding Employee's Entitlement to Overtime Pay Proper — Correct Standard of Review Applied: Winkler filed an overtime wage claim, and a state compliance specialist awarded Winkler the entire amount plus a 15% statutory penalty. A state hearings officer found that Winkler was not entitled to overtime. The Board of Personnel Appeals reversed the hearings officer, and the District Court affirmed the Board. The employer appealed on grounds that the Board and the District Court erroneously substituted their judgment for the findings of fact of the hearings officer, but the Supreme Court found no abuse of discretion and affirmed. Under the federal Fair Labor Standards Act, to avoid paying overtime, an employer has the burden of proving that the employee fits plainly and unmistakably within the Act's exemption requirements. The Board concluded that the hearings officer failed to show that Winkler was exempt, and the District Court agreed. Thus, the Board and the court did not modify the findings of the hearings officer in violation of 2-4-704, but did comply with 2-4-621 in rejecting and ordering a modification of the hearings officer's conclusions of law. Further, the Board and the District Court applied the correct standard of review set out in Moran v. Shotgun Willies, Inc., 270 M 47, 889 P2d 1185 (1995), in holding that the hearings officer's findings were based on competent substantial evidence that Winkler did not agree to work for a set number of hours each week. Key W., Inc. v. Winkler, 2004 MT 186, 322 M 184, 95 P3d 666 (2004).

Liquidated Damages for Failure to Pay Overtime Warranted Absent Showing That Employer Acted in Good Faith and With Reasonable Grounds in Paying Wages — Fees and Costs of Appeal Allowed to Employee: The federal Fair Labor Standards Act provides that employees who are not paid overtime may recover liquidated damages in the amount of unpaid wages in addition to the unpaid wages. In this case, Winkler was awarded liquidated damages, and the employer appealed on grounds that it paid Winkler's wages in good faith and had reasonable grounds to believe that it did not violate the Act, so liquidated damages were not warranted under 29 U.S.C. 260. The Supreme Court applied the test in Walton v. United Consumers Club, Inc., 786 F2d 303 (7th Cir. 1986), to determine what constitutes good faith and reasonable grounds. The Walton standard is whether, when objectively viewed through the lens of the tort law reasonable person standard, the employer acted in good faith and had reasonable grounds for believing that the employer's act or omission did not violate the Act. The hearings officer found that, based on the entire record, the employer failed to present sufficient evidence of good faith and reasonable grounds, and the Supreme Court declined to substitute its judgment for that of the agency as to the weight of the evidence on the factual question. Winkler was also entitled to court costs and attorney fees for appeal as the prevailing party under 39-3-214 and 29 U.S.C. 216(b). Key W., Inc. v. Winkler, 2004 MT 186, 322 M 184, 95 P3d 666 (2004).

Family Member Exclusion Inapplicable to Claim for Unpaid Back Wages — One Hundred Ten Percent Penalty Applied — Attorney Fees and Costs Properly Awarded: Greta worked for her husband's broadcasting company as a traffic system manager, initially working without hourly wages or a salary. About 10 months after her employment began, her husband offered Greta a monthly salary and agreed that Greta should be paid retroactively to the first day on which she started working, preparing a memorandum of understanding to that effect. The M.O.U. also provided that Greta be repaid for the 10-month period according to a mutually agreeable schedule. Greta continued to work several months at salary, but the marriage began to dissolve, and she left her position without receiving any back wages. The company eventually made some payments, but Greta ultimately sued for unpaid wages plus penalties under the wage protection statutes. The District Court granted Greta summary judgment on the issue of whether unpaid wages were owed and, after trial, ordered the company to pay Greta the amount still owing. However, the court declined to award the maximum 110% penalty, establishing a 55% penalty instead and awarding Greta her attorney fees and costs. Both parties appealed. The company claimed that the penalty and fees should not have been awarded because, as a family member, Greta's employment relationship was excluded under this section. However, that exception applies to the minimum wage and overtime provisions of the employment relationship, not to the failure to timely pay wages, which is governed by 39-3-205. Once Greta became a salaried employee, she was entitled to the rights and remedies afforded to all employees under state law. Therefore, the District Court properly determined that back wages were owing. However, under ARM 24.16.7551, an employer who pays some or all of a contested wage may be relieved in whole or in part of paying a penalty, unless the employer has previously violated similar wage and hour statutes within 3 years prior to the date of the filing of the wage claim. The District Court erred in not taking judicial notice of the administrative rule. Because the company had been the subject of at least three prior wage claims by other employees, the special circumstances of the rule applied, so the 110% penalty, as a matter of law, applied to the back wages owed to Greta at the time of her separation from employment. Thus, the Supreme Court vacated the 55% award and directed a 110% award from that date. Further, the District Court's award of attorney fees and costs was based on substantial evidence and was proper under 39-3-214, including Greta's attorney fees incurred on appeal. Reier Broadcasting Co. v. Reier, 2000 MT 120, 299 M 463, 1 P3d 940, 57 St. Rep. 504 (2000).

Employee Who Spent Eighty Percent of Time on Nonmanagerial Work Considered Manager Exempt From Overtime Requirements: Showers sued Kemp for unpaid wages allegedly owed for Showers' work as a chef. The Board of Personnel Appeals found that Kemp owed $5,820.15 in unpaid overtime, and the District Court affirmed. On appeal, Kemp maintained that Showers was employed in an executive capacity under 29 U.S.C. 213(a)(1) and was thus exempt from the overtime provisions of the Fair Labor Standards Act. The Supreme Court considered the factors in 29 CFR 541.103 in determining whether Showers' primary duty was management: (1) time spent performing managerial duties; (2) the relative importance of the employee's managerial duties as compared with other duties; (3) the frequency with which the employee exercises discretionary powers; (4) the employee's relative freedom from supervision; and (5) the relationship between the employee's salary and wages paid to subordinates for the nonexempt work performed by the employee. Generally, an employee who spends 50% or more of time in management would have management as the primary duty, but time is not the sole test. An employee may spend less than 50% of time on management and still be considered a manager if other factors support that conclusion. Here, Showers spent only 20% of her time performing managerial work and 80% of her time cooking, but the managerial duties were more important than her other duties because they needed to be done so that her subordinates could work and so the kitchen could operate successfully. Further, Showers frequently exercised discretionary powers by making weekly, if not daily, decisions concerning operation of the kitchen, was relatively, if not totally, free from supervision, and was compensated better than her subordinates. Although exemptions from the Fair Labor Standards Act are to be narrowly construed against the employer asserting the exemption and the employer has the burden of proving that the employee fits plainly and unmistakably within the terms of the exemption, the Supreme Court found that, considering the other factors in the federal regulations, Showers was an exempt employee whose primary duty was management, even though she spent 80% of her time performing nonmanagerial work. Kemp v. Bd. of Personnel Appeals, 1999 MT 255, 296 M 319, 989 P2d 317, 56 St. Rep. 1015 (1999).

Agency's Findings of Fact — Not Overturned Unless Clearly Erroneous: The plaintiff sued the defendant for past wages and overtime. The defendant argued that no overtime was owed on the grounds that the plaintiff was an executive employee as set out in ARM 24.16.201 (now repealed). The Department of Labor and Industry determined that the plaintiff was not an executive employee and was entitled to overtime pay. The Supreme Court ruled that the Department's findings were supported by substantive evidence and therefore could not be overturned by the District Court. Holbeck v. Stevi-West, Inc., 240 M 121, 783 P2d 391, 46 St. Rep. 1990 (1989).

Dispatcher Not Subject to Federal Regulations — Not Exempt From Overtime Requirements: The federal Motor Carrier Safety Act of 1984 affects only those employees whose activities concern the safety of motor carrier operations. A trucking company dispatcher does not engage in such activities and therefore is not subject to federal regulations concerning maximum hours. Thus, the exemption in this section, which states that the overtime provisions of 39-3-405 do not apply to employees with respect to whom the United States Secretary of Transportation has the power to establish maximum hours of service, does not apply to the dispatcher. The dispatcher is not exempt from overtime requirements. V.K. Putnam, Inc. v. McFarlane, 239 M 300, 779 P2d 905, 46 St. Rep. 1699 (1989).

Trucking Dispatcher as Administrative Employee — Overtime Denied: Evidence of a trucking dispatcher's customary exercise of discretion and judgment was sufficiently credible to support the conclusion that he acted in an administrative capacity and was not eligible for overtime compensation. Dennis v. Tomahawk Serv., Inc., 235 M 378, 767 P2d 346, 46 St. Rep. 69 (1989).

Deputy Sheriffs' Overtime and On-Call Time Before and After "Garcia Decision": Section 39-3-405 relates to overtime compensation generally, while 7-4-2507 through 7-4-2509 specifically address the salary and overtime compensation of Deputy Sheriffs. Therefore, under the rule that the specific statute governs over the general, 39-3-405 does not apply to Deputy Sheriffs. Furthermore, 7-4-2507 provides that 7-4-2508 through 7-4-2510 govern if they conflict with any other law. Under 7-4-2509, payment of overtime for time worked beyond the regularly scheduled work period is not mandatory and lies in the discretion of the Board of County Commissioners. Since 39-3-405 does not apply to the deputies, the Fair Labor Standards Act (FLSA) and Garcia v. San Antonio Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985), set the threshold (171 hours per 28-day work period) above which the deputies must be paid overtime, retroactive to April 15, 1985, the date Garcia was decided; it could not be argued that the FLSA intended that the lower of the FLSA and the 39-3-405 (160 hours) threshold for a 28-day period should be used to determine when overtime begins. The deputies' claim for compensation for on-call time was another claim for overtime, and payment for on-call time prior to Garcia was in the discretion of the County Commissioners. On-call time since Garcia did not constitute work under a United States Supreme Court test that for FLSA purposes work is physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer. Phillips v. Lake County, 222 M 42, 721 P2d 326, 43 St. Rep. 1046 (1986).

Deputy Sheriffs' Retroactive Overtime — Conflict of Laws: Since deputies' award of retroactive overtime compensation was grounded in federal rather than state law, the state laws relating to penalties, interest, attorney fees, and costs did not apply. Phillips v. Lake County, 222 M 42, 721 P2d 326, 43 St. Rep. 1046 (1986).

Ranch Hand at State Research Ranch: Plaintiff was a beef herdsman at the Gerwin Research Farm, a part of the Agricultural Research Station of Montana State University (now Montana State University—Bozeman). He fed and watered cattle, helped deliver calves, maintained fences, assisted with artificial insemination, and maintained herd management records. He was a "farm worker" working on a "farm or ranch" for purposes of 39-3-402 and 39-3-405. He was also a person employed in agriculture for purposes of 39-3-406(2). On both grounds, he was not covered by the overtime compensation requirement of 39-3-405. The definition of "farm or ranch" in 39-3-402 does not require that the employer be a farm or ranch or even be primarily engaged in farming or ranching. It focuses on the activities at the work situs, and the Gerwin Research Farm fits within that definition. Terry v. Bd. of Regents, 220 M 214, 714 P2d 151, 43 St. Rep. 304 (1986).

Two-Part Test in Qualifying an Employee as an Executive for the Purposes of Overtime Wage: In order to qualify an employee as an "executive" for the purposes of denying the employee overtime wage compensation, the test under the administrative rules is "whether the employee's duties 'include the customary and regular direction of the work of two or more other employees therein'", and in addition, whether the employee customarily and regularly supervised at least two full-time employees or the equivalent. Both rules defining the test must be met, and where the employee supervised two employees, one of which did not work for him full time, the employee does not meet the requirement of being an "executive". Rosebud County v. Roan, 192 M 252, 627 P2d 1222, 38 St. Rep. 639 (1981), followed in Bronken's Goodtime Co. v. Bishop, 201 M 360, 664 P2d 292, 39 St. Rep. 2165 (1982).

Commissioned Employees — Minimum Wage and Overtime Compliance: When an employer paid employees on a commission basis, the Department of Labor and Industry did not err in requiring that the employees must be compensated in compliance with the minimum wage and overtime compensation laws. To determine whether an employee's regular pay meets minimum wage standards, his total compensation each week is divided by his total hours worked. To comply with the requirements of 39-3-404 and 39-3-405, the employer must agree with his employees to pay the stated commission or the minimum wage plus overtime, whichever is greater. (This holding is subject to certain exclusions for employees paid on a commission basis that are provided for by this statute.) St. v. Wilson, 189 M 52, 614 P2d 1066, 37 St. Rep. 1393 (1980).

Policemen of Third-Class Cities — Overtime Compensation: A 1971 decision of the Supreme Court held that policemen were professionals and exempt from the minimum wage and hour law (Title 39, ch. 3, part 4). As exempt employees they were not entitled to overtime pay. In 1973, the Legislature enacted 7-32-4119 which provided overtime pay for police officers of first- and second-class cities. Plaintiff, a police officer in a third-class city, argued that the 1973 enactment repealed the 1971 decision and that he was entitled to overtime pay. The court held that the 1973 enactment did not repeal the 1971 decision and since he was not within the class that the Legislature authorized the payment of overtime, he was not entitled to overtime. Dodd v. E. Helena, 180 M 518, 591 P2d 241, 36 St. Rep. 414 (1979).

Dependent: Pope was not a dependent of Keefer even though he lived with Keefer and Keefer provided all of his support. The fair inference is that the support was given not because Pope was a dependent in any customary sense but in exchange for the work he performed. Pope is therefore not a person excluded under this section and is entitled to the minimum wage provided by 39-3-404. (See 1999 amendment.) Pope v. Keefer, 180 M 454, 591 P2d 206, 36 St. Rep. 366 (1979).

Handicapped Worker: A person who has an I.Q. of 80 but who is not so mentally impaired as to be unable to engage in competitive, gainful employment within a limited range of possibilities is not a handicapped worker within the meaning of this section. Such an individual is entitled to the minimum wage provided by 39-3-404. Pope v. Keefer, 180 M 454, 591 P2d 206, 36 St. Rep. 366 (1979).

Law Enforcement Officers: The Legislature intended to include policemen, firemen, and Deputy Sheriffs within the terms of "bona fide executives, administrative, or professional capacity" and exclude them from coverage of 39-3-404 and 39-3-405. Billings v. Smith, 158 M 197, 490 P2d 221 (1971).

Attorney General's Opinions

Computation of Salaries, Longevity Payments, and Overtime for Sheriffs, Undersheriffs, and Deputy Sheriffs:

Since no statutory right to compensation for overtime for Deputy Sheriffs and undersheriffs existed prior to enactment of 7-4-2509 in 1981, they are not entitled to a cash payment in lieu of compensatory time off for overtime hours worked before October 1, 1981. The enactment of 7-4-2509 was not expressly retroactive. 40 A.G. Op. 55 (1984).

Chapter 603, L. 1981, amended 7-4-2505 and 39-3-406 and enacted 7-4-2507 through 7-4-2510. Under Ch. 603, the following holdings were made:

(1) an individual undersheriff or Deputy Sheriff is entitled to an initial longevity payment on his first employment anniversary occurring after October 1, 1981;

(2) years of service prior to October 1, 1981, must be considered in determining the amount of longevity payments to Deputy Sheriffs and undersheriffs;

(3) the "minimum base annual salary" for calculating longevity payments is the statutory minimum level for the county involved, as specified in 7-4-2508;

(4) the "salary" of a Sheriff, for purposes of calculating the annual compensation of Deputy Sheriffs and undersheriffs, includes the additional $2,000 received by the Sheriff pursuant to 7-4-2503; and

(5) the payment of overtime compensation to undersheriffs and Deputy Sheriffs is within the discretion of the individual Boards of County Commissioners. 39 A.G. Op. 21 (1981).

39-3-407. Enforcement.

Case Notes

Applicability of State Wage Protection Laws to Private Action by State Employees Not Covered by Federal Fair Labor Standards Act: Sixteen highway patrol officers filed federal and state wage claims. A hearings examiner found that the claims were governed by the federal Fair Labor Standards Act of 1938 (FLSA), rather than by Montana law. The U.S. Supreme Court subsequently issued its decision in Alden v. Maine, 527 US 706 (1999), and the patrol moved to dismiss on grounds that under Alden, sovereign immunity barred the wage claims. The motion was denied, and the parties appealed to the Bureau of Personnel Appeals (BPA), which reversed the hearings examiner's holding and concluded that neither the hearings examiner nor the BPA had jurisdiction to consider the issue of sovereign immunity. The parties then appealed to District Court, and the court held that because Montana had not waived sovereign immunity from suit pursuant to the FLSA and Alden, the officers were not covered by the FLSA as contemplated by 39-3-408, so their state wage claim was incorrectly dismissed and the officers were entitled to pursue the wage claim under Montana law. Following certification, the case was appealed to the Supreme Court, which, without addressing the sovereign immunity issue, affirmed the District Court's conclusion that the officers had a state claim because they were not covered by the FLSA. It makes no difference whether a Montana employer is excluded from the protection of the FLSA by its terms or as the result of a judicial decision and to hold otherwise would defeat the policy behind the state wage payment laws set forth in 39-3-401. As a result of Alden, the primary enforcement mechanism of the FLSA to allow the right to bring a private wage claim against an employer for monetary damages has been taken from the people whom it was intended to protect, creating a de facto exclusion of the officers in this case from full FLSA protection. Without the right of private action, the right to fair wages cannot be enforced in the manner contemplated by Congress and the Montana Legislature. Because the officers were not covered by the FLSA, the District Court properly concluded that provisions of the state wage payment laws applied. (See the 2001 amendments to 39-3-408, which expressly covered state employees.) In re Wage Claim of Babinecz v. Mont. Highway Patrol, 2003 MT 107, 315 M 325, 68 P3d 715 (2003). See also Plouffe v. Farm & Ranch Equip. Co., 174 M 313, 570 P2d 1106 (1977), Berry v. KRTV Communications, Inc., 262 M 415, 865 P2d 1104 (1993), and Kearney v. KXLF Communications, Inc., 263 M 407, 869 P2d 772 (1994).

State Remedy and State Court Enforcement of Contract Wages Required by Federal Davis-Bacon Act: The District Court had subject matter jurisdiction of state contract law claims against a contractor and subcontractors by workers hired to build housing on Malmstrom Air Force base under a contract between the contractor and the Air Force. The workers claimed that they were not paid the prevailing wages required by the federal Davis-Bacon Act. The defendants claimed that there was no private right of action and that the workers had not exhausted their federal administrative remedies. The evidence showed that the workers extensively used the administrative remedies, taking all proper steps to attempt to administratively resolve the dispute. The workers were not seeking to enforce the Davis-Bacon Act labor standards; they sought to enforce a contract that includes wages required by the Act, a subtle but important distinction. The Act does not preempt the workers' right to a state enforcement action, using state remedies, under the facts of this case. That right is in keeping with Montana's longstanding policy and constitutional guarantee in Art. II, sec. 16, Mont. Const., of citizens' access to Montana courts when they are aggrieved. As third-party beneficiaries of the contract, the workers have the right to sue in state court to enforce the contract under state law. Favel v. Am. Renovation & Constr. Co., 2002 MT 266, 312 M 285, 59 P3d 412 (2002).

Remedies Cumulative: On the question of whether plaintiffs who were denied overtime compensation under 39-3-405 must seek relief exclusively from the Commissioner of Labor under this chapter, the Supreme Court held that the clear and unambiguous language of 39-3-408 provides for cumulative remedies. Therefore, resort to the Commissioner of Labor was not plaintiffs' exclusive option. The court reversed a dismissal that was based on plaintiffs' failure to exhaust administrative remedies. Boegli v. Glacier Mtn. Cheese Co., 238 M 426, 777 P2d 1303, 46 St. Rep. 1389 (1989).

Procedural, Not Substantive, Provisions of Wage Payment Law Applicable to Minimum Wage Claims: Plaintiffs filed claims against their former employer, school district, for violation of Minimum Wage and Overtime Compensation Act (MWOCA), now codified in Title 39, ch. 3, part 4. Section 41-2306, R.C.M. 1947 (now 39-3-407), provided that MWOCA claims were to be enforced in accordance with the Montana Wage Payment Act (WPA), (now codified at Title 39, ch. 3, part 5). The District Court found that plaintiffs were entitled to payment of back wages from the school district. However, the court denied plaintiffs' claim for statutory penalty and attorney fees, ruling that the school district was not an "employer" within the meaning of WPA. Plaintiffs appealed, claiming that WPA provisions are to be used only for the purpose of providing a mechanism for the enforcement of MWOCA, that the substantive provisions of WPA are not applicable to a MWOCA claim, and that the court should have used the broad definition of "employer" found in MWOCA to assess a penalty and attorney fees against the school district. The Supreme Court reversed the District Court and ruled that the plain meaning of the statute indicated that it was the Legislature's intent to incorporate the remedial portions of the WPA only and that the substantive provisions of the MWOCA, including its definition of "employer", applied in this case. Sink v. School District, 199 M 352, 649 P2d 1263, 39 St. Rep. 1448 (1982).

Wage Claim Action — Department Power to Initiate: The Department of Labor and Industry has the authority to bring an action for violation of the Montana minimum wage and overtime compensation law (Title 39, ch. 3, part 4) even though no complaint was filed by any of the defendant's wage earners, such a complaint being unnecessary under 39-3-209 as provided by this section. St. v. Wilson, 189 M 52, 614 P2d 1066, 37 St. Rep. 1393 (1980).

39-3-408. Provisions cumulative.

Compiler's Comments

2001 Amendment: Chapter 71 near beginning of (1) after "salaries" substituted "and are applicable to employees of the state of Montana, except that the penalty provisions of 39-3-206 do not apply to minimum wage and overtime claims that are subject to the Fair Labor Standards Act of 1938, in which case liquidated damages as determined under the Fair Labor Standards Act of 1938 apply" for "but shall not apply to employees covered by the Fair Labor Standards Act of 1938 except as provided in subsection (2)"; and made minor changes in style. Amendment effective March 20, 2001.

1987 Amendment: At end of (1) inserted "except as provided in subsection (2)"; and inserted (2) providing that 39-3-402 and 39-3-404 apply to an employee covered by the FLSA if the state minimum wage is higher than the federal minimum wage.

Fair Labor Standards Act: This federal Act, referred to in this section, is codified at Title 29, U.S.C., Ch. 8.

Case Notes

Claimant May Choose Administrative or Judicial Proceeding, but Not Both — Latter Disallowed After Former Begun and Not Finished: Under this section, a claimant may file a claim in either an administrative proceeding or in the District Court, but not both. Plaintiff who filed an administrative proceeding claim and lost before the compliance specialist could not then file his claim in the District Court. He should have pursued the administrative proceedings to their conclusion, after which if he had still received an adverse ruling, he could have appealed it to the District Court. Von Petersdorff v. Kenyon Noble Lumber Co., 2004 MT 382, 325 M 94, 103 P3d 1082 (2004).

Applicability of State Wage Protection Laws to Private Action by State Employees Not Covered by Federal Fair Labor Standards Act: Sixteen highway patrol officers filed federal and state wage claims. A hearings examiner found that the claims were governed by the federal Fair Labor Standards Act of 1938 (FLSA), rather than by Montana law. The U.S. Supreme Court subsequently issued its decision in Alden v. Maine, 527 US 706 (1999), and the patrol moved to dismiss on grounds that under Alden, sovereign immunity barred the wage claims. The motion was denied, and the parties appealed to the Bureau of Personnel Appeals (BPA), which reversed the hearings examiner's holding and concluded that neither the hearings examiner nor the BPA had jurisdiction to consider the issue of sovereign immunity. The parties then appealed to District Court, and the court held that because Montana had not waived sovereign immunity from suit pursuant to the FLSA and Alden, the officers were not covered by the FLSA as contemplated by this section, so their state wage claim was incorrectly dismissed and the officers were entitled to pursue the wage claim under Montana law. Following certification, the case was appealed to the Supreme Court, which, without addressing the sovereign immunity issue, affirmed the District Court's conclusion that the officers had a state claim because they were not covered by the FLSA. It makes no difference whether a Montana employer is excluded from the protection of the FLSA by its terms or as the result of a judicial decision and to hold otherwise would defeat the policy behind the state wage payment laws set forth in 39-3-401. As a result of Alden, the primary enforcement mechanism of the FLSA to allow the right to bring a private wage claim against an employer for monetary damages has been taken from the people whom it was intended to protect, creating a de facto exclusion of the officers in this case from full FLSA protection. Without the right of private action, the right to fair wages cannot be enforced in the manner contemplated by Congress and the Montana Legislature. Because the officers were not covered by the FLSA, the District Court properly concluded that provisions of the state wage payment laws applied. (See the 2001 amendments to this section, which expressly covered state employees.) In re Wage Claim of Babinecz v. Mont. Highway Patrol, 2003 MT 107, 315 M 325, 68 P3d 715 (2003). See also Plouffe v. Farm & Ranch Equip. Co., 174 M 313, 570 P2d 1106 (1977), Berry v. KRTV Communications, Inc., 262 M 415, 865 P2d 1104 (1993), and Kearney v. KXLF Communications, Inc., 263 M 407, 869 P2d 772 (1994).

Employee Who Spent Eighty Percent of Time on Nonmanagerial Work Considered Manager Exempt From Overtime Requirements: Showers sued Kemp for unpaid wages allegedly owed for Showers' work as a chef. The Board of Personnel Appeals found that Kemp owed $5,820.15 in unpaid overtime, and the District Court affirmed. On appeal, Kemp maintained that Showers was employed in an executive capacity under 29 U.S.C. 213(a)(1) and was thus exempt from the overtime provisions of the Fair Labor Standards Act. The Supreme Court considered the factors in 29 CFR 541.103 in determining whether Showers' primary duty was management: (1) time spent performing managerial duties; (2) the relative importance of the employee's managerial duties as compared with other duties; (3) the frequency with which the employee exercises discretionary powers; (4) the employee's relative freedom from supervision; and (5) the relationship between the employee's salary and wages paid to subordinates for the nonexempt work performed by the employee. Generally, an employee who spends 50% or more of time in management would have management as the primary duty, but time is not the sole test. An employee may spend less than 50% of time on management and still be considered a manager if other factors support that conclusion. Here, Showers spent only 20% of her time performing managerial work and 80% of her time cooking, but the managerial duties were more important than her other duties because they needed to be done so that her subordinates could work and so the kitchen could operate successfully. Further, Showers frequently exercised discretionary powers by making weekly, if not daily, decisions concerning operation of the kitchen, was relatively, if not totally, free from supervision, and was compensated better than her subordinates. Although exemptions from the Fair Labor Standards Act are to be narrowly construed against the employer asserting the exemption and the employer has the burden of proving that the employee fits plainly and unmistakably within the terms of the exemption, the Supreme Court found that, considering the other factors in the federal regulations, Showers was an exempt employee whose primary duty was management, even though she spent 80% of her time performing nonmanagerial work. Kemp v. Bd. of Personnel Appeals, 1999 MT 255, 296 M 319, 989 P2d 317, 56 St. Rep. 1015 (1999).

Inclusion of District Construction Allowance in Base Pay for Purposes of Calculating Overtime Pay: Plaintiff employees' union sought a declaratory judgment that the district construction allowance (DCA) paid to eligible state employees should be included in their base pay for purposes of calculating overtime compensation. The District Court found that the DCA should not be included in the base pay and granted summary judgment to defendant state agency. On appeal, the Supreme Court reversed, holding that the District Court erred in granting summary judgment. Defendant did not meet its burden of showing that the DCA fit plainly and unmistakenly within one of the exceptions to the federal Fair Labor Standards Act (FLSA), 29 U.S.C. 201 through 219. The FLSA exceptions are to be narrowly construed against the employer asserting them, and the employer bears the burden of showing that the employee fits within the terms of the exception. All remuneration that does not fall within one of the seven exclusionary clauses of the FLSA must be added into the total compensation received by the employee before the hourly pay rate is determined. In the present case, the expenses at issue were not incurred on the employer's behalf or for its benefit or convenience, but rather the money was reimbursement for normal, everyday expenses incurred by the employee for traveling to and from work and thus could not be excluded from the regular rate as reimbursement for travel expenses under 29 U.S.C. 207(e)(2). Further, the agency could not be relieved of liability under the Portal-to-Portal Act of 1947 (PPA), 29 U.S.C. 251, et seq., because under the PPA, that relief does not extend to an employer if the activity is compensable by either an express provision of a written or nonwritten contract in effect, at the time of the activity, between the employer and the employee, the employee's agent, or the collective bargaining representative, as was the case here. Mont. Pub. Employees Ass'n v. Dept. of Transportation, 1998 MT 17, 287 M 229, 954 P2d 21, 55 St. Rep. 60 (1998).

State Firefighter Reclassification Plan Violative of Fair Labor Standards Act: In 1985, the U.S. Supreme Court in Garcia v. Metropolitan Transit Authority, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985), reversed previous case law that excluded state jobs from coverage under the federal Fair Labor Standards Act of 1938 (FLSA), making FLSA provisions binding on state and local governments. Under the FLSA, a firefighter must be paid at the overtime rate if the firefighter's tour of duty exceeds 212 hours in 28 days. The Montana Department of Military Affairs employed certain firefighters, the cost of whose jobs was paid by the federal government through a cooperative arrangement with the state. In response to Garcia, the Department proposed changes in the manner in which the firefighters were paid and, in 1986, an exclusion from the state pay matrix was granted under 2-18-103. Following the reclassification, the firefighters' wages were reduced. The firefighters sought compensation for unpaid "straight time" and for discrimination in violation of the FLSA. The state's economic necessity argument failed because under Blanton v. Murfreesboro, 856 F2d 731 (6th Cir. 1988), the state could not prove that the wages were reduced from fiscal concern that was not attributable to the extra cost of complying with the FLSA nor could the state show that it could not augment federal funds with state funds or implement a different plan without violating the FLSA. The state's contention that the firefighters were not reclassified in response to their assertion of coverage under the FLSA because violations were not asserted until 1988 also was invalid because under Drollinger v. Ariz., 962 F2d 956 (9th Cir. 1992), the FLSA also prohibits violations in anticipation of assertions of coverage. The state's argument that the firefighters ratified the wage cuts when they signed agreements reducing their hourly wage also was incorrect because under Barrentine v. Ark.-Best Freight Sys., 450 US 728, 67 L Ed 2d 641, 101 S Ct 1437 (1981), employees' rights under the FLSA cannot be abridged by contract or otherwise. Cumulatively, the uncontroverted evidence established a state violation of the FLSA, and summary judgment was proper. Tefft v. St., 271 M 82, 894 P2d 317, 52 St. Rep. 357 (1995).

Overtime for TV News Editor/Reporter Not Covered by Federal Law: Since the overtime pay section of the federal Fair Labor Standards Act of 1938 specifically exempted a TV news editor/reporter from overtime pay, he was not covered by the federal Act for purposes of this section's provision that this part does not apply to employees covered by the federal Act. Therefore, he is covered by this part's overtime pay provisions and is entitled to overtime pay for past work because this part does not exempt him from overtime provisions. Berry v. KRTV Communications, Inc., 262 M 415, 865 P2d 1104, 50 St. Rep. 1617 (1993).

No Coverage by Montana Labor Law for Employees Covered by Federal Fair Labor Standards Act: The claimants argued that they were covered by the provisions of Title 39, ch. 3, part 4, because the federal Fair Labor Standards Act contains a clause stating that nothing in its provisions excuses compliance with state laws creating higher standards. The Supreme Court ruled that the claimants were not covered by Montana law because the language of Title 39, ch. 3, part 4, as it read in 1985, clearly showed that the state Legislature intended to exclude workers covered by the federal Act from coverage under state law. Stewart v. Region II Child & Family Serv., 242 M 88, 788 P2d 913, 47 St. Rep. 572 (1990).

Remedies Cumulative: On the question of whether plaintiffs who were denied overtime compensation under 39-3-405 must seek relief exclusively from the Commissioner of Labor under this chapter, the Supreme Court held that the clear and unambiguous language of this section provides for cumulative remedies. Therefore, resort to the Commissioner of Labor was not plaintiffs' exclusive option. The court reversed a dismissal that was based on plaintiffs' failure to exhaust administrative remedies. Boegli v. Glacier Mtn. Cheese Co., 238 M 426, 777 P2d 1303, 46 St. Rep. 1389 (1989).

State Enforcement of FLSA Claim: The Montana Department of Labor is not precluded by this section or the Fair Labor Standards Act from seeking enforcement of the FLSA claim of an employee working in Montana, but rather is authorized by 39-3-202, 39-3-211, 29 C.F.R. 515.8, and FLSA to do so. St. v. Holman Aviation Co., 176 M 31, 575 P2d 923 (1978).

Attorney General's Opinions

Applicability of State Law Other Than Montana Minimum Wage and Maximum Hours Law to Workers Covered by Fair Labor Standards Act: The federal Fair Labor Standards Act of 1938 requires provisions of state law other than the Montana minimum wage and maximum hours law (Title 39, ch. 3, part 4), which set shorter workweeks for specified groups of employees, to be given effect. 41 A.G. Op. 58 (1986).

Montana Law Not Applicable to Workers Covered by Fair Labor Standards Act: State and local government employees who are covered by the federal Fair Labor Standards Act of 1938 (FLSA) are not subject to the provisions of the Montana minimum wages and maximum hours law (Title 39, ch. 3, part 4) and therefore may reach agreement with their employers to receive compensatory time in lieu of cash overtime in accordance with FLSA amendments in 1985. (Chapter 446, L. 1987, amended this section to allow the state minimum wage law to apply to employees covered by the federal Act.) 41 A.G. Op. 58 (1986).

39-3-409. Adoption of minimum wage rates — exception.

Compiler's Comments

2006 Amendment by Initiative: Section 1, Initiative Measure No. 151, proposed by initiative petition and approved at the general election held November 7, 2006, in (1) near beginning deleted "commissioner shall adopt rules to establish a" and at end substituted "greater of either" for "same"; inserted (1)(b) establishing wage at $6.15 an hour; inserted (2) concerning cost-of-living adjustments; and made minor changes in style. Amendment effective January 1, 2007.

1991 Amendment: In (1), after "that", inserted exception clause, inserted reference to subsection (a)(1) of 29 U.S.C. 206, and at end substituted "excluding the value of tips received by the employee and the special provisions for a training wage" for "but not to exceed $4 an hour"; and inserted (2) providing a $4 an hour wage for certain businesses. Amendment effective April 26, 1991.

1989 Statement of Intent: The statement of intent attached to Ch. 674, L. 1989, provided: "A statement of intent is required for this bill because [section 2] [39-3-409] grants the commissioner of labor and industry authority to adopt rules to establish the minimum wage provided for in 39-3-404(1). It is the intent of the legislature that the commissioner, in adopting rules, shall establish a minimum wage that is the same minimum hourly wage rate as provided under the federal Fair Labor Standards Act, but not to exceed $4 an hour."

Effective Date: Section 5, Ch. 674, L. 1989, provided that this section is effective January 1, 1990.

Part 5

Wage Protection for Certain Employees of Mineral and Oil Industry

Part Case Notes

Procedural, Not Substantive, Provisions of Wage Payment Law Applicable to Minimum Wage Claims: Plaintiffs filed claims against their former employer, school district, for violation of Minimum Wage and Overtime Compensation Act (MWOCA), now codified in Title 39, ch. 3, part 4. Section 41-2306, R.C.M. 1947 (now 39-3-407), provided that MWOCA claims were to be enforced in accordance with the Montana Wage Payment Act (WPA), (now codified at Title 39, ch. 3, part 5). The District Court found that plaintiffs were entitled to payment of back wages from the school district. However, the court denied plaintiffs' claim for statutory penalty and attorney fees, ruling that the school district was not an "employer" within the meaning of WPA. Plaintiffs appealed, claiming that WPA provisions are to be used only for the purpose of providing a mechanism for the enforcement of MWOCA, that the substantive provisions of WPA are not applicable to a MWOCA claim, and that the court should have used the broad definition of "employer" found in MWOCA to assess a penalty and attorney fees against the school district. The Supreme Court reversed the District Court and ruled that the plain meaning of the statute indicated that it was the Legislature's intent to incorporate the remedial portions of the WPA only and that the substantive provisions of the MWOCA, including its definition of "employer", applied in this case. Sink v. School District, 199 M 352, 649 P2d 1263, 39 St. Rep. 1448 (1982).

39-3-501. Certain laws extended to certain employers in mineral and oil industry.

Compiler's Comments

2017 Amendment: Chapter 67 near end after "unpaid or unredeemed tax lien" deleted "sale". Amendment effective March 2, 2017.

Applicability: Section 46(1), Ch. 67, L. 2017, provided: "(1) [This act] applies to tax delinquencies that begin on or after [the effective date of this act]. Effective March 2, 2017."

2007 Amendment: Chapter 110 in last sentence near middle substituted "tax lien sale" for "tax sale"; and made minor changes in style. Amendment effective October 1, 2007.

39-3-503. Report of violations to county attorney by commissioner.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-3-506. County attorney to file complaint in district court on belief of violation.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-3-507. Prayer for relief.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-3-508. Summons — service of process.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-3-509. Hearing on complaint — court order to pay wages due or appear and show cause why bond should not be required.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-3-511. Bond requirements.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-3-512. Enjoining further operations if bond not filed.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-3-513. Costs of proceeding.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-3-516. Review of court order by supreme court.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-3-517. Suit on bond.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-3-518. Attorney's fee for suit on bond.

Case Notes

Attorney Fees Award — Disposition: Attorney fees awarded on appeal of Fair Labor Standards Act claim must be paid into the Cascade County General Fund and not given to the County Attorney as private attorney fees because Cascade County is in excess of 30,000 people, prohibiting profits by the County Attorney from private practice of law. St. v. Holman Aviation Co., 176 M 31, 575 P2d 923 (1978).

39-3-519. Clarification as to construction and applicability of part.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-3-520. Remedy cumulative.

Case Notes

Exhaustion of Administrative Remedy: Since defendant did not plead, as an affirmative defense, plaintiff's failure to exhaust his administrative remedy and plaintiff's remedy is permissive and not mandatory, it was error to find that plaintiff failed to exhaust his administrative remedy. Pope v. Keefer, 180 M 454, 591 P2d 206, 36 St. Rep. 366 (1979).

CHAPTER 4
HOURS OF LABOR IN CERTAIN EMPLOYMENTS

Part 1
Hours of Labor — Penalties and Liability for Violations Thereof

39-4-101. Hoisting engineers.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Attorney General's Opinions

Four Consecutive Ten-Hour Days: Only regular county road and bridge departments may schedule a 40-hour workweek consisting of 4 consecutive 10-hour days if the schedule is agreed to by the employees. 37 A.G. Op. 16 (1977).

39-4-102. Drivers and attendants of motor buses.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-4-103. Underground miners and smelter workers.

Compiler's Comments

2011 Amendment: Chapter 212 in (1) after "other tunnels" substituted current text for "is 8 hours a day, except in cases of emergency when life and property are in imminent danger"; inserted (1)(a) and (1)(b) relating to collective bargaining and mutual agreement; in (2) after "ores or metals" substituted current text for "is 8 hours a day, except in cases of emergency when life or property is in imminent danger"; inserted (2)(a) and (2)(b) regarding collective bargaining and mutual agreement; in (3) near end substituted "not more than 6 months" for "not less than 1 month or more than 7 months"; and made minor changes in style. Amendment effective October 1, 2011.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Federal Regulation — Collar-to-Collar Rule: Citing Art. XVIII, sec. 4, 1889 Mont. Const. and this section, the United States Supreme Court said, "Statutes of several important metal mining states provide that the eight-hour per day limitation upon work includes travel underground." Conclusion reached by administrator of wage and hour division approving informal report of representative after investigation was that "the workday in underground metal mining starts when the miner reports for duty as required at or near the collar (portal) of the mine and ends when he reaches the collar at the end of the shift". (Cites also Butte Miners' Union v. Anaconda Copper Min. Co., 112 M 418, 118 P2d 148 (1941).) Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123, 321 US 590, 88 L Ed 949, 64 S Ct 698 (5th Cir. 1944).

39-4-104. Strip mining.

Compiler's Comments

2011 Amendment: Chapter 212 in (2) substituted current text for "A period of not more than 8 hours will constitute a day's labor of all employees working in strip mining, except in cases of emergencies for the protection of life or property when same is in danger"; in (3) in first sentence near end substituted "not more than 6 months" for "not less than 30 days or more than 7 months"; and made minor changes in style. Amendment effective October 1, 2011.

Attorney General's Opinions

Coal Company Not Subject to Criminal Prosecution for Scheduling Workdays in Excess of Eight Hours: Criminal penalties for hours worked in excess of 8 hours in any day have been repealed by implication through the adoption of Montana's overtime compensation laws. Therefore, a company engaged in the strip mining of coal is not subject to criminal prosecution under this section for scheduling its employees for a workweek consisting of 4 10-hour days. (See 2011 amendment.) 45 A.G. Op. 21 (1994), following 39 A.G. Op. 35 (1981).

39-4-105. Retail stores.

Case Notes

Classification as to Cities and Towns: This section was not open to the complaint that in designating retail stores in cities and towns having a population of 2,500 or over subject to its provisions the Legislature made an arbitrary discrimination instead of a reasonable classification, it being presumed in the absence of a contrary showing that, when the Legislature made the classification, it had all the controlling facts before it. St. v. Safeway Stores, Inc., 106 M 182, 76 P2d 81 (1938).

Constitutionality: This section was not, even prior to the adoption of Art. XVIII, sec. 4, 1889 Mont. Const., making 8 hours a day's work, invalid as offending against the 14th amendment to the federal constitution, or Art. III, sec. 27, 1889 Mont. Const. St. v. Safeway Stores, Inc., 106 M 182, 76 P2d 81 (1938).

Definiteness: Section 39-4-105 is not so indefinite as to be unenforceable. St. v. Safeway Stores, Inc., 106 M 182, 76 P2d 81 (1938).

Attorney General's Opinions

Constitutionality: This section was held impliedly repealed by the amendment of Art. XVIII, sec. 4, 1889 Mont. Const., insofar as 39-4-105 allows employees of cities of less than 2,500 to work more than 8 hours a day. 18 A.G. Op. 16 (1939).

39-4-107. State and municipal governments and school districts.

Compiler's Comments

2011 Amendments — Composite Section: Chapter 128 in (1) in first sentence after "courthouses of" substituted "counties having a taxable valuation of less than $10 million" for "sixth- and seventh-class counties". Amendment effective July 1, 2011.

Chapter 212 in (1) deleted former second sentence that read: "A period of 8 hours constitutes a day's work in mills and smelters for the treatment of ores, in underground mines, and in the washing, reducing, and treatment of coal"; in (3) in second sentence at end substituted "is opposed to working more than 8 hours" for "prefers not to"; in (4)(b) after "mutual agreement" deleted "of the employer and employee"; and made minor changes in style. Amendment effective October 1, 2011.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1983 Amendments: Chapter 375 substituted (2) providing that provisions of subsection (1) do not apply to certain firefighters for "For firefighters in cities of the first and second class, a workweek consists of a maximum of 40 hours during a 5-day week."

Chapter 640 substituted last sentence of (1) stating circumstances in which provisions of subsection (1) do not apply for former last sentence, which read: "In cases of emergency when life or property is in imminent danger this subsection does not apply."; and substituted (4) stating when certain government employers and employees may agree to hours of workday for former (4), which read: "Every person, corporation, stock company, or association of persons who violates any of the provisions of this section is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than $100 or more than $600 or by imprisonment in the county jail for not less than 30 days or more than 7 months or by both such fine and imprisonment."

Case Notes

Constitutional Provision Regarding Work Day Not Applicable to Firefighters Under Collective Bargaining Agreement: The provision in Art. XII, sec. 2, Mont. Const., that guarantees an 8-hour workday is not self-executing in that the permissive language in the section allows the Legislature to change the maximum period of 8 hours for certain professions, such as firefighters working pursuant to a collective bargaining agreement. Thus, firefighters in this case ineffectively argued that the constitutional guarantee applied when their collective bargaining agreement was for a 27-day work cycle that included working 24-hour shifts and sometimes more than 40 hours a week. (See 2011 amendment.) Kuhr v. Billings, 2007 MT 201, 338 M 402, 168 P3d 615 (2007).

No Error in Finding Hourly, Rather Than Annual, Wage Agreement Applicable: A collective bargaining agreement between firefighters and the city of Billings was disputed when the firefighters alleged that the city failed to pay for all hours worked and for leave time. The District Court determined that the contract was an hourly wage contract and that the firefighters were entitled to unpaid wages and leave time. The city asserted that the agreement was an annual salary contract and that the hourly wage provisions did not apply. The Supreme Court examined the agreement and affirmed. Despite the mention of an annual base salary, the contract listed and clearly provided for actual hourly wages, and there was no basis for treating the contract as an annual salary contract. It would have been illogical to provide an actual hourly wage but not pay for each hour worked. Thus, the District Court did not err in concluding that the firefighters were entitled to unpaid wages and leave time. Kuhr v. Billings, 2007 MT 201, 338 M 402, 168 P3d 615 (2007).

Overtime Compensation: The cause of action having arisen prior to the 1972 Montana Constitution, the Supreme Court noted that under Art. XVIII, sec. 4 and 5, 1889 Mont. Const. and under 39-4-107, there is no right to receive overtime compensation on the part of the appellant. Weston v. Mont. Highway Comm'n, 186 M 46, 606 P2d 150, 37 St. Rep. 236 (1980).

Overtime Computation: Forty-hour workweek was proper basis for determining hourly rate in computing overtime pay for state employees who worked on a 24-hours-per-day basis. Glick v. St. Dept. of Institutions, 162 M 82, 509 P2d 1 (1973), certiorari denied St. v. Glick, 414 US 856, 38 L Ed 2d 106, 94 S Ct 158 (1973).

Employer and Employee Subject to Penalty: The inhibition contained in this section includes both employer and employee, and renders both subject to the penalty whenever the former causes the employee to work, and the latter works for a period longer than 8 hours. Melville v. Butte-Balaklava Copper Co., 47 M 1, 130 P 441 (1913). This opinion was overruled in Waller v. Engelke, 227 M 470, 741 P2d 385, 44 St. Rep. 1241 (1987), which held that the pari delicto doctrine, found in 1-3-215, does not necessarily bar a plaintiff's negligence action against a defendant because the plaintiff himself violated a statute. Conduct prohibited by law that is not strongly condemned by public policy as a matter of serious criminal conduct or delinquency may not be sufficient to bar recovery. (See 2011 amendment.) See also St. v. Livingston Concrete Bldg. & Mfg. Co., 34 M 570, 87 P 980 (1906).

Enforcement by Civil Action: If a statute makes a requirement, or prohibits a thing, for the benefit of a person or class of person, one injured by reason of a violation of it, if free from fault himself, is entitled to maintain an action against him by whose disobedience he has suffered injury. This is true whether the statute is penal in its character or not, a violation of the statute being negligence per se, or legal negligence. Melville v. Butte-Balaklava Copper Co., 47 M 1, 130 P 441 (1913). This opinion was overruled in Waller v. Engelke, 227 M 470, 741 P2d 385, 44 St. Rep. 1241 (1987), which held that the pari delicto doctrine, found in 1-3-215, does not necessarily bar a plaintiff's negligence action against a defendant because the plaintiff himself violated a statute. Conduct prohibited by law that is not strongly condemned by public policy as a matter of serious criminal conduct or delinquency may not be sufficient to bar recovery. See Kelley v. John R. Daily Co., 56 M 63, 181 P 326 (1919).

Independent Contractors: One who does not sustain the relation of employer to any of the men employed by subcontractors is not answerable for the conduct of the latter in requiring their men to work more than 8 hours per day. St. v. Hughes, 38 M 468, 100 P 610 (1909).

Constitutionality: This statute, prior to its amendment, was constitutional. St. v. Livingston Concrete Bldg. & Mfg. Co., 34 M 570, 87 P 980 (1906).

Attorney General's Opinions

Pay for Holidays — 10-Hour Days — Collective Bargaining for County Employees: A county may collectively bargain that public employees who work 10-hour days for 4 days per week are to be paid for 10 hours on holidays that fall on their regularly scheduled workday. 53 A.G. Op. 4 (2010).

Holiday Pay Applicable to County Road Employees Who Work Ten-Hour Days: County road and bridge department employees regularly working 10-hour days 4 days a week are entitled to 8 hours' pay under 2-18-603 for all nonworked holidays. 43 A.G. Op. 14 (1989).

Firefighters — Receipt of Compensatory Time Off: A firefighter may receive compensatory time off for bonus hours worked in excess of 40 in one week, and under 7-5-4101 the governing body of a city has the authority to manage the affairs of the city, including entering into a contract providing compensatory time off for firefighters. 39 A.G. Op. 35 (1981), followed in 45 A.G. Op. 21 (1994).

Four-Day Workweek: Local law enforcement agencies may, with the consent of affected employees, schedule a 40-hour workweek consisting of 4 consecutive 10-hour days. 38 A.G. Op. 83 (1980).

Hours of Labor and Compensation: An agency of state government may permit an employee to work more than 8 hours in any workday, but overtime need only be paid for hours worked in excess of 40 hours in any one workweek, and paid days off for annual leave, legal holidays, jury duty, and military leave are not counted as hours worked in computing weekly overtime. 37 A.G. Op. 16 (1977).

Highway Patrolman Workweek: This section does not mandate a 5-day, 40-hour workweek for highway patrolmen. 27 A.G. Op. 28 (1957).

School Janitors: Eight hours constitute a day's work for all janitors in schools, and therefore a school board may not contract to employ janitors for a workday in excess of 8 hours. 20 A.G. Op. 105 (1943).

39-4-109. Cement plants and quarries.

Compiler's Comments

2011 Amendment: Chapter 212 in (1) substituted current text for "A period of 8 hours shall constitute a day's work, except in cases of emergency where life and property are in imminent danger, for all persons employed in or about cement plants and at quarries"; in (2) substituted "not more than 6 months" for "not less than 30 days or more than 7 months"; and made minor changes in style. Amendment effective October 1, 2011.

1985 Amendment: At end of (1) deleted "and hydroelectric dams".

39-4-110. Sugar refineries.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-4-112. Persons employed about public amusements.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

CHAPTER 6
APPRENTICESHIP

Chapter Compiler's Comments

Section Not Codified: Section 41-1201(a), (d), and (e), R.C.M. 1947, relating to the appointment to the apprenticeship council, the compensation paid to council members, and the operation of the council, was not codified in the MCA because it is obsolete. The section has not been repealed and is still valid law. Citation may be made to sec. 2, Ch. 149, L. 1941, as amended by sec. 2, Ch. 183, L. 1957, and sec. 2, Ch. 160, L. 1963.

Chapter Administrative Rules

Title 24, chapter 21, ARM Apprenticeship.

Part 1
General Provisions

39-6-101. Duties of department — definitions.

Compiler's Comments

2013 Amendment: Chapter 15 inserted (3) defining "apprentice" and "department"; and made minor changes in style. Amendment effective October 1, 2013.

2005 Amendment: Chapter 538 in (1)(c) after "agreements and" substituted "taking into consideration performance of the agreement" for "upon performance thereof"; inserted (1)(g) requiring that the department use the standard prevailing wage rate for construction services for a prevailing wage rate district as a base on which an apprenticeship wage is calculated for apprentices; and made minor changes in style. Amendment effective October 1, 2006.

Preamble: The preamble attached to Ch. 538, L. 2005, provided: "WHEREAS, the Legislature has required the creation of at least 10 prevailing wage rate districts in 18-2-411, and these districts cover the entire state and use an annual survey to establish prevailing wage rates; and

WHEREAS, the Department of Labor and Industry has created a separate biennial survey of journeyman's wages in districts outside of Cascade, Flathead, Gallatin, Lewis and Clark, Missoula, Silver Bow, and Yellowstone Counties for a building construction occupation and has used this wage rate rather than the standard prevailing wage rate as a base for calculating the wages of apprentices, thus duplicating efforts."

1991 Amendment: Near beginning of (2), after "less", inserted "often" and inserted reference to 5-11-210; and made minor changes in style. Amendment effective March 20, 1991.

Administrative Rules

Title 24, chapter 21, ARM Apprenticeship.

39-6-102. Powers of department.

Compiler's Comments

2013 Amendment: Chapter 15 in (2) substituted "occupational procedure" for "trade procedure"; and made minor changes in style. Amendment effective October 1, 2013.

39-6-104. Local and state joint apprenticeship committees.

Compiler's Comments

2013 Amendment: Chapter 15 throughout section substituted references to occupation for references to trade; and made minor changes in style. Amendment effective October 1, 2013.

39-6-106. Contents of apprenticeship agreements — credit for prior training or experience.

Compiler's Comments

2013 Amendment: Chapter 15 in (1)(a) and (2) substituted "occupation" for "trade or craft"; in (1)(b) substituted "occupational divisions" for "trade or craft divisions"; in (1)(c) substituted "number of hours is at least 144 hours" for "to be 144 hours"; in (1)(g) substituted "occupational procedure" for "trade procedure"; and made minor changes in style. Amendment effective October 1, 2013.

2005 Amendment: Chapter 538 in (1)(e) at end after "apprentice" inserted "using the criteria established in 39-6-108"; in (1)(f) at end of first sentence after "any" substituted "participating party" for "party thereto"; and made minor changes in style. Amendment effective October 1, 2006.

Preamble: The preamble attached to Ch. 538, L. 2005, provided: "WHEREAS, the Legislature has required the creation of at least 10 prevailing wage rate districts in 18-2-411, and these districts cover the entire state and use an annual survey to establish prevailing wage rates; and

WHEREAS, the Department of Labor and Industry has created a separate biennial survey of journeyman's wages in districts outside of Cascade, Flathead, Gallatin, Lewis and Clark, Missoula, Silver Bow, and Yellowstone Counties for a building construction occupation and has used this wage rate rather than the standard prevailing wage rate as a base for calculating the wages of apprentices, thus duplicating efforts."

Administrative Rules

ARM 24.21.411 Minimum guidelines for registration of programs.

39-6-107. Provisions of chapter voluntary.

Compiler's Comments

2013 Amendment: Chapter 15 in two places substituted "occupation" for "craft"; and made minor changes in style. Amendment effective October 1, 2013.

39-6-108. Apprentice wage rate.

Compiler's Comments

2013 Amendment: Chapter 15 in (1)(b) substituted "same occupation" for "same craft"; deleted former (4) that read: "(4) For purposes of this section, "apprentice" means a worker employed to learn a skilled trade under a written apprenticeship agreement registered with the department of labor and industry"; and made minor changes in style. Amendment effective October 1, 2013.

Preamble: The preamble attached to Ch. 538, L. 2005, provided: "WHEREAS, the Legislature has required the creation of at least 10 prevailing wage rate districts in 18-2-411, and these districts cover the entire state and use an annual survey to establish prevailing wage rates; and

WHEREAS, the Department of Labor and Industry has created a separate biennial survey of journeyman's wages in districts outside of Cascade, Flathead, Gallatin, Lewis and Clark, Missoula, Silver Bow, and Yellowstone Counties for a building construction occupation and has used this wage rate rather than the standard prevailing wage rate as a base for calculating the wages of apprentices, thus duplicating efforts."

Effective Date: Section 7, Ch. 538, L. 2005, provided: "[This act] is effective October 1, 2006."

39-6-109. Employer apprenticeship tax credit — increased credit for employing veteran apprentice.

Compiler's Comments

Effective Date: Section 7, Ch. 380, L. 2017, provided: "[This act] is effective January 1, 2018."

Applicability: Section 8, Ch. 380, L. 2017, provided: "[This act] applies to tax years beginning after December 31, 2017."

CHAPTER 7
WOMEN IN EMPLOYMENT
DISPLACED HOMEMAKERS

Part 1
Duties of Department of Labor and Industry

Part Law Review Articles

Toward Dignity in the Workplace: Miller-Wohl and Beyond, Fitzgerald, 49 Mont. L. Rev. 147 (1988).

Part 3
Displaced Homemakers

Part Compiler's Comments

Preamble: The preamble to HB 400 (Ch. 709, L. 1983) read: "WHEREAS, the Legislature finds that there is an increasing number of persons in the state who, being in their middle years and having fulfilled the role of homemaker, find themselves displaced because of dissolution of marriage, death or disability of spouse, or other loss of family income; and

WHEREAS, the Legislature finds that displaced homemakers have a greatly reduced income and a high rate of unemployment due to age, education, or lack of paid work experience and are likely to be ineligible for Social Security benefits, Unemployment Compensation, Medicaid, and other health insurance benefits or pension plans of the spouse; and

WHEREAS, the Legislature finds that homemakers are an unrecognized part of the work force who make an invaluable contribution to the welfare of society as a whole."

Part Administrative Rules

Title 24, chapter 12, subchapter 1, ARM Displaced homemaker program.

39-7-303. Definitions.

Compiler's Comments

2019 Amendment: Chapter 41 in definition of displaced homemaker in (b)(i) near middle substituted "cash assistance" for "financial assistance". Amendment effective July 1, 2019.

2001 Amendment: Chapter 465 in definition of displaced homemaker in (b)(i) after "financial assistance" substituted "as defined in 53-4-201" for "under the FAIM financial assistance, as defined in 53-2-902". Amendment effective July 1, 2001.

Retroactive Applicability: Section 45, Ch. 465, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to payments made after January 1, 2001, for mental health services provided to children with serious emotional disturbances for whom mental health services are not provided by any other public mental health services program and whose family income is at or below 150% of the federal poverty level."

1997 Amendment: Chapter 486 in definition of displaced homemaker, in (b) after "receive", substituted "financial assistance under the FAIM financial assistance, as defined in 53-2-902" for "assistance under the program for aid to families with dependent children". Amendment effective May 2, 1997.

Saving Clause: Section 50, Ch. 486, L. 1997, was a saving clause.

1995 Amendment: Chapter 127 inserted definition of adult; and in definition of displaced homemaker, in introductory phrase, substituted "adult" for "individual", in (a), after "has worked", substituted current language relating to care for home and family without remuneration for "in the home for at least 3 years providing unpaid household services for family members" and substituted second phrase relating to former dependence on public assistance or relative for "is not gainfully employed or is underemployed", in (b)(i) substituted current language relating to ineligibility of youngest dependent child for AFDC assistance for "has had or would have difficulty securing paid employment", in (b)(ii) substituted current language relating to unemployment or underemployment for "was dependent on the income of another family member but is no longer supported by such income, was dependent on federal assistance but is no longer eligible for such assistance, or whose eligibility for such federal assistance will be terminated within 6 months", and inserted (b)(iii) relating to criminal offender. Amendment effective March 13, 1995.

39-7-306. Rulemaking duties of commissioner.

Compiler's Comments

Statement of Intent: The statement of intent attached to HB 400 (Ch. 709, L. 1983) read: "This bill requires a Statement of Intent because Section 6 [39-7-306] requires the Commissioner of Labor and Industry to adopt administrative rules relating to the displaced homemaker program. The rules shall prescribe eligibility requirements for benefit recipients, set fees for program services, and set criteria for making grants to agencies administering programs to aid displaced homemakers. In addition, Section 8 authorizes rules to prescribe the contents of annual reports from each program administrator."

CHAPTER 8
PROFESSIONAL EMPLOYER ORGANIZATIONS AND GROUPS LICENSING

Chapter Compiler's Comments

1995 Statement of Intent: The statement of intent attached to Ch. 344, L. 1995, provided: "A statement of intent is required for this bill because [section 3] [39-8-201] authorizes the department of labor and industry to adopt rules regarding professional employer organization and group licensing. It is intended that the department develop rules similar to those adopted by other states that regulate professional employer licensing organizations and groups and develop rules to provide for the reciprocal licensing provisions provided for in [this act] [Title 39, ch. 8]."

Severability: Section 21, Ch. 344, L. 1995, was a severability clause.

Effective Date: Section 22, Ch. 344, L. 1995, provided: "[This act] [Title 39, ch. 8] is effective July 1, 1995."

Chapter Administrative Rules

ARM 24.11.2204 Rates for new employers.

Part 1
General Provisions

39-8-102. Definitions.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 260 inserted definition of financial statements; and made minor changes in style. Amendment effective April 15, 2005.

Chapter 448 in definition of professional employer arrangement in (b)(iii) after "independent contractor" substituted reference to working under independent contractor exemption certificate for "as defined in 39-71-120"; and made minor changes in style. Amendment effective April 28, 2005.

Preamble: The preamble attached to Ch. 448, L. 2005, provided: "WHEREAS, the Montana Supreme Court ruled in Wild v. Fregein Construction, 2003 MT 115, 315 Mont. 425, 68 P.3d 855, that the independent contractor exemption certificate does not raise a conclusive presumption as to the status of a person as an independent contractor and that an employer has an obligation to determine whether an individual is treated as an independent contractor or as an employee; and

WHEREAS, the Montana Supreme Court in the Wild decision ruled that it is against the public policy of the state for an employer to coerce a worker to work as an independent contractor by offering to pay an independent contractor at a rate higher than the employer pays employees; and

WHEREAS, the Montana Supreme Court in the Wild decision affirmed the twin determinants of independent contractor status as being "A" issues of control and "B" whether the individual is in an independent business, commonly known as the "A-B" test, and emphasized the necessity of both factors being present, with performing work for other persons being an indication of an independent business; and

WHEREAS, the concurring opinion in the Wild decision further suggested that the Department of Labor and Industry strengthen the certification process to provide a conclusive determination of independent contractor status; and

WHEREAS, the Wild decision created a great deal of uncertainty in matters involving independent contractors and employees in the business community, with employers and independent contractors coming together to propose a consensus solution after participating in a study required by Senate Bill 270, passed by the 58th Legislature; and

WHEREAS, the Montana Legislature considers enacting legislation appropriate to effectively reverse the Wild decision and to restore the conclusive presumption of an independent contractor exemption certificate as well as to allow employers to pay persons with the independent contractor exemption certificate at a rate higher than the rate paid to employees and additionally to allow a person with an independent contractor exemption certificate to work for only one employing unit without becoming an employee as well as to waive the benefits of the workers' compensation and occupational disease laws."

Effective Date — Applicability: Section 15, Ch. 448, L. 2005, provided: "[This act] is effective on passage and approval and applies to all applications and renewals for the independent contractor exemption certificate submitted to the department after [the effective date of this act]." Approved April 28, 2005.

2003 Amendment: Chapter 149 in definition of professional employer arrangement inserted (b)(iv) providing that the term does not include arrangements by a health care facility to provide its own employees to perform services at and on behalf of another health care facility or at and on behalf of a private office of physicians, dentists, or other physical or mental health care workers; in definition of professional employer organization inserted (b) providing that the term does not include a health care facility that provides its own employees to perform services at and on behalf of another health care facility or at and on behalf of a private office of physicians, dentists, or other physical or mental health care workers; and made minor changes in style. Amendment effective October 1, 2003.

Part 2
Licensing

39-8-202. Initial license application — application fee — standards — provisional license.

Compiler's Comments

2009 Amendment: Chapter 112 in (5)(b)(i) through (5)(b)(iv) in five places and in (5)(c) in four places inserted reference to controlling person; and made minor changes in style. Amendment effective July 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2007 Amendment: Chapter 15 in (4) in introductory clause after "meet" inserted "one of" and after "following" inserted "applicable"; inserted (5)(b) requiring a criminal background check on an applicant; inserted (5)(c) allowing an applicant with a criminal history to demonstrate rehabilitation and allowing denial of the license if rehabilitation is not demonstrated; in (10) near beginning after "for a" deleted "restricted" and at end after "state" inserted "if a registered agent has not already been appointed"; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendment: Chapter 260 in (4)(c) after "interest in the corporation" deleted "and provide a certificate of good standing from the secretary of state demonstrating that the corporation is qualified to do business in this state"; in (4)(d) after "interest in the limited liability company" deleted "and provide a certificate of good standing from the secretary of state demonstrating that the company is qualified to do business in this state"; in (4)(c) and (4)(d) inserted second sentence regarding prerequisites to conduct business pursuant to chapter; in (6)(a)(i) substituted current text regarding financial statements for former text that read: "providing a financial statement prepared in accordance with generally accepted accounting principles and accompanied by a compilation report by an independent certified public accountant"; inserted (6)(a)(ii) regarding independently compiled financial statements and security deposit; inserted (6)(b) regarding use of security deposit; in (6)(c)(iii) in first sentence at beginning substituted "If an applicant is unable to meet the $50,000 net worth requirement" for "In meeting the specified net worth requirement", after "applicant" substituted "shall" for "may", and near end after "the department" inserted "in an amount not less than $50,000 to cover the deficiency", inserted second sentence regarding use of bond, letter of credit, or securities to meet obligations caused by default, and at end deleted former last two sentences that read: "A surety will not be acceptable to satisfy this requirement unless the applicant submits sufficient evidence to satisfy the department that the surety has adequate resources to satisfy the obligations of the surety. A surety is subject to audit or verification by the department or its agent"; in (7) at end substituted "as evidenced by financial statements" for "as determined in accordance with generally accepted accounting principles"; inserted (8) authorizing department to adopt rule providing for acceptance of affidavit by assurance organization; in (10) near beginning after "applicant for a" deleted "nonresident or", near middle substituted "appoint" for "file, on a form provided by the department, an appointment of", and substituted "registered agent" for "attorney"; inserted (11) authorizing department to issue provisional license and adopt rules; in (12) inserted reference to 39-8-204 and after "this section" deleted "remains the property of the department and"; and made minor changes in style. Amendment effective April 15, 2005.

Directions to Code Commissioner: Pursuant to sec. 41, Ch. 416, L. 2005, in (6)(b) and (6)(c)(iii) the code commissioner deleted references to Title 39, chapter 72.

39-8-204. License renewal.

Compiler's Comments

2005 Amendment: Chapter 260 in (1) at beginning deleted "Except as provided in subsection (5)"; inserted (2) subjecting applicant for license renewal to requirements of 39-8-202(3) through (11); deleted former (5) that read: "(5) If the application fee required in 39-8-202 is paid and accepted, then no additional license fee is required for the first year"; and made minor changes in style. Amendment effective April 15, 2005.

39-8-205. Renewal fees.

Compiler's Comments

2007 Amendment: Chapter 15 deleted former (4) that read: "(4) A restricted license may not be granted to a professional employer organization or group that is a resident of or domiciled in another state if the state requires licensing but does not grant a similar privilege for restricted licensing to a licensee who is a resident of or domiciled in this state"; and made minor changes in style. Amendment effective July 1, 2007.

39-8-206. License suspension, revocation, or nonrenewal.

Compiler's Comments

2005 Amendment: Chapter 260 in (1) near end after "notice to the licensee" deleted "of the charges and after a hearing". Amendment effective April 15, 2005.

39-8-207. Requirements of licensee.

Compiler's Comments

2007 Amendment: Chapter 15 in (2)(b) inserted third sentence allowing waiver of the requirement to demonstrate payment of taxes if an affidavit is provided by a qualified assurance organization; in (4)(c) near end after "proof of" inserted "Montana" and at end substituted "the professional employer organization or group" for "all employees assigned to any client location in this state"; in (9) near beginning of introductory clause after "organization" inserted "or group"; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendment: Chapter 260 in (5) inserted last sentence regarding provision of benefits to employees; and made minor changes in style. Amendment effective April 15, 2005.

1999 Amendment: Chapter 472 in (11)(c) after "is" inserted "not". Amendment effective October 1, 1999.

1997 Amendment: Chapter 42 in (7), after "Employee Retirement Income Security Act of 1974", inserted "(29 U.S.C. 1001, et seq.)"; in (11)(a) substituted "employee welfare benefit plan" for "employee benefit program"; and made minor changes in style. Amendment effective March 12, 1997.

Case Notes

Workers' Compensation — Extending Exclusive Remedy to Both Professional Employer Organization and Client Business Constitutional: The plaintiff worked for a trucking company that was a client of a professional employer organization (PEO) that hired and assigned that plaintiff to the trucking company. The plaintiff received workers' compensation benefits through the PEO for an injury sustained on the job. The plaintiff then sued the trucking company for unsafe working conditions. On cross motions for summary judgment, the District Court ruled that the plaintiff's claim was barred by 39-8-207(8)(b)(i), which extends the exclusivity provision of the workers' compensation act from a PEO to its client. The plaintiff appealed, asserting that the provision violates the state constitution by purporting to extend the exclusive remedy to both the PEO and the trucking company. On appeal, the Supreme Court affirmed, finding that both the PEO and the trucking company were immediate employers who hired the plaintiff and together provided workers' compensation coverage, and there was thus no conflict with Art. II, sec. 16, Mont. Const. Ramsbacher v. Jim Palmer Trucking, 2018 MT 118, 391 Mont. 298, 417 P.3d 313.

Part 3
Disciplinary Provisions

39-8-302. Disciplinary action against licensee — penalties.

Compiler's Comments

2005 Amendment: Chapter 260 in (1)(b)(iii) substituted "any payroll-related taxes" for "unemployment insurance". Amendment effective April 15, 2005.

CHAPTER 9
CONTRACTOR REGISTRATION

Chapter Compiler's Comments

1995 Statement of Intent: The statement of intent attached to Ch. 500, L. 1995, provided: "A statement of intent is required for this bill because the bill gives the department of labor and industry authority to adopt administrative rules. It is the intent of the legislature that the department adopt rules to implement a self-funding registration program for contractors to ensure that:

(1) contractors are in compliance with the laws governing workers' compensation coverage, unemployment insurance coverage, and other state laws; and

(2) all persons in the construction business are operating on a "level playing field" with regard to compliance with state laws."

Severability: Section 33, Ch. 500, L. 1995, was a severability clause.

Chapter Administrative Rules

Title 24, chapter 33, ARM Construction contractors and home inspectors.

Part 1
General Provisions

39-9-101. Purpose.

Compiler's Comments

2019 Amendment: Chapter 294 in (1) after "contractors" inserted "and home inspectors". Amendment effective January 1, 2020.

1997 Amendment: Chapter 548 before "contractors" inserted "construction". Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 548, L. 1997, provided: "WHEREAS, the contractor registration program affects an industry in Montana that has a high number of accidents, resulting in workers' compensation rates that are higher than other industries' and creating a situation that often results in noncompliance with the requirements of the Workers' Compensation Act and the Unemployment Insurance Law; and

WHEREAS, the contractor registration program provides needed structure to the construction industry by providing a means to distinguish, prior to an accident, those persons who qualify as independent contractors and those employers who are required to provide workers' compensation coverage for their employees; and

WHEREAS, the contractor registration law protects a contractor from the liabilities for workers' compensation and unemployment insurance obligations that exist from contracting with a contractor who is not in compliance with those laws by removing those liabilities when a contractor contracts with a registered contractor."

Severability: Section 13, Ch. 548, L. 1997, was a severability clause.

39-9-102. Definitions.

Compiler's Comments

2019 Amendment: Chapter 294 inserted definitions of home inspection, home inspection report, and home inspector. Amendment effective January 1, 2020.

1997 Amendment: Chapter 548 substituted construction contractor for contractor as defined term, and in (b), before "contractor's property", inserted "construction"; deleted definitions of general contractor, specialty contractor, and verification that read: ""General contractor" means a contractor whose business operations require the use of more than two unrelated building trades or crafts that the contractor intends to supervise or perform in whole or in part", ""Specialty contractor" means a contractor whose operations do not fall within the definition of general contractor", and ""Verification" means the receipt and duplication by a political subdivision of a contractor registration card that is current on its face." Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 548, L. 1997, is printed with the compiler's comments for 39-9-901.

Severability: Section 13, Ch. 548, L. 1997, was a severability clause.

Part 2
Registration

Part Administrative Rules

Title 24, chapter 33, subchapter 1, ARM Registration process.

39-9-201. Registration required — application.

Compiler's Comments

2005 Amendment: Chapter 133 in (2) after "application" deleted "under oath". Amendment effective March 30, 2005.

1997 Amendment: Chapter 548 deleted former (2) and (3) that read: "It is a misdemeanor for a contractor to:

(a) advertise, offer to perform work, submit a bid, or perform work as a contractor:

(i) without being registered as required by this chapter; or

(ii) when the contractor's registration is suspended;

(b) use a false or expired registration number in purchasing or offering to purchase an advertisement for which a contractor registration number is required; or

(c) transfer a valid registration to an unregistered contractor to work under a registration issued to another contractor.

(3) The department may cause the criminal proceedings for a misdemeanor action under this chapter to be initiated for prosecution in the lowest court of concurrent jurisdiction in the county where the infraction occurs"; inserted (2) relating to the application for registration; and made minor changes in style. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 548, L. 1997, is printed with the compiler's comments for 39-9-901.

Severability: Section 13, Ch. 548, L. 1997, was a severability clause.

39-9-204. Certificate of registration — issuance — duration.

Compiler's Comments

1997 Amendment: Chapter 548 in (2), at beginning, deleted "If the department approves an application, it shall issue a certificate of registration to the applicant" and at beginning of last sentence deleted "Except as provided in subsection (3)", and at end inserted "for 2 years"; and deleted (2)(a) through (2)(c) and (3) through (5) that read: "(a) 1 year;

(b) the date the bond expires; or

(c) the date the workers' compensation or unemployment insurance expires or any applicable exemption terminates.

(3) The certificate issued under this section to an independent contractor is invalid on the date the contractor hires employees unless the contractor provides proof to the department of workers' compensation coverage for those employees.

(4) A contractor may supply a short-term bond or insurance policy to bring its registration period to the full 1 year.

(5) If a contractor's surety bond or other security has an unsatisfied judgment against it or it is canceled, the contractor's registration is automatically suspended on the effective date of the impairment or cancellation. The department shall give notice of the suspension to the contractor." Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 548, L. 1997, is printed with the compiler's comments for 39-9-901.

Severability: Section 13, Ch. 548, L. 1997, was a severability clause.

39-9-206. Fees — education program.

Compiler's Comments

2019 Amendment: Chapter 294 in (1) after "fees" inserted "to construction contractors and home inspectors"; in (3)(a) inserted "for a construction contractor"; inserted (3)(b) regarding determination of fee for home inspector; in (5) in two places inserted "and home inspectors", after " building industry" inserted "and the home inspection industry", and substituted "registration requirements" for "registration program"; and made minor changes in style. Amendment effective January 1, 2020.

2005 Amendment: Chapter 133 in (4) at end inserted "and independent contractor certification provided for in Title 39, chapter 71, part 4"; in (6) in first sentence near middle after "exemption" inserted "certificate", after "exceed the" inserted "total", and at end inserted "and an independent contractor exemption certificate that are obtained separately" and inserted second sentence concerning use of fee paid for the independent contractor exemption certificate to offset the cost of administering independent contractor certification; and made minor changes in style. Amendment effective March 30, 2005.

1997 Amendment: Chapter 548 in (3), at end, deleted "$80"; inserted (3)(a) and (3)(b) relating to $70 fees for registration and renewal; and in (5), near end before "contractors", inserted "construction". Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 548, L. 1997, is printed with the compiler's comments for 39-9-901.

Severability: Section 13, Ch. 548, L. 1997, was a severability clause.

39-9-207. Registration — limiting liability.

Compiler's Comments

2019 Amendment: Chapter 294 throughout section after "contractor" inserted reference to home inspector; and made minor changes in style. Amendment effective January 1, 2020.

1997 Amendment: Chapter 548 in introduction substituted "A person who, pursuant to an oral or written contract, engages a construction contractor who is registered under this chapter on the date of the contract is not liable as an employer for workers' compensation coverage under 39-71-405, for unemployment insurance coverage, or for wages and fringe benefits for" for "A contractor engaging the services of another contractor is not liable as an employer for workers' compensation and unemployment insurance coverage for the other contractor or for any employee of the other contractor if the contractor verifies with the department that the other contractor with whom the contractor is contracting for services is registered as provided under this chapter"; deleted former (1) through (4) that read: "(1) A person engaged in the business or acting in the capacity of a contractor may not bring or maintain an action in any court of this state for the collection of compensation for the performance of any work or for breach of contract for which registration is required under this chapter without alleging and proving that the contractor was a registered contractor and held a current and valid certificate of registration at the time the contractor entered the contract for the performance of work.

(2) For the purposes of this section, the court may not find a contractor in compliance with the registration requirements of this chapter unless:

(a) the department has on file the information required by 39-9-202; and

(b) the contractor has a current bond or other security as required by 39-9-203.

(3) In determining whether a contractor is in compliance with the registration requirements of this chapter, the court shall consider the length of time during which the contractor did not hold a valid certificate of registration.

(4) A contractor may not bring or maintain a lien claim under Title 71, chapter 3, part 5, unless the contractor is registered at the time of entering into a contract"; and inserted (1), (2), and (3) regarding registered construction contractors, their employees, and subcontractors. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 548, L. 1997, is printed with the compiler's comments for 39-9-901.

Severability: Section 13, Ch. 548, L. 1997, was a severability clause.

39-9-211. Exemptions.

Compiler's Comments

2019 Amendment: Chapter 294 at beginning inserted "As related to construction contractors"; and made minor changes in style. Amendment effective January 1, 2020.

1997 Amendment: Chapter 548 in (3) inserted "or to a rural cooperative utility operating under Title 35, chapter 18"; in (4), at end, deleted "when performed by an owner or lessee"; in (6), before "legal jurisdiction", inserted "exclusive"; in (7), before "contractor", inserted "construction"; in (8), in two places, increased exemption amount to $2,500 from $500, before "contractor" inserted "construction", and deleted last sentence that read: "The exemption prescribed in this subsection does not apply to a person who advertises or puts out any sign or card or other device that might indicate to the public that the person is a contractor or is qualified to engage in the business of a contractor"; in (9) substituted "to a farmer or rancher while engaged in a farming, dairying, agriculture, viticulture, horticulture, or stock or poultry operation" for "except when work is performed by a registered contractor, to a construction or operation incidental to the construction or repair"; in (10), at beginning, substituted "to" for "of irrigation and drainage ditches of"; deleted (9)(b) that read: "(b) of a farming, dairying, agriculture, viticulture, horticulture, or stock or poultry operation"; in (11), at beginning, inserted "to an operation"; in (12), near beginning, substituted "work to be performed by a registered construction contractor" for "a project with a registered contractor" and at end inserted provision relating to owners building for resale; in (13), throughout subsection, substituted "owner" for "person", near beginning, after "occupied by the owner or not", deleted "and a person working on the person's residence, whether owned by the person or not", and at end inserted "unless the owner has continuously occupied the property as the owner's primary residence for at least the last 12 months"; in (15) inserted reference to professional land surveyor; in (18), before "contractor", inserted "construction"; inserted (19) relating to fire suppression equipment; inserted (20) relating to water well contractors; inserted (21) relating to tribal entities; inserted (22) relating to logging roads; inserted (23) relating to nonowner residents; inserted (24) relating to independent contractors without employees; and made minor changes in style. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 548, L. 1997, is printed with the compiler's comments for 39-9-901.

Severability: Section 13, Ch. 548, L. 1997, was a severability clause.

39-9-212. Home inspector registration — penalty — rulemaking.

Compiler's Comments

Effective Date: Section 12, Ch. 294, L. 2019, provided: "[This act] is effective January 1, 2020."

Administrative Rules

Title 24, chapter 33, subchapter 4, ARM Registration of home inspectors.

Part 3
Business Practices

39-9-301. Business practices — penalty.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 505, L. 2023. Amendment effective May 18, 2023.

2019 Amendment: Chapter 294 in (1) after "contractor" inserted "or a home inspector"; in (2) substituted "Use of a falsified registration number" for "A construction contractor may not falsify a registration number and use it" and at end after "construction contractor" inserted "or a home inspector is prohibited"; in (3) in three places after "contractor" inserted "or a home inspector" and at beginning deleted "individual construction contractor"; and made minor changes in style. Amendment effective January 1, 2020.

1997 Amendment: Chapter 548 throughout section, before "contractor", inserted "construction"; deleted former (2), (3), and (4) that read: "(2) Except for telephone books, all advertising, contracts, correspondence, cards, signs, posters, papers, and documents that show a contractor's name or address must show the contractor's name and address as registered under this chapter.

(3) (a) The alphabetized listing of contractors appearing in the advertising section of directories, excluding telephone books, and all advertising must show the contractor's current registration number. However, signs on motor vehicles and on-premises signs do not constitute advertising under this section.

(b) All materials used to directly solicit business from retail customers who are not businesses must show a contractor's current registration number. A contractor may not use a false or expired registration number in purchasing or offering to purchase an advertisement. Advertising by radio or television is not subject to this subsection.

(4) A contractor may not advertise that the contractor is bonded because of the bond required to be filed provided in 39-9-203." Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 548, L. 1997, is printed with the compiler's comments for 39-9-901.

Severability: Section 13, Ch. 548, L. 1997, was a severability clause.

39-9-303. Department to compile and update registration lists — availability — fee.

Compiler's Comments

2019 Amendment: Chapter 294 in (1) near middle of first sentence after "all construction contractors" inserted "and home inspectors" and after "the list" inserted "of construction contractors", at end of first sentence after "bimonthly" inserted "and the list of home inspectors as provided by rule", and at end of second sentence inserted "or posted on the department's website"; in (2) after "contractor" inserted "or a home inspector"; and made minor changes in style. Amendment effective January 1, 2020.

1997 Amendment: Chapter 548 in two places, before "contractor", inserted "construction". Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 548, L. 1997, is printed with the compiler's comments for 39-9-901.

Severability: Section 13, Ch. 548, L. 1997, was a severability clause.

39-9-304. Provisions exclusive — certain local authority not limited or abridged.

Compiler's Comments

2019 Amendment: Chapter 294 at end of first sentence after "exclusive" inserted "for registered construction contractors". Amendment effective January 1, 2020.

Part 4
Infractions — Penalties

39-9-401. Violation — infraction — penalty — disposition.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 377 at end of (2)(c) substituted "39-71-503" for "39-71-502". Amendment effective July 1, 1999.

Chapter 442 at end of (2)(a) deleted "and 39-51-2404". Amendment effective April 23, 1999.

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 24, Ch. 377, L. 1999, was a severability clause.

Section 28, Ch. 442, L. 1999, was a severability clause.

1997 Amendment: Chapter 548 in (1), throughout subsection, before "contractor" inserted "construction"; in (1)(a) and (1)(b), at beginning, deleted "advertise, offer to perform work, submit a bid, or"; deleted former (2) that read: "(2) Each day that a contractor works without being registered as required by this chapter, works while the contractor's registration is suspended, or works under a registration issued to another contractor is a separate infraction. Each worksite at which a contractor works without being registered as required by this chapter, works while the contractor's registration is suspended, or works under a registration issued to another contractor is a separate infraction"; and inserted (2) relating to determination and procedures involving violations. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 548, L. 1997, is printed with the compiler's comments for 39-9-901.

Severability: Section 13, Ch. 548, L. 1997, was a severability clause.

CHAPTER 11
WORKFORCE TRAINING AND EMPLOYER INCENTIVES

Chapter Compiler's Comments

Termination Provision Repealed: Section 1, Ch. 84, L. 2009, repealed sec. 10, Ch. 567, L. 2003, and sec. 4, Ch. 169, L. 2005, which terminated this chapter June 30, 2009. Effective March 25, 2009.

Extension of Termination Date: Section 4, Ch. 169, L. 2005, amended sec. 10, Ch. 567, L. 2003, by extending the termination date imposed by Ch. 567 to June 30, 2009. Effective April 8, 2005.

Effective Date — Applicability: Section 9, Ch. 567, L. 2003, provided: "[This act] is effective on passage and approval [approved May 5, 2003] and applies to grants issued on or after [the effective date of this act]."

Termination: Section 10, Ch. 567, L. 2003, provided: "[This act] terminates June 30, 2007."

Part 1
General Provisions

39-11-103. Definitions.

Compiler's Comments

2015 Amendment: Chapter 85 inserted definition of primary sector business training account; and made minor changes in style. Amendment effective February 27, 2015.

Retroactive Applicability: Section 6, Ch. 85, L. 2015, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all workforce training grants awarded on or after July 1, 2011."

2013 Amendment: Chapter 10 deleted definition that read: ""Average weekly age" has the meaning provided in 39-71-116"; in definition of full-time job before "35 hours" inserted "at least"; in definition of new job in (a) substituted "full-time or part-time job in a primary sector business" for "full-time job in an eligible business" and in (b)(i) before "seasonal jobs" deleted "part-time jobs or"; in definition of primary sector business at end inserted "at least one of the following conditions applies"; and made minor changes in style. Amendment effective February 11, 2013.

2011 Amendment: Chapter 348 inserted definition of part-time job; in definition of primary sector business in (c) near middle after "as determined by the" substituted "department" for "committee provided for in 39-11-201"; and made minor changes in style. Amendment effective July 1, 2011.

2005 Amendments — Composite Section: (Temporary version) Chapter 26 deleted definition of average weekly wage that read: ""Average weekly wage" has the meaning provided in 39-71-116"; inserted definition of state's average weekly wage; and made minor changes in style. Amendment effective July 1, 2005, and terminates June 30, 2007.

(Both versions) Chapter 169 inserted definition of department; deleted definition of new jobs credit that read: ""New jobs credit" means the credit provided in 39-11-203"; deleted definition of office of economic development that read: ""Office of economic development" means the office of economic development established in 2-15-218"; in definition of primary sector business in introductory clause near beginning after "engaged in" inserted "establishing or" and inserted (c) including in the definition certain new businesses that provide a service not available in the state; in definition of program costs in (b) after "cost of" deleted "purchase of"; and made minor changes in style. Amendment effective April 8, 2005.

Effective Date — Applicability: Section 12, Ch. 26, L. 2005, provided that this section is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005.

Part 2
Workforce Training Grants

39-11-202. Primary sector business workforce training grants — eligibility.

Compiler's Comments

2015 Amendment: Chapter 85 in (1) near beginning after "legislature" inserted "to the primary sector business training program"; and made minor changes in style. Amendment effective February 27, 2015.

Retroactive Applicability: Section 6, Ch. 85, L. 2015, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all workforce training grants awarded on or after July 1, 2011."

2013 Amendment: Chapter 10 in (1) after "providers" deleted "from the eligible training provider list"; in (2) substituted "the applicant is a primary sector business and meets" for "at least 50% of the applicant's sales will be from outside of Montana or that the applicant is a manufacturing company with 50% of its sales from companies that have 50% of their sales outside of Montana and must meet"; in (2)(b) at beginning substituted "has" for "demonstrate"; inserted (10) providing rulemaking authority; and made minor changes in style. Amendment effective February 11, 2013.

2011 Amendment: Chapter 348 in (1) near beginning substituted "department" for "grant review committee provided for in 39-11-201"; in (3)(b) in two places substituted "department" for "committee"; in (4)(a) in first sentence inserted "and $2,500 for each part-time position" and in second sentence substituted "170% of Montana's current minimum wage" for "Montana's current average weekly wage" and at end inserted "provided minimum wage requirements are met"; in (4)(c) substituted "department" for "committee" and after "jobs that will pay" substituted "high wages" for "significantly higher wages"; in (6)(a) in two places substituted "department" for "committee"; in (7) in three places substituted "department" for "committee"; inserted (8) requiring the department to provide employers assistance in accessing workforce and education services; in (9)(a)(iii) after "documents the" deleted "higher"; and made minor changes in style. Amendment effective July 1, 2011.

2007 Amendment: Chapter 177 in (5) deleted former first sentence that read: "A primary sector business workforce training program must involve at least 10 new jobs unless unique circumstances are documented that indicate a significant, positive, secondary impact to the local economy." Amendment effective July 1, 2007.

2005 Amendments — Composite Section: (Temporary version) Chapter 26 in (4)(a) near beginning of second sentence after "wage" inserted "is paid" and after "lesser of" substituted "the current state's average weekly wage" for "Montana's current average weekly wage"; and made minor changes in style. Amendment effective July 1, 2005, and terminates June 30, 2007.

(Both versions) Chapter 169 in (1) at beginning inserted "Subject to appropriation by the legislature"; in (3)(b) in third sentence at end substituted "committee" for "department"; in (4)(a) at end of second sentence deleted "or for jobs that will be principally located on a reservation, the current average weekly wage of the reservation"; in (4)(b) near beginning substituted "department" for "office of economic development"; in (4)(d) near beginning after "section" substituted "must be proportional to the number of jobs provided, the expected average annual wage of all jobs provided, and the underlying economic indicators of the region where the majority of the jobs will be created" for "may not exceed an amount greater than the present value of expected incremental tax receipts, as described in 39-11-203, that are expected over the 10-year period immediately following the grant award. The committee shall consider the loan rate established by the board of investments pursuant to the Municipal Finance Consolidation Act of 1983 that is in effect at the time of the grant and the state personal income tax rates in effect or those rates scheduled to take effect in calculating the maximum grant amount"; in (5) in second sentence at end inserted "and whether training will be provided in Montana"; in (7) near end after "funds" inserted "under contract"; in (8)(a)(i) near beginning before "amount" deleted "full", after "grant" inserted "already expended", and at end after "operation" substituted "in the state of Montana within the grant contract period, which may be up to 2 years" for "within 12 months from the time that the grant is awarded"; in (8)(a)(ii) substituted language pertaining to an employer documenting the creation of jobs, hiring employees, or incurring training expenses for "requiring the employer receiving the grant to repay any shortfall in the personal income tax revenues to the state, as calculated in 39-11-203, that are the result of the company failing to meet the number of jobs or pay level of those jobs described in the final grant application. A shortfall in any fiscal year must be accessed against and paid by the company in the next fiscal year"; and made minor changes in style. Amendment effective April 8, 2005.

Effective Date — Applicability: Section 12, Ch. 26, L. 2005, provided that this section is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005.

39-11-205. Primary sector business training account.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 4, Ch. 636, L. 2023. Amendment effective July 1, 2023.

Effective Date: Section 5, Ch. 85, L. 2015, provided: "[This act] is effective on passage and approval." Approved February 27, 2015.

Retroactive Applicability: Section 6, Ch. 85, L. 2015, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all workforce training grants awarded on or after July 1, 2011."

Part 4
Annual Job Growth Incentive Tax Credit

39-11-404. Employer job growth incentive tax credit — administration.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 391, L. 2023. Amendment effective May 3, 2023.

Termination Provision Amended: Section 4, Ch. 391, L. 2023, amended sec. 24, Ch. 550, L. 2021, by revising the multiple termination dates imposed by Ch. 550 to December 31, 2028. Amendment effective May 3, 2023.

Contingent Termination Provision Repealed: Section 5, Ch. 391, L. 2023, repealed sec. 25, Ch. 550, L. 2021, which terminated this section on occurrence of a contingency. Effective May 3, 2023.

Retroactive Applicability: Section 7, Ch. 391, L. 2023, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 2021."

Effective Dates — Applicability: Section 23, Ch. 550, L. 2021 (amended by sec. 3, Ch. 391, L. 2023), provided: "(1) Except as provided in subsections (2) through (6), [this act] is effective July 1, 2021.

(2) [Sections 1 through 3] [first enactment of 15-30-2361, 15-31-175, and 39-11-404] are effective October 1, 2021, and apply to the income tax year beginning after December 31, 2021.

(3) [Sections 4 through 6] [second enactment of 15-30-2361, 15-31-175, and 39-11-404] are effective October 1, 2022, and apply to the income tax year beginning after December 31, 2022.

(4) [Sections 7 through 9] [third enactment of 15-30-2361, 15-31-175, and 39-11-404] are effective October 1, 2023, and apply to the income tax year beginning after December 31, 2023.

(5) [Sections 10 through 12] [fourth enactment of 15-30-2361, 15-31-175, and 39-11-404] are effective October 1, 2024, and apply to the income tax year beginning after December 31, 2024.

(6) [Sections 13 through 15] [last enactment of 15-30-2361, 15-31-175, and 39-11-404] are effective October 1, 2025, and apply to income tax years beginning after December 31, 2025."

Termination: Section 24, Ch. 550, L. 2021 (amended by sec. 4, Ch. 391, L. 2023), provided: "(1) Except as provided in subsections (2) through (6), [this act] [including last enactment of 15-30-2361, 15-31-175, and 39-11-404] terminates December 31, 2028.

(2) [Sections 1 through 3] [first enactment of 15-30-2361, 15-31-175, and 39-11-404] terminate December 31, 2022.

(3) [Sections 4 through 6] [second enactment of 15-30-2361, 15-31-175, and 39-11-404] terminate December 31, 2023.

(4) [Sections 7 through 9] [third enactment of 15-30-2361, 15-31-175, and 39-11-404] terminate December 31, 2024.

(5) [Sections 10 through 12] [fourth enactment of 15-30-2361, 15-31-175, and 39-11-404] terminate December 31, 2025.

(6) [Section 25] terminates January 1, 2025."

Severability: Section 22, Ch. 550, L. 2021, was a severability clause.

Contingent Termination: Section 25, Ch. 550, L. 2021 (repealed by sec. 5, Ch. 391, L. 2023), provided: "(1) The legislature intends to provide the tax relief provided by [this act] while also preventing the loss of federal funds that are available to the state as part of the recently enacted American Rescue Plan Act, Public Law 117-2. The contingent termination provisions in subsections (2) through (5) are limited to the duration of time established by each subsection and are necessary based on the lack of information available to the legislature from the federal government at the time of enactment of [this act].

(2) [Sections 1 through 3] [first enactment of 15-30-2361, 15-31-175, and 39-11-404] terminate on the date that the budget director provides the certification provided for in subsection (7). In order to be effective, the certification must be made in calendar year 2021.

(3) [Sections 4 through 6] [second enactment of 15-30-2361, 15-31-175, and 39-11-404] terminate on the date that the budget director provides the certification provided for in subsection (7). In order to be effective, the certification must be made between October 1, 2022, and December 31, 2022.

(4) [Sections 7 through 9] [third enactment of 15-30-2361, 15-31-175, and 39-11-404] terminate on the date that the budget director provides the certification provided for in subsection (7). In order to be effective, the certification must be made between October 1, 2023, and December 31, 2023.

(5) [Sections 10 through 12] [fourth enactment of 15-30-2361, 15-31-175, and 39-11-404] terminate on the date that the budget director provides the certification provided for in subsection (7). In order to be effective, the certification must be made between October 1, 2024, and December 31, 2024.

(6) (a) The budget director shall continually evaluate whether implementation of a section of [this act] [first, second, third, and fourth enactments of 15-30-2361, 15-31-175, and 39-11-404] will:

(i) result in a reduction of funds from the American Rescue Plan Act; or

(ii) require the state to repay or refund to the federal government pursuant to the American Rescue Plan Act.

(b) The budget director shall consider guidance from:

(i) the federal government about the American Rescue Plan Act;

(ii) court decisions about the American Rescue Plan Act;

(iii) amendments to the American Rescue Plan Act;

(iv) any information provided by the attorney general; and

(v) other relevant information about the American Rescue Plan Act.

(c) If the budget director determines that the implementation of a section of [this act] may satisfy the criteria in subsection (6)(a) based on the guidance in subsection (6)(b), the budget director shall notify the legislative finance committee of the preliminary determination. The budget director's notification of the preliminary determination may occur after January 1 but no later than December 10 of each of the calendar years 2021, 2022, 2023, and 2024. Within 20 days of notification, the legislative finance committee shall provide the budget director with any recommendations concerning the preliminary determination. The budget director shall consider any recommendations of the legislative finance committee.

(7) If the budget director determines that the implementation of a section of [this act] [first, second, third, and fourth enactments of 15-30-2361, 15-31-175, and 39-11-404] would more likely than not satisfy the criteria in subsection (6)(a) based on the guidance in subsection (6)(b) and the recommendations of the legislative finance committee in subsection (6)(c), the budget director shall provide certification in writing to the legislative finance committee and the code commissioner of the occurrence of the relevant contingency provided for in subsections (2) through (5)." Effective July 1, 2021, and terminates January 1, 2025.

CHAPTER 12
MONTANA HEALTH AND ECONOMIC LIVELIHOOD PARTNERSHIP (HELP) ACT

Part 1
General Provisions

Part Compiler's Comments

Extension of Termination Date: Section 38, Ch. 415, L. 2019, amended sec. 28, Ch. 368, L. 2015, by extending the termination date imposed by Ch. 368 to June 30, 2025. Effective May 9, 2019.

Transition: Section 41, Ch. 415, L. 2019, provided: "(1) The legislature directs the department of public health and human services to notify the centers for medicare and medicaid services that passage and approval of [this act] constitutes legislative authorization to continue the current research and demonstration project approved under waiver No. 11-W00300/8 for the Montana Health and Economic Livelihood Partnership (HELP) Program Demonstration through December 31, 2020.

(2) The legislature directs the department of public health and human services to:

(a) apply no later than August 30, 2019, to the centers for medicare and medicaid services for any waivers needed to implement the provisions of [this act]; and

(b) carry out any activities before August 30, 2019, that are needed in order to develop and submit waiver proposals by August 30, 2019, including but not limited to:

(i) presenting any section 1115 waiver proposals to the medicaid advisory council and the children, families, health, and human services interim committee prior to submission to the centers for medicare and medicaid services, as required under 53-2-215;

(ii) providing for a public comment period at least 60 days before submission as required under 53-2-215; and

(iii) complying with any other public comment provisions required under federal law or regulation.

(3) The legislature directs the department of public health and human services to notify individuals enrolled in medicaid pursuant to Title 53, chapter 6, part 13, of the proposed changes to the program and the time periods within which the individuals would have to comply with the requirements of [this act] if the centers for medicare and medicaid services approves any waivers submitted to carry out the provisions of [this act]. Notification may be made at the time any waiver proposal is submitted or approved, at the department's discretion.

(4) The director of the department shall notify the legislative finance committee and the children, families, health, and human services interim committee of:

(a) the date on which waiver approval is received or denied; and

(b) if waiver approval is received, the date on which the community engagement requirements are implemented."

Applicability: Section 47, Ch. 415, L. 2019, provided: "An individual enrolled in the expanded medicaid program provided for in Title 53, chapter 6, part 13, on the date the centers for medicare and medicaid services approves a waiver authorizing community engagement requirements shall comply with the community engagement requirements of [this act] within 180 days of the date the department of public health and human services has implemented the community engagement requirements."

Transition: Section 23, Ch. 368, L. 2015, provided: "(1) For the successful and appropriate implementation of [sections 1 through 13] [Title 53, chapter 6, part 13], the department of public health and human services may initiate eligibility processing and other measures necessary for implementation of [sections 4 and 5] [53-6-1304 and 53-6-1305] prior to the date that health care services provided pursuant to [section 5] [53-6-1305] are covered.

(2) The department may implement coverage of health care services for individuals eligible pursuant to [section 4] [53-6-1304] only after:

(a) the department has obtained the approvals and waivers needed from the U.S. department of health and human services to receive the federal medical assistance percentage provided for in 42 U.S.C. 1396d(y) for individuals eligible for coverage pursuant to [section 4] [53-6-1304] and to provide services in accordance with [sections 1 through 17] [Title 53, chapter 6, part 13, and Title 39, chapter 12]; and

(b) all necessary administrative arrangements, including contract services, are in place."

Nonseverability — Code Commissioner Correction: Section 26, Ch. 368, L. 2015, provided: "Except as provided in subsection (2), it is the intent of the legislature that each part of [this act] is essentially dependent upon every other part, and if one part is held unconstitutional or invalid, all other parts are invalid.

(2) If [section 19 or 20] is held unconstitutional, all other parts are valid."

Because these section references were not changed when new sections 20 and 22 were added to the bill by amendment, the code commissioner has determined that "[section 19 or 20]" should be replaced with "[section 19 or 21]" [25-3-106 or 27-2-205].

Contingent Effective Date: Section 27(1), Ch. 368, L. 2015, provided that this part is effective upon approval by the U.S. department of health and human services of all waivers and approvals necessary to provide medicaid-funded services to individuals eligible pursuant to 53-6-1304 in the manner provided for in Title 53, chapter 6, part 13, and Title 39, chapter 12. The contingency occurred pursuant to approval by the U.S. department of health and human services in letters dated November 2, 2015, with waivers and eligibility effective January 1, 2016.

Termination: Section 28, Ch. 368, L. 2015, provided: "(1) [This act] terminates June 30, 2019.

(2) The department may reapply for the same waiver received to implement the Montana Health and Economic Livelihood Partnership Act program if the waiver expires before June 30, 2019."

39-12-101. Montana HELP Act workforce development — legislative findings — purpose.

Compiler's Comments

2019 Amendment: Chapter 415 inserted (3)(c) concerning providing grants to employers; and made minor changes in style. Amendment effective July 1, 2019, and terminates June 30, 2025, on occurrence of contingency.

Severability: Section 44, Ch. 415, L. 2019, was a severability clause.

39-12-103. Montana HELP Act workforce development — participation — providers — allowable activities — report.

Compiler's Comments

2021 Amendments — Composite Section: Chapter 261 in (6) at end of introductory clause inserted "in accordance with 5-11-210". Amendment effective April 20, 2021.

Chapter 547 in (1) at end after " with the option of" inserted current language and deleted former end of sentence (see 2021 Session Law for former text); in (2) inserted current language concerning the department's duties and deleted former (2) (see 2021 Session Law for former text); inserted (3) outlining what allowable workforce development services include; inserted (4) concerning reporting requirements for contracting entities; in (6)(c) before "total cost of providing" inserted "services provided and the"; and made minor changes in style. Amendment effective July 1, 2021.

2019 Amendments — Composite Section — Code Commissioner Correction: Chapter 21 deleted former (3) that read: "(3) The department shall report the following information to the oversight committee provided for in 53-6-1316:

(a) the activities undertaken to establish a workforce development program for program participants; and

(b) the number of participants in the workforce development program and the number of participants who have obtained employment or higher-paying employment"; and made minor changes in style. Amendment effective February 26, 2019. The code commissioner has reinserted the bracketed language that was deleted by Ch. 21 to conform with the Ch. 415 amendments.

Chapter 415 inserted (2) requiring the department to contact program participants subject to the community engagement requirements for the purposes of an employment or reemployment assessment; in (4) at end of introductory clause substituted "legislative finance committee and the children, families, health, and human services interim committee" for "oversight committee provided for in 53-6-1316"; in (4)(a) inserted "and the employer grant program provided for in 39-12-106"; inserted (4)(c) concerning employers receiving grant awards; inserted (4)(d) concerning the total cost of providing workforce development services under this chapter; and made minor changes in style. Amendment effective July 1, 2019, and terminates June 30, 2025, on occurrence of contingency.

Severability: Section 44, Ch. 415, L. 2019, was a severability clause.

39-12-106. Montana HELP Act employer grant program.

Compiler's Comments

Effective Date: Section 46(1), Ch. 415, L. 2019, provided that this section is effective July 1, 2019.

Severability: Section 44, Ch. 415, L. 2019, was a severability clause.

39-12-107. Rulemaking authority.

Compiler's Comments

2021 Amendment: Chapter 547 inserted (2) providing that the rules must allow for flexibility and requiring consultation with the department of public health and human services; and made minor changes in style. Amendment effective July 1, 2021.

CHAPTER 29
VETERANS' EMPLOYMENT PREFERENCE

Chapter Compiler's Comments

Severability: Section 18, Ch. 646, L. 1989, was a severability clause.

Termination: Section 19, Ch. 646, L. 1989, provided that the act terminates July 1, 1991.

Chapter Case Notes

Ability, Rather Than Advertisement, as Criteria for Judging Qualifications: Petitioner who claimed a veterans' preference contended that the criteria for judging position applicants was contained solely in the advertisement soliciting proposals. The Supreme Court disagreed, holding that analysis of an applicant's ability to provide services outlined in the advertisement, rather than the advertisement itself, constituted the criteria for judging an applicant's qualifications. Hamner v. Butte-Silver Bow County, 233 M 271, 760 P2d 76, 45 St. Rep. 1481 (1988).

Contract Providing Monthly Payments Not Establishment of Employment Relationship: A county contract for provision of certain legal services expressly provided independent contractor status because: (1) the county had no right to control the firm that was awarded the contract; (2) the firm was customarily engaged in independent practice; and (3) the contract was unnecessary for the firm to continue its business. Because an independent contract was indicated by these facts, the veterans' preference did not apply to hiring of the contractor, despite the contention that a contract provision for monthly payments established an employment relationship. Hamner v. Butte-Silver Bow County, 233 M 271, 760 P2d 76, 45 St. Rep. 1481 (1988).

Part 1
General Provisions

39-29-101. Definitions.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 4, Ch. 303, L. 2023. Amendment effective October 1, 2023.

2005 Amendment: Chapter 75 in definition of position inserted (b)(vi) excluding position occupied by student intern from definition; and made minor changes in style. Amendment effective March 24, 2005.

2003 Amendment: Chapter 24 deleted definition of active duty that read: ""Active duty" means full-time duty with military pay and allowances in the armed forces, except for training, determining physical fitness, or service in the reserve or national guard"; in definition of armed forces inserted (c) including the Montana army and air national guard; in definition of disabled veteran in (a) near beginning after "veteran" deleted "as defined in this section", after "conditions from" substituted "military duty" for "active duty", and at end inserted "or the state of Montana"; inserted definition of military duty; in definition of under honorable conditions in (a) near middle of first sentence after "separation from" substituted "military duty" for "active duty"; in definition of veteran in (a) after "active" inserted "federal military", in (b) near beginning after "order of" substituted "federal duty" for "active duty", and inserted (c) concerning certain members of the Montana army or air national guard who complete at least 6 years of service; and made minor changes in style. Amendment effective October 1, 2003.

Applicability: Section 2, Ch. 24, L. 2003, provided: "[This act] applies to positions of public employment that are subject to the provisions of [this act] that are open for employment on or after [the effective date of this act]." Effective October 1, 2003.

1997 Amendments: Chapter 42 in definition of veteran, in (b), substituted "10 U.S.C. 12301(a), (d), or (g), 10 U.S.C. 12302, or 10 U.S.C. 12304" for "10 U.S.C. 672(a), (d), or (g), 10 U.S.C. 673, or 10 U.S.C. 673b". Amendment effective March 12, 1997.

Chapter 339 in definition of position, in first sentence in two places after "seasonal", substituted "employee" for "position", near beginning, after "means a", inserted "position occupied by a", and near middle, after "state", deleted "position"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 308 in definition of public employer, in (b) after "system", deleted "or a vocational-technical center". Amendment effective July 1, 1995.

1993 Amendment: Chapter 78 in definition of veteran inserted (b) to include a member of a reserve component who served on active duty and was honorably discharged; and made minor changes in style. Amendment effective February 24, 1993.

Termination Provision Repealed: Section 1, Ch. 12, L. 1991, repealed sec. 19, Ch. 646, L. 1989, which terminated this section July 1, 1991. Repealer effective February 7, 1991.

39-29-102. Point preference or alternative preference in initial hiring for certain applicants — substantially equivalent selection procedure.

Compiler's Comments

2013 Amendment: Chapter 191 in (4) substituted "a person with a disability, a veteran, an eligible relative as defined in 39-29-101, and an eligible spouse as defined in 39-30-103" for "eligible relative, or veteran"; and inserted (5) regarding requirements concerning guaranteed job interviews. Amendment effective October 1, 2013.

1999 Amendment: Chapter 168 in (2)(b) substituted language regarding minimum qualifications for former text that read: "(b) received 70 or more percentage points of the total possible points that may be granted in the scored procedure"; inserted (4) requiring an employer to give veteran preference when using a selection procedure other than a scored procedure; and made minor changes in style. Amendment effective October 1, 1999.

Termination Provision Repealed: Section 1, Ch. 12, L. 1991, repealed sec. 19, Ch. 646, L. 1989, which terminated this section July 1, 1991. Repealer effective February 7, 1991.

39-29-103. Notice and claim of preference.

Compiler's Comments

2013 Amendment: Chapter 191 inserted (3)(a) concerning the option to provide guaranteed job interviews to veterans; and made minor changes in style. Amendment effective October 1, 2013.

1999 Amendment: Chapter 168 in (1) after "notice of the" deleted "point"; in (2) near middle of first sentence after "receive a" deleted "point"; and made minor changes in style. Amendment effective October 1, 1999.

Termination Provision Repealed: Section 1, Ch. 12, L. 1991, repealed sec. 19, Ch. 646, L. 1989, which terminated this section July 1, 1991. Repealer effective February 7, 1991.

39-29-104. Enforcement of preference.

Compiler's Comments

1999 Amendment: Chapter 168 in (1) near middle of first sentence after "given the" deleted "point"; in (2) at end of second sentence before "preference" deleted "point"; in (3)(a) near middle of second sentence after "applied the" substituted "preference" for "points"; and made minor changes in style. Amendment effective October 1, 1999.

Termination Provision Repealed: Section 1, Ch. 12, L. 1991, repealed sec. 19, Ch. 646, L. 1989, which terminated this section July 1, 1991. Repealer effective February 7, 1991.

39-29-111. Retention during reduction in force.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Termination Provision Repealed: Section 1, Ch. 12, L. 1991, repealed sec. 19, Ch. 646, L. 1989, which terminated this section July 1, 1991. Repealer effective February 7, 1991.

39-29-112. Adoption of rules.

Compiler's Comments

2013 Amendment: Chapter 191 after "chapter" inserted exception clause regarding the decision of local governments to provide guaranteed job interviews for veterans. Amendment effective October 1, 2013.

Termination Provision Repealed: Section 1, Ch. 12, L. 1991, repealed sec. 19, Ch. 646, L. 1989, which terminated this section July 1, 1991. Repealer effective February 7, 1991.

1989 Statement of Intent: The statement of intent attached to Ch. 646, L. 1989, provided: "A statement of intent is required for this bill because [section 6] [39-29-112] requires the department of administration to adopt rules to implement [sections 1 through 5] [Title 39, ch. 29]. The legislature intends the rules to adequately provide for the administration of the point preference provided for in [section 2] [39-29-102] and the retention preference provided for in [section 5] [39-29-111], but to include only those rules that are reasonably necessary.

It is the desire of the legislature that the department take all necessary steps in formulating, proposing, and adopting rules to ensure that the public, particularly those persons and organizations that have shown past interest in the employment preference law, is afforded sufficient time and opportunity to participate in the rulemaking procedure. The department should give ample notice and hold necessary hearings to ensure adequate public participation.

Rules adopted by the department apply to both state and local government employers. In formulating its rules, the department should take this into consideration and adopt rules that can be used and applied by the broad spectrum of public employers."

Administrative Rules

ARM 2.21.3603 Definitions.

Part 2
Private Employer Hiring Preference

Part Compiler's Comments

Effective Date: This part is effective October 1, 2015.

CHAPTER 30
PERSONS WITH DISABILITIES PUBLIC EMPLOYMENT PREFERENCE

Chapter Compiler's Comments

Discrimination Statutes Not Violated: Sections 12 and 13, Ch. 1, Sp. L. 1983, codified as 49-2-405 and 49-3-103(2), provide that application of an employment preference provided for by 10-2-402, 39-30-101 through 39-30-103, 39-30-106 through 39-30-108, 39-30-201 through 39-30-203, 39-30-206, and 39-30-207, by a public employer, as defined in 39-30-103, may not be construed to violate Chapter 2 or 3 of Title 49.

Effective Date — Applicability — Retroactive Repealer of Former Veterans' and Disabled Civilians' Employment Preference Law: Section 16, Ch. 1, Sp. L. 1983, read: "(1) This act is effective on passage and approval. [Approved December 20, 1983.]

(2) Except as provided in section 14, this act applies only to positions that are filled after the effective date of this act."

Section 14, Ch. 1, Sp. L. 1983, read: "Sections 10-2-201 through 10-2-206, MCA, are repealed. This repeal applies retroactively to bar any claim of violation or application of 10-2-201 through 10-2-206 that has not been reduced to judgment, whether or not the judgment is final, on the effective date of this act [December 20, 1983]. Claims under 10-2-201 through 10-2-206 that have been reduced to judgment, whether or not the judgment is final, on the effective date of this act are enforceable. No claim for a violation of 10-2-201 through 10-2-206 may be made under section 8 of this act [39-30-206 and 39-30-207]."

Legislative History: Chapter 1, Sp. L. 1983 (Senate Bill 2, 1983 Special Session) was introduced by request of Joint Interim Subcommittee No. 4 of the 48th (1983) Legislature. The bill generated an extensive legislative history as it passed through the Legislature. See minutes of the Senate and House Judiciary Committees of 1983 Special Session (available at Montana Historical Society in Helena).

Severability Clause: Section 15, Ch. 1, Sp. L. 1983, was a severability clause.

Constitutional Provisions: Montana Constitution, Article II, section 35, provides that the Legislature may give Montana veterans special considerations. Veterans' preference provisions may also be found in: Colo. Const., Article 12, section 14; N.J. Const., Article VII, section 1, paragraph 2; and N.Y. Const., Article 5, section 6.

Chapter Case Notes

Use of Point System Prior to Application of Preference: It was within the legislative intent of abolishment of the absolute employment preference for a hiring agency to compare applicants' qualifications through use of a point system before considering whether the preference should be applied. When point scores indicated applicants were not substantially equally qualified, failure to apply the preference was not an error. Olson v. Dept. of Revenue, 235 M 31, 765 P2d 171, 45 St. Rep. 2137 (1988).

Veterans' Preference Claim Based on Gratuity — No Express Reservation Through Stipulation: Plaintiff Jensen filed an amended petition to enforce employment preference that contained three counts. Thereafter, the parties filed a stipulated set of facts and agreement that the court would hear only Count I. The stipulation reserved all claims and defenses arising from Counts II and III. The District Court ruled on Count I, finding Jensen had been denied his veterans' preference, and the ruling was then appealed to the Supreme Court. While the appeal was pending, the Legislature met in special session and enacted a new Veterans' and Handicapped Persons' Employment Preference Act that retroactively repealed the old Veterans' Preference Act under which Jensen had filed his amended petition. The state then filed a motion to dismiss Counts II and III, and the motion was granted by the District Court. On appeal, Jensen questioned whether Count II, which has been expressly reserved by the stipulation, survived the Legislature's retroactive repealer. He argued that the stipulation created an obligation on behalf of the state to reserve the claim for an indefinite period and regardless of legislative action. The Supreme Court held that the stipulation must be viewed as an agreement to reserve a claim based not on a vested right but on a gratuity that the Legislature was empowered to repeal at any time, and that the stipulation reserved only what existed at the time it was entered into. Jensen v. St. 221 M 42, 718 P2d 1335, 43 St. Rep. 621 (1986).

Veterans' Preference a Gratuity — Retroactive Repeal: Plaintiff applied for a position with the Montana University System, claiming entitlement to the then statutory veterans' preference in employment. He was not interviewed for the job; a nonveteran was hired. Plaintiff petitioned the District Court for an order to show cause why he should not have been employed. Before a hearing was held, the veterans' preference was repealed. Plaintiff's filing of a claim to what was a government gratuity does not change the gratuity to a vested right. Because the preference was a gratuity, its repeal did not violate the Due Process Clause of the state or federal constitution. Violation of the preference statute did not result in a compensable injury within the meaning of Art. II, sec. 16, Mont. Const., which provides that courts "shall be open to every person, and speedy remedy afforded for every injury of person, property, or character". Repeal of the preference statute did not deprive plaintiff of a remedy for an injury. Femling v. Mont. St. Univ., 220 M 133, 713 P2d 996, 43 St. Rep. 235 (1986).

Retroactivity of Employment Preference — No Equal Protection Violation: A provision (Ch. 1, sec. 14, Sp. L. 1983) in the 1983 employment preference law (Title 39, ch. 30), making the repeal of the former law retroactive, is not a violation of Art. II, sec. 4, of the Montana Constitution or the Equal Protection Clause of the 14th amendment to the United State Constitution. The proper standard of review in this case is the rational basis test since the employment preference law neither burdens a fundamental right nor involves a suspect class. The law is valid under the rational basis test since it was a rational response to the Legislature's legitimate concerns of fiscal integrity, employee competence, and academic freedom created by the implications of the decision in Crabtree v. Mont. St. Library, 204 M 398, 665 P2d 231, 40 St. Rep. 963 (1983). Nick v. Dept. of Highways, 219 M 168, 711 P2d 795, 42 St. Rep. 1926 (1985).

Veterans' Preference Gratuity — Not Vested Right: Plaintiff served in the capacity of deputy clerk of the Supreme Court for 20 years. He ran for the Clerk of Court position but was defeated. The newly elected Clerk terminated plaintiff and appointed a new deputy. Plaintiff contended that as a veteran he was entitled to a preference in employment and that the Legislature's repeal of the former veterans' preference law was invalid. On appeal, the Supreme Court held that the veterans' preference rights granted under the repealed portion of the veterans' preference law are not rights earned through years of service to the state, but are a gratuity given to citizens of Montana by the state to show its appreciation for service in the armed forces. They do not amount to rights vested in the veterans. The Legislature could properly repeal the law by majority vote at any time, and veterans acting under the old law are considered to have acted in contemplation of the Legislature's power of repeal. Conboy v. St., 214 M 492, 693 P2d 547, 42 St. Rep. 120 (1985).

Crabtree Retroactively Applied: On June 16, 1982, the Department of Labor hired Waltermire to fill a position. Another Department employee filed a petition on June 21, 1983, claiming he was a veteran while Waltermire was not, and therefore he should have been hired instead. On June 16, 1983, the Supreme Court issued its Crabtree decision holding that the then current veterans' preference law (10-2-201 through 10-2-206, repealed in 1983) granted an absolute preference. That decision applies retroactively to Jensen's claim, and the potential impact upon one person, Waltermire, who may lose his job, was insufficient to rule that Crabtree did not apply retroactively. Jensen v. St., 213 M 84, 689 P2d 1231, 41 St. Rep. 1971 (1984).

Court Order to Hire Bypassed Veteran — Improper Remedy: Although under the former veterans' preference law (10-2-201 through 10-2-206, repealed in 1983) the lower court had authority to order an appointing authority to comply with the law, the court did not have authority to order an appointing authority to grant to a veteran a job it had improperly denied him and granted to a nonveteran. The judiciary does not have and cannot be granted the executive power of appointment. The lower court was directed to order the employer to reopen the position to the original applicants, grant preference to the petitioner-veteran in this case and the other preferred applicants, and otherwise fill the position in accordance with Crabtree. Jensen v. St., 213 M 84, 689 P2d 1231, 41 St. Rep. 1971 (1984).

Preference Absolute Between Enactment and Repeal of Statute: The plain and unambiguous language of the former veterans' preference law (10-2-201 through 10-2-206, repealed in 1983) created an absolute preference that existed from its enactment in 1921 through its 1983 repeal. Jensen v. St., 213 M 84, 689 P2d 1231, 41 St. Rep. 1971 (1984).

Part 1
General Provisions

39-30-101. Short title.

Compiler's Comments

1997 Amendment: Chapter 472 substituted "Persons With Disabilities" for "Handicapped Persons"'.

Termination Provision Repealed: Section 1, Ch. 12, L. 1991, repealed sec. 19, Ch. 646, L. 1989, which terminated the 1989 amendments to this section July 1, 1991. Repealer effective February 7, 1991.

1989 Amendment: After "Montana" deleted "Veterans' and".

Severability: Section 18, Ch. 646, L. 1989, was a severability clause.

39-30-102. Purposes.

Compiler's Comments

1997 Amendment: Chapter 472 in two places substituted "persons with disabilities" for "handicapped persons"; and made minor changes in style.

Termination Provision Repealed: Section 1, Ch. 12, L. 1991, repealed sec. 19, Ch. 646, L. 1989, which terminated the 1989 amendments to this section July 1, 1991. Repealer effective February 7, 1991.

1989 Amendment: After "this chapter are to" deleted "recognize veterans and disabled veterans for service to their country"; near end, after "readjustment of", deleted "veterans, disabled veterans, and"; and made minor change in punctuation.

Severability: Section 18, Ch. 646, L. 1989, was a severability clause.

39-30-103. Definitions.

Compiler's Comments

2015 Amendment: Chapter 161 in (3)(b) substituted "mental impairment or mental disease or disorder" for "mental impairment, disease, or defect". Amendment effective April 1, 2015.

2013 Amendments — Composite Section: Chapter 68 in definition of mental impairment substituted "intellectual disability" for "mental retardation" in two places and substituted "intellectually disabled" for "mentally retarded". Amendment effective October 1, 2013.

Chapter 191 in definition of person with a disability inserted (b) concerning disabled veterans; and made minor changes in style. Amendment effective October 1, 2013.

2005 Amendment: Chapter 75 in definition of position inserted (h) excluding position occupied by student intern from definition; and made minor changes in style. Amendment effective March 24, 2005.

1997 Amendments: Chapter 339 in definition of initial hiring, in (b) in two places, substituted "subsection (3)(a)" for "subsections (3)(a)(i) through (3)(a)(v)" (voided by Ch. 472 amendment); and in definition of position, in first sentence near beginning after "means a", substituted "position occupied by a permanent or seasonal employee" for "permanent or seasonal position", near middle, after "for", substituted "the state or a position occupied by" for "a state position or a", and after "seasonal" substituted "employee" for "position" and substituted language in (a) concerning temporary employee for former language that read: "a temporary position as defined in 2-18-101 for a state position or similar temporary position with a public employer other than the state". Amendment effective July 1, 1997.

Chapter 472 in definition of eligible spouse substituted "person with a disability" for "handicapped person"; substituted person with a disability for handicapped person as defined term; in definition of mental impairment, in (a)(i) at beginning, deleted "suffering from" and substituted "disabling" for "handicapping"; adjusted internal references; and made minor changes in style.

1995 Amendments — Composite Section: Chapter 308 in definition of public employer, in (b) after "vocational-technical", deleted "center or"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 545 in definition of initial hiring, in (a)(ii) after "agency", deleted "such as the consumer counsel, environmental quality council, office of the legislative auditor, legislative council, or office of the legislative fiscal analyst"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in definitions of eligible spouse and handicapped person substituted "department of public health and human services" for "department of social and rehabilitation services"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

1995 Transition: Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Termination Provision Repealed: Section 1, Ch. 12, L. 1991, repealed sec. 19, Ch. 646, L. 1989, which terminated the 1989 amendments to this section July 1, 1991. Repealer effective February 7, 1991.

1989 Amendment: Deleted definitions of active duty, disabled veteran, veteran, and war or declared national emergency; in definition of eligible spouse deleted (a) that read: "(a) the unremarried surviving spouse of a veteran who died while on active duty or whose death resulted from a service-connected disability" and after "the spouse of" deleted former (b)(i) and (b)(ii) that read: "(i) a disabled veteran determined by the United States veterans administration to have a 100% service-connected disability who is unable to use his employment preference because of his disability;

(ii) a person on active duty determined by the United States government to be missing in action or a prisoner of war"; corrected internal references; and made minor changes in form and phraseology.

Severability: Section 18, Ch. 646, L. 1989, was a severability clause.

1987 Amendment: In (8)(b), before "vocational-technical", deleted "postsecondary".

Case Notes

Reasonable Accommodation of Disabled Employee's Service Dog — Employer's Duties to Provide Reasonable Accommodation — Employee's Requested Accommodation Within Scope of Human Rights Act: McDonald was employed by the Department of Environmental Quality (DEQ) as a fiscal officer. As a disabled person, McDonald required the use of a service dog. However, the dog continually slipped on the floors of the DEQ building where McDonald worked, and despite McDonald's repeated requests for DEQ to install nonslip surfaces for the dog, the requested accommodation was still not made 1 ½ years after McDonald's request. McDonald eventually left DEQ and had to retire the dog, which allegedly caused numerous work-related and social problems for McDonald. McDonald then sued DEQ for employment discrimination. The hearings examiner concluded that there was no rational basis for the delay and that McDonald was discriminated against; the examiner imposed injunctive relief and awarded McDonald damages of $10,000 for emotional distress, $18,000 for a replacement service animal, $1,536 for travel expenses to procure the animal, and $333.84 for veterinary expenses. The Human Rights Commission affirmed the agency decision, but the District Court reversed. The court concluded that DEQ met its legal duty to provide a reasonable accommodation by allowing McDonald to use the service dog in the workplace but held that DEQ had no legal duty to provide an accommodation for the service animal. McDonald appealed and the Supreme Court reversed. The court held that the reasonable accommodation requirement is best understood as a means by which barriers to equal employment of disabled persons are removed or alleviated, so if an adjustment or modification is job-related and specifically assists the person in performing the duties of a particular job, it will be considered a type of reasonable accommodation. Employers are not relieved of the duty to accommodate when an employee is already able to perform the essential functions of a job. Rather, an employer is fundamentally obligated to not interfere, either through action or inaction, with a disabled employee's efforts to pursue a normal life. Further, an employer's duty to make reasonable accommodations does not end with allowing an assistive device through the front door. The duty also requires an employer to address any barriers to the employee's ability to actually use the device effectively in the workplace, which includes modification of a floor surface if such an accommodation is otherwise reasonable. In this case, substantial evidence supported the hearings examiner's ultimate finding that McDonald needed an accommodation, and the District Court erred in holding that McDonald's requested accommodation for the service dog was beyond the scope of the DEQ's duty under the Montana Human Rights Act. McDonald v. Dept. of Environmental Quality, 2009 MT 209, 351 M 243, 214 P3d 749 (2009), following Buckingham v. U.S., 998 F2d 735 (9th Cir. 1993).

39-30-106. Adoption of rules.

Compiler's Comments

1997 Amendment: Chapter 472 near end of first sentence substituted "persons with disabilities" for "handicapped persons".

1995 Amendment: Chapter 546 substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Statement of Intent: The statement of intent attached to Senate Bill 2 (Ch. 1, Sp. L. 1983) read: "A statement of intent is provided to address the nature of the employment preference granted in the bill. The legislature intends that public employers seek and hire the most qualified persons for positions in public employment. It is also the intent of the legislature that the nature of the preference is a relative one in that it is to be applied among two or more applicants for a position who have substantially equal qualifications. Substantially equal qualifications does not mean a situation in which two or more applicants are exactly equally qualified. It means a range within which two applicants must be considered to be substantially equal in view of the qualifications set for the job. Qualifications should include job-related knowledge, skill, and abilities. The legislature recognizes that public employers use a variety of scored and unscored selection procedures such as conventional written examinations, training and experience requirements, performance tests, structured oral interviews, or combinations of these. The legislature does not intend to specify the type of selection procedure to be used by a public employer.

A statement of intent is also required for this bill because section 9 [39-30-106] requires the department of administration to adopt rules implementing sections 1 through 10 [this chapter] and to consult with the department of social and rehabilitation services [now department of public health and human services] in formulating rules for the certification of handicapped persons.

The legislature intends the rules to adequately provide for the administration of the employment preference law, but to include only those rules that are reasonably necessary to implement sections 1 through 10 [this chapter].

It is the desire of the legislature that the department take all necessary steps in formulating, proposing, and adopting rules to ensure that the public, particularly those persons and organizations that have shown past interest in the employment preference law, is afforded sufficient time and opportunity to participate in the rulemaking procedure. The department should give such notice and hold such hearings as will ensure adequate public participation.

Rules adopted by the department apply to all initial hirings to positions by all public employers. In formulating its rules the department should take this into consideration and adopt rules that can be used and applied by the broad spectrum of state and local public employers subject to sections 1 through 10 [this chapter].

It is the intent of the legislature that the department formulate and adopt rules relating, but not limited, to the following matters and take into account the following considerations.

(1) Claiming preference — documentation and verification. Rules relating to the job application process should include the manner in which a preference should be claimed when a job is applied for. They should prescribe the means by which the applicant must document and submit evidence of such things as the applicant's status as a Montana resident veteran, disabled

veteran, handicapped person, or eligible spouse. It is the intent of the legislature that rules for claiming and documenting a preference do not place unreasonable burdens upon applicants.

(2) Handicapped persons — certification. The rules should provide that a person will not be denied handicapped status and certification merely because of his current or former employment, should address the matter of what constitutes a physical or mental impairment that substantially limits one or more major life activities, and outline in what instances a physical or mental impairment limits a person's ability to obtain, retain, or advance in employment. The department may wish to do this by a combination of a statement of general principles and specific examples.

Rules should provide for a certification process that allows, when appropriate, permanent certification of those impairments considered to be permanent in nature. A procedure for extension or loss of certification should be provided for those instances in which a handicap is or may be temporary.

(3) Military conflicts. The legislature intends the rules to apply federal law to determine what constitutes a campaign or expedition for which a campaign badge is authorized by the Congress of the United States or department of defense.

(4) Honorable discharges. The legislature intends the rules to apply federal law in defining honorable discharges.

(5) Hiring decision notices and explanations. The legislature intends the rules to provide for the form and content of written notices of hiring decisions, including whether the position was obtained as the result of application of the preference by the public employer, written requests for explanations of hiring decisions, and written explanations of hiring decisions.

(6) Reopening of selection process. The legislature intends the rules to provide for a method of reopening the selection process for a job should a court order the selection process reopened, and include a method of giving notice to those who applied for the job informing them of the reopening and the reason therefor.

(7) Jobs subject to federal law. The legislature intends the rules to identify or provide a method of identifying work or positions to which the employment preference does not apply by virtue of section 10 [39-30-108]."

Administrative Rules

Title 2, chapter 21, subchapter 14, ARM Persons with disabilities employment preference policy.

39-30-107. Certification of persons with disabilities.

Compiler's Comments

2013 Amendment: Chapter 191 at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2013.

1997 Amendment: Chapter 472 near middle substituted "persons with disabilities" for "persons as handicapped."

1995 Amendment: Chapter 546 substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Case Notes

Reasonable Accommodation of Disabled Employee's Service Dog — Employer's Duties to Provide Reasonable Accommodation — Employee's Requested Accommodation Within Scope of Human Rights Act: McDonald was employed by the Department of Environmental Quality (DEQ) as a fiscal officer. As a disabled person, McDonald required the use of a service dog. However, the dog continually slipped on the floors of the DEQ building where McDonald worked, and despite McDonald's repeated requests for DEQ to install nonslip surfaces for the dog, the requested accommodation was still not made 1 ½ years after McDonald's request. McDonald eventually left DEQ and had to retire the dog, which allegedly caused numerous work-related and social problems for McDonald. McDonald then sued DEQ for employment discrimination. The hearings examiner concluded that there was no rational basis for the delay and that McDonald was discriminated against; the examiner imposed injunctive relief and awarded McDonald damages of $10,000 for emotional distress, $18,000 for a replacement service animal, $1,536 for travel expenses to procure the animal, and $333.84 for veterinary expenses. The Human Rights Commission affirmed the agency decision, but the District Court reversed. The court concluded that DEQ met its legal duty to provide a reasonable accommodation by allowing McDonald to use the service dog in the workplace but held that DEQ had no legal duty to provide an accommodation for the service animal. McDonald appealed and the Supreme Court reversed. The court held that the reasonable accommodation requirement is best understood as a means by which barriers to equal employment of disabled persons are removed or alleviated, so if an adjustment or modification is job-related and specifically assists the person in performing the duties of a particular job, it will be considered a type of reasonable accommodation. Employers are not relieved of the duty to accommodate when an employee is already able to perform the essential functions of a job. Rather, an employer is fundamentally obligated to not interfere, either through action or inaction, with a disabled employee's efforts to pursue a normal life. Further, an employer's duty to make reasonable accommodations does not end with allowing an assistive device through the front door. The duty also requires an employer to address any barriers to the employee's ability to actually use the device effectively in the workplace, which includes modification of a floor surface if such an accommodation is otherwise reasonable. In this case, substantial evidence supported the hearings examiner's ultimate finding that McDonald needed an accommodation, and the District Court erred in holding that McDonald's requested accommodation for the service dog was beyond the scope of the DEQ's duty under the Montana Human Rights Act. McDonald v. Dept. of Environmental Quality, 2009 MT 209, 351 M 243, 214 P3d 749 (2009), following Buckingham v. U.S., 998 F2d 735 (9th Cir. 1993).

Part 2
Operative Provisions

39-30-201. Employment preference in initial hiring.

Compiler's Comments

2013 Amendment: Chapter 191 in (1) after "10-2-402" inserted "and subsection (3) of this section"; deleted former (1)(b) that read: "(b) In an initial hiring, a public employer shall hire a person with a disability over any other preference-eligible applicant with substantially equal qualifications"; inserted (3) concerning 39-29-102 and scoring procedures; and made minor changes in style. Amendment effective October 1, 2013.

1997 Amendment: Chapter 472 in two places substituted "person with a disability" for "handicapped person"; and in (2) substituted "39-30-103(2)(b)" for "39-30-103(3)(b)".

Termination Provision Repealed: Section 1, Ch. 12, L. 1991, repealed sec. 19, Ch. 646, L. 1989, which terminated the 1989 amendments to this section July 1, 1991. Repealer effective February 7, 1991.

1989 Amendment: In (1)(a), before "handicapped person", deleted "veteran, disabled veteran"; in (1)(b), before "handicapped person", deleted "disabled veteran or"; and in (2) substituted reference to 39-30-103(3)(b) for reference to 39-30-103(5)(b).

Severability: Section 18, Ch. 646, L. 1989, was a severability clause.

Case Notes

Veterans' Preference Gratuity — Not Vested Right: Plaintiff served in the capacity of deputy clerk of the Supreme Court for 20 years. He ran for the Clerk of Court position but was defeated. The newly elected Clerk terminated plaintiff and appointed a new deputy. Plaintiff contended that as a veteran he was entitled to a preference in employment and that the Legislature's repeal of the former veterans' preference law was invalid. On appeal, the Supreme Court held that the veterans' preference rights granted under the repealed portion of the veterans' preference law are not rights earned through years of service to the state, but are a gratuity given to citizens of Montana by the state to show its appreciation for service in the armed forces. They do not amount to rights vested in the veterans. The Legislature could properly repeal the law by majority vote at any time, and veterans acting under the old law are considered to have acted in contemplation of the Legislature's power of repeal. Conboy v. St., 214 M 492, 693 P2d 547, 42 St. Rep. 120 (1985).

Former Law Not Discriminatory: Section 10-2-203 (repealed Ch. 1, Sp. L. 1983), providing that veterans and certain other persons "shall be preferred for appointment and employment", was construed to grant an "absolute" preference to a preferred person with the minimum qualifications and with the business capacity, competence, and education to discharge the duties of the job. In this case a blind person sued for failure to grant her a job under the disabled civilians preference. The court stated that the statute did not conflict with Title 49 sex and other discrimination provisions and indicated that it did not run afoul of equal protection considerations. Crabtree v. Mont. St. Library, 204 M 398, 665 P2d 231, 40 St. Rep. 963 (1983).

39-30-202. Eligibility requirements.

Compiler's Comments

1997 Amendment: Chapter 472 in introductory clause substituted "person with a disability" for "handicapped person"; and made minor changes in style.

Termination Provision Repealed: Section 1, Ch. 12, L. 1991, repealed sec. 19, Ch. 646, L. 1989, which terminated the 1989 amendments to this section July 1, 1991. Repealer effective February 7, 1991.

1989 Amendment: At beginning deleted "No veteran, disabled veteran"; and made minor changes in phraseology.

Severability: Section 18, Ch. 646, L. 1989, was a severability clause.

39-30-203. Duration of preference.

Compiler's Comments

1997 Amendment: Chapter 472 substituted "person with a disability" for "handicapped person".

Termination Provision Repealed: Section 1, Ch. 12, L. 1991, repealed sec. 19, Ch. 646, L. 1989, which terminated the 1989 amendments to this section July 1, 1991. Repealer effective February 7, 1991.

1989 Amendment: Near beginning inserted "or eligible"; after "spouse" deleted "of a handicapped person as described in subsection (3)(b)(iii) of 39-30-103, a disabled veteran, or the spouse of a disabled veteran as described in subsection (3)(b)(i) of 39-30-103"; deleted former (2), (3), and (4) that read: "(2) a veteran, as defined in 39-30-103, who is not a disabled veteran, as defined in 39-30-103, qualifies for employment preference for no longer than 15 years following separation from service or for no longer than 5 years following December 20, 1983, whichever is later.

(3) the surviving spouse of a veteran as described in subsection (3)(a) of 39-30-103 qualifies for employment preference for as long as the spouse remains unmarried; and

(4) the spouse of a person described in subsection (3)(b)(ii) of 39-30-103 qualifies for employment preference for as long as the person is missing in action or a prisoner of war"; and made minor changes in punctuation and form.

Severability: Section 18, Ch. 646, L. 1989, was a severability clause.

39-30-206. Notice and claim of preference.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

39-30-207. Enforcement of preference.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Termination Provision Repealed: Section 1, Ch. 12, L. 1991, repealed sec. 19, Ch. 646, L. 1989, which terminated the 1989 amendments to this section July 1, 1991. Repealer effective February 7, 1991.

1989 Amendment: In (3) changed reference to 39-30-103(9) to reference to 39-30-103(7); and made minor changes in phraseology.

Severability: Section 18, Ch. 646, L. 1989, was a severability clause.

Case Notes

Judicial Appointment to Job: The 1943 amendment to the former employment preference law, 10-2-201 through 10-2-206, insofar as it attempted to confer authority upon the court to make an appointment and insofar as it undertook to confer judicial power without notice and hearing was declared unconstitutional and void. State ex rel. O'Sullivan v. District Court, 119 M 189, 172 P2d 816 (1946); Application of O'Sullivan, 117 M 295, 158 P2d 306, 161 ALR 487 (1945).

No Duty Where No Vacancy Exists: Mandamus was improper to compel the Mayor of a city to transmit the application of an honorably discharged World War veteran for the position of patrolman on the police force to the city Police Commission, since neither under 10-2-211 (now repealed) nor under 7-32-4108, relating generally to appointments to the force, was the Mayor required to transmit such applications when no vacancy on the police force existed. State ex rel. Montgomery v. Mayor, 112 M 275, 114 P2d 1046 (1941).

Veteran to Qualify Physically: Although veteran's application must be transmitted to Police Commission by Mayor when a vacancy exists, he may not be coerced by Writ of Mandate to forward application after his investigation reveals veteran is not qualified physically due to a back injury. Court will not substitute its discretion for that of Mayor unless it is shown Mayor abused his discretion by making his decision unfairly or in bad faith. Horvath v. Mayor, 112 M 266, 116 P2d 874 (1941).

CHAPTER 31
COLLECTIVE BARGAINING FOR PUBLIC EMPLOYEES

Chapter Compiler's Comments

Severability Clause: Section 15, Ch. 441, L. 1973, was a severability clause.

Chapter Case Notes

Pursuit in Court of Certain Wrongful Discharge Claims Precluded by Collective Bargaining Agreement — Claims of Deceit and Emotional Distress Not Precluded: Klein was suspended with pay from her position as a probation and parole officer, and following a meeting with Department of Corrections officials and a Department investigation, Klein's employment was terminated on grounds that she had obstructed and interfered with a police investigation. Klein filed a grievance with the Department, stating that she was fired without just cause and seeking reinstatement in her former position, back pay, and benefits. The grievance was arbitrated in Klein's favor, but before entry of the arbitrator's final decision, Klein filed suit in District Court, alleging: (1) violation of due process: (2) Department deceit through willful misrepresentation of the purpose of the meeting with Department officials; (3) negligent investigation of the incident by the Department; and (4) negligent infliction of severe emotional distress caused by the Department's actions throughout the affair. The District Court concluded that the terms of the collective bargaining agreement required Klein to exhaust all remedies through arbitration and that because those remedies had not been exhausted, Klein was prohibited from litigating the dispute. Klein appealed, and the Supreme Court affirmed in part and reversed in part. The court affirmed dismissal of claims 1 and 3 on grounds that judicial pursuit of the claims was precluded by the terms of the collective bargaining agreement and that Klein had addressed those issues through arbitration. However, the court reversed the dismissal of claims 2 and 4 because those issues were not contemplated in or precluded by the collective bargaining agreement and because those claims were not barred by the Wrongful Discharge From Employment Act and were wholly independent from any rights or remedies related to Klein's discharge that were previously addressed in the grievance process. Therefore, the issues of Department deceit and emotional distress were remanded to the District Court for further proceedings. Klein v. St., 2008 MT 189, 343 M 520, 185 P3d 986 (2008). See also Lueck v. United Parcel Serv., 258 M 2, 851 P2d 1041 (1993), and Winchester v. Mountain Line, 1999 MT 134, 294 M 517, 982 P2d 1024 (1999).

Clear Language of Collective Bargaining Agreement Excluding State Unfair Labor Practice Charge From Grievance and Arbitration Procedure — Deferral to Arbitration Procedure Improper: Winchester asserted that his employer, Mountain Line, committed unfair labor practices by discharging him for union activities and because he was shop steward. Mountain Line contended that Winchester was discharged for violation of the employee's handbook. The District Court decided that Winchester's unfair labor practice claim was subject to the final and binding arbitration clause in the collective bargaining agreement and held that the Board of Personnel Appeals properly deferred to the arbitration procedure. One section of the discrimination provisions in the collective bargaining agreement obviously covered Winchester's claim regarding union activities. However, the clear language of the very next section specifically excluded any alleged violation of state statutes from the arbitration procedure. The Supreme Court cited Small v. McRae, 200 M 497, 651 P2d 982, 39 St. Rep. 1896 (1982), for the proposition that only in those cases in which it is certain that the arbitration clause is not susceptible to an interpretation that covers the dispute is an employee entitled to sidestep the provisions of the collective bargaining agreement. Therefore, the District Court erred in ruling that the Board properly deferred to the arbitration procedure in addressing the state law violations. The case was remanded for further proceedings. Winchester v. Mountain Line, 1999 MT 134, 294 M 517, 982 P2d 1024, 56 St. Rep. 540 (1999).

Proof of Retaliatory Discharge — Claim Outside Context of Collective Bargaining Agreement Not Preempted by Federal Law: To prove retaliatory discharge involving sexual harassment, it must be shown that: (1) the employee was discharged; (2) the employee was subjected to sexual harassment during the course of employment; and (3) the employer's motivation for the discharge was to retaliate for the employee's resistance to the sexual harassment. When this factual inquiry does not turn on the meaning of any term of a collective bargaining agreement, the wrongful discharge claim is considered independent of the agreement for purposes of preemption under federal law. Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720, 49 St. Rep. 638 (1992), following Lingle v. Norge Div. of Magic Chef, Inc., 486 US 399, 100 L Ed 2d 410, 108 S Ct 1877 (1988), and followed in Miller v. Glacier County, 257 M 422, 851 P2d 401, 50 St. Rep. 339 (1993), and, with respect to sexual discrimination, Pike v. Burlington N. RR Co., 273 M 390, 903 P2d 1352, 52 St. Rep. 1005 (1995).

Temporary Employment — No Recall Rights: A labor agreement provided that an employee would not have recall rights under a seniority clause unless he was employed for 6 continuous months. A union employee was hired to temporarily replace an injured permanent employee and worked for a period 2 days short of 6 months. The injured employee returned but worked only 3 days. Twenty days later, the union employee was rehired for a period 1 day short of 6 months. The employer then hired a permanent employee to replace the union employee, who contended the contract was violated by the employer's failure to recall him for the permanent position. Recall rights were not earned by the union employee under the contract because the position fell short of 6 months on both occasions. The 20-day break in employment represented a substantial break in service; therefore, the employment was not continuous or renewable. Local 1334 v. Great Falls, 233 M 432, 760 P2d 99, 45 St. Rep. 1611 (1988).

Alleged Violations of Collective Bargaining Agreement Preempted by Federal Labor Law: Although a collective bargaining agreement did not specifically address standards to be applied in a situation where an employee was discharged, tort claims alleging negligence and breach of good faith were substantially dependent on terms in the contract establishing wage schedules, union representation, and adherence to a grievance and arbitration procedure. In determining that summary judgment was proper, the Supreme Court cited Allis-Chalmers v. Lueck, 471 US 202, 85 L Ed 2d 206, 105 S Ct 1904 (1985), and reasoned that preemption of the tort claims by federal law was necessary to ensure a unified body of labor contract law and to preserve the central role of arbitration in labor disputes. Smith v. Mont. Power Co., 225 M 166, 731 P2d 924, 44 St. Rep. 124 (1987). See also Anderson v. TW Corp., 228 M 1, 741 P2d 397, 44 St. Rep. 1293 (1987), where it was held that a party may not avoid the preemptive effect of federal labor law when a dispute involves an interpretation of a union contract by pleading in tort and that vacation pay is one item preempted by operation of federal law. But see Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720, 49 St. Rep. 638 (1992), which relied on Lingle v. Norge Div. of Magic Chef, Inc., 486 US 399, 100 L Ed 2d 410, 108 S Ct 1877 (1988), to partially overrule Brinkman v. St., 224 M 238, 729 P2d 1301 (1986), and subsequent cases, including Smith, to the extent that a state law claim is preempted by federal law only when its resolution requires construing the collective bargaining agreement, even if the state law analysis involves the same factual considerations as the contractual determination under the collective bargaining agreement of whether the employee was discharged for just cause. Foster was followed in Hanley v. Safeway Stores, Inc., 254 M 379, 838 P2d 408, 49 St. Rep. 755 (1992), Miller v. Glacier County, 257 M 422, 851 P2d 401, 50 St. Rep. 339 (1993), Pike v. Burlington N. RR Co., 273 M 390, 903 P2d 1352, 52 St. Rep. 1005 (1995), and Winslow v. Mont. Rail Link, Inc., 2000 MT 292, 302 M 289, 16 P3d 992, 57 St. Rep. 1238 (2000).

Federal Law — Use of Compatible State Law to Effectuate: State law that is compatible with federal labor law may be resorted to in order to find a rule that will best effectuate federal policy. Audit Services, Inc. v. Anderson, 211 M 323, 684 P2d 491, 41 St. Rep. 1388 (1984).

NLRA — Aid to Interpretation:

Because of the similarity between the National Labor Relations Act (NLRA) and the Montana public employees' collective bargaining law, the Supreme Court found federal administrative and judicial construction of the NLRA instructive and often persuasive regarding the meaning of Montana's labor relations law. Great Falls v. Young, 211 M 13, 686 P2d 185, 41 St. Rep. 1174 (1984).

The Montana Supreme Court looks to the construction placed on the National Labor Relations Act (NLRA) by the federal courts as an aid in interpretation of the Montana Public Employees Collective Bargaining Act. Small v. McRae, 200 M 497, 651 P2d 982, 39 St. Rep. 1896 (1982), followed in Brinkman v. St., 224 M 238, 729 P2d 1301, 43 St. Rep. 2163 (1986).

Right to Strike: Employees under Montana's collective bargaining law are not prohibited from striking. If the Legislature had intended to limit their right to strike, it could have so expressly provided, as it has provided in other occupations. Dept. of Highways v. Pub. Employees Craft Council, 165 M 349, 529 P2d 785 (1974).

Chapter Attorney General's Opinions

Pay for Holidays — 10-Hour Days — Collective Bargaining for County Employees: A county may collectively bargain that public employees who work 10-hour days for 4 days per week are to be paid for 10 hours on holidays that fall on their regularly scheduled workday. 53 A.G. Op. 4 (2010).

Prohibition on Separate Health Benefit Plan: A county with general government powers may not establish a separate health benefit plan for certain employees in a collective bargaining unit when a county employee-wide group insurance plan adopted under 2-18-702 already exists. 42 A.G. Op. 37 (1987).

Part 1
General Provisions

39-31-101. Policy.

Case Notes

Collective Bargaining Required for Agency to Set Pay: Collective bargaining statutes mandate that the state and the union representative have a duty to bargain collectively and in good faith. This duty expressly requires that the agency and union representative negotiate wages, hours, and fringe benefits. In other words, an agency cannot set the pay of its employees without collective bargaining. Mashek v. Dept. of Public Health and Human Services, 2016 MT 86, 383 Mont. 168, 369 P.3d 348.

Ambiguity in Collective Bargaining Agreement — Duty to Bargain in Good Faith: The Bonner school district involuntarily transferred and reassigned several teachers, which affected the subjects taught and the teachers' areas of expertise. The Bonner Education Association responded by filing an unfair labor practices claim, alleging that the school district had violated 39-31-305 and 39-31-401 by refusing to bargain for the transfers and reassignments. The school district contended that a management rights provision in the collective bargaining agreement allowed the district to unilaterally transfer and reassign teachers because that right was not limited by explicit provisions elsewhere in the agreement. The Supreme Court disagreed, noting that the agreement contained two other clauses that provided conflicting provisions. An integration clause, or zipper clause, seemingly waived the Association's statutory right to bargain for teacher transfers and reassignments as terms and conditions of employment, while a professional advantages clause could be interpreted to protect teachers from involuntary transfers and reassignments. These conflicting clauses made the agreement ambiguous as a matter of law. However, 39-31-305 provides a statutory duty to bargain regarding any question arising under a collective bargaining agreement, and 39-31-401 provides that it is an unfair labor practice to refuse to bargain in good faith. Regarding the school district's argument concerning management rights, the court held that requiring collective bargaining has no effect on an employer's fundamental right to manage and operate and does not impose on management the duty to concede to union demands, but only obligates the employer to bargain in good faith, in conformity with the purpose of state employment law. In light of the ambiguity in the collective bargaining agreement in this case, the school district committed an unfair labor practice by refusing to bargain for teacher transfers and reassignments. Bonner School District No. 14 v. Bonner Educ. Ass'n, 2008 MT 9, 341 M 97, 176 P3d 262 (2008).

39-31-103. Definitions.

Compiler's Comments

2005 Amendment: Chapter 483 in definition of supervisory employee in (a) near beginning after "authority" inserted "on a regular, recurring basis while acting" and near middle after "discipline other employees" deleted "having responsibility to direct them, to adjust their grievances" and inserted (b) restricting use of other criteria; and made minor changes in style. Amendment effective April 28, 2005.

1995 Amendment — Phrase Change: Section 14, Ch. 108, L. 1995, directed the Code Commissioner to change references in the MCA to engineer-in-training to engineer intern. In this section, the Code Commissioner has made the change in (9)(b)(xi).

1987 Amendment: In (1), at end, inserted sentence including head start agency as public employer.

Case Notes

Elimination of Lay Reader Program Not Grievance Subject to Arbitration: The board of trustees' elimination of a lay reader program was not an alleged violation of a specific provision of the collective bargaining agreement and therefore did not constitute a grievance that was subject to arbitration. Summary dismissal of an application by a teachers' association to compel arbitration was proper. Missoula County High School Educ. Ass'n v. Bd. of Trustees, 259 M 438, 857 P2d 696, 50 St. Rep. 870 (1993), distinguishing Union-Scioto Local School District Bd. of Educ. v. Unioto Support Ass'n, 603 NE 2d 375 (Ohio App. 1992).

Criteria for Defining "Public Employee": The definition of "public employee" within the meaning of this section will be determined broadly in doubtful situations. In this case, the city who had entered a collective bargaining agreement with city employees is the "public employer" for the purposes of this chapter, not the library board of trustees. Local 2390 v. Billings, 171 M 20, 555 P2d 507 (1976).

39-31-105. Administrative procedure act applicable — conduct of hearing.

Compiler's Comments

1995 Amendment: Chapter 90 inserted second sentence providing that hearings and appeals may be conducted by telephone or videoconference with the consent of the necessary parties; and made minor changes in style. Amendment effective March 9, 1995.

Applicability: Section 12, Ch. 90, L. 1995, provided: "[Sections 2, 3, 6, 7, and 9] [2-18-1002, 2-18-1012, 39-3-216, 39-3-217, now repealed, and 39-31-105] apply to hearings or appeals requested on or after [the effective date of this act]." Effective March 9, 1995.

39-31-107. Service of subpoenas, notices of hearing, and other process.

Compiler's Comments

2011 Amendment: Chapter 10 at end substituted "may be served by depositing it in the U.S. mail, postage prepaid" for "shall be served as provided by the rules of civil procedure". Amendment effective October 1, 2011.

39-31-109. Existing collective bargaining agreements not affected.

Case Notes

Applicability of Grandfather Clause: An election and certification of a new exclusive representative nullifies the application of 39-31-109. Thus, after a change in representation of a public employees' labor bargaining unit, it would be proper to exclude supervisory employees from membership in that unit even though supervisory employees had been members of the unit prior to passage of Montana's public employees collective bargaining law (Ch. 441, L. 1973). In re Unit Clarification No. 6-80 v. Dept. of Administration, 217 M 230, 703 P2d 862, 42 St. Rep. 1157 (1985).

Section Rendered Inapplicable by Change in Representatives: An election and certification of new exclusive representatives nullifies the applicability of this section. In re Unit Clarification No. 6-80 v. Dept. of Administration, 217 M 230, 703 P2d 862, 42 St. Rep. 1157 (1985).

Grandfather Clause — Supervisory Personnel Allowed to Remain in Unit — Two-Part Test: The city of Billings and its firefighters' union requested the Board of Personnel Appeals (BPA) to conduct a hearing to clarify the membership of the bargaining unit. At issue was whether Local No. 521, the bargaining unit since 1968, fell within the grandfather clause of 39-31-109, or whether the unit contained supervisory personnel in violation of 39-31-201. The hearing officer recommended an order concluding the unit fell within the grandfather clause's protection. The city appealed the recommendation to the BPA. The BPA remanded the case to use a two-part test: (1) a determination of the nature of each position; and (2) whether the inclusion of the position would create an actual substantial conflict. The BPA then adopted the recommended order. The city appealed to the District Court, which overturned the decision, finding it to be arbitrary and capricious because inclusion of supervisory personnel in the unit created an inherent conflict. On appeal, the Supreme Court held that BPA's interpretation of 39-31-109 was rational and did not involve an abuse of discretion. The decision recognized a violation of 39-31-201, but in light of 39-31-109, the two-part test applied by BPA was a rational approach for determining unit membership. The hearing officer's findings relating to each position were supported by substantial credible evidence. There was no arbitrary or capricious action. The order of the BPA was reinstated. Billings v. Billings Firefighters Local No. 521, 200 M 421, 651 P2d 627, 39 St. Rep. 1844 (1982).

Part 2

Public Employee Self-Organization and Certification of Bargaining Representative

39-31-201. Public employees protected in right of self-organization.

Case Notes

Pursuit in Court of Certain Wrongful Discharge Claims Precluded by Collective Bargaining Agreement — Claims of Deceit and Emotional Distress Not Precluded: Klein was suspended with pay from her position as a probation and parole officer, and following a meeting with

Department of Corrections officials and a Department investigation, Klein's employment was terminated on grounds that she had obstructed and interfered with a police investigation. Klein filed a grievance with the Department, stating that she was fired without just cause and seeking reinstatement in her former position, back pay, and benefits. The grievance was arbitrated in Klein's favor, but before entry of the arbitrator's final decision, Klein filed suit in District Court, alleging: (1) violation of due process: (2) Department deceit through willful misrepresentation of the purpose of the meeting with Department officials; (3) negligent investigation of the incident by the Department; and (4) negligent infliction of severe emotional distress caused by the Department's actions throughout the affair. The District Court concluded that the terms of the collective bargaining agreement required Klein to exhaust all remedies through arbitration and that because those remedies had not been exhausted, Klein was prohibited from litigating the dispute. Klein appealed, and the Supreme Court affirmed in part and reversed in part. The court affirmed dismissal of claims 1 and 3 on grounds that judicial pursuit of the claims was precluded by the terms of the collective bargaining agreement and that Klein had addressed those issues through arbitration. However, the court reversed the dismissal of claims 2 and 4 because those issues were not contemplated in or precluded by the collective bargaining agreement and because those claims were not barred by the Wrongful Discharge From Employment Act and were wholly independent from any rights or remedies related to Klein's discharge that were previously addressed in the grievance process. Therefore, the issues of Department deceit and emotional distress were remanded to the District Court for further proceedings. Klein v. St., 2008 MT 189, 343 M 520, 185 P3d 986 (2008). See also Lueck v. United Parcel Serv., 258 M 2, 851 P2d 1041 (1993), and Winchester v. Mountain Line, 1999 MT 134, 294 M 517, 982 P2d 1024 (1999).

Preclusion of Wrongful Discharge Suit by Collective Bargaining Agreement Not Unconstitutional Impediment to Access to Courts: When plaintiff filed a wrongful discharge claim, defendant pointed out that the employment was covered by a union collective bargaining agreement (CBA) and that 39-2-912(2) precludes an employee covered by a CBA from seeking relief under the Wrongful Discharge From Employment Act. Plaintiff argued that if she was precluded from bring a wrongful discharge claim solely because her employment was covered by a CBA, then 39-2-912 unconstitutionally violated her access to courts, full redress, and a jury trial. However, constitutionality of a statute is presumed unless the person challenging it proves unconstitutionality beyond a reasonable doubt. Here, plaintiff presented nothing to overcome the presumption of constitutionality. Plaintiff's argument concerning lack of legal redress also failed because a possible action against the union was still available. LaFournaise v. Mont. Developmental Center, 2003 MT 240, 317 M 283, 77 P3d 202 (2003).

Clear Language of Collective Bargaining Agreement Excluding State Unfair Labor Practice Charge From Grievance and Arbitration Procedure — Deferral to Arbitration Procedure Improper: Winchester asserted that his employer, Mountain Line, committed unfair labor practices by discharging him for union activities and because he was shop steward. Mountain Line contended that Winchester was discharged for violation of the employee's handbook. The District Court decided that Winchester's unfair labor practice claim was subject to the final and binding arbitration clause in the collective bargaining agreement and held that the Board of Personnel Appeals properly deferred to the arbitration procedure. One section of the discrimination provisions in the collective bargaining agreement obviously covered Winchester's claim regarding union activities. However, the clear language of the very next section specifically excluded any alleged violation of state statutes from the arbitration procedure. The Supreme Court cited Small v. McRae, 200 M 497, 651 P2d 982, 39 St. Rep. 1896 (1982), for the proposition that only in those cases in which it is certain that the arbitration clause is not susceptible to an interpretation that covers the dispute is an employee entitled to sidestep the provisions of the collective bargaining agreement. Therefore, the District Court erred in ruling that the Board properly deferred to the arbitration procedure in addressing the state law violations. The case was remanded for further proceedings. Winchester v. Mountain Line, 1999 MT 134, 294 M 517, 982 P2d 1024, 56 St. Rep. 540 (1999).

Unfair Labor Practices — Due Process — Collateral Estoppel: In an action charging unfair labor practices, an employee was collaterally estopped from relitigating the issue of whether his due process rights were violated by the 3-year delay between the filing of his charges and the administrative hearing on the charges. The issue was previously decided, a final judgment was rendered, and the party against whom the claim was advanced remained the same or was privy of the earlier party. Klundt v. St., 222 M 172, 720 P2d 1181, 43 St. Rep. 1148 (1986).

Grandfather Clause — Supervisory Personnel Allowed to Remain in Unit — Two-Part Test: The city of Billings and its firefighters' union requested the Board of Personnel Appeals (BPA) to conduct a hearing to clarify the membership of the bargaining unit. At issue was whether Local No. 521, the bargaining unit since 1968, fell within the grandfather clause of 39-31-109, or whether the unit contained supervisory personnel in violation of 39-31-201. The hearing officer recommended an order concluding the unit fell within the grandfather clause's protection. The city appealed the recommendation to the BPA. The BPA remanded the case to use a two-part test: (1) a determination of the nature of each position; and (2) whether the inclusion of the position would create an actual substantial conflict. The BPA then adopted the recommended order. The city appealed to the District Court, which overturned the decision, finding it to be arbitrary and capricious because inclusion of supervisory personnel in the unit created an inherent conflict. On appeal, the Supreme Court held that BPA's interpretation of 39-31-109 was rational and did not involve an abuse of discretion. The decision recognized a violation of 39-31-201, but in light of 39-31-109, the two-part test applied by BPA was a rational approach for determining unit membership. The hearing officer's findings relating to each position were supported by substantial credible evidence. There was no arbitrary or capricious action. The order of the BPA was reinstated. Billings v. Billings Firefighters Local No. 521, 200 M 421, 651 P2d 627, 39 St. Rep. 1844 (1982).

Duty of Fair Representation — Breach as Unfair Labor Practice — Jurisdiction in BPA and District Court: Appellant was hired by the Great Falls Public Library as a bookmobile driver. Upon receipt of his first paycheck, he discovered he was paid for 20 hours per week as a driver and 20 hours per week as a clerk, at a lower rate. He asked his union to file a grievance on his behalf. He made the same request for over a year. The union continually refused to file a grievance, stating that the union and the city had a long standing oral agreement that drivers would be paid in that manner. Appellant then filed an unfair labor practice charge against the union alleging that it had breached its duty of fair representation. The Board of Personnel Appeals (BPA) concluded that the union had breached its duty of fair representation. The union appealed to District Court, and the court, relying on Ford v. Univ. of Mont., 183 M 112, 598 P2d 604 (1979), decided that the BPA lacked the jurisdiction to decide such a claim. The rule of Ford which recognizes original jurisdiction in state District Courts to decide questions of fair representation is correct and stands, but certain dicta in Ford were based on a misinterpretation of federal labor law, on which Montana law is based, and cannot stand. Ford erroneously concluded that breach of a duty of fair representation was not an unfair labor practice. The Supreme Court also no longer recognizes dicta in Ford, which stated that a finding by BPA on those matters would deprive the District Court of jurisdiction. BPA has jurisdiction to hear claims that a union has breached its duty of fair representation for administrative remedies, and original jurisdiction of such claims lies in the District Court. Teamsters Local 45 v. State ex rel. Bd. of Personnel Appeals, 195 M 272, 635 P2d 1310, 38 St. Rep. 1841 (1981).

Jurisdiction: Defendant union's argument that the District Court had no jurisdiction because plaintiff's exclusive remedy was under Title 34, ch. 31, lacks merit. The chapter provides no remedy for an alleged breach of duty by a union's failure to fairly represent a grievance. The Supreme Court held that the District Court had jurisdiction, as opposed to the federal court. Ford v. Univ. of Mont., 183 M 112, 598 P2d 604, 36 St. Rep. 1485 (1979).

Concerted Activities: The phrase "concerted activities" includes strikes. Dept. of Highways v. Pub. Employees Craft Council, 165 M 349, 529 P2d 785 (1974).

Attorney General's Opinions

Pay for Holidays — 10-Hour Days — Collective Bargaining for County Employees: A county may collectively bargain that public employees who work 10-hour days for 4 days per week are to be paid for 10 hours on holidays that fall on their regularly scheduled workday. 53 A.G. Op. 4 (2010).

Collective Bargaining Agreement — Days of Leave in Addition to Legal Holidays: The Board of County Commissioners may enter into an agreement with county employees that grants a day of paid leave in addition to the enumerated legal holidays. The collective bargaining provision in question merely provides an additional paid day off to attend the county fair for those employees covered by the contract. The provision does not make "fair day" a "legal holiday" nor does it suggest that an employee may accumulate "fair days" as vacation. The provision contravenes no statutory determination of employee benefits. The provision falls within the area which is a proper subject for collective bargaining. 38 A.G. Op. 116 (1980).

39-31-202. Board to determine appropriate bargaining unit — factors to be considered.

Compiler's Comments

1999 Amendment: Chapter 176 inserted (2) providing that the public employer representative may petition the board to make a new determination of the appropriate collective bargaining unit in certain cases of reorganization of a state agency or facility; inserted (3) prohibiting the board with respect to a reorganization from considering a labor organization as a collective bargaining unit without the filing of a petition; and made minor changes in style. Amendment effective March 25, 1999.

Case Notes

Board of Personnel Appeals' Discretionary Power — Decertification Election: When unfair labor practices charges were pending against an employer, it was within statutory discretionary boundaries for the Board of Personnel Appeals (BPA) to refuse to hold a bargaining representative decertification election until the charges were no longer pending. A Writ of Mandamus to conduct a decertification election need not be obeyed by BPA under these conditions. Without a clear legal duty, mandamus does not lie. State ex rel. Bd. of Personnel Appeals v. District Court, 183 M 223, 598 P2d 1117, 36 St. Rep. 1531 (1979).

39-31-205. Designated labor organizations to represent employees without discrimination.

Case Notes

Three-Year Delay Between Filing of Grievance and Board of Personnel Appeals Hearing — Possible Union Interference: When appellant was not rehired by the city of Billings for a vacant position, he filed a grievance with the State Board of Personnel Appeals (Board), charging that the city was discriminating against him for earlier filing an unfair labor practice charge against the city. There was a 3-year delay between the filing of the grievance and a Board hearing, allegedly caused in part by labor union interference. Although the union does not owe appellant a duty of fair representation in this case under this statute because appellant was not attempting to resolve his claim through binding arbitration or internal union procedures, the union is not entitled to affirmatively interfere with appellant's unfair labor practice charge. Thus, the District Court erred in dismissing appellant's claim against the union for failure to state a claim; it cannot be said as a matter of law that appellant can prove no set of facts stating a claim against the union. Klundt v. State ex rel. Bd. of Personnel Appeals, 219 M 347, 712 P2d 776, 43 St. Rep. 1 (1986). See also In re Connell v. St., 280 M 491, 930 P2d 88, 54 St. Rep. 28 (1997), in which the delay was by a state agency.

Duty of Fair Representation — Breach as Unfair Labor Practice — Jurisdiction in BPA and District Court: Appellant was hired by the Great Falls Public Library as a bookmobile driver. Upon receipt of his first paycheck, he discovered he was paid for 20 hours per week as a driver and 20 hours per week as a clerk, at a lower rate. He asked his union to file a grievance on his behalf. He made the same request for over a year. The union continually refused to file a grievance, stating that the union and the city had a long standing oral agreement that drivers would be paid in that manner. Appellant then filed an unfair labor practice charge against the union alleging that it had breached its duty of fair representation. The Board of Personnel Appeals (BPA) concluded that the union had breached its duty of fair representation. The union appealed to District Court, and the court, relying on Ford v. Univ. of Mont., 183 M 112, 598 P2d 604 (1979), decided that the BPA lacked the jurisdiction to decide such a claim. The rule of Ford which recognizes original jurisdiction in state District Courts to decide questions of fair representation is correct and stands, but certain dicta in Ford were based on a misinterpretation of federal labor law, on which Montana law is based, and cannot stand. Ford erroneously concluded that breach of a duty of fair representation was not an unfair labor practice. The Supreme Court also no longer recognizes dicta in Ford, which stated that a finding by BPA on those matters would deprive the District Court of jurisdiction. BPA has jurisdiction to hear claims that a union has breached its duty of fair representation for administrative remedies, and original jurisdiction of such claims lies in the District Court. Teamsters Local 45 v. State ex rel. Bd. of Personnel Appeals, 195 M 272, 635 P2d 1310, 38 St. Rep. 1841 (1981).

Duty of Union in Processing Members' Grievances: The District Court erred in finding that the union had breached its duty not to discriminate between its members in representing a member's grievance and in denying the union's motion to dismiss. A union is not liable for refusing to process a grievance so long as such a refusal is not arbitrary, the product of bad faith, or discriminatory. Further, a union has similar discretion in interpreting its own rules. Ford v. Univ. of Mont., 183 M 112, 598 P2d 604, 36 St. Rep. 1485 (1979).

39-31-206. Labor organization to guarantee certain rights and safeguards prior to certification or recognition.

Compiler's Comments

1985 Amendment: In (1) inserted "or recognition" after "Certification"; and inserted (2) providing the Board will hear and decide all disputes under subsection (1).

39-31-207. Petition on representation question — investigation by board — hearing.

Case Notes

Board of Personnel Appeals' Discretionary Power — Decertification Election: When unfair labor practices charges were pending against an employer, it was within statutory discretionary boundaries for the Board of Personnel Appeals (BPA) to refuse to hold a bargaining representative decertification election until the charges were no longer pending. A Writ of Mandamus to conduct a decertification election need not be obeyed by BPA under these conditions. Without a clear legal duty, mandamus does not lie. State ex rel. Bd. of Personnel Appeals v. District Court, 183 M 223, 598 P2d 1117, 36 St. Rep. 1531 (1979).

39-31-208. Representation election at direction of board.

Case Notes

Duty of Fair Representation — Breach as Unfair Labor Practice — Jurisdiction in BPA and District Court: Appellant was hired by the Great Falls Public Library as a bookmobile driver. Upon receipt of his first paycheck, he discovered he was paid for 20 hours per week as a driver and 20 hours per week as a clerk, at a lower rate. He asked his union to file a grievance on his behalf. He made the same request for over a year. The union continually refused to file a grievance, stating that the union and the city had a long standing oral agreement that drivers would be paid in that manner. Appellant then filed an unfair labor practice charge against the union alleging that it had breached its duty of fair representation. The Board of Personnel Appeals (BPA) concluded that the union had breached its duty of fair representation. The union appealed to District Court, and the court, relying on Ford v. Univ. of Mont., 183 M 112, 598 P2d 604 (1979), decided that the BPA lacked the jurisdiction to decide such a claim. The rule of Ford which recognizes original jurisdiction in state District Courts to decide questions of fair representation is correct and stands, but certain dicta in Ford were based on a misinterpretation of federal labor law, on which Montana law is based, and cannot stand. Ford erroneously concluded that breach of a duty of fair representation was not an unfair labor practice. The Supreme Court also no longer recognizes dicta in Ford, which stated that a finding by BPA on those matters would deprive the District Court of jurisdiction. BPA has jurisdiction to hear claims that a union has breached its duty of fair representation for administrative remedies, and original jurisdiction of such claims lies in the District Court. Teamsters Local 45 v. State ex rel. Bd. of Personnel Appeals, 195 M 272, 635 P2d 1310, 38 St. Rep. 1841 (1981).

Part 3
Bargaining

Part Case Notes

Statutory Discrimination and Wage Claims Not Clearly Covered in Collective Bargaining Agreement — Arbitration Not Required Prior to Filing in District Court: When the terms of a collective bargaining agreement did not clearly and unmistakably cover plaintiffs' statutory discrimination and wage claims, arbitration of the claims pursuant to the agreement was not required as a precondition to filing suit in District Court. Edwards v. Cascade County Sheriff's Dept., 2009 MT 451, 354 M 307, 223 P3d 893 (2009), following Wright v. Universal Maritime Serv. Corp., 525 US 70 (1998).

Failure to Follow Mandatory Collective Bargaining Agreement Grievance Procedure — "May" Construed — Suit Precluded: Two nursing instructors were harassed by a student and sued the Board of Regents and the University System for failure to maintain a safe working environment, common-law constructive discharge, statutory constructive discharge, and breach of the covenant of good faith and fair dealing. Although the instructors were not union members, their employment was governed by a collective bargaining agreement that included a grievance procedure. The instructors interpreted the grievance procedure as permissive rather than mandatory because it stated that an employee may file a grievance. The Supreme Court disagreed. Use of the word "may" meant that if an employee chose to seek a remedy, it could be done through a written grievance, but the employee may also choose not to file a grievance. However, the word "may" did not mean that use of the grievance procedure was not mandatory.

The court held that use of the grievance procedure was not permissive, but clearly mandatory. The collective bargaining agreement covered the dispute and was interpreted as requiring use of the grievance procedure. An employee who is covered by a collective bargaining agreement that contains a grievance procedure must exhaust that remedy before bringing suit, and having failed to avail themselves of the remedy available through the collective bargaining agreement, the instructors were foreclosed from maintaining the suit. The Supreme Court ordered dismissal of the complaint. Mackay v. St. Bd. of Regents, 2003 MT 274, 317 M 467, 79 P3d 236 (2003), following Small v. McRae, 200 M 497, 651 P2d 982 (1982), and Brinkman v. St., 224 M 238, 729 P2d 1301 (1986), and followed in Russell v. Masonic Home of Mont., Inc., 2006 MT 286, 334 M 351, 147 P3d 216 (2006). See also Edwards v. Cascade County Sheriff's Dept., 2009 MT 451, 354 M 307, 223 P3d 893 (2009), where irrespective of whether discrimination claims were covered by a collective bargaining agreement, the claims were barred for failure to comply with the Montana Human Rights Act.

Proof of Retaliatory Discharge — Claim Outside Context of Collective Bargaining Agreement Not Preempted by Federal Law: To prove retaliatory discharge involving sexual harassment, it must be shown that: (1) the employee was discharged; (2) the employee was subjected to sexual harassment during the course of employment; and (3) the employer's motivation for the discharge was to retaliate for the employee's resistance to the sexual harassment. When this factual inquiry does not turn on the meaning of any term of a collective bargaining agreement, the wrongful discharge claim is considered independent of the agreement for purposes of preemption under federal law. Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720, 49 St. Rep. 638 (1992), following Lingle v. Norge Div. of Magic Chef, Inc., 486 US 399, 100 L Ed 2d 410, 108 S Ct 1877 (1988), and followed, with respect to sexual discrimination, in Pike v. Burlington N. RR Co., 273 M 390, 903 P2d 1352, 52 St. Rep. 1005 (1995).

Alleged Violations of Collective Bargaining Agreement Preempted by Federal Labor Law: Although a collective bargaining agreement did not specifically address standards to be applied in a situation where an employee was discharged, tort claims alleging negligence and breach of good faith were substantially dependent on terms in the contract establishing wage schedules, union representation, and adherence to a grievance and arbitration procedure. In determining that summary judgment was proper, the Supreme Court cited Allis-Chalmers v. Lueck, 471 US 202, 85 L Ed 2d 206, 105 S Ct 1904 (1985), and reasoned that preemption of the tort claims by federal law was necessary to ensure a unified body of labor contract law and to preserve the central role of arbitration in labor disputes. Smith v. Mont. Power Co., 225 M 166, 731 P2d 924, 44 St. Rep. 124 (1987). See also Anderson v. TW Corp., 228 M 1, 741 P2d 397, 44 St. Rep. 1293 (1987), where it was held that a party may not avoid the preemptive effect of federal labor law when a dispute involves an interpretation of a union contract by pleading in tort and that vacation pay is one item preempted by operation of federal law. But see Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720, 49 St. Rep. 638 (1992), which relied on Lingle v. Norge Div. of Magic Chef, Inc., 486 US 399, 100 L Ed 2d 410, 108 S Ct 1877 (1988), to partially overrule Brinkman v. St., 224 M 238, 729 P2d 1301 (1986), and subsequent cases, including Smith, to the extent that a state law claim is preempted by federal law only when its resolution requires construing the collective bargaining agreement, even if the state law analysis involves the same factual considerations as the contractual determination under the collective bargaining agreement of whether the employee was discharged for just cause. Foster was followed in Hanley v. Safeway Stores, Inc., 254 M 379, 838 P2d 408, 49 St. Rep. 755 (1992), Miller v. Glacier County, 257 M 422, 851 P2d 401, 50 St. Rep. 339 (1993), Pike v. Burlington N. RR Co., 273 M 390, 903 P2d 1352, 52 St. Rep. 1005 (1995), and Winslow v. Mont. Rail Link, Inc., 2000 MT 292, 302 M 289, 16 P3d 992, 57 St. Rep. 1238 (2000).

Collective Bargaining Grievance Procedure to Be Utilized Prior to Court Action: An employee must use the contract grievance procedure contained in a collective bargaining agreement prior to seeking a remedy in District Court. Plaintiff argued that his constitutional right to due process was violated and that right cannot be waived by private contract, thereby allowing him to proceed directly to District Court. The court disagreed, holding that the grievance procedure contained in the collective bargaining agreement satisfied any due process requirement. Small v. McRae, 200 M 497, 651 P2d 982, 39 St. Rep. 1896 (1982), followed in Brinkman v. St., 224 M 238, 729 P2d 1301, 43 St. Rep. 2163 (1986), Fellows v. Sears, Roebuck & Co., 244 M 7, 795 P2d 484, 47 St. Rep. 1385 (1990), Lueck v. United Parcel Serv., 258 M 2, 851 P2d 1041, 50 St. Rep. 401 (1993), and Mackay v. St. Bd. of Regents, 2003 MT 274, 317 M 467, 79 P3d 236 (2003).

39-31-301. Representative of public employer.

Attorney General's Opinions

Collective Bargaining — Representation of Executive Agencies: The Governor or his designee has the statutory authority to represent all agencies of the executive branch for purposes of collective bargaining with public employee unions. 37 A.G. Op. 168 (1978).

39-31-302. Participation by student representative when public employer is board of regents.

Attorney General's Opinions

Collective Bargaining — Representation of Executive Agencies: The Governor or his designee has the statutory authority to represent all agencies of the executive branch for purposes of collective bargaining with public employee unions. 37 A.G. Op. 168 (1978).

39-31-303. Management rights of public employers.

Case Notes

School District Refusal to Bargain for Teacher Transfers and Assignments Considered Unfair Labor Practice: The Bonner school district involuntarily transferred and reassigned several teachers, which affected the subjects taught and the teachers' areas of expertise. The Bonner Education Association responded by filing an unfair labor practices claim, alleging that the school district had violated 39-31-305 and 39-31-401 by refusing to bargain for the transfers and reassignments. The Board of Personnel Appeals found that involuntary teacher transfers constituted mandatory subjects of bargaining as conditions of employment and that the Association's right to bargain for transfers and reassignments was preserved in the collective bargaining agreement, so the school district had committed an unfair labor practice by transferring and reassigning teachers without bargaining with the Association. The school district petitioned for judicial review, and the District Court held that teacher transfers and reassignments were not mandatory subjects for collective bargaining. The Association appealed, and the Supreme Court reversed. Citing several federal decisions, the court concluded that, as contemplated by 39-31-305(2), teacher transfers and reassignments constituted other conditions of employment for which the school district, as a public employer, was required to bargain in good faith. Bonner School District No. 14 v. Bonner Educ. Ass'n, 2008 MT 9, 341 M 97, 176 P3d 262 (2008).

Circumstances Warranting Good Faith Discharge — Claim Not Stating Public Concern — Summary Judgment Proper: An employee was issued reprimands, notices of corrective discipline, and notices of punitive discipline but still failed to perform assigned duties or correct job inadequacies. He had the chance to rebut charges of incompetency but chose not to do so. He had the right of grievance but failed to exercise it. His claim of wrongful discharge did not state a public policy concern, but rather was a personal matter. The Supreme Court declined to interfere with the employer's right to manage its affairs and hire employees who will perform their jobs so long as there is a standard of discipline and the employer abides by it in good faith. Summary dismissal of the wrongful discharge claim was proper. Belcher v. Dept. of State Lands, 228 M 352, 742 P2d 475, 44 St. Rep. 1591 (1987).

Arbitrator's Award Granting Reinstatement to Teachers Upheld: The Supreme Court rejected school district's contention that the arbitrator of a teacher termination case exceeded his authority by determining that the remedy for firing, in violation of union contract procedures, was to offer full reinstatement, which would thereby confer tenured status to the teachers. The school district, contrary to its assertion, had the statutory and constitutional authority to enter into collective bargaining agreements, and the provisions at issue were proper subjects of bargaining. The trustees, having entered into the agreement in good faith, were bound by it. When parties agree to binding arbitration, the role of a court in reviewing the arbitrator's findings is a narrow one. Savage Educ. Ass'n v. Trustees, 214 M 289, 692 P2d 1237, 41 St. Rep. 2479 (1984), followed in Nelson v. Livingston Rebuild Center, Inc., 1999 MT 116, 294 M 408, 981 P2d 1185, 56 St. Rep. 486 (1999).

Reassignment From Administrator to Teacher Within Power of School Board — Tenure Laws Not Violated: Sorlie was an elementary teacher for 20 years prior to assuming an administrative position. In 1980, because a mill levy failed, the school board eliminated Sorlie's position and offered her a job as an elementary schoolteacher. Sorlie argued that she was demoted in violation of Montana's tenure laws. The Supreme Court found the two positions to be comparable positions for purpose of tenure although they are functionally dissimilar. The court concluded that the reassignment, without reduction in salary, for legitimate financial constraints, is justifiable and not contrary to tenure laws. Sorlie was removed from her administrative position pursuant to the board's power to financially manage the school district, and this action was in accordance with 39-31-303. Sorlie v. School District, 205 M 22, 667 P2d 400, 40 St. Rep. 1070 (1983), followed in King v. Hays/Lodge Pole Pub. School District No. 50, 2011 MT 200, 361 Mont. 415, 259 P.3d 772, which held that a teacher position and a principal position are comparable positions under 20-4-203, even when one of the positions has not been eliminated for financial reasons.

Substituting Timeclocks Not Managerial Prerogative: The substituting of timeclocks as a more efficient method to record attendance was a change from the established rule since the past attendance policy did not apply to every union member under the contract. Thus, it was not a managerial prerogative but subject to mandatory and binding arbitration. Butte Teachers' Union v. Bd. of Educ., 173 M 215, 567 P2d 51 (1977).

Attorney General's Opinions

District Residency Requirements of School Employees: A school board may, as a condition of employment, require that school district employees be residents of the school district. Nothing in the U.S. or Montana Constitution prohibits the establishment of a continuous residency requirement as long as the policy has a rational basis. 43 A.G. Op. 54 (1990).

39-31-305. Duty to bargain collectively — good faith.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Collective Bargaining Required for Agency to Set Pay: Collective bargaining statutes mandate that the state and the union representative have a duty to bargain collectively and in good faith. This duty expressly requires that the agency and union representative negotiate wages, hours, and fringe benefits. In other words, an agency cannot set the pay of its employees without collective bargaining. Mashek v. Dept. of Public Health and Human Services, 2016 MT 86, 383 Mont. 168, 369 P.3d 348.

Ambiguity in Collective Bargaining Agreement — Duty to Bargain in Good Faith: The Bonner school district involuntarily transferred and reassigned several teachers, which affected the subjects taught and the teachers' areas of expertise. The Bonner Education Association responded by filing an unfair labor practices claim, alleging that the school district had violated 39-31-305 and 39-31-401 by refusing to bargain for the transfers and reassignments. The school district contended that a management rights provision in the collective bargaining agreement allowed the district to unilaterally transfer and reassign teachers because that right was not limited by explicit provisions elsewhere in the agreement. The Supreme Court disagreed, noting that the agreement contained two other clauses that provided conflicting provisions. An integration clause, or zipper clause, seemingly waived the Association's statutory right to bargain for teacher transfers and reassignments as terms and conditions of employment, while a professional advantages clause could be interpreted to protect teachers from involuntary transfers and reassignments. These conflicting clauses made the agreement ambiguous as a matter of law. However, 39-31-305 provides a statutory duty to bargain regarding any question arising under a collective bargaining agreement, and 39-31-401 provides that it is an unfair labor practice to refuse to bargain in good faith. Regarding the school district's argument concerning management rights, the court held that requiring collective bargaining has no effect on an employer's fundamental right to manage and operate and does not impose on management the duty to concede to union demands, but only obligates the employer to bargain in good faith, in conformity with the purpose of state employment law. In light of the ambiguity in the collective bargaining agreement in this case, the school district committed an unfair labor practice by refusing to bargain for teacher transfers and reassignments. Bonner School District No. 14 v. Bonner Educ. Ass'n, 2008 MT 9, 341 M 97, 176 P3d 262 (2008).

School District Refusal to Bargain for Teacher Transfers and Assignments Considered Unfair Labor Practice: The Bonner school district involuntarily transferred and reassigned several teachers, which affected the subjects taught and the teachers' areas of expertise. The Bonner Education Association responded by filing an unfair labor practices claim, alleging that the school district had violated 39-31-305 and 39-31-401 by refusing to bargain for the transfers and reassignments. The Board of Personnel Appeals found that involuntary teacher transfers constituted mandatory subjects of bargaining as conditions of employment and that the Association's right to bargain for transfers and reassignments was preserved in the collective bargaining agreement, so the school district had committed an unfair labor practice by transferring and reassigning teachers without bargaining with the Association. The school district petitioned for judicial review, and the District Court held that teacher transfers and reassignments were not mandatory subjects for collective bargaining. The Association appealed, and the Supreme Court reversed. Citing several federal decisions, the court concluded that, as contemplated by 39-31-305(2), teacher transfers and reassignments constituted other conditions of employment for which the school district, as a public employer, was required to bargain in good faith. Bonner School District No. 14 v. Bonner Educ. Ass'n, 2008 MT 9, 341 M 97, 176 P3d 262 (2008).

Preemployment Travel Payment Considered Wages Subject to Mandatory Bargaining: A school district gave a prospective teacher $2,000 for moving expenses a few days before a contract was formally offered. However, 2 weeks later, an offer was made to another teacher, but a similar request for moving expenses was denied. The teachers' union filed a charge, alleging that the school district failed to bargain in good faith when it paid one teacher's moving expenses. A hearings examiner found that the preemployment incentive payment was additional compensation and a condition of employment and was therefore subject to mandatory bargaining, and the District Court affirmed the holding in favor of the union. On appeal, the Supreme Court also affirmed. Under Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 US 157 (1971), even though the obligation to bargain collectively does not extend to terms and conditions of employment conferred on nonemployees, those terms and conditions may still be subject to mandatory bargaining if they vitally affect the terms and conditions of employment for current employees. An active employee is vitally affected if the nonemployee benefit materially or significantly affects unit employees' terms and conditions of employment. In this case, the moving benefit was considered an offer of employment and wages that materially affected currently employed teachers and should have been subjected to mandatory bargaining. Ekalaka Unified Bd. of Trustees v. Ekalaka Teachers' Ass'n, 2006 MT 337, 335 M 149, 149 P3d 902 (2006).

Arbitrator's Award Granting Reinstatement to Teachers Upheld: The Supreme Court rejected school district's contention that the arbitrator of a teacher termination case exceeded his authority by determining that the remedy for firing, in violation of union contract procedures, was to offer full reinstatement, which would thereby confer tenured status to the teachers. The school district, contrary to its assertion, had the statutory and constitutional authority to enter into collective bargaining agreements, and the provisions at issue were proper subjects of bargaining. The trustees, having entered into the agreement in good faith, were bound by it. When parties agree to binding arbitration, the role of a court in reviewing the arbitrator's findings is a narrow one. Savage Educ. Ass'n v. Trustees, 214 M 289, 692 P2d 1237, 41 St. Rep. 2479 (1984), followed in Nelson v. Livingston Rebuild Center, Inc., 1999 MT 116, 294 M 408, 981 P2d 1185, 56 St. Rep. 486 (1999).

Agreement Not Condition Precedent to Issuance of Contract: The negotiation of a master agreement was not a condition precedent to the issuance of individual teacher contracts, and if there had been a good faith effort to reach agreement, injunction would not lie to prevent school board from issuing individual teacher contracts. State ex rel. Billings Educ. Ass'n v. District Court, 166 M 1, 531 P2d 685 (1974).

Attorney General's Opinions

Pay for Holidays — 10-Hour Days — Collective Bargaining for County Employees: A county may collectively bargain that public employees who work 10-hour days for 4 days per week are to be paid for 10 hours on holidays that fall on their regularly scheduled workday. 53 A.G. Op. 4 (2010).

Mandatory Method of Calculating Longevity — Collective Bargaining Not Applicable: A Board of County Commissioners sought to implement a collective bargaining agreement provision that authorized longevity increases to Deputy Sheriffs, predicated on years of service, including any years during which the Deputy's base salary was set at the same level as the previous year. However, 7-4-2510 constitutes a mandatory condition of employment that a Board of County Commissioners may not deviate from or alter through collective bargaining. Therefore, the collective bargaining agreement provision was held unenforceable to the extent it permitted inclusion of service years for the purpose of calculating longevity pay increases expressly excluded under 7-4-2510. 43 A.G. Op. 34 (1989). See also 42 A.G. Op. 37 (1987).

Prohibition on Separate Health Benefit Plan: A county with general government powers may not establish a separate health benefit plan for certain employees in a collective bargaining unit when a county employee-wide group insurance plan adopted under 2-18-702 already exists. 42 A.G. Op. 37 (1987).

Employee Benefits: Title 2, ch. 18, part 6, establishes maximum and minimum benefits which may not be varied through collective bargaining or other negotiation. 38 A.G. Op. 20 (1979).

39-31-306. Collective bargaining agreements.

Compiler's Comments

1993 Amendment: Chapter 582 in (2) inserted exception clause; inserted (5) providing that if a school is a party to it, an agreement must contain a grievance procedure culminating in final and binding arbitration, that grievant may have either final and binding arbitration or any other available legal method and forum, but not both, that after submission to arbitration, grievant and the exclusive representative waive any right to pursue an action or complaint seeking the same remedy, and that if a complaint or other action is filed, arbitration seeking the same remedy is forbidden; and made minor changes in style. Amendment effective April 28, 1993.

Applicability: Section 2, Ch. 582, L. 1993, provided that [this act] applies to agreements entered into on or after [the effective date of this act], except that subsection (5) is applicable to agreements for school years that begin on or after July 1, 1996. Effective April 28, 1993.

Case Notes

Collective Bargaining Required for Agency to Set Pay: Collective bargaining statutes mandate that the state and the union representative have a duty to bargain collectively and in good faith. This duty expressly requires that the agency and union representative negotiate wages, hours, and fringe benefits. In other words, an agency cannot set the pay of its employees without collective bargaining. Mashek v. Dept. of Public Health and Human Services, 2016 MT 86, 383 Mont. 168, 369 P.3d 348.

Arbitration of Teacher's Grievance Under Collective Bargaining Agreement Upheld — No Error by District Court: A tenured teacher's employment was terminated after he inadvertently failed to renew his teaching certificate. Following his termination, the teacher obtained a retroactive certificate and sought to file a grievance pursuant to a collective bargaining agreement that was in effect when he was hired. The school district refused to participate, arguing the teacher's contract was void because he did not hold a current certificate. The District Court granted a petition to compel arbitration, and the Supreme Court affirmed. A presumption of arbitrability is to be applied if an arbitration agreement is ambiguous, and sufficient questions existed regarding the validity of the contract and the application of the collective bargaining agreement after the teacher's certificate expired. Kalispell Educ. Ass'n v. Bd. of Trustees, 2011 MT 154, 361 Mont. 115, 255 P.3d 199.

No Error in Finding Hourly, Rather Than Annual, Wage Agreement Applicable: A collective bargaining agreement between firefighters and the city of Billings was disputed when the firefighters alleged that the city failed to pay for all hours worked and for leave time. The District Court determined that the contract was an hourly wage contract and that the firefighters were entitled to unpaid wages and leave time. The city asserted that the agreement was an annual salary contract and that the hourly wage provisions did not apply. The Supreme Court examined the agreement and affirmed. Despite the mention of an annual base salary, the contract listed and clearly provided for actual hourly wages, and there was no basis for treating the contract as an annual salary contract. It would have been illogical to provide an actual hourly wage but not pay for each hour worked. Thus, the District Court did not err in concluding that the firefighters were entitled to unpaid wages and leave time. Kuhr v. Billings, 2007 MT 201, 338 M 402, 168 P3d 615 (2007).

School Required to Include Grievance Procedure in Collective Bargaining Agreement — Preselection and Mutual Consent Not Allowed: When read as a whole, this section requires a school to include in a collective bargaining agreement a grievance procedure that culminates in final and binding arbitration of disputed interpretations of the agreement and to comply with an aggrieved party's election of arbitration as its chosen method for resolving the dispute. Once an aggrieved party has elected a dispute resolution method or forum, the party is bound by the election and cannot seek the same remedy by a different method or forum. A mutual consent provision allowing arbitration of nondisciplinary matters only upon mutual consent, insofar as the provision limits or denies an aggrieved party the statutory right to elect arbitration or another means of dispute resolution, is contrary to the express provisions of this section and is unlawful and void. Further, a school district may not preselect methods of resolution for particular disputes. Thus, by failing to arbitrate when an employee elected to do so, the school district in this case violated its clear statutory duty. Belgrade Educ. Ass'n v. Belgrade School District No. 44, 2004 MT 318, 324 M 50, 102 P3d 517 (2004), distinguishing Mackay v. St., 2003 MT 274, 317 M 467, 79 P3d 236 (2003).

Writ of Mandate Proper to Compel Arbitration of Collective Bargaining Agreement: Plaintiffs sought a writ of mandate to compel defendants to arbitrate an employee grievance, but the District Court denied the writ. On appeal, the Supreme Court held that plaintiffs established a clear legal duty to arbitrate, and absent a plain, speedy, and adequate remedy to compel arbitration, issuance of the writ of mandate was appropriate. The Supreme Court reversed and remanded for further proceedings. Belgrade Educ. Ass'n v. Belgrade School District No. 44, 2004 MT 318, 324 M 50, 102 P3d 517 (2004).

Collective Bargaining Agreement Not Considered Contract of Adhesion: When plaintiff filed a wrongful discharge claim, defendant pointed out that the employment was covered by a union collective bargaining agreement (CBA) and that 39-2-912 precludes an employee covered by a CBA from seeking relief under the Wrongful Discharge From Employment Act. At argument in District Court on defendant's motion for summary judgment, plaintiff argued that the CBA was a contract of adhesion. The District Court held that the CBA was not a contract of adhesion and granted summary judgment, and on appeal the Supreme Court agreed. A contract of adhesion is a contract with terms dictated by one contracting party to another party who has no voice in the contract's formulation, and such contracts are unenforceable if they are not within the reasonable expectations of the weaker party or if they are unduly oppressive, unconscionable, or against public policy. Because CBAs arise only after a public employer and a union representative have bargained collectively and in good faith, it cannot be said that one party dictates the terms of a CBA to another, so a CBA cannot be considered a contract of adhesion. The court noted that under Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 M 123, 54 P3d 1 (2002), a contract of adhesion may also be found in cases when an contract arbitration provision is presented on a standardized form without the opportunity for negotiation. Arbitration provisions are also negotiated in a CBA rather than dictated by standardized form, so Kloss did not apply. Summary judgment was affirmed. LaFournaise v. Mont. Developmental Center, 2003 MT 240, 317 M 283, 77 P3d 202 (2003).

Preclusion of Wrongful Discharge Suit by Collective Bargaining Agreement Not Unconstitutional Impediment to Access to Courts: When plaintiff filed a wrongful discharge claim, defendant pointed out that the employment was covered by a union collective bargaining agreement (CBA) and that 39-2-912(2) precludes an employee covered by a CBA from seeking relief under the Wrongful Discharge From Employment Act. Plaintiff argued that if she was precluded from bring a wrongful discharge claim solely because her employment was covered by a CBA, then 39-2-912 unconstitutionally violated her access to courts, full redress, and a jury trial. However, constitutionality of a statute is presumed unless the person challenging it proves unconstitutionality beyond a reasonable doubt. Here, plaintiff presented nothing to overcome the presumption of constitutionality. Plaintiff's argument concerning lack of legal redress also failed because a possible action against the union was still available. LaFournaise v. Mont. Developmental Center, 2003 MT 240, 317 M 283, 77 P3d 202 (2003).

Collective Bargaining — Arbitration — Once Matter Determined to Be Arbitrable Procedure, Wholly Within Jurisdiction of Arbitrator: The union filed a grievance on an employee's behalf, challenging the employee's transfer as a violation of the collective bargaining agreement. Later, the employee reached a retirement agreement with Montana Power Company (MPC) that included a release by the employee of grievances against MPC. MPC claimed that the arbitrability of the grievance was precluded by the private contract entered into by MPC and the employee. MPC went to court seeking an alternative writ of prohibition to prevent arbitration. The court issued a writ of prohibition and, after hearing, made the writ permanent. The union appealed to the Supreme Court, which held that this was a procedural, rather than a substantive, challenge to the collective bargaining agreement and that once a grievance is determined to be arbitrable according to the collective bargaining agreement, subsequent procedural questions are wholly within the jurisdiction of the arbitrator. Int'l Bhd. of Elec. Workers v. Mont. Power Co., 280 M 55, 929 P2d 839, 53 St. Rep. 1296 (1996).

Statutory Duty of City Council to Hold Termination Hearing Not Superseded by City Policy or Collective Bargaining Agreement: Phillips was terminated from his employment as a full-time firefighter for the city of Livingston. Before his termination, the city manager held a termination hearing. Phillips argued that the hearing was held in violation of 7-33-4124, requiring the hearing to be held before the City Council. The city responded that the termination procedures followed were provided in the city policy and procedures manual that was included in the firefighters' collective bargaining agreement and that the provisions of that agreement controlled pursuant to subsection (3) of this section. The Supreme Court noted that the agreement adopted the city's procedures manual that allowed the manager to hold the hearing but that the agreement also referenced termination action "by the appropriate authority". Because the appropriate authority under 7-33-4124 was the City Council, the Supreme Court held that the agreement and the city's policies did not supersede state statute. Phillips v. Livingston, 268 M 156, 885 P2d 528, 51 St. Rep. 1227 (1994), followed, as to the inability of a city charter to supersede the statutory duty of a City Council to hold a disciplinary hearing, in Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Not All Disputes Subject to Arbitration by Mere Presence of Grievance Clause: Statutes governing collective bargaining for public employees do not provide a basis for requiring arbitration. Although a bargaining agreement may contain a grievance procedure culminating in arbitration, the mere existence of that provision does not require all controversies to be arbitrated, nor does entry by a party into a bargaining agreement containing a grievance procedure imply consent to submitting all disputes to arbitration. Under 27-5-115, the District Court must determine the arbitrability of a controversy when one party denies that the issue requires arbitration. If the court determines that an agreement to arbitrate the controversy does not exist, denial of an application for arbitration is proper. Missoula County High School Educ. Ass'n v. Bd. of Trustees, 259 M 438, 857 P2d 696, 50 St. Rep. 870 (1993).

Alleged Violations of Collective Bargaining Agreement Preempted by Federal Labor Law: Although a collective bargaining agreement did not specifically address standards to be applied in a situation where an employee was discharged, tort claims alleging negligence and breach of good faith were substantially dependent on terms in the contract establishing wage schedules, union representation, and adherence to a grievance and arbitration procedure. In determining that summary judgment was proper, the Supreme Court cited Allis-Chalmers v. Lueck, 471 US 202, 85 L Ed 2d 206, 105 S Ct 1904 (1985), and reasoned that preemption of the tort claims by federal law was necessary to ensure a unified body of labor contract law and to preserve the central role of arbitration in labor disputes. Smith v. Mont. Power Co., 225 M 166, 731 P2d 924, 44 St. Rep. 124 (1987). See also Anderson v. TW Corp., 228 M 1, 741 P2d 397, 44 St. Rep. 1293 (1987), where it was held that a party may not avoid the preemptive effect of federal labor law when a dispute involves an interpretation of a union contract by pleading in tort and that vacation pay is one item preempted by operation of federal law. But see Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720, 49 St. Rep. 638 (1992), which relied on Lingle v. Norge Div. of Magic Chef, Inc., 486 US 399, 100 L Ed 2d 410, 108 S Ct 1877 (1988), to partially overrule Brinkman v. St., 224 M 238, 729 P2d 1301 (1986), and subsequent cases, including Smith, to the extent that a state law claim is preempted by federal law only when its resolution requires construing the collective bargaining agreement, even if the state law analysis involves the same factual considerations as the contractual determination under the collective bargaining agreement of whether the employee was discharged for just cause. Foster was followed in Hanley v. Safeway Stores, Inc., 254 M 379, 838 P2d 408, 49 St. Rep. 755 (1992), Miller v. Glacier County, 257 M 422, 851 P2d 401, 50 St. Rep. 339 (1993), and Pike v. Burlington N. RR Co., 273 M 390, 903 P2d 1352, 52 St. Rep. 1005 (1995). Miller was followed in Int'l Bhd. of Elec. Workers v. Mont. Power Co., 280 M 55, 929 P2d 839, 53 St. Rep. 1296 (1996).

Explicit Contractual Provision Giving Greater Protection Than Implied Covenant of Good Faith and Fair Dealing — No Application of Covenant: Where a collective bargaining agreement provided explicitly that employees could be discharged "only for just cause", the Supreme Court declined to imply the covenant of good faith and fair dealing to the employment relationship since the contractual agreement provided greater protection than the implied covenant. Such a covenant generally applies to "at will" employment contracts. Brinkman v. St., 224 M 238, 729 P2d 1301, 43 St. Rep. 2163 (1986). See also Riley v. Warm Springs St. Hosp., 229 M 518, 748 P2d 455, 44 St. Rep. 2183 (1987).

Collective Bargaining Grievance Procedure to Be Utilized Prior to Court Action: An employee must use the contract grievance procedure contained in a collective bargaining agreement prior to seeking a remedy in District Court. Plaintiff argued that his constitutional right to due process was violated and that right cannot be waived by private contract, thereby allowing him to proceed directly to District Court. The court disagreed, holding that the grievance procedure contained in the collective bargaining agreement satisfied any due process requirement. Small v. McRae, 200 M 497, 651 P2d 982, 39 St. Rep. 1896 (1982), followed in Brinkman v. St., 224 M 238, 729 P2d 1301, 43 St. Rep. 2163 (1986), Fellows v. Sears, Roebuck & Co., 244 M 7, 795 P2d 484, 47 St. Rep. 1385 (1990), and in Lueck v. United Parcel Serv., 258 M 2, 851 P2d 1041, 50 St. Rep. 401 (1993).

Arbitration of Teacher Contract Nonrenewal: Nonrenewal of nontenured teacher's contract was not a "grievance" within a collective bargaining agreement with the school board and subject to arbitration provisions of the agreement when not allowed under former law regarding negotiations for teachers. Wibaux Educ. Ass'n v. Wibaux County High School, 175 M 331, 573 P2d 1162 (1978).

Repeal of Ordinance Establishing Contract Right: A contract was created for the benefit of firefighters by the city's adoption of a resolution concerning longevity pay. Therefore, a subsequent resolution repealing the provision was unconstitutional as applied to firefighters covered by the contract in effect between the city and labor organization representing the firefighters at time of the repeal. Local 8 Int'l Ass'n of Firefighters v. Great Falls, 174 M 53, 568 P2d 541, 34 St. Rep. 991 (1977), explained and distinguished in In re the Wage Appeal of Highway Patrol Officers v. Bd. of Personnel Appeals, 208 M 33, 676 P2d 194, 41 St. Rep. 154 (1984).

Attorney General's Opinions

When Collective Bargaining Agreement That Includes Payments in Lieu of Group Health Plan Participation May Be Altered: When a collective bargaining agreement includes a provision for payments to county employees in lieu of participation in a group health plan, that provision may not be altered by the Board of County Commissioners without the written agreement of the collective bargaining unit. 51 A.G. Op. 11 (2005). See also 43 A.G. Op. 79 (1990).

39-31-309. Factfinding proceedings.

Compiler's Comments

1995 Amendment: Chapter 90 at beginning of (5) inserted "When a party petitions the board to initiate factfinding" and after "equally borne by" deleted "the board and" and inserted second sentence providing that when the Board initiates factfinding, the cost of the factfinding proceedings must be borne equally by the Board and the parties; and made minor changes in style. Amendment effective March 9, 1995.

39-31-310. Submission of issues to arbitration.

Case Notes

Collective Bargaining — Arbitration — Once Matter Determined to Be Arbitrable Procedure, Wholly Within Jurisdiction of Arbitrator: The union filed a grievance on an employee's behalf, challenging the employee's transfer as a violation of the collective bargaining agreement. Later, the employee reached a retirement agreement with Montana Power Company (MPC) that included a release by the employee of grievances against MPC. MPC claimed that the arbitrability of the grievance was precluded by the private contract entered into by MPC and the employee. MPC went to court seeking an alternative writ of prohibition to prevent arbitration. The court issued a writ of prohibition and, after hearing, made the writ permanent. The union appealed to the Supreme Court, which held that this was a procedural, rather than a substantive, challenge to the collective bargaining agreement and that once a grievance is determined to be arbitrable according to the collective bargaining agreement, subsequent procedural questions are wholly within the jurisdiction of the arbitrator. Int'l Bhd. of Elec. Workers v. Mont. Power Co., 280 M 55, 929 P2d 839, 53 St. Rep. 1296 (1996).

Monetary Limit on Employment Dispute as Precluding Arbitration: A labor agreement, which contained a provision that any grievance involving a monetary issue in excess of $500 was subject to arbitration only if mutually agreed upon, was properly relied on by the District Court in excusing an employer from arbitrating a claim in excess of $500. Local 1334 v. Great Falls, 233 M 432, 760 P2d 99, 45 St. Rep. 1611 (1988).

Section Permissive: This section is permissive, not mandatory. Young v. Great Falls, 198 M 349, 646 P2d 512, 39 St. Rep. 1047 (1982).

39-31-311. Training of fact finders and arbitrators.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 4

Unfair Labor Practices

Part Case Notes

Statutory Discrimination and Wage Claims Not Clearly Covered in Collective Bargaining Agreement — Arbitration Not Required Prior to Filing in District Court: When the terms of a collective bargaining agreement did not clearly and unmistakably cover plaintiffs' statutory discrimination and wage claims, arbitration of the claims pursuant to the agreement was not required as a precondition to filing suit in District Court. Edwards v. Cascade County Sheriff's

Dept., 2009 MT 451, 354 M 307, 223 P3d 893 (2009), following Wright v. Universal Maritime Serv. Corp., 525 US 70 (1998).

Failure to Follow Mandatory Collective Bargaining Agreement Grievance Procedure — "May" Construed — Suit Precluded: Two nursing instructors were harassed by a student and sued the Board of Regents and the University System for failure to maintain a safe working environment, common-law constructive discharge, statutory constructive discharge, and breach of the covenant of good faith and fair dealing. Although the instructors were not union members, their employment was governed by a collective bargaining agreement that included a grievance procedure. The instructors interpreted the grievance procedure as permissive rather than mandatory because it stated that an employee may file a grievance. The Supreme Court disagreed. Use of the word "may" meant that if an employee chose to seek a remedy, it could be done through a written grievance, but the employee may also choose not to file a grievance. However, the word "may" did not mean that use of the grievance procedure was not mandatory. The court held that use of the grievance procedure was not permissive, but clearly mandatory. The collective bargaining agreement covered the dispute and was interpreted as requiring use of the grievance procedure. An employee who is covered by a collective bargaining agreement that contains a grievance procedure must exhaust that remedy before bringing suit, and having failed to avail themselves of the remedy available through the collective bargaining agreement, the instructors were foreclosed from maintaining the suit. The Supreme Court ordered dismissal of the complaint. Mackay v. St. Bd. of Regents, 2003 MT 274, 317 M 467, 79 P3d 236 (2003), following Small v. McRae, 200 M 497, 651 P2d 982 (1982), and Brinkman v. St., 224 M 238, 729 P2d 1301 (1986), and followed in Russell v. Masonic Home of Mont., Inc., 2006 MT 286, 334 M 351, 147 P3d 216 (2006). See also Edwards v. Cascade County Sheriff's Dept., 2009 MT 451, 354 M 307, 223 P3d 893 (2009), where irrespective of whether discrimination claims were covered by a collective bargaining agreement, the claims were barred for failure to comply with the Montana Human Rights Act.

Effort to Compel Arbitration — Alleged Violation of Duty to Bargain Not Properly Resolved by Arbitration: An employees' association asserted that a board of trustees failed to bargain collectively and that the violation constituted a grievance subject to arbitration. However, alleged violations of the duty to bargain collectively are subject to procedures and remedies set forth in the unfair labor practices statutes and are not properly resolved by arbitration. Further, the board's failure to collectively bargain was not a violation of a specific provision of the bargaining agreement and therefore did not constitute a grievance under the terms of the agreement. Missoula County High School Educ. Ass'n v. Bd. of Trustees, 259 M 438, 857 P2d 696, 50 St. Rep. 870 (1993), following Int'l Union v. Acme Precision Prod., 521 F. Supp. 1358 (E.D. Mich. 1981), and distinguishing First Nat'l Maintenance Corp. v. NLRB, 452 US 666, 107 LRRM 2705 (1981).

Alleged Violations of Collective Bargaining Agreement Preempted by Federal Labor Law: Although a collective bargaining agreement did not specifically address standards to be applied in a situation where an employee was discharged, tort claims alleging negligence and breach of good faith were substantially dependent on terms in the contract establishing wage schedules, union representation, and adherence to a grievance and arbitration procedure. In determining that summary judgment was proper, the Supreme Court cited Allis-Chalmers v. Lueck, 471 US 202, 85 L Ed 2d 206, 105 S Ct 1904 (1985), and reasoned that preemption of the tort claims by federal law was necessary to ensure a unified body of labor contract law and to preserve the central role of arbitration in labor disputes. Smith v. Mont. Power Co., 225 M 166, 731 P2d 924, 44 St. Rep. 124 (1987). See also Anderson v. TW Corp., 228 M 1, 741 P2d 397, 44 St. Rep. 1293 (1987), where it was held that a party may not avoid the preemptive effect of federal labor law when a dispute involves an interpretation of a union contract by pleading in tort and that vacation pay is one item preempted by operation of federal law. But see Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720, 49 St. Rep. 638 (1992), which relied on Lingle v. Norge Div. of Magic Chef, Inc., 486 US 399, 100 L Ed 2d 410, 108 S Ct 1877 (1988), to partially overrule Brinkman v. St., 224 M 238, 729 P2d 1301 (1986), and subsequent cases, including Smith, to the extent that a state law claim is preempted by federal law only when its resolution requires construing the collective bargaining agreement, even if the state law analysis involves the same factual considerations as the contractual determination under the collective bargaining agreement of whether the employee was discharged for just cause. Foster was followed in Hanley v. Safeway Stores, Inc., 254 M 379, 838 P2d 408, 49 St. Rep. 755 (1992), in Miller v. Glacier County, 257 M 422, 851 P2d 401, 50 St. Rep. 339 (1993), and Winslow v. Mont. Rail Link, Inc., 2000 MT 292, 302 M 289, 16 P3d 992, 57 St. Rep. 1238 (2000).

Fiduciary Duty of Union Officers: It was proper to instruct the jury on the duty of fiduciary responsibility owed by union officers by comparing it to a trust relationship; stating that, as fiduciaries, the officers were required to act prudently; and allowing the jury to consider the duties, powers, and obligations in the union constitution and bylaws. Local Union No. 400 v. Bosh, 220 M 304, 715 P2d 36, 43 St. Rep. 388 (1986).

Burdens of Proof in Case Involving Claimed Breach of Fiduciary Duty by Union Officers: In a dispute between a union and its former business managers, the District Court gave a general instruction that the party who asserts the affirmative of an issue has the burden of proving that issue by a preponderance of the evidence. The court further instructed the jury that if a fiduciary profits personally from the use of union funds, the burden shifts to the fiduciary to show he acted reasonably. Finally, the court instructed that a person with the duty to keep proper accounts has the burden of proving that he is entitled to the credits he claims. These instructions were consistent, clear, and accurate. Local Union No. 400 v. Bosh, 220 M 304, 715 P2d 36, 43 St. Rep. 388 (1986).

Union Management Dispute — No Specific Form Required for Accounting Request: Generally the demand for accounting need not be in any particular form, so long as it is sufficiently explicit to leave no room for doubt in a defendant's mind that the plaintiff intended to demand an accounting. Local Union No. 400 v. Bosh, 220 M 304, 715 P2d 36, 43 St. Rep. 388 (1986).

Sufficient Evidence Supporting Jury Verdict Against Union Officials for Misappropriation of Funds: A union sued former officers and business managers, alleging, among other things, misappropriation and conversion of union funds and constructive fraud. The union prevailed, and money damages were awarded to the union. On appeal, the Supreme Court ruled that the evidence supported the award of money damages even though no one had testified at trial as to the specific amount of money defendants allegedly owed to the union. The jury heard evidence on mismanagement and self-dealing with regard to union property and on the financial losses of the union during defendant Bosh's administration. Testimony of the union indicated that defendants had not kept adequate financial records. The evidence may have contained contradictions, but it was substantial and adequate. Local Union No. 400 v. Bosh, 220 M 304, 715 P2d 36, 43 St. Rep. 388 (1986).

Union-Employer Trust Fund for Employees and Union — Suing Employer in Separate Actions: A union sued an electrical contractor in federal court, claiming that the contractor failed to hire persons referred by the union and failed to require persons he hired to join the union and that persons referred who were not hired lost compensation and contributions to a benefit trust fund administered by the union and an electrical contractors' association. The assignee of the trust fund's claim against the contractor sued the contractor in a state District Court for contributions due the trust fund. The federal action was dismissed with prejudice by stipulation of the union and contractor. The state District Court then held that the state action was barred by res judicata. That ruling was erroneous, for the rights and claims sought to be enforced in the two actions were not the same and the claimants in the two actions were not in privity. Their functions and duties were different. Audit Services, Inc. v. Anderson, 211 M 323, 684 P2d 491, 41 St. Rep. 1388 (1984).

Collective Bargaining Grievance Procedure to Be Utilized Prior to Court Action: An employee must use the contract grievance procedure contained in a collective bargaining agreement prior to seeking a remedy in District Court. Plaintiff argued that his constitutional right to due process was violated and that right cannot be waived by private contract, thereby allowing him to proceed directly to District Court. The court disagreed, holding that the grievance procedure contained in the collective bargaining agreement satisfied any due process requirement. Small v. McRae, 200 M 497, 651 P2d 982, 39 St. Rep. 1896 (1982), followed in Brinkman v. St., 224 M 238, 729 P2d 1301, 43 St. Rep. 2163 (1986), Fellows v. Sears, Roebuck & Co., 244 M 7, 795 P2d 484, 47 St. Rep. 1385 (1990), Lueck v. United Parcel Serv., 258 M 2, 851 P2d 1041, 50 St. Rep. 401 (1993), and Mackay v. St. Bd. of Regents, 2003 MT 274, 317 M 467, 79 P3d 236 (2003).

39-31-401. Unfair labor practices of public employer.

Compiler's Comments

2021 Amendment: Chapter 233 in (3) at end deleted "However, nothing in this chapter or in any other statute of this state precludes a public employer from making an agreement with an exclusive representative to require, as a condition of employment, that an employee who is not or does not become a union member must have an amount equal to the union initiation fee and monthly dues deducted from the employee's wages in the same manner as checkoff of union dues"; and made minor changes in style. Amendment effective October 1, 2021.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Pursuit in Court of Certain Wrongful Discharge Claims Precluded by Collective Bargaining Agreement — Claims of Deceit and Emotional Distress Not Precluded: Klein was suspended with pay from her position as a probation and parole officer, and following a meeting with Department of Corrections officials and a Department investigation, Klein's employment was terminated on grounds that she had obstructed and interfered with a police investigation. Klein filed a grievance with the Department, stating that she was fired without just cause and seeking reinstatement in her former position, back pay, and benefits. The grievance was arbitrated in Klein's favor, but before entry of the arbitrator's final decision, Klein filed suit in District Court, alleging: (1) violation of due process: (2) Department deceit through willful misrepresentation of the purpose of the meeting with Department officials; (3) negligent investigation of the incident by the Department; and (4) negligent infliction of severe emotional distress caused by the Department's actions throughout the affair. The District Court concluded that the terms of the collective bargaining agreement required Klein to exhaust all remedies through arbitration and that because those remedies had not been exhausted, Klein was prohibited from litigating the dispute. Klein appealed, and the Supreme Court affirmed in part and reversed in part. The court affirmed dismissal of claims 1 and 3 on grounds that judicial pursuit of the claims was precluded by the terms of the collective bargaining agreement and that Klein had addressed those issues through arbitration. However, the court reversed the dismissal of claims 2 and 4 because those issues were not contemplated in or precluded by the collective bargaining agreement and because those claims were not barred by the Wrongful Discharge From Employment Act and were wholly independent from any rights or remedies related to Klein's discharge that were previously addressed in the grievance process. Therefore, the issues of Department deceit and emotional distress were remanded to the District Court for further proceedings. Klein v. St., 2008 MT 189, 343 M 520, 185 P3d 986 (2008). See also Lueck v. United Parcel Serv., 258 M 2, 851 P2d 1041 (1993), and Winchester v. Mountain Line, 1999 MT 134, 294 M 517, 982 P2d 1024 (1999).

Ambiguity in Collective Bargaining Agreement — Duty to Bargain in Good Faith: The Bonner school district involuntarily transferred and reassigned several teachers, which affected the subjects taught and the teachers' areas of expertise. The Bonner Education Association responded by filing an unfair labor practices claim, alleging that the school district had violated 39-31-305 and 39-31-401 by refusing to bargain for the transfers and reassignments. The school district contended that a management rights provision in the collective bargaining agreement allowed the district to unilaterally transfer and reassign teachers because that right was not limited by explicit provisions elsewhere in the agreement. The Supreme Court disagreed, noting that the agreement contained two other clauses that provided conflicting provisions. An integration clause, or zipper clause, seemingly waived the Association's statutory right to bargain for teacher transfers and reassignments as terms and conditions of employment, while a professional advantages clause could be interpreted to protect teachers from involuntary transfers and reassignments. These conflicting clauses made the agreement ambiguous as a matter of law. However, 39-31-305 provides a statutory duty to bargain regarding any question arising under a collective bargaining agreement, and 39-31-401 provides that it is an unfair labor practice to refuse to bargain in good faith. Regarding the school district's argument concerning management rights, the court held that requiring collective bargaining has no effect on an employer's fundamental right to manage and operate and does not impose on management the duty to concede to union demands, but only obligates the employer to bargain in good faith, in conformity with the purpose of state employment law. In light of the ambiguity in the collective bargaining agreement in this case, the school district committed an unfair labor practice by refusing to bargain for teacher transfers and reassignments. Bonner School District No. 14 v. Bonner Educ. Ass'n, 2008 MT 9, 341 M 97, 176 P3d 262 (2008).

School District Refusal to Bargain for Teacher Transfers and Assignments Considered Unfair Labor Practice: The Bonner school district involuntarily transferred and reassigned several teachers, which affected the subjects taught and the teachers' areas of expertise. The Bonner Education Association responded by filing an unfair labor practices claim, alleging that the school district had violated 39-31-305 and 39-31-401 by refusing to bargain for the transfers and reassignments. The Board of Personnel Appeals found that involuntary teacher transfers constituted mandatory subjects of bargaining as conditions of employment and that the Association's right to bargain for transfers and reassignments was preserved in the collective bargaining agreement, so the school district had committed an unfair labor practice by transferring and reassigning teachers without bargaining with the Association. The school district petitioned for judicial review, and the District Court held that teacher transfers and reassignments were not mandatory subjects for collective bargaining. The Association appealed, and the Supreme Court reversed. Citing several federal decisions, the court concluded that, as contemplated by 39-31-305(2), teacher transfers and reassignments constituted other conditions of employment for which the school district, as a public employer, was required to bargain in good faith. Bonner School District No. 14 v. Bonner Educ. Ass'n, 2008 MT 9, 341 M 97, 176 P3d 262 (2008).

Preemployment Travel Payment Considered Wages Subject to Mandatory Bargaining: A school district gave a prospective teacher $2,000 for moving expenses a few days before a contract was formally offered. However, 2 weeks later, an offer was made to another teacher, but a similar request for moving expenses was denied. The teachers' union filed a charge, alleging that the school district failed to bargain in good faith when it paid one teacher's moving expenses. A hearings examiner found that the preemployment incentive payment was additional compensation and a condition of employment and was therefore subject to mandatory bargaining, and the District Court affirmed the holding in favor of the union. On appeal, the Supreme Court also affirmed. Under Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 US 157 (1971), even though the obligation to bargain collectively does not extend to terms and conditions of employment conferred on nonemployees, those terms and conditions may still be subject to mandatory bargaining if they vitally affect the terms and conditions of employment for current employees. An active employee is vitally affected if the nonemployee benefit materially or significantly affects unit employees' terms and conditions of employment. In this case, the moving benefit was considered an offer of employment and wages that materially affected currently employed teachers and should have been subjected to mandatory bargaining. Ekalaka Unified Bd. of Trustees v. Ekalaka Teachers' Ass'n, 2006 MT 337, 335 M 149, 149 P3d 902 (2006).

Clear Language of Collective Bargaining Agreement Excluding State Unfair Labor Practice Charge From Grievance and Arbitration Procedure — Deferral to Arbitration Procedure Improper: Winchester asserted that his employer, Mountain Line, committed unfair labor practices by discharging him for union activities and because he was shop steward. Mountain Line contended that Winchester was discharged for violation of the employee's handbook. The District Court decided that Winchester's unfair labor practice claim was subject to the final and binding arbitration clause in the collective bargaining agreement and held that the Board of Personnel Appeals properly deferred to the arbitration procedure. One section of the discrimination provisions in the collective bargaining agreement obviously covered Winchester's claim regarding union activities. However, the clear language of the very next section specifically excluded any alleged violation of state statutes from the arbitration procedure. The Supreme Court cited Small v. McRae, 200 M 497, 651 P2d 982, 39 St. Rep. 1896 (1982), for the proposition that only in those cases in which it is certain that the arbitration clause is not susceptible to an interpretation that covers the dispute is an employee entitled to sidestep the provisions of the collective bargaining agreement. Therefore, the District Court erred in ruling that the Board properly deferred to the arbitration procedure in addressing the state law violations. The case was remanded for further proceedings. Winchester v. Mountain Line, 1999 MT 134, 294 M 517, 982 P2d 1024, 56 St. Rep. 540 (1999).

Metropolitan Police Law Exclusive Remedy — Collective Bargaining Agreement Grievance Procedure Inapplicable: A police officer terminated pursuant to the metropolitan police law, Title 7, ch. 32, part 41, pursued remedies under the grievance procedure of his union's collective bargaining agreement. The Supreme Court noted that under the agreement a grievance arose only on a misapplication of a provision of the agreement. Neither party claimed a misapplication of the method of discharge. By the agreement's own terms, the metropolitan police law was applicable and provided adequate administrative and judicial determination and review. Butte-Silver Bow did not commit an unfair labor practice by refusing to grieve the matter as being outside the grievance procedure provided by 7-32-4164. City/County of Butte-Silver Bow v. Bd. of Personnel Appeals, 225 M 286, 732 P2d 835, 44 St. Rep. 237 (1987).

Derivative as Opposed to Independent Violation: Where it was held that the employer's conduct was motivated by a legitimate and substantial business reason, there can be no independent violation of this section. Missoula County High School District v. Bd. of Personnel Appeals, 224 M 50, 727 P2d 1327, 43 St. Rep. 2008 (1986).

Discrimination Not Solely Based on Union Activity: The Supreme Court held that a school district's actions were not inherently destructive or antiunion motivated when the district discriminated in favor of nonstriking teachers because they took the affirmative step of agreeing to teach for 18 days and to forego other options for those days. The court noted that payments to the nonstriking teachers were made more than 1 year after the strike and only after threat of a lawsuit. Further, the conduct was not equivalent to permanently discharging strikers or granting superseniority to nonstrikers. Missoula County High School District v. Bd. of Personnel Appeals, 224 M 50, 727 P2d 1327, 43 St. Rep. 2008 (1986).

Legitimate Business Justification Precluding Unfair Labor Practice: The Supreme Court affirmed the District Court reversal of a Board of Personnel Appeals decision that a high school committed an unfair labor practice by paying certain nonstriking teachers for 18 days of work when those teachers had agreed to work for 18 days but actually worked only 1 day. The Supreme Court held that the school district made a reasonable interpretation of the contract and paid the claim out of a bona fide belief that the claim was valid, which amounted to a substantial legitimate business justification for the payment. Missoula County High School District v. Bd. of Personnel Appeals, 224 M 50, 727 P2d 1327, 43 St. Rep. 2008 (1986).

Unfair Labor Practices — Due Process — Collateral Estoppel: In an action charging unfair labor practices, an employee was collaterally estopped from relitigating the issue of whether his due process rights were violated by the 3-year delay between the filing of his charges and the administrative hearing on the charges. The issue was previously decided, a final judgment was rendered, and the party against whom the claim was advanced remained the same or was privy of the earlier party. Klundt v. St., 222 M 172, 720 P2d 1181, 43 St. Rep. 1148 (1986).

Unfair Labor Practice Established but Claim Moot: In an action by teachers through their labor union to receive a continuing level salary during contract renewal negotiations, the Board of Personnel Appeals found that the school district's failure to advance teachers on the salary schedule contained in the expired collective bargaining agreement constituted a unilateral change in wages and was an unfair labor practice. However, the Board granted no relief because by the time the matter was reviewed a new contract had been negotiated, the teachers were paid at a new salary level, and they had received retroactive pay at the new level. The District Court dismissed the school district's appeal on the ground that the claims were moot. The Supreme Court upheld this ruling, stating this was not an occasion to apply the "capable of repetition, yet evading review" doctrine set forth by the U.S. Supreme Court. School District v. Bd. of Personnel Appeals, 214 M 361, 692 P2d 1261, 42 St. Rep. 21 (1985).

Unfair Labor — Merit Increase Not to Preclude Consideration of Prior Work History: Carlson, an animal warden employed by defendant, was terminated allegedly because of insubordination and noncooperation resulting from an incident involving a schnauzer and because of earlier noncooperation. Carlson filed an unfair labor practice complaint with the Board of Personnel Appeals (BPA) alleging that the actual reason for her termination was her union activity. BPA ruled in favor of Carlson and ordered her reinstated with backpay. On appeal, the District Court reversed on the basis of unlawful procedure, contending that BPA failed to consider Carlson's conduct prior to the time that she received a merit increase in salary. The District Court's position was correct, and BPA was instructed to consider evidence of events prior to the merit increase on remand. The fact of a merit increase does not cause prior work history to vanish; it remains relative and to ignore it is to place an unwarranted artificial limitation on the employer's review process. Bd. of Personnel Appeals v. Billings, 199 M 302, 648 P2d 1169, 39 St. Rep. 1414 (1982).

Unfair Labor Practice — Statute of Limitations Not a Rule of Evidence: Carlson, an animal warden employed by defendant, was terminated allegedly because of insubordination and noncooperation resulting from an incident involving a schnauzer and because of earlier noncooperation. Carlson filed an unfair labor practice complaint with the Board of Personnel Appeals (BPA) alleging that the actual reason for her termination was her union activity. BPA ruled in favor of Carlson and ordered her reinstated with backpay. On appeal, the District Court reversed on the basis of unlawful procedure, contending that BPA gave primary weight to incidents occurring more than 6 months prior to the filing of Carlson's claim in violation of 39-31-404. The Supreme Court held that 39-31-404 requires an employee to file a charge within 6 months after an alleged unfair labor practice; it does not forbid the introduction of relevant evidence bearing on the issue of whether a violation has occurred during the 6-month period. Bd. of Personnel Appeals v. Billings, 199 M 302, 648 P2d 1169, 39 St. Rep. 1414 (1982).

School District's Refusal to Arbitrate: A collective bargaining agreement between a school district and teachers guaranteed certain procedural rights to nontenured teachers upon termination. Terminated nontenured teachers submitted the matter of their nonrenewal to arbitration, but the school district refused to arbitrate. This refusal by the school district amounted to a failure to bargain in good faith and constituted an unfair labor practice. Savage Pub. Schools v. Savage Educ. Ass'n, 199 M 39, 647 P2d 833, 39 St. Rep. 1192 (1982).

Interference, Restraint, or Coercion — Laying Off Employee Who Filed Grievances: City street department employee's record of filing grievances affected the judgment of city officials responsible for laying him off and keeping a worker on the payroll who was of the same class, but with less seniority. This constituted an unfair labor practice within the meaning of this section's provision making it an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by this chapter. Young v. Great Falls, 198 M 349, 646 P2d 512, 39 St. Rep. 1047 (1982).

Tenure Discrimination — Laying Off Employee Who Filed Grievances: City's discriminatory motive, based on employee's record of filing grievances, was a factor and was probably the dominant factor in decision to lay off the employee even though an employee of the same class and with less seniority was not laid off, and city's actions caused unrest among union members working for the city and had the effect of discouraging membership. This constituted an unfair labor practice within the meaning of this section's provision making it an unfair labor practice to discriminate in regard to hiring, tenure, or conditions of employment in order to encourage or discourage membership in any labor organization. Young v. Great Falls, 198 M 349, 646 P2d 512, 39 St. Rep. 1047 (1982).

Violations Following Complaint — Jurisdiction Over: The Board of Personnel Appeals found that an unfair labor practice against employee occurred after he filed an unfair labor practice charge. District Court reversed on the ground that violations alleged in the complaint must occur before filing of the complaint. The Supreme Court reversed the District Court, holding that employee could have amended his complaint to include the postcomplaint discrimination and that employer could not possibly have been prejudiced. Young v. Great Falls, 198 M 349, 646 P2d 512, 39 St. Rep. 1047 (1982).

Complaint in Compliance With Notice Requirements of MAPA: The Billings Education Association's complaint complied with the notice requirements of the Montana Administrative Procedure Act when it alleged that the mailing of individual contracts violated section 59-1605(1)(a) and (e), R.C.M. 1947 (now 39-31-401(1) and (5)), which prohibits coercion of employees in the exercise of certain rights protected by the collective bargaining law. The word "coercion" is not a talisman without which the complaint fails. The allegations were sufficient to inform the board of trustees that the issue of coercion would be litigated. Bd. of Trustees v. State ex rel. Bd. of Personnel Appeals, 185 M 104, 604 P2d 778, 36 St. Rep. 2311 (1979).

Discharge of Teacher — Board's Lack of Knowledge of Protected Union Activity: Based on the recommendation of the principal, a striking teacher was not rehired by a board of trustees. The board had no knowledge of the teacher's union activities, but the principal did. The Supreme Court held that the board had committed an unfair labor practice despite its lack of knowledge of the teacher's union activity, because the board was responsible for the principal's tainted evaluation and in accepting his recommendation, committed the prohibited act of discrimination. This is not the usual employee-employer relationship, and the Legislature did not intend to allow a school board to insulate itself by claiming lack of knowledge when a public employee's rights have been disregarded. Bd. of Trustees v. State ex rel. Bd. of Personnel Appeals, 185 M 89, 604 P2d 770, 36 St. Rep. 2289 (1979).

Dual Motivation for Teacher's Discharge — Burden of Proof — "But For" Test: Where a striking teacher was not rehired by a board of trustees based upon proper reasons related to the teacher's competence and improper reasons related to protected union activity of the teacher, the Supreme Court held that the District Court correctly affirmed the decision of the Board of Personnel Appeals, which in essence utilized the procedure and the "but for" test of Mt. Healthy City Bd. of Educ. v. Doyle, 429 US 274, 97 S Ct 568, 50 L Ed 2d 471 (1977). Under Mt. Healthy, the burden is first placed upon the teacher to show that the protected activity was a motivating factor in the discharge. The board of trustees then has the burden of showing that the teacher would have been discharged even in the absence of the protected activity. Bd. of Trustees v. State ex rel. Bd. of Personnel Appeals, 185 M 89, 604 P2d 770, 36 St. Rep. 2289 (1979).

Dismissal Without Hearing: Because the collective bargaining agreement provided for a hearing prior to dismissal, the city's failure to provide such a hearing for a terminated employee constituted an unfair labor practice. Livingston v. Mont. Council No. 9, 174 M 421, 571 P2d 374 (1977).

Attorney General's Opinions

Refusal of Nonunion Member to Pay Dues — Merit System Council Powers: Section 39-31-401(3) gives legislative approval to agency shop agreements in labor contracts with public employees.

The agreement requires an employee in a bargaining unit to pay to the union an amount equal to union dues if he does not join the union. The Merit System Council cannot intervene on behalf of employees who fail to pay. 36 A.G. Op. 102 (1976).

39-31-402. Unfair labor practices of labor organization.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Duty of Fair Representation — Breach as Unfair Labor Practice — Jurisdiction in BPA and District Court: Appellant was hired by the Great Falls Public Library as a bookmobile driver. Upon receipt of his first paycheck, he discovered he was paid for 20 hours per week as a driver and 20 hours per week as a clerk, at a lower rate. He asked his union to file a grievance on his behalf. He made the same request for over a year. The union continually refused to file a grievance, stating that the union and the city had a long standing oral agreement that drivers would be paid in that manner. Appellant then filed an unfair labor practice charge against the union alleging that it had breached its duty of fair representation. The Board of Personnel Appeals (BPA) concluded that the union had breached its duty of fair representation. The union appealed to District Court, and the court, relying on Ford v. Univ. of Mont., 183 M 112, 598 P2d 604 (1979), decided that the BPA lacked the jurisdiction to decide such a claim. The rule of Ford which recognizes original jurisdiction in state District Courts to decide questions of fair representation is correct and stands, but certain dicta in Ford were based on a misinterpretation of federal labor law, on which Montana law is based, and cannot stand. Ford erroneously concluded that breach of a duty of fair representation was not an unfair labor practice. The Supreme Court also no longer recognizes dicta in Ford, which stated that a finding by BPA on those matters would deprive the District Court of jurisdiction. BPA has jurisdiction to hear claims that a union has breached its duty of fair representation for administrative remedies, and original jurisdiction of such claims lies in the District Court. Teamsters Local 45 v. State ex rel. Bd. of Personnel Appeals, 195 M 272, 635 P2d 1310, 38 St. Rep. 1841 (1981).

Jurisdiction: Defendant union's argument that the District Court had no jurisdiction because plaintiff's exclusive remedy was under Title 34, ch. 31, lacks merit. The chapter provides no remedy for an alleged breach of duty by a union's failure to fairly represent a grievance. The Supreme Court held that the District Court had jurisdiction, as opposed to the federal court. Ford v. Univ. of Mont., 183 M 112, 598 P2d 604, 36 St. Rep. 1485 (1979).

Attorney General's Opinions

Discharge of Employee Refusing to Abide by Agreement: The Merit System Council cannot act on behalf of an employee who has refused to abide by the conditions of a negotiated, ratified collective bargaining agreement and prevent the employee's discharge for failure to contribute to the expenses of an elected bargaining agent. 36 A.G. Op. 102 (1976).

39-31-403. Remedies for unfair labor practices.

Case Notes

Effort to Compel Arbitration — Alleged Violation of Duty to Bargain Not Properly Resolved by Arbitration: An employees' association asserted that a board of trustees failed to bargain collectively and that the violation constituted a grievance subject to arbitration. However, alleged violations of the duty to bargain collectively are subject to procedures and remedies set forth in the unfair labor practices statutes and are not properly resolved by arbitration. Further, the board's failure to collectively bargain was not a violation of a specific provision of the bargaining agreement and therefore did not constitute a grievance under the terms of the agreement. Missoula County High School Educ. Ass'n v. Bd. of Trustees, 259 M 438, 857 P2d 696, 50 St. Rep. 870 (1993), following Int'l Union v. Acme Precision Prod., 521 F. Supp. 1358 (E.D. Mich. 1981), and distinguishing First Nat'l Maintenance Corp. v. NLRB, 452 US 666, 107 LRRM 2705 (1981).

Deference by Board to Grievance Procedure: City street department employee filed unfair labor practice complaint after he was laid off, claiming other employees with less seniority were not laid off. It was proper for the Board of Personnel Appeals not to defer to the grievance procedure provided by the collective bargaining agreement because: (1) the city's conduct did not lead one to believe that a stable collective bargaining relationship existed between the parties; (2) there was no indication of a willingness on the part of the city to arbitrate; (3) the grievance procedure did not culminate in a final and binding decision; and (4) employee alleged interference with protected rights and employment discrimination intending to discourage the free exercise of those rights. The department apparently felt employee was a troublemaker due to his having filed three previous grievances under the collective bargaining agreement. Young v. Great Falls, 198 M 349, 646 P2d 512, 39 St. Rep. 1047 (1982).

39-31-404. Six-month limitation on unfair labor practice complaint — exception.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Duty of Fair Representation — Breach as Unfair Labor Practice — Failure to Properly Process Grievance: Union appealed District Court order affirming decision of Teamsters Local 45 v. State ex rel. Bd. of Personnel Appeals, 195 M 272, 635 P2d 1310, 38 St. Rep. 1841 (1981), finding that the union had breached its duty to represent Great Falls bookmobile driver by failing to process a backpay grievance. The union argued that the court should have limited backpay damages to 6 months prior to the date on which the claim was filed, that the court abused its discretion in requiring notice to be mailed to each employee, and that the court incorrectly concluded that the union's conduct was so unreasonable and arbitrary as to constitute a breach of the duty of fair representation. The Supreme Court stated that limiting damages to 6 months before the filing of the charge would reward the union for procrastination. The District Court did not abuse its discretion in ordering the union to mail a notice to all employees, acknowledging its unlawful refusal to process the employee's grievance. Accordingly, the court affirmed the District Court's finding that the union's conduct in processing the grievance was so unreasonable as to constitute a breach of duty of fair representation. Teamsters Local No. 45 v. State ex rel. Bd. of Personnel Appeals, 223 M 89, 724 P2d 189, 43 St. Rep. 1555 (1986).

Unfair Labor Practice — Statute of Limitations Not a Rule of Evidence: Carlson, an animal warden employed by defendant, was terminated allegedly because of insubordination and noncooperation resulting from an incident involving a schnauzer and because of earlier noncooperation. Carlson filed an unfair labor practice complaint with the Board of Personnel Appeals (BPA) alleging that the actual reason for her termination was her union activity. BPA ruled in favor of Carlson and ordered her reinstated with backpay. On appeal, the District Court reversed on the basis of unlawful procedure, contending that BPA gave primary weight to incidents occurring more than 6 months prior to the filing of Carlson's claim in violation of 39-31-404. The Supreme Court held that 39-31-404 requires an employee to file a charge within 6 months after an alleged unfair labor practice; it does not forbid the introduction of relevant evidence bearing on the issue of whether a violation has occurred during the 6-month period. Bd. of Personnel Appeals v. Billings, 199 M 302, 648 P2d 1169, 39 St. Rep. 1414 (1982).

39-31-405. Unfair labor practice complaint — investigation — notice of hearing — service — answer.

Compiler's Comments

1983 Amendments: Chapter 95 made the following changes: in (1), after "the board" deleted "or any agent designated by the board for such purposes" and inserted everything after "cause to be served upon the person a copy of the complaint and"; inserted (2) providing procedure for dismissal of complaint; in (3), inserted all language before "a notice of hearing before the board"; and at the beginning of (4), inserted "If a hearing is to be held" and substituted "against" for "upon" and "filed" for "served".

Chapter 211 enacted (5) providing entitlement to and procedure for disqualifying hearing examiner.

Case Notes

Violations Following Complaint — Jurisdiction Over: The Board of Personnel Appeals found that an unfair labor practice against employee occurred after he filed an unfair labor practice charge. District Court reversed on the ground that violations alleged in the complaint must occur before filing of the complaint. The Supreme Court reversed the District Court, holding that employee could have amended his complaint to include the postcomplaint discrimination and that employer could not possibly have been prejudiced. Young v. Great Falls, 198 M 349, 646 P2d 512, 39 St. Rep. 1047 (1982).

39-31-406. Hearing on complaint — findings — order.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1983 Amendment: Substituted the last two sentences of (6) stating when final order must be issued if briefs are not submitted for "The board shall issue a final order within 5 months after a complaint is submitted to the hearing officer."

Case Notes

Duty of Fair Representation — Breach as Unfair Labor Practice — Failure to Properly Process Grievance: Union appealed District Court order affirming decision of Teamsters Local 45 v. State ex rel. Bd. of Personnel Appeals, 195 M 272, 635 P2d 1310, 38 St. Rep. 1841 (1981), finding that the union had breached its duty to represent Great Falls bookmobile driver by failing to process a backpay grievance. The union argued that the court should have limited backpay damages to 6 months prior to the date on which the claim was filed, that the court abused its discretion in requiring notice to be mailed to each employee, and that the court incorrectly concluded that the union's conduct was so unreasonable and arbitrary as to constitute a breach of the duty of fair representation. The Supreme Court stated that limiting damages to 6 months before the filing of the charge would reward the union for procrastination. The District Court did not abuse its discretion in ordering the union to mail a notice to all employees, acknowledging its unlawful refusal to process the employee's grievance. Accordingly, the court affirmed the District Court's finding that the union's conduct in processing the grievance was so unreasonable as to constitute a breach of duty of fair representation. Teamsters Local No. 45 v. State ex rel. Bd. of Personnel Appeals, 223 M 89, 724 P2d 189, 43 St. Rep. 1555 (1986).

Remedial Period Proper: The remedial period adopted by the hearing examiner and affirmed by the Board of Personnel Appeals was proper. The period for calculating backpay typically begins to run at the time of the illegal discharge and ends when the aggrieved employee's reinstatement becomes effective. The remedial period can be reduced if there is proof of mitigating circumstances, but the burden of proof is on the employer. Great Falls v. Young, 211 M 13, 686 P2d 185, 41 St. Rep. 1174 (1984).

Backpay and Interest Formulas Upheld: The Woolworth formula, used to calculate the amount of backpay owed Young, and the Florida Steel formula, used to calculate the amount of interest awarded on backpay, were appropriate for this case. The first formula applied quarterly calculations, and the second formula applied a variable interest in excess of Montana's statutory limit. The statutory provision on interest must not supplant but should complement the legitimate ends of public policy. Great Falls v. Young, 211 M 13, 686 P2d 185, 41 St. Rep. 1174 (1984).

Reasonable Diligence in Seeking Interim Employment: Once the Board of Personnel Appeals has established the amount of backpay owed a wrongfully discharged employee, the burden is upon the employer to produce evidence to mitigate its liability. Here, the evidence of Young's job-hunting efforts and the detrimental effect of weather and economic conditions on the job market were uncontroverted. The City did not demonstrate how the available evidence could reasonably be interpreted as indicative of indifference, insincerity, or slothfulness on Young's part in his search for employment. There is substantial evidence to support the finding of the Board that Young had exercised reasonable diligence. Great Falls v. Young, 211 M 13, 686 P2d 185, 41 St. Rep. 1174 (1984).

Discharge of Teacher — Substantial Evidence of Unfair Labor Practices — Union Activity: Where a striking teacher had not been rehired by a board of trustees following a strike and where after an administrative hearing the teacher was ordered rehired with backpay, the hearing record of the Board of Personnel Appeals, including several pages of testimony from witness tending to show that the teacher's problems were strike-related, contained sufficiently substantial evidence to support the Board's findings that the teacher's discharge was the result of unfair labor practices and to support the order of the Board. Bd. of Trustees v. State ex rel. Bd. of Personnel Appeals, 185 M 89, 604 P2d 770, 36 St. Rep. 2289 (1979).

39-31-407. Amendment of complaint.

Case Notes

Violations Following Complaint — Jurisdiction Over: The Board of Personnel Appeals found that an unfair labor practice against employee occurred after he filed an unfair labor practice charge. District Court reversed on the ground that violations alleged in the complaint must occur before filing of the complaint. The Supreme Court reversed the District Court, holding that employee could have amended his complaint to include the postcomplaint discrimination and that employer could not possibly have been prejudiced. Young v. Great Falls, 198 M 349, 646 P2d 512, 39 St. Rep. 1047 (1982).

39-31-408. Modification by board of findings and order.

Case Notes

Violations Following Complaint — Jurisdiction Over: The Board of Personnel Appeals found that an unfair labor practice against employee occurred after he filed an unfair labor practice charge. District Court reversed on the ground that violations alleged in the complaint must occur before filing of the complaint. The Supreme Court reversed the District Court, holding that employee could have amended his complaint to include the postcomplaint discrimination and that employer could not possibly have been prejudiced. Young v. Great Falls, 198 M 349, 646 P2d 512, 39 St. Rep. 1047 (1982).

39-31-409. Court enforcement and review of board order.

Case Notes

School District's Refusal to Arbitrate — Scope of Judicial Review Exceeded: A decision by the Board of Personnel Appeals found that the refusal of a school district to arbitrate whether the procedural steps for nonrenewal of a nontenured teacher were followed was a breach of the collective bargaining agreement and constituted an unfair labor practice. On appeal, the District Court went on to decide the broader issue of whether the school district was required to arbitrate the substantive basis of nontenured teacher renewal. The District Court exceeded the proper scope of judicial review. Savage Pub. Schools v. Savage Educ. Ass'n, 199 M 39, 647 P2d 833, 39 St. Rep. 1192 (1982).

Part 5

Police Officers — Strikes Prohibited — Binding Arbitration

Part Compiler's Comments

Saving Clause: Section 8, Ch. 225, L. 2005, was a saving clause.

Effective Date: Section 9, Ch. 225, L. 2005, provided: "[This act] is effective July 1, 2005."

CHAPTER 32

COLLECTIVE BARGAINING FOR NURSES

Chapter Compiler's Comments

Section Not Codified: Section 41-2202(4), R.C.M. 1947, defining "board" or "board of health" to mean the State Board of Health, was not codified in the MCA because it is obsolete. The section has not been repealed and is still valid law. Citation may be made to sec. 2, Ch. 320, L. 1969.

Part 1

General Provisions

39-32-102. Definitions.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1983 Amendment: Inserted definition of Board.

39-32-103. Rules.

Compiler's Comments

1983 Amendment: Substituted "board shall" for "department of labor and industry may" and deleted provision for rules "as to times and places for hearing and notice thereof so as to provide adequate notice and opportunity to be heard to all interested parties" and "as to elections".

39-32-104. Hearings for determination of appropriate unit.

Compiler's Comments

1983 Amendment: Substituted "board" for "department of labor and industry", and deleted "or 39-32-108(1)" at end.

39-32-105. General classifications for health care facilities and appropriate units — petition for removal from general classification.

Compiler's Comments

1983 Amendment: In (1), substituted "board" for "department of labor and industry" in two places.

39-32-106. Determination of appropriate bargaining unit.

Compiler's Comments

1983 Amendment: In (2), substituted "board" for "department of labor and industry" in two places.

39-32-109. Unfair labor practices.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1983 Amendment: In introductory clause, substituted "unfair labor practice" for "improper employment practice".

39-32-113. Representation questions decided by board.

Case Notes

Assignment of Bargaining Rights: Where 9 of 17 nurses had assigned their bargaining rights to new nurses' association prior to "cutoff date", assignments were effective. The Board's request that assignments of bargaining rights be executed anew after employer asked for a redetermination was unnecessary and the fact that employee reaffirmed assignment of her bargaining rights after the cutoff date and also after termination of her employment had no effect on validity of assignment where she had previously assigned her bargaining rights to new association. Such assignment had not been revoked and she was an employee on the cutoff date. St. John's Lutheran Hosp., Inc. v. St. Bd. of Health, 161 M 406, 506 P2d 1378 (1973).

CHAPTER 33
GENERAL LIMITATIONS ON COLLECTIVE BARGAINING RIGHTS

Part 1
Right to Work Without Union Interference in Certain Small Businesses

39-33-101. Intent of part.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-33-102. Immediate family defined.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-33-103. Unfair labor practice.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 2
Employment of Strikebreakers

39-33-202. Professional strikebreakers prohibited.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

CHAPTER 34
ARBITRATION FOR FIREFIGHTERS

Part 1
General Provisions

39-34-101. Arbitration between firefighters and public employers.

Compiler's Comments

1981 Amendment: Inserted "of personnel appeals" after "board" in (2).

39-34-102. Designation of arbitrator.

Compiler's Comments

1981 Amendment: Inserted "of personnel appeals" after "board".

39-34-103. Powers and duties of arbitrator for firefighters and public employers.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1981 Amendment: Inserted "of personnel appeals" after "board" in (4).

CHAPTER 51
UNEMPLOYMENT INSURANCE

Chapter Compiler's Comments

Division of Employment Security and Certain Bureaus — Name Change: Section 1, Ch. 349, L. 1981, provided: "The division of employment security and its bureaus created in 2-15-1703 and 39-51-306 are abolished. Their functions are continued in the department of labor and industry provided for in Title 2, chapter 15, part 17. Unless inconsistent with this act, any reference in the MCA to "division of employment security", "division" (of employment security), or any bureau of the division of employment security, including "Montana state employment service bureau" or "unemployment insurance bureau", is changed to "department of labor and industry" or "department" (of labor and industry). Consistent with the intent of this section and without changing the meaning, the code commissioner shall remove any redundancies caused by such name changes."

Instructions to Code Commissioner: Section 2, Ch. 57, L. 1979, provided: "The code commissioner is authorized and instructed to change any reference in the Montana code annotated from "unemployment compensation" to "unemployment insurance" except in 7-1-111, 39-51-2306, and 39-51-2501."

Chapter Administrative Rules

Title 24, chapter 11, ARM Unemployment Insurance Division.

Part 1
General Provisions

39-51-102. Declaration of state public policy.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Owner-Corporate Officer Working Full-Time Without Pay Not Entitled to Unemployment Benefits — Implied Contract — Administrative Penalty: The plaintiff owned and was president of a bicycle company. During a slow period in the business in 2010, the plaintiff stopped paying himself a salary but continued working approximately 50 hours per week. The plaintiff periodically received unemployment assistance between November 2010 and September 2012. After an audit and subsequent administrative hearing, the Montana Department of Labor and Industry required the plaintiff to pay $28,387 in overpaid benefits and a $9,367.71 administrative penalty. On appeal, the District Court held that the plaintiff lawfully claimed benefits during certain periods because he was not working for a wage and was not under a contract for hire pursuant to 39-51-203. The Supreme Court reversed the District Court, finding that there was an implied contract because the plaintiff stood to benefit from his business' future growth. As a result, the plaintiff was employed and was not entitled to unemployment benefits and the administrative penalty was correctly ordered. Sayler v. Mt. Dept. of Labor & Industry, 2014 MT 255A, 376 Mont. 369, 336 P.3d 358.

Ability to Contract Not Absolute — Public Policy Legislation May Not Be Avoided: Phoenix Physical Therapy argued that the intent of the contract for services entered into with an individual was to create an independent contractor relationship and that therefore it was not liable to pay unemployment insurance premiums. The Supreme Court ruled that the right to contract is not absolute, the purpose of the Unemployment Insurance Law is to protect the general welfare of the citizens of the state, and parties may not privately contract to waive public protection statutes. Phoenix Physical Therapy v. Unemployment Ins. Div., 284 M 95, 943 P2d 523, 54 St. Rep. 791 (1997).

Striking Employees: A striking employee is not considered voluntarily unemployed for purposes of the specific voluntary learning work provision, and therefore cannot be considered voluntarily unemployed for purpose of the general statement of public policy. Cont. Oil Co. v. Bd. of Labor Appeals, 178 M 143, 582 P2d 1236, 35 St. Rep. 1153 (1978).

Intention of Legislature: In construing sections 87-102 through 87-106, R.C.M. 1947 (now this section, 39-51-601, 39-51-2103 through 39-51-2110, 39-51-2201, 39-51-2204, 39-51-2205, and Title 39, ch. 51, parts 23 and 25), the fundamental purpose of the Supreme Court is to ascertain, if possible, and to give effect to the intention of the Legislature. McCarthy v. Mont. Power Co., 143 M 134, 387 P2d 438 (1963).

Purpose: The unemployment compensation law was not enacted for the purpose of providing benefits for one who ceases employment for purely personal reasons, but was intended only for those who are involuntarily unemployed. McCarthy v. Mont. Power Co., 143 M 134, 387 P2d 438 (1963).

Liberal Construction: By reason of the policy stated in this section, the unemployment compensation law should be liberally construed in favor of the allowance of benefits, keeping in mind, however, that such benefits are to be paid only to "persons unemployed through no fault of their own", as specifically charged by the law. Scott v. Smith, 141 M 230, 376 P2d 733 (1962).

39-51-103. Nonliability of state — right to benefits subject to provisions of chapter and extent of available funds.

Compiler's Comments

1981 Amendment: Substituted "department" for "division" near the end of (1).

39-51-104. Chapter to become inoperative if federal act becomes inoperative.

Compiler's Comments

Federal Statute: Title III of the federal Social Security Act, referred to in this section, is compiled as 42 U.S.C. §§ 501 through 503. Title IX is compiled as 42 U.S.C. §§ 1101 through 1105.

39-51-105. Disbursement of funds if federal act becomes inoperative.

Compiler's Comments

1981 Amendment: Substituted "department" for "division" near the end of the first sentence.

Federal Statute: Title III of the federal Social Security Act, referred to in this section, is compiled as 42 U.C.S. §§ 501 through 503. Title IX is compiled as 42 U.S.C. §§ 1101 through 1105.

39-51-110. Collateral estoppel.

Compiler's Comments

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 28, Ch. 442, L. 1999, was a severability clause.

Effective Date: Section 29, Ch. 442, L. 1999, provided that this section is effective April 23, 1999.

Case Notes

Award of Unemployment Benefits Not Proof of Wrongful Discharge: In his motion for summary judgment, the plaintiff argued that because he was found eligible for unemployment benefits, the question of whether he was wrongfully discharged was settled under the doctrines of issue preclusion and claim preclusion. The Supreme Court held that the plaintiff's argument was specifically precluded by 39-51-110, which provides that a finding of fact or law, judgment, conclusion, or order made under unemployment insurance law may not be binding or conclusive or used as evidence in any separate or subsequent action, regardless of whether that action involves the same parties and facts. Cartwright v. Scheels All Sports, Inc., 2013 MT 158, 370 Mont. 369, 310 P.3d 1080.

Part 2
Definitions

39-51-201. General definitions.

Compiler's Comments

2015 Amendment: Chapter 132 in definition of board substituted "unemployment insurance appeals board" for "board of labor appeals". Amendment effective July 1, 2015.

2013 Amendment: Chapter 287 in definition of misconduct in (a)(i) inserted "including", inserted (a)(i)(A) through (a)(i)(H) concerning types of misconduct, and in (a)(ii) inserted "of established employer standards or"; and made minor changes in style. Amendment effective October 1, 2013.

2011 Amendments — Composite Section: Chapter 98 inserted definition of misconduct; and made minor changes in style. Amendment effective October 1, 2011.

Chapter 123 in definition of wages inserted (b)(v) related to a salary, draw, or profit distribution paid to certain entities; and made minor changes in style. Amendment effective October 1, 2011.

Code Commissioner Correction — 2011 Codification: This section was amended by Chapters 98 and 123, Laws of 2011. The amendment to 39-51-201(10) made by Ch. 123 that changed a subsection reference to 39-51-204 from "(1)(q)" to "(1)(p)" was erroneously omitted in the published MCA.

2009 Amendments — Composite Section: Chapter 25 in definition of benefit year at beginning of first sentence before "means" deleted "with respect to any individual" and near end after "base" substituted "period" for "year", in second sentence after "established" inserted "in Montana", and in third sentence near middle substituted "benefit year" for "base period"; and made minor changes in style. Amendment effective July 1, 2009.

Chapter 489 in definition of base period inserted (b) concerning 4 most recently completed calendar quarters immediately preceding first day of individual's benefit year; and made minor changes in style. Amendment effective May 14, 2009.

2007 Amendment: Chapter 52 inserted definition of licensed and practicing health care provider; and made minor changes in style. Amendment effective October 1, 2007.

2005 Amendments — Composite Section: Chapter 448 in definition of contributions deleted reference to subsection (4) of 39-51-404; in definition of independent contractor after "an individual" substituted "working under an independent contractor exemption certificate provided for in 39-71-417" for "who renders service in the course of an occupation and:

(a) has been and will continue to be free from control or direction over the performance of the services, both under a contract and in fact; and

(b) is engaged in an independently established trade, occupation, profession, or business"; and made minor changes in style. Amendment effective April 28, 2005.

Chapter 466 in definition of institution of higher education in (b) at beginning deleted "Notwithstanding subsection (17)(a)"; in definition of tribal unit before "subdivision" inserted "tribal"; in definition of wages inserted (b)(iv) excepting wage subsidies received pursuant to the alternative trade adjustment assistance for older workers program from the definition; and made minor changes in style. Amendment effective April 28, 2005.

Preamble: The preamble attached to Ch. 448, L. 2005, provided: "WHEREAS, the Montana Supreme Court ruled in Wild v. Fregein Construction, 2003 MT 115, 315 Mont. 425, 68 P.3d 855, that the independent contractor exemption certificate does not raise a conclusive presumption as to the status of a person as an independent contractor and that an employer has an obligation to determine whether an individual is treated as an independent contractor or as an employee; and

WHEREAS, the Montana Supreme Court in the Wild decision ruled that it is against the public policy of the state for an employer to coerce a worker to work as an independent contractor by offering to pay an independent contractor at a rate higher than the employer pays employees; and

WHEREAS, the Montana Supreme Court in the Wild decision affirmed the twin determinants of independent contractor status as being "A" issues of control and "B" whether the individual is in an independent business, commonly known as the "A-B" test, and emphasized the necessity of both factors being present, with performing work for other persons being an indication of an independent business; and

WHEREAS, the concurring opinion in the Wild decision further suggested that the Department of Labor and Industry strengthen the certification process to provide a conclusive determination of independent contractor status; and

WHEREAS, the Wild decision created a great deal of uncertainty in matters involving independent contractors and employees in the business community, with employers and independent contractors coming together to propose a consensus solution after participating in a study required by Senate Bill 270, passed by the 58th Legislature; and

WHEREAS, the Montana Legislature considers enacting legislation appropriate to effectively reverse the Wild decision and to restore the conclusive presumption of an independent contractor exemption certificate as well as to allow employers to pay persons with the independent contractor exemption certificate at a rate higher than the rate paid to employees and additionally to allow a person with an independent contractor exemption certificate to work for only one employing unit without becoming an employee as well as to waive the benefits of the workers' compensation and occupational disease laws."

Effective Date — Applicability: Section 15, Ch. 448, L. 2005, provided: "[This act] is effective on passage and approval and applies to all applications and renewals for the independent contractor exemption certificate submitted to the department after [the effective date of this act]." Approved April 28, 2005.

2003 Amendment: Chapter 267 inserted definition of no-additional-cost service; in definition of wages inserted (b)(iii) providing that wages do not include a no-additional-cost service; and made minor changes in style. Amendment effective July 1, 2003.

Effective Date — Applicability: Section 2, Ch. 267, L. 2003, provided: "[This act] is effective July 1, 2003, and applies to tax periods beginning on or after July 1, 2003."

2001 Amendment: Chapter 200 in definition of employing unit near beginning after "instrumentalities" inserted "or an Indian tribe or tribal unit"; inserted definition of Indian tribe; inserted definition of tribal unit; and made minor changes in style. Amendment effective July 1, 2001.

Preamble: The preamble attached to Ch. 200, L. 2001, provided: "WHEREAS, on December 21, 2000, federal law changed regarding state law treatment of employment by recognized Indian tribes for the purposes of state unemployment insurance programs by mandating the formerly optional state unemployment insurance coverage of employment by those Indian tribes; and

WHEREAS, as of December 21, 2000, federal law now requires states in which recognized Indian tribes exist to offer to those tribes a choice of experience-rating or direct reimbursable unemployment insurance accounts; and

WHEREAS, Montana's unemployment laws do not conform to the new federal requirements, and nonconformity of the state's unemployment insurance laws with the new federal provisions will jeopardize the ability of all Montana employers to take credit on federal taxes for the amounts paid to Montana's unemployment insurance program and will further depress Montana's economy; and

WHEREAS, the Legislature finds that it is the best interests of all the people of Montana that Montana's unemployment insurance laws conform to those December 21, 2000, federal law changes with respect to the treatment of Indian tribes for unemployment insurance purposes."

Effective Date — Retroactive Applicability: Section 9, Ch. 200, L. 2001, provided: "[This act] is effective July 1, 2001, and applies retroactively, within the meaning of 1-2-109, to employment by recognized Indian tribes occurring on or after December 21, 2000."

1997 Amendments: Chapter 60 in third sentence of definition of base period, after "5", inserted "completed calendar"; near middle of first sentence of definition of employing unit inserted "or limited liability partnership"; and made minor changes in style. Amendment effective March 17, 1997.

Chapter 491 inserted definition of domestic household service; in definition of employing unit, at end of first sentence, substituted "39-51-204(1)(a) and (1)(q)" for "39-51-204(1)(a) and (1)(b)"; in definition of wages, in first sentence near beginning, inserted "unless specifically exempted under subsection (20)(b)", near middle, after "including", deleted "commissions and bonuses", and at end deleted "and backpay received pursuant to a dispute related to employment", inserted "The term includes but is not limited to", inserted (a)(i) through (a)(iii) concerning types of payment included in definition, in (b)(i) inserted "for employees" and after "payment was made" deleted "under a plan established for the employees in general or for a specific class or classes of employees, to or on behalf of the employee", in (b)(i)(A) inserted "or pension pursuant to a qualified plan as defined under the provisions of the Internal Revenue Code", in (b)(i)(B), at end, substituted "policy" for "law", in (b)(i)(C), near beginning, substituted "or" for "and" and at end inserted "including health insurance for the employee or the employee's immediate family", in (b)(i)(D) inserted "including life insurance for the employee or the employee's immediate family", and in (b)(ii) deleted former text that read: "remuneration paid by a county welfare office from public assistance funds for services performed at the direction and request of the county welfare office"; adjusted subsection references; and made minor changes in style. Amendment effective January 1, 1998.

Preamble: The preamble attached to Ch. 491, L. 1997, provided: "WHEREAS, House Bill No. 98 (Ch. 48, L. 1995), enacted by the 54th Legislature, excluded direct sellers from minimum wage, overtime, unemployment insurance, and workers' compensation requirements; and

WHEREAS, the Legislature in House Bill No. 98 adopted the federal definition of direct seller to apply to relevant Montana statutes; and

WHEREAS, ARM 24.11.831 narrowed the scope of the federal definition of direct seller; and

WHEREAS, an original purpose of this House Bill No. 561 was to codify the narrower definition of direct seller; and

WHEREAS, this House Bill No. 561 is the appropriate place to repeal Rule 24.11.831, Administrative Rules of Montana."

Severability: Section 36, Ch. 491, L. 1997, was a severability clause.

Saving Clause: Section 37, Ch. 491, L. 1997, was a saving clause.

1995 Amendment: Chapter 195 in definition of employing unit, in first sentence, inserted "limited liability company that has filed with the secretary of state"; in definition of institution of higher education, in (b) before "universities", deleted "colleges and"; and made minor changes in style. Amendment effective March 23, 1995.

Applicability: Section 19, Ch. 195, L. 1995, provided: "[This act] applies to hearings or appeals requested on or after [the effective date of sections 2 through 10 and 12 through 19]." Sections effective March 23, 1995.

1991 Amendments: Chapter 261 in definition of wages inserted (b)(iii) referring to employee expense reimbursements or allowances; and made minor change in style.

Chapter 373 in definition of employing unit substituted "39-51-204(1)(a) and (1)(b)" for "subsections (8) and (9) of 39-51-203"; inserted definition of taxes; and in definition of wages, in (b)(i)(B) after "disability", deleted "but in the case of payments made by an employer directly to an employee, only those payments made" and after "law" deleted "are excluded from "wages"". Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1989 Amendment: In definition of base period, in middle of third sentence, inserted "or a similar statute of another state". Amendment effective July 1, 1989.

1987 Amendments: Chapter 234 near middle of (9), after "which has or", deleted "subsequent to January 1, 1936"; in (18)(b)(i), after "payment", substituted language excluding payment under a plan established for employees in general or for a specific class or classes of employees for "made to or on behalf of an employee by an employer on account of"; in (18)(b)(i)(B), after "disability", inserted language excluding, of those payments made directly by an employer to an employee, only workers' compensation payments; and made minor changes in phraseology.

Chapter 314 inserted definition of independent contractor.

Chapter 370 in (11), near middle after "are required", inserted "to be paid"; and made minor change in grammar.

1985 Amendments: Chapter 23 at end of definition of base period substituted "within 24 months of the date on which the individual's disability was incurred" for "within 18 months of the individual's last employment".

Chapter 125 deleted former (1) that read: "The word "administrator" refers to a person appointed by the commissioner of labor and industry to direct and administer the unemployment insurance laws and federal laws falling within the administrator's jurisdiction"; deleted former (3) that read: ""Annual total payroll" means the total of the four quarters of total payrolls of an employer preceding the computation date as fixed herein"; and in definition of wages, at end of first sentence, inserted clause relating to backpay.

Chapter 461 in definition of contributions, at end, inserted "but does not include assessments under 39-51-404(4)".

1983 Amendment: In definition of base period inserted last sentence establishing base period for person who is temporarily totally disabled.

1981 Amendment: Substituted the definition of "department of labor and industry" for "employment security division"; and in definitions of employment office and wages substituted "department" for "division".

Administrative Rules

ARM 24.11.203 Determination of employment status regarding independent contractors.

ARM 42.17.218 Employer registration.

Case Notes

Owner-Corporate Officer Working Full-Time Without Pay Not Entitled to Unemployment Benefits — Implied Contract — Administrative Penalty: The plaintiff owned and was president of a bicycle company. During a slow period in the business in 2010, the plaintiff stopped paying himself a salary but continued working approximately 50 hours per week. The plaintiff periodically received unemployment assistance between November 2010 and September 2012. After an audit and subsequent administrative hearing, the Montana Department of Labor and Industry required the plaintiff to pay $28,387 in overpaid benefits and a $9,367.71 administrative penalty. On appeal, the District Court held that the plaintiff lawfully claimed benefits during certain periods because he was not working for a wage and was not under a contract for hire pursuant to 39-51-203. The Supreme Court reversed the District Court, finding that there was an implied contract because the plaintiff stood to benefit from his business' future growth. As a result, the plaintiff was employed and was not entitled to unemployment benefits and the administrative penalty was correctly ordered. Sayler v. Mt. Dept. of Labor & Industry, 2014 MT 255A, 376 Mont. 369, 336 P.3d 358.

No Misconduct for Making Allegations About Supervisor — Board of Labor Appeals Determination Based on Substantial Evidence: An employee was discharged from her job for misconduct based on allegations that she made about a supervisor to another employee and that an investigation by the employer determined were unsupported. The employee applied for unemployment benefits, and after a series of administrative proceedings the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) determined the employee was entitled to benefits. On appeal, the District Court dismissed a petition for review of the Board's determination on the grounds that there was substantial evidence for the determination. Subsequently, the Supreme Court affirmed the District Court, reasoning that the function of the reviewing court is to determine whether substantial evidence supported the Board's finding and not whether, on the same evidence, it would have arrived at the same conclusion. Somont Oil Co. v. King, 2012 MT 207, 366 Mont. 251, 286 P.3d 585, distinguished in Gary and Leo's Fresh Foods, Inc. v. St., 2012 MT 219, 366 Mont. 313, 286 P.3d 1218.

Summary Judgment on Breach of Contract Affirmed — Wrongful Discharge Claim Reversed for Determination of Whether Claimant Was Employee or Independent Contractor: Tvedt brought a claim for breach of contract, wrongful termination, and indemnification of expenses, alleging that defendant group had breached the covenant of good faith and fair dealing, waived the at-will clauses in their employment agreement, and mischaracterized Tvedt as an independent contractor, rather than an employee. Defendant group moved for summary judgment and filed a contingent counterclaim stating that in the event that Tvedt was found to be defendant group's employee, then defendant group's obligation to pay Tvedt the contract value should cease and all payments made to Tvedt should be returned. The District Court determined that Tvedt was not an employee and granted summary judgment to defendant group on all claims, and Tvedt appealed. The Supreme Court affirmed summary judgment on the breach of covenant issue because Tvedt was given adequate notice of termination, defendant group was exercising the specific language of the at-will termination provision of the contract, and Tvedt did not demonstrate that defendant group had waived the right to enforce that provision. However, the court reversed summary judgment on the wrongful discharge claim because the District Court incorrectly applied defendant group's novation argument and because genuine issues of fact remained whether Tvedt was an employee or independent contractor and whether a manager's agreement that recognized Tvedt individually was in effect at the time of termination. Remand was ordered because the District Court never considered whether Tvedt was entitled to relief for wrongful discharge as a matter of law and, if so, whether the claim for indemnification was appropriate. Tvedt v. Farmers Ins. Group of Co., 2004 MT 125, 321 M 263, 91 P3d 1 (2004).

Business Owner's Burden of Proof in Showing Independent Contractor Status Not Considered Unfair or Unconstitutional: The District Court held that a business owner had the burden of proof to rebut a presumption of employee status, that the burden was constitutionally valid, and that the employer failed to demonstrate that application of the presumption implicated any fundamental liberty or property interests. The Supreme Court affirmed. Requiring the business owner to show independent contractor status did not create an irrebuttable presumption, but rather placed the burden of proof on the workers—those individuals who could most effectively demonstrate whether they were employees or independent contractors. Here, the business owner did not attempt to have its workers testify or try to obtain tax information, thus failing to meet the burden of showing that several of its workers were independent contractors. Spain v. Dept. of Revenue, 2002 MT 146, 310 M 282, 49 P3d 615 (2002).

Fundamental Right to Choose Independent Contractor Status — Presumption of Employee Status Not Violative of Right to Contract: The Department of Revenue classified a worker as an employee, despite the worker's contention that he was an independent contractor. The worker contended that he had a fundamental right to choose independent contractor status and that the Department's classification deprived him of the right to contract. The District Court cited Phoenix Physical Therapy v. Unemployment Ins. Div., 284 M 95, 943 P2d 523 (1997), for the proposition that the ability to contract is not absolute and that a party's intent does not control whether the party is classified as an employee or independent contractor, but rather that the status must be proved as a matter of fact. Although the worker in question had a fundamental right to choose employment status, the worker was nevertheless required to prove that he was an independent contractor as a matter of fact, and the fact that he failed to do so was supported by substantial evidence in the record. Thus, the Department did not exceed its statutory authority in classifying the worker as an employee. Spain v. Dept. of Revenue, 2002 MT 146, 310 M 282, 49 P3d 615 (2002).

Test for Independent Contractor: In determining whether an individual is an independent contractor or an employee, the crucial question is whether or not an employer has a right of control over a worker. To decide the question, the Supreme Court developed a four-part control test in Walling v. Hardy Constr., 247 M 441, 807 P2d 1335 (1991): (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. A finding that an individual is an independent contractor demands a convincing accumulation of these and other tests, while a finding of employee status can if necessary often be proved on the strength of one of the four items. Spain v. Dept. of Revenue, 2002 MT 146, 310 M 282, 49 P3d 615 (2002).

Crop Adjusters as Employees, Not Independent Contractors — Administrative Findings Improperly Reversed: The Unemployment Insurance Division of the Department of Labor and Industry, a Department hearings office, and the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) successively determined that crop adjusters were employees of American Agrijusters Co. (American) for unemployment insurance tax purposes. The District Court reversed, holding that the crop adjusters were independent contractors. The Supreme Court applied the four-part test used in Sharp v. Hoerner Waldorf Corp., 178 M 419, 584 P2d 1298 (1978), to determine whether a right of control existed sufficient to give rise to an employer-employee relationship. The factors do not constitute a balancing test, however, so employee status may be established on the strength of evidence under one of the factors standing alone. Here, American exercised a right of control over the means and methods by which crop adjusters completed their job assignments through training, supervision, and review of completed job assignments. Further, payment by a unit of time and the right to terminate the work relationship without liability also evidenced employment status. The District Court erred in finding that crop adjusters were independent contractors, and the Supreme Court reversed. Am. Agrijusters Co. v. Dept. of Labor and Industry, 1999 MT 241, 296 M 176, 988 P2d 782, 56 St. Rep. 948 (1999). See also 3 Larson & Larson, Larson's Workers' Compensation Law §§ 61.04, 61.06, 61.07 (1999).

Carpenter and Mason Paid by Hourly Wage Properly Determined to Be Independent Contractor: Potter, a carpenter and mason who sold his own business in 1987, worked for three private parties and two construction companies and was paid by the hour by all of them. Because he was hired by some of the employers prior to 1987, the Supreme Court held that the Department of Labor and Industry hearing officer properly determined Potter to have satisfied the second part of the test for an independent contractor. The Supreme Court also determined that the hearing officer properly found that there was substantial evidence that Potter was free from control over the performance of his services when the Court examined the direct evidence of the right to exercise control, the method of payment, the furnishing of equipment, and the right of Potter's employers to fire him. Potter v. Dept. of Labor and Industry, 258 M 476, 853 P2d 1207, 50 St. Rep. 621 (1993).

"Independently Established Occupation or Profession" Construed: Northwest Publishing sells advertisements that appear in Northwest's magazine, using salespersons employed under an "independent contractor agreement". They receive a set commission and are provided lodging, sales forms, and credit cards. The Department of Labor and Industry, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board), and the District Court determined that these independent contractors were employees for unemployment insurance purposes. The Supreme Court affirmed, holding that Northwest did not satisfy subsection (14)(b) of this section. Citing Standard Chem. Mfg. Co. v. Employment Sec. Div., 185 M 241, 605 P2d 610 (1980), the Supreme Court held that satisfaction of one or two of the criteria discussed in Standard Chem. and in Zimmer-Jackson Associates, Inc. v. Dept. of Labor and Industry, 231 M 357, 752 P2d 1095 (1988), followed in Phoenix Physical Therapy v. Unemployment Ins. Div., 284 M 95, 943 P2d 523, 54 St. Rep. 791 (1997), was insufficient to overcome the requirement that the salespeople be "engaged in an independently established business". NW. Publishing v. Dept. of Labor and Industry, 256 M 360, 846 P2d 1030, 50 St. Rep. 110 (1993).

Compensation for Travel Expenses — Constituted Wages: The petitioner's employee was paid 10 cents a mile as wages and 7½ cents a mile for travel expenses. The Board of Labor Appeals (now the Unemployment Insurance Appeals Board), relying on a test set out in the Division guidelines, ruled that the travel compensation constituted wages. The lower court upheld the Board's decision but relied on a statute rather than the Division guidelines. The Supreme Court held that in the case of conflict between a statute and an administrative rule or guideline, the statute governs. The court also held that under both the statute and the test set out in the Division guidelines, the travel compensation constituted wages. Berglund & Berglund, Inc., Inc. v. Unemployment Ins. Div., 241 M 49, 784 P2d 933, 47 St. Rep. 73 (1990).

"AB" Test of Independent Contractor Status — Measure of Control: The two-part test to determine whether an individual is an independent contractor, known as the "AB" test (formerly the "ABC" test prior to 1987 amendment), is set out in subsection (14) of this section. The emphasis of the test, and at common law, is control. The four factors to consider in determining if the right to control exists, as formerly recognized in Sharp v. Hoerner Waldorf Corp., 178 M 419, 584 P2d 1298 (1978), followed in Phoenix Physical Therapy v. Unemployment Ins. Div., 284 M 95, 943 P2d 523, 54 St. Rep. 791 (1997), include: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. Existence of three of the four control factors substantiated a finding of an independent contractor relationship under the "A" portion of the test, and coupled with the fact that the individual was engaged in an independently established occupation, satisfying the "B" portion, the Supreme Court concluded a worker was an independent contractor rather than an employee under this section. Johnson v. Dept. of Labor and Industry, 240 M 288, 783 P2d 1355, 46 St. Rep. 2131 (1989).

Contract Providing Monthly Payments Not Establishment of Employment Relationship: A county contract for provision of certain legal services expressly provided independent contractor status because: (1) the county had no right to control the firm that was awarded the contract; (2) the firm was customarily engaged in independent practice; and (3) the contract was unnecessary for the firm to continue its business. Because an independent contract was indicated by these facts, the veterans' preference did not apply to hiring of the contractor, despite the contention that a contract provision for monthly payments established an employment relationship. Hamner v. Butte-Silver Bow County, 233 M 271, 760 P2d 76, 45 St. Rep. 1481 (1988).

Determination of Employment Status — Administrative Findings Upheld: In determining whether salesmen for a livestock product manufacturer were independent contractors and therefore exempt from the unemployment compensation tax, the court will uphold an administrative agency's finding where there is sufficient credible evidence in the record to support its holding. Where there are several factors weighing on both sides of the issue, the court will look to 39-51-203(4)(c) as controlling. This subsection concerns whether an individual is customarily engaged in an independently established trade, occupation, profession, or business. Here, the court found that the salesmen had no business apart from their relationship with the company, were dependent upon the company for their employment, had no authority to hire subordinates, had no liability for a peremptory termination of their relationship, and therefore found the salesmen to be employees rather than independent contractors. Standard Chem. Mfg. Co. v. Employment Sec. Div., 185 M 241, 605 P2d 610, 37 St. Rep. 105 (1980), distinguished in Kyriss v. St., 218 M 162, 707 P2d 5, 42 St. Rep. 1487 (1985). (Annotator's note: Definition of independent contractor was transferred from 39-51-203 to 39-51-201, and second prong of three-prong test was repealed by Ch. 314, L. 1987.)

39-51-202. Employer defined.

Compiler's Comments

1991 Amendment: Inserted (2) expanding definition of employer to include certain agricultural employing units; inserted (3) expanding definition of employer to include certain domestic employing units; and in (7) changed internal references to subsections. Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1989 Amendment: In (1), before "exceeds the sum", inserted "equals or". Amendment effective July 1, 1989.

1985 Amendment: In (1) increased dollar amount from $500 to $1,000.

Federal Unemployment Tax Act: This Act, referred to in this section, is codified at Title 26, U.S.C., Ch. 23.

Administrative Rules

ARM 42.17.223 Determining employee status.

39-51-203. Employment defined.

Compiler's Comments

2021 Amendment: Chapter 345 in (4) inserted second sentence: "An individual may not be determined to be an employee based solely on not having an independent contractor exemption certificate." Amendment effective October 1, 2021.

Applicability: Section 3, Ch. 345, L. 2021, provided: "[This act] applies to employment determinations for the purposes of unemployment insurance and workers' compensation on or after [the effective date of this act]." Effective October 1, 2021.

Preamble: The preamble attached to Ch. 345, L. 2021, provided: "WHEREAS, the Department of Labor and Industry's rule ARM 24.35.203 provides that when a worker does not have an independent contractor certificate, the worker is conclusively determined by the Department to be an employee for the purposes of wages and hours, unemployment insurance, workers' compensation, and income tax; and

WHEREAS, this interpretation is overly broad, does not correctly consider Montana Supreme Court caselaw, leads to confusion, conflicts with established law, and results in unfair determinations."

2007 Amendment: Chapter 52 in (1) near beginning after "member of a" deleted "manager-managed" and after "company" substituted "treated as a corporation pursuant to 39-51-207" for "that has filed with the secretary of state". Amendment effective January 1, 2008.

1995 Amendment: Chapter 195 in (1) inserted "by a manager or member of a manager-managed limited liability company that has filed with the secretary of state"; in (5), after "universities", deleted "any of its colleges"; and made minor changes in style. Amendment effective March 23, 1995.

Applicability: Section 19, Ch. 195, L. 1995, provided: "[This act] applies to hearings or appeals requested on or after [the effective date of sections 2 through 10 and 12 through 19]." Sections effective March 23, 1995.

1991 Amendment: Deleted (8) and (9) describing certain agricultural labor and domestic service exempted from definition of employment. Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1989 Amendment: In (8) substituted second sentence revising definition of employment relating to agricultural labor (see 1989 Session Law for text) for former sentence concerning agricultural wages (see 1987 MCA for former text); and in (9) substituted second sentence revising definition of employment relating to domestic service (see 1989 Session Law for text) for former provision concerning domestic employment (see 1987 MCA for former text). Amendment effective July 1, 1989.

1987 Amendments: Chapter 234 throughout section deleted "after December 31, 1971"; in (5), after "performed", deleted "after July 1, 1975"; in (8) and (9), after "employment", deleted "subject to this chapter effective January 1, 1978"; at end of (8) inserted third sentence providing that if otherwise subject wages are paid for outfitter and guide services, the wages are not covered; and made minor changes in phraseology.

Chapter 314 at end of (4), after "that", substituted "the individual is an independent contractor" for "(a) such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract and in fact;

(b) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(c) such individual is customarily engaged in an independently established trade, occupation, profession, or business".

1981 Amendment: Substituted "department" for "division" in (3) and (4).

Administrative Rules

ARM 42.17.223 Determining employee status.

Case Notes

Owner-Corporate Officer Working Full-Time Without Pay Not Entitled to Unemployment Benefits — Implied Contract — Administrative Penalty: The plaintiff owned and was president of a bicycle company. During a slow period in the business in 2010, the plaintiff stopped paying himself a salary but continued working approximately 50 hours per week. The plaintiff periodically received unemployment assistance between November 2010 and September 2012. After an audit and subsequent administrative hearing, the Montana Department of Labor and Industry required the plaintiff to pay $28,387 in overpaid benefits and a $9,367.71 administrative penalty. On appeal, the District Court held that the plaintiff lawfully claimed benefits during certain periods because he was not working for a wage and was not under a contract for hire pursuant to 39-51-203. The Supreme Court reversed the District Court, finding that there was an implied contract because the plaintiff stood to benefit from his business' future growth. As a result, the plaintiff was employed and was not entitled to unemployment benefits and the administrative penalty was correctly ordered. Sayler v. Mt. Dept. of Labor & Industry, 2014 MT 255A, 376 Mont. 369, 336 P.3d 358.

Business Owner's Burden of Proof in Showing Independent Contractor Status Not Considered Unfair or Unconstitutional: The District Court held that a business owner had the burden of proof to rebut a presumption of employee status, that the burden was constitutionally valid, and that the employer failed to demonstrate that application of the presumption implicated any fundamental liberty or property interests. The Supreme Court affirmed. Requiring the business owner to show independent contractor status did not create an irrebuttable presumption, but rather placed the burden of proof on the workers—those individuals who could most effectively demonstrate whether they were employees or independent contractors. Here, the business owner did not attempt to have its workers testify or try to obtain tax information, thus failing to meet the burden of showing that several of its workers were independent contractors. Spain v. Dept. of Revenue, 2002 MT 146, 310 M 282, 49 P3d 615 (2002).

Fundamental Right to Choose Independent Contractor Status — Presumption of Employee Status Not Violative of Right to Contract: The Department of Revenue classified a worker as an employee, despite the worker's contention that he was an independent contractor. The worker contended that he had a fundamental right to choose independent contractor status and that the Department's classification deprived him of the right to contract. The District Court cited Phoenix Physical Therapy v. Unemployment Ins. Div., 284 M 95, 943 P2d 523 (1997), for the proposition that the ability to contract is not absolute and that a party's intent does not control whether the party is classified as an employee or independent contractor, but rather that the status must be proved as a matter of fact. Although the worker in question had a fundamental right to choose employment status, the worker was nevertheless required to prove that he was an independent contractor as a matter of fact, and the fact that he failed to do so was supported by substantial evidence in the record. Thus, the Department did not exceed its statutory authority in classifying the worker as an employee. Spain v. Dept. of Revenue, 2002 MT 146, 310 M 282, 49 P3d 615 (2002).

Vacation Pay Not Considered Wages for Purposes of Determining Eligibility for Unemployment Benefits — Claim Independent of Contract Not Precluded by Federal Labor Law: Lumber company employees filed for unemployment insurance benefits following a week-long shutdown of the lumber mills. Their claims were denied in turn by the Department of Labor and Industry, a referee, and the Board of Labor Appeals (now the Unemployment Insurance Appeals Board). The Department reasoned that the employees received vacation pay during their time away from work and that because they earned wages, they could not be considered totally unemployed and were thus ineligible for benefits. On appeal to the District Court, the ineligibility determination was reversed when the court determined that the Department had incorrectly concluded that, as a matter of law, wages previously paid to the employees had been properly imputed to the shutdown period. The company appealed to the Supreme Court, and the primary issue was whether the employees were eligible for benefits during the shutdown. The employees argued that their collective bargaining agreement did not require time off in order to take vacation pay, but rather that vacation pay is an entitlement once an employee works the specified number of hours during the vacation base year. The Supreme Court agreed. Vacation pay is payment in exchange for an employee's work in the vacation base year. Even though time off could be scheduled unilaterally by the employer when the mill was closed, the vacation pay received was not considered compensation for time off during the shutdown. Thus, the employees did not earn wages during the shutdown that would prevent them from qualifying for unemployment benefits. The employer's argument that the employees were "voluntarily unemployed" because they consented to the shutdown in their collective bargaining agreement was also unpersuasive. A collective bargaining agreement cannot waive rights ensured to an employee by state law. Lastly, this action was not precluded by sec. 301 of the federal Labor Management Relations Act (29 U.S.C. 185) because the case involved matters implicating state rules and obligations independent of the labor contract, as evidenced by the inclusion as parties those state agencies charged with determining unemployment eligibility. The District Court was affirmed, and the case was remanded to the appropriate state agencies for decisions on each individual claim. Multiple Stimson Employees v. Stimson Lumber Co., 2001 MT 56, 304 M 333, 21 P3d 613 (2001), distinguishing Anderson v. TW Corp., 228 M 1, 741 P2d 397 (1987), and Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720 (1992).

Woodcutters Held to Be Employees — Not Independent Contractors: A post company argued that woodcutters working for the company were independent contractors but failed to produce evidence demonstrating that the services performed by the woodcutters did not constitute employment. The Supreme Court ruled that the company had not overcome the statutory presumption of employment because the company could not prove all three elements of the ABC test. Specifically, the company's control over the woodcutters' activities was too great for the woodcutters to be considered independent contractors. Larry's Post Co., Inc. v. Unemployment Ins. Div., 238 M 190, 777 P2d 325, 46 St. Rep. 1193 (1989).

Contract Providing Monthly Payments Not Establishment of Employment Relationship: A county contract for provision of certain legal services expressly provided independent contractor status because: (1) the county had no right to control the firm that was awarded the contract; (2) the firm was customarily engaged in independent practice; and (3) the contract was unnecessary for the firm to continue its business. Because an independent contract was indicated by these facts, the veterans' preference did not apply to hiring of the contractor, despite the contention that a contract provision for monthly payments established an employment relationship. Hamner v. Butte-Silver Bow County, 233 M 271, 760 P2d 76, 45 St. Rep. 1481 (1988).

"ABC" Test of Employment Met: The three-part standard to be met in order for a service to be considered employment, referred to as the "ABC" test, is: (1) Tier "A", that an individual be free from control over the performance of his services; (2) Tier "B", that the nature of an individual's services falls outside the usual course of the employer's business or that the services be performed outside the place where the employer's business is carried on; and (3) Tier "C", that the individual be customarily engaged in an independently established trade or occupation. A person meeting all three tiers of this standard is properly considered an employee. (Annotator's note: The statutory language outlining the three-tier test was replaced through 1987 amendment by a requirement that the individual be shown to be an independent contractor. See 39-71-120, now repealed.) Zimmer-Jackson Associates, Inc. v. Dept. of Labor and Industry, 231 M 357, 752 P2d 1095, 45 St. Rep. 679 (1988), followed with respect to employment of a baseball league

umpire in In re Unemployment Ins. Tax Contribution, Pioneer Baseball League v. Friedrichs, 233 M 384, 760 P2d 93, 45 St. Rep. 1573 (1988).

Employment or Joint Venture: A contractor obtained services of a worker on various jobs, referring to the relationship as a partnership or joint venture. Where worker was paid $500 a week, all contracts were signed by contractor only, there were no documents, correspondence, or accounts indicating a partnership or joint venture, no partnership income tax was filed, and all materials were purchased by contractor using his personal accounts with suppliers, the court upheld the finding of an employment relationship for unemployment insurance tax purposes. Hammerquist v. Employment Sec. Div., 230 M 347, 749 P2d 535, 45 St. Rep. 261 (1988).

Amount of Control Determinative: Kirby trained dealers in marketing methods and provided them with materials. Kirby suggested retail prices which dealers generally adhered to. Kirby received the dealers' sales receipts and paid the dealers their commissions. The dealers had to be authorized to sell Kirby products through a wholesale outlet, and Kirby could terminate the contract without cause on 30 days' notice. Applying the test set out in 39-51-203 and the common-law test, the Supreme Court found that the dealers were employees and not independent contractors. Kirby Co. of Bozeman, Inc. v. Employment Sec. Div., 189 M 1, 614 P2d 1040, 37 St. Rep. 1255 (1980), followed in Phoenix Physical Therapy v. Unemployment Ins. Div., 284 M 95, 943 P2d 523, 54 St. Rep. 791 (1997). (Annotator's note: Definition of independent contractor was transferred from 39-51-203 to 39-51-201, and second prong of three-prong test was repealed by Ch. 314, L. 1987.)

Determination of Employment Status — Administrative Findings Upheld: In determining whether salesmen for a livestock product manufacturer were independent contractors and therefore exempt from the unemployment compensation tax, the court will uphold an administrative agency's finding where there is sufficient credible evidence in the record to support its holding. Where there are several factors weighing on both sides of the issue, the court will look to 39-51-203(4)(c) as controlling. This subsection concerns whether an individual is customarily engaged in an independently established trade, occupation, profession, or business. Here, the court found that the salesmen had no business apart from their relationship with the company, were dependent upon the company for their employment, had no authority to hire subordinates, had no liability for a peremptory termination of their relationship, and therefore found the salesmen to be employees rather than independent contractors. Standard Chem. Mfg. Co. v. Employment Sec. Div., 185 M 241, 605 P2d 610, 37 St. Rep. 105 (1980), distinguished in Kyriss v. St., 218 M 162, 707 P2d 5, 42 St. Rep. 1487 (1985). (Annotator's note: Definition of independent contractor was transferred from 39-51-203 to 39-51-201, and second prong of three-prong test was repealed by Ch. 314, L. 1987.)

Employee or Independent Contractor:

Despite fact that this section is used as a guide in the determination of the relationship between an employer and an individual performing services, the well established test in determining whether an individual is an employee or an independent contractor is also a guide to be used; lessee of self-service gasoline station was an employee for purposes of this act where he was required to make three reports weekly and daily bank deposits to lessor accounts, where the lessee was required to order gasoline from a distributor named by the lessor, and where the total control of the gasoline lay with the lessor. Pat Griffin Co. v. Employment Sec. Comm'n, 163 M 529, 519 P2d 147 (1974).

Logging trucker was an independent contractor and not covered by unemployment compensation under this section where he provided his own truck, licensed and insured it in his own name, repaired it and paid operational costs himself, hauled logs from paper company's logging operation site to its log pond, was compensated by weight hauled, could take off any days he chose or could work for others, could hire any relief driver he wanted, could refuse any load he did not want, could choose any route of travel he wanted, and was working under a written contract describing him as an independent contractor and requiring him to carry his own industrial insurance, despite the fact that he had to enter the company's premises to load and unload and that the company determined the hours when crews would be available to assist in loading and unloading. St. Regis Paper Co., Forest Prod. Div. v. Unemployment Comp. Comm'n, 157 M 548, 487 P2d 524 (1971). (Annotator's note: Definition of independent contractor was transferred from 39-51-203 to 39-51-201, and second prong of three-prong test was repealed by Ch. 314, L. 1987.)

Law Review Articles

Application of Workers' and Unemployment Compensation Statutes to Limited Liability Companies, Bahls, 55 Mont. L. Rev. 387 (1994).

39-51-204. Exclusions from definition of employment.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 393, L. 2023. Amendment effective October 1, 2023.

2015 Amendment: Chapter 132 deleted former (1)(j), (1)(k), (1)(l), (1)(m), (1)(n), and (1)(o) that read: "(j) service performed by an ordained, commissioned, or licensed minister of a church in the exercise of the church's ministry or by a member of a religious order in the exercise of duties required by the order;

(k) service performed by an individual receiving rehabilitation or remunerative work in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who, because of impaired physical or mental capacity, cannot be readily absorbed in the competitive labor market;

(l) service performed as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by a federal agency, any agency of a state or political subdivision of the state, or an Indian tribe by an individual receiving work relief or work training;

(m) service performed for a state prison or other state correctional or custodial institution by an inmate of that institution;

(n) service performed by an individual who is sentenced to perform court-ordered community service or similar work;

(o) service performed by elected public officials"; deleted former (1)(z) that read: "(z) services performed by an election judge appointed pursuant to 13-4-101 if the remuneration received for those services is less than $1,000 in the calendar year"; inserted (2) concerning exceptions to the term "employment"; and made minor changes in style. Amendment effective July 1, 2015.

2011 Amendment: Chapter 123 deleted former (1)(g) that read: "(g) service performed by sole proprietors, working members of a partnership, members of a limited liability company treated as a partnership or sole proprietorship pursuant to 39-51-207, or partners in a limited liability partnership that has filed with the secretary of state"; inserted (1)(aa) regarding certain volunteer service; and made minor changes in style. Amendment effective October 1, 2011.

2007 Amendments — Composite Section: Chapter 52 in (1)(g) near beginning after "members of a" deleted "member-managed" and after "company" substituted "treated as a partnership or sole proprietorship pursuant to 39-51-207" for "that has filed with the secretary of state". Amendment effective January 1, 2008.

Chapter 340 in (2)(a) at beginning inserted exception clause; inserted (2)(b) providing that officer or manager who is exempt from workers' compensation and who obtains independent contractor exemption under 39-71-417(1)(a)(ii) is not considered independent contractor for unemployment insurance purposes; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendments — Composite Section: Chapter 448 in (2) in first sentence near middle substituted "39-71-417" for "39-71-401(3)". Amendment effective April 28, 2005.

Chapter 466 in (1)(w) after "alien" substituted "as identified in 8 U.S.C. 1101(a)(15)(F), (a)(15)(H)(ii)(a), (a)(15)(J), (a)(15)(M), or (a)(15)(Q)" for "admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 1101(a)(H)(ii)(a) of the Immigration and Nationality Act"; inserted (1)(aa) to include services of an election judge if remuneration for the services is $1,000 a year or more; and made minor changes in style. Amendment effective April 28, 2005.

Preamble: The preamble attached to Ch. 448, L. 2005, provided: "WHEREAS, the Montana Supreme Court ruled in Wild v. Fregein Construction, 2003 MT 115, 315 Mont. 425, 68 P.3d 855, that the independent contractor exemption certificate does not raise a conclusive presumption as to the status of a person as an independent contractor and that an employer has an obligation to determine whether an individual is treated as an independent contractor or as an employee; and

WHEREAS, the Montana Supreme Court in the Wild decision ruled that it is against the public policy of the state for an employer to coerce a worker to work as an independent contractor by offering to pay an independent contractor at a rate higher than the employer pays employees; and

WHEREAS, the Montana Supreme Court in the Wild decision affirmed the twin determinants of independent contractor status as being "A" issues of control and "B" whether the individual is in an independent business, commonly known as the "A-B" test, and emphasized the necessity of both factors being present, with performing work for other persons being an indication of an independent business; and

WHEREAS, the concurring opinion in the Wild decision further suggested that the Department of Labor and Industry strengthen the certification process to provide a conclusive determination of independent contractor status; and

WHEREAS, the Wild decision created a great deal of uncertainty in matters involving independent contractors and employees in the business community, with employers and independent contractors coming together to propose a consensus solution after participating in a study required by Senate Bill 270, passed by the 58th Legislature; and

WHEREAS, the Montana Legislature considers enacting legislation appropriate to effectively reverse the Wild decision and to restore the conclusive presumption of an independent contractor exemption certificate as well as to allow employers to pay persons with the independent contractor exemption certificate at a rate higher than the rate paid to employees and additionally to allow a person with an independent contractor exemption certificate to work for only one employing unit without becoming an employee as well as to waive the benefits of the workers' compensation and occupational disease laws."

Effective Date — Applicability: Section 15, Ch. 448, L. 2005, provided: "[This act] is effective on passage and approval and applies to all applications and renewals for the independent contractor exemption certificate submitted to the department after [the effective date of this act]." Approved April 28, 2005.

2003 Amendments — Composite Section: Chapter 83 inserted (1)(y) regarding companionship or respite care services; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 94 in (1)(r) near end after "as defined in" inserted "5 U.S.C. 8501(1)(I)" and substituted "section 3306(c)(6)" for "section 3306(c)(7)"; and made minor changes in style. Amendment effective July 1, 2003.

Chapter 197 inserted (1)(z) concerning services of an individual at an amateur athletic event; and made minor changes in style. Amendment effective April 1, 2003.

Chapter 243 in (1)(e) in introductory clause after "cosmetologist" inserted "or barber" and at end deleted "or a barber who is licensed under Title 37, chapter 30"; in (1)(e)(ii) substituted "salon or shop" for "cosmetology salon" and after "37-31-101" deleted "or a barbershop, as defined in 37-30-101"; in (1)(e)(iii) substituted "salon or shop" for "cosmetology salon or barbershop"; and made minor changes in style. Amendment effective October 1, 2003.

Saving Clause: Section 4, Ch. 94, L. 2003, was a saving clause.

Applicability: Section 6, Ch. 94, L. 2003, provided: "[This act] applies to claims for benefits filed on or after July 1, 2003."

Severability: Section 25, Ch. 243, L. 2003, was a severability clause.

2001 Amendments — Composite Section: Chapter 200 in (1)(m) near end inserted "or an Indian tribe"; inserted (1)(x) concerning service performed in fishing rights-related activity by an Indian tribe; in (3) near beginning after "entity" inserted "an Indian tribe or tribal unit"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 339 substituted (1)(d) concerning services performed by qualified real estate agents or insurance salespeople by commission for former text that read: "service performed as a real estate broker or salesperson who is licensed pursuant to Title 37, chapter 51". Amendment effective April 21, 2001.

Preamble: The preamble attached to Ch. 200, L. 2001, provided: "WHEREAS, on December 21, 2000, federal law changed regarding state law treatment of employment by recognized Indian tribes for the purposes of state unemployment insurance programs by mandating the formerly optional state unemployment insurance coverage of employment by those Indian tribes; and

WHEREAS, as of December 21, 2000, federal law now requires states in which recognized Indian tribes exist to offer to those tribes a choice of experience-rating or direct reimbursable unemployment insurance accounts; and

WHEREAS, Montana's unemployment laws do not conform to the new federal requirements, and nonconformity of the state's unemployment insurance laws with the new federal provisions will jeopardize the ability of all Montana employers to take credit on federal taxes for the amounts paid to Montana's unemployment insurance program and will further depress Montana's economy; and

WHEREAS, the Legislature finds that it is the best interests of all the people of Montana that Montana's unemployment insurance laws conform to those December 21, 2000, federal law changes with respect to the treatment of Indian tribes for unemployment insurance purposes."

Effective Date — Retroactive Applicability: Section 9, Ch. 200, L. 2001, provided: "[This act] is effective July 1, 2001, and applies retroactively, within the meaning of 1-2-109, to employment by recognized Indian tribes occurring on or after December 21, 2000."

1999 Amendment: Chapter 61 in (1)(q) inserted reference to subsections (4) and (6) of 39-51-202. Amendment effective July 1, 1999.

Saving Clause: Section 12, Ch. 61, L. 1999, was a saving clause.

Severability: Section 13, Ch. 61, L. 1999, was a severability clause.

1997 Amendments: Chapter 60 in (1)(g), at end, inserted "or partners in a limited liability partnership that has filed with the secretary of state"; and made minor changes in style. Amendment effective March 17, 1997.

Chapter 491 in (1)(a) deleted former text that read: "agricultural labor, except as provided in 39-51-202(2). If an employer is otherwise subject to this chapter and has agricultural employment, all employees engaged in agricultural labor must be excluded from coverage under this chapter if the employer:

(i) in any quarter or calendar year, as applicable, does not meet either of the tests relating to the monetary amount or number of employees and days worked, for the subject wages attributable to agricultural labor; and

(ii) keeps separate books and records to account for the employment of persons in agricultural labor"; in (1)(b), in second sentence in two places, and in (1)(b)(i) and (i)(b)(ii) inserted "or household"; in (1)(b), after "service performed by", substituted current text concerning a sole proprietor's dependent member or spouse for "an individual in the employ of that individual's son, daughter, or spouse and service performed by a child under the age of 21 in the employ of the child's father or mother"; in (1)(d) substituted "broker or salesperson who is licensed pursuant to Title 37, chapter 51" for "securities, and insurance salespeople paid solely by commissions and without guarantee of minimum earnings"; deleted former (1)(k) that read: "(k) service performed in the employ of a hospital if the service is performed by a patient of the hospital"; in (1)(g), at beginning, substituted "service performed by" for "employment of" and at end inserted "or partners in a limited liability partnership that has filed with the secretary of state"; in (1)(i) substituted "services performed as" for "employment of"; deleted former (3) that read: "(3) For the purposes of 39-51-203(6), the term "employment" does not apply to service performed:

(a) in the employ of a church or convention or association of churches or an organization that is operated primarily for religious purposes and that is operated, supervised, controlled, or principally supported by a church or convention or association of churches"; inserted (1)(o) concerning individual sentenced to perform court-ordered community service; inserted (1)(q) concerning agricultural labor; inserted (1)(w) concerning alien admitted to perform agricultural work; and made minor changes in style. Amendment effective January 1, 1998.

Preamble: The preamble attached to Ch. 476, L. 1997, provided: "WHEREAS, House Bill No. 98 (Ch. 48, L. 1995), enacted by the 54th Legislature, excluded direct sellers from minimum wage, overtime, unemployment insurance, and workers' compensation requirements; and

WHEREAS, the Legislature in House Bill No. 98 adopted the federal definition of direct seller to apply to relevant Montana statutes; and

WHEREAS, ARM 24.11.831 narrowed the scope of the federal definition of direct seller; and

WHEREAS, an original purpose of this House Bill No. 561 was to codify the narrower definition of direct seller; and

WHEREAS, this House Bill No. 561 is the appropriate place to repeal Rule 24.11.831, Administrative Rules of Montana."

Severability: Section 36, Ch. 491, L. 1997, was a severability clause.

Saving Clause: Section 37, Ch. 491, L. 1997, was a saving clause.

1995 Amendments — Composite Section: Chapter 48 inserted (1)(p) excluding employment of a direct seller from the definition of employment; and made minor changes in style. Amendment effective February 9, 1995.

Chapter 95 inserted (1)(q) concerning services performed by a petroleum land professional; and made minor changes in style. Amendment effective March 9, 1995.

Chapter 195 in three places in (1)(i), after "school", deleted "college"; in (1)(n), at end, inserted "or members of a member-managed limited liability company that has filed with the secretary of state"; and made minor changes in style. Amendment effective March 23, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Applicability: Section 19, Ch. 195, L. 1995, provided: "[This act] applies to hearings or appeals requested on or after [the effective date of sections 2 through 10 and 12 through 19]." Sections effective March 23, 1995.

1993 Amendments: Chapter 171 in (4) inserted second sentence regarding an independent contractor's ability to file a claim and receive a determination; inserted (5) precluding application of the section to certain state or local government entities and nonprofit organizations; and made minor changes in style. Amendment effective March 25, 1993.

Chapter 473 in (1)(l), in two places, substituted "cosmetology salon" for "cosmetological establishment".

Severability: Section 8, Ch. 171, L. 1993, was a severability clause.

1991 Amendments: Chapter 373 in (1)(a) substituted "39-51-202(2)" for "39-51-203(8)" and inserted introductory clause regarding exclusion from coverage; inserted (1)(a)(i) and (1)(a)(ii) establishing criteria for exempting certain agricultural labor from definition of employment; in (1)(b) substituted "39-51-202(3)" for "39-51-203(9)" and inserted introductory clause regarding exclusion from coverage; and inserted (1)(b)(i) and (1)(b)(ii) establishing criteria for exempting certain domestic labor from definition of employment. Amendment effective July 1, 1991.

Chapter 573 at beginning of (1)(b) inserted "household and"; in (1)(g), after "performed", substituted language exempting from definition of employment those services performed as newspaper carrier or free-lance correspondent for "in the delivery and distribution of newspapers or shopping news from house to house and business establishments by an individual under the age of 18 years, but not including the delivery or distribution to any point or points for subsequent delivery or distribution" and inserted definitions of free-lance correspondent and newspaper carrier; inserted (1)(n) exempting from definition of employment sole proprietors or working members of a partnership; and inserted (4) providing that an individual found by Department to be independent contractor under 39-71-401(3) is considered independent contractor for workers' compensation purposes. Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

Applicability: Section 5, Ch. 573, L. 1991, provided: "[This act] applies to all claims filed on or after [the effective date of this act] [effective July 1, 1991]."

1989 Amendment: Inserted (1)(n) excluding services of installers of floor coverings under certain circumstances. Amendment effective July 1, 1989.

1987 Amendments: Chapter 234 deleted former (3)(c) that read: "(c) in the employ of a school which is not an institution of higher education, prior to December 31, 1977"; and made minor changes in phraseology.

Chapter 526 inserted (1)(l) excluding services performed by licensed cosmetologist or licensed barber.

1985 Amendment: Near beginning of (1)(j) after "service performed by an individual", deleted "under the age of 22"; and inserted definition of "regularly employed" in regard to casual labor not in course of employer's business.

1983 Amendment: In (1)(d), increased the age limit for purposes of the child services exclusion from 18 to 21.

1981 Amendment: Substituted "department" for "division" in (1)(f).

Administrative Rules

ARM 42.17.223 Determining employee status.

39-51-206. Agricultural labor — who treated as employer of member of crew furnished by crew leader.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: In (1)(b)(ii), after "person", substituted "for whom services in agricultural labor are performed" for "within the meaning of 39-51-202(1), 39-51-203(8), or 39-51-203(9)". Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1989 Amendment: In (1)(a) substituted citation to Migrant and Seasonal Agricultural Worker Protection Act, as amended, for citation to Farm Labor Contractor Registration Act of 1963; and made minor changes in form. Amendment effective July 1, 1989.

39-51-207. Treatment of limited liability companies.

Compiler's Comments

Effective Date: Section 18(3), Ch. 52, L. 2007, provided that this section is effective January 1, 2008.

Part 3
General Administrative Provisions

39-51-301. Administration — duties and powers of department — duties and powers of board — emergency provisions.

Compiler's Comments

2013 Amendment: Chapter 81 inserted (5)(c) requiring the department to verify an employer's location within a portion of the state covered by a disaster order. Amendment effective October 1, 2013.

Retroactive Applicability: Section 4, Ch. 81, L. 2013, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to any claims filed on or after January 1, 2011, that were charged to the account of an employer with an experience rating if that employer was in an area covered by a disaster declaration under 42 U.S.C. 5170, et seq."

2011 Amendment: Chapter 123 in (4)(a) near beginning inserted "jointly or individually", and after "records" inserted "papers, documents, and other objects that may be necessary and proper"; inserted (4)(b) related to issuance of subpoena; and made minor changes in style. Amendment effective October 1, 2011.

2009 Amendment: Chapter 25 deleted former (6) through (9) that read: "(6) Employees transferring from the department of revenue to the department as a result of the termination of the delegation of duties associated with unemployment insurance contribution functions are entitled to all rights, including those under 2-15-131, possessed as a state officer or employee before transferring, including rights under any law or administrative policy including the State Employee Protection Act. Employees transferring must be considered internal applicants by the department of revenue for recruitment purposes for 1 year from the date of the termination of the delegation of duties associated with unemployment insurance contribution functions.

(7) The department shall succeed the department of revenue in its rights to property relating to the termination of the delegation of duties associated with unemployment insurance contribution functions to the extent that is consistent with federal property transfer policy. The property includes real property, records, office equipment, forms, supplies, and contracts other than the program budget plan with the United States department of labor.

(8) (a) The termination of the delegation of duties associated with unemployment insurance contribution functions does not affect the validity of any pending judicial or administrative proceeding.

(b) All appeals that have not been heard prior to the termination of the delegation of duties associated with unemployment insurance contribution functions must be made in accordance with the procedures identified in 39-51-1109.

(c) The department must be substituted for the department of revenue and succeed to all audits, determinations, and other actions following the date of the termination of the delegation of duties associated with unemployment insurance contribution functions.

(9) The rights, privileges, and duties of the holders of bonds and other obligations issued and of the parties to contracts, leases, indentures, and other transactions entered into before the termination of the delegation of duties associated with unemployment insurance contribution functions remain in effect, and none of those rights, privileges, duties, covenants, or agreements are impaired or diminished by reason of the delegation of duties. The department is substituted for the department of revenue and succeeds to the rights and duties under the provisions of those bonds, contracts, leases, indentures, and other transactions. The provisions of this subsection do not apply to the program budget plan agreement between the department and the United States department of labor". Amendment effective July 1, 2009.

2007 Amendments — Composite Section: Chapter 52 inserted (5) allowing for modification of rules regarding claim filings, registration for work, and work search in the aftermath of a disaster under certain conditions; and made minor changes in style. Amendment effective October 1, 2007.

Chapter 81 in (6) in first sentence near middle after "including rights" deleted "to tenure in office and of rank or grade, rights to vacation and sick pay and leave, rights under any retirement or personnel plan or labor union contract, rights to compensatory time earned, and any other rights". Amendment effective July 1, 2007.

2005 Amendment: Chapter 466 deleted former (5) and (6) that read: "(5) The department may delegate to the department of revenue all duties associated with the administration of unemployment insurance contributions and the employment security account. The duties must be carried out in conformity with the requirements of the program budget plan with the United States department of labor. The department of revenue must receive funds from the department for the performance of the delegated duties. The department of revenue has rulemaking authority with respect to any function or duty delegated to the department of revenue pursuant to this section.

(6) The department may revoke its delegation to the department of revenue at any time"; in (5) near beginning of first sentence after "duties" substituted "associated with unemployment insurance contribution functions" for "in subsection (5)" and in second sentence near beginning after "department" inserted "of revenue" and at end after "duties" substituted "associated with unemployment insurance contribution functions" for "in subsection (5)"; in (6) near middle of first sentence after "duties", in (7)(a), (7)(b), and (7)(c) after "duties", and in (8) near middle of first sentence after "duties" substituted "associated with unemployment insurance contribution functions" for "in subsection (5)"; in (8) near beginning of second sentence after "revenue and" deleted "subject to the provisions of subsection (5)"; and made minor changes in style. Amendment effective April 28, 2005.

2003 Amendment: Chapter 597 in (5) at beginning of first sentence substituted "may" for "shall" and deleted former second sentence that read: "The delegated duties do not include oversight duties such as revenue quality control, risk management, and trust fund management"; inserted (6) concerning revocation of delegation; in (7) near beginning of first sentence substituted "from the department of revenue to the department" for "from the department to the department of revenue" and after "result of" inserted "the termination of the" and at end of second sentence inserted language concerning 1 year from termination of duties for "the period from July 1, 1997, through June 30, 1998"; in (8) at beginning of first sentence substituted "department shall succeed the department of revenue" for "department of revenue shall succeed the department" and after "relating to the" inserted "termination of the"; in (9)(a) at beginning inserted "termination of the"; substituted (9)(b) concerning appeals not heard prior to termination of delegation for former text that read: "(b) Appeals that were filed with the board of labor appeals or the department's hearings bureau before July 1, 1997, must follow the procedures and processes in effect when the appeal was first taken. An appeal that is filed on or after July 1, 1997, must be taken in accordance with the procedures and processes in effect on the date the appeal is filed"; in (9)(c) at beginning substituted "department must be substituted for the department of revenue" for "department of revenue must be substituted for the department" and at end substituted "following the date of the termination of the delegation of duties in subsection (5)" for "that have not been appealed to the board of labor appeals or the department's hearings bureau prior to July 1, 1997"; in (10) in first sentence near middle after "before the" inserted "termination of the" and in second sentence near beginning substituted "the department is substituted for the department of revenue" for "the department of revenue is substituted for the department"; and made minor changes in style. Amendment effective May 9, 2003.

Severability: Section 14, Ch. 597, L. 2003, was a severability clause.

Saving Clause: Section 15, Ch. 597, L. 2003, was a saving clause.

1999 Amendment: Chapter 61 inserted fourth sentence in (5) granting the department of revenue rulemaking authority for any function or duty delegated by section. Amendment effective July 1, 1999.

Saving Clause: Section 12, Ch. 61, L. 1999, was a saving clause.

Severability: Section 13, Ch. 61, L. 1999, was a severability clause.

1997 Amendment: Chapter 491 inserted (5) through (9) concerning delegation to Department of Revenue, employees transferring to Department of Revenue, succession rights of Department of Revenue, validity of pending proceedings, appeals, substitution of Department names, and rights, privileges, and duties of holders of bonds and other obligations; and made minor changes in style. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 491, L. 1997, provided: "WHEREAS, House Bill No. 98 (Ch. 48, L. 1995), enacted by the 54th Legislature, excluded direct sellers from minimum wage, overtime, unemployment insurance, and workers' compensation requirements; and

WHEREAS, the Legislature in House Bill No. 98 adopted the federal definition of direct seller to apply to relevant Montana statutes; and

WHEREAS, ARM 24.11.831 narrowed the scope of the federal definition of direct seller; and

WHEREAS, an original purpose of this House Bill No. 561 was to codify the narrower definition of direct seller; and

WHEREAS, this House Bill No. 561 is the appropriate place to repeal Rule 24.11.831, Administrative Rules of Montana."

Severability: Section 36, Ch. 491, L. 1997, was a severability clause.

Saving Clause: Section 37, Ch. 491, L. 1997, was a saving clause.

1985 Amendment: At end of (1) deleted last sentence that read: "Such rules shall be effective upon publication in the manner, not inconsistent with the provisions of this chapter, which the department shall prescribe"; and inserted (4) allowing Department and Board to issue subpoenas and compel testimony and production of evidence.

1983 Amendment: Deleted former (3), which read: "The department shall report as provided in 2-7-102. Such report shall include a balance sheet of the money in the fund in which there shall be provided, if possible, a reserve against the liability in future years to pay benefits in excess of the then-current contributions, which reserve shall be set up by the department in accordance with accepted actuarial principles on the basis of statistics of employment, business activity, and other relevant factors for the longest possible period."

1981 Amendment: Substituted "department" for "division" throughout the section.

Administrative Rules

ARM 24.11.470 Quality control.

Title 24, chapter 11, subchapter 22, ARM Types of accounts and rate setting.

39-51-302. Administrative rules.

Compiler's Comments

2005 Amendment: Chapter 466 deleted former (2) that read: "(2) The department shall delegate rulemaking authority to the department of revenue with respect to any function or duty delegated to the department of revenue pursuant to 39-51-301(5)"; and made minor changes in style. Amendment effective April 28, 2005.

1999 Amendment: Chapter 61 inserted (2) requiring department of labor and industry to delegate to department of revenue rulemaking authority for function or duty delegated by section; and made minor changes in style. Amendment effective July 1, 1999.

Saving Clause: Section 12, Ch. 61, L. 1999, was a saving clause.

Severability: Section 13, Ch. 61, L. 1999, was a severability clause.

1985 Amendment: Substituted language allowing Department to adopt rules to implement chapter for: "General and special rules may be adopted, amended, or rescinded by the department only after public hearing or opportunity to be heard thereon, of which proper notice has been given. General rules shall become effective 10 days after filing with the secretary of state and publication in one or more newspapers of general circulation in this state. Special rules shall become effective 10 days after notification to or mailing to the last known address of the individuals or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the department and shall become effective in the manner and at the time prescribed by law."

1981 Amendment: Substituted "department" for "division" throughout the section.

Administrative Rules

Title 24, chapter 11, ARM Unemployment Insurance Division.

Case Notes

Notice of Administrative Hearing Regarding Unemployment Insurance Proceedings Not Violative of Due Process Rights — Administrative Hearings Not Governed by Rules of Civil Procedure: In an unemployment insurance case, the notice of appeal sent to the attorney for Wheelsmith Fabrication, Inc. (Wheelsmith), stated that the purpose of an administrative hearing was to determine whether Hall was discharged for misconduct connected with her work or directly affecting her employment. Wheelsmith contended that the notice failed to adequately inform Wheelsmith of the factual claims involved, constituting a denial of due process of law. Applying the traditional due process balancing test in Mathews v. Eldridge, 424 US 319, 47 L Ed 2d 18, 96 S Ct 893 (1976), the Supreme Court held that Wheelsmith failed to show a risk of erroneous deprivation of a private interest affected by official government action. Further, unemployment insurance proceedings are governed by administrative rule, rather than the Montana Rules of Civil Procedure, and pursuant to 2-4-601, a notice of hearing must contain a short and plain statement of the matters asserted. The notice sent to Wheelsmith's attorney met the statutory criteria of a short and plain statement, and the District Court did not err in holding that Wheelsmith's due process rights were not violated by the notice of hearing. Wheelsmith Fabrication, Inc. v. Dept. of Labor and Industry, 2000 MT 27, 298 M 187, 993 P2d 713, 57 St. Rep. 131 (2000). See also ARM 24.11.201 and 24.11.317.

39-51-303. Publication and distribution of materials.

Compiler's Comments

1989 Amendment: After "special rules" deleted "annual reports to the governor"; and made minor changes in phraseology.

1981 Amendment: Substituted "department" for "division" throughout the section.

39-51-304. Personnel — criminal record background check.

Compiler's Comments

2019 Amendment: Chapter 287 inserted new (2) regarding personnel who have direct access to federal tax information; and made minor changes in style. Amendment effective May 3, 2019.

1995 Amendment: Chapter 18 near middle, after "accordance with", deleted "merit system".

1985 Amendment: Deleted former (1) and (2) that read: "(1) Except as otherwise provided, the department is authorized to appoint, fix the compensation, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of its duties under this chapter. The department may delegate to any such persons such power and authority as it considers reasonable and proper for the effective administration of this chapter and may in its discretion bond any person handling money or signing checks hereunder.

(2) No person who is an officer or committee member of any political party organization or who holds or is a candidate for any public office may be appointed or employed under this chapter"; inserted "personnel to administer this chapter"; and at end substituted "department of administration" for "merit system council".

1981 Amendment: Substituted "department" for "division" throughout the section.

39-51-305. Department to appoint appeals referees.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1985 Amendment: Near beginning before "appeals referees", inserted "salaried"; and near middle, before "in accordance with", deleted "consisting of salaried examiners selected".

1981 Amendment: Substituted "department" for "division" throughout the section.

Case Notes

Attorney Entitled to Absolute Quasi-Judicial Immunity for Actions in Contested Case Proceedings: The doctrine of immunity evolved to protect not only judges but also certain participants in the judicial process whose functions are closely associated with those of judicial officers. The immunity that those participants receive is quasi-judicial immunity, which is not a mere defense to liability but an absolute immunity from suit. Like judicial immunity, quasi-judicial immunity benefits the public by ensuring that quasi-judicial officers exercise their functions unfettered by fear of legal consequences, as long as the functions are within the scope of the officers' jurisdiction and authorized by law. A state attorney who discharged his duty under professional rules of conduct when notifying a contested case hearings examiner that a certified public accountant who was representing a client was practicing law without a license was protected by quasi-judicial immunity and was not subject to suit. Steele v. McGregor, 1998 MT 85, 288 M 238, 956 P2d 1364, 55 St. Rep. 349 (1998).

Hearings Examiner Entitled to Judicial Immunity: The state Department of Labor and Industry's hearings examiners perform adjudicatory functions comparable to those performed by judges under similar safeguards. As a result, those hearings examiners are entitled to absolute judicial immunity when acting in their adjudicatory capacities. This immunity results from the independence that judges need to make decisions in matters involving such things as monetary and liberty interests, without fear of reprisal from dissatisfied litigants. Absolute immunity is immunity from suit, rather than a mere defense to liability. Judicial immunity is dependent on the challenged conduct being an official act within the judge's broad statutory jurisdiction but does not depend on acting correctly. A person acting in a judicial capacity will not be deprived of immunity simply because that person acted maliciously, mistakenly, or in excess of authority. Steele v. McGregor, 1998 MT 85, 288 M 238, 956 P2d 1364, 55 St. Rep. 349 (1998).

39-51-307. Department to create employment service.

Compiler's Comments

1997 Amendment: Chapter 42 in (1) substituted "29 U.S.C. 49" for "48 Stat. 113; U.S.C. Title 29, Sec. 49(c)"; and made minor changes in style. Amendment effective March 12, 1997.

1981 Amendment: Substituted "department" for "division" throughout the section; deleted "create a bureau to be known as the Montana state employment service, which bureau shall" after "shall" at the beginning of (1); deleted "The bureau shall be administered by a full-time salaried director" from the end of (1); substituted "department" for "employment security division" in the second sentence in (3); deleted "The division is directed to appoint the personnel of the Montana state employment service" from the end of (3).

Case Notes

Job Service Office as "Employment Agency" — Private Employment Agency Not Entitled to Fee: Plaintiff employment agency is not entitled to an employment fee under 39-5-310 (now repealed) when the applicant was referred to the same position by the Job Service Office before the plaintiff contacted the applicant about the position. The Job Service Office is an "employment agency" within the definition established in 39-5-102 (now repealed). To interpret the employment contract between the applicant and the plaintiff as counter to the purpose for the existence of the state employment service is against the public policy of the state. Koopman v. Baggett, 235 M 336, 767 P2d 332, 46 St. Rep. 33 (1989).

39-51-308. Acquisition and disposition of property by department.

Compiler's Comments

1981 Amendment: Substituted "department" for "division" throughout the section.

39-51-309. Representation of department and state in court.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Substituted "department" for "division" throughout (1).

Case Notes

Petition for Judicial Review — Notice of Nonparticipation — Failure to Preserve Evidentiary Argument on Appeal: The Board of Labor Appeals (now the Unemployment Insurance Appeals Board) determined that a fired employee did not engage in misconduct and therefore was entitled to unemployment benefits. The employer filed a petition for judicial review and the Board filed a notice of nonparticipation. After the District Court reversed the determination, the Board filed a motion to alter or amend the judgment, claiming that the District Court had improperly considered inadmissible hearsay. Because the Board had not raised the issue with the District Court before its ruling, the Supreme Court concluded that it had not preserved the argument on appeal. Gary & Leo's Fresh Foods, Inc. v. St., 2012 MT 219, 366 Mont. 313, 286 P.3d 1218.

39-51-310. Function of board.

Compiler's Comments

2009 Amendment: Chapter 25 at end after "laws" deleted "concerning benefits". Amendment effective July 1, 2009.

1999 Amendment: Chapter 442 after "laws" deleted "and disputes arising under Title 39, chapter 71, not" and after "benefits" deleted "regarding whether an individual is an employee or an independent contractor as defined in that chapter". Amendment effective April 23, 1999.

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 28, Ch. 442, L. 1999, was a severability clause.

1987 Amendment: Near middle of section, after "unemployment insurance laws", inserted remainder of section referring to disputes arising under Title 39, ch. 71, regarding independent contractor status.

Part 4
Financial Administration

39-51-401. Unemployment insurance fund — establishment and control.

Compiler's Comments

2013 Amendment: Chapter 203 in (5) substituted "42 U.S.C. 1103 and 1104" for "sections 903 and 904 of the Social Security Act (42 U.S.C. 1103 and 1104)"; inserted (6) adding 30% of penalties collected to this fund; and made minor changes in style. Amendment effective October 1, 2013.

2001 Amendment: Chapter 34 in two places in introductory clause substituted reference to enterprise fund for reference to expendable trust fund; in (4) at end inserted "acquired by the fund"; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendment: Chapter 42 in (5) substituted "sections 903 and 904 of the Social Security Act (42 U.S.C. 1103 and 1104)" for "section 903 of the Social Security Act"; and made minor changes in style. Amendment effective March 12, 1997.

1983 Amendment: In first sentence, substituted "a fund in the expendable trust fund type known as the unemployment insurance fund" for "an account in the agency fund known as the unemployment insurance account"; in second sentence, substituted "expendable trust fund" for "account in the agency fund"; and changed "account" to "fund", referring to the unemployment insurance fund, in four places.

1981 Amendment: Substituted "department" for "division" in the first sentence.

Federal Statute: Section 903 of the Social Security Act, referred to in this section, is compiled as 42 U.S.C. § 1103.

39-51-402. Unemployment insurance fund — custodian — accounts and deposits.

Compiler's Comments

1997 Amendment: Chapter 42 near end of (2), after "Social Security Act", inserted "(42 U.S.C. 1104)"; and made minor changes in style. Amendment effective March 12, 1997.

1985 Amendment: In (1) at beginning, substituted "commissioner of labor and industry" for "state treasurer" and at end of first sentence, after "in accordance with", substituted "this chapter" for "the directions of the department and shall issue his warrants upon it in accordance with such regulations as the department shall prescribe"; in (2) in first sentence, substituted "immediately deposited" for "forwarded to the treasurer who shall immediately deposit it", at end of second sentence deleted "upon warrants issued by the treasurer under the direction of the department", and deleted from end of subsection "any provision of law in this state relating to the deposit, administration, release, or disbursement of money in the possession or custody of this state to the contrary notwithstanding"; in (4) after "may be deposited", deleted "by the treasurer, under the direction of the department"; and deleted former (5) that read: "The treasurer shall give a separate bond conditioned upon the faithful performance of his duties as custodian of the unemployment insurance fund in an amount fixed by the department and in a form prescribed by law or approved by the attorney general. Premiums for the bond shall be paid from the unemployment insurance administration account."

1983 Amendment: Throughout section, changed references to unemployment insurance account to unemployment insurance fund.

1981 Amendment: Substituted "department" for "division" throughout the section.

Federal Statute: Section 904 of the Social Security Act, referred to in this section, is compiled as 42 U.S.C. § 1104.

39-51-403. Money to be requisitioned from unemployment trust fund solely for payment of benefits.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 2 in (1) near end of second sentence after "stamp" substituted "benefits" for "coupons"; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 88 in (1) in first sentence after "accordance" inserted "with section 904 of the Social Security Act, 42 U.S.C. 1104, and", at end after "department" deleted "except that money credited to this state's account pursuant to sections 903 and 904 of the Social Security Act (42

U.S.C. 1103 and 1104), as amended, may also be withdrawn for the payment of expenses for the administration of this chapter and of public employment offices, as provided by this chapter", near middle of second sentence after "39-51-2207" deleted "or money withheld" and after "39-51-2208" inserted "or for repayment of child support obligations pursuant to 39-51-3106"; in (2) in second sentence substituted "the secretary of the treasury of the United States" for "the treasurer" and at beginning of third sentence inserted "Upon receipt of the deposit, the department"; and made minor changes in style. Amendment effective July 1, 2009.

1997 Amendments — Composite Section: Chapter 42 in (1) substituted "sections 903 and 904 of the Social Security Act (42 U.S.C. 1103 and 1104)" for "section 903 of the Social Security Act (42 U.S.C. 1103)"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 60 at beginning of (1) substituted "may be" for "shall be" and inserted second sentence concerning when money withheld by the Department must be considered benefits; and made minor changes in style. Amendment effective March 17, 1997.

Style changes in the chapters were slightly different. In each case, the codifier chose the more appropriate.

Retroactive Applicability: Section 13, Ch. 60, L. 1997, provided: "[Sections 1, 5, and 10] [39-51-2207, 39-51-403, and 39-51-3105] apply retroactively, within the meaning of 1-2-109, to January 1, 1997, in order to comply with federal requirements."

1981 Amendment: Substituted "department" for "division" throughout the section.

Federal Statute: Section 903 of the Social Security Act, referred to in this section, is compiled as 42 U.S.C. § 1103.

39-51-404. Special administrative funds.

Compiler's Comments

2009 Amendment: Chapter 25 in (1) near beginning after "section 903" deleted "and 904", after "1103" deleted "and 1104", after "may be" substituted "used, pursuant to a specific appropriation by the legislature, for the payment of expenses incurred by the department for the administration of the unemployment insurance laws and public employment offices. The appropriation must specify the purposes of the appropriation and the amounts of the appropriation" for "requisitioned and used for the payment of expenses incurred for the administration of this chapter pursuant to a specific appropriation by the legislature if the expenses are incurred and the money is requisitioned after the enactment of an appropriation law that:

(a) specifies the purposes for which the money is appropriated and the amounts appropriated; and

(b) limits the amount that may be used during any 12-month period beginning on July 1 and ending on the next June 30 to an amount not exceeding the amount by which the aggregate of the amounts credited to the account of this state pursuant to sections 903 and 904 of the Social Security Act, 42 U.S.C. 1103 and 1104, as amended, during the same 12-month period and the 34 preceding 12-month periods exceeds the aggregate of the amounts used pursuant to this section and charged against the amounts credited to the account of this state during any of the 35 12-month periods"; deleted former (2) that read: "For the purposes of this section, amounts used during any 12-month period must be charged against equivalent amounts that were first credited and that are not already charged, except that an amount used for administration during any 12-month period may not be charged against any amount credited during a 12-month period earlier than the 34th preceding period. Money requisitioned for the payment of expenses of administration pursuant to this section must be deposited in the unemployment insurance administration account but, until expended, must remain a part of the unemployment insurance fund"; at beginning of former (4)(a) deleted "beginning January 1, 2008"; at beginning of former (4)(b) deleted "beginning July 1, 2008"; in (5)(d) at beginning deleted "beginning July 1, 2008"; and made minor changes in style. Amendment effective July 1, 2009.

2007 Amendment: Chapter 362 deleted former (4) that read: "(4) An assessment equal to 0.13% of all taxable wages provided for in 39-51-1108 and 0.05% of total wages paid by employers not covered by an experience rating must be levied against and paid by all employers. All assessments and investment income must be deposited in the employment security account provided for in 39-51-409"; inserted (4) establishing employer assessments; inserted (5) requiring deposits in employment security account; inserted (6) designating assessments and income to be used for administrative expenses of program; inserted (7) relating to use of excess funds; and made minor changes in style. Amendment effective January 1, 2008.

2003 Amendment: Chapter 94 deleted former (1)(b) that read: "(b) limits the period within which the money may be expended to a period ending not more than 2 years after the date of the enactment of the appropriation law"; and made minor changes in style. Amendment effective July 1, 2003.

Saving Clause: Section 4, Ch. 94, L. 2003, was a saving clause.

Applicability: Section 6, Ch. 94, L. 2003, provided: "[This act] applies to claims for benefits filed on or after July 1, 2003."

1999 Amendment: Chapter 399 in (4) substituted assessment of 0.13% for assessment of 0.1%. Amendment effective October 1, 1999.

Applicability: Section 5, Ch. 399, L. 1999, provided: "[This act] applies to taxable wages paid on or after January 1, 2000."

1997 Amendment: Chapter 42 in (1) and (1)(c) substituted "sections 903 and 904 of the Social Security Act (42 U.S.C. 1103 and 1104)" for "section 903 of the Social Security Act (42 U.S.C. 1103)"; and made minor changes in style. Amendment effective March 12, 1997.

1993 Amendment: Chapter 173 in (4), at beginning of first sentence, deleted "Beginning with the third quarter of 1983" and at end, after "employers", deleted "and may be used by the department for administrative purposes", near beginning of second sentence, after "assessments", inserted "and investment income" and at end substituted "the employment security account provided for in 39-51-409" for "the unemployment insurance administration account provided for in 39-51-406 and used as appropriated by the legislature", and deleted former third sentence that read: "Any assessments deposited to the unemployment insurance administration account, including investment income, that are not appropriated by the legislature must be transferred to the unemployment trust fund account provided for in 39-51-402"; and made minor changes in style. Amendment effective July 1, 1993.

1992 Special Session Amendment: Chapter 15 in (4), at end of first sentence after "employers", deleted "and may be used by the department for administrative purposes". Amendment effective February 4, 1992.

Termination: Section 3, Ch. 15, Sp. L. January 1992, provided that this section terminates July 1, 1992.

1989 Amendment: In last sentence of (4), after "assessments deposited to the unemployment insurance administration account", inserted "including investment income".

1985 Amendment: In (4) after first phrase, substituted "an assessment equal to .1% of all taxable wages provided for in 39-51-1108" for ".1% of employer contributions received by the department", near end of first sentence, after "rating", inserted "must be levied against and paid by all employers and", and in two places substituted "assessments" for "contributions".

1983 Amendments: Chapter 251, in (1)(c), near middle before "preceding 12-month periods" changed "four" to "34" and near end, changed "five" to "35"; and near middle of (2), before "preceding such period" changed "fourth" to "34th".

Chapter 281, in last sentence of (2), after "unemployment insurance administration", changed "fund" to "account".

Chapter 304 enacted (4) concerning use of funds for administrative purposes.

1981 Amendment: Substituted "department" for "division" in (3).

Federal Statute: Section 903 of the Social Security Act, referred to in this section, is compiled as 42 U.S.C. § 1103.

Administrative Rules

Title 24, chapter 11, subchapter 22, ARM Types of accounts and rate setting.

39-51-405. Signatures required on warrants.

Compiler's Comments

2007 Amendment: Chapter 52 near beginning after "issued" deleted "by the treasurer" and at end after "countersignature of" substituted "the commissioner of labor and industry or an agent authorized for that purpose" for "a member of the department or its duly authorized agent for that purpose". Amendment effective October 1, 2007.

1981 Amendment: Substituted "department" for "division".

39-51-406. Unemployment insurance administration account.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 10 in (1) in second sentence after "account is" deleted "appropriated and made" and after "available" inserted "for appropriation". Amendment effective October 1, 2009.

Chapter 25 in (1) at end after "administration" inserted "of unemployment insurance laws"; in (2) near middle after "section 302" deleted "Title III"; in (3)(a) after "section 302" deleted

"Title III"; in (3)(b) at end inserted "that are designated for use in the administration of the unemployment insurance program"; and made minor changes in style. Amendment effective July 1, 2009.

2007 Amendment: Chapter 52 deleted former (3)(b) that read: "(b) all money appropriated by the state from the general fund for the purpose of administering this chapter"; deleted former (3)(c)(ii), (3)(c)(iii), (3)(c)(iv), and (3)(c)(v) that read: "(ii) this state or any agency of the state;

(iii) any other state or any of its agencies;

(iv) political subdivisions of the state; or

(v) any other source for administrative expense and purpose"; deleted former (6) that read: "(6) The state treasurer shall give a separate and additional bond conditioned upon the faithful performance of the treasurer's duties in connection with the unemployment insurance administration account in an amount to be fixed by the department and in a form prescribed by law or approved by the attorney general. The premiums for the bond must be paid from the money in the unemployment insurance administration account"; and made minor changes in style. Amendment effective October 1, 2007.

1993 Amendment: Chapter 10 in (6), in last sentence after "bond", deleted "and the premiums for the bond given by the treasurer for the unemployment insurance fund under 39-51-402"; and made minor changes in style.

1992 Special Session Amendment: Chapter 15 in (1), at beginning of second and third sentences, inserted exception clause; at beginning of (4) substituted exception clause for "Notwithstanding any provisions of this section"; and inserted (8) requiring Department to transfer up to $1.5 million from the unemployment insurance administration account to the general fund on or before June 30, 1992. Amendment effective February 4, 1992.

Termination: Section 3, Ch. 15, Sp. L. January 1992, provided that this section terminates July 1, 1992.

1983 Amendments: Chapters 277 and 281, in (1) and (7), substituted "federal special revenue fund" for "federal and private revenue fund". Chapter 281, in (4) and (6) after "unemployment insurance", changed "account" to "fund".

Chapter 369, deleted subsection under (3), which provided "all interest and penalties collected on past due contributions as provided by 39-51-1301".

1981 Amendment: Substituted "department" for "division" in (1), (5), and (6).

Federal Statute: Section 302, Title III of the Social Security Act, referred to in this section, is compiled as 42 U.S.C. § 502.

39-51-407. Reimbursement of fund by state.

Compiler's Comments

2009 Amendment: Chapter 25 at beginning substituted "The state of Montana shall replace within a reasonable time any money received under section 302 of the Social Security Act, 42 U.S.C. 502, that" for "This state recognizes its obligation to replace and pledges the faith of this state that funds will be provided in the future and applied to the replacement of any of the money received from the United States or any agency of the United States under Title III of the Social Security Act (now Subchapter III), any unencumbered balances in the unemployment insurance administration account, any money granted to this state pursuant to the provisions of the Wagner-Peyser Act (29 U.S.C. 49, et seq.), and any money made available by the state or its political subdivisions and matched by money granted to this state pursuant to the provisions of the Wagner-Peyser Act that the secretary of labor finds have", near middle after "labor" inserted "of the United States", at end after "administration of" substituted "Montana's unemployment insurance laws" for "this chapter", and deleted former second and third sentences that read: "The money must be promptly supplied by money furnished by the state of Montana or any of its subdivisions for the use of the department and used only for purposes approved by the secretary of labor. The department shall, if necessary, promptly report to the governor and the governor to the legislature, by a letter to the speaker of the house of representatives and the president of the senate, the amount required for replacement of the money"; and made minor changes in style. Amendment effective July 1, 2009.

1997 Amendment: Chapter 42 in first sentence, after "Title III of the Social Security Act", inserted "(now Subchapter III)" and after "Wagner-Peyser Act" inserted "(29 U.S.C. 49, et seq.)"; and made minor changes in style. Amendment effective March 12, 1997.

1991 Amendment: In last sentence, after "legislature", inserted "by a letter to the speaker of the house of representatives and the president of the senate". Amendment effective March 20, 1991.

1987 Amendment: In first sentence, after "received", deleted "after July, 1941", after "account" deleted "as of that date", deleted former (2) that read: "(2) This section shall not be construed to relieve this state of its obligation with respect to funds received prior to July 1, 1941, pursuant to the provisions of Title III of the Social Security Act"; and made minor changes in phraseology.

1983 Amendment: Near middle of first sentence after "unemployment insurance administration", changed "fund" to "account".

1981 Amendment: Substituted "department" for "unemployment insurance division" in the next to last sentence of (1); substituted "department" for "division" in the last sentence of (1).

Federal Statute: Title III of the Social Security Act, referred to in this section, is compiled as 42 U.S.C. §§ 501 through 503.

The Wagner-Peyser Act, referred to in this section, is Ch. 49, 48 Stat. 113, and is compiled as 29 U.S.C. §§ 49 through 49c, 49d, 49g, 49h, 49j, 49k.

39-51-408. Advances from federal unemployment trust fund.

Compiler's Comments

2009 Amendment: Chapter 25 in (1) at end after "specified" substituted "in section 1201 of the Social Security Act, 42 U.S.C. 1321" for "by congress"; and made minor changes in style. Amendment effective July 1, 2009.

39-51-409. Employment security account.

Compiler's Comments

Termination Provision Repealed: Section 1, Ch. 394, L. 2023, repealed sec. 7, Ch. 400, L. 2019, which terminated the 2019 amendment to this section June 30, 2023. Effective May 3, 2023.

2019 Amendment: Chapter 400 in (2)(e) at end inserted "and for the administration of 39-71-319". Amendment effective July 1, 2019, and terminates June 30, 2023.

2009 Amendment: Chapter 435 inserted (2)(i) allowing appropriation for payment of principal, interest, and redemption premium on employment security revenue bonds; in (3) at beginning inserted exception clause; and made minor changes in style. Amendment effective May 5, 2009.

Severability: Section 16, Ch. 435, L. 2009, was a severability clause.

2007 Amendment: Chapter 362 inserted (2)(b) allowing money in account to be used for administrative expenses; and made minor changes in style. Amendment effective October 1, 2007.

2005 Amendment: Chapter 466 inserted (2) providing that money deposited in the employment security account may be appropriated to the department for payment of benefits and certain expenses; in (3) near beginning after "from the" inserted "employment security" and at end after "programs" inserted "identified in subsection (2)"; and made minor changes in style. Amendment effective April 28, 2005.

1999 Amendment: Chapter 399 in (2) at end and in (3) near middle substituted "employment services programs" for reference to employment office programs; and made minor changes in style. Amendment effective October 1, 1999.

Applicability: Section 5, Ch. 399, L. 1999, provided: "[This act] applies to taxable wages paid on or after January 1, 2000."

Effective Date: Section 4, Ch. 173, L. 1993, provided: "[This act] is effective July 1, 1993."

Part 5
Governmental Cooperation

Part Administrative Rules

Title 24, chapter 11, subchapter 5, ARM Interstate claimants.

39-51-501. State-federal cooperation.

Compiler's Comments

2009 Amendment: Chapter 88 substituted (1)(a)(i) through (1)(a)(iii) and (1)(b) regarding department duties and fees for former (1)(a) through (1)(c) that read: "(a) cooperate to the fullest extent consistent with the provisions of this chapter with the secretary of labor, pursuant to the provisions of the Social Security Act, as amended;

(b) make reports in a form and containing the information that the secretary of labor may require and shall comply with the provisions that the secretary of labor may find necessary to ensure the correctness and verification of the reports; and

(c) comply with the regulations prescribed by the secretary of labor governing the expenditures of the sums that are allotted and paid to this state under Title III of the Social

Security Act (now Subchapter III), as amended, for the purpose of assisting in the administration of this chapter"; and made minor changes in style. Amendment effective July 1, 2009.

1997 Amendment: Chapter 42 in (1)(c), after "Title III of the Social Security Act", inserted "(now Subchapter III)"; and made minor changes in style. Amendment effective March 12, 1997.

1981 Amendment: Substituted "department" for "division" throughout the section.

Federal Statute: Title III of the Social Security Act, referred to in this section, is compiled as 42 U.S.C. §§ 501 through 503.

39-51-502. Cooperation with other agencies.

Compiler's Comments

1981 Amendment: Substituted "department" for "division" throughout the section.

39-51-503. Agreements with railroad retirement board.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 2 near end after "administration" substituted "account" for "fund" (rendered void by Ch. 25); and made minor changes in style. Amendment effective October 1, 2009.

Chapter 25 in (2) at beginning inserted "The department shall", near middle after "department" deleted "relating to employer's status and contributions received from employers covered by the Railroad Unemployment Insurance Act (45 U.S.C. 351, et seq.), together with employee wage records and other data", near end after "Act" inserted "45 U.S.C. 351, et seq.", and deleted former second sentence that read: "Any money received by the department from the railroad retirement board or any other governmental agency with respect to the establishment, maintenance, and use of employment service facilities must be paid into and credited to the proper division of the unemployment insurance administration fund set up and established under 39-51-406 and 39-51-407"; inserted (3) regarding the charging and deposit of fees; and made minor changes in style. Amendment effective July 1, 2009.

1997 Amendment: Chapter 42 in first sentence, after first "Railroad Unemployment Insurance Act", inserted "(45 U.S.C. 351, et seq.)" and after second "Railroad Unemployment Insurance Act" deleted "(52 Stat. 1094)"; and made minor changes in style. Amendment effective March 12, 1997.

1981 Amendment: Substituted "department" for "division" throughout the section; deleted "Montana state" before "employment service facilities" in the first sentence; deleted "state" before "employment service facilities" in the last sentence.

Federal Statute: The Railroad Unemployment Insurance Act, referred to in this section, is Ch. 680, 52 Stat. 1094, and is compiled as 45 U.S.C. § 351, et seq.

39-51-504. Reciprocal benefit arrangements.

Compiler's Comments

2009 Amendment: Chapter 25 in (1) after "enter into" inserted "reciprocal benefit" and at end after "government" inserted "or both"; in (2)(a) at beginning substituted "Subject to subsection (2)(b), services performed by an individual" for "whereby individuals performing services in this and other states" and after "employing unit" substituted "that are customarily performed in more than one state may be considered to be performed entirely within any one of the states in which:

(i) any part of the services is performed;

(ii) the individual maintains the individual's residence; or

(iii) the employing unit maintains a place of business.

(b) An election made by the employing unit and approved by the department must be in place and must designate in which of the states described in subsection (2)(a) the services must be considered to have been performed" for "under circumstances not specifically provided for in this chapter or under similar provisions of the unemployment insurance laws of such other states shall be deemed to be engaged in employment performed entirely within this state or within one of such other states and whereby potential rights to benefits accumulated under the unemployment insurance laws of several states or under such a law of the federal government or both may constitute the basis for the payment of benefits through a single appropriate agency under terms which the department finds will be fair and reasonable as to all affected interests and will not result in any substantial loss to the fund"; in (3) in introductory clause after "labor" substituted "for the payment of benefits on the basis of combining an individual's wages and employment covered under this chapter with the individual's wages and employment covered by the unemployment laws of another state or the federal government provided that the arrangements contain provisions" for "with the appropriate agencies of the other states or of the federal government whereby wages or services upon the basis of which an individual may become entitled to benefits under the unemployment insurance law of another state or of the federal government shall be deemed to be wages for employment by employers for benefit purposes, provided that"; in (3)(a) substituted "for the application of the base period of a single state to a claim involving the combining of an individual's wages and employment covered by the laws of two or more states" for "in any instance involving the combining of an individual's wages and employment covered under two or more state unemployment insurance laws, that the base period of a single state law will be used"; in (3)(c) at end after "interests" deleted "and whereby the department will reimburse other state or federal agencies charged with the administration of unemployment insurance laws with such reasonable portion of benefits paid under the law of any such other states or of the federal government upon the basis of employment or wages for employment by employers as the department finds will be fair and reasonable to all affected interests"; inserted (4) requiring that wages or services for which an individual may become entitled to benefits under the unemployment insurance laws of another state or the federal government must be considered wages for employment for benefit purposes by employers; in (5) near beginning after "authorized to" substituted "issue reimbursements" for "make", after "agencies" inserted "and to receive", and after "reimbursements from" substituted "other state or federal agencies and to deposit or withdraw the reimbursements from" for "or to"; and made minor changes in style. Amendment effective July 1, 2009.

1981 Amendment: Substituted "department" for "division" throughout the section.

Administrative Rules

Title 24, chapter 11, subchapter 5, ARM Interstate claimants.

39-51-505. Access to governmental records.

Compiler's Comments

Applicability: Section 19, Ch. 195, L. 1995, provided: "[This act] applies to hearings or appeals requested on or after [the effective date of sections 2 through 10 and 12 through 19]." Sections effective March 23, 1995.

Effective Date: Section 20(2), Ch. 195, L. 1995, provided that this section is effective on passage and approval. Approved March 23, 1995.

Part 6
Records and Reports

Part Administrative Rules

Title 24, chapter 11, subchapter 27, ARM Records, reporting, and payment.

39-51-601. Department to maintain wage record.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1981 Amendment: Substituted "department" for "division".

Severability Clause: Section 5, Ch. 4, Ex. L. 1969, was a severability clause.

39-51-602. Method to be used by department in keeping wage records.

Compiler's Comments

2009 Amendment: Chapter 25 in first sentence after "department" deleted "for purposes of this chapter" and in second sentence after "accrued wages" substituted "may" for "must"; and made minor changes in style. Amendment effective July 1, 2009.

1991 Amendment: After "paid" inserted exception clause concerning assignment of certain wages to time periods; and made minor change in style. Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1989 Amendment: At beginning, deleted language that provided wage records kept prior to January 1, 1941, must be kept on basis of wages payable. Amendment effective July 1, 1989.

1981 Amendment: Substituted "department" for "division" throughout the section.

39-51-603. Employing unit to keep records and make reports — confidentiality — rules.

Compiler's Comments

2009 Amendment: Chapter 88 inserted (4) requiring the adoption of rules providing for confidentiality; in (5)(a) near beginning after "department" inserted "or any other state or local government employee"; inserted (5)(b) regarding the use of disclosed information; and made minor changes in style. Amendment effective July 1, 2009.

1995 Amendment: Chapter 195 inserted last sentence in (1) requiring employing unit maintaining records outside the state to furnish the Department with copy of records or pay audit costs; and made minor changes in style. Amendment effective March 23, 1995.

Applicability: Section 19, Ch. 195, L. 1995, provided: "[This act] applies to hearings or appeals requested on or after [the effective date of sections 2 through 10 and 12 through 19]." Sections effective March 23, 1995.

1991 Amendment: In (1), after "inspection", inserted "and audit". Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1981 Amendment: Substituted "department" for "division" throughout the section.

Administrative Rules

ARM 42.17.203 Records to be kept by employer.
ARM 42.17.204 Remittance of tax by employers.
ARM 42.17.221 Due date and application of taxes.
ARM 42.17.223 Determining employee status.

39-51-605. Employing unit responsibility to respond to department requests for information — waiver of rights.

Compiler's Comments

Effective Date: This section is effective October 1, 2013.

Administrative Rules

ARM 24.11.208 Employer loss of interested party status.

Part 7
Program Integrity

Part Compiler's Comments

Effective Date: Section 6, Ch. 425, L. 2021, provided: "[This act] is effective on passage and approval." Approved May 7, 2021.

Part 11
Employer Contributions

Part Administrative Rules

Title 42, chapter 17, subchapter 2, ARM Withholding and unemployment insurance.

39-51-1101. Commencement and termination of coverage under chapter.

Compiler's Comments

1991 Amendment: In (2), near end of first sentence before "exceed", inserted "equal or" and after "exceed" substituted remainder of sentence referring to wages required under 39-51-202 for "$1,000" and in second sentence changed references to subsections of 39-51-202; and made minor change in style. Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1987 Amendment: In (2) increased wage amount to $1,000 from $500.

1981 Amendment: Substituted "department" for "division" throughout (2).

39-51-1102. Election by employing units not otherwise subject to chapter.

Compiler's Comments

1981 Amendment: Substituted "department" for "division" throughout the section.

39-51-1103. Contributions by employers required — payments in lieu of contributions authorized for certain employers.

Compiler's Comments

2001 Amendment: Chapter 200 near middle of (2) substituted "rules" for "regulations"; in (5) after "subdivisions" deleted "effective January 1, 1977"; inserted (6) concerning separate election by Indian tribe; and made minor changes in style. Amendment effective July 1, 2001.

Preamble: The preamble attached to Ch. 200, L. 2001, provided: "WHEREAS, on December 21, 2000, federal law changed regarding state law treatment of employment by recognized Indian tribes for the purposes of state unemployment insurance programs by mandating the formerly optional state unemployment insurance coverage of employment by those Indian tribes; and

WHEREAS, as of December 21, 2000, federal law now requires states in which recognized Indian tribes exist to offer to those tribes a choice of experience-rating or direct reimbursable unemployment insurance accounts; and

WHEREAS, Montana's unemployment laws do not conform to the new federal requirements, and nonconformity of the state's unemployment insurance laws with the new federal provisions will jeopardize the ability of all Montana employers to take credit on federal taxes for the amounts paid to Montana's unemployment insurance program and will further depress Montana's economy; and

WHEREAS, the Legislature finds that it is the best interests of all the people of Montana that Montana's unemployment insurance laws conform to those December 21, 2000, federal law changes with respect to the treatment of Indian tribes for unemployment insurance purposes."

Effective Date — Retroactive Applicability: Section 9, Ch. 200, L. 2001, provided: "[This act] is effective July 1, 2001, and applies retroactively, within the meaning of 1-2-109, to employment by recognized Indian tribes occurring on or after December 21, 2000."

1985 Amendment: In (1) deleted "(19)" after "39-51-201".

1981 Amendment: Substituted "department" for "division" throughout (2).

Severability Clause: Section 5, Ch. 4, Ex. L. 1969, was a severability clause.

Administrative Rules

Title 24, chapter 11, subchapter 6, ARM Classifications and rates.

Title 24, chapter 11, subchapter 22, ARM Types of accounts and rate setting.

ARM 42.17.221 Due date and application of taxes.

ARM 42.17.222 Demand of payment or reports if employer transfers or discontinues business.

ARM 42.17.223 Determining employee status.

Case Notes

Employment or Joint Venture: A contractor obtained services of a worker on various jobs, referring to the relationship as a partnership or joint venture. Where worker was paid $500 a week, all contracts were signed by contractor only, there were no documents, correspondence, or accounts indicating a partnership or joint venture, no partnership income tax was filed, and all materials were purchased by contractor using his personal accounts with suppliers, the court upheld the finding of an employment relationship for unemployment insurance tax purposes. Hammerquist v. Employment Sec. Div., 230 M 347, 749 P2d 535, 45 St. Rep. 261 (1988).

39-51-1104. Duty and liability of contractor and subcontractor, respectively, in regard to taxes, penalties, and interest owed by subcontractor.

Compiler's Comments

1991 Amendment: In (1) and (3), before "penalties", substituted "taxes" for "contributions". Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1981 Amendment: Substituted "department" for "division" in (2).

39-51-1105. Liability for taxes, penalties, and interest owed.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 25 in (1) after "39-51-1125(1)" deleted "and (2)". Amendment effective July 1, 2009.

Chapter 88 in (1) after "provided by" inserted "39-51-404" and after "39-51-1125(1)" inserted "and 39-51-1301"; in (4) at end after "member" inserted "and to each manager, if any"; in (5) near end after "managers" inserted "and members"; and made minor changes in style. Amendment effective March 25, 2009.

2007 Amendment: Chapter 52 in (3) at beginning of first sentence deleted "In the case of a corporate bankruptcy", near middle after "unaffected by the" inserted "bankruptcy of a business entity to which a", and at end after "discharge" substituted "cannot be granted under 11 U.S.C. 727" for "of penalty and interest against the corporation"; in (4) at beginning substituted "In the case of a limited liability company treated as a partnership pursuant to 39-51-207, the" for "For determining" and near end after "interest owed" substituted "extends jointly and severally" for "a member-managed limited liability company must be treated as a partnership, with liability for taxes, penalties, and interest owed extending"; in (5) at beginning substituted "In the case of a limited liability company that is not treated as a partnership pursuant to 39-51-207" for "For determining", near middle after "interest owed" substituted "extends jointly and severally to" for "by a manager-managed limited liability company", and at end after "company" deleted "are jointly and severally liable for any taxes, penalties, and interest owed"; and made minor changes in style. Amendment effective January 1, 2008.

1997 Amendment: Chapter 491 in (1) and in (2)(a), near beginning, after reference to officer, deleted "or employee"; at end of introductory clause in (2)(a) substituted "corporate officer" for "individual"; deleted former (2)(a)(ii) that read: "possessed the authority on behalf of the corporation to direct the filing of reports and payment of taxes"; in (2)(a)(ii) substituted "responsibility" for "fiscal authority" and "responsibility" for "authority"; and made minor changes in style. Amendment effective January 1, 1998.

Preamble: The preamble attached to Ch. 491, L. 1997, provided: "WHEREAS, House Bill No. 98 (Ch. 48, L. 1995), enacted by the 54th Legislature, excluded direct sellers from minimum wage, overtime, unemployment insurance, and workers' compensation requirements; and

WHEREAS, the Legislature in House Bill No. 98 adopted the federal definition of direct seller to apply to relevant Montana statutes; and

WHEREAS, ARM 24.11.831 narrowed the scope of the federal definition of direct seller; and

WHEREAS, an original purpose of this House Bill No. 561 was to codify the narrower definition of direct seller; and

WHEREAS, this House Bill No. 561 is the appropriate place to repeal Rule 24.11.831, Administrative Rules of Montana."

Severability: Section 36, Ch. 491, L. 1997, was a severability clause.

Saving Clause: Section 37, Ch. 491, L. 1997, was a saving clause.

1995 Amendment: Chapter 529 substituted new text concerning liability for existing text (see 1995 Session Law for text). Amendment effective April 25, 1995.

Coordination: Section 16(1), Ch. 529, L. 1995, a coordination section, voided the amendment to this section in Ch. 195, L. 1995.

Applicability: Section 17(2), Ch. 529, L. 1995, provided that this section applies to debts incurred on or after July 1, 1996.

1991 Amendment: In two places substituted "taxes, penalties, and interest" for "contributions". Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1981 Amendment: Substituted "department" for "division" in the first sentence.

39-51-1108. Amount of wages per employee subject to contribution.

Compiler's Comments

1985 Amendment: In (1) after "including", substituted "the amount specified in this section" for "$4,200" and at end of subsection after "employment", deleted "during the calendar years 1972, 1973, 1974, and the first calendar quarter of year 1975"; deleted former (2) and (3) and part of former (4) that read: "(2) For the second calendar quarter of the calendar year 1975 through the fourth calendar quarter of 1977, the taxable wage base for each year is $4,800.

(3) Effective January 1, 1978, and thereafter the taxable wage base for each year is $6,000.

(4) For the first calendar quarter of 1979 and thereafter, the"; in (2) substituted "80% of the average annual wage" for "75% of the average annual wage", substituted "39-51-2201" for "39-51-2201(2)", and after "$100" deleted "not to exceed an increase of $200 over the taxable wage base of the preceding year"; and deleted former (5) that read: "Notwithstanding subsection (4) the taxable wage base for 1979 shall be $7,400."

Applicability: Section 11, Ch. 371, L. 1985, was an applicability section that read: "Sections 1 through 5 apply retroactively, within the meaning of 1-2-109, to January 1, 1985."

Federal Unemployment Tax Act: This Act, referred to in this section, is codified at Title 26, U.S.C., Ch. 23.

39-51-1109. Tax appeals — procedure.

Compiler's Comments

2007 Amendment: Chapter 52 in (1) near middle of first sentence after "relationship" deleted "or the charging of benefit payments to employers"; in (2) near middle of first sentence after "wages" inserted "the charging of benefit payments to employers"; and made minor changes in style. Amendment effective October 1, 2007.

Contingent Effective Date: Section 16(2), Ch. 597, L. 2003, provided: "(2) [Sections 8 through 10] [39-51-1109, version effective on occurrence of contingency, 39-51-1301, and 39-51-2402] are effective on the date that the commissioner of labor and industry certifies to the governor that the delegation of duties in 39-51-301 is terminated." On June 28, 2004, the Commissioner of Labor and Industry certified to the Governor that the delegation of duties under 39-51-301 terminates at 11:59 p.m. on June 30, 2004.

Contingent Termination: Section 17, Ch. 597, L. 2003, provided: "(1) [Section 7] [39-51-1109, temporary version] terminates on the date that the commissioner of labor and industry certifies to the governor that the delegation of duties in 39-51-301 is terminated.

(2) The commissioner of labor and industry shall transmit a copy of the certification of the termination of duties to the code commissioner." On June 28, 2004, the Commissioner of Labor and Industry certified to the Governor that the delegation of duties under 39-51-301 terminates at 11:59 p.m. on June 30, 2004.

2003 Amendment: (Temporary version) Chapter 597 in (1) near middle of first sentence inserted "contribution liability, contribution rate, application for a refund". Amendment effective May 9, 2003, and terminates on occurrence of contingency.

(Version effective on occurrence of contingency) In (2) in first sentence after "other" substituted "contribution-related" for "tax-related", after "department" deleted "of revenue as provided in Title 15, chapter 1, part 2, and 15-30-257, if applicable", and after "notification" substituted "submits a written appeal of the decision, determination, or redetermination" for "follows the uniform dispute review procedures as prescribed in 15-1-211 and 15-30-257, if applicable" and inserted remainder of subsection concerning manner of appeal, nonapplication of rules of evidence and civil procedure, conduct of hearing, and decision and subsequent appeal; and made minor changes in style. Amendment effective on occurrence of contingency.

Severability: Section 14, Ch. 597, L. 2003, was a severability clause.

Saving Clause: Section 15, Ch. 597, L. 2003, was a saving clause.

1999 Amendments — Composite Section: Chapter 36 in (2) near middle of second sentence after "uniform" substituted "dispute" for "tax". Amendment effective February 24, 1999.

Chapter 442 in (1) at end of second sentence substituted "39-71-415" for "39-51-2402 for the appeal of a decision relating to a claim for unemployment insurance benefits. Statutory rules of evidence and civil procedure do not apply to a hearing on the appeal. A hearing may be conducted by telephone or by videoconference. The decision of the appeals referee and any subsequent appeal must be made in the same manner as prescribed in 39-51-2403 through 39-51-2410." Amendment effective April 23, 1999.

Applicability: Section 6, Ch. 36, L. 1999, provided: "[This act] applies to disputes arising with the department after June 30, 1999."

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 28, Ch. 442, L. 1999, was a severability clause.

1997 Amendment: Chapter 491 in (1), in first sentence near beginning, substituted "an employer-employee relationship" for "contribution liability, contribution rate, application for refund, employment status" and after "benefit payments to employers" deleted "making payment in lieu of contributions"; inserted (2) concerning decisions by Department of Revenue; and made minor changes in style. Amendment effective January 1, 1998.

Preamble: The preamble attached to Ch. 491, L. 1997, provided: "WHEREAS, House Bill No. 98 (Ch. 48, L. 1995), enacted by the 54th Legislature, excluded direct sellers from minimum wage, overtime, unemployment insurance, and workers' compensation requirements; and

WHEREAS, the Legislature in House Bill No. 98 adopted the federal definition of direct seller to apply to relevant Montana statutes; and

WHEREAS, ARM 24.11.831 narrowed the scope of the federal definition of direct seller; and

WHEREAS, an original purpose of this House Bill No. 561 was to codify the narrower definition of direct seller; and

WHEREAS, this House Bill No. 561 is the appropriate place to repeal Rule 24.11.831, Administrative Rules of Montana."

Severability: Section 36, Ch. 491, L. 1997, was a severability clause.

Saving Clause: Section 37, Ch. 491, L. 1997, was a saving clause.

1995 Amendment: Chapter 195 at end of first sentence substituted "notification submits a written appeal of the decision, determination, or redetermination" for "notice thereof applies for an appeal to an appeals referee"; inserted fourth sentence authorizing conduct of hearing by telephone or videoconference; and made minor changes in style. Amendment effective March 23, 1995.

Applicability: Section 19, Ch. 195, L. 1995, provided: "[This act] applies to hearings or appeals requested on or after [the effective date of sections 2 through 10 and 12 through 19]." Sections effective March 23, 1995.

1989 Amendment: At beginning of first sentence substituted "A" for "Any person aggrieved by any", near middle, after "contributions", deleted "may appeal to an appeals referee. Such decision, determination, or redetermination", at end substituted "an appeal to an appeals referee" for "a review within 10 days after notification was mailed to the last-known address, provided that the period may be extended for good cause", inserted second and third sentences that read: "The appeal must be made in the same manner as provided in 39-51-2402 for the appeal of a decision relating to a claim for unemployment insurance benefits. Statutory rules of evidence and civil procedure do not apply to hearings in the appeal", and at end substituted "through 39-51-2410" for "and 39-51-2404".

Applicability: Section 3, Ch. 302, L. 1989, provided: "[This act] applies to any decision, determination, or redetermination of the department of labor and industry on or after October 1, 1989, involving contribution liability, contribution rate, application for refund, employment status, or the charging of benefit payments to employers making payment in lieu of contributions."

1987 Amendments — Composite Section: Chapter 234 inserted second sentence providing decision is final unless review is sought within 10 days and that period may be extended for good cause.

Chapter 314 near middle of first sentence inserted "employment status" and at end of first sentence, after "in lieu of contributions", substituted "may appeal to an appeals referee within 10 days after notice of the decision is mailed to that person's last-known address, except the period for timely appeal may be extended by the referee upon a showing of good cause" for "is entitled to a review in accordance with Title 2, chapter 4, parts 6 and 7"; and inserted last sentence prescribing manner of appeal. The Code Commissioner, in codifying the amendments made to this section by Ch. 314, has not codified the language providing that the period for timely appeal after notice by mail to the last-known address may be extended for good cause because that provision is contained in the amendment to the section made by Ch. 234.

1985 Amendment: At end after "review", (see 1987 amendment note) substituted "in accordance with Title 2, chapter 4, parts 6 and 7" for "by the department or its authorized representative, hereinafter referred to as a deputy. The decision of the deputy is considered the decision of the department. The department or the deputy conducting the review may refer the matter to an appeals referee, may decide the application for review on the basis of such facts and information as may be obtained, or may hear argument to secure further facts. After such review, notice of the decision must be given to the employing unit. Such decision made pursuant to such review is considered the final decision of the department unless the employing unit or any other such interested party, within 5 calendar days after delivery of such notification or within 7 calendar days after such notification was mailed to his last-known address, files an appeal from this decision. Such appeal will be referred to an appeals referee who shall make his decisions with respect thereto in accordance with the procedure prescribed in 39-51-2403."

1981 Amendment: Substituted "department" for "division" throughout the section.

39-51-1110. Refunds to employers.

Compiler's Comments

2015 Amendment: Chapter 132 inserted (1)(b) concerning adjustment of and credit or refund for wages; and made minor changes in style. Amendment effective July 1, 2015.

2005 Amendment: Chapter 466 in (1) near beginning of first sentence after "department" deleted "or its delegate, as provided in 39-51-301" and near beginning of third sentence and in (2) near beginning after "department" deleted "or its delegate pursuant to 39-51-301(5)"; and made minor changes in style. Amendment effective April 28, 2005.

1997 Amendments — Composite Section: Chapter 42 in (3) substituted "the Internal Revenue Code, 26 U.S.C. 3304, as amended" for "section 1603 of the Internal Revenue Code, as amended, 1939"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 491 in (1) substituted current text concerning adjustments and overpayments for "If not later than 3 years after the date on which any taxes or interest thereon became due or not later than 1 year from the date on which payment was made, whichever is later, an employer who has paid such taxes or interest thereon shall make application for an adjustment thereof in connection with subsequent tax payments or for a refund thereof because such adjustment cannot be made and the department shall determine that such taxes or interest or any portion thereof was erroneously collected, the department shall allow such employer to make an adjustment thereof, without interest, in connection with subsequent tax payments by him or, if such adjustment cannot be made, the department shall refund said amount, without interest, from the fund. For like cause and within the same period, adjustment or refund may be so made on the department's own initiative"; in (2), near beginning, inserted "or its delegate pursuant to 39-51-301(5)"; in (3) substituted "26 U.S.C. 3304" for "section 1603 of the Internal Revenue Code"; and made minor changes in style. Amendment effective January 1, 1998.

Style changes in the chapters were slightly different. In each case, the codifier chose the more appropriate.

Preamble: The preamble attached to Ch. 491, L. 1997, provided: "WHEREAS, House Bill No. 98 (Ch. 48, L. 1995), enacted by the 54th Legislature, excluded direct sellers from minimum wage, overtime, unemployment insurance, and workers' compensation requirements; and

WHEREAS, the Legislature in House Bill No. 98 adopted the federal definition of direct seller to apply to relevant Montana statutes; and

WHEREAS, ARM 24.11.831 narrowed the scope of the federal definition of direct seller; and

WHEREAS, an original purpose of this House Bill No. 561 was to codify the narrower definition of direct seller; and

WHEREAS, this House Bill No. 561 is the appropriate place to repeal Rule 24.11.831, Administrative Rules of Montana."

Severability: Section 36, Ch. 491, L. 1997, was a severability clause.

Saving Clause: Section 37, Ch. 491, L. 1997, was a saving clause.

1991 Amendment: Throughout substituted references to taxes for references to contributions. Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1981 Amendment: Substituted "department" for "division" throughout the section.

Federal Statute: Section 1603 of the Internal Revenue Code of 1939, referred to in this section, was repealed and reenacted by the Internal Revenue Code of 1954. The corresponding section of the 1954 Code is compiled as 26 U.S.C. § 3304.

Administrative Rules

ARM 42.17.221 Due date and application of taxes.

Case Notes

Construction: This section is general in scope while section 87-109, R.C.M. 1947 (now 39-51-201(3), 39-51-1103, 39-51-1106 through 39-51-1109, and 39-51-1201 through 39-51-1206), lends itself to the specific subject of experience ratings and where one statute deals with a subject in general and comprehensive terms and another in a more minute and definite way, the two should be read together if possible but to the extent of any repugnancy between them the special will prevail over the general statute. Hence, an employer could not make application for an adjustment under this section where he did not avail himself of the right to file a written request for a redetermination of classification within 30 days after receipt of such notice as provided for by section 87-109, R.C.M. 1947. Wymont Tractor & Equip. Co. v. Unemployment Comp. Comm'n, 128 M 501, 278 P2d 208 (1954).

39-51-1121. Definitions.

Compiler's Comments

2009 Amendment: Chapter 25 in definition of computation date after "means the" inserted "12-month"; in definition of eligible employer substituted "3 federal fiscal years" for "3 fiscal years"; changed defined term from fiscal year to federal fiscal year; inserted definition of state fiscal year; and made minor changes in style. Amendment effective July 1, 2009.

2007 Amendment: Chapter 362 in definition of taxable wage base in two places substituted "39-51-404" for "39-51-404(4)"; and made minor changes in style. Amendment effective January 1, 2008.

1991 Amendment: In (2) changed "December 31" to "October 31"; deleted definition of Department as Department of Labor and Industry and of unrated employer as an employer not meeting criteria of an eligible or deficit employer; in definition of eligible employer deleted former (a) requiring filing of contribution reports to be eligible employer and (b) requiring payment of contributions and assessments to be eligible employer; and inserted definition of new employer. Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1989 Amendment: In definition of eligible employer, before "years", inserted "fiscal"; inserted definition of taxable wage base; and made minor change in phraseology. Amendment effective July 1, 1989.

1987 Amendment: In (3) substituted "an employer who is subject under this chapter and" for "a covered employer" and after "date" deleted "and has a minus experience factor"; in (5), after "means", substituted language (see 1987 Session Law for text) for "a covered employer"; in (5)(a) through (5)(d) substituted language (see 1987 Session Law for text) for: "(a) paid contributions during each of the 3 fiscal years immediately preceding the computation date;

(b) with respect to such 3 fiscal years, filed all contribution reports prescribed by the department;

(c) paid all contributions due with respect to the 3 fiscal years before the cutoff date of the rate year;

(d) established a record of accumulated contributions in excess of benefits charged to his account; and"; deleted former (5)(e) that read: "(e) achieved a plus experience factor"; in (8), after "means", substituted language defining unrated employer as one who is subject to the chapter and is not an eligible or a deficit employer for "a covered employer who has not paid contributions in each of the 3 fiscal years immediately preceding the computation date or an employer who has established a record of accumulated contributions in excess of benefits charged to his account but has not filed all required payroll reports or paid contributions by the cutoff date for any of the quarters in the 3 fiscal years immediately preceding the computation date"; and made minor changes in phraseology.

1981 Amendments: Chapter 3 substituted "the reporting period ending September 30" for "June 30" in (1), "December 31" for "September 30" in (2), and "September 30" for "June 30" in (6).

Chapter 349 substituted "department" for "division" in two places; substituted the definition of "department of labor and industry" for "employment security division".

Codification: Section 20, Ch. 685, L. 1979, provided: "It is intended that sections 1 through 7 and 9 through 16 of this act be codified as an integral part of Title 39, chapter 51, part 21, and the provisions of Title 39, chapter 51, apply to sections 1 through 7 and 9 through 16 of this act." The reference to part 21 is apparently a typographical error. Part 11 is more appropriate for sections 1 through 7, and they have been codified as 39-51-1121 through 39-51-1126. Section 1 provides definitions and specifically states that they apply to part 11. The Code Commissioner codified sections 9 through 16 in part 12 as 39-51-1212 through 39-51-1219 because part 12 more specifically deals with the subject matter. Section 39-51-1211 was added by the Code Commissioner to ensure that the definitions in section 1 apply.

Administrative Rules

Title 24, chapter 11, subchapter 22, ARM Types of accounts and rate setting.

39-51-1122. Treatment of minor irregularities in determination of eligible employer status.

Compiler's Comments

1981 Amendment: Substituted "department" for "division".

39-51-1123. Rates of contributions.

Compiler's Comments

1981 Amendment: Substituted "department" for "division".

Administrative Rules

Title 24, chapter 11, subchapter 22, ARM Types of accounts and rate setting.

39-51-1124. Procedure for election to make payments in lieu of contributions.

Compiler's Comments

2001 Amendment: Chapter 200 in (1) and (2) after "39-51-1103" inserted "tribal unit"; and made minor changes in style. Amendment effective July 1, 2001.

Preamble: The preamble attached to Ch. 200, L. 2001, provided: "WHEREAS, on December 21, 2000, federal law changed regarding state law treatment of employment by recognized Indian tribes for the purposes of state unemployment insurance programs by mandating the formerly optional state unemployment insurance coverage of employment by those Indian tribes; and

WHEREAS, as of December 21, 2000, federal law now requires states in which recognized Indian tribes exist to offer to those tribes a choice of experience-rating or direct reimbursable unemployment insurance accounts; and

WHEREAS, Montana's unemployment laws do not conform to the new federal requirements, and nonconformity of the state's unemployment insurance laws with the new federal provisions will jeopardize the ability of all Montana employers to take credit on federal taxes for the amounts paid to Montana's unemployment insurance program and will further depress Montana's economy; and

WHEREAS, the Legislature finds that it is the best interests of all the people of Montana that Montana's unemployment insurance laws conform to those December 21, 2000, federal law changes with respect to the treatment of Indian tribes for unemployment insurance purposes."

Effective Date — Retroactive Applicability: Section 9, Ch. 200, L. 2001, provided: "[This act] is effective July 1, 2001, and applies retroactively, within the meaning of 1-2-109, to employment by recognized Indian tribes occurring on or after December 21, 2000."

1981 Amendment: Substituted "department" for "division" throughout the section.

39-51-1125. Computation of payments in lieu of contributions.

Compiler's Comments

2013 Amendment: Chapter 203 in (1) and (2) before "fund" inserted "unemployment insurance"; in (1) after "fund" inserted "established in 39-51-401"; in (4) at beginning inserted "Subject to the provisions of 39-51-605"; and made minor changes in style. Amendment effective October 1, 2013.

2009 Amendment: Chapter 25 in (1) at beginning of first sentence deleted "After June 30, 1987, qualified", after "contributions" inserted "under 39-51-1103", and at beginning of second sentence deleted "After December 31, 1978"; deleted former (2) that read: "If benefits paid an individual are based on wages paid by both the employer and one or more other employers, the amount payable by any one employer to the fund bears the same ratio to total benefits paid to the individual as the base period wages paid to the individual by such employer bear to the total amount of base period wages paid to the individual by all the individual's base period employers"; and made minor changes in style. Amendment effective July 1, 2009.

1991 Amendment: Inserted (5) providing for no payment if employer continues employment with no hour or wage reduction. Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1987 Amendment: After (1) inserted "After June 30, 1987" and after "plus" substituted "the state's share" for "one-half of the amount"; deleted former (5) that read: "(5) A nonprofit organization which elects to make payments in lieu of contributions into the unemployment insurance fund is not liable to make such payments with respect to the benefits paid to any individual whose base period wages include wages for previously uncovered services, as defined in 39-51-204(3)(c), to the extent that the unemployment insurance fund is reimbursed for such benefits pursuant to section 121 of Public Law 94-566"; and made minor changes in phraseology.

1981 Amendment: Substituted "department" for "division" in (4).

39-51-1126. Termination of election to make payments in lieu of contributions.

Compiler's Comments

2001 Amendment: Chapter 200 in (1) and (2) after "nonprofit organization" inserted "tribal unit"; and made minor changes in style. Amendment effective July 1, 2001.

Preamble: The preamble attached to Ch. 200, L. 2001, provided: "WHEREAS, on December 21, 2000, federal law changed regarding state law treatment of employment by recognized Indian tribes for the purposes of state unemployment insurance programs by mandating the formerly optional state unemployment insurance coverage of employment by those Indian tribes; and

WHEREAS, as of December 21, 2000, federal law now requires states in which recognized Indian tribes exist to offer to those tribes a choice of experience-rating or direct reimbursable unemployment insurance accounts; and

WHEREAS, Montana's unemployment laws do not conform to the new federal requirements, and nonconformity of the state's unemployment insurance laws with the new federal provisions will jeopardize the ability of all Montana employers to take credit on federal taxes for the amounts paid to Montana's unemployment insurance program and will further depress Montana's economy; and

WHEREAS, the Legislature finds that it is the best interests of all the people of Montana that Montana's unemployment insurance laws conform to those December 21, 2000, federal law changes with respect to the treatment of Indian tribes for unemployment insurance purposes."

Effective Date — Retroactive Applicability: Section 9, Ch. 200, L. 2001, provided: "[This act] is effective July 1, 2001, and applies retroactively, within the meaning of 1-2-109, to employment by recognized Indian tribes occurring on or after December 21, 2000."

1981 Amendment: Substituted "department" for "division" throughout the section.

39-51-1132. Liability of tribal units — cancellation for failure to make payments.

Compiler's Comments

Preamble: The preamble attached to Ch. 200, L. 2001, provided: "WHEREAS, on December 21, 2000, federal law changed regarding state law treatment of employment by recognized Indian tribes for the purposes of state unemployment insurance programs by mandating the formerly optional state unemployment insurance coverage of employment by those Indian tribes; and

WHEREAS, as of December 21, 2000, federal law now requires states in which recognized Indian tribes exist to offer to those tribes a choice of experience-rating or direct reimbursable unemployment insurance accounts; and

WHEREAS, Montana's unemployment laws do not conform to the new federal requirements, and nonconformity of the state's unemployment insurance laws with the new federal provisions will jeopardize the ability of all Montana employers to take credit on federal taxes for the amounts paid to Montana's unemployment insurance program and will further depress Montana's economy; and

WHEREAS, the Legislature finds that it is the best interests of all the people of Montana that Montana's unemployment insurance laws conform to those December 21, 2000, federal law changes with respect to the treatment of Indian tribes for unemployment insurance purposes."

Effective Date — Retroactive Applicability: Section 9, Ch. 200, L. 2001, provided: "[This act] is effective July 1, 2001, and applies retroactively, within the meaning of 1-2-109, to employment by recognized Indian tribes occurring on or after December 21, 2000."

Part 12

Employer Classification and Experience Rating

39-51-1206. Department to provide for notification of employers of their classification and contribution rate.

Compiler's Comments

2015 Amendment: Chapter 132 in (1) in second sentence substituted "after the department sends" for "after the mailing date of"; and inserted (3) concerning employer's request for determination. Amendment effective July 1, 2015.

2005 Amendment: Chapter 466 in (1) near beginning of first sentence after "by" substituted "rule" for "regulation", in second sentence near end after "after" substituted "the mailing date" for "receipt", and inserted third sentence allowing extension of the 30-day period for good cause; and made minor changes in style. Amendment effective April 28, 2005.

2003 Amendment: Chapter 95 in (1) at beginning of second sentence inserted exception clause; inserted (2) providing that the department may make changes in classification and contribution rates upon an oral request for redetermination; and made minor changes in style. Amendment effective March 24, 2003.

1981 Amendment: Substituted "department" for "division" throughout the section.

39-51-1211. Definitions.

Compiler's Comments

Codification: Section 20, Ch. 685, L. 1979, provided: "It is intended that sections 1 through 7 and 9 through 16 of this act be codified as an integral part of Title 39, chapter 51, part 21, and the provisions of Title 39, chapter 51, apply to sections 1 through 7 and 9 through 16 of this act." The reference to part 21 is apparently a typographical error. Part 11 is more appropriate for sections 1 through 7, and they have been codified as 39-51-1121 through 39-51-1126. Section 1 provides definitions and specifically states that they apply to part 11. The Code Commissioner codified sections 9 through 16 in part 12 as 39-51-1212 through 39-51-1219 because part 12 more specifically deals with the subject matter. Section 39-51-1211 was added by the Code Commissioner to ensure that the definitions in section 1 apply.

39-51-1212. Experience rating for governmental entities.

Compiler's Comments

2015 Amendment: Chapter 132 in (4) substituted "last completed state fiscal year" for "last 2 completed state fiscal years". Amendment effective July 1, 2015.

2013 Amendment: Chapter 203 in (7) at beginning inserted "Subject to the provisions of 39-51-605"; and made minor changes in style. Amendment effective October 1, 2013.

2011 Amendment: Chapter 123 in (7) substituted "The department may relieve benefit charges paid by a governmental employer" for "A payment may not be required under this section". Amendment effective October 1, 2011.

2009 Amendment: Chapter 25 deleted former (1) that read: "Governmental entities covered under this chapter shall make payments at the median rate"; in (4) near middle after "completed" inserted "state"; and made minor changes in style. Amendment effective July 1, 2009.

2007 Amendment: Chapter 362 in (1) near beginning before "covered" deleted "newly" and after "chapter" deleted "after December 31, 1974, shall make payments for the period prior to July 1, 1977, equal to 0.4% of total wages paid employees for services in employment during the calendar quarter and for the period after July 1, 1977"; in (4) reduced minimum rate from "0.1%" to "0.06%"; and made minor changes in style. Amendment effective July 1, 2008.

1991 Amendment: Inserted (8) providing for no payment if governmental employer continues employment with no wage or hour reduction. Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1989 Amendment: Inserted (7) requiring governmental entity to be charged share of benefits paid to claimant if the entity contributed wages during claimant's base period.

39-51-1213. Classification of employers for experience rating purposes.

Compiler's Comments

2013 Amendment: Chapter 81 in (4)(c) at end following "class" deleted "notwithstanding the provisions of 39-51-1214"; and made minor changes in style. Amendment effective October 1, 2013.

Retroactive Applicability: Section 4, Ch. 81, L. 2013, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to any claims filed on or after January 1, 2011, that were charged to the account of an employer with an experience rating if that employer was in an area covered by a disaster declaration under 42 U.S.C. 5170, et seq."

2009 Amendment: Chapter 25 in (2)(a) near middle substituted "3 federal fiscal years" for "3 fiscal years"; in (2)(b)(i) and (2)(b)(ii) substituted "federal fiscal year" for "fiscal year"; and made minor changes in style. Amendment effective July 1, 2009.

1999 Amendment: Chapter 399 in (6) at end substituted "1/100% of 1%" for "1/10% of 1%". Amendment effective October 1, 1999.

Applicability: Section 5, Ch. 399, L. 1999, provided: "[This act] applies to taxable wages paid on or after January 1, 2000."

1997 Amendment: Chapter 60 near beginning of (5), after "both", deleted "such taxable payroll amount and experience factor"; in (6), after "assigned", deleted "the maximum" and at end inserted "plus an additional assessment of 50% of the employer's assigned contribution rate, rounded to the nearest 1/10 of 1%"; and made minor changes in style. Amendment effective January 1, 1998.

1991 Amendment: At beginning of (6) substituted "An employer" for "Deficit employers", after "all" substituted "taxes, penalties, and interest" for "contributions", and at end, after "year", inserted "for his classification as an eligible, deficit, or new employer"; and made minor changes in style. Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1987 Amendment: Inserted (6) relating to deficit employers being assigned maximum rate; and made minor changes in phraseology.

1985 Amendment: At end of introductory language in (2) after "below", deleted "for the calendar year 1980 and for each calendar year thereafter"; and in (2)(a) after "contributions paid", inserted "since October 1, 1981", after "employer's account" substituted "since October 1, 1981" for "for the most recent 3 fiscal years immediately preceding the computation date", and at end of first sentence substituted "the 3 fiscal years immediately preceding the computation date" for "the same 3 fiscal years".

Applicability: Section 11, Ch. 371, L. 1985, was an applicability section that read: "Sections 1 through 5 apply retroactively, within the meaning of 1-2-109, to January 1, 1985."

1981 Amendments: Chapter 3 substituted "October 1" for "July 1" in (1); substituted "for the most recent 3 fiscal years immediately preceding the computation date" for "since July 1, 1976" and substituted "same 3 fiscal years" for "3 fiscal years immediately preceding the computation date" in (2)(a).

Chapter 349 substituted "department" for "division" in (1).

Chapter 575 substituted "39-51-1214" for "39-51-1213" at the end of (4)(c).

Administrative Rules

ARM 24.11.2201 Experience-rated employers.

39-51-1214. Benefit payments chargeable to employer experience rating accounts — definition.

Compiler's Comments

2013 Amendments — Composite Section: Chapter 81 inserted (2)(i) exempting benefits paid to a claimant as a direct result of a major natural disaster; and made minor changes in style. Amendment effective October 1, 2013.

Chapter 167 in (2)(a) after "voluntarily" substituted "with a covered employer without good cause" for "without good cause attributable to a covered employer or who had been discharged for misconduct in connection with services" and inserted second sentence and (2)(a)(i) through (2)(a)(iii) concerning determination of good cause for leaving work; inserted (2)(h) concerning workers terminated for misconduct or gross misconduct; inserted (3) defining compelling reasons; and made minor changes in style. Amendment effective July 1, 2013.

Chapter 203 in (2)(c) at beginning inserted "subject to the provisions of 39-51-605". Amendment effective October 1, 2013.

Retroactive Applicability: Section 4, Ch. 81, L. 2013, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to any claims filed on or after January 1, 2011, that were charged to the account of an employer with an experience rating if that employer was in an area covered by a disaster declaration under 42 U.S.C. 5170, et seq."

2011 Amendment: Chapter 123 in (2) substituted "The account of an employer with an experience rating as provided in 39-51-1213 may not be charged" for "A charge may not be made to the account of a covered employer"; inserted (2)(g) regarding domestic violence, sexual assault, or stalking; and made minor changes in style. Amendment effective October 1, 2011.

2007 Amendment: Chapter 52 inserted (2)(f) disallowing a charge to the account of a covered employer if benefits are paid to an employee laid off as a result of the return to work of a permanent employee who performed certain military service; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendment: Chapter 381 in (2)(e) after "ordered to" substituted "military service as defined in 10-1-1003" for "state or federal active duty in the national guard or reserves". Amendment effective April 25, 2005.

1993 Amendment: Chapter 86 inserted (2)(e) providing for no charge to the account of an employer if the base period employer is ordered to certain active military duty; and made minor changes in style. Amendment effective March 5, 1993.

Effective Date — Retroactive Applicability: Section 2, Ch. 86, L. 1993, provided: "(1) [This act] is effective on passage and approval [approved March 5, 1993].

(2) [Section 1] [amending 39-51-1214] applies retroactively, within the meaning of 1-2-109, to benefit claims filed on or after August 2, 1990."

1991 Amendment: Inserted (2)(d) providing for no charge to employer if benefits are paid to claimants in training approved under 39-51-2307. Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1989 Amendment: At beginning of (1) inserted exception clause and near end substituted requirement that benefits be charged pro rata to each base period employee for former requirement that benefits be charged to the covered employer, except governmental employers "who paid the largest individual amount of base period wages as shown on the determination used as the basis for the payment of such benefits"; and inserted (2)(c) providing for no charge to a base period employer who continues to provide employment with no reduction in hours or wages.

1981 Amendment: Deleted "prior to June 30, with respect to benefit years commencing with July 1, 1976, and thereafter . . . as of June 30 of each year preceding the calendar year for which a covered employer's contribution rate is effective" in the first paragraph. See sec. 11, Ch. 685, L. 1979, for full text.

Administrative Rules

ARM 24.11.617 Relief of charges to employers.

Case Notes

Charge Improper — Worker Terminated Services Voluntarily Without Good Cause: The District Court reversed a Board of Labor Appeals (now Unemployment Insurance Appeals Board) decision that an employer was chargeable for a pro rata share of the unemployment insurance benefits paid to a former worker. The Supreme Court affirmed, concluding that a charge under this section was improper because the worker had declined, without qualification, to consider any future work offered by the employer. Sheila Callahan & Friends, Inc. v. Dept. of Labor and Industry, 2012 MT 133, 365 Mont. 283, 280 P.3d 895.

39-51-1215. Maintenance of experience rating records.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1985 Amendment: At end of second sentence after "paid", substituted "since October 1, 1981" for "for the most recent 3 fiscal years immediately preceding the computation date, prior to the cutoff date", and at end of third sentence, after "account", substituted "since October 1, 1981" for "for the most recent 3 fiscal years ending September 30".

Applicability: Section 11, Ch. 371, L. 1985, was an applicability section that read: "Sections 1 through 5 apply retroactively, within the meaning of 1-2-109, to January 1, 1985."

1981 Amendment: Substituted "for the most recent 3 fiscal years immediately preceding the computation date" for "for covered employment" in the second sentence and added "for the most recent 3 fiscal years ending September 30" in the third sentence.

39-51-1216. Experience rating record voided when account inactive.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 88 near beginning after "employer" inserted "who has not had covered employment or", near middle after "business" substituted "for 5 consecutive years" for "or because he has not covered employment for a period of 3 years becomes a covered employer"; and made minor changes in style. Amendment effective July 1, 2009.

39-51-1217. Schedule of rates assigned based on trust fund reserve.

Compiler's Comments

1991 Amendment: In (1), near middle before "prior", changed "December 31" to "October 31" and near end, after "period", inserted "ending June 30"; in (3), after "eligible", deleted "unrated"; and in (4), near beginning after "classified as", substituted "a new employer" for "unrated" and near beginning of second sentence, after "may", substituted "a new" for "an unrated". Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1989 Amendment: Inserted (4) providing for assignment of a rate for 1990 and beyond to any previously unrated employer.

1981 Amendment: In (1), deleted a clause requiring an employer rate increase whenever a recomputed trust fund balance ratio increased.

Code Commissioner Deletion: The Code Commissioner 1981 deleted "except that for calendar year 1979, the tax rate Schedule X shall be applied as provided for in [39-51-1202]" as being temporary and referring to a repealed section.

39-51-1218. Rate schedules.

Compiler's Comments

2007 Amendments — Composite Section: Chapter 52 in schedules of contribution rates - part II under schedule IX substituted a minimum ratio of fund to total wages of "(.0025)" for "(...)". Amendment effective October 1, 2007. This amendment was rendered void by the Ch. 362 amendment.

Chapter 362 revised rate schedules (see 2007 Session Law for former text). Amendment effective January 1, 2008.

2005 Amendment: Chapter 466 in Schedules of Contribution Rates—Part II under Sched. VII substituted "(.0075)" for "(.00575)". Amendment effective April 28, 2005.

2003 Amendment: Chapter 432 in part I under minimum ratio of fund to total wages for schedule I substituted "(.0245)" for "(.0260)", for schedule II substituted "(.0225)" for "(.0245)", for schedule III substituted "(.0200)" for "(.0225)", and for schedule IV substituted "(.0170)" for "(.0200)"; and in part II at beginning under schedule V substituted "(.0135)" for "(.0170)", in schedule VI substituted "(.0095)" for "(.0135)", in schedule VII substituted "(.00575)" for "(.0095)", in schedule VIII substituted "(.0050)" for "(.0075)", and in schedule IX substituted "(...)" for "(.0050)". Amendment effective April 21, 2003.

Effective Date — Applicability: Section 4, Ch. 432, L. 2003, provided: "[This act] is effective on passage and approval [approved April 21, 2003] and applies to claims for benefits filed on or after October 1, 2003."

1999 Amendment: Chapter 399 substituted new schedules of contribution rates for former schedules of contribution rates (see 1999 Session Law for former text). Amendment effective October 1, 1999.

Applicability: Section 5, Ch. 399, L. 1999, provided: "[This act] applies to taxable wages paid on or after January 1, 2000."

1991 Amendment: In parts I and II deleted former schedules of contribution rates for unrated employers. Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1985 Amendment: Substituted present schedules (see 1985 Session Law for schedules) for former schedules. For former text see sec. 15, Ch. 685, L. 1979.

Applicability: Section 11, Ch. 371, L. 1985, was an applicability section that read: "Sections 1 through 5 apply retroactively, within the meaning of 1-2-109, to January 1, 1985."

39-51-1219. Procedures for substitution, merger, transfer, or acquisition of employer account by successor employing unit — prohibitions and penalties — definitions.

Compiler's Comments

2015 Amendment: Chapter 132 in (1)(e) near end substituted "sent" for "mailed"; and made minor changes in style. Amendment effective July 1, 2015.

2005 Amendment: Chapter 466 in (1)(a) at beginning of first sentence substituted "If an employer" for "Subject to the provisions of subsection (3), whenever any individual or organization (whether or not a covered employer)" and after "all or" substituted "a portion of the trade or business of another employer or transfers all or a portion of the employer's trade or business to another employer and both employers are under substantially common ownership, management, or control at the time of the succession, acquisition, or transfer, the experience rating record attributable to the predecessor employer must be transferred to and combined with the experience rating record of the successor employer" for "substantially all of the business of an employer who at the time of acquisition was a covered employer and whenever in respect to whom the department finds that the business of the predecessor is continued solely by the successor"; in (1)(b) substituted "In the case of a partial transfer of a trade or business, the portion of the experience rating record transferred from the predecessor employer to the successor employer must be based on the portion of the trade or business transferred. The portion must be determined in the same ratio as the payroll transferred to the successor employer in the 4 reported calendar quarters immediately preceding the date of the transfer" for "the separate account and the actual contribution, benefit, and taxable payroll experience of the predecessor must, upon the joint application of the predecessor and the successor within 90 days after the acquisition and approval by the department, be transferred to the successor employer for the purpose of determining the successor's liability and rate of contribution"; inserted (1)(c) requiring that a transfer be based on estimates of the applicable payroll whenever a transfer involves only a portion of the experience rating record and the predecessor employer or successor employer fails to supply the required payroll information to the department within 10 days after notification; in (1)(d) at beginning after "successor" inserted "employer"; inserted (1)(e) providing that a successor employer must be notified by the department in writing of the transfer of the experience rating record and that unless the successor employer appeals the transfer within 30 days of the date on which the notice was mailed, the successor employer's right to appeal the transfer is waived; in (2)(a) at beginning substituted "If an employer transfers" for "Whenever any individual or organization (whether or not a covered employer) in any manner", after "acquires" substituted "all or a portion of the trade of business of a covered employer and the employers are not under substantially common ownership, management, or control, the predecessor employer and the successor employer have the option to transfer the applicable portion of the experience rating record from the predecessor employer to the successor employer if that portion of the trade or" for "part of the business of an employer who at the time of acquisition was a covered employer and whenever that portion of the", and at end after "successor" inserted "employer"; in (2)(b) at beginning deleted "so much of the separate account and the actual contribution, benefit, and taxable payroll experience of the predecessor as is attributable to the portion of the business transferred, as determined on a pro rata basis in the same ratio that the wages of covered employees properly allocable to the transferred portion of the business bear to the payroll of the predecessor in the last 4 completed calendar quarters immediately preceding the date of transfer, must, upon the", at beginning of sentence inserted "In order to make the transfer, a", after "application" inserted "for the transfer of the experience rating record must be made by", after "predecessor" and after "successor" inserted "employer", and at end after "department" deleted "be transferred to the successor employer for the purpose of determining the successor's liability and rate of contribution"; inserted (2)(c) providing for transfer of all of the experience rating record of the predecessor employer to the successor employer; inserted (2)(d) regarding transfer of a portion of the experience rating in case of partial transfer of a trade or business; in (2)(e) at beginning after "successor" inserted "employer"; in (2)(f) after "period" inserted "for filing the joint application"; deleted former (3)(b) and (3)(c) that read: "(b) Whenever a predecessor covered employer has a deficit experience rating account as of the last computation date, the transfer provided for in subsections (1) and (2) is mandatory except when it is shown by substantial evidence that the management, the ownership, or both the management and ownership are not substantially the same for the successor as for the predecessor, in which case the successor shall begin with the rate of a new employer. Whenever a mandatory transfer involves only a portion of the experience rating record and the predecessor or successor employers fail to supply the required payroll information within 10 days after notice, the transfer must be based on estimates of the applicable payrolls. The successor must be notified in writing of the mandatory transfer, and unless the mandatory transfer is appealed within 30 calendar days, the right to appeal is waived.

(c) Whenever a predecessor covered employer has an eligible experience rating account as of the last computation date and when it is shown by substantial evidence that the management, the ownership, or both the management and the ownership are substantially the same for the successor as for the predecessor, the transfer provided for in subsections (1) and (2) is automatic. Whenever an automatic transfer involves only a portion of the experience rating record and the predecessor or successor employers fail to supply the required payroll information within 10 days after notification, the transfer must be based on estimates of the applicable payrolls. The successor must be notified in writing of the automatic transfer and shall request within 30 days of notification that the experience rating account of the predecessor not be transferred"; in (3)(a) at beginning after "successor" inserted "employer" and near end before "business" substituted "predecessor employer's trade or" for "predecessor's"; in (3)(a)(i) at beginning substituted "the employers are not under substantially common ownership, management, or control at the time of acquisition, the successor employer's" for "the successor's" and at end after "predecessor" and after "successor" inserted "employer"; inserted (3)(a)(ii) requiring that if the employers were under substantially common ownership, management, or control at the time of acquisition, the successor employer's experience rate must be combined with the predecessor employer's experience rate and must be recalculated and become effective at the beginning of the calendar quarter in which the acquisition occurred; in (3)(b) at beginning of first sentence after "successor" inserted "employer" and after "all or a" substituted "portion of the predecessor employer's trade or business and the employers are not under substantially common ownership, management, or control, upon joint application by the employers, the successor employer's rate is the rate assigned to the predecessor employer as of" for "part of the predecessor's business, the successor's rate is the rate applicable to the predecessor with respect to the period immediately preceding" and in second sentence after "one predecessor" substituted "employer, the successor employer's" for "the successor's", after "must be" deleted "a newly", after "computed" deleted "rate", and after "experience of the" substituted "predecessor employers and becomes" for "predecessors becoming"; inserted (4) providing that transfer of all or part of an employer's workforce to another employer must be considered a transfer of a trade or business under certain circumstances; inserted (5) prohibiting transfer of the experience rating record of a predecessor trade or business under certain circumstances; inserted (6) outlining factors that the department may consider in determining if a person acquired a trade or business solely or primarily for the purpose of obtaining a lower rate of contributions; inserted (7) establishing penalties; inserted (8) defining knowingly, person, and trade or business; inserted (9) requiring that the department establish procedures to identify the transfer or acquisition of a trade or business; inserted (10) requiring that this section be interpreted and applied in a manner that meets the minimum requirements contained in any guidance or regulations issued by the United States department of labor; and made minor changes in style. Amendment effective January 1, 2006.

1993 Amendment: Chapter 171 in (3)(b) inserted third sentence regarding successor notification and waiver of appeal; inserted (3)(c) providing for automatic transfer; and made minor changes in style. Amendment effective March 25, 1993.

Severability: Section 8, Ch. 171, L. 1993, was a severability clause.

1989 Amendment: Near middle of (2)(a) substituted "bear" for "bears"; and in (3)(b) substituted "that the management, the ownership, or both the management and ownership are not substantially the same" for "that neither the management, the ownership, nor both the management and ownership are substantially the same".

1987 Amendment: In (4)(a) and (4)(b) substituted "the successor's" for "his"; and made minor changes in phraseology.

1981 Amendment: Substituted "department" for "division" throughout the section.

Part 13
Unpaid Contributions

39-51-1301. Penalty and interest on past-due reports and payments.

Compiler's Comments

2009 Amendment: Chapter 88 in (1) near middle after "required under" inserted "39-51-404"; and made minor changes in style. Amendment effective March 25, 2009.

2005 Amendment: Chapter 466 in (1) at end substituted "in subsection (2)" for "by 15-30-209"; inserted (2) and (3) allowing the assessment and waiver of penalties and interest; in (4) in third sentence near beginning after first "department" deleted "or transferred by the department to its delegate, pursuant to 39-51-301(5)" and after second "department" deleted "or its delegate"; and made minor changes in style. Amendment effective April 28, 2005.

Contingent Effective Date: Section 16(2), Ch. 597, L. 2003, provided: "(2) [Sections 8 through 10] [39-51-1109, version effective on occurrence of contingency, 39-51-1301, and 39-51-2402] are effective on the date that the commissioner of labor and industry certifies to the governor that the delegation of duties in 39-51-301 is terminated." On June 28, 2004, the Commissioner of Labor and Industry certified to the Governor that the delegation of duties under 39-51-301 terminates at 11:59 p.m. on June 30, 2004.

2003 Amendments — Composite Section: Chapter 95 in (1) at end substituted "15-30-209" for "15-1-216". Amendment effective March 24, 2003.

Chapter 597 in (2) near middle of second sentence after "obligations" deleted "are distributed as provided in 15-30-250 and". Amendment effective on occurrence of contingency.

Severability: Section 14, Ch. 597, L. 2003, was a severability clause.

Saving Clause: Section 15, Ch. 597, L. 2003, was a saving clause.

1999 Amendment: Chapter 427 in (1) at end substituted "15-1-216" for "15-30-209". Amendment effective January 1, 2000.

Applicability: Section 57, Ch. 427, L. 1999, provided that this section applies to all tax periods beginning after December 31, 1999.

1997 Amendment: Chapter 491 in (1) substituted current text concerning failure to file reports and payments for former (1) and (2) that read: "Taxes unpaid on the date on which they are due and payable, as provided by 39-51-1103(1) and (2) and 39-51-1125, that are paid by the end of the month following the due date are subject to a penalty assessment of $10 or 10% of the taxes due, whichever is greater. If the taxes are not paid by the end of the month following the due date, the employer is subject to a penalty assessment of $15 or 15% of the taxes due, whichever is greater. All past-due taxes bear interest at the rate of 18% a year, to be prorated on a daily basis.

(2) A penalty of $40 must be assessed whenever, as the result of a willful refusal of an employer to furnish wage information or pay taxes on time, the department issues a subpoena to obtain wage information or makes a summary or jeopardy assessment pursuant to 39-51-1302"; in (2), in second sentence, substituted "for unemployment insurance obligations are distributed as provided in 15-30-250, and" for "under this section" and in third sentence inserted "or transferred by the department to its delegate, pursuant to 39-51-301(5)" and inserted "or its delegate"; deleted (4) that read: "(4) When failure to pay taxes on time was not caused by willful intent of the employer, the department may abate the penalty and interest"; in (3), near middle after "collected on past-due", inserted "unemployment insurance"; and made minor changes in style. Amendment effective January 1, 1999.

Preamble: The preamble attached to Ch. 491, L. 1997, provided: "WHEREAS, House Bill No. 98 (Ch. 48, L. 1995), enacted by the 54th Legislature, excluded direct sellers from minimum wage, overtime, unemployment insurance, and workers' compensation requirements; and

WHEREAS, the Legislature in House Bill No. 98 adopted the federal definition of direct seller to apply to relevant Montana statutes; and

WHEREAS, ARM 24.11.831 narrowed the scope of the federal definition of direct seller; and

WHEREAS, an original purpose of this House Bill No. 561 was to codify the narrower definition of direct seller; and

WHEREAS, this House Bill No. 561 is the appropriate place to repeal Rule 24.11.831, Administrative Rules of Montana."

Severability: Section 36, Ch. 491, L. 1997, was a severability clause.

Saving Clause: Section 37, Ch. 491, L. 1997, was a saving clause.

1995 Amendment: Chapter 195 in second sentence in (3), after "chapter", deleted "to fund apprenticeship instruction programs pursuant to 39-6-103" and in last sentence substituted "each fiscal year" for "each biennium"; and made minor changes in style. Amendment effective March 23, 1995.

Applicability: Section 19, Ch. 195, L. 1995, provided: "[This act] applies to hearings or appeals requested on or after [the effective date of sections 2 through 10 and 12 through 19]." Sections effective March 23, 1995.

1991 Amendments: Chapter 373 throughout substituted references to taxes for references to contributions. Amendment effective July 1, 1991.

Chapter 639 in (3), in second sentence after "chapter", substituted "to fund apprenticeship instruction programs pursuant to 39-6-103, and to detect and collect unpaid contributions and overpayments of benefits to the extent that federal grant revenue is less than amounts appropriated for this purpose" for "and for programs to train and retrain unemployed and underemployed persons" and at end of third sentence substituted "biennium" for "fiscal year"; and made minor changes in style. Amendment effective April 25, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

Termination Provision Deleted: Section 3, Ch. 639, L. 1991, amended sec. 1, Ch. 600, L. 1989, to remove the termination of the amendments to this section.

Extension of Termination Date: Section 1, Ch. 600, L. 1989, amended sec. 3, Ch. 13, Sp. L. June 1986, by changing the termination date of the temporary version from July 1, 1989, to July 1, 1991, thereby extending collection of penalties and interest on overdue employer contributions. Amendment effective April 21, 1989.

1987 Amendment: In two places in (1), after "paid", substituted "by the end of the month following" for "within 20 days after".

1986 Amendment: In (3) of temporary version substituted language concerning deposit and disposition of money in federal special revenue fund for former (3) that read: "Interest and penalties collected pursuant to this section shall be paid into the unemployment insurance trust fund."

Effective Date: The 1986 amendment was effective July 3, 1986, and terminates July 1, 1989.

1983 Amendments: Chapter 369 inserted (5) concerning disposition of money collected on past-due contributions.

Chapter 555 substituted (1) concerning penalty and interest on past-due contributions for "Contributions unpaid on the date on which they are due and payable, as provided by subsections (1) and (2) of 39-51-1103 and 39-51-1125, shall be subject to a penalty assessment of $10 or 10% of the contribution due, whichever is greater, and shall bear interest at the rate of 1% per month."; and inserted (2) requiring penalty assessment if Department must pursue past-due contributions.

1981 Amendments: Chapter 2 deleted the first sentence in (1) which assessed a $10 penalty for late filing of unemployment contribution reports; made minor changes in phraseology.

Chapter 349 substituted "department" for "division" in (3).

39-51-1302. Summary or jeopardy assessment of unpaid taxes.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 25 in (1) in first sentence substituted "rules adopted by" for "regulations of" and near end after "due by" substituted "estimating the" for "making up such"; in (2) in first sentence after "mail" substituted "sent to the last-known mailing address or" for "in the usual course at the last known principal"; inserted (2)(c) requiring employer notification if good cause exists; in (3) near beginning substituted language regarding written protest by employer and regarding department reconsideration of summary or jeopardy assessment and notification of redetermination and the reasons for redetermination for former text that read: "as above set forth, a day certain for the hearing thereof shall be fixed by the department and notice thereof mailed to the employer. At such hearing, the facts ascertained by the department shall be conclusive and the department may upon the basis of such facts ascertained assess the amount due, modify, set aside, or revise the prior assessment and require the employer to pay the amount due with penalty and interest as provided for in this chapter. A copy of the decision of the department and the assessment of the amount due shall be mailed to the employer at his last known principal place of business and thereupon become final"; and made minor changes in style. Amendment effective July 1, 2009.

Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

1991 Amendment: In (1), after "specified", inserted clause relating to inaccurate or incomplete employer records and in two places, before "due", substituted "taxes" for "contributions"; and in (2), after "certified", deleted "or registered". Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1981 Amendment: Substituted "department" for "division" throughout the section.

39-51-1303. Collection of unpaid taxes.

Compiler's Comments

2005 Amendment: Chapter 466 in (1) at beginning after "department" substituted "may" for "or its delegate pursuant to 39-51-301(5), has authority to"; in (2) near middle after "department" deleted "or its delegate pursuant to 39-51-301(5)" and near end after "company" deleted "referred to in 39-51-1105"; in (4) at beginning after "department" deleted "or its delegate pursuant to 39-51-301(5)"; and made minor changes in style. Amendment effective April 28, 2005.

1997 Amendments: Chapter 60, in (2), in two places after "39-51-1105", inserted "or partner in a limited liability partnership"; and made minor changes in style. Amendment effective March 17, 1997.

Chapter 491 inserted (1) concerning authority of Department to resolve unpaid taxes, penalties, and interest; in (2) and (4) inserted "or its delegate pursuant to 39-51-301(5)"; in (2), near beginning after "liable corporate officer", deleted "or employee", in two places, after "referred to in 39-51-1105", inserted "or partner in a limited liability partnership", and near middle, after "action in the name of the", substituted "state" for "department"; in (3) substituted "original or amended report was filed or assessment became due, whichever is later" for "taxes"; and made minor changes in style. Amendment effective January 1, 1998.

Preamble: The preamble attached to Ch. 491, L. 1997, provided: "WHEREAS, House Bill No. 98 (Ch. 48, L. 1995), enacted by the 54th Legislature, excluded direct sellers from minimum wage, overtime, unemployment insurance, and workers' compensation requirements; and

WHEREAS, the Legislature in House Bill No. 98 adopted the federal definition of direct seller to apply to relevant Montana statutes; and

WHEREAS, ARM 24.11.831 narrowed the scope of the federal definition of direct seller; and

WHEREAS, an original purpose of this House Bill No. 561 was to codify the narrower definition of direct seller; and

WHEREAS, this House Bill No. 561 is the appropriate place to repeal Rule 24.11.831, Administrative Rules of Montana."

Severability: Section 36, Ch. 491, L. 1997, was a severability clause.

Saving Clause: Section 37, Ch. 491, L. 1997, was a saving clause.

1995 Amendments: Chapter 195 in two places in (1), after "employer", inserted "liable corporate officer, or liable member or manager of a limited liability company referred to in 39-51-1105"; and made minor changes in style. Amendment effective March 23, 1995.

Chapter 529 in (1), near beginning, inserted "liable corporate officer or employee, or liable member or manager of a limited liability company referred to in 39-51-1105"; and made minor changes in style. Amendment effective April 25, 1995.

Applicability: Section 19, Ch. 195, L. 1995, provided: "[This act] applies to hearings or appeals requested on or after [the effective date of sections 2 through 10 and 12 through 19]." Sections effective March 23, 1995.

Section 17(1), Ch. 529, L. 1995, provided that this section applies to warrants for distraint filed by the Department of Revenue and certificates of lien filed by the Department of Labor and Industry on or after July 1, 1996.

1991 Amendment: In (1), after "payment of", substituted "taxes, penalties" for "contributions"; and in (2), in two places, substituted "taxes" for "contributions". Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1987 Amendment: Near middle of (1), after "may", substituted "at" for "in".

1985 Amendment: Deleted former (2) that read: "Civil actions brought under this section to collect contributions or interest thereon from an employer must be heard by the court at the earliest possible date and are entitled to preference upon the calendar of the court over all other civil actions except petitions for judicial review under this chapter and cases arising under the workers' compensation law of this state"; and inserted (3) allowing Department to pursue remedy under this section and 39-51-1304.

1983 Amendment: In (1), after "interest thereon," substituted "the department may in its discretion initiate a" for "the amount due must be collected by"; following "labor and industry" inserted "to collect the amount due".

1981 Amendment: Deleted "division" before "Montana department of labor and industry" in (1).

39-51-1304. Lien for payment of unpaid taxes — levy and execution.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 397 in (1) inserted fifth through seventh sentences concerning notice of levy having effect of writ of execution and concerning duration of levy upon earnings. Amendment effective July 1, 2001.

Chapter 515 in (2) at end after "10-year period" substituted "upon motion, or by judgment for that purpose founded upon supplemental pleadings" for "pursuant to the methods provided in 25-13-102"; and made minor changes in style. Amendment effective October 1, 2001.

1997 Amendments: Chapter 42 in (2) substituted "methods provided in 25-13-102" for "provisions of 25-13-102"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 60 in (1), in first sentence, inserted "or a partner in a limited liability partnership"; inserted (4)(d) referring to a partner in a limited liability company; and made minor changes in style. Amendment effective March 17, 1997.

Chapter 491 in (1), in first sentence, and in (4)(b), after "liable corporate officer", deleted "or employee". Amendment effective January 1, 1998.

Preamble: The preamble attached to Ch. 491, L. 1997, provided: "WHEREAS, House Bill No. 98 (Ch. 48, L. 1995), enacted by the 54th Legislature, excluded direct sellers from minimum wage, overtime, unemployment insurance, and workers' compensation requirements; and

WHEREAS, the Legislature in House Bill No. 98 adopted the federal definition of direct seller to apply to relevant Montana statutes; and

WHEREAS, ARM 24.11.831 narrowed the scope of the federal definition of direct seller; and

WHEREAS, an original purpose of this House Bill No. 561 was to codify the narrower definition of direct seller; and

WHEREAS, this House Bill No. 561 is the appropriate place to repeal Rule 24.11.831, Administrative Rules of Montana."

Severability: Section 36, Ch. 491, L. 1997, was a severability clause.

Saving Clause: Section 37, Ch. 491, L. 1997, was a saving clause.

1995 Amendments — Composite Section: Chapter 195 in (1) and (4), after "employer", inserted "liable corporate officer, or liable member or manager of a limited liability company referred to in 39-51-1105"; and made minor changes in style. Amendment effective March 23, 1995.

Chapter 529 in first sentence of (1), after "employer", inserted "or liable corporate officer or employee or liable member or manager of a limited liability company referred to in 39-51-1105", in fourth sentence substituted "through the sheriff or agent authorized to collect the tax in the same manner as prescribed for execution upon a judgment" for "pursuant to Title 25, chapter 13", inserted fifth sentence allowing a notice of levy to be made by certified letter by an agent authorized to collect the tax, and at end of sixth sentence inserted "or the effective date of the lien, whichever is later"; inserted (2) allowing renewal of a judgment lien; in (4), in second sentence after "employer", inserted "liable corporate officer or employee, or liable member or manager of a limited liability company referred to in 39-51-1105"; and made minor changes in style. Amendment effective April 25, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Applicability: Section 19, Ch. 195, L. 1995, provided: "[This act] applies to hearings or appeals requested on or after [the effective date of sections 2 through 10 and 12 through 19]." Sections effective March 23, 1995.

Section 17(1), Ch. 529, L. 1995, provided that this section applies to warrants for distraint filed by the Department of Revenue and certificates of lien filed by the Department of Labor and Industry on or after July 1, 1996.

1991 Amendment: At beginning of (1) substituted "taxes" for "contributions and assessments under 39-51-404(4)", in third sentence, after "real", inserted "and personal", and deleted former fourth sentence establishing that lien on personal property exists from time judgment is filed with Secretary of State or registrar; in (2)(b) and (3) substituted "taxes" for "contributions, assessments"; and inserted (4) relating to release of lien. Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1987 Amendments: Chapter 234 in (1), at beginning after "contributions", inserted "and assessments under 39-51-404(4), including penalties and interest assessed thereon", near end of first sentence, after "time", substituted "such payments" for "the contributions", in second sentence, before "lien", inserted "certificate of" (However, see amendment to section by Ch. 487 that substituted "certificate" for "lien" and which Code Commissioner has codified.) and after "amount of" substituted "payments due" for "contributions due and accrued interest", and inserted third and fourth sentences relating to docketing and filing of judgment.

Chapter 487 in second sentence of (1) substituted "certificate" for "lien"; inserted (2) stating when lien is not valid against a third party; and inserted (3) providing when grantor is subject to penalties and allowing Department to proceed against a delinquent employer.

Applicability: Section 3, Ch. 487, L. 1987, provided: "This act is effective on passage and approval and applies to contributions due after the effective date of this act." Effective April 15, 1987.

1985 Amendment: Substituted language creating lien for unpaid contributions and providing for levy and execution (see sec. 2, Ch. 514, L. 1985, for full text) for "(1) If any contributions payable by an employer under this chapter or any portion thereof is not paid within 25 days after the same becomes due, the department may issue a certificate under its official seal, setting forth the amount of contributions due and interest accrued, directed to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the employer owing the same, found within his county, for the payment of the amount thereof, with the added penalties, interest, and costs of executing the same and to return such certificates to the department and pay to the department the money collected by virtue thereof by a time to be therein specified, not more than 90 days from the date of the certificate.

(2) The sheriff shall, within 5 days after the receipt of the certificate, file with the clerk of the district court of his county a copy thereof and thereupon the clerk of the district court shall enter in the judgment docket in the column for judgment debtors the name of the employer mentioned in the certificate and in the appropriate columns the amount of contributions due and the penalties for which the certificate is issued and the date when such copy is filed, and thereupon the amount of such certificate so docketed shall become a lien upon the title to and interest in real property or chattels real of the employer against whom it is filed in the same manner as a judgment docketed in the office of such clerk.

(3) The sheriff shall thereupon proceed upon the same in all respects, with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgment of a court of record and shall be entitled to the same fees for his services in executing the certificate, to be collected in the same manner."

1981 Amendment: Substituted "department" for "division" throughout (1).

Case Notes

Contributions From National Bank Illegal: Contributions attempted to be collected from national bank for years during which state law made no provision for refund in event social security board approval not obtained, a condition to collecting contributions from governmental instrumentalities, were illegal and collection could be enjoined although social security board had approved state law for years involved. First Nat'l Bank v. Bergan, 119 M 1, 169 P2d 233, 165 ALR 1244 (1946).

39-51-1305. Priority of payment of taxes due under legal dissolutions or distributions.

Compiler's Comments

1991 Amendment: Near middle, after "proceeding", substituted "taxes" for "contributions". Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1985 Amendment: Deleted former (2) that read: "in the event of an employer's adjudication in bankruptcy, judicially confirmed extension proposal, or composition under the Federal Bankruptcy Act, contributions then or thereafter due shall be entitled to priority of payment as a debt due the sovereign power as provided by the Bankruptcy Act of June 22, 1938 (Chap. 575-52 Stat. 840)."

39-51-1306. Reciprocity with other states for collection of unpaid taxes.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: In (1), (2), and (4) substituted "taxes and any other special assessments" for "contributions"; in (2), after "unemployment", substituted "taxes, penalties" for "contributions"; and in (3), after "delinquent", substituted "taxes" for "contributions". Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1981 Amendment: Substituted "department" for "division" in (2).

39-51-1307. Collection of unpaid taxes, penalties, and interest by offset.

Compiler's Comments

2015 Amendment: Chapter 81 inserted (5) regarding offset of funds for and providing a definition of covered unemployment insurance tax debt. Amendment effective July 1, 2015.

Retroactive Applicability: Section 4, Ch. 81, L. 2015, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to debts incurred on or before [the effective date of this act]." Effective July 1, 2015.

2001 Amendment: Chapter 7 in (1) in second sentence after "through the" substituted "department of revenue" for "state auditor's office"; and in (2) in three places substituted "department of revenue" for "state auditor". Amendment effective October 1, 2001.

Effective Date: Section 18(1), Ch. 529, L. 1995, provided that this section is effective on passage and approval. Approved April 25, 1995.

Part 21
Benefit Eligibility

Part Administrative Rules

Title 24, chapter 11, subchapter 4, ARM Claims for benefits.

39-51-2101. Total unemployment — when.

Compiler's Comments

2011 Amendment: Chapter 123 in (1)(b) inserted exception clause; in (1)(b)(i) substituted current text for "worked less than the customary hours that are normal for the individual's particular occupation due to a lack of work and provided that the"; in (1)(b)(ii) inserted "earned"; inserted (2) regarding when individual is not considered unemployed; and made minor changes in style. Amendment effective October 1, 2011.

2009 Amendment: Chapter 88 in (2) near beginning after "less than" substituted "the customary hours that are normal for the individual's particular occupation due to a lack of work and provided that the wages payable to the individual are" for "full-time work in employment with wages for employment of"; and made minor changes in style. Amendment effective January 1, 2010.

Termination Provision Repealed: Section 1, Ch. 12, L. 2001, repealed sec. 4, Ch. 400, L. 1999, which terminated the temporary version of this section July 1, 2001. Effective February 14, 2001.

1999 Amendment: Chapter 400 in (1) inserted "in employment" and inserted "for employment"; in (2) at beginning substituted "performed" for "a week of" and inserted "in employment" and "for employment"; and made minor changes in style. Amendment effective July 1, 1999, and terminates July 1, 2001.

Effective Date — Applicability: Section 3, Ch. 400, L. 1999, provided: "[This act] is effective July 1, 1999, and applies to claims for benefits first filed on or after July 1, 1999."

1987 Amendment: Deleted former last sentence that read: "No individual is unemployed in any week that he is self-employed"; and made minor changes in phraseology.

Case Notes

Owner-Corporate Officer Working Full-Time Without Pay Not Entitled to Unemployment Benefits — Implied Contract — Administrative Penalty: The plaintiff owned and was president of a bicycle company. During a slow period in the business in 2010, the plaintiff stopped paying himself a salary but continued working approximately 50 hours per week. The plaintiff periodically received unemployment assistance between November 2010 and September 2012. After an audit and subsequent administrative hearing, the Montana Department of Labor and Industry required the plaintiff to pay $28,387 in overpaid benefits and a $9,367.71 administrative penalty. On appeal, the District Court held that the plaintiff lawfully claimed benefits during certain periods because he was not working for a wage and was not under a contract for hire pursuant to 39-51-203. The Supreme Court reversed the District Court, finding that there was an implied contract because the plaintiff stood to benefit from his business' future growth. As a result, the plaintiff was employed and was not entitled to unemployment benefits and the administrative penalty was correctly ordered. Sayler v. Mt. Dept. of Labor & Industry, 2014 MT 255A, 376 Mont. 369, 336 P.3d 358.

Vacation Pay Not Considered Wages for Purposes of Determining Eligibility for Unemployment Benefits — Claim Independent of Contract Not Precluded by Federal Labor Law: Lumber company employees filed for unemployment insurance benefits following a week-long shutdown of the lumber mills. Their claims were denied in turn by the Department of Labor and Industry, a referee, and the Board of Labor Appeals (now the Unemployment Insurance Appeals Board). The Department reasoned that the employees received vacation pay during their time away from work and that because they earned wages, they could not be considered totally unemployed and were thus ineligible for benefits. On appeal to the District Court, the ineligibility determination was reversed when the court determined that the Department had incorrectly concluded that, as a matter of law, wages previously paid to the employees had been properly imputed to the shutdown period. The company appealed to the Supreme Court, and the primary issue was whether the employees were eligible for benefits during the shutdown. The employees argued that their collective bargaining agreement did not require time off in order to take vacation pay, but rather that vacation pay is an entitlement once an employee works the specified number of hours during the vacation base year. The Supreme Court agreed. Vacation pay is payment in exchange for an employee's work in the vacation base year. Even though time off could be scheduled unilaterally by the employer when the mill was closed, the vacation pay received was not considered compensation for time off during the shutdown. Thus, the employees did not earn wages during the shutdown that would prevent them from qualifying for unemployment benefits. The employer's argument that the employees were "voluntarily unemployed" because they consented to the shutdown in their collective bargaining agreement was also unpersuasive. A collective bargaining agreement cannot waive rights ensured to an employee by state law. Lastly, this action was not precluded by sec. 301 of the federal Labor Management Relations Act (29 U.S.C. 185) because the case involved matters implicating state rules and obligations independent of the labor contract, as evidenced by the inclusion as parties those state agencies charged with determining unemployment eligibility. The District Court was affirmed, and the case was remanded to the appropriate state agencies for decisions on each individual claim. Multiple Stimson Employees v. Stimson Lumber Co., 2001 MT 56, 304 M 333, 21 P3d 613 (2001), distinguishing Anderson v. TW Corp., 228 M 1, 741 P2d 397 (1987), and Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720 (1992).

39-51-2102. Commencement of week of unemployment.

Compiler's Comments

2005 Amendment: Chapter 466 near beginning after "only after" substituted "the individual files a claim for unemployment insurance benefits with the unemployment insurance division and has registered for work with the individual's local job service" for "his registration at an unemployment office" and at end after "may by" substituted "rule" for "regulation"; and made minor changes in style. Amendment effective April 28, 2005.

1981 Amendment: Substituted "department" for "division".

39-51-2103. Payment of benefits.

Compiler's Comments

1981 Amendment: Substituted "department" for "division" throughout (2).

Case Notes

Acceptance of Valuable Gift in Probationer's Will Considered Negligent — Termination of Probation Officer Justified — Denial of Unemployment Benefits Proper: Probation officer Morrow accepted an envelope from a probationer that was marked to be opened in the event of the probationer's death. When the probationer died, Morrow opened the envelope and found the probationer's will, which designated Morrow as the personal representative of the probationer's estate and devised real and personal property to Morrow. Morrow accepted the position of personal representative and began probating the will. Morrow mentioned the situation to his supervisor in passing, but did not discuss ethics or inheritances, minimizing the significance of the event. The Department of Corrections became concerned about ethical violations after the situation was brought to the Department's attention by a citizen complainant, and Morrow was subsequently terminated for failing to follow performance and conduct guidelines regarding supervision of the probationer and Morrow's status as devisee of the estate. Morrow applied for unemployment benefits, but the benefits were denied because of the discharge for misconduct. Morrow appealed, but the referee upheld the denial of benefits, so Morrow appealed to the Board of Labor Appeals (now the Unemployment Insurance Appeals Board). The Board found that Morrow was negligent in not opening the envelope immediately but that the act did not amount to willful or wanton disregard for the Department's interests, so the benefits were reinstated. The Department appealed to the District Court, which reviewed the record and reversed the Board's decision and reinstated the denial of benefits. Morrow appealed to the Supreme Court. The court held that Morrow's failure to open the envelope referencing the event of the probationer's death was a negligent act that substantially disregarded the Department's interest in properly supervising the probationer and that at the very least, Morrow should have closely scrutinized the gift and sought guidance from the supervisor, in accordance with the agency's policy manual, rather than downplaying the significance of Morrow's inclusion in the will. Morrow's termination for accepting a gift of significant value was justified, and denial of unemployment benefits was affirmed. Dept. of Corrections v. St., 2006 MT 298, 334 M 425, 148 P3d 619 (2006).

39-51-2104. General benefit eligibility conditions.

Compiler's Comments

2009 Amendment: Chapter 88 in (1) near beginning after "individual" inserted "including an alien entitled to benefits under the provisions of 39-51-2110"; in (1)(b) inserted second sentence prohibiting an individual from placing limitations on the individual's availability that would constitute a withdrawal from the labor market; deleted former (1)(b)(ii) that read: "(ii) enrollment as a student as provided in 39-51-2307"; inserted (2) regarding reduction or ineligibility for weekly benefits based on the availability for work; and made minor changes in style. Amendment effective January 1, 2010.

2005 Amendment: Chapter 466 in (1)(a) near beginning after "and has" substituted "filed continued claims" for "continued to report at an employment office" and at end after "prescribe" deleted "except that the department may by rule prescribe that in cases in which it finds the requirements oppressive or inconsistent with the purposes of this chapter, an unemployed individual may file a claim and report for work by mail or through other governmental agencies"; in (1)(b)(i) near beginning after "claimant has" substituted "filed or reopened a claim for unemployment insurance benefits" for "registered for work"; inserted (1)(d) requiring that a claimant register for work with the local job service office unless excused by department rule from registering; and made minor changes in style. Amendment effective April 28, 2005.

1995 Amendment: Chapter 195 inserted (2) requiring establishment of a profiling system for persons likely to exhaust benefits, authorizing participation in reemployment services for unemployment benefits eligibility, and authorizing waiver from participation in reemployment services if reemployment services are completed or if failure to participate is justifiable; and made minor changes in style.

Applicability: Section 19, Ch. 195, L. 1995, provided: "[This act] applies to hearings or appeals requested on or after [the effective date of sections 2 through 10 and 12 through 19]." Sections effective March 23, 1995.

1993 Amendment: Chapter 404 inserted (2)(b) providing that a person is not ineligible during any week that the person is enrolled as a student as provided in 39-51-2307; and made minor changes in style. Amendment effective July 1, 1993.

1985 Amendments: Chapter 125 at beginning of (1) substituted "filed a claim" for "registered for work" and made similar change at end of (1); and deleted former (2) that read: "he has made a claim for benefits in accordance with the provisions of 39-51-2401".

Chapter 371 in (3) in first sentence, substituted "the first week for which he is paid benefits" for "any week for which he claims benefits", and deleted second sentence that read: "However, if claimant's benefit year expires during a period of compensable unemployment, claimant will continue to receive weekly benefits in a new benefit year, if otherwise eligible, without interruption to serve the waiting week for the new benefit year but will thereafter be required to serve the waiting week before receiving benefits during subsequent unemployment in the new benefit year."

1981 Amendment: Substituted "department" for "division" throughout the section.

Administrative Rules

Title 24, chapter 11, subchapter 4, ARM Claims for benefits.

Case Notes

Vacation Pay Not Considered Wages for Purposes of Determining Eligibility for Unemployment Benefits — Claim Independent of Contract Not Precluded by Federal Labor Law: Lumber company employees filed for unemployment insurance benefits following a week-long shutdown of the lumber mills. Their claims were denied in turn by the Department of Labor and Industry, a referee, and the Board of Labor Appeals (now the Unemployment Insurance Appeals Board). The Department reasoned that the employees received vacation pay during their time away from work and that because they earned wages, they could not be considered totally unemployed and were thus ineligible for benefits. On appeal to the District Court, the ineligibility determination was reversed when the court determined that the Department had incorrectly concluded that, as a matter of law, wages previously paid to the employees had been properly imputed to the shutdown period. The company appealed to the Supreme Court, and the primary issue was whether the employees were eligible for benefits during the shutdown. The employees argued that their collective bargaining agreement did not require time off in order to take vacation pay, but rather that vacation pay is an entitlement once an employee works the specified number of hours during the vacation base year. The Supreme Court agreed. Vacation pay is payment in exchange for an employee's work in the vacation base year. Even though time off could be scheduled unilaterally by the employer when the mill was closed, the vacation pay received was not considered compensation for time off during the shutdown. Thus, the employees did not earn wages during the shutdown that would prevent them from qualifying for unemployment benefits. The employer's argument that the employees were "voluntarily unemployed" because they consented to the shutdown in their collective bargaining agreement was also unpersuasive. A collective bargaining agreement cannot waive rights ensured to an employee by state law. Lastly, this action was not precluded by sec. 301 of the federal Labor Management Relations Act (29 U.S.C. 185) because the case involved matters implicating state rules and obligations independent of the labor contract, as evidenced by the inclusion as parties those state agencies charged with determining unemployment eligibility. The District Court was affirmed, and the case was remanded to the appropriate state agencies for decisions on each individual claim. Multiple Stimson Employees v. Stimson Lumber Co., 2001 MT 56, 304 M 333, 21 P3d 613 (2001), distinguishing Anderson v. TW Corp., 228 M 1, 741 P2d 397 (1987), and Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720 (1992).

Workers' Compensation Denied — Claimant Receiving Unemployment Benefits: The judgment of the Workers' Compensation Court denying claimant disability benefits will not be disturbed on appeal as it is supported by substantial credible evidence. Claimant was receiving unemployment benefits during the period he claims he was disabled, asserting on his application for unemployment benefits that he was able and available to work and had no medical condition that prevented him from accepting immediate employment in his field. Eveleigh v. Nat'l Union Fire Ins. Co. of Pittsburgh, 225 M 53, 730 P2d 1176, 44 St. Rep. 36 (1987).

Type of Work: Under statute providing that claimant must be available for work and seeking work, claimant was not eligible where all his applications were either for work in which he had no experience or work which he had no prospect of securing. Claimant voluntarily removed himself from only then-existing labor market in area for which he was qualified by refusal to accept farm or ranch work because he despised it. Noone v. Reeder, 151 M 248, 441 P2d 309 (1968).

Burden of Proof: Unemployment compensation claimant has the burden of showing that he is not disqualified from the receipt of benefits. Ollila v. Reeder, 148 M 134, 417 P2d 473 (1966); Scott v. Smith, 141 M 230, 376 P2d 733 (1962).

Withdrawal From Labor Market: Claimant, who voluntarily withdrew himself from the active labor market, rendered himself ineligible to receive unemployment compensation benefits. Ollila v. Reeder, 148 M 134, 417 P2d 473 (1966).

Attorney General's Opinions

Applicability — Indian Reservations: The Montana unemployment compensation statutes do not apply to Indian businesses conducted within the Blackfeet Indian Reservation. 37 A.G. Op. 90 (1977).

39-51-2105. Qualifying wages.

Compiler's Comments

1991 Amendment: Near beginning of introductory clause, before "employment", substituted "been paid total wages for" for "had at least 20 weeks of work with an average of $50 per week in subject" and at end inserted "in an amount"; inserted (1) setting amount of wages at 1½ times the wages earned in the quarter in which wages were highest but at least equal to or greater than 7% of the average annual wage; at beginning of (2) deleted "On and after July 5, 1987, to qualify for benefits, an individual's total base period wages must be", after "greater than" substituted "50%" for "7%", deleted reference to subsection (2) of 39-51-2201, and deleted former second sentence that read: "To qualify for benefits, an individual's total base period wages must be $1,000 or more"; and made minor changes in style. Amendment effective July 7, 1991.

1987 Amendments: Chapter 153 substituted language (see 1987 Session Law for text) for former language that read: "(1) To qualify as an insured worker an individual must have been paid wages for insured work in the quarters of his base period an amount totaling not less than 1½ times his base period high quarter wages.

(2) On and after July 1, 1980, to qualify for benefits, an individual must have had at least 20 weeks of work with an average of $50 per week in subject employment in the base period. To qualify for benefits, the total base period wages must be $1,000 or more.

(3) With respect to weeks of unemployment beginning on or after January 1, 1978, wages for insured work shall include wages paid for previously uncovered services. For the purposes of this subsection, the term "previously uncovered services" means services:

(a) which were not employment as defined in 39-51-204(1)(a) and (1)(b) at any time during the 1-year period ending December 31, 1975; and

(b) which:

(i) are agricultural labor, as defined in 39-51-203(8), or domestic service, as defined in 39-51-203(9); or

(ii) are services performed by an employee of this state or a political subdivision thereof, as provided in 39-51-203(5), or by an employee of a nonprofit educational institution which is not an institution of higher education, as provided in 39-51-203(6), except to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 was paid on the basis of such services."

Chapter 234 substituted language of (1) and language similar to second sentence of (2) (see 1987 Session Law for text) for former language that read as in amendment note for Ch. 153.

The Code Commissioner has codified the section as amended by Ch. 153 because those amendments contain the substance of the Ch. 234 amendments.

Section Not Codified: Part of subsection (e) of section 87-103, R.C.M. 1947, concerning the transition period, was not codified in the MCA because it was temporary. The subsection has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 528, L. 1977.

Administrative Rules

ARM 24.11.442 Initial monetary determination — wages — revisions.

39-51-2106. Certain wages not to be used in determining benefit eligibility or amount.

Compiler's Comments

1997 Amendment: Chapter 42 after "Railroad Unemployment Insurance Act" substituted "(45 U.S.C. 351, et seq.)" for "(52 Stat. 1094)"; and made minor changes in style. Amendment effective March 12, 1997.

Railroad Unemployment Insurance Act: This federal Act, referred to in this section, is codified at Title 45, U.S.C., Ch. 11.

39-51-2107. Services for remuneration to be performed during benefit year as condition for receiving benefits in second benefit year — amount required.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: In first sentence, after "remuneration", substituted "following the initial separation from employment in the previous benefit year" for "after the beginning of that year" and substituted second sentence referencing 39-51-203 and 39-51-204 for former second sentence that read: "The service may be in either covered or noncovered employment". Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

39-51-2108. Payment of benefits based on services in public, charitable, or educational organizations.

Compiler's Comments

1999 Amendment: Chapter 61 near beginning of (1) after "conditions" substituted "as benefits payable" for "as compensation payable", near end after "individual's contract" inserted "if the individual performs the services in the first of the academic years or terms and", and at end after "institution" substituted "in the second of the academic years or terms" for "for both academic years or both terms"; and made minor changes in style. Amendment effective July 1, 1999.

Saving Clause: Section 12, Ch. 61, L. 1999, was a saving clause.

Severability: Section 13, Ch. 61, L. 1999, was a severability clause.

1997 Amendment: Chapter 491 in (1), near beginning after "39-51-203(5) and (6)", deleted "and subsections (2) and (3) of 39-51-204"; and made minor changes in style. Amendment effective January 1, 1998.

Preamble: The preamble attached to Ch. 491, L. 1997, provided: "WHEREAS, House Bill No. 98 (Ch. 48, L. 1995), enacted by the 54th Legislature, excluded direct sellers from minimum wage, overtime, unemployment insurance, and workers' compensation requirements; and

WHEREAS, the Legislature in House Bill No. 98 adopted the federal definition of direct seller to apply to relevant Montana statutes; and

WHEREAS, ARM 24.11.831 narrowed the scope of the federal definition of direct seller; and

WHEREAS, an original purpose of this House Bill No. 561 was to codify the narrower definition of direct seller; and

WHEREAS, this House Bill No. 561 is the appropriate place to repeal Rule 24.11.831, Administrative Rules of Montana."

Severability: Section 36, Ch. 491, L. 1997, was a severability clause.

Saving Clause: Section 37, Ch. 491, L. 1997, was a saving clause.

1985 Amendment: Near end of (1) after "if the individual has a contract", inserted "or reasonable assurance of a contract"; and inserted (2) through (4) precluding the payment of benefits to certain educational employees during summer and holiday break periods.

Administrative Rules

ARM 24.11.464 Benefits based on services in educational institutions and educational service agencies.

Case Notes

Teachers — "Reinstated" Distinguished From "Rehired" — Repayment of Benefits: Appellants were notified in March that their teaching contracts would not be renewed for the coming year. Each challenged the nonrenewal and was reinstated with backpay, the right to full advancement on the salary schedule, and no loss of seniority, tenure rights, or benefits. The Unemployment Insurance Division of the Department of Labor and Industry notified appellants that each would have to repay all unemployment compensation received during the summer. The Board of Labor Appeals (now the Unemployment Insurance Appeals Board) reversed and held appellants did not have to repay benefits. The District Court reversed the decision of the Board and held that benefits would have to be repaid. The Supreme Court affirmed and held that the reinstatement related back to the time of termination and that appellants had a contract for both academic years for purposes of this section. School District v. Dept. of Labor and Industry, 217 M 72, 702 P2d 975, 42 St. Rep. 1033 (1985).

39-51-2110. Payment of benefits to aliens.

Compiler's Comments

1997 Amendment: Chapter 42 in (1), near end, substituted "the Immigration and Nationality Act, 8 U.S.C. 1152" for "section 212(d)(5) of the Immigration and Nationality Act". Amendment effective March 12, 1997.

1993 Amendment: Chapter 171 near end of (1) deleted reference to section 203(a)(7) of the Immigration and Nationality Act; and made minor changes in style. Amendment effective March 25, 1993.

Severability: Section 8, Ch. 171, L. 1993, was a severability clause.

1991 Amendment: At beginning of (1) deleted "effective January 1, 1978", near middle, after "residence", inserted "at the time the services were performed, was lawfully present for the purposes of performing the services", and after "color of law" inserted "at the time the services were performed"; and made minor changes in style. Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

39-51-2111. Unemployment benefits for victims of domestic violence, sexual assault, or stalking.

Compiler's Comments

2015 Amendment: Chapter 417 in (1)(c) near beginning substituted "28 weeks" for "10 weeks". Amendment effective July 1, 2015.

2011 Amendment: Chapter 123 in (1)(b) substituted "The account of an employer with an experience rating as provided in 39-51-1213" for "An employer's account"; near end of (1)(c) after "unemployment" inserted "insurance"; and made minor changes in style. Amendment effective October 1, 2011.

2005 Amendment: Chapter 187 in (1)(a) near middle after "violence" and at end after "abuse" inserted "a sexual assault, or stalking"; in (1)(b), in (2), and in (2)(b) after "violence" inserted reference to a sexual assault or stalking; in (2)(c) after "violence" inserted "or a sexual assault"; in (2)(d) in two places after "violence" inserted "a sexual assault, or stalking"; in (5)(a) near beginning after "physical" deleted "sexual"; inserted (5)(b) defining sexual assault; inserted (5)(c) defining stalking; and made minor changes in style. Amendment effective October 1, 2005.

Termination Provision Repealed: Section 1, Ch. 313, L. 2003, repealed sec. 4, Ch. 520, L. 2001, which terminated this section July 1, 2003. Effective April 14, 2003.

Effective Date — Applicability: Section 3, Ch. 520, L. 2001, provided: "[This act] is effective July 1, 2001, and applies to an individual who leaves work or is discharged because of circumstances resulting from domestic violence on or after [the effective date of this act]."

Termination: Section 4, Ch. 520, L. 2001, provided: "[This act] terminates July 1, 2003."

Administrative Rules

ARM 24.11.617 Relief of charges to employers.

39-51-2112. Benefit ineligibility for leave of absence.

Compiler's Comments

Effective Date: Section 23(3), Ch. 88, L. 2009, provided that this section is effective January 1, 2010.

39-51-2113. Benefit ineligibility for suspension.

Compiler's Comments

Effective Date: Section 23(3), Ch. 88, L. 2009, provided that this section is effective January 1, 2010.

39-51-2115. Part-time work search — eligibility for benefits.

Compiler's Comments

Effective Date: Section 80, Ch. 489, L. 2009, provided: "[This act] is effective on passage and approval." Approved May 14, 2009.

39-51-2116. Participation in worker training program — eligibility for training benefits.

Compiler's Comments

2017 Amendment: Chapter 37 in (2) substituted "Workforce Innovation and Opportunity Act" for "Workforce Investment Act of 1998". Amendment effective February 20, 2017.

Effective Date: Section 80, Ch. 489, L. 2009, provided: "[This act] is effective on passage and approval." Approved May 14, 2009.

Administrative Rules

ARM 24.11.617 Relief of charges to employers.

Part 22
Amount and Duration of Benefits

Part Administrative Rules

ARM 24.11.442 Initial monetary determination — wages — revisions.

39-51-2201. Weekly benefit amount — determination of average weekly wage.

Compiler's Comments

2009 Amendment: Chapter 25 deleted former (3)(a)(iii) that read: "The minimum weekly benefit amount, if not a multiple of $1, must be computed to the nearest lower full dollar amount"; and deleted former (3)(b)(iii) that read: "The minimum weekly benefit amount, if not a multiple of $1, must be computed to the nearest lower full dollar amount". Amendment effective July 1, 2009.

2007 Amendment: Chapter 86 in (2) deleted former fourth and fifth sentences that read: "The maximum weekly benefit amount is 66.5% of the average weekly wage and must be applied to all maximum weekly benefit amount claims for benefits filed to establish a benefit year commencing on or after July 1 of the same year. The maximum weekly benefit amount, if not a multiple of $1, must be computed to the nearest lower full dollar amount"; and in (3) substituted text regarding computation of maximum and minimum weekly benefits for former language that read: "(3) The minimum weekly benefit amount must be 19% of the average weekly wage. The minimum weekly benefit amount, if not a multiple of $1, must be computed to the nearest lower full dollar amount." Amendment effective October 1, 2007.

2005 Amendment: Chapter 92 in (3) increased minimum weekly benefit amount from 15% to 19% of the average weekly wage. Amendment effective July 1, 2005.

2003 Amendment: Chapter 432 in (2) in fourth sentence increased benefit amount from 63% to 66.5%. Amendment effective April 21, 2003.

Effective Date — Applicability: Section 4, Ch. 432, L. 2003, provided: "[This act] is effective on passage and approval [approved April 21, 2003] and applies to claims for benefits filed on or after October 1, 2003."

2001 Amendment: Chapter 333 deleted former (1) that read: "(1) For claims filed before July 7, 1985, an eligible individual's weekly benefit amount shall be the total base period wages divided by the number of weeks of covered employment times 50%. The weekly benefit amount, if not a multiple of $1, must be rounded to the nearest lower full dollar amount. However, such amount shall not be less than the minimum or more than the maximum weekly benefit amount. For claims effective July 7, 1985, and filed before July 7, 1991, an individual's weekly benefit amount shall be the total base period wages divided by the number of weeks of covered employment times 49%. The weekly benefit amount, if not a multiple of $1, must be rounded to the nearest lower full dollar amount. However, such amount shall not be less than the minimum or more than the maximum weekly benefit amount"; at beginning of (1) deleted "For claims filed on or after July 7, 1991"; in fourth sentence of (2) substituted "The maximum weekly benefit amount is 63% of the average weekly wage and must be applied" for "Sixty percent of the average weekly wage shall constitute the maximum weekly benefit amount and shall apply" and at end after "same year" deleted "except that the maximum weekly benefit amount for benefit years commencing on or after July 1, 1984, through January 3, 1987, is the amount calculated under this subsection after January 1, 1984, and on or before May 31, 1984"; and made minor changes in style. Amendment effective July 1, 2001, and applies to claims for benefits filed on or after July 1, 2001.

1991 Amendment: In (1), in fourth sentence after "1985", substituted "and filed before July 7, 1991" for "and after"; inserted (2) regarding the weekly benefit amount for claims filed on or after July 7, 1991; and in (3), in second sentence after "obtained", inserted "is the average annual wage" and at beginning of third sentence substituted "The average annual wage" for "shall be", after "52" deleted "and the average weekly wage", and after "cent" substituted "is the average weekly wage" for "thus determined". Amendment effective July 7, 1991.

1985 Amendment: In (1) at beginning of first sentence, inserted "For claims filed before July 7, 1985", and inserted last three sentences referring to calculation of claims effective July 7, 1985, and after; and in (2) at end of third sentence, inserted exception clause referring to benefit years commencing on or after July 1, 1984, through January 3, 1987.

1983 Amendment: Deleted former (1), which read: "Any individual whose benefit year begins on or after July 1, 1971, shall receive as his weekly benefit amount an amount equal to one twenty-sixth of his total wages for insured work paid during the calendar quarter of his base period in which his wages were highest. Such weekly benefit amount, if not a multiple of $1, shall be rounded to the nearest multiple of $1."; at beginning of (1), deleted "On and after July 1, 1980"; inserted second sentence of (1) allowing for rounding of benefit amount; at end of (2), substituted "lower full dollar amount" for "multiple of $1"; inserted last sentence of (3) requiring rounding of minimum benefit amount to nearest lower full dollar amount; deleted former (5), which read: "The department shall prepare and publish annually a benefit schedule in accordance with the provisions of this subsection."

1981 Amendment: Substituted "department" for "division" in (5).

Administrative Rules

ARM 24.11.445 Inactive claims — reactivating a claim.

39-51-2202. Partial payment of benefits.

Compiler's Comments

Termination Provision Repealed: Section 1, Ch. 12, L. 2001, repealed sec. 4, Ch. 400, L. 1999, which terminated the temporary version of this section July 1, 2001. Effective February 14, 2001.

1999 Amendment: Chapter 400 in first and second sentences inserted "for employment"; and made minor changes in style. Amendment effective July 1, 1999, and terminates July 1, 2001.

Effective Date — Applicability: Section 3, Ch. 400, L. 1999, provided: "[This act] is effective July 1, 1999, and applies to claims for benefits first filed on or after July 1, 1999."

1983 Amendment: Near end of last sentence, substituted "nearest lower full dollar amount" for "nearest dollar".

39-51-2203. Reduction of benefits because of amounts received from certain other sources.

Compiler's Comments

1995 Amendment: Chapter 195 deleted last sentence in (2) that read: "A pension plan negotiated under a collective bargaining agreement is considered a direct employee contribution under this section." Amendment effective March 23, 1995.

Applicability: Section 19, Ch. 195, L. 1995, provided: "[This act] applies to hearings or appeals requested on or after [the effective date of sections 2 through 10 and 12 through 19]." Sections effective March 23, 1995.

1993 Amendment: Chapter 171 near beginning of (1), after "reduced", inserted "(but not below zero)" and near middle, after "based on", substituted "the previous work of the individual and that is reasonably attributable to the week" for "for and entirely contributed to by a base-period employer"; substituted (1)(a) concerning plan, (1)(b) excepting certain payments, and (2) concerning direct employee contributions for former (2) through (4) that read: "(2) However, if the service performed for the base-period employer does not affect either the eligibility for or the amount of the pension or other type of retirement benefit received from the plan maintained or contributed to by the base-period employer, the reduction requirement of subsection (1) does not apply.

(3) The exception in subsection (2) is not applicable to the receipt of social security and/or railroad retirement benefits.

(4) For the purposes of subsection (1), the department shall, by rule, adopt minimum federal offset requirements as imposed by the federal Employee Retirement Income Security Act of 1974, P.L. 94-566, as amended in 1980 by P.L. 96-364, and as may be amended after March 11, 1981"; and made minor changes in style. Amendment effective March 25, 1993.

Severability: Section 8, Ch. 171, L. 1993, was a severability clause.

1989 Amendment: In (1), at end of first sentence, substituted "entirely contributed to by a base-period employer" for "contributed to in whole or in part by a base-period employer" and deleted second sentence providing reduction amount determined by ratio of employer's contributions to fund from which payment made so claimant receives credit only for proportion of his contributions to fund. Amendment effective July 1, 1989.

1983 Amendment: In (1), substituted last sentence concerning determination of amount by which weekly benefits are to be reduced for "If a claimant is receiving payments under the federal Social Security Act or the federal Railroad Retirement Act or from a pension to which he has contributed in part, his weekly benefit amount must be reduced by 50% of the amount that he is receiving from such payments."

1981 Amendments: Chapter 41 deleted "This provision does not apply to the receipt of benefits under the federal Social Security Act, as amended" from (1); added the last sentence of (1) requiring offset of benefits if claimant is receiving federal social security or railroad retirement benefits and added (2) and (3) stating circumstances under which benefits may not be reduced and exception to those circumstances. Subsection (4) requiring Division to adopt minimum federal offset requirements was added by Governor's amendment.

Chapter 349 substituted "department" for "division" in (4).

Statement of Intent: The statement of intent added by Governor's amendment to HB 76 (Ch. 41, L. 1981) provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the Employment Security Division of the Department of Labor and Industry in subsection (4). It is the intent of this bill to grant the Division the authority to adopt the minimum federal offset requirements as set forth in the federal Employee Retirement Income Security Act of 1974, as amended. This is a conformity requirement of the federal Employee Retirement Income Security Act which is imposed on the states."

Administrative Rules

ARM 24.11.472 Pension benefit reduction.

39-51-2204. Maximum benefit amount.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 731, L. 2023. Amendment effective July 1, 2023.

Applicability: Section 3, Ch. 731, L. 2023, provided: "[This act] applies to unemployment insurance claims filed on or after July 1, 2023."

2003 Amendment: Chapter 432 in table in 26-week benefit period in less than column inserted "3.50" and inserted last item providing 28 weeks of benefits for earning ratio of at least 3.50. Amendment effective April 21, 2003.

Effective Date — Applicability: Section 4, Ch. 432, L. 2003, provided: "[This act] is effective on passage and approval [approved April 21, 2003] and applies to claims for benefits filed on or after October 1, 2003."

1991 Amendment: Near beginning deleted reference to subsection (1) of 39-51-2201. Amendment effective July 7, 1991.

1987 Amendment: Substituted language before table relating to calculation of benefit for "Any otherwise eligible individual shall be entitled during his benefit year to benefits for the total number of weeks appearing in the following table on the line which includes his ratio of total base period earnings to highest quarter base period earnings"; and in table, in first column, changed "0" to "1.00", changed heading of third column to "Full Weeks of Benefits" from "Week's Duration of Benefits", and made minor change in phraseology.

39-51-2207. Voluntary withholding of taxes from benefits — procedures.

Compiler's Comments

2019 Amendment: Chapter 51 in (1)(d) at end inserted "subject to the provisions in subsection (3)"; deleted former (3)(b) that read: "(b) deduct and withhold from unemployment compensation amounts of federal income tax other than those specified in subsection (1)(c) in accordance with the priorities established by the department by rule"; and made minor changes in style. Amendment effective March 7, 2019.

Retroactive Applicability: Section 13, Ch. 60, L. 1997, provided: " [Sections 1, 5, and 10] [39-51-2207, 39-51-403, and 39-51-3105] apply retroactively, within the meaning of 1-2-109, to January 1, 1997, in order to comply with federal requirements."

Effective Date: Section 14(1), Ch. 60, L. 1997, provided: "Except as provided in subsections (2) and (3), [this act] is effective on passage and approval." Approved March 17, 1997.

39-51-2208. Deduction and withholding of unemployment benefits to repay overissuance of food stamps — definitions.

Compiler's Comments

2007 Amendment: Chapter 205 throughout section after "food stamp" substituted "benefits" for "coupons"; in (3) at beginning of introductory clause inserted exception clause; inserted (7) providing that the department may not deduct or withhold unemployment benefits in a case involving overissuance of food stamps because of a department error in processing or administering the recipient's case; and made minor changes in style. Amendment effective April 17, 2007.

Retroactive Applicability: Section 4, Ch. 205, L. 2007, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to any cases pending before a Montana court on [the effective date of this act]." Effective April 17, 2007.

Part 23
Benefit Disqualification

Part Administrative Rules

Title 24, chapter 11, subchapter 4, ARM Claims for benefits.

Part Case Notes

Prior Workers' Compensation Settlement: Claimant was barred from receiving unemployment compensation benefits by reason of prior lump-sum workers' compensation settlement during the period which lump-sum settlement was intended to cover. Keller v. Reeder, 149 M 322, 425 P2d 830 (1967).

Intention of Legislature: In construing Title 39, ch. 51, part 23, the fundamental purpose of the Supreme Court is to ascertain, if possible, and to give effect to the intention of the Legislature. McCarthy v. Mont. Power Co., 143 M 134, 387 P2d 438 (1963).

39-51-2302. Disqualification for leaving work without good cause — requalification.

Compiler's Comments

2019 Amendment: Chapter 27 in (2)(c) in first sentence substituted "180 days" for "6 weeks" and after "terminated due to" deleted "the military service or for". Amendment effective February 28, 2019.

2011 Amendment: Chapter 123 near end of (2)(c) and (2)(d) substituted "account of an employer with an experience rating as provided in 39-51-1213" for "employer's account". Amendment effective October 1, 2011.

2007 Amendments — Composite Section: Chapter 52 in (2)(a) in two places substituted "health care provider" for "physician". Amendment effective October 1, 2007.

Chapter 86 inserted (2)(d) regarding lack of disqualification for benefits of individual who leaves employment because of military transfer of spouse; and made minor changes in style. Amendment effective October 1, 2007.

2005 Amendment: Chapter 381 in (2)(c) in first sentence near beginning after "being" substituted "ordered to military service, as defined in 10-1-1003" for "called to active military duty to serve in the United States armed forces" and near end before second "military" deleted "active". Amendment effective April 25, 2005.

2003 Amendment: Chapter 94 inserted (2)(c) providing that an individual may not be disqualified if the individual's employment is terminated because of being called to active duty and providing that any benefits paid are not chargeable to the employer's account; in (3) at end of first sentence deleted "individual's enrollment" and inserted "act that caused the disqualification"; and made minor changes in style. Amendment effective July 1, 2003.

Saving Clause: Section 4, Ch. 94, L. 2003, was a saving clause.

Applicability: Section 6, Ch. 94, L. 2003, provided: "[This act] applies to claims for benefits filed on or after July 1, 2003."

1999 Amendment: Chapter 61 near beginning of (3) after "services" deleted "other than self-employment" and inserted second sentence requiring that services meet definition of employment as provided in 39-51-203 and 39-51-204. Amendment effective July 1, 1999.

Saving Clause: Section 12, Ch. 61, L. 1999, was a saving clause.

Severability: Section 13, Ch. 61, L. 1999, was a severability clause.

1997 Amendment: Chapter 60 inserted (2)(b) referring to temporary work accepted by an individual during a period of unemployment caused by a lack of work with the individual's regular employer; and made minor changes in style. Amendment effective March 17, 1997.

1991 Amendment: In (2), near beginning after "misconduct", deleted "or left his employment". Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1985 Amendment: At end of (1) inserted "attributable to his employment".

1981 Amendment: Substituted "department" for "division" throughout (2).

Administrative Rules

ARM 24.11.457 Leaving work with or without good cause attributable to employment.

ARM 24.11.463 Lie detector tests — drug and alcohol testing.

ARM 24.11.617 Relief of charges to employers.

Case Notes

Voluntary Resignation Due to Fear of Termination and Hostile Work Environment — Good Cause Not Established — Benefits Denied: After receiving multiple complaints, the county commissioners sent two written warnings to the county sanitarian, but they continued to receive complaints. The commissioners then sent a due process letter to the sanitarian listing areas of concern, she submitted a response, and before the county commissioners made a decision, she quit and filed for unemployment benefits, claiming the county's conduct created a hostile work environment and that she had good cause to leave. The District Court affirmed the Unemployment Insurance Appeals Board's decision to deny the unemployment claim because the sanitarian voluntarily resigned her position and she did not satisfy her burden to establish that she left her position for good cause. On appeal, the Supreme Court affirmed. Crouse v. St., 2017 MT 254, 389 Mont. 90, 403 P.3d 1260.

Good Cause Attributable to Employer Not Demonstrated: The plaintiff was employed by the defendant electric cooperative as a master electrician and complained to management that unqualified employees were performing work that only electricians could perform. Management took certain actions to remedy the plaintiff's concerns. The plaintiff eventually applied for an apprentice lineman position, which paid approximately 40% less than his wage as a master electrician, but no applicants were hired for the position. The plaintiff resigned from his position and filed for unemployment benefits. The Board of Labor Appeals (now the Unemployment Insurance Appeals Board) concluded that substantial evidence supported that the plaintiff did not show he left work for good cause attributable to his employment. The District Court affirmed the Board's decision. On appeal, the Supreme Court concluded that the District Court did not err when it affirmed the Board's conclusion because the Board's findings were supported by substantial evidence, including that the plaintiff's reasons for resigning were not compelling in light of the defendant's responsive actions and because his electrician's license was never at risk. Cruson v. Missoula Elec. Co-op, Inc., 2015 MT 309, 381 Mont. 304, 359 P.3d 98.

Employee Not Required to Obtain Physician's Advice Prior to Resigning for Good Cause: Rice, who was employed as a truck driver and who was also being treated for bipolar disorder, informed his employer that he would not return to work because he had experienced blackouts. The state denied his request for unemployment benefits, arguing that subsection (2)(a) of this section requires an employee to obtain the advice of a licensed physician (now health care provider) prior to resigning from employment. The Supreme Court held that subsection (1) of this section provides for other good cause reasons to resign from employment in addition to a physician's advice and that Rice clearly had good cause to resign. Rice v. St., 2002 MT 267, 312 M 315, 60 P3d 394 (2002).

Employer Given No Opportunity to Address Employee's Concerns — Benefits Denied: Plaintiff appealed from a District Court order that upheld the Board of Labor Appeals' (now the Unemployment Insurance Appeals Board) denial of unemployment insurance benefits, claiming that she left employment for good cause after being subjected to retaliation for making statements about workers' compensation claims and for complaining about the employer's public policy violations. The Supreme Court affirmed the District Court decision, ruling that plaintiff's failure to give management an opportunity to address her employment concerns disqualified plaintiff from receiving benefits when the plaintiff left work without good cause attributable to employment. Reynolds v. Pac. Telecom, 259 M 309, 856 P2d 1365, 50 St. Rep. 809 (1993).

Lockout Unemployment Not Fault of Employees: The disqualification provisions were not intended by the Legislature to apply to a fact situation wherein there was no voluntary action on the part of the employees precipitating the employer's lockout. The employees involved in the labor dispute were unemployed through no fault of their own. Application of the disqualification statute did not interfere with federal labor policy. Mont. Ready Mixed Concrete Ass'n v. Bd. of Labor Appeals, 175 M 143, 572 P2d 915 (1977).

39-51-2303. Disqualification for discharge due to misconduct.

Compiler's Comments

2021 Amendment — Coordination: Chapter 555 inserted (3) relating to drug tests; and made minor changes in style. Amendment effective July 1, 2021. Section 4, Ch. 555, L. 2021, a coordination section, in (3) at end substituted reference to Title 50, chapter 46, part 3, for reference to Title 16, chapter 12, part 5.

1999 Amendment: Chapter 61 at end of (1) after "services" deleted "other than self-employment"; inserted (1)(b) requiring disqualification for misconduct until individual has performed services that constitute employment defined in 39-51-203 and 39-51-204; and made minor changes in style. Amendment effective July 1, 1999.

Saving Clause: Section 12, Ch. 61, L. 1999, was a saving clause.

Severability: Section 13, Ch. 61, L. 1999, was a severability clause.

1987 Amendment: In first sentence, after "benefits", substituted "after being" for "if he has been"; at end of (2) substituted "52 weeks" for "12 months"; and made minor changes in phraseology.

1981 Amendment: Substituted "department" for "division" in (2).

Administrative Rules

ARM 24.11.454A Leaving or discharge from work.
ARM 24.11.455 Refusal of work.
ARM 24.11.457 Leaving work with or without good cause attributable to employment.
ARM 24.11.462 Off-duty conduct.
ARM 24.11.463 Lie detector tests — drug and alcohol testing.
ARM 24.11.469 Domestic violence disqualification.
ARM 24.11.617 Relief of charges to employers.

Case Notes

Refusal to Comply with Reasonable School District Policy — Misconduct Making Terminated Employee Ineligible to Receive Unemployment Benefits: A high school teacher was fired after she refused to deposit activity funds into an account maintained by the school district, in violation of its policy. She filed for unemployment benefits, but the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) concluded that she was fired for misconduct and therefore was ineligible to receive benefits. The plaintiff then appealed to the District Court, which agreed with the Board that her refusal to comply with a reasonable school board policy constituted misconduct. The plaintiff finally appealed to the Supreme Court, which also affirmed the District Court's ruling, holding that there was substantial evidence in the record that the plaintiff's actions constituted misconduct that precluded her from receiving unemployment benefits. Roberts v. Bd. of Labor Appeals, 2013 MT 328, 372 Mont. 374, 313 P.3d 110.

Employee Behavior — Misconduct as Matter of Law Under Carelessness Standard — Reversal of Board Decision Affirmed: A deli employee was fired after receiving numerous customer complaints. A hearings officer awarded her employment benefits based on the determination that she had not shown a deliberate disregard for the employer and thus her conduct did not constitute misconduct, and the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) affirmed the award. The deli petitioned for judicial review and the District Court reversed the Board's decision, ruling that the employee's actions, which included being rude to customers and swearing within their earshot, constituted misconduct as a matter of law under the "careless disregard" definition of misconduct. The Board appealed and the Supreme Court affirmed the reversal. Gary & Leo's Fresh Foods, Inc. v. St., 2012 MT 219, 366 Mont. 313, 286 P.3d 1218.

No Misconduct for Making Allegations About Supervisor — Board of Labor Appeals Determination Based on Substantial Evidence: An employee was discharged from her job for misconduct based on allegations that she made about a supervisor to another employee and that an investigation by the employer determined were unsupported. The employee applied for unemployment benefits, and after a series of administrative proceedings the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) determined the employee was entitled to benefits. On appeal, the District Court dismissed a petition for review of the Board's determination on the grounds that there was substantial evidence for the determination. Subsequently, the Supreme Court affirmed the District Court, reasoning that the function of the reviewing court is to determine whether substantial evidence supported the Board's finding and not whether, on the same evidence, it would have arrived at the same conclusion. Somont Oil Co. v. King, 2012 MT 207, 366 Mont. 251, 286 P.3d 585, distinguished in Gary and Leo's Fresh Foods, Inc. v. St., 2012 MT 219, 366 Mont. 313, 286 P.3d 1218.

Acceptance of Valuable Gift in Probationer's Will Considered Negligent — Termination of Probation Officer Justified — Denial of Unemployment Benefits Proper: Probation officer Morrow accepted an envelope from a probationer that was marked to be opened in the event of the probationer's death. When the probationer died, Morrow opened the envelope and found the probationer's will, which designated Morrow as the personal representative of the probationer's estate and devised real and personal property to Morrow. Morrow accepted the position of personal representative and began probating the will. Morrow mentioned the situation to his supervisor in passing, but did not discuss ethics or inheritances, minimizing the significance of the event. The Department of Corrections became concerned about ethical violations after the situation was brought to the Department's attention by a citizen complainant, and Morrow was subsequently terminated for failing to follow performance and conduct guidelines regarding supervision of the probationer and Morrow's status as devisee of the estate. Morrow applied for unemployment benefits, but the benefits were denied because of the discharge for misconduct. Morrow appealed, but the referee upheld the denial of benefits, so Morrow appealed to the Board of Labor Appeals (now the Unemployment Insurance Appeals Board). The Board found that Morrow was negligent in not opening the envelope immediately but that the act did not amount to willful or wanton disregard for the Department's interests, so the benefits were reinstated. The Department appealed to the District Court, which reviewed the record and reversed the Board's decision and reinstated the denial of benefits. Morrow appealed to the Supreme Court. The court held that Morrow's failure to open the envelope referencing the event of the probationer's death was a negligent act that substantially disregarded the Department's interest in properly supervising the probationer and that at the very least, Morrow should have closely scrutinized the gift and sought guidance from the supervisor, in accordance with the agency's policy manual, rather than downplaying the significance of Morrow's inclusion in the will. Morrow's termination for accepting a gift of significant value was justified, and denial of unemployment benefits was affirmed. Dept. of Corrections v. St., 2006 MT 298, 334 M 425, 148 P3d 619 (2006).

Employee Misconduct — Unemployment Benefits Properly Withheld: Wiman, a dispatcher at the Fallon County jail, allowed an unauthorized person to enter a convicted felon's cell to give the prisoner a haircut. Wiman's deliberate action violated county security policy, and Wiman was suspended without pay for 60 days, during which time Wiman sought unemployment benefits, but the benefits were denied. The District Court affirmed the denial of benefits. Under this section, an employee is disqualified for unemployment benefits after being discharged for work-related misconduct. The denial of benefits was supported by evidence, as required by 39-51-2410, and on appeal, the Supreme Court also affirmed. Wiman v. Dept. of Labor and Industry, 2004 MT 208, 322 M 332, 96 P3d 710 (2004).

Irrelevant Evidence Unrelated to Employee's Ineligibility for Unemployment Benefits Based on Misconduct Properly Denied: Wiman, a dispatcher at the Fallon County jail, allowed an unauthorized person to enter a convicted felon's cell to give the prisoner a haircut. Wiman's deliberate action violated county security policy, and Wiman was suspended without pay for 60 days, during which time Wiman sought unemployment benefits, but the benefits were denied. Wiman contended that the hearings officer improperly denied her the right to introduce evidence that went to the heart of the misconduct issue, such as evidence regarding the inmate's mental state, whether Wiman or another employee had previously provided items to inmates, and whether Wiman's breach of security policy was adequately investigated. However, the question before the hearings officer was the denial of unemployment benefits during the time that Wiman was suspended for allowing an unauthorized person into the cell—conduct which Wiman admitted—so the evidence related to Wiman's misconduct issue was irrelevant and inadmissible. Wiman v. Mont. Dept. of Labor and Industry, 2004 MT 208, 322 M 332, 96 P3d 710 (2004).

No Basis for Charge of Misconduct by Police Officer — Error in Dismissal of Action for Unemployment Benefits: Police officer McKay was charged in District Court with official misconduct for his involvement in an altercation and was suspended from his job, but the charge was dismissed without prejudice for failure to show probable cause. McKay was subsequently charged in City Court with assault, convicted, and terminated from employment. McKay then filed an unemployment insurance claim. The appeals referee determined that McKay was ineligible for benefits under this section because of misconduct. The Board of Labor Appeals (now the Unemployment Insurance Appeals Board) affirmed the referee's decision, and McKay appealed to District Court. The District Court took judicial notice of McKay's acquittal on the misconduct charges, but concluded that the acquittal was immaterial. The Supreme Court disagreed. Absent the City Court conviction, no facts existed upon which to base a legal conclusion that McKay engaged in misconduct that would preclude unemployment benefits. Thus, the District Court committed reversible error in affirming the Board's conclusion that McKay was discharged for misconduct. McKay v. Bd. of Labor Appeals, 1999 MT 329, 297 M 357, 990 P2d 1251, 56 St. Rep. 1313 (1999), distinguishing Smith v. Roosevelt County, 242 M 27, 788 P2d 895, 47 St. Rep. 506 (1990).

Discharge for Misconduct — Tactics in Negotiation for Raise Held Not to Constitute Threat to Employer: Moody, a gas plant field inspector for Northland, told his supervisor, Sheehan, that he had been offered a job by a competitor, that he needed a raise, that he needed an answer by noon, and that if he left employment with Northland, he would take another employee of Northland with him. Sheehan then offered the other employee a raise, which was accepted, and telephoned another individual and offered Moody's job, which offer was also accepted. Sheehan then terminated Moody's employment. Moody applied for unemployment benefits, which Northland opposed. At first, Moody's actions to secure a raise were held not to constitute misconduct, but that determination was later reversed. In the process of Moody's application and the reversal of the award for benefits, Northland discovered that Moody had been offered less money by the competitor and therefore claimed that Moody was guilty of misconduct in failing to disclose that fact. The Supreme Court reversed, holding that Northland could not have discharged Moody for misconduct if it was unaware of the salary disparity at the time that Moody was discharged. The Supreme Court found that although Moody may have been somewhat deceptive, that deception did not equate with "misconduct" as used in the statute or administrative rule. Further, the Supreme Court held that Moody's action in saying that he had to have a decision by noon that day or that he would take another employee with him did not constitute a threat to Northland. The Supreme Court found that Northland had adequate means to protect itself from such a threat and in fact did use those means effectively. Moody v. Northland Royalty Co., 281 M 26, 930 P2d 1100, 54 St. Rep. 43 (1997).

Failure to Notify Employer of Conflict of Interest — Misconduct Question of Law, Not Fact: Hafner was fired for failure to inform the employer of Hafner's pending litigation against the employer's client while continuing to work on the client's account on behalf of the employer. Hafner was denied unemployment compensation benefits based on employee misconduct. Reversing prior precedent, the Supreme Court held that "misconduct" is a question of law reviewable by the court on appeal. Hafner's failure to inform the employer of the conflict of interest constituted willful disregard of the interests of the employer and of reasonable standards of behavior that the employer had the right to expect. The District Court's determination that Hafner's conduct amounted to misconduct was correct. Hafner v. Dept. of Labor and Industry, 280 M 95, 929 P2d 233, 53 St. Rep. 1315 (1996).

Payment of Severance Benefits — Not Proof That Employee's Actions Leading to Firing Were Unintentional: Stine, who was denied unemployment insurance benefits based on employee misconduct, argued that Western Federal's payment of posttermination severance benefits demonstrated that her conduct was unintentional and did not rise to the level of misconduct. The Supreme Court held that the payment of severance benefits was irrelevant to the issue of whether Stine's conduct was intentional. Stine v. W. Fed. Sav. Bank, 266 M 83, 879 P2d 53, 51 St. Rep. 746 (1994). Stine was reversed on the issue of whether "misconduct" is a question of fact or law in Hafner v. Dept. of Labor and Industry, 280 M 95, 929 P2d 233, 53 St. Rep. 1315 (1996).

Negligent Act — No Misconduct: Employee's inadvertent failure to replace oil in a customer's automobile was not a willful, wanton, deliberate disregard of the employer's interest and therefore did not constitute "misconduct" as statutorily defined. LaVe v. Dept. of Labor and Industry, 239 M 339, 780 P2d 189, 46 St. Rep. 1730 (1989). See also Stine v. W. Fed. Sav. Bank, 266 M 83, 879 P2d 53, 51 St. Rep. 746 (1994), clarifying deliberate or willful conduct. Stine was reversed on the issue of whether "misconduct" is a question of fact or law in Hafner v. Dept. of Labor and Industry, 280 M 95, 929 P2d 233, 53 St. Rep. 1315 (1996).

Writing Bad Checks as Sufficient Grounds for Denial of Unemployment Benefits: An employee who issued 11 bad checks to his employer over a 3-month period and allowed them to remain unpaid for up to 6 weeks clearly went beyond the conduct an employer may reasonably expect from an employee. The repeated criminal violations, which were directly adverse to the employer's interests, constituted misconduct as a matter of law, affected the employee's ability to perform his duties, and warranted denial of unemployment benefits. Ashland Oil, Inc. v. Dept. of Labor and Industry, 235 M 72, 765 P2d 727, 45 St. Rep. 2169 (1988).

Misconduct as Question of Fact — Right to Claim Not Waived by Delayed Termination: An employee claimed that: (1) by waiting 11 days after the decision to terminate was made, the employer should have been estopped from claiming misconduct; and (2) since waiver is a legal question, the District Court erred in not ruling on the issue. The Supreme Court found that an employer is not obligated to immediately terminate an employee once the decision has been made and that, in this case, the employer acted reasonably in waiting 11 days in order to find a replacement and to allow other employees to take vacations. Further, the District Court properly concluded that misconduct was a factual question properly left to the appeals referee and the Board of Labor Appeals (now the Unemployment Insurance Appeals Board). Connolly v. Bd. of Labor Appeals, 226 M 201, 734 P2d 1211, 44 St. Rep. 587 (1987). Connolly was reversed on the issue of whether "misconduct" is a question of fact or law in Hafner v. Dept. of Labor and Industry, 280 M 95, 929 P2d 233, 53 St. Rep. 1315 (1996).

Participation in Illegal Strike — "Misconduct": Participation in an unlawful strike constitutes misconduct within the meaning of this section as a matter of law. Therefore, members of the Professional Air Traffic Controllers' Organization (PATCO) who participated in a labor strike in August 1981 were not eligible for unemployment benefits. F.A.A. v. Mont. Dept. of Labor and Industry, 212 M 1, 685 P2d 365, 41 St. Rep. 1542 (1984).

Refusal to Train New Employee or Work Overtime: The court properly concluded that refusal to train a new employee and refusal to work overtime constituted simple misconduct under this statute. Gaunce v. Bd. of Labor Appeals, 164 M 445, 524 P2d 1108 (1974).

39-51-2304. Disqualification for failure to apply for or to accept suitable work.

Compiler's Comments

2009 Amendment: Chapter 25 deleted former (1)(a)(iii) that read: "return to customary self-employment, if any, when directed to do so by the department"; in (1)(b) at end of first sentence after "department" deleted "provided the individual has not left this work under disqualifying circumstances" and end of second sentence after "39-51-203" deleted "and 39-51-204"; and made minor changes in style. Amendment effective July 1, 2009.

2007 Amendment: Chapter 52 in (1)(a)(ii) near beginning after "offer" inserted "from a former employer or a new employer"; and made minor changes in style. Amendment effective October 1, 2007.

1999 Amendment: Chapter 61 in second sentence in (1) after "services" deleted "other than self-employment" and in middle substituted "subsequent to the week" for "subsequent to the date" and inserted third sentence requiring that services meet definition of employment provided in 39-51-203 and 39-51-204. Amendment effective July 1, 1999.

Saving Clause: Section 12, Ch. 61, L. 1999, was a saving clause.

Severability: Section 13, Ch. 61, L. 1999, was a severability clause.

1987 Amendments: Chapters 153 and 234 throughout section changed "he" and "his" to "the individual" and "individual's"; in (1), at beginning of first sentence, deleted "Effective April 1, 1977"; and made minor changes in phraseology.

Chapter 153 in middle of second sentence, after "in excess of", substituted remainder of section (see 1987 Session Law for text) for "his weekly benefit amount in 6 separate weeks subsequent to the date the act causing the disqualification occurred, with 6 weeks' reduction in benefit duration".

1985 Amendment: In (3) near beginning, inserted "including subsection (4)"; and in (4), at beginning inserted "Subject to subsection (3)" and deleted "During the first 13 weeks of unemployment, suitable work is work that meets the criteria in this section and that offers wages equal to the prevailing wage for that area in the individual's customary occupation", at end of first sentence, after "75% of the", substituted "individual's earnings in his previous insured work in his customary occupation" for "prevailing wage", and inserted last sentence providing that an employee does not have to accept lower than federal minimum wage to remain eligible.

1981 Amendment: Substituted "department" for "division" throughout the section.

Administrative Rules

ARM 24.11.458 Self-employment.

ARM 24.11.463 Lie detector tests — drug and alcohol testing.

ARM 24.11.471 Eligibility review program.

39-51-2305. Disqualification when unemployment because of strike.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1985 Amendment: In (1) at beginning deleted "Effective April 1, 1977"; in introductory clause of (1) and in (1)(a) changed "stoppage of work" to "strike"; and in (1)(b) changed "stoppage" to "strike" twice.

1981 Amendment: Substituted "department" for "division" throughout the section.

Administrative Rules

ARM 24.11.465A Disqualification when unemployment due to strike.

Case Notes

No Substantial Curtailment of Operations of Employer — Not Work Stoppage:

Stoppage of work refers to the employer's operation rather than to the individual employee's work. Employees may (prior to 1985 amendment) collect benefits so long as their activities do not substantially curtail the productive operations of the employer. In this case, the petitioner coal company stockpiled coal in anticipation of the strike and there was no backlog of orders and no accumulation of work to be done following the strike. The Supreme Court reinstated the Board of Labor Appeals' (now the Unemployment Insurance Appeals Board) holding that there had not been a work stoppage. Decker Coal Co. v. Employment Security Div., 205 M 1, 667 P2d 923, 40 St. Rep. 1056 (1983).

Montana has adopted the "American rule" which states that the phrase "stoppage of work" refers to the employer's operations rather than to the individual employee's work. This rule applies to a governmental employer. The city has failed to establish a substantial curtailment of its normal operations in delivering municipal government services. Therefore, there was no "stoppage of work" within the meaning of this section (as it read prior to 1985 amendment). Billings v. Bd. of Labor Appeals, 204 M 38, 663 P2d 1167, 40 St. Rep. 648 (1983).

Stoppage of work (see 1985 amendment note) refers to the employer's operations rather than the individual employee's work. The correct test is that there must be a substantial curtailment of operations in the employer's business to constitute a stoppage of work. Where a plant is engaged in the production of a final product, the first and major measure of stoppage of work must be whether such production is curtailed or stopped. Cont. Oil Co. v. Bd. of Labor Appeals, 178 M 143, 582 P2d 1236, 35 St. Rep. 1153 (1978).

Stoppage of Work — Not Synonymous With "Strike" or "Lockout": The phrase "stoppage of work" (see 1985 amendment note) was not intended by the Legislature to be a synonym for a strike or a lockout. There may be a labor dispute and yet no stoppage of work. Billings v. Bd. of Labor Appeals, 204 M 38, 663 P2d 1167, 40 St. Rep. 648 (1983).

Service on State Governmental Division — Substance Over Form: Retail clerks went on strike against petitioner in a labor dispute. The clerks claimed unemployment benefits. Benefits are denied during a strike if unemployment results from a "stoppage of work" existing because of a labor dispute (see 1985 amendment note). A deputy of the Employment Security Division (now the Unemployment Insurance Division) found claimants disqualified from benefits. Claiming strikers appealed to a referee who sustained the denial of benefits. Claimants then appealed to the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) which reversed the referee. Petitioner filed petitions for review with the District Court, naming as respondent the Board. Following a motion to dismiss the petition, the appellants and counsel for the Employment Security Division entered an agreement to substitute the Division and the court ordered the substitution. The clerks were not made parties, and at the time service was made on the Board, appellants did not provide sufficient copies. The clerks' union moved to intervene and the motion was granted. The District Court granted summary judgment to respondents, concluding that failure to name all parties and failure to provide a sufficient number of copies of the petition for service were fatal jurisdictional flaws. Since the Board and the Division are housed within the same department of state government and were represented by the same counsel, granting summary judgment on purely technical grounds would be an unconscionable elevation of form over substance. F.W. Woolworth Co., Inc. v. Employment Sec. Div., 192 M 289, 627 P2d 851, 38 St. Rep. 694 (1981).

Lockout Unemployment Not Fault of Employees: The disqualification provisions (as they read prior to 1985 amendment) were not intended by the Legislature to apply to a fact situation wherein there was no voluntary action on the part of the employees precipitating the employer's lockout. The employees involved in the labor dispute were unemployed through no fault of their own. Application of the disqualification statute did not interfere with federal labor policy. Mont. Ready Mixed Concrete Ass'n v. Bd. of Labor Appeals, 175 M 143, 572 P2d 915 (1977).

Temporary Employment During Strike:

A member of a striking union was not entitled to unemployment compensation where he quit temporary employment taken during strike. Sprague v. MacPherson, 142 M 581, 386 P2d 572 (1963).

Union members on strike against mining company, by whom they were regularly employed, who took other stop-gap employment during the labor dispute with intention of returning to work for the mining company when the dispute was settled, were improperly awarded unemployment compensation by the District Court based on termination of temporary employment before settlement of the dispute, after which the members returned to work for the mining company. Scott v. Smith, 141 M 230, 376 P2d 733 (1962).

Labor Dispute: Under this section, an applicant for compensation is ordinarily ineligible for benefits if his unemployment is due to a labor dispute in which he participates or is interested, unless the commission finds that the dispute was caused by the employer's failure or refusal to conform to the provisions of any law, federal or state, pertaining to collective bargaining, hours of work, wages, or other conditions of work. Jordan v. Craighead, 114 M 337, 136 P2d 526 (1943).

39-51-2306. Disqualification because of receipt of certain other wages, compensation, or benefits.

Compiler's Comments

2009 Amendment: Chapter 25 in (1) in introductory clause after "payment" inserted "for the week or part of the week". Amendment effective July 1, 2009.

2007 Amendment: Chapter 52 in (1) at beginning of introductory clause deleted "Effective April 1, 1977"; in (1)(a) at end of first sentence after "States" deleted "or under the social security disability law"; in (1)(b) near beginning of first sentence after "Act" inserted "45 U.S.C. 351, et seq."; and made minor changes in style. Amendment effective October 1, 2007.

1989 Amendment: Deleted (1)(a) that provided disqualification for payment in form of wages in lieu of notice or separation or termination allowance. Amendment effective July 1, 1989.

1981 Amendment: Substituted "department" for "division" in (2).

Railroad Unemployment Insurance Act: This federal Act, referred to in this section, is codified at Title 45, U.S.C., Ch. 11.

Attorney General's Opinions

Unemployment Compensation Benefits and Award of Backpay: The Human Rights Division is not required to disclose to the Employment Security Division (now the Unemployment Insurance Division) the award of backpay to a party who has filed a complaint with the Human Rights Division. 37 A.G. Op. 56 (1977).

39-51-2307. School attendance.

Compiler's Comments

2009 Amendment: Chapter 88 in (1) substituted "An individual who is a student attending an established educational institution may qualify for benefits provided that the individual can demonstrate to the department's satisfaction that the individual meets the requirements of 39-51-2104" for "Except as provided in subsection (2) or (3), an individual is disqualified for benefits during the school year (within the autumn, winter, and spring seasons of the year) or the vacation periods within the school year or during any prescribed school term if the individual is a student regularly attending an established educational institution". Amendment effective July 1, 2009.

1995 Amendment: Chapter 195 at end of (3) substituted reference to 39-51-2104(1)(b) for reference to 39-51-2104(2). Amendment effective March 23, 1995.

Applicability: Section 19, Ch. 195, L. 1995, provided: "[This act] applies to hearings or appeals requested on or after [the effective date of sections 2 through 10 and 12 through 19]." Sections effective March 23, 1995.

1993 Amendment: Chapter 404 at beginning of (1) substituted exception clause for "Effective April 1, 1977"; inserted (2) providing that a person attending an adult basic education class 20 or fewer hours a week while laid off is not disqualified from benefits if willing to return to work when notified; at beginning of (3) deleted "Notwithstanding any other provisions in this section"; and made minor changes in style. Amendment effective July 1, 1993.

1985 Amendment: At end of (2) substituted "(2)" for "(3)" after "39-51-2104".

1981 Amendment: Substituted "department" for "division" throughout (2).

Administrative Rules

ARM 24.11.457 Leaving work with or without good cause attributable to employment.

Part 24
Claims for Benefits

Part Case Notes

Adequate Findings Required for Review: Greenwood was hired as a truck driver by plaintiff. During the 14 months of his employment, six incidents of alleged misconduct occurred. Plaintiff discharged Greenwood on the basis of those incidents. Greenwood applied for unemployment benefits. Plaintiff challenged, contending Greenwood was ineligible because he was discharged for misconduct. Greenwood was awarded benefits, and plaintiff appealed to the appeals section of the Employment Security Division (now the Unemployment Insurance Division). After the hearing, Greenwood was found ineligible. Greenwood appealed to the Board of Labor Appeals (now the Unemployment Insurance Appeals Board). The Board found for Greenwood. Plaintiff then filed for judicial review with the District Court. The District Court reversed the decision of the Board, and Greenwood appealed. Greenwood contended the District Court erred by making findings different from those of the Board, without first determining whether there was substantial evidence to support the Board's findings. The Supreme Court found that the District Court had violated the standard of review by entering findings without determining whether the Board's findings were supported by substantial evidence. The Supreme Court also found that the Board's findings were inadequate for the District Court to review. The case was remanded to the District Court with directions to remand to the Board for entry of complete findings. Dick Irvin, Inc. v. Dept. of Labor, 207 M 336, 673 P2d 1271, 40 St. Rep. 2086 (1983).

Montana Administrative Procedure Act Not Applicable to Unemployment Insurance Claims: The unemployment compensation insurance law contains a complete procedure for hearing and determining undisputed claims for unemployment insurance. The Board of Labor Appeals (now the Unemployment Insurance Appeals Board), as a quasi-judicial board, may consider not only the record made before the appeals referee but also new evidence produced at the Board hearing. The provisions of MAPA are unworkable when an attempt is made to apply them to determine claims for unemployment insurance benefits. It is an incorrect interpretation of statutory law to hold that the Board has no power to overturn the findings of fact of the appeals referee. In reviewing the Board's decision, the District Court is limited by the provisions of 39-51-2410. Decker Coal Co. v. Employment Security Div., 205 M 1, 667 P2d 923, 40 St. Rep. 1056 (1983).

Failure to Exhaust Administrative Remedies: Plaintiff was precluded from bringing a legal action in District Court when he failed to utilize the rehearing and appeal processes provided in this part. Barnicoat v. Comm'r of Dept. of Labor and Industry, 201 M 221, 653 P2d 498, 39 St. Rep. 2070 (1982).

39-51-2401. Claims to be made in accordance with rules — notice of coverage.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 25 in second sentence after "statements of" substituted "the notice of coverage that is prepared and distributed by the department" for "such regulations", at end after "service" deleted "and shall make available to each such individual at the time he becomes unemployed a printed statement of such regulations", and at beginning of third sentence substituted "The notice of coverage must" for "Such printed statements shall"; and made minor changes in style. Amendment effective July 1, 2009.

Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Substituted "department" for "division" throughout the section.

Administrative Rules

Title 24, chapter 11, subchapter 4, ARM Claims for benefits.

39-51-2402. Determination — redetermination.

Compiler's Comments

2015 Amendment: Chapter 132 in (3) substituted current first sentence for former first sentence that read: "A determination or redetermination is final unless an interested party entitled to notice of the decision applies for reconsideration of the determination or appeals the decision within 10 days after the notification was mailed to the interested party's last-known address." Amendment effective July 1, 2015.

2009 Amendment: Chapter 88 throughout section in seven places substituted reference to department for reference to deputy; in (1) at beginning of first sentence substituted "The department" for "A representative designated by the department and referred to as a deputy" and in fourth sentence in two places substituted reference to determination for reference to decision; in (2) after "reconsider" substituted "its determination" for "the decision", after "parties of the" substituted "redetermination" for "amended decision", and at end substituted "redetermination" for "decision"; in (4) after "redetermination of" substituted "any issue of an original determination" for "a claim for benefits" and near end substituted "original" for "initial"; in (5) near beginning after "redetermination" inserted "of any issue of an original determination" and substituted "original determination of that issue if the original determination" for "initial determination of a claim if the initial determination"; and made minor changes in style. Amendment effective March 25, 2009.

2005 Amendments — Composite Section: Chapter 67 in (1) deleted former fourth sentence that read: "With respect to a determination, redetermination, or appeal by a claimant involving wages, the issue must be resolved in accordance with procedures for unemployment insurance benefit claimant appeals, as prescribed in 15-2-302 and 15-30-257 during the time that the department delegated the duties associated with the administration of unemployment insurance contributions to the department of revenue pursuant to 39-51-301"; and made minor changes in style. Amendment effective March 24, 2005.

Chapter 466 in (1) near beginning of first sentence after "claim" inserted "for benefits" and deleted former fourth sentence that read: "With respect to a determination, redetermination, or appeal by a claimant involving wages, the issue must be resolved in accordance with procedures for unemployment insurance benefit claimant appeals, as prescribed in 15-2-302 and 15-30-257 during the time that the department delegated the duties associated with the administration of unemployment insurance contributions to the department of revenue pursuant to 39-51-301"; deleted former (3) that read: "(3) A determination or redetermination of an initial or additional claim may not be made under this section unless 5 days' notice of the time and place of the claimant's interview for examination of the claim is mailed to each interested party"; and made minor changes in style. Amendment effective April 28, 2005.

Saving Clause: Section 11, Ch. 67, L. 2005, was a saving clause.

Retroactive Applicability: Section 13, Ch. 67, L. 2005, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to wages paid after December 31, 2004."

Contingent Effective Date: Section 16(2), Ch. 597, L. 2003, provided: "(2) [Sections 8 through 10] [39-51-1109, version effective on occurrence of contingency, 39-51-1301, and 39-51-2402] are effective on the date that the commissioner of labor and industry certifies to the governor that the delegation of duties in 39-51-301 is terminated." On June 28, 2004, the Commissioner of Labor and Industry certified to the Governor that the delegation of duties under 39-51-301 terminates at 11:59 p.m. on June 30, 2004.

2003 Amendment: Chapter 597 in (1) at end of fourth sentence inserted "during the time that the department delegated the duties associated with the administration of unemployment insurance contributions to the department of revenue pursuant to 39-51-301". Amendment effective on occurrence of contingency.

Severability: Section 14, Ch. 597, L. 2003, was a severability clause.

Saving Clause: Section 15, Ch. 597, L. 2003, was a saving clause.

1997 Amendment: Chapter 491 in (1) inserted fourth sentence concerning procedure for making determination, redetermination, or appeal; and made minor changes in style. Amendment effective January 1, 1998.

Preamble: The preamble attached to Ch. 491, L. 1997, provided: "WHEREAS, House Bill No. 98 (Ch. 48, L. 1995), enacted by the 54th Legislature, excluded direct sellers from minimum wage, overtime, unemployment insurance, and workers' compensation requirements; and

WHEREAS, the Legislature in House Bill No. 98 adopted the federal definition of direct seller to apply to relevant Montana statutes; and

WHEREAS, ARM 24.11.831 narrowed the scope of the federal definition of direct seller; and

WHEREAS, an original purpose of this House Bill No. 561 was to codify the narrower definition of direct seller; and

WHEREAS, this House Bill No. 561 is the appropriate place to repeal Rule 24.11.831, Administrative Rules of Montana."

Severability: Section 36, Ch. 491, L. 1997, was a severability clause.

Saving Clause: Section 37, Ch. 491, L. 1997, was a saving clause.

1989 Amendment: Inserted (5) providing that no redetermination may be made after 2 years from initial determination, except as provided in subsection (6); inserted (6) allowing redetermination within 3 years if initial determination was based on false claim, misrepresentation, or failure to disclose material fact; and made minor change in phraseology. Amendment effective July 1, 1989.

1987 Amendments: Chapters 153 and 234 in (1), near beginning after "found by", substituted "the deputy" for "him"; in (4), near middle, substituted "10 days" for "5 days after delivery of such notification or within 7 days"; and made minor changes in phraseology.

Chapter 153 in (1), near middle of first sentence after "maximum", substituted "benefit amount" for "duration thereof".

Chapter 234 in (4), before "last-known address", substituted "the interested party's" for "his".

1981 Amendment: Substituted "department" for "division" in (1).

Case Notes

Reasonable Good Cause for Reconsideration Extension — Pro Se Party: A pro se party was notified that the period for giving notice for reconsideration could be extended for 10 days for "good cause" but was not given a definition of "good cause". The determination by the hearings officer that the party established a good cause was reasonable, so the reconsideration appeal was not untimely. Johnson v. W. Transp., LLC, 2011 MT 13, 359 Mont. 145, 247 P.3d 1094.

Due Process: There is no violation of due process in making an administrative determination without a hearing if a hearing may be had on application to an administrative tribunal for reconsideration or review. Cont. Oil Co. v. Bd. of Labor Appeals, 178 M 143, 582 P2d 1236, 35 St. Rep. 1153 (1978).

Sufficiency of Notice: The notification procedure of the Employment Security Division (now the Unemployment Insurance Division), whereby the Division notifies an employer that its employee has filed a claim for benefits and gives the employer an opportunity to request and attend a predetermination hearing, satisfies the statutory notice requirements. Cont. Oil Co. v. Bd. of Labor Appeals, 178 M 143, 582 P2d 1236, 35 St. Rep. 1153 (1978).

39-51-2403. Hearing — decision of appeals referee.

Compiler's Comments

2015 Amendment: Chapter 132 in fourth sentence near end substituted "10 days after the decision was sent to the interested party's address of record" for "10 days after notification was mailed to the interested party's last-known address". Amendment effective July 1, 2015.

2009 Amendment: Chapter 88 in second sentence after "reverse the" substituted "department's" for "deputy's". Amendment effective March 25, 2009.

1995 Amendment: Chapter 195 inserted first sentence requiring hearing upon appeal of determination and redetermination and authorizing conduct of hearing by telephone or videoconference; and made minor changes in style. Amendment effective March 23, 1995.

Applicability: Section 19, Ch. 195, L. 1995, provided: "[This act] applies to hearings or appeals requested on or after [the effective date of sections 2 through 10 and 12 through 19]." Sections effective March 23, 1995.

1987 Amendment: In third sentence, after "within", substituted "10 days" for "5 days after delivery of such notification or within 7 days" and after "mailed to" substituted "the interested party's" for "his".

Case Notes

Attorney Entitled to Absolute Quasi-Judicial Immunity for Actions in Contested Case Proceedings: The doctrine of immunity evolved to protect not only judges but also certain participants in the judicial process whose functions are closely associated with those of judicial officers. The immunity that those participants receive is quasi-judicial immunity, which is not a mere defense to liability but an absolute immunity from suit. Like judicial immunity, quasi-judicial immunity benefits the public by ensuring that quasi-judicial officers exercise their functions unfettered by fear of legal consequences, as long as the functions are within the scope of the officers' jurisdiction and authorized by law. A state attorney who discharged his duty under professional rules of conduct when notifying a contested case hearings examiner that a certified public accountant who was representing a client was practicing law without a license was protected by quasi-judicial immunity and was not subject to suit. Steele v. McGregor, 1998 MT 85, 288 M 238, 956 P2d 1364, 55 St. Rep. 349 (1998).

Hearings Examiner Entitled to Judicial Immunity: The state Department of Labor and Industry's hearings examiners perform adjudicatory functions comparable to those performed by judges under similar safeguards. As a result, those hearings examiners are entitled to absolute judicial immunity when acting in their adjudicatory capacities. This immunity results from the independence that judges need to make decisions in matters involving such things as monetary and liberty interests, without fear of reprisal from dissatisfied litigants. Absolute immunity is immunity from suit, rather than a mere defense to liability. Judicial immunity is dependent on the challenged conduct being an official act within the judge's broad statutory jurisdiction but does not depend on acting correctly. A person acting in a judicial capacity will not be deprived of immunity simply because that person acted maliciously, mistakenly, or in excess of authority. Steele v. McGregor, 1998 MT 85, 288 M 238, 956 P2d 1364, 55 St. Rep. 349 (1998).

39-51-2404. Appeal to board procedure.

Compiler's Comments

2017 Amendment: Chapter 10 near end after "interested party" substituted "initiates judicial review pursuant to 39-51-2410" for "requests a rehearing or initiates judicial review by filing a petition in district court within 30 days of the date of sending the board's decision to the party's address of record"; and made minor changes in style. Amendment effective October 1, 2017.

2015 Amendment: Chapter 132 in fourth sentence near end substituted "date of sending the board's decision to the party's address of record" for "date of mailing of the board's decision to the party's last-known address". Amendment effective July 1, 2015.

1995 Amendment: Chapter 195 inserted second sentence authorizing appeal hearing by telephone or videoconference; in third sentence, after "decision", inserted "are mailed"; and made minor changes in style. Amendment effective March 23, 1995.

Applicability: Section 19, Ch. 195, L. 1995, provided: "[This act] applies to hearings or appeals requested on or after [the effective date of sections 2 through 10 and 12 through 19]." Sections effective March 23, 1995.

1981 Amendment: Substituted "department" for "division" throughout the section.

Case Notes

De Novo Board Hearing Discretionary, Not Required, Under Rule: Neither ARM 24.7.314(2) (now repealed), providing that the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) may "affirm, modify, or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence", nor this court's former opinion that the Board "may consider not only the record made before the appeals referee, but new evidence produced at the board hearing" requires the Board to allow the presentation of new evidence, much less requires the Board to conduct a de novo evidentiary hearing. The Board is required to review the entire record. Bean v. Bd. of Labor Appeals, 270 M 253, 891 P2d 516, 52 St. Rep. 169 (1995).

Failure to Follow Procedure for Review of Administrative Ruling — Dismissal Proper: The Board of Labor Appeals (now the Unemployment Insurance Appeals Board) upheld a decision regarding assessments made by the Unemployment Insurance Division relating to classification of three corporation workers as employees. About the same time, the employer requested a contested case hearing before the Division of Workers' Compensation. Following an adverse decision by the Division of Workers' Compensation, the employer filed a complaint in District Court alleging bad faith and seeking damages. The proper procedure was to file a petition in District Court seeking review of the Board's decision. Dismissal of the complaint, based on failure to follow the proper procedure for judicial review, was proper. Cottonwood Hills, Inc. v. St., 238 M 404, 777 P2d 1301, 46 St. Rep. 1371 (1989).

Board of Labor Appeals — Scope of Authority: The Board of Labor Appeals (now the Unemployment Insurance Appeals Board) is a quasi-judicial board and as such may consider not only the record made before the appeals referee but also new evidence produced at the Board hearing. Billings v. Bd. of Labor Appeals, 204 M 38, 663 P2d 1167, 40 St. Rep. 648 (1983).

39-51-2405. Prompt payment of claims.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 25 in (1) at beginning of introductory clause deleted "Notwithstanding any provision in 39-51-2402 or 39-51-2404" and at end after "accordance with" inserted "the most recently issued"; in (1)(b) after "referee" substituted "under 39-51-2303" for "the board, or a reviewing court under 39-51-2404"; inserted (1)(c) regarding payment pursuant to a board decision; inserted (1)(d) regarding payment pursuant to the decision of a reviewing court; deleted remainder of former (1) that read: "upon the issuance of such determination, redetermination, or decision regardless of the pendency of the period to apply for reconsideration, file an appeal, or petition for judicial review that is provided with respect thereto in 39-51-2404, as the case may be, or the pendency of any such application, filing, or petition, unless and until such determination, redetermination, or decision has been modified or reversed by a subsequent redetermination or decision, in which event benefits shall be paid or denied for weeks of unemployment thereafter in accordance with such modifying or reversing redetermination or decision"; deleted former (2) that read: "If a deputy's determination or redetermination allowing benefits is affirmed in any amount by an appeals referee or by the board or if a decision of an appeals referee allowing benefits is affirmed in any amount by the board, such benefits shall be paid promptly regardless of any further appeal or the disposition of such appeal and no injunction, supersedeas, stay, or other writ or process suspending the payment of such benefits shall be issued by the board or any court. Benefits shall not be paid for any weeks of unemployment involved in such modification or reversal that begins after such final decision"; inserted (2) providing that the filing of a request for redetermination or judicial review or an appeal may not delay or postpone the payment of benefits; inserted (3) regarding prompt payment of benefits; and made minor changes in style. Amendment effective July 1, 2009.

Chapter 88 in (2) at beginning substituted "the department's" for "a deputy's"; and made minor changes in style. Amendment effective March 25, 2009. The amendment by Ch. 25 rendered the amendment by Ch. 88 void.

39-51-2406. Continuing jurisdiction of department over claims.

Compiler's Comments

1981 Amendment: Substituted "department" for "division".

Case Notes

Agency's Unemployment Compensation Decision — Not Res Judicata in Separate Wrongful Discharge Suit: The Board of Labor Appeals (now the Unemployment Insurance Appeals Board) ruled that the plaintiff left his employment voluntarily and was not entitled to unemployment compensation. In a separate suit for wrongful discharge, the employer argued that the agency's decision was res judicata as to the issue of whether the plaintiff had been wrongfully discharged or had quit. The Supreme Court held that the agency's decision was not res judicata in the wrongful discharge suit in that the full panoply of issues that arises in a wrongful discharge suit is not within the realm of the agency's consideration in determining eligibility for unemployment benefits. Niles v. Weissman & Sons, Inc., 241 M 230, 786 P2d 662, 47 St. Rep. 240 (1990), following Fetherston v. ASARCO, Inc., 635 F. Supp. 1443 (D.C. Mont. 1986), and distinguishing Nasi v. Dept. of Highways, 231 M 395, 753 P2d 327 (1988).

District Court Required to Adhere to Board's Findings: The District Court must treat the findings of the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) as conclusive if the findings are supported by the evidence and there is no fraud. Here, the District Court affirmed the decision of the Board but in so doing entered findings of fact different from those adopted by the Board. Although this was improper, the Supreme Court did not reverse because the eventual result of the case would be the same. Kirby Co. of Bozeman, Inc. v. Employment Sec. Div., 189 M 1, 614 P2d 1040, 37 St. Rep. 1255 (1980).

39-51-2407. Procedure for disputed claims to be prescribed by regulation — conduct of hearing or appeal.

Compiler's Comments

1995 Amendment: Chapter 195 inserted (2) authorizing hearing or appeal by telephone or videoconference; and made minor changes in style. Amendment effective March 23, 1995.

Applicability: Section 19, Ch. 195, L. 1995, provided: "[This act] applies to hearings or appeals requested on or after [the effective date of sections 2 through 10 and 12 through 19]." Sections effective March 23, 1995.

1981 Amendment: Substituted "department" for "division".

Administrative Rules

Title 24, chapter 11, subchapter 3, ARM Procedural appeals rules.

39-51-2408. Disputed claim — records of all proceedings to be kept.

Compiler's Comments

2009 Amendment: Chapter 25 at end of second sentence after "unless" substituted "required by a district court or appellate court for judicial review" for "the disputed claim is further appealed"; and made minor changes in style. Amendment effective July 1, 2009.

39-51-2409. Witness fees.

Compiler's Comments

1981 Amendment: Substituted "department" for "division".

Administrative Rules

ARM 24.11.336 Witness fees.

39-51-2410. Finality of board's decision — judicial review.

Compiler's Comments

2017 Amendment: Chapter 10 in (1)(a) after "appeal" inserted "filed within 30 days"; in (2) at beginning of second sentence substituted "As part of the action, the aggrieved party seeking judicial review shall file" for "In such an action", at beginning of third sentence inserted "The petition", and at end inserted "within 30 days of filing the petition"; in (4) after "review" inserted "under this section"; in (5) in second sentence after "certified" inserted "as described in subsection (3)"; in (6) at beginning substituted "The district court's decision may be appealed" for "An appeal may be taken from the decision of the district court"; and made minor changes in style. Amendment effective October 1, 2017.

2015 Amendment: Chapter 132 in (1) near middle substituted "the decision was sent to the parties at their respective addresses of record" for "the date of notification or mailing thereof"; in (2) substituted "30 days after the decision of the board was sent to the parties at their respective addresses of record" for "30 days after the date of notification or mailing of the decision of the board"; in (5) in second sentence after "cases" deleted "except cases arising under the workers' compensation law of this state"; and made minor changes in style. Amendment effective July 1, 2015.

1987 Amendment: In (1), after "mailing thereof", deleted "except in the case of the department when such decision becomes final 20 days following the board's decision"; at beginning of (3) deleted "With its answer" and before "of all testimony" substituted "record" for "transcript"; and made minor changes in phraseology.

1985 Amendment: At end of (2) after "commissioner of labor and industry", substituted "and all other interested parties in the manner provided in the Montana Rules of Civil Procedure" for "or his designee and such service shall be deemed completed service on all parties, but there shall be left with the party so served as many copies of the petition as there are defendants and the department shall forthwith mail one such copy to each such defendant".

1981 Amendment: Substituted "department" for "division" throughout the section; substituted "commissioner of labor and industry or his designee" for "administrator of the division or the administrator's designee" in the second sentence of (2).

Case Notes

Good Cause Attributable to Employer Not Demonstrated: The plaintiff was employed by the defendant electric cooperative as a master electrician and complained to management that unqualified employees were performing work that only electricians could perform. Management took certain actions to remedy the plaintiff's concerns. The plaintiff eventually applied for an apprentice lineman position, which paid approximately 40% less than his wage as a master electrician, but no applicants were hired for the position. The plaintiff resigned from his position and filed for unemployment benefits. The Board of Labor Appeals (now the Unemployment Insurance Appeals Board) concluded that substantial evidence supported that the plaintiff did not show he left work for good cause attributable to his employment. The District Court affirmed the Board's decision. On appeal, the Supreme Court concluded that the District Court did not err when it affirmed the Board's conclusion because the Board's findings were supported by substantial evidence, including that the plaintiff's reasons for resigning were not compelling in light of the defendant's responsive actions and because his electrician's license was never at risk. Cruson v. Missoula Elec. Co-op, Inc., 2015 MT 309, 381 Mont. 304, 359 P.3d 98.

Refusal to Comply with Reasonable School District Policy — Misconduct Making Terminated Employee Ineligible to Receive Unemployment Benefits: A high school teacher was fired after she refused to deposit activity funds into an account maintained by the school district, in violation of its policy. She filed for unemployment benefits, but the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) concluded that she was fired for misconduct and therefore was ineligible to receive benefits. The plaintiff then appealed to the District Court, which agreed with the Board that her refusal to comply with a reasonable school board policy constituted misconduct. The plaintiff finally appealed to the Supreme Court, which also affirmed the District Court's ruling, holding that there was substantial evidence in the record that the plaintiff's actions constituted misconduct that precluded her from receiving unemployment benefits. Roberts v. Bd. of Labor Appeals, 2013 MT 328, 372 Mont. 374, 313 P.3d 110.

Petition for Judicial Review of Denial of Unemployment Benefits — Supporting Brief Not Required to Be Filed with Petition: The appellant filed a petition for judicial review of an adverse unemployment benefits determination by the Board of Labor Appeals (now the Unemployment Insurance Appeals Board). The District Court denied the petition because she failed to file a supporting brief or to state issues of law for review in violation of Rule 2 of the Montana Uniform District Court Rules. The Supreme Court reversed and remanded for a full review of the administrative record, holding that the specific judicial review process outlined in 39-51-2410 requires only that the aggrieved party file a petition, rather than a motion and supporting brief as required under Rule 2. Additionally, the Supreme Court found that the appellant was not required to provide discussion or legal authority in support of her request for judicial review of the Board's decision; instead, the court found that the appellant's statement that her claim was not processed accurately, honestly, fairly, or ethically, resulting in a gross miscarriage of justice, was a sufficient statement of the grounds on which she sought review. Jacky v. Avitus Group, 2013 MT 296, 372 Mont. 134, 311 P.3d 423.

Acceptance of Valuable Gift in Probationer's Will Considered Negligent — Termination of Probation Officer Justified — Denial of Unemployment Benefits Proper: Probation officer Morrow accepted an envelope from a probationer that was marked to be opened in the event of the probationer's death. When the probationer died, Morrow opened the envelope and found the probationer's will, which designated Morrow as the personal representative of the probationer's estate and devised real and personal property to Morrow. Morrow accepted the position of personal representative and began probating the will. Morrow mentioned the situation to his supervisor in passing, but did not discuss ethics or inheritances, minimizing the significance of the event. The Department of Corrections became concerned about ethical violations after the situation was brought to the Department's attention by a citizen complainant, and Morrow was subsequently terminated for failing to follow performance and conduct guidelines regarding supervision of the probationer and Morrow's status as devisee of the estate. Morrow applied for unemployment benefits, but the benefits were denied because of the discharge for misconduct. Morrow appealed, but the referee upheld the denial of benefits, so Morrow appealed to the Board of Labor Appeals (now the Unemployment Insurance Appeals Board). The Board found that Morrow was negligent in not opening the envelope immediately but that the act did not amount to willful or wanton disregard for the Department's interests, so the benefits were reinstated. The Department appealed to the District Court, which reviewed the record and reversed the Board's decision and reinstated the denial of benefits. Morrow appealed to the Supreme Court. The court held that Morrow's failure to open the envelope referencing the event of the probationer's death was a negligent act that substantially disregarded the Department's interest in properly supervising the probationer and that at the very least, Morrow should have closely scrutinized the gift and sought guidance from the supervisor, in accordance with the agency's policy manual, rather than downplaying the significance of Morrow's inclusion in the will. Morrow's termination for accepting a gift of significant value was justified, and denial of unemployment benefits was affirmed. Dept. of Corrections v. St., 2006 MT 298, 334 M 425, 148 P3d 619 (2006).

Employee Misconduct — Unemployment Benefits Properly Withheld: Wiman, a dispatcher at the Fallon County jail, allowed an unauthorized person to enter a convicted felon's cell to give the prisoner a haircut. Wiman's deliberate action violated county security policy, and Wiman was suspended without pay for 60 days, during which time Wiman sought unemployment benefits, but the benefits were denied. The District Court affirmed the denial of benefits. Under 39-51-2303, an employee is disqualified for unemployment benefits after being discharged for work-related misconduct. The denial of benefits was supported by evidence, as required by this section, and on appeal, the Supreme Court also affirmed. Wiman v. Dept. of Labor and Industry, 2004 MT 208, 322 M 332, 96 P3d 710 (2004).

Irrelevant Evidence Unrelated to Employee's Ineligibility for Unemployment Benefits Based on Misconduct Properly Denied: Wiman, a dispatcher at the Fallon County jail, allowed an unauthorized person to enter a convicted felon's cell to give the prisoner a haircut. Wiman's deliberate action violated county security policy, and Wiman was suspended without pay for 60 days, during which time Wiman sought unemployment benefits, but the benefits were denied. Wiman contended that the hearings officer improperly denied her the right to introduce evidence that went to the heart of the misconduct issue, such as evidence regarding the inmate's mental state, whether Wiman or another employee had previously provided items to inmates, and whether Wiman's breach of security policy was adequately investigated. However, the question before the hearings officer was the denial of unemployment benefits during the time that Wiman was suspended for allowing an unauthorized person into the cell—conduct which Wiman admitted—so the evidence related to Wiman's misconduct issue was irrelevant and inadmissible. Wiman v. Mont. Dept. of Labor and Industry, 2004 MT 208, 322 M 332, 96 P3d 710 (2004).

No Basis for Charge of Misconduct by Police Officer — Error in Dismissal of Action for Unemployment Benefits: Police officer McKay was charged in District Court with official misconduct for his involvement in an altercation and was suspended from his job, but the charge was dismissed without prejudice for failure to show probable cause. McKay was subsequently charged in City Court with assault, convicted, and terminated from employment. McKay then filed an unemployment insurance claim. The appeals referee determined that McKay was ineligible for benefits under 39-51-2303 because of misconduct. The Board of Labor Appeals (now the Unemployment Insurance Appeals Board) affirmed the referee's decision, and McKay appealed to District Court. The District Court took judicial notice of McKay's acquittal on the misconduct charges, but concluded that the acquittal was immaterial. The Supreme Court disagreed. Absent the City Court conviction, no facts existed upon which to base a legal conclusion that McKay engaged in misconduct that would preclude unemployment benefits. Thus, the District Court committed reversible error in affirming the Board's conclusion that McKay was discharged for misconduct. McKay v. Bd. of Labor Appeals, 1999 MT 329, 297 M 357, 990 P2d 1251, 56 St. Rep. 1313 (1999), distinguishing Smith v. Roosevelt County, 242 M 27, 788 P2d 895, 47 St. Rep. 506 (1990).

Scope of Judicial Review: Under that portion of statute relating to court review, findings of fact by commission, if supported by substantial evidence, are conclusive and confine scope of judicial review to questions of law. Am. Agrijusters Co. v. Dept. of Labor and Industry, 1999 MT 241, 296 M 176, 988 P2d 782, 56 St. Rep. 948 (1999); Brothers v. Cargill, Inc., 276 M 105, 915 P2d 226, 53 St. Rep. 299 (1996); Connolly v. Bd. of Labor Appeals, 226 M 201, 734 P2d 1211, 44 St. Rep. 587 (1987); Gaunce v. Bd. of Labor Appeals, 164 M 445, 524 P2d 1108 (1974); Noone v. Reeder, 151 M 248, 441 P2d 309 (1968), followed in Phoenix Physical Therapy v. Unemployment Ins. Div., 284 M 95, 943 P2d 523, 54 St. Rep. 791 (1997), and Johnson v. W. Transp., LLC, 2011 MT 13, 359 Mont. 145, 247 P.3d 1094.

Admission of Inadmissible Hearsay — Denial of Due Process Right: Allowing an employer to submit hearsay statements of witnesses with personal knowledge of alleged work misconduct without requiring that the witnesses testify in person at the eligibility hearing denied claimant of the right to confront and cross-examine the witnesses and was a violation of the constitutional right to due process, warranting reversal and remand. Bean v. Bd. of Labor Appeals, 1998 MT 222, 290 M 496, 965 P2d 256, 55 St. Rep. 927 (1998), distinguishing Richardson v. Perales, 402 US 389 (1971). See also In re Marriage of Bonamarte, 263 M 170, 866 P2d 1132 (1994).

Required Evidentiary Findings — Burden of Proof: As appellate tribunal, the Supreme Court reviews decisions of the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for errors of law. The Board's decision will be upheld if substantial evidence supports it. Whether substantial evidence supports the decision is a question of law. In determining whether substantial evidence exists, only admissible evidence may be considered and testimony that is inadmissible hearsay may not be considered in determining if substantial evidence exists to support an agency's findings. An employer who challenges the eligibility of an unemployment compensation benefits claimant on grounds that the claimant was discharged for employee misconduct bears the burden of proving that the employee was in fact discharged for misconduct. Bean v. Bd. of Labor Appeals, 1998 MT 222, 290 M 496, 965 P2d 256, 55 St. Rep. 927 (1998), following Parker v. St. Maries Plywood, 614 P2d 955 (Idaho 1980).

Failure to Notify Employer of Conflict of Interest — Misconduct Question of Law, Not Fact: Hafner was fired for failure to inform the employer of Hafner's pending litigation against the employer's client while continuing to work on the client's account on behalf of the employer. Hafner was denied unemployment compensation benefits based on employee misconduct. Reversing prior precedent, the Supreme Court held that "misconduct" is a question of law reviewable by the court on appeal. Hafner's failure to inform the employer of the conflict of interest constituted willful disregard of the interests of the employer and of reasonable standards of behavior that the employer had the right to expect. The District Court's determination that Hafner's conduct amounted to misconduct was correct. Hafner v. Dept. of Labor and Industry, 280 M 95, 929 P2d 233, 53 St. Rep. 1315 (1996).

"Regular" and "Comparable Suitable" Work Construed: Absent statutory definitions, "regular" work means normal, typical, or natural work and "comparable suitable" work means equivalent or similar work with matching duties. Even though he was originally hired as a millman, for the 9 months prior to his back surgery, Brothers was not performing the work that he had originally been assigned because of a prior back injury, but rather was doing a light duty job created especially for him by his employer to allow his continued employment. Even though the job description was modified, Brothers' continued employment in that capacity constituted his regular work. Thus, it was error for the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) and the District Court to deny Brothers unemployment benefits under the rationale that the work was not his regular work. To conclude otherwise would allow an employer to defeat an employee's claim for unemployment benefits by the simple expedient of directing the employee to perform duties different from those in his job description and then claiming that the employee was not engaged in his regular work. Brothers v. Cargill, Inc., 276 M 105, 915 P2d 226, 53 St. Rep. 299 (1996).

Substantial Evidence Supporting Referee's Decision: The Board of Labor Appeals (now the Unemployment Insurance Appeals Board) adopted the findings and decision of the hearings referee that an employee had been improperly fired by her employer and was entitled to unemployment benefits. The District Court reversed the Board and found that the firing was justified. The Supreme Court held that even though the evidence was subject to more that one interpretation, substantial evidence existed to support the Board's and referee's decision and that therefore the lower court had no jurisdiction to reexamine the facts. Ward v. Johnson, 242 M 225, 790 P2d 483, 47 St. Rep. 748 (1990).

Failure to Follow Procedure for Review of Administrative Ruling — Dismissal Proper: The Board of Labor Appeals (now the Unemployment Insurance Appeals Board) upheld a decision regarding assessments made by the Unemployment Insurance Division relating to classification of three corporation workers as employees. About the same time, the employer requested a contested case hearing before the Division of Workers' Compensation. Following an adverse decision by the Division of Workers' Compensation, the employer filed a complaint in District Court alleging bad faith and seeking damages. The proper procedure was to file a petition in District Court seeking review of the Board's decision. Dismissal of the complaint, based on failure to follow the proper procedure for judicial review, was proper. Cottonwood Hills, Inc. v. St., 238 M 404, 777 P2d 1301, 46 St. Rep. 1371 (1989).

Error to Dismiss Appeal: The District Court erred when it dismissed the appeal of a Board of Labor Appeals (now the Unemployment Insurance Appeals Board) decision when the case was fully submitted on briefs and all that remained was a decision by the District Court. The District Court dismissed the appeal 4 days after the motion to dismiss was made and 1 day after the petitioner had received notice of the motion. It was as much the responsibility of the hospital and the Department of Labor as it was the petitioner's to bring to the District Court's attention the fact that the pending motions had not been ruled upon. The policy favoring the resolution of a case on its merits is more compelling than the policy of dismissal for failure to prosecute. The District Court abused its discretion by failing to provide the petitioner with meaningful access to the judicial system. Martin v. Board of Labor Appeals, 227 M 145, 737 P2d 488, 44 St. Rep. 951 (1987).

Standard of Review — Board of Labor Appeals Decisions: The statutory standard of judicial review of Board of Labor Appeals (now the Unemployment Insurance Appeals Board) decisions outlined in 39-51-2410 limits District and Supreme Court review to a consideration of whether the findings of the Board are supported by the evidence. In the present case, the Supreme Court upheld a District Court decision affirming an award of unemployment compensation benefits to a gas plant employee where the employee quit due to hazardous working conditions. The Supreme Court held that an employee need not be seriously injured before acting to remove himself from an unsafe working environment. Gypsy Highview Gathering Sys., Inc. v. Stokes, 221 M 11, 716 P2d 620, 43 St. Rep. 595 (1986), followed in Phoenix Physical Therapy v. Unemployment Ins. Div., 284 M 95, 943 P2d 523, 54 St. Rep. 791 (1997).

Selective Treatment of Record Prohibited: Wessell was terminated from her position with plaintiff. Plaintiff contended Wessell quit, and Wessell contended she was fired. Wessell filed for unemployment benefits. Plaintiff alleged she had been terminated for misconduct. A claims examiner determined there was no evidence of misconduct and approved Wessell's application. Plaintiff appealed, and a hearing appeals referee affirmed the award of benefits, finding Wessell had been terminated for reasons other than misconduct. The Board of Labor Appeals (now the Unemployment Insurance Appeals Board) affirmed the referee. Plaintiff then appealed to District Court, which concluded that Wessell had been fired for misconduct and terminated her benefits. On appeal, the Supreme Court found that although testimony was sometimes conflicting and equivocal, there was substantial credible evidence to support the Board's determination. The District Court's determination could be supported only by selective treatment of certain aspects of the record. The court also had to weigh testimony and credibility differently from the referee and the Board. Because the Board's finding was not clearly erroneous in view of the whole record, the decision of the District Court was reversed. Slater v. Employment Sec. Div., 208 M 166, 676 P2d 220, 41 St. Rep. 243 (1984).

Adequate Findings Required for Review: Greenwood was hired as a truck driver by plaintiff. During the 14 months of his employment, six incidents of alleged misconduct occurred. Plaintiff discharged Greenwood on the basis of those incidents. Greenwood applied for unemployment benefits. Plaintiff challenged, contending Greenwood was ineligible because he was discharged for misconduct. Greenwood was awarded benefits, and plaintiff appealed to the appeals section of the Employment Security Division (now the Unemployment Insurance Division). After the hearing, Greenwood was found ineligible. Greenwood appealed to the Board of Labor Appeals (now the Unemployment Insurance Appeals Board). The Board found for Greenwood. Plaintiff then filed for judicial review with the District Court. The District Court reversed the decision of the Board, and Greenwood appealed. Greenwood contended the District Court erred by making findings different from those of the Board, without first determining whether there was substantial evidence to support the Board's findings. The Supreme Court found that the District Court had violated the standard of review by entering findings without determining whether the Board's findings were supported by substantial evidence. The Supreme Court also found that the

Board's findings were inadequate for the District Court to review. The case was remanded to the District Court with directions to remand to the Board for entry of complete findings. Dick Irvin, Inc. v. Dept. of Labor, 207 M 336, 673 P2d 1271, 40 St. Rep. 2086 (1983).

Montana Administrative Procedure Act Not Applicable to Unemployment Insurance Claims: The unemployment compensation insurance law contains a complete procedure for hearing and determining undisputed claims for unemployment insurance. The Board of Labor Appeals (now the Unemployment Insurance Appeals Board), as a quasi-judicial board, may consider not only the record made before the appeals referee but also new evidence produced at the Board hearing. The provisions of MAPA are unworkable when an attempt is made to apply them to determine claims for unemployment insurance benefits. It is an incorrect interpretation of statutory law to hold that the Board has no power to overturn the findings of fact of the appeals referee. In reviewing the Board's decision, the District Court is limited by the provisions of 39-51-2410. Decker Coal Co. v. Employment Security Div., 205 M 1, 667 P2d 923, 40 St. Rep. 1056 (1983).

The Montana Administrative Procedure Act does not apply to agency and court handling of claims for unemployment insurance benefits. Billings v. Bd. of Labor Appeals, 204 M 38, 663 P2d 1167, 40 St. Rep. 648 (1983), followed in Brothers v. Cargill, Inc., 276 M 105, 915 P2d 226, 53 St. Rep. 299 (1996).

Factual Findings of Board Conclusive: It was error for the District Court, in reviewing the decision of the Board of Labor Appeals (now the Unemployment Insurance Appeals Board), to determine if the findings of the Board were supported by evidence. Billings v. Bd. of Labor Appeals, 204 M 38, 663 P2d 1167, 40 St. Rep. 648 (1983).

Failure to Exhaust Administrative Remedies: Plaintiff was precluded from bringing a legal action in District Court when he failed to utilize the rehearing and appeal processes provided in this part. Barnicoat v. Comm'r of Dept. of Labor and Industry, 201 M 221, 653 P2d 498, 39 St. Rep. 2070 (1982).

Jurisdiction — Proper Parties and Timeliness: Retail clerks went on strike against petitioner in a labor dispute. The clerks claimed unemployment benefits. Benefits are denied during a strike if unemployment results from a "stoppage of work" existing because of a labor dispute. A deputy of the Employment Security Division (now the Unemployment Insurance Division) found claimants disqualified from benefits. Claiming strikers appealed to a referee who sustained the denial of benefits. Claimants then appealed to the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) which reversed the referee. Petitioner filed petitions for review with the District Court, naming as respondent the Board. Following a motion to dismiss the petition, the appellants and counsel for the Employment Security Division entered an agreement to substitute the Division and the court ordered the substitution. The clerks were not made parties, and at the time service was made on the Board, appellants did not provide sufficient copies. The clerks' union moved to intervene and the motion was granted. The District Court granted summary judgment to respondents, concluding that failure to name all parties and failure to provide a sufficient number of copies of the petition for service were fatal jurisdictional flaws. Petitioners argued that intervention by the union conferred jurisdiction. It did not. The answer raised lack of jurisdiction. Petitioners argued the applicability of former Rule 21, M.R.Civ.P. (now superseded), which provides that parties may be added or dropped at any stage of the proceeding. The rule presupposes in personam jurisdiction. The rule does not confer that jurisdiction. Under this section, the decision of the Board became final as to claimants 30 days after notification of the decision. The District Court thereafter had no jurisdiction over the clerks and could acquire none. Claimants' benefits could not be adversely affected, but they are not indispensable to a review of legal questions by the District Court. There is a justiciable controversy between petitioners and the Employment Security Division concerning "work stoppage". F.W. Woolworth Co., Inc. v. Employment Sec. Div., 192 M 289, 627 P2d 851, 38 St. Rep. 694 (1981).

Service on State Governmental Division — Substance Over Form: Retail clerks went on strike against petitioner in a labor dispute. The clerks claimed unemployment benefits. Benefits are denied during a strike if unemployment results from a "stoppage of work" existing because of a labor dispute. A deputy of the Employment Security Division (now the Unemployment Insurance Division) found claimants disqualified from benefits. Claiming strikers appealed to a referee who sustained the denial of benefits. Claimants then appealed to the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) which reversed the referee. Petitioner filed petitions for review with the District Court, naming as respondent the Board. Following a motion to dismiss the petition, the appellants and counsel for the Employment Security Division entered an agreement to substitute the Division and the court ordered the substitution. The clerks were not made parties, and at the time service was made on the Board, appellants did not provide sufficient copies. The clerks' union moved to intervene and the motion was granted. The District Court granted summary judgment to respondents, concluding that failure to name all parties and failure to provide a sufficient number of copies of the petition for service were fatal jurisdictional flaws. Since the Board and the Division are housed within the same department of state government and were represented by the same counsel, granting summary judgment on purely technical grounds would be an unconscionable elevation of form over substance. F.W. Woolworth Co., Inc. v. Employment Sec. Div., 192 M 289, 627 P2d 851, 38 St. Rep. 694 (1981).

District Court Required to Adhere to Board's Findings: The District Court must treat the findings of the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) as conclusive if the findings are supported by the evidence and there is no fraud. Here, the District Court affirmed the decision of the Board but in so doing entered findings of fact different from those adopted by the Board. Although this was improper, the Supreme Court did not reverse because the eventual result of the case would be the same. Kirby Co. of Bozeman, Inc. v. Employment Sec. Div., 189 M 1, 614 P2d 1040, 37 St. Rep. 1255 (1980).

Findings of Commission: Finding of Unemployment Compensation Commission (now the Unemployment Insurance Appeals Board) that claimant was not available for and seeking work as required by 39-51-2104 was proper where the evidence showed that claimant quit his job to protect his social security retirement benefits; he knew that his employer would not rehire him if he failed to report off from work; he went to Minnesota to take a rest; and he failed to seek full-time employment. Ollila v. Reeder, 148 M 134, 417 P2d 473 (1966).

When Findings of Commission Conclusive Upon Courts: The provision of this section that the findings of the Unemployment Compensation Commission (now the Unemployment Insurance Appeals Board) as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive was held to mean not a mere scintilla but substantial evidence, or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In a judicial review of the commission's decision, the District Court is precluded from considering the preponderance of the evidence and is limited to questions of law, the question whether there is substantial evidence to sustain them being one of law. Jordan v. Craighead, 114 M 337, 136 P2d 526 (1943).

Part 25
Extended Benefits

39-51-2501. Definitions.

Compiler's Comments

2003 Amendment: Chapter 114 in (7) at end substituted "26 U.S.C. 3304, as amended" for "of 1954"; and made minor changes in style. Amendment effective October 1, 2003.

1987 Amendment: In three places changed "ex-servicemen" to "ex-service personnel"; near beginning of (5) substituted "relating to extended benefits" for "of an individual"; in (6)(c), after "Act", deleted "the Trade Expansion Act of 1962, the Automotive Products Trade Act of 1965"; and made minor changes in phraseology.

1983 Amendment: In definition of rate of insured unemployment, before "reports to the U.S. secretary" changed "his" to "its".

1981 Special Session Amendment: Deleted "whichever of the following weeks occurs first: (i) a week for which there is a national "on" indicator; or (ii)" after "third week after" at the beginning of definition of extended benefit period; deleted "either of the following weeks, whichever occurs later:" after "ends with" at the beginning of (1)(b); deleted "both a national "off" indicator and" before "a state "off" indicator" in (1)(b); inserted "for regular benefits" after "individuals filing claims" in definition of rate of insured unemployment.

1981 Regular Session Amendment: Substituted "department" for "division" in two places in definition of rate of insured unemployment.

References to Federal Acts: The Railroad Unemployment Insurance Act is codified at Title 45, U.S.C., Ch. 11. The Trade Expansion Act of 1962 is codified at Title 19, U.S.C., Ch. 7. The Automotive Products Trade Act of 1965 is codified at Title 19, U.S.C., Ch. 8. Section 3304 of the Internal Revenue Code of 1954 is codified at 26 U.S.C. 3304.

39-51-2504. State "on" indicator — when.

Compiler's Comments

1981 Special Session Amendment: Deleted "for the period consisting of" following "labor, that" in the introductory clause; inserted "the rate of insured unemployment equals or exceeds 5% for any" at the beginning of (1)(a); deleted "the rate of insured unemployment (not seasonally adjusted) under this chapter" from the end of (1)(a); substituted "the insured unemployment rate equals or exceeds" for "equaled or exceeded" at the beginning of (1)(b); substituted "or" for "and" at the end of (1)(b); substituted text of (2) requiring a slightly higher rate of present unemployment if 2-year average is less than 120% for "equaled or exceeded 4%".

1981 Regular Session Amendment: Substituted "department" for "division".

39-51-2505. State "off" indicator — when.

Compiler's Comments

1981 Special Session Amendment: Added "is less than 5%; or" to the end of (1); deleted "was less than 120% of" from the beginning of (2); added "is less than 120%" at the end of (2); deleted former subsection (2) that read: "was less than 4%".

1981 Regular Session Amendment: Substituted "department" for "division" throughout the section.

39-51-2506. Beginning and termination of extended benefit period — announcement of.

Compiler's Comments

1981 Special Session Amendment: Deleted "(or in all states)" after "effective in this state" near the beginning of the section; deleted "or a national" before ""on" indicator"; deleted "and national" before ""off" indicators".

1981 Regular Session Amendment: Substituted "department" for "division".

39-51-2507. Effect of state law provisions relating to regular benefits on claims for and the payment of extended benefits.

Compiler's Comments

1981 Amendment: Substituted "department" for "division".

39-51-2508. Eligibility requirements for extended benefits — disqualifications — acceptance of suitable work.

Compiler's Comments

1997 Amendment: Chapter 42 in (5), at end, substituted "in accordance with the requirements of 26 U.S.C. 3304" for "in accordance with the definition required by the Omnibus Reconciliation Act of 1980, Public Law 96-499, and as may be amended after March 19, 1981". Amendment effective March 12, 1997.

1993 Amendment: Chapter 171 inserted (1)(b) establishing wage amounts applicable to determining eligibility for extended benefits; in (2) substituted "subsection (1)(c)" for "subsection (1)(b)"; and made minor changes in style. Amendment effective March 25, 1993.

Severability: Section 8, Ch. 171, L. 1993, was a severability clause.

1983 Amendment: At end of (1)(b), deleted "except that subsections (1), (2), and (4) of 39-51-2304 do not apply to this section"; at end of first sentence of (2), substituted "if he fails to seek work" for "if he fails without good cause either to apply for available and suitable work, to accept suitable work offered to him, or, when so directed by the department, to return to his customary occupation, if any"; at end of (2), deleted ", with 4 weeks' reduction in benefit duration, as determined by the department, provided he has not left this work under disqualifying circumstances"; inserted (3) disqualifying claimant discharged for gross misconduct until he purges disqualification by returning to work; inserted (4) requiring claimant who leaves work to attend school to requalify with certain period of earnings; at beginning of (5), substituted "For the purposes of determining eligibility for extended benefits" for "For the purposes of subsection (2)".

1981 Amendments: Chapter 99 added (1)(b), relating to disqualification and requalification under part 23 of this chapter; in (1)(c), inserted "other" before "requirements"; deleted ", including not being subject to a disqualification for the receipt of benefits" at the end of (1)(c); inserted (2) disqualifying claimant who does not seek or accept suitable work and stating method of purging such disqualification; and inserted (3) stating method for defining suitable work.

Chapter 349 substituted "department" for "division" throughout the section.

Statement of Intent: The statement of intent attached to HB 464 (Ch. 99, L. 1981), provided: "A statement of intent is required for this bill because it delegates rulemaking authority to the Department of Labor and Industry in section 1, subsection (3).

It is the intent of this bill that the Department adopt the same definition for "suitable work" that is used in the federal Emergency Unemployment Compensation Act of 1974, as amended. This is a conformity requirement of the Federal Unemployment Tax Act which is imposed on the states."

The "federal Emergency Unemployment Compensation Act", referred to in this statement of intent, as adopted by the House Labor and Employment Relations Committee, was also referred to in HB 464 as originally introduced but was changed to the "Omnibus Reconciliation Act of 1980, P.L. 96-499" (see subsection (5) of this section) by the House Committee of the Whole.

Administrative Rules

ARM 24.11.481 Definition of suitable work for extended benefits purposes — classification and determination of job prospects.

39-51-2509. Weekly extended benefit amount.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-51-2510. Total extended benefit amount.

Compiler's Comments

2007 Amendment: Chapter 52 inserted (3) requiring payment of total extended benefit amount of at least 39 times the individual's weekly benefit amount, less the amount of regular benefits paid or considered paid during the individual's applicable benefit year; and made minor changes in style. Amendment effective October 1, 2007.

Part 26

Trade Readjustment

39-51-2602. Approved training under federal programs.

Compiler's Comments

2017 Amendment: Chapter 37 in (1)(a) substituted "Workforce Innovation and Opportunity Act, 29 U.S.C. 3101, et seq." for "Workforce Investment Act of 1998 (29 U.S.C. 2801, et seq.)"; and made minor changes in style. Amendment effective February 20, 2017.

2001 Amendment: Chapter 424 at end of (1)(a) substituted "Title I-B of the Workforce Investment Act of 1998 (29 U.S.C. 2801, et seq.) when the individual is receiving Title I-B services as a dislocated worker" for "Title III of the federal Job Training Partnership Act (29 U.S.C. 1501, et seq.)"; in (2) in two places after "federal Trade Act of 1974" deleted "and the federal Job Training Partnership Act"; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 12, Ch. 424, L. 2001, was a severability clause.

1997 Amendment: Chapter 42 in (1)(a), after "federal Trade Act of 1974", inserted "(19 U.S.C. 2296)" and after "Job Training Partnership Act" inserted "(29 U.S.C 1501, et seq.)"; and made minor changes in style. Amendment effective March 12, 1997.

1991 Amendment: In (1)(a), after "1974", inserted "or under Title III of the federal Job Training Partnership Act"; in (1)(b), after "training", inserted "described in subsection (1)(a)"; in (2), in two places after "1974", inserted "and the federal Job Training Partnership Act"; and made minor changes in style. Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

Citation to Federal Act: The Federal Trade Act of 1974, referred to in this section, is codified at Title 19, U.S.C., Ch. 12.

Part 31

Protections and Limitations on Rights and Benefits

39-51-3101. Protection against self-incrimination.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1981 Amendment: Substituted "department" for "division" throughout the section.

39-51-3102. Certain agreements in violation of chapter void.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Vacation Pay Not Considered Wages for Purposes of Determining Eligibility for Unemployment Benefits — Claim Independent of Contract Not Precluded by Federal Labor Law: Lumber company employees filed for unemployment insurance benefits following a week-long shutdown of the lumber mills. Their claims were denied in turn by the Department of Labor and Industry, a referee, and the Board of Labor Appeals (now the Unemployment Insurance Appeals Board). The Department reasoned that the employees received vacation pay during their time away from work and that because they earned wages, they could not be considered totally unemployed and were thus ineligible for benefits. On appeal to the District Court, the ineligibility determination was reversed when the court determined that the Department had incorrectly concluded that, as a matter of law, wages previously paid to the employees had been properly imputed to the shutdown period. The company appealed to the Supreme Court, and the primary issue was whether the employees were eligible for benefits during the shutdown. The employees argued that their collective bargaining agreement did not require time off in order to take vacation pay, but rather that vacation pay is an entitlement once an employee works the specified number of hours during the vacation base year. The Supreme Court agreed. Vacation pay is payment in exchange for an employee's work in the vacation base year. Even though time off could be scheduled unilaterally by the employer when the mill was closed, the vacation pay received was not considered compensation for time off during the shutdown. Thus, the employees did not earn wages during the shutdown that would prevent them from qualifying for unemployment benefits. The employer's argument that the employees were "voluntarily unemployed" because they consented to the shutdown in their collective bargaining agreement was also unpersuasive. A collective bargaining agreement cannot waive rights ensured to an employee by state law. Lastly, this action was not precluded by sec. 301 of the federal Labor Management Relations Act (29 U.S.C. 185) because the case involved matters implicating state rules and obligations independent of the labor contract, as evidenced by the inclusion as parties those state agencies charged with determining unemployment eligibility. The District Court was affirmed, and the case was remanded to the appropriate state agencies for decisions on each individual claim. Multiple Stimson Employees v. Stimson Lumber Co., 2001 MT 56, 304 M 333, 21 P3d 613 (2001), distinguishing Anderson v. TW Corp., 228 M 1, 741 P2d 397 (1987), and Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720 (1992).

39-51-3103. Employer prohibited from making, requiring, or accepting deduction from wages or requiring or accepting waiver of rights under chapter — penalty for violation.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Vacation Pay Not Considered Wages for Purposes of Determining Eligibility for Unemployment Benefits — Claim Independent of Contract Not Precluded by Federal Labor Law: Lumber company

employees filed for unemployment insurance benefits following a week-long shutdown of the lumber mills. Their claims were denied in turn by the Department of Labor and Industry, a referee, and the Board of Labor Appeals (now the Unemployment Insurance Appeals Board). The Department reasoned that the employees received vacation pay during their time away from work and that because they earned wages, they could not be considered totally unemployed and were thus ineligible for benefits. On appeal to the District Court, the ineligibility determination was reversed when the court determined that the Department had incorrectly concluded that, as a matter of law, wages previously paid to the employees had been properly imputed to the shutdown period. The company appealed to the Supreme Court, and the primary issue was whether the employees were eligible for benefits during the shutdown. The employees argued that their collective bargaining agreement did not require time off in order to take vacation pay, but rather that vacation pay is an entitlement once an employee works the specified number of hours during the vacation base year. The Supreme Court agreed. Vacation pay is payment in exchange for an employee's work in the vacation base year. Even though time off could be scheduled unilaterally by the employer when the mill was closed, the vacation pay received was not considered compensation for time off during the shutdown. Thus, the employees did not earn wages during the shutdown that would prevent them from qualifying for unemployment benefits. The employer's argument that the employees were "voluntarily unemployed" because they consented to the shutdown in their collective bargaining agreement was also unpersuasive. A collective bargaining agreement cannot waive rights ensured to an employee by state law. Lastly, this action was not precluded by sec. 301 of the federal Labor Management Relations Act (29 U.S.C. 185) because the case involved matters implicating state rules and obligations

independent of the labor contract, as evidenced by the inclusion as parties those state agencies charged with determining unemployment eligibility. The District Court was affirmed, and the case was remanded to the appropriate state agencies for decisions on each individual claim. Multiple Stimson Employees v. Stimson Lumber Co., 2001 MT 56, 304 M 333, 21 P3d 613 (2001), distinguishing Anderson v. TW Corp., 228 M 1, 741 P2d 397 (1987), and Foster v. Albertsons, Inc., 254 M 117, 835 P2d 720 (1992).

39-51-3105. Assignment, pledge, or encumbrance of right to benefits void — benefits exempt from levy, execution, attachment, or other remedy for collection of debt — exception.

Compiler's Comments

1999 Amendment: Chapter 61 near end of second sentence inserted reference to 39-51-3107. Amendment effective July 1, 1999.

Saving Clause: Section 12, Ch. 61, L. 1999, was a saving clause.

Severability: Section 13, Ch. 61, L. 1999, was a severability clause.

1997 Amendment: Chapter 60 near end of second sentence inserted "39-51-2207, 39-51-2208"; and made minor changes in style. Amendment effective March 17, 1997.

Retroactive Applicability: Section 13, Ch. 60, L. 1997, provided: "[Sections 1, 5, and 10] [39-51-2207, 39-51-403, and 39-51-3105] apply retroactively, within the meaning of 1-2-109, to January 1, 1997, in order to comply with federal requirements."

1993 Amendment: Chapter 171 at end of first sentence inserted reference to 39-51-3206; and made minor changes in style. Amendment effective March 25, 1993.

Severability: Section 8, Ch. 171, L. 1993, was a severability clause.

1987 Amendment: At end of first sentence, after "except", substituted "as provided in 39-51-3106" for "debts incurred for necessaries furnished to such individual or his spouse or dependents during the time when such individual was unemployed".

Case Notes

Attorney's Fees: Where services rendered by attorney restored three men to the rolls of the Unemployment Compensation Commission (now the Unemployment Insurance Appeals Board), set aside a 1-year purge of their names from those rolls, and cleared their names of fraud, court concluded that under such facts attorney's fees should be considered a debt incurred for "necessaries". McAlear v. Unemployment Comp. Comm'n, 145 M 458, 405 P2d 219 (1965). (Annotator's note: Language concerning debts incurred for necessaries deleted by Ch. 234, L. 1987.)

39-51-3106. Child support interception of unemployment benefits.

Compiler's Comments

2013 Amendment: Chapter 203 in (1)(a) substituted "42 U.S.C. 654" for "section 454 of the Social Security Act (42 U.S.C. 654)" and substituted "Title 42, Chapter 7, Subchapter IV, Part D, of the United States Code" for "Part D of Title IV of the Social Security Act (now Subchapter IV)"; in (1)(c) inserted last sentence subjecting benefits to certain provisions of Title 40; in (3)(b) substituted "42 U.S.C. 654(19)(B)(i)" for "section 454(19)(B)(i) of the Social Security Act (42 U.S.C. 654(19)(B)(i))"; in (3)(c) after "process" deleted "as that term is defined in section 462(e) of the Social Security Act (42 U.S.C. 662(e))"; and made minor changes in style. Amendment effective October 1, 2013.

1997 Amendment: Chapter 42 in definition of child support obligations, in (a) after "Social Security Act", inserted "(42 U.S.C. 654)" and after "Title IV of the Social Security Act" inserted "(now Subchapter IV)"; in (3)(b) substituted "section 454(19)(B)(i) of the Social Security Act (42 U.S.C. 654(19)(B)(i))" for "section 454(20)(B)(i) of the Social Security Act"; in (3)(c), after "Social Security Act", inserted "(42 U.S.C. 662(e))"; and made minor changes in style. Amendment effective March 12, 1997.

1983 Amendment: Throughout section, changed "compensation" to "benefits" and "division" to "department".

39-51-3107. Internal revenue levy — withholding of unemployment benefits to repay federal tax obligations.

Compiler's Comments

Saving Clause: Section 12, Ch. 61, L. 1999, was a saving clause.

Severability: Section 13, Ch. 61, L. 1999, was a severability clause.

Effective Date: Section 14, Ch. 61, L. 1999, provided that this section is effective July 1, 1999.

Part 32
General Penalties

39-51-3201. Making false statement or representation or failing to disclose material fact in order to obtain or increase benefits — administrative penalty and remedy.

Compiler's Comments

2013 Amendment: Chapter 203 in (1)(a)(ii) substituted "a department-assessed penalty equal to 50%" for "the department may assess a penalty not to exceed 100%" and inserted last sentence concerning 15% penalty; in (1)(b) before "benefits" deleted "Future" and after "individual" inserted "subject to this section"; in (3) substituted "Of the money collected from the penalties " for "All money accruing from the penalty", after "(1)(a)" inserted "70%", before "account" deleted "federal special revenue", in three places after "account" inserted "provided for in 39-51-406", and inserted second sentence concerning deposit of 30% of penalties; and made minor changes in style. Amendment effective October 1, 2013.

2009 Amendment: Chapter 88 in (1)(a)(ii) near beginning after "department" substituted "pursuant to the provisions of 39-51-3206" for "either directly or as authorized by the department, by offset of future benefits to which the individual may be entitled, or by a combination of both methods"; in (2)(a) near end after "behalf" inserted "without designating that person as an authorized agent"; inserted (2)(b) regarding designation of a person who is not an attorney; inserted (2)(c) providing that any action taken or information provided by an agent has the same effect as an action taken or information provided by the individual; and made minor changes in style. Amendment effective January 1, 2010.

1997 Amendment: Chapter 60 inserted (2) providing that persons who allow another to file a claim on their behalf are subject to penalties; and made minor changes in style. Amendment effective March 17, 1997.

1991 Amendment: In (1)(b), at end of first sentence after "plus", substituted "the department may assess a penalty not to exceed 100% of the fraudulently obtained benefits" for "interest at the rate of 18% a year computed from the time the false statement or representation or the failure to disclose a material fact occurred" and substituted "penalty" for "interest"; inserted (2) relating to disposition and appropriation of penalty money; and made minor changes in style. Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1985 Amendment: In first sentence of (2), after "amount wrongfully received by him", inserted "plus interest at the rate of 18% a year computed from the time the false statement or representation or the failure to disclose a material fact occurred, except that future benefits may not be used to offset the interest due".

1981 Amendment: Substituted "department" for "division" throughout the section.

Administrative Rules

ARM 24.11.1209 Fraudulent benefit overpayments — administrative penalties.

Case Notes

Owner-Corporate Officer Working Full-Time Without Pay Not Entitled to Unemployment Benefits — Implied Contract — Administrative Penalty: The plaintiff owned and was president of a bicycle company. During a slow period in the business in 2010, the plaintiff stopped paying himself a salary but continued working approximately 50 hours per week. The plaintiff periodically received unemployment assistance between November 2010 and September 2012. After an audit and subsequent administrative hearing, the Montana Department of Labor and Industry required the plaintiff to pay $28,387 in overpaid benefits and a $9,367.71 administrative penalty. On appeal, the District Court held that the plaintiff lawfully claimed benefits during certain periods because he was not working for a wage and was not under a contract for hire pursuant to 39-51-203. The Supreme Court reversed the District Court, finding that there was an implied contract because the plaintiff stood to benefit from his business' future growth. As a result, the plaintiff was employed and was not entitled to unemployment benefits and the administrative penalty was correctly ordered. Sayler v. Mt. Dept. of Labor & Industry, 2014 MT 255A, 376 Mont. 369, 336 P.3d 358.

Attorney General's Opinions

Penalties for Fraudulent Benefits Claim — Specific Remedy Controlling Over General Remedy: Although 17-8-231 (now repealed) appears to provide a penalty for fraudulent claiming of unemployment insurance benefits, that statute is a general one that provides a penalty in conflict with the more specific penalty provided under this section. Because the more particular statute must control to the extent of any inconsistency, the Department of Labor and Industry is limited to recovery of those amounts of benefits wrongfully received by the claimant (plus, under the 1985 amendment, interest). The Department may not sue a claimant for all benefits paid to the claimant or for the additional penalty provided in 17-8-231 (now repealed), but may disqualify the claimant under this section from receipt of future benefits. 40 A.G. Op. 21 (1983).

39-51-3202. Making false statement or representation or failing to disclose material fact in order to obtain or increase benefits — criminal penalty.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 70, L. 2023. Amendment effective October 1, 2023.

2009 Amendment: Chapter 88 in (2) at end substituted "39-51-3201(1)(a)" for "39-51-3201(1)(b)". Amendment effective July 1, 2009.

1991 Amendment: In (2), at end, changed subsection reference to 39-51-3201; in (3), at end of first sentence after "plus", substituted language authorizing Department to assess a penalty not to exceed 100% for "18% interest a year notwithstanding the provisions of 25-9-205" and inserted last three sentences relating to disposition and appropriation of penalty money; and made minor change in style. Amendment effective July 1, 1991.

Severability: Section 32, Ch. 373, L. 1991, was a severability section.

1987 Amendment: In (1), after "increase for", substituted "personal gain" for "himself"; inserted (2) and (3) requiring person to repay restitution plus interest; and made minor changes in phraseology.

1981 Amendment: Substituted "department" for "division".

Administrative Rules

ARM 24.11.1209 Fraudulent benefit overpayments — administrative penalties.

39-51-3203. Obtaining benefits through deception or other fraudulent means — criminal penalty.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

39-51-3204. Employing unit making false statement or representation, failing to disclose material fact, or failing or refusing to make contributions or other payments, furnish reports, or permit inspection or copying of records — criminal penalty.

Compiler's Comments

2009 Amendment: Chapter 25 in (1)(a) after "any" inserted "entitled" and after "individual" deleted "entitled thereto or to avoid becoming or remaining subject hereto or to"; in (1)(c) substituted "avoid the requirements of this chapter" for "or who willfully fails or refuses to make any such contributions or other payment or to furnish any reports required hereunder or to produce or permit the inspection or copying of records as required hereunder"; in (2) at beginning of first sentence inserted "An employing unit, any officer or agent of an employing unit, or any other person who violates a provision of subsection (1)" and near end after "failure" substituted "to disclose constitutes" for "or refusal shall constitute"; inserted (3) outlining actions for which the penalty applies; and made minor changes in style. Amendment effective July 1, 2009.

Attorney General's Opinions

Complaint to Human Rights Division — Disclosure of Award of Backpay: The Human Rights Division is not required to disclose to the Employment Security Division (now the Unemployment Insurance Division) the award of backpay to a party who has filed a complaint with the Human Rights Division. 37 A.G. Op. 56 (1977).

39-51-3206. Collection of benefit overpayments.

Compiler's Comments

2019 Amendment: Chapter 284 in (6)(a) near middle of second sentence after "or through the state lottery" inserted "and sports wagering". Amendment effective May 3, 2019.

Transition: Section 25, Ch. 284, L. 2019, provided: "The state lottery commission shall implement sports wagering, including adoption of administrative rules, no later than 1 year after [the effective date of this act]." Effective May 3, 2019.

2015 Amendment: Chapter 81 inserted (3)(c) concerning fees associated with obtaining an offset; inserted (4)(a)(ii) and (4)(b) related to lump-sum repayment agreements; in (5) before "consent" deleted "written"; in (7)(a) and (7)(b) substituted "covered unemployment compensation benefit debt" for "covered unemployment compensation debt"; in (7)(b) after "means" substituted current text related to erroneous payments of unemployment compensation for former (7)(b)(i) and (7)(b)(ii) that read: "(i) a benefit overpayment and penalty owed because of the erroneous payment of unemployment compensation resulting from fraud, which has been adjudicated as a debt under Montana law and has remained uncollected for not more than 10 years; or

(ii) employer contributions, penalty, and interest owed to the unemployment trust fund that the department determines are attributable to fraud and that have remained uncollected for not more than 10 years"; and made minor changes in style. Amendment effective July 1, 2015.

Retroactive Applicability: Section 4, Ch. 81, L. 2015, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to debts incurred on or before [the effective date of this act]." Effective July 1, 2015.

2011 Amendment: Chapter 123 inserted (2)(c) concerning 39-51-3208; in (5)(b) inserted "or when benefit overpayments have been made to winners of a state lottery as provided in 39-51-3208"; near end of (6)(a) after "revenue" inserted "or through the state lottery commission established in 23-7-201 if overpayment is to be collected as provided in 39-51-3208"; and made minor changes in style. Amendment effective October 1, 2011.

2009 Amendment: Chapter 88 inserted (2) outlining methods the department may use to collect a benefit overpayment and penalty; inserted (3) setting out the claimant's responsibilities; inserted (4) allowing the department to enter into a repayment agreement; in (5) deleted former second sentence that read: "The sum is collectible in the manner provided in this chapter for the collection of past-due contributions"; inserted (6) allowing collection by offset of funds due the claimant from the state; inserted (7) allowing direction of the offset to pay a covered unemployment compensation debt; inserted (8) allowing treatment of an unpaid benefit overpayment and penalty as a judgment; inserted (9)(b) regarding the waiver of a benefit overpayment if found to be the result of a department error; and made minor changes in style. Amendment effective January 1, 2010.

1999 Amendment: Chapter 61 at end of second sentence inserted exception clause providing 100% offset of benefits in cases of theft and fraud; at end of third sentence after "contributions" deleted "unless the department finds that the benefits were received through no fault of the person and the recovery of the benefits would be against equity and good conscience"; inserted fourth sentence authorizing department to waive benefit overpayment upon finding that claimant did not conceal or misrepresent material facts to obtain overpaid benefits and that recovery would cause long-term financial hardship; and made minor changes in style. Amendment effective July 1, 1999.

Saving Clause: Section 12, Ch. 61, L. 1999, was a saving clause.

Severability: Section 13, Ch. 61, L. 1999, was a severability clause.

1993 Amendment: Chapter 171 inserted second sentence limiting benefit offset to 50% of weekly benefits absent written consent. Amendment effective March 25, 1993.

Severability: Section 8, Ch. 171, L. 1993, was a severability clause.

1989 Amendment: Near end substituted "the laws of this state or another state" for "this state or another state law".

1987 Amendment: Substituted text (see 1987 Session Law) for former text that read: "Any person who, by reason of the nondisclosure or misrepresentation by him or by another of a material fact, irrespective of whether such nondisclosure or misrepresentation was known or fraudulent, has received any sum as benefits under this chapter while any conditions for the receipt of benefits imposed by this chapter were not fulfilled in his case or while he was disqualified from receiving benefits shall, in the discretion of the department, either be liable to have such sum deducted from any future benefits payable to him under this chapter or shall be liable to repay to the department for the unemployment insurance fund a sum equal to the amount so received by him, and such sum shall be collectible in the manner provided in this chapter for the collection of past due contributions. An action for collection of overpaid benefits must be brought within 5 years after the date of such overpayment or it is barred."

1981 Amendment: Substituted "department" for "division" throughout the section.

Administrative Rules

ARM 24.11.1205 Benefit overpayments — notices and appeal rights.

ARM 24.11.1207 Waiver of recovery of benefit overpayments.

39-51-3207. Authority to determine uncollectibility of debts — transfer of debts for collection — liability for payment of fees and costs of collection.

Compiler's Comments

2009 Amendment: Chapter 88 in (1) in first sentence near middle after "benefits" inserted "and penalties" and after "39-51-3206" deleted "and interest". Amendment effective March 25, 2009.

2007 Amendment: Chapter 362 in (1) in first sentence substituted "39-51-404" for "39-51-404(4)". Amendment effective January 1, 2008.

2001 Amendment: Chapter 7 in (1) near end of second sentence after "department of" substituted "revenue" for "administration"; and in (2) in first and third sentences after "department of" substituted "revenue" for "administration" and in fourth sentence after "collected, the" substituted "department of revenue" for "state auditor". Amendment effective October 1, 2001.

1995 Amendment: Chapter 325 throughout section substituted "department of administration" for "state auditor"; and made minor changes in style. Amendment effective July 1, 1995.

1989 Amendment: Throughout section changed "department of revenue" to "state auditor". Amendment effective January 1, 1990.

39-51-3208. Interception of lottery winnings for unemployment insurance offsets — notice to agency — procedures.

Compiler's Comments

Effective Date: This section is effective October 1, 2011.

CHAPTER 71
WORKERS' COMPENSATION

Chapter Compiler's Comments

Study of Role and Possible Sale of State Compensation Insurance Fund: Section 2, Ch. 598, L. 2003, provided: "(1) Subject to Article VIII, section 13, of the Montana constitution, the committee established in [section 1] [not codified] shall study the role of the state compensation insurance fund and shall determine if it is cost-effective and in the best interest of the state, Montana employees, and Montana employers to sell all or a portion of the state compensation insurance fund assets and liabilities and to create an assigned risk pool.

(2) The committee shall make separate determinations concerning the role of the state compensation insurance fund and the sale of the assets and liabilities for the portion of the state compensation insurance fund related to claims for injuries resulting from accidents that occurred before July 1, 1990, and claims for injuries resulting from accidents that occur on or after July 1, 1990, and concerning the creation of an assigned risk pool.

(3) The committee may use the expertise of all executive branch agencies and personnel and any consultants determined to be necessary in making the determinations required by subsections (1) and (2).

(4) The committee shall report to the 59th legislature on the determinations made pursuant to this section. As a part of the report, the committee shall prepare any necessary legislation to implement a recommended sale. A sale of the assets and liabilities of the state compensation insurance fund may not be made unless the sale is approved by the 59th legislature."

1987 Statement of Intent: The statement of intent attached to Ch. 464, L. 1987, provided: "A statement of intent is required for this bill because of the following:

The division of workers' compensation needs to adopt rules to efficiently and fairly implement the Workers' Compensation Act. There are numerous references throughout the act to rules, rates, procedures, and forms to be prescribed by the division (e.g., 39-71-208, 39-71-307, 39-71-410, 39-71-604, 39-71-2102, 39-71-2303 [renumbered 39-71-2336], and 39-71-2304 [now repealed]). However, there is no explicit statutory grant of rulemaking authority in the chapter.

The Montana supreme court, in Garland v. The Anaconda Company, 177 Mont. 240, 581 P.2d 431 (1978), tacitly recognized 39-71-203 as a general grant of rulemaking authority. To preserve the division's rulemaking authority and extend it to the amendments promulgated in this bill, the legislature explicitly grants and extends rulemaking authority to the division to implement the Workers' Compensation Act.

The division may adopt rules as necessary to implement the act. The division shall provide the rules, procedures, and forms specifically referred to in sections of the act and implement other sections as necessary and appropriate by providing specific guidelines, policies, and procedures to serve the efficient and fair administration of the act."

Applicability: Section 72, Ch. 464, L. 1987, provided: "(1) Sections 8 [39-71-2401] and 52 through 57 [39-71-2406 through 39-71-2411] apply retroactively, within the meaning of 1-2-109, to all injuries and diseases, regardless of the date of occurrence. With respect to rehabilitation disputes, sections 8 [39-71-2401] and 52 through 57 [39-71-2406 through 39-71-2411] apply retroactively, within the meaning of 1-2-109, unless the division had jurisdiction over the dispute under the law in effect at the time of injury.

(2) The remaining portions of this act apply only to injuries, diseases, and events occurring after June 30, 1987."

Chapter Administrative Rules

Title 24, chapter 29, ARM Workers' compensation and occupational disease.

Chapter Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

No Error in Granting Summary Judgment for Common-Law Claims Against State Fund: A plaintiff sought relief for common-law bad faith for the State Fund's termination of his benefits, malicious prosecution for referral of his case to the Department of Justice for possible criminal prosecution by the fraud detection unit of the State Fund, and negligent and intentional infliction of emotional distress for requiring the plaintiff to endure a criminal trial. The Supreme Court determined that summary judgment for the defendant was appropriate in all three instances. First, the plaintiff had violated Montana law by receiving wages and disability benefits at the same time, in violation of 39-71-701. Because of these undisputed facts, the District Court appropriately determined the State Fund's termination of the plaintiff's benefits was reasonable as a matter of law. Second, with respect to malicious prosecution, the Department of Justice, not the State Fund, instigated the criminal proceeding against the plaintiff, and the State Fund had referred the case based on a statutory duty. Because there was no conflicting evidence, the determination properly became a question of law. Third, the emotional distress claim lacked sufficient evidentiary support. White v. St., 2013 MT 187, 371 Mont. 1, 305 P.3d 795.

Claims for Malice and Punitive Damages Properly Certified — Motion to Certify as Class Action Upheld: In a class action filed by former Montana Power Company employees against the company's successors in interest for past-due workers' compensation "impairment awards," the District Court did not abuse its discretion when it certified the class's claims for malice and punitive damages. The class's claims for malice and punitive damages were based on the company's conduct, including withholding information, failing to investigate, and the company's system and method of handling claims, not on fact-specific issues of reasonable reliance by members of the class. Gonzales v. Mont. Power Co., 2010 MT 117, 356 Mont. 351, 233 P.3d 328.

Retroactivity Dependent on Whether Claim Final or Settled — Settled Claim Defined: State Fund asserted that the Workers' Compensation Court erred by refusing to adopt the 2-year statute of limitations in 39-71-2905 as a limit on the retroactive effect of judicial decisions in workers' compensation claims. The Supreme Court held that retroactivity for workers' compensation claims is dependent on whether a claim is final or settled. A settled claim is a department-approved or court-ordered compromise of benefits between a claimant and an insurer, or a claim that was paid in full. The court refused to adopt a 2-year limit on retroactivity on all workers' compensation claims when the clear intent of 39-71-2905 is to apply the limit only to particular cases. There is no specific statutory cutoff point for most workers' compensation claims, and as stated in Dempsey v. Allstate Ins. Co., 2004 MT 391, 325 M 207, 104 P3d 483 (2004), the interests of fairness and finality are not generally served by drawing an arbitrary distinction between litigants based merely on the timing of their claims. Flynn v. Mont. St. Fund, 2008 MT 394, 347 M 146, 197 P3d 1007 (2008). See also Schmill v. Liberty NW. Ins. Corp., 2005 MT 144, 327 M 293, 114 P3d 204 (2005), and Flynn v. Montana State Fund, 2011 MT 300, 363 Mont. 55, 267 P.3d 23 (Flynn III). In Flynn III, the Supreme Court affirmed the Workers' Compensation Court's definition of "paid in full" for a "settled" workers' compensation claim. The actual payment of a benefit, and not the potential of a future benefit, makes a claim not "paid in full". Hence, a settled claim for purposes of retroactivity is either: (1) a settlement agreement ordered by a court or approved by the Department of Labor and Industry; or (2) a claim in which the claimant received all applicable benefits prior to a new judicial decision and has not received benefits on the predecision claims.

Claimant Judicially Estopped From Claiming Wrongful Discharge Following Settlement of Occupational Disease Claim Based on Same Employment: In 1997 and 1998, Vogel filed workers' compensation claims, contending that injuries received on the job required surgeries. Defendant accepted liability for the injuries. Between 1998 and 2002, Vogel continued to have problems performing his job, and Vogel's employment was terminated in May 2002. In June 2002, Vogel filed an occupational disease claim, and in October 2002, Vogel filed a wrongful discharge claim. During the ensuing 2 years, no action was taken on the wrongful discharge case, but Vogel settled the occupational disease claim, stating that starting in 1999, he suffered job-related injuries that rendered him physically unable to continue his work with defendant. When Vogel later pursued the wrongful discharge claim, defendant argued judicial estoppel, asserting that having represented in the occupational disease claim that he was unable to perform his time-of-injury job, Vogel was precluded from later arguing entitlement to wrongful discharge damages resulting from loss of the same job. The District Court agreed and granted summary judgment to defendant, and on appeal, the Supreme Court affirmed. Applying the elements of judicial estoppel set out in Fiedler v. Fiedler, 266 M 133, 879 P2d 675 (1994), the court held that all four elements were met and that the District Court had correctly ruled that judicial estoppel applied and properly granted summary judgment. Vogel v. Intercontinental Truck Body, Inc., 2006 MT 131, 332 M 322, 137 P3d 573 (2006).

Insurer at Risk During Claimant's Last Occupational Exposure Liable for Benefits: Murray suffered knee injuries in 1967 and 1974 that required removal of cartilage in both knees, but Murray remained active in both his jobs and vigorous recreational activities. In 1982, Murray was employed by MSE Technology Applications (MSE) and worked for MSE for the next 18½ years while continuing to have episodes of knee complications in connection with his recreational activities. MSE was insured by Indemnity Insurance Company (Indemnity) until 2000, when State Fund became the insurer. In late 2000, Murray's surgeon told Murray that working while standing on concrete or asphalt at MSE contributed to the need for Murray's knee replacement. Murray filed an occupational disease claim, and State Fund began paying benefits, but State Fund then petitioned the Workers' Compensation Court for a determination that Indemnity was liable for compensation. The court held that Murray's work at MSE significantly aggravated the preexisting knee condition and led to or accelerated Murray's need for surgery and that as the insurer at risk during Murray's last occupational exposure, State Fund was liable for paying benefits. On appeal, the Supreme Court affirmed. The Workers' Compensation Court properly relied on the surgeon's testimony, and there was substantial credible evidence that Murray's employment at MSE contributed to the knee condition. Absent evidence that Murray was aware of the connection between his knee problems and employment at MSE prior to filing the claim, State Fund was properly found to be the liable workers' compensation insurer. Mont. St. Fund v. Murray, 2005 MT 97, 326 M 516, 111 P3d 210 (2005).

Former Statute of Repose Precluding Redress Under Former Occupational Disease Act: Hardgrove was employed by W.R. Grace until 1984. About 14 years later, Hardgrove discovered that he had been exposed to asbestos while employed and filed an occupational disease claim 1 month and 1 day after discovering the problem. The employer's insurer refused to cover the claim. The District Court concluded that Hardgrove's claim was barred under 39-72-403(3) (subsection (3) deleted in 1985 and section now repealed) and that the statute violated neither the constitutional equal protection clause nor the full legal redress clause. On appeal, the Supreme Court affirmed after characterizing 39-72-403(3) (now repealed) as a statute of repose. As distinguished from a statute of limitations, which limits the time within which a claimant may pursue a right, a statute of repose extinguishes the existence of the underlying right itself and establishes the absolute time beyond which no party is liable if the statutory period for bringing the claim can lapse before the action accrues. A court may equitably toll a statute of limitations, but only a legislative mandate can toll a statute of repose. In this case, the statute of repose extinguished Hardgrove's right to the cause of action 3 years after Hardgrove finished work, so the claim filed 14 years later was barred and Hardgrove had no right to legal redress under the former Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act). Without deciding whether Hardgrove had a legal remedy outside the former Act, the Supreme Court nevertheless affirmed that 39-72-403(3) (now repealed) was a statute of repose that did not violate the constitutional equal protection and full redress provisions. Hardgrove v. Transp. Ins. Co., 2004 MT 340, 324 M 238, 103 P3d 999 (2004).

Inability to Pay for Second Medical Examination Held Not to Deny Access to Justice: Grooms filed a workers' compensation claim with her insurer, the State Fund, alleging that she suffered from a skin allergy condition. The State Fund denied liability under the Workers' Compensation Act and requested the Department of Labor and Industry to process the claim under the Occupational Disease Act of Montana (now repealed and merged with Workers'

Compensation Act) by providing her with a medical examination. Subsequently, Grooms claimed that her inability to pay for a second medical examination denied her right to access to justice. The Workers' Compensation Court concluded that when her claim was denied under the Workers' Compensation Act, Grooms retained the right under 39-72-611 (now repealed) to have her claim resolved by the Workers' Compensation Court. Therefore, Grooms was not precluded from pursuing her claim and thereby denied access to justice. The Supreme Court affirmed the Workers' Compensation Court, noting that when her claim was denied, Grooms was informed by an order of the Department that she had the right to request a second examination under 39-72-602 (now repealed), which she would pay for, and a right to request a hearing pursuant to 39-72-611 (now repealed) before the Department issued its final determination. The Supreme Court noted that Grooms' right to a hearing to pursue her claim was not dependent upon a second medical examination. Thus, she was not denied access to justice by the requirement that she pay for any second medical examination. Grooms v. Ponderosa Inn, 283 M 459, 942 P2d 699, 54 St. Rep. 725 (1997).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Award of No Damages Supported — Jury Verdict Supported by Adequate Evidence: A jury's award of no damages was supported by sufficient evidence. After the plaintiff's claims for medical benefits under a workers' compensation settlement were denied, the claims were eventually accepted, the plaintiff underwent surgery, and payment was approved for the plaintiff's doctor visits and surgery. The plaintiff filed a suit claiming that the initial denial of her medical benefits resulted in months of pain and suffering while she waited for the claims processor to approve her surgery. The jury was presented with adequate evidence to support a finding that the plaintiff's pain and suffering resulted from her own reluctance to undergo surgery. Moreover, the plaintiff admitted that she had not missed any treatment due to the initial denial. The jury heard evidence that contradicted the plaintiff's claim that the defendant's breach was the cause of her damages. Because the record was not devoid of evidence supporting the jury's verdict, the Supreme Court did not displace it. Suzor v. Int'l Paper Co., 2016 MT 344, 386 Mont. 54, 386 P.3d 584, distinguishing Thompson v. Bozeman, 284 Mont. 440, 945 P.2d 48 (1997), Renville v. Taylor, 2000 MT 217, 301 Mont. 99, 7 P.3d 400, and Reis v. Luckett, 2015 MT 337, 381 Mont. 490, 362 P.3d 632.

Causation Jury Instruction Upheld — Plaintiff Failed to Show Prejudice From Instruction: The District Court did not abuse its discretion in denying an injured worker plaintiff's jury instruction on causation. The Supreme Court reasoned that cause-in-fact is a simple concept that most lay people are capable of understanding and that the plaintiff did not show how the omitted instruction prejudiced her substantial rights. Suzor v. Int'l Paper Co., 2016 MT 344, 386 Mont. 54, 386 P.3d 584.

Equitable Estoppel Against Discontinuation of Worker's Benefits — Element of Representation or Concealment of Material Facts Not Satisfied: After Beery was injured in a fall from an oil rig in 1984, his employer's workers' compensation insurer, CNA Insurance Company, paid domiciliary care benefits for a period of time. Correspondence from CNA indicated that payment was being made to prevent future litigation but that CNA had reservations about the necessity for the payments and care. After Beery was evaluated by a medical panel that concluded that he did not need domiciliary care, CNA terminated benefits. The Supreme Court held that the doctrine of equitable estoppel did not apply to prevent CNA from terminating coverage because one of the criteria announced in Mellem v. Kalispell Laundry & Dry Cleaners, 237 M 439, 774 P2d 390 (1989), that there be an act amounting to a representation or concealment of material facts, had not been satisfied by Beery. Beery's reliance on a letter from the CNA adjuster that stated that the insurer did not contest Beery's right to care was taken out of context because the evidence showed that CNA did reserve the right to determine the value and extent of the care paid for. Other correspondence and the settlement agreement between the parties covering benefits during an earlier period of time support this finding. The Supreme Court also held that although Beery argues he did not have an opportunity to establish the satisfaction of all of the elements of the test for estoppel, the record shows that Beery had ample opportunity before the Workers' Compensation Court to establish the medical necessity for the care and, therefore, he cannot argue that he was put in a worse situation than he would have been in had there not been a representation or concealment. Beery v. Grace Drilling, 260 M 157, 859 P2d 429, 50 St. Rep. 980 (1993).

Claimant Not Eligible to Receive Benefits Under Both Workers' Compensation Act and Occupational Disease Act (Now Repealed and Merged With Workers' Compensation Act): As held in Ridenour v. Equity Supply Co., 204 M 473, 665 P2d 783, 40 St. Rep. 1012 (1983), an eligible claimant may seek benefits under the Workers' Compensation Act or the Occupational Disease Act (now repealed and merged with Workers' Compensation Act); however, a claimant may not receive benefits under both Acts. Poppleton v. Rollins, Inc., 226 M 267, 735 P2d 286, 44 St. Rep. 644 (1987).

Allergic Contact Dermatitis as Injury and Disease — Claimant's Election of Remedy: Claimant developed allergic contact dermatitis unexpectedly after a single exposure to chemicals that triggered an immunological response creating antibodies that were his allergy, even though he had been exposed to the chemicals for many years without any response. This reaction met the tests of 39-71-119, constituting the allergy as an injury within the meaning of the Workers' Compensation Act, as well as an occupational disease within the meaning of the Occupational Disease Act (now repealed and merged with Workers' Compensation Act). Claimant could elect his remedy between the Acts. Bremer v. Buerkle, 223 M 495, 727 P2d 529, 43 St. Rep. 1942 (1986).

Application of Certain Workers' Compensation Act Provisions to MODA (Now Repealed and Merged With Workers' Compensation Act): With respect to the Montana Occupational Disease Act (MODA) (now repealed and merged with Workers' Compensation Act), the same rationale that applies to workers' compensation cases should apply, specifically: (1) the MODA (now repealed and merged with Workers' Compensation Act) statutes in effect on the last actual day of work of claimant are controlling; (2) because both Acts involve the same employer-employee relationship, the same rules of liberal construction apply; (3) MODA (now repealed and merged with Workers' Compensation Act) is to be administered so as to give the employee the greatest possible protection within the purposes of the Act; and (4) when MODA (now repealed and merged with Workers' Compensation Act) statutes are open to more than one interpretation, one of which is favorable to the employee and another against him, the statutes may be properly construed in a manner most favorable to the employee. Therefore, in liberally construing the statute in effect on the last actual day of work of claimant in the present case, section 92-1331, R.C.M. 1947 (39-72-308, MCA, repealed L. 1979), allowed a common-law right of action although the claimant was not eligible for compensation under MODA (now repealed and merged with Workers' Compensation Act). Gidley v. W.R. Grace & Co., 221 M 36, 717 P2d 21, 43 St. Rep. 616 (1986), overruling The Anaconda Co. v. District Court, 161 M 318, 506 P2d 81 (1973), and distinguished in Lockwood v. W.R. Grace & Co., 272 M 202, 900 P2d 314, 52 St. Rep. 705 (1995). Gidley was followed in Nelson v. Cenex, Inc., 2008 MT 108, 342 M 371, 181 P3d 619 (2008), and in Fleming v. Int'l Paper Co., 2008 MT 327, 346 M 141, 194 P3d 77 (2008), in that statutes in effect on the last actual day of work of claimant are controlling. However, see Murphy v. WestRock Co., 2018 MT 54, 390 Mont. 394, 414 P.3d 276, concluding that statements made in Fleming — that no exception exists to the general rule applying workers' compensation statutes in effect on the date of the injury — were overly broad and incorrect.

Workers' Compensation Benefits as Marital Assets — Error to Preclude as Matter of Law: The District Court found as a matter of law that workers' compensation benefits of the husband were not marital assets. The Supreme Court vacated the judgment, ordering an evidentiary hearing because it was unable to make an informed opinion from the record. At the hearing, findings should address the terms and purpose of the workers' compensation award. Blankenship v. Blankenship, 210 M 31, 682 P2d 1354, 41 St. Rep. 901 (1984).

Election by Claimant Between Occupational Disease Act (Now Repealed and Merged With Workers' Compensation Act) and Workers' Compensation Act Permissible: The fact that a person may have a compensable disease under the Occupational Disease Act (now repealed and merged with Workers' Compensation Act) does not preclude eligibility under the Workers' Compensation Act. Thus a claimant who meets the requirements of both acts may choose his remedy. The phrase "exclusive remedy" in 39-72-305 (now repealed) means that an employee does not have a common-law action against his employer. Ridenour v. Equity Supply Co., 204 M 473, 665 P2d 783, 40 St. Rep. 1012 (1983).

Jurisdiction and Nature of Workers' Compensation Court: A driver was injured while operating a tractor-trailer owned by one company and leased to another company that was in turn a division of a third company. The driver was awarded workers' compensation benefits. When the Workers' Compensation Uninsured Employers' Fund sought to collect the amount of the benefits from the company that owned the rig and from the third company, both companies denied any responsibility for the employment of the injured man. The Workers' Compensation Court and the Fund could not agree on the court's jurisdiction, and the instant appeal followed. The Supreme Court determined that the dispute involved benefits payable to the claimant, the

Workers' Compensation Court has exclusive jurisdiction, the legislative history relied upon by the Fund and the history of the court indicated that the jurisdiction of the Workers' Compensation Court went beyond adjudication of workers' claims only when a dispute is related to benefits payable to a claimant, and that the Workers' Compensation Court has declaratory power under the Montana Administrative Procedure Act. State ex rel. St. Uninsured Employers' Fund v. Hunt, 191 M 514, 625 P2d 539, 38 St. Rep. 421 (1981).

Purpose of Workers' Compensation:

The object of such legislation is to compensate injured workers for disabilities caused from industrial accidents. The law was not enacted to provide for payments of damages in tort-connected liability cases. The principle on which it is based is social insurance, to insure the injured worker against disability from connected injuries. Mahlum v. Broeder, 147 M 386, 412 P2d 572 (1966).

It is the theory of the workers' compensation law that loss occasioned by injury to a worker shall not be borne by the worker alone, but by the industry directly and indirectly through the cost of the product by the public. St. v. Indus. Accident Bd., 130 M 272, 301 P2d 954 (1956).

Act to Be Liberally Construed in Favor of the Claimant: The Workers' Compensation Act must be construed liberally in favor of the claimant, and to authorize recovery the law does not require demonstration or such a degree of proof as, excluding possibility of error, produces absolute certainty. Murphy v. The Anaconda Co., 133 M 198, 321 P2d 1094 (1958).

Allowance Permitted Under Act Does Not Provide Measure of Damages in Tort Action: In an action by an employee for negligence of employer who had not elected to be bound by the Workmen's Compensation Act (now Workers' Compensation Act), the compensation provided by the Act is not to be taken as a yardstick to measure plaintiff's damages, since the compensation is not based upon a cause of action for tort and omits entirely the element of pain and suffering. Chancellor v. Hines Motor Supply Co., 104 M 603, 69 P2d 764 (1937).

Cause of Action for Damages Not Created: The right to secure compensation for the results of an industrial accident, as provided for in the Workmen's Compensation Act (now Workers' Compensation Act), is not a cause of action for damages for the resulting injury. In determining the amount of an award of compensation under the Act, the element of pain and suffering has no place. Chisholm v. Vocational School for Girls, 103 M 503, 64 P2d 838 (1936).

Hospitalization of Employees — Act as Part of Contract: A contract entered into between a mining company and a hospital for the hospitalization of its employees under the Workmen's Compensation Act (now Workers' Compensation Act) must be construed in the light of the intent and purpose of the Act which became a part of the contract. Sample v. Murray Hosp., 103 M 195, 62 P2d 241 (1936).

Enforcement of Court's Decision: The Industrial Accident Board (now Department of Labor and Industry) is required to obey direction of District Court made in pursuance of the opinion of the Supreme Court, as against the contention that Writ of Mandate did not lie since the Board's functions in the matter were quasi-judicial, its functions under the remand being ministerial only. State ex rel. Miller v. Indus. Accident Bd., 102 M 206, 56 P2d 1087 (1936).

Act to Be Administered to Give Employee Greatest Protection: The Workmen's Compensation Act (now Workers' Compensation Act) was enacted for the benefit of the employee and the act implies that the first duty of the Industrial Accident Board (now Department of Labor and Industry) is to administer it so as to give the employee the greatest possible protection consistent with its purposes. Miller v. Aetna Life Ins. Co., 101 M 212, 53 P2d 704 (1936).

Effect to Be Given to Act as a Whole: In the construction of the Workmen's Compensation Act (now Workers' Compensation Act), all of its sections, as originally enacted or amended, must be considered together in such manner as to give effect to the Act as a whole. State ex rel. Roundup Coal Min. Co. v. Indus. Accident Bd., 94 M 386, 23 P2d 253 (1933).

Theory of Act: The theory of the Workmen's Compensation Act (now Workers' Compensation Act) is that loss occasioned by injury to the worker shall not be borne by him alone, but directly by the industry and indirectly by the public, the same as is the deterioration of the buildings, machinery, and other appliances necessary to enable the employer to carry on the particular industry. Murray Hosp. v. Angrove, 92 M 101, 10 P2d 577 (1932).

Compensation to Be Awarded Only When Provided For: The purpose of the Workmen's Compensation Act (now Workers' Compensation Act) is to provide that the loss occasioned to an employee by reason of an injury shall not be borne by him alone, but directly by the industry and indirectly by the public. Its provisions must be liberally construed, but in so construing it the Industrial Accident Board (now Department of Labor and Industry) and the courts may not disregard its plain provisions or award compensation in a case for which no provision is made. Kerns v. Anaconda Copper Min. Co., 87 M 546, 289 P 563 (1930). See also Betor v. Nat'l Biscuit

Co., 85 M 481, 280 P 641 (1929), and Dosen v. E. Butte Copper Min. Co., 78 M 579, 254 P 880 (1927).

Absolute Remedy: It is competent for a party to waive his right to have a cause of action determined by a court before it actually arises, especially where the Legislature has provided a substitute remedy, as under the Workers' Compensation Act, which renders his right to relief absolute. Shea v. North-Butte Min. Co., 55 M 522, 179 P 499 (1919).

Constitutionality: The rule that a statute will not be declared invalid on constitutional grounds unless its invalidity is made to appear beyond a reasonable doubt applies with peculiar force where, as in the case of the Workmen's Compensation Act (now Workers' Compensation Act), the statute seems to have been found satisfactory after a 4-year period of operation by those directly affected by it, namely the employer and the employee. The Workmen's Compensation Act is not repugnant to the state constitution. Shea v. North-Butte Min. Co., 55 M 522, 179 P 499 (1919).

Applicable to County Employees: The Workmen's Compensation Act (now Workers' Compensation Act) is applicable to counties and county employees, and as such it is not class legislation, nor is it in violation of the constitutional prohibition against donations to individuals. Lewis & Clark County v. Indus. Accident Bd., 52 M 6, 155 P 268 (1916).

OCCUPATIONAL DISEASE ACT DECISIONS PRIOR TO 2005 MERGER

Work Contributing to Aggravated Health Conditions — Compensable Occupational Disease: After leaving employment as a plumber and pipefitter, Kratovil filed a workers' compensation claim and an occupational disease claim. Kratovil suffered pain and numbness in his hands and fingers for many years after working with heavy equipment. Kratovil was also injured in a motorcycle accident prior to leaving employment. The employer's insurer denied liability, but the Workers' Compensation Court held the insurer liable for the occupational disease, and the insurer appealed. The Supreme Court held that, based on the evidence, Kratovil's hand and wrist condition was an occupational disease that was not significantly affected by the motorcycle accident. Kratovil's employment significantly aggravated or contributed to the occupational disease and was therefore compensable. The Workers' Compensation Court was affirmed. Kratovil v. Liberty NW. Ins. Corp., 2008 MT 443, 347 M 521, 200 P3d 71 (2008).

Improper Apportionment of Total Disability Benefits for Total Wage Loss as Result of Occupational Disease — Schmill Applied: In its order of determination, the Department determined that Hand was entitled to 25% of total disability payments if Hand suffered a total wage loss as the result of an occupational disease. However, Hand's case was still pending when the Supreme Court decided Schmill v. Liberty NW. Ins. Corp., 2003 MT 80, 315 M 51, 67 P3d 290 (2003), which held that the apportionment of benefits for a work-related injury was statutorily prohibited and violated the equal protection clause of the Montana Constitution. Thus, the Supreme Court remanded Hand's case and ordered that Hand be awarded 100% of his total disability payments if he suffered a total wage loss as the result of an occupational disease. Hand v. Uninsured Employers' Fund, 2004 MT 336, 324 M 196, 103 P3d 994 (2004).

Improper Retroactive Application of Statute — Failure to Timely Address Medical Evaluator's Report — Reversal Warranted: The Workers' Compensation Court determined that the 1999 version of 39-72-602 (now repealed) applied to Hand's case and that, upon receipt of a medical evaluator's report, Hand's case was considered a dispute subject to jurisdiction of the Workers' Compensation Court. However, the court improperly applied the 1999 version of the statute because the 1997 version governed the proceedings in Hand's case. The 1997 version required the court to address the issuance of the medical evaluator's report, which was received 4 months prior to the effective date of the 1999 version of 39-72-602 (now repealed), and required parties to request a hearing within 20 days pursuant to 39-72-612 (now repealed). Hand perfected the appeal, but the uninsured employers' fund did not, so the fund lost the opportunity to request a review of the Department's findings and the court erred in allowing the fund to raise substantive affirmative defenses on an unperfected appeal. For these reasons, the case was remanded to the Workers' Compensation Court for further proceedings. Hand v. Uninsured Employers' Fund, 2004 MT 336, 324 M 196, 103 P3d 994 (2004), following Epperson v. Willis Corroon Administrative Serv. Corp., 281 M 373, 934 P2d 1034 (1997).

When Insurer Liable for Coverage for Occupational Disease: Pursuant to 39-72-303 (now repealed), liability rests with the insurer providing coverage at the earlier of the time that an occupational disease was first diagnosed or at the time that the employee knew or should have known that the condition was the result of an occupational disease. In re Abfalder v. Nationwide Mut. Fire Ins. Co., 2003 MT 180, 316 M 415, 75 P3d 1246 (2003), distinguishing Belton v. Hartford

Accident & Indem. Co., 202 M 384, 658 P2d 405 (1983), and Stangler v. Home Ins. Co., 229 M 251, 746 P2d 99 (1987).

Similarly Situated Classes of Workers Treated Differently Under Workers' Compensation Act and Occupational Disease Act — Occupational Disease Permanent Impairment Award Violative of Equal Protection — Retroactive Applicability: Schmill suffered an occupational disease arising from employment, resulting in a 3% physical impairment rating. In spite of the limitations, Schmill did not suffer an actual wage loss as a result of the occupational disease, so Schmill requested an impairment award pursuant to the Workers' Compensation Act because the Occupational Disease Act of Montana does not provide partial disability or impairment benefits. Schmill's petition alleged that plaintiff was entitled to the same impairment award available under the Workers' Compensation Act. Subsequently, the Workers' Compensation Court issued a decision (affirmed in Stavenjord v. Mont. St. Fund, 2003 MT 67, 314 M 466, 67 P3d 229 (2003)) requiring that permanent partial disability benefits be paid to occupational disease claimants pursuant to the Workers' Compensation Act. Based on that decision, the insurer agreed to pay Schmill's impairment award, but deducted 20% from the award for nonoccupational factors that contributed to the disability, pursuant to 39-72-706 (now repealed). Schmill claimed entitlement to full payment pursuant to the Workers' Compensation Act, and the Workers' Compensation Court agreed, concluding that full payment was warranted because 39-72-706 (now repealed) violated equal protection guarantees by providing disparate treatment to workers injured and workers with occupational diseases. The insurer appealed, but the Supreme Court affirmed. Apportioning a permanent impairment award under the Occupational Disease Act of Montana while providing a full award for a permanent impairment under the Workers' Compensation Act is not rationally related to a legitimate government interest, and by treating similarly situated classes of workers differently, 39-72-706 (now repealed) is violative of the constitutional guarantee of equal protection. Schmill v. Liberty NW. Ins. Corp., 2003 MT 80, 315 M 51, 67 P3d 290 (2003). On remand, the Workers' Compensation Court held that the 2003 Schmill rule applied retroactively, and on appeal, the Supreme Court affirmed. A retroactive application of the rule that the former Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) cannot allow for apportionment deductions for nonoccupational factors if the Workers' Compensation Act does not allow apportionment deductions places workers whose occupational disease arose before the decision on equal footing with those whose occupational disease arose subsequently. A retroactive application of the Schmill rule does not retard the rule's operation, and future claimants will not find it more difficult to receive nonapportioned awards, so the 2003 Schmill decision applies retroactively to all cases not final or settled at the time of its issuance. Schmill v. Liberty NW. Ins. Corp., 2005 MT 144, 327 M 293, 114 P3d 204 (2005), following Dempsey v. Allstate Ins. Co., 2004 MT 391, 325 M 207, 104 P3d 483 (2004).

Following the 2005 Schmill decision, the Workers' Compensation Court issued summonses to over 500 insurers regarding their obligation to identify and pay past Schmill-type claims. Numerous insurers appealed on grounds that enforcement of the Schmill decisions violated the insurers' due process rights inasmuch as the summonses failed to satisfy notice requirements because the insurers were not parties to the Schmill cases. Nevertheless, the Supreme Court affirmed. Once all potential beneficiaries were granted a vested right pursuant to the Schmill decisions, a corresponding duty to pay on the part of all insurers arose as a matter of law. Schmill v. Liberty NW. Ins. Corp., 2009 MT 430, 354 M 88, 223 P3d 842 (2009), following Murer v. St. Comp. Mut. Ins. Fund, 283 M 210, 942 P2d 69 (1997), and Ruhd v. Liberty NW. Ins. Corp., 2004 MT 236, 322 M 478, 97 P3d 561 (2004).

Disparate Partial Disability Benefits Under Workers' Compensation Act and Occupational Disease Act Violative of Equal Protection: Plaintiff contracted an occupational disease. Because of the extent of the impairment, plaintiff would have been entitled to a partial disability benefit of $27,027 if the entitlement was calculated under 39-71-703 of the Workers' Compensation Act, but the maximum that could be recovered under 39-72-405 (now repealed) was $10,000. Plaintiff argued that 39-72-405 (now repealed) violated the right to equal protection by limiting compensation to less than would have been available for the same disability under 39-71-703. The Supreme Court agreed. Providing partial disability benefits to a person in plaintiff's situation in the amount of $27,027 under the Workers' Compensation Act but limiting plaintiff's wage supplement to $10,000 under the Occupational Disease Act of Montana violated the constitutional guarantee of equal protection under the law. Stavenjord v. Mont. St. Fund, 2003 MT 67, 314 M 466, 67 P3d 229 (2003), following Henry v. St. Comp. Ins. Fund, 1999 MT 126, 294 M 449, 982 P2d 456 (1999).

Refusal of Workers' Compensation Court to Reopen Case for Introduction of Further Evidence of Historical and Anatomical Differences Between Injuries and Occupational Diseases Not Abuse of Discretion: After an occupational disease case was submitted to the Workers' Compensation Court, the state sought to reopen the case for the introduction of further evidence of the historical and anatomical differences between injuries and occupational diseases. The court declined to reopen the record, and the state appealed. The Supreme Court affirmed, noting that the state could have offered the evidence prior to the close of evidence. Further, the state did not demonstrate the materiality of the evidence in support of the motion to reopen the case. The Workers' Compensation Court did not abuse its discretion in declining to reopen the case for additional evidence. Stavenjord v. Mont. St. Fund, 2003 MT 67, 314 M 466, 67 P3d 229 (2003). See also Cole v. Helena Light & Ry., 49 M 443, 143 P 974 (1914).

Failure to Notify Employer of Injury Within Statutory Time Period — Claim Precluded — Occupational Disease Act Inapplicable to Single Incident: Hanks suffered a back injury while working as a home-care aide, but did not report the incident to the employer until more than 5 years later, when Hanks sought workers' compensation benefits. Those benefits were denied because Hanks did not report the incident within 30 days as required by 39-71-603. Hanks was then granted an emergency trial, and she claimed that the Workers' Compensation Act did not apply because the incident was not caused by an injury, but rather by an occupational disease. That claim was also dismissed with prejudice because Hanks did not comply with the notice requirement, and Hanks appealed. The Supreme Court affirmed. Hanks' problem was properly characterized as an injury rather than an occupational disease because the incident was a single identifiable incident occurring in a single work shift. Hanks was not entitled to bring an occupational disease claim because the injury did not occur on more than a single day, so the occupational disease claim was properly dismissed with prejudice. Because Hanks failed to notify the employer of the injury within 30 days, the workers' compensation claim was also dismissed as untimely. Hanks v. Liberty NW. Ins. Corp., 2002 MT 334, 313 M 263, 62 P3d 710 (2002).

Failure to Provide Vocational Rehabilitation Benefits — Occupational Disease Act Violative of Equal Protection: Henry's on-the-job injury claim was accepted under the Occupational Disease Act of Montana, but his request for rehabilitation benefits after reaching maximum healing was denied. On appeal, the Supreme Court found that providing rehabilitation benefits to workers covered by the Workers' Compensation Act, but not to workers covered by the Occupational Disease Act of Montana, was not rationally related to the legitimate government interest of returning workers to work as soon as possible after suffering a work-related injury. The historical justification for treating workers differently under the Workers' Compensation Act and the Occupational Disease Act of Montana no longer exists. Therefore, to the extent that it fails to provide vocational rehabilitation benefits as are provided under the Workers' Compensation Act, the Occupational Disease Act of Montana violates the equal protection clause, Art. II, sec. 4, of the Montana Constitution. Henry v. St. Comp. Ins. Fund, 1999 MT 126, 294 M 449, 982 P2d 456, 56 St. Rep. 506 (1999), distinguishing Eastman v. Atlantic Richfield Co., 237 M 332, 777 P2d 862, 46 St. Rep. 845 (1989).

Causal Test for Compensability — Whether Conditions Aggravated Disease: Occupational aggravations of preexisting, nonoccupational diseases are compensable, as are occupational diseases that are aggravated by nonoccupational factors. The test for compensability is whether occupational factors significantly aggravated a preexisting condition, not whether occupational factors played the major or most significant role in causing the resulting disease. Polk v. Planet Ins. Co., 287 M 79, 951 P2d 1015, 54 St. Rep. 1508 (1997).

Reversal for Failure to Apply Appropriate Test for Causation: Of the eight doctors who examined an employee, four said that he had an occupational disease. Three of the other four doctors said that he had no occupational disease, but their testimony would support a finding that work conditions aggravated or contributed to his nonoccupational pulmonary condition. These three doctors believed that the work conditions had to be the major or primary factor causing the medical condition. The appropriate test was whether those work conditions aggravated the medical condition. The hearings examiner wrongly applied the same erroneous standard as these three doctors and concluded that no compensation was due. The Workers' Compensation Court erred in not overruling the hearings examiner on this point, and that court's decision affirming the hearings examiner's decision was reversed. Polk v. Planet Ins. Co., 287 M 79, 951 P2d 1015, 54 St. Rep. 1508 (1997).

Workers' Compensation Court Review, for Errors of Law, of Test for Proximate Causation of Disease: The Workers' Compensation Court erred in reviewing findings, conclusions, and the order of the hearings examiner of the Department of Labor and Industry only for erroneous findings of fact. Whether the hearings examiner applied the appropriate test for proximate causation of the disease was a question of law. Thus, pursuant to 39-72-612 (now repealed), the court should also have reviewed to determine whether the decision was affected by error of law. Polk v. Planet Ins. Co., 287 M 79, 951 P2d 1015, 54 St. Rep. 1508 (1997).

Last Injurious Exposure Rule: As set out in Caekaert v. St. Comp. Mut. Ins. Fund, 268 M 105, 885 P2d 495 (1994), Montana statutorily recognizes a version of the last injurious exposure rule in occupational disease cases. Section 39-72-303 (now repealed) provides that when compensation is payable for an occupational disease, the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease. For the rule to apply, there must be evidence of a second injury or injurious exposure that materially or substantially contributed to the injury. In the present case, Deschamps injured his back while in the employ of Champion International and eventually returned to work with no restrictions. The Champion International mill was subsequently purchased by Stimson Lumber Company, and Deschamps continued to work at the mill under changed work activities that resulted in further injury to his back. Deschamps sought additional benefits from Champion International, which denied liability. The Workers' Compensation Court properly held that Deschamps' back disease was significantly aggravated by his employment at Stimson Lumber Company and, pursuant to the last injurious exposure rule, correctly assigned liability to Stimson, the employer for whom Deschamps was working at the time of the last injurious exposure. Liberty NW. Ins. Corp. v. Champion Int'l Corp., 285 M 76, 945 P2d 433, 54 St. Rep. 1051 (1997). See also Harrison v. Liberty NW. Ins. Corp., 2008 MT 102, 342 M 326, 181 P3d 590 (2008).

Inability to Pay for Second Medical Examination Held Not to Deny Access to Justice: Grooms filed a workers' compensation claim with her insurer, the State Fund, alleging that she suffered from a skin allergy condition. The State Fund denied liability under the Workers' Compensation Act and requested the Department of Labor and Industry to process the claim under the Occupational Disease Act of Montana by providing her with a medical examination. Subsequently, Grooms claimed that her inability to pay for a second medical examination denied her right to access to justice. The Workers' Compensation Court concluded that when her claim was denied under the Workers' Compensation Act, Grooms retained the right under 39-72-611 (now repealed) to have her claim resolved by the Workers' Compensation Court. Therefore, Grooms was not precluded from pursuing her claim and thereby denied access to justice. The Supreme Court affirmed the Workers' Compensation Court, noting that when her claim was denied, Grooms was informed by an order of the Department that she had the right to request a second examination under 39-72-602 (now repealed), which she would pay for, and a right to request a hearing pursuant to 39-72-611 (now repealed) before the Department issued its final determination. The Supreme Court noted that Grooms' right to a hearing to pursue her claim was not dependent upon a second medical examination. Thus, she was not denied access to justice by the requirement that she pay for any second medical examination. Grooms v. Ponderosa Inn, 283 M 459, 942 P2d 699, 54 St. Rep. 725 (1997).

No Equal Protection Violation Under Workers' Compensation Act and Occupational Disease Act Requirements for Medical Examination: Grooms filed a workers' compensation claim with her insurer, the State Fund, alleging that she suffered from a skin allergy condition. The State Fund denied liability and requested that the Department of Labor and Industry process her claim under the Occupational Disease Act of Montana by scheduling a medical examination for her by a member of a panel of physicians. Grooms argued before the Supreme Court that her rights to equal protection were infringed by the requirement that if she requested a second medical examination, she would have to pay for it, whereas if her claim had been processed under the Workers' Compensation Act, then 39-71-605 requires the insurer or the Department to pay for the cost of the examination. The Supreme Court held that Grooms misinterpreted the statutes because 39-71-605 does not allow a workers' compensation claimant to request and obtain an examination at the insurer's expense but, rather, provides that an insurer or the Department may require the claimant to submit to physical examinations from time to time and provides that the entity requesting the examination must pay for it. As a result, the Supreme Court held that there was no disparate treatment between the two Acts. In response to Grooms' argument that the Occupational Disease Act violates the state constitutional equal protection clause by requiring a mandatory physical examination without providing for a waiver of the costs of the examination for an indigent claimant, the Supreme Court again held that Grooms misapprehended the statutes because 39-72-602 and 39-72-608 (both now repealed) do not mandate an examination at the claimant's expense but provide that it is mandatory for a claimant to submit to a medical examination and require the claimant to pay for an examination only if the claimant is dissatisfied with the results of the first examination and requests a second examination. Because a second examination is not mandatory but optional at the choice of the claimant, the Supreme Court held that Grooms' right of equal protection was not violated. Grooms v. Ponderosa Inn, 283 M 459, 942 P2d 699, 54 St. Rep. 725 (1997).

Workers' Compensation Claimant's Right to Choose Treating Physician Not Denied by Department of Labor and Industry Selection of Panel Physician for Diagnosis: Grooms filed a workers' compensation claim with her insurer, the State Fund, alleging that she suffered from a skin allergy condition. The State Fund denied liability and requested that the Department of Labor and Industry process her claim under the Occupational Disease Act of Montana by scheduling a medical examination for her by a member of a panel of physicians. Grooms objected to the first designated physician, and another was designated. The physician concluded that Grooms was suffering from an allergic condition that could not be definitively attributed to her employment. The diagnosis was given to Grooms, and she was notified of her right to have another medical evaluation done by a panel physician at her own expense. In the Workers' Compensation Court, Grooms alleged that her right to choose her own treating physician under 33-22-111 was violated by 39-72-602 (now repealed), pursuant to which the Department chose a panel physician to conduct an examination. However, the Workers' Compensation Court held against her. The Supreme Court affirmed the Workers' Compensation Court, holding that the choice of a treating physician under 33-22-111 has nothing to do with the selection of an examining physician from a panel by the Department. The purpose of the examination by a physician chosen from the panel is for consultation with an independent expert to determine if the claimant is suffering from an occupational disease and not for the purpose of treatment. The Supreme Court distinguished the case relied on by Grooms, Stordalen v. Ricci's Food Farm, 261 M 256, 862 P2d 393 (1993), by noting that the case involved neither 39-72-602 (now repealed) nor examination by a medical panel physician. Grooms v. Ponderosa Inn, 283 M 459, 942 P2d 699, 54 St. Rep. 725 (1997).

Rehabilitation Benefits Provided Under Workers' Compensation Act Inapplicable to Occupational Disease Act: Loss suffered from carpal tunnel syndrome and filed an occupational disease claim, which was paid by the insurer. Later, Loss sought total rehabilitation benefits pursuant to 39-71-2001 (renumbered 39-71-1006), which were denied by the insurer, and the denial was affirmed by the Workers' Compensation Court. The Supreme Court held that rehabilitation benefits payable under the Workers' Compensation Act pursuant to 39-71-2001 (renumbered 39-71-1006) are not available to a claimant proceeding under the Occupational Disease Act of Montana. The Supreme Court noted in response to Loss's argument that 39-71-2001 (renumbered 39-71-1006) is a "stand alone" section that just happens to be codified in Title 39, ch. 71, but that applies with equal force to Title 39, ch. 72; that the Legislature had directed that 39-71-2001 (renumbered 39-71-1006) be codified as an integral part of Title 39, ch. 71; and that the provisions of Title 39, ch. 71, should apply to that section. The Supreme Court also distinguished Ingbretson v. La. Pac. Corp., 272 M 294, 900 P2d 912 (1995), by noting that 39-72-402 (now repealed), the section relied on by the Supreme Court in that case to apply Title 39, ch. 71, procedural sections to Title 39, ch. 72, stated that the "practice and procedure" of one act applied to the other. The Supreme Court concluded that a substantive section such as 39-71-2001 (renumbered 39-71-1006) dealing with benefits did not fall within the "practice and procedure" language of 39-72-402 (now repealed) to be applied to the Occupational Disease Act of Montana. Loss v. Lumbermens Mut. Cas. Co., 282 M 80, 936 P2d 313, 54 St. Rep. 251 (1997).

Occupational Disease Claim Barred by Statute of Limitations: Grenz filed an occupational disease claim in 1992, seeking benefits for degenerative arthritis in his hands, wrists, shoulders, elbows, ankles, and knees. The hearings examiner found, and the Supreme Court affirmed, that Grenz knew as early as 1988 that he was suffering from degenerative arthritis and that his total disability was caused by an occupational disease. The 1992 claim was thus time-barred by the statute of limitations in 39-72-403 (now repealed). Grenz v. Fire & Cas. of Conn., 278 M 268, 924 P2d 264, 53 St. Rep. 898 (1996).

Physical Inability to Perform Work as Triggering Entitlement to Total Disability Benefits: Only when a person is unable to physically perform any employment is that person entitled to either temporary total disability benefits or permanent total disability benefits under the Occupational Disease Act of Montana. Notwithstanding Smart's argument regarding the definition of "worker's job pool" that was set out in a prior section and then repealed, even though Smart could not return to his former work, he was physically able to perform other available work for which he was qualified and thus was not entitled to permanent total disability benefits under 39-72-701 (now repealed). The Workers' Compensation Court properly limited Smart's compensation to an award of up to $10,000, pursuant to 39-72-405 (now repealed). Smart v. Mont. Historical Soc'y, 277 M 89, 918 P2d 670, 53 St. Rep. 554 (1996).

Application of Statute to Final Order Contemplated by Administrative Rule: Epperson filed a claim for occupational disease benefits, which was denied by the Department of Labor and Industry in an "order of determination" issued by the Department. This order also notified Epperson of her right to request a hearing within 20 days pursuant to 39-72-612 (now repealed). Epperson did not request a hearing within 20 days but did request one in January 1996. The Workers' Compensation Court held that the request was timely pursuant to Department rules. The Supreme Court affirmed, holding that the statute contemplates a hearing only after a final order and that final order was not the order issued by the Department on November 27. The statute contemplates a final order, and because the Department's rules allow an "administrative review" by the Department within 90 days of a determination, the order issued by the Department did not become a final order for the purposes of the statute until after the administrative review was held or after the time for the review had expired. Under the Department's rules, Epperson had 90 days to request that review. Her application for a hearing waived that review, thus making the order of determination final on the date of her request for a hearing and thereby starting the 20-day period to request a hearing. Epperson v. Willis Corroon Administrative Serv. Corp., 281 M 373, 934 P2d 1034, 54 St. Rep. 226 (1997).

Exclusive Remedy Provisions Precluding Negligence Suit Following Successful Remedy Under Occupational Disease Act: Torres was injured by chemicals while pursuing a doctorate of philosophy in chemistry at Montana State University. She filed a workers' compensation claim, which was denied, but the parties later entered into a disputed liability settlement under the Occupational Disease Act of Montana. Torres then brought suit against the state for negligence. The District Court correctly dismissed the negligence claim, holding that the exclusivity provisions of the Workers' Compensation Act and the Occupational Disease Act of Montana precluded pursuit of the tort claim. The only exception to the exclusivity provisions is in 39-71-413, regarding intentional or malicious acts or omissions by the employer or a coemployee. Torres v. St., 273 M 83, 902 P2d 999, 52 St. Rep. 833 (1995).

Award of Costs and Attorney Fees Proper: When the Workers' Compensation Court did not err in finding that the employee was entitled to benefits, substantial credible evidence supported the conclusion that denial of benefits was unreasonable and that the employee was entitled to costs and attorney fees. Ingbretson v. Louisiana-Pacific Corp., 272 M 294, 900 P2d 912, 52 St. Rep. 764 (1995).

Penalty Not Limited to Cases Under Workers' Compensation Act: The Workers' Compensation Court had direct jurisdiction when the case was not an appeal from a final determination by the Department of Labor and Industry but was a benefits dispute in which it had already been established that the employee suffered an occupational disease. Because the Occupational Disease Act of Montana provides that practice and procedures prescribed in the Workers' Compensation Act apply to proceedings under the Occupational Disease Act, the court did not err in applying the penalty. Ingbretson v. Louisiana-Pacific Corp., 272 M 294, 900 P2d 912, 52 St. Rep. 764 (1995).

No Authority Under Occupational Disease Act for Award of Assessments and Penalties: The Workers' Compensation Act, Title 39, ch. 71, authorizes the Workers' Compensation Court to increase by 20% the full amount of benefits due a claimant if an insurer unreasonably delays or refuses to pay benefits. The Occupational Disease Act of Montana, codified in this chapter, contains no similar penalty provision. The court's broad jurisdiction under the Workers' Compensation Act differs substantially under the Occupational Disease Act and cannot be superimposed upon and override the limited jurisdiction under the latter. Thus, the court did not err in denying a claimant's petition for a penalty based on an employer's unreasonable delay in accepting liability for an occupational disease claim. Wunderlich v. Lumbermens Mut. Cas. Co., 270 M 404, 892 P2d 563, 52 St. Rep. 251 (1995).

Illness Neither Arising Out of nor Aggravated by Employment: Hughes submitted a claim for benefits for dermatitis. Hughes argued that the dermatitis was aggravated by the travel required by her job. The Supreme Court affirmed the lower court's finding that the condition was a preexisting condition intrinsic to Hughes and that although the condition was aggravated by the travel requirement, it was noncompensable because the dermatitis was not job-related in itself and travel did not constitute an aggravating factor. Hughes v. Dept. of Labor and Industry, 253 M 499, 833 P2d 1099, 49 St. Rep. 568 (1992).

Aggravation as Factor Necessitating Proportional Reduction in Compensation: Conflicting though substantial evidence showed that Nelson suffered from an occupational disease related to prior back problems that were aggravated by cumulative trauma from his lifting work at

Semitool, Inc. Under 39-72-706 (now repealed), compensation for the disease was properly reducible by the proportional amount that the disease aggravated or accelerated the disability. Nelson v. Semitool, Inc., 252 M 286, 829 P2d 1, 49 St. Rep. 253 (1992).

Late Claim Caused by Misstatement of Employer or Insurer — Equitable Estoppel Allows Claim: Affirming the legal maxim that no one can take advantage of his own wrong, the Supreme Court applied to the Occupational Disease Act of Montana the concept set out in Davis v. Jones, 203 M 464, 661 P2d 859 (1983), that when misstatements by an employer or insurer prevent a claimant from filing a claim in a timely manner or mislead the claimant into believing that no claim can or need be filed, the doctrine of equitable estoppel applies to toll the limitation period and allow filing of the claim. Mellem v. St. Comp. Ins. Fund, 237 M 439, 774 P2d 390, 46 St. Rep. 932 (1989), followed in Shelley v. USF&G, 252 M 106, 827 P2d 1288, 49 St. Rep. 277 (1992).

Claimant Suffering Occupational Disease: Claimant, who has a history of asthma, was exposed to an unusually large and concentrated dose of fumes while working as a welder. He was hospitalized briefly, and, following treatment, his health was returned to its preexacerbation state. Claimant is not entitled to compensation under the Workers' Compensation Act for the injury he suffered when he inhaled the fumes because his health was returned to its preexacerbation state. However, he is entitled to compensation under the Occupational Disease Act. Eastman v. Atl. Richfield Co., 237 M 332, 777 P2d 862, 46 St. Rep. 845 (1989), distinguished in Henry v. St. Comp. Ins. Fund, 1999 MT 126, 294 M 449, 982 P2d 456, 56 St. Rep. 506 (1999).

Occupational Disease Act — Equal Protection: Claimant, who has a history of asthma, was exposed to an unusually large and concentrated dose of fumes while working as a welder. He was hospitalized briefly, and, following treatment, his health was returned to its preexacerbation state. Claimant is not entitled to compensation under the Workers' Compensation Act for the injury he suffered during the incident in which he inhaled fumes because his health was returned to its preexacerbation state. However, he is entitled to compensation under the Occupational Disease Act. The Occupational Disease Act does not violate the equal protection clause of the state or federal constitution because there is a rational basis for the benefits awarded under the Act. Eastman v. Atl. Richfield Co., 237 M 332, 777 P2d 862, 46 St. Rep. 845 (1989), distinguished in Henry v. St. Comp. Ins. Fund, 1999 MT 126, 294 M 449, 982 P2d 456, 56 St. Rep. 506 (1999).

Claimant Not Eligible to Receive Benefits Under Both Workers' Compensation Act and Occupational Disease Act: As held in Ridenour v. Equity Supply Co., 204 M 473, 665 P2d 783, 40 St. Rep. 1012 (1983), an eligible claimant may seek benefits under the Workers' Compensation Act or the Occupational Disease Act; however, a claimant may not receive benefits under both Acts. Poppleton v. Rollins, Inc., 226 M 267, 735 P2d 286, 44 St. Rep. 644 (1987).

No Jurisdiction to Grant Occupational Disease Benefits: Claimant filed a petition for hearing under the Workers' Compensation Act alleging an industrial injury. Because the procedures for obtaining workers' compensation or occupational disease benefits differ, the Workers' Compensation Court had jurisdiction to determine entitlement to workers' compensation benefits but lacked jurisdiction to find that claimant suffered from an occupational disease and was entitled to occupational disease benefits. Cocking v. Hillhaven Corp., 225 M 369, 732 P2d 1333, 44 St. Rep. 309 (1987).

Allergic Contact Dermatitis as Injury and Disease — Claimant's Election of Remedy: Claimant developed allergic contact dermatitis unexpectedly after a single exposure to chemicals that triggered an immunological response creating antibodies that were his allergy, even though he had been exposed to the chemicals for many years without any response. This reaction met the tests of 39-71-119, constituting the allergy as an injury within the meaning of the Workers' Compensation Act, as well as an occupational disease within the meaning of the Occupational Disease Act. Claimant could elect his remedy between the Acts. Bremer v. Buerkle, 223 M 495, 727 P2d 529, 43 St. Rep. 1942 (1986).

Application of Certain Workers' Compensation Act Provisions to MODA: With respect to the Montana Occupational Disease Act (MODA), the same rationale that applies to workers' compensation cases should apply, specifically: (1) the MODA statutes in effect on the last actual day of work of claimant are controlling; (2) because both Acts involve the same employer-employee relationship, the same rules of liberal construction apply; (3) MODA is to be administered so as to give the employee the greatest possible protection within the purposes of the Act; and (4) when MODA statutes are open to more than one interpretation, one of which is favorable to the employee and another against him, the statutes may be properly construed in a manner most favorable to the employee. Therefore, in liberally construing the statute in effect on the last actual day of work of claimant in the present case, section 92-1331, R.C.M. 1947 (39-72-308, MCA, repealed L. 1979), allowed a common-law right of action although the claimant was not eligible for compensation under MODA. Gidley v. W.R. Grace & Co., 221 M 36, 717 P2d 21, 43 St. Rep. 616 (1986), overruling The Anaconda Co. v. District Court, 161 M 318, 506 P2d 81 (1973), and distinguished in Lockwood v. W.R. Grace & Co., 272 M 202, 900 P2d 314, 52 St. Rep. 705 (1995).

Psychological Disorder as Occupational Disease: During McMahon's employment at The Anaconda Company's refinery in Great Falls, he was continuously exposed to moderate levels of sulphuric acid, organic arsenic, zinc, lead, copper, tellurium, asbestos, silver, dust, and other compounds. McMahon was diagnosed as having "chronic obstructive lung disease", "laryngeal irritation", "leukoplakia of the vocal cords", and "severe anxiety" and other psychological problems. His physical ailments resulted from the exposure to fumes and from a two-pack-a-day cigarette habit. He was not totally disabled as a result of his physical impairment, but the Occupational Disease Act includes inability to work in the normal labor market by reason of a psychological disorder stemming from an occupational disease. The case is remanded to determine whether the claimant is totally disabled due to his physical and psychological disorders. McMahon v. The Anaconda Co., 208 M 482, 678 P2d 661, 41 St. Rep. 480 (1984).

Election by Claimant Between Occupational Disease Act and Workers' Compensation Act Permissible: The fact that a person may have a compensable disease under the Occupational Disease Act does not preclude eligibility under the Workers' Compensation Act. Thus a claimant who meets the requirements of both acts may choose his remedy. The phrase "exclusive remedy" in 39-72-305 (now repealed) means that an employee does not have a common-law action against his employer. Ridenour v. Equity Supply Co., 204 M 473, 665 P2d 783, 40 St. Rep. 1012 (1983).

Allergy: When an individual allergy is aggravated by work experience in the ordinary course of work, the result is an occupational disease. Greger v. St. Ins. Fund, 180 M 348, 590 P2d 1121, 36 St. Rep. 268 (1979).

Attorney Fees: When it is found that a claimant suffered some disease under this chapter, he is not entitled to attorney fees under 39-71-613. Greger v. St. Ins. Fund, 180 M 348, 590 P2d 1121, 36 St. Rep. 268 (1979).

Definition of Occupational Disease: If a disease is caused by the conditions of employment and these conditions carry with them a risk of incurring the disease greater than that which prevails in employment and living conditions in general, then such disease is an occupational disease within the scope of this chapter. Compensation is not to be barred because the risk is not generally recognized or because only those unusually susceptible or predisposed to a given disease will contract it. Greger v. St. Ins. Fund, 180 M 348, 590 P2d 1121, 36 St. Rep. 268 (1979), distinguished in Bremer v. Buerkle, 223 M 495, 727 P2d 529, 43 St. Rep. 1942 (1986).

Purpose of Act: The purpose of the Occupational Disease Act of Montana is to compensate workers who contract a disease or have inert diseases when no "accident" is involved or when there is no "injury" as defined in 39-71-119. Greger v. St. Ins. Fund, 180 M 348, 590 P2d 1121, 36 St. Rep. 268 (1979), distinguished in Bremer v. Buerkle, 223 M 495, 727 P2d 529, 43 St. Rep. 1942 (1986).

Common-Law Action Denied: Provisions of the Workmen's Compensation Act (now Workers' Compensation Act) are exclusive, and therefore defendant who was not eligible to receive compensation because of partial disability due to occupational disease may not pursue his common-law remedy against his employer. Dayton v. Boeing Co., 389 F. Supp. 433 (D.C. Mont. 1975).

Radiation Injury — Exclusive Remedy: Plaintiff's injuries caused as a result of his exposure to electromagnetic pulses and laser radiations while employed with the defendant were compensable under this act, and common-law remedies were barred under 39-72-102 (now repealed). Dayton v. Boeing Co., 389 F. Supp. 433 (D.C. Mont. 1975).

Exclusive Remedy: Prior to the 1985 amendment, claimant who was covered by the Occupational Disease Act of Montana but who did not meet the requirements set forth in 39-72-405 (now repealed), including the number of workshifts required, was precluded from bringing lawsuit to recover for his alleged ailments. The Anaconda Co. v. District Court, 161 M 318, 506 P2d 81 (1973).

Proof of Claim: Determination by Industrial Accident Board (now State Fund) that worker was not entitled to benefits for silicosis was not an exclusion of him from the act but was a finding he had not proved his claim. The Anaconda Co. v. District Court, 161 M 318, 506 P2d 81 (1973).

Silicosis: Determination by Industrial Accident Board (now State Fund) that worker was not entitled to benefits for silicosis was not an exclusion of him from the act but was a finding he had not proved his claim. The Anaconda Co. v. District Court, 161 M 318, 506 P2d 81 (1973).

Hydrocarbon Inhalation: Evidence was insufficient to sustain automobile mechanic's allegation that his exposure to concentration of diesel smoke resulted in his contracting emphysema or aggravating a preexisting emphysema condition because of hydrocarbon inhalation. Aho v. Burkland Studs, Inc., 153 M 1, 452 P2d 415 (1969).

Exposure to Phosphorus Fumes: Where employee's injuries alleged to have been suffered, in the course of his employment by defendant, as a result of exposure to phosphorus fumes constituted an occupational disease under the terms and provisions of this Act (Title 39, ch. 72), his action for personal injuries against his employer should not have been dismissed where the employer did not elect to come under nor was it covered by any plans set forth in this Act. Summer v. Victor Chem. Works, 298 F2d 66 (9th Cir. 1961).

Chapter Attorney General's Opinions

OPINIONS PRIOR TO 1987 GENERAL REVISION

Salary Payments to Municipal Policemen After Disabling Injury: Section 7-32-4132 requires a municipality to pay an injured policeman's full salary during the period of disability or 1 year, whichever ends first. The Workers' Compensation Fund is not liable for any wage loss benefits during that period because the municipality pays the policeman in full and he has suffered no wage loss. 37 A.G. Op. 156 (1978).

Applicability of Workers' Compensation Act on Indian Reservations: The Montana Workers' Compensation Act does not apply to Indian businesses being conducted within the borders of an Indian reservation. 37 A.G. Op. 28 (1977).

Chapter Law Review Articles

Montana's Workers' Compensation System, Special Section, 50 Mont. L. Rev. 81 (1989).

Hensley v. Montana State Fund: A Shift in the Grand Bargain of Workers' Compensation, Hagan, 83 Mont. L. Rev. 159 (2022).

Part 1
General Provisions

Part Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Substantial Evidence of Independent Contractor Status: Defendant employer presented substantial evidence that plaintiff served as an independent contractor, including the fact that plaintiff was paid on a lump-sum basis, provided identical services to other employing physicians, and was free to decline work offered by defendant. Although the evidence may have been somewhat less than a preponderance, it was a convincing accumulation of undisputed evidence, and the Supreme Court declined to disturb the findings. In re Wage Claim of Ramsey v. Yellowstone Neurosurgical Associates, P.C., 2005 MT 317, 329 M 489, 125 P3d 1091 (2005), distinguishing Wild v. Fregein Constr., 2003 MT 115, 315 M 425, 68 P3d 855 (2003).

Disputable Presumption Created of Employee Status — List of Presumptions Held Not Exclusive: Berg was sued by the State Fund in a civil action for the recovery of workers' compensation premium payments. Earlier, at the time of an audit, Berg was asked by a State Fund auditor to submit evidence that 23 persons working for him were independent contractors as Berg claimed and was told that if he did not submit any evidence, the State Fund would presume that the 23 people were employees and that premiums must be paid for those people. Berg submitted no evidence. The Supreme Court contrasted the language of 26-1-601 with the language of 26-1-602 regarding the exclusive or nonexclusive nature of the lists of presumptions in those sections and, citing Werre v. David, 275 M 376, 913 P2d 625 (1996), stated that the language of 39-71-120 (now repealed) should be interpreted in its usual and ordinary meaning. The Supreme Court held that 39-71-120 (now repealed) creates a disputable presumption that a person is an employee and held that the fact that the presumption created by 39-71-120 (now repealed) is not contained in the list of disputable presumptions in 26-1-602 is not controlling. The Supreme Court noted that the compiler's comment to Title 26, ch. 1, part 6, makes clear that the listing of disputable presumptions is not intended to be exclusive. State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Logging Consultant With No Third-Party Customers — No Independently Established Business: Jerrold Lundberg established Lundberg Logging as a small logging consulting company. The business had a checking account, owned some heavy equipment, paid dues to the Montana Logging Association, and maintained insurance. Lundberg was hired by Pyramid Mountain Lumber Company to work on logging projects. He was provided living quarters but provided his own materials and transportation and was reimbursed mileage. He established his own schedule and did not have to request days off. When Lundberg was injured in an automobile accident while performing work for Pyramid, Pyramid's insurer denied Lundberg's claim. Citing St. John's Lutheran Church v. St. Comp. Ins. Fund, 252 M 516, 830 P2d 1271 (1992), the Supreme Court held that because Lundberg did not engage in the business of buying lumber for third parties, he should not be considered an independent contractor for the purposes of coverage by Pyramid's workers' compensation insurer. Lundberg v. Liberty NW. Ins. Co., Inc., 268 M 499, 887 P2d 156, 51 St. Rep. 1254 (1994).

Use of Independent Contractor Test to Determine Status as Employee or Sole Proprietor: The Supreme Court held that the lower court had not erred in relying exclusively on the independent contractor test to determine the status of the claimant as an employee or sole proprietor because the workers' compensation statutes contain no definition of sole proprietor. Loos v. Waldo, 257 M 266, 849 P2d 166, 50 St. Rep. 262 (1993).

Classification of Church Pastor as Employee Rather Than as Independent Contractor for Workers' Compensation Purposes: A church provided its pastor with the vast majority of the tools of his trade, including an office, place of worship, hymnals, and various items necessary for the pastor to perform his services, and with a support staff consisting of a full-time secretary, part-time bookkeeper, custodian, and groundskeeper. The furnishing of equipment was considered strong evidence of control and a lack of independence sufficient to establish the pastor's status as an employee rather than as an independent contractor. St. John's Lutheran Church v. St. Comp. Ins. Fund, 252 M 516, 830 P2d 1271, 49 St. Rep. 119 (1992).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Work-Related Injury Following Nonwork-Related Injury — Permanent Total Disability Found — Workers' Compensation Court's Findings of Fact Reviewed De Novo and Reversed: Larson, a parts manager for a truck dealership, suffered a nonwork-related heart attack in 1980 but returned to work full-time in 1981. Then, in July 1981, Larson suffered a left inguinal hernia after lifting a heavy truck spring at his job. The Workers' Compensation Court found that Larson's heart attack and other medical problems had rendered him totally disabled prior to the industrial injury. For that reason, Larson was not entitled to permanent total disability benefits. The court also found that even if Larson's employer had the burden of proving that Larson could still work, the employer's insurance company had proved that Larson was employable despite his industrial accident. The Supreme Court, applying the 1979 workers' compensation statutes liberally and in favor of the injured worker, noted that an employer takes an employee subject to the employee's existing physical condition at the time of employment. Citing McIntyre v. Glen Lake Irrigation District, 249 M 63, 813 P2d 451 (1991), and White v. Ford, Bacon & Davis Tex., Inc., 256 M 9, 843 P2d 787 (1992), the Supreme Court held that to the extent that the Workers' Compensation Court's findings of fact are based upon deposition testimony, the Supreme Court sits in as good a position as the Workers' Compensation Court to review the evidence de novo. The Supreme Court therefore reviewed the deposition testimony of the physicians and rehabilitation counselors and found that there was insufficient evidence from which the Workers' Compensation Court could determine that Larson had a reasonable prospect for employment. Larson v. Cigna Ins. Co., 276 M 283, 915 P2d 863, 53 St. Rep. 394 (1996), citing Larson v. Cigna Ins. Co., 271 M 98, 894 P2d 327 (1995).

Independent Disabling Conditions — One Work-Related, Another Not: The Workers' Compensation Court held that Larson was ineligible to receive permanent total disability benefits for a work-related hernia because he first became totally disabled by a preexisting, nonwork-related and independent heart condition. In a case of first impression, the Supreme Court, noting that the liberal construction provision in 39-71-104 (now repealed) favored the injured worker, relied on Bond v. St. Regis Paper Co., 174 M 417, 571 P2d 372 (1977), for the proposition that an employer takes an employee subject to the employee's physical condition at the time of employment and on Shea v. Dept. of Labor and Industry, 529 P2d 1131 (Wash. Ct. App. 1974), and Estate of Ensley v. Anglo Alaska Constr., 773 P2d 955 (Alaska 1989), in holding that if evidence showed that Larson's hernia produced a permanent total disability, total disability benefits were payable regardless of the fact that the preexisting, nonwork-related heart condition also could be considered a cause of the permanent total disability. Larson v. Cigna Ins. Co., 271 M 98, 894 P2d 327, 52 St. Rep. 369 (1995). See also Larson v. Cigna Ins. Co., 276 M 283, 915 P2d 863, 53 St. Rep. 394 (1996).

Evidence of General Contractor's Control to Be Established Under Contract and in Fact: A subcontractor was injured on the job and claimed workers' compensation benefits as an employee of the general contractor. The claimant argued that the lower court erred in looking only at the "four corners of the contract" to determine the question of the extent of control exercised by the general contractor. The Supreme Court held that control must be established by looking at both the contract and the actual working relationship between the parties. In this case, the lower court had based its findings on evidence of control under the contract and in fact. Walling v. Hardy Constr., 247 M 441, 807 P2d 1335, 48 St. Rep. 250 (1991).

General Contractor's Control Over Subcontractor Insufficient to Create Employee Status: A subcontractor was injured on the job and claimed workers' compensation benefits as an employee of the general contractor. The Supreme Court held that to determine employee status, a four-part test had to be applied to determine whether the general contractor had sufficient right of control to render the subcontractor an employee. In applying the test of evidence of the exercise of control, method of payment, furnishing of equipment, and right to fire, the court found that the subcontractor was not an employee. Walling v. Hardy Constr., 247 M 441, 807 P2d 1335, 48 St. Rep. 250 (1991).

Furnishing Valuable Equipment as Suggestive of Employment Relationship: The fact that an employer furnished valuable equipment necessary to perform employment obligations and enjoyed the right to fire if proper equipment maintenance was not performed satisfied the test of direct employment status despite a contract provision designating the employment as being within independent contractor status. Schrock v. Evans Transfer & Storage, 225 M 348, 732 P2d 848, 44 St. Rep. 292 (1987).

Application of Certain Workers' Compensation Act Provisions to MODA (Now Repealed and Merged With Workers' Compensation Act): With respect to the Montana Occupational Disease Act (MODA) (now repealed and merged with Workers' Compensation Act), the same rationale that applies to workers' compensation cases should apply, specifically: (1) the MODA (now repealed and merged with Workers' Compensation Act) statutes in effect on the last actual day of work of claimant are controlling; (2) because both Acts involve the same employer-employee relationship, the same rules of liberal construction apply; (3) MODA (now repealed and merged with Workers' Compensation Act) is to be administered so as to give the employee the greatest possible protection within the purposes of the Act; and (4) when MODA (now repealed and merged with Workers' Compensation Act) statutes are open to more than one interpretation, one of which is favorable to the employee and another against him, the statutes may be properly construed in a manner most favorable to the employee. Therefore, in liberally construing the statute in effect on the last actual day of work of claimant in the present case, section 92-1331, R.C.M. 1947 (39-72-308, MCA, repealed L. 1979), allowed a common-law right of action although the claimant was not eligible for compensation under MODA (now repealed and merged with Workers' Compensation Act). Gidley v. W.R. Grace & Co., 221 M 36, 717 P2d 21, 43 St. Rep. 616 (1986), overruling The Anaconda Co. v. District Court, 161 M 318, 506 P2d 81 (1973). Gidley was followed in Nelson v. Cenex, Inc., 2008 MT 108, 342 M 371, 181 P3d 619 (2008), and in Fleming v. Int'l Paper Co., 2008 MT 327, 346 M 141, 194 P3d 77 (2008), in that statutes in effect on the last actual day of work of claimant are controlling. However, see Murphy v. WestRock Co., 2018 MT 54, 390 Mont. 394, 414 P.3d 276, concluding that statements made in Fleming — that no exception exists to the general rule applying workers' compensation statutes in effect on the date of the injury — were overly broad and incorrect.

Medical Evidence Entered by Deposition — No Substantial Evidence to Deny Claim — Liberal Construction: Because the record on appeal of a Workers' Compensation Court decision consisted mainly of testimony by deposition, the court's function on review is different than the usual limited standard of review. When the critical evidence, particularly medical evidence, is entered by deposition, the Supreme Court is in as good a position as the Workers' Compensation Court to judge the weight to be given to such record testimony. A review of the medical experts' depositions in this case reveals a sharp conflict in the medical evidence presented in regard to the claimant's injury. The court held that the testimony of the expert relied on in the Workers' Compensation Court's findings did not amount to substantial evidence and that there was no causal relation between claimant's current symptoms and the original injuries suffered while in defendant's employ. Moreover, the Legislature has mandated that the Workers' Compensation Act be liberally construed. Shupert v. Anaconda Aluminum Co., 215 M 182, 696 P2d 436, 42 St. Rep. 277 (1985), followed in Frost v. Anaconda Co., 216 M 387, 701 P2d 987, 42 St. Rep. 889 (1985).

Permanent Partial Disability — Pain to Be Considered in Determining Disability — Standard of Review: The claimant injured his back on the job in 1980 and for the next 3 years underwent a series of unsuccessful operations designed to relieve the pain. On appeal, claimant argued that the District Court had failed to take proper account of his disabling pain in its determination of permanent partial rather than permanent total disability. The Supreme Court held that pain is "another factor" to be considered in determining disability and that the Supreme Court's function on review is to determine whether there is substantial evidence to support the findings and conclusions of the Workers' Compensation Court. The Supreme Court found there was substantial evidence on the record to support a finding of partial disability. Metzger v. Chemetron Corp., 212 M 351, 687 P2d 1033, 41 St. Rep. 1788 (1984).

Restrictions on Liberal Construction:

The rule of liberal construction does not relieve the court of its duty to consider carefully all of the evidence before determining whether the weight of the evidence presented supports the worker's claim. Soelter v. Aetna Life & Cas. Co., 211 M 50, 683 P2d 480, 41 St. Rep. 1205 (1984).

The court cannot liberally construe a statute to the point of repealing it. Klein v. Independent Wholesale Assoc. Grocers, 167 M 341, 538 P2d 1358 (1975).

While the Workers' Compensation Act must be liberally construed, it does not mean that the employer becomes the insurer of his employees at all times during the employment. Williams v. Glacier Park Co., 140 M 440, 373 P2d 517 (1962); Sullivan v. Roman Catholic Bishop of Helena, 103 M 117, 61 P2d 838 (1936).

While 39-71-104 (now repealed) directs a liberal construction of the Act, it is not meant thereby that the Workers' Compensation Administrative Agency or the courts may disregard its clear statutory provisions. State ex rel. Magelo v. Indus. Accident Bd., 102 M 455, 59 P2d 785 (1936); Davis v. Indus. Accident Bd., 92 M 503, 15 P2d 919 (1932).

Offset Statute Includes All of Social Security Provisions: In construing the Offset Statute of the Workers' Compensation Act, the court found that it was the intention of the Legislature to incorporate all of the relevant subchapters of the Social Security Act into the Statute and not merely section 301 (since repealed), which was the beginning subchapter of the Social Security Act. Limiting the Statute to just section 301 would defeat the Statute's meaning and purpose and would lead to an absurd result whereas a reasonable construction avoids it. The court therefore held that the Offset Statute is effective and that despite the repeal of section 301, federal disability insurance benefits are covered under the Statute. McClanathan v. St. Compensation Ins. Fund, 186 M 56, 606 P2d 507, 37 St. Rep. 113 (1980).

Liberal Construction — Employee to Keep Full Amount of Common-Law Recovery: The Legislature has commanded the courts to construe the Workers' Compensation Act liberally in favor of the claimant. It is plainly the intent of the Act that if an employee is injured in the course of his employment, through the negligence of one other than his employer or his employer's servants, the injured employee may sue, recover, and keep the full amount of his common-law recovery from the responsible third party, plus one-half of his costs or 50% of the benefits he received from the employer under the Act. Cordier v. Stetson-Ross, Inc., 184 M 502, 604 P2d 86, 36 St. Rep. 2107 (1979).

Changing Physicians — Effect on Compensation: Although an administrative rule adopted pursuant to 39-71-203 properly requires prior employer authorization before an injured employee changes physicians and denies coverage in the absence of authorization, the Workers' Compensation Court must consider the medical reports and diagnosis of the second doctor in order to determine physical disability of claimant because statutory provisions have always been liberally construed in favor of the injured worker, even though the employer cannot be charged for services of second doctor. Garland v. The Anaconda Co., 177 M 240, 581 P2d 431 (1978).

Injured Worker — Third-Party Action: The Supreme Court vacated a lower court grant of summary judgment to a third-party defendant who was joined in an action for personal injuries sustained by an employee whose immediate employer elected to be covered by the Workers' Compensation Act. Piper v. Lockwood Water Users Ass'n, 175 M 242, 573 P2d 646 (1978), overruling Fiscus v. Beartooth Elec., 164 M 319, 522 P2d 87 (1974).

Function of Supreme Court: The function of the Supreme Court in workers' compensation cases is to determine whether there is substantial evidence to support the finding of the Workers' Compensation Court. Flansburg v. Pack River Co., 172 M 163, 561 P2d 1329 (1977).

Wages at Time of Injury: Notwithstanding the directive in 39-71-104 (now repealed) to construe provisions of the Workers' Compensation Act liberally, the court found no room for interpretation of the words "wages received at the time of the injury" in section 92-703, R.C.M. 1947 (now repealed). Olson v. Manion's, Inc., 162 M 197, 510 P2d 6 (1973).

Failure to List Children in Claim: Where claimant failed to list all of his children in his claim for compensation, it did not constitute a waiver of the claim. Stokes v. Delaney & Sons, Inc., 143 M 516, 391 P2d 698 (1964).

Liberal Construction in Favor of Claimant:
Section 39-71-104 (now repealed) means that the Workers' Compensation Act shall be liberally construed in favor of the claimant. Stokes v. Delaney & Sons, Inc., 143 M 516, 391 P2d 698 (1964); Marker v. Zeiler, 140 M 44, 367 P2d 311 (1961); Murphy v. The Anaconda Co., 133 M 198, 321 P2d 1094 (1958); Grief v. Indus. Accident Fund, 108 M 519, 93 P2d 961 (1939), distinguished in Roberts v. Pegasus Gold Corp., 273 M 266, 903 P2d 782, 52 St. Rep. 967 (1995).

The Industrial Accident Board's (now Department of Labor and Industry's) first duty is to administer the Workers' Compensation Act so as to give the employee the greatest possible protection within the purposes of the Act. Yurkovich v. Indus. Accident Bd., 132 M 77, 314 P2d 866 (1957).

The court cannot under the guise of liberal interpretation disregard plain provisions of 39-71-104 (now repealed), but when it is open to more than one interpretation, one favorable to the employee and the other against him, the court must give it the construction most favorable to the injured worker. Geary v. Anaconda Copper Min. Co., 120 M 485, 188 P2d 185 (1947).

Where board assumed jurisdiction by allowing physician's claim for medical services rendered to employee who lost no wages by his injury, it could subsequently award compensation for loss of injured eye notwithstanding 39-71-601, under liberal construction of this Act in favor of beneficiaries as required by 39-71-104 (now repealed). Gugler v. Indus. Accident Bd., 117 M 38, 157 P2d 89 (1945).

The Workers' Compensation Act, and every part and section thereof, is to be liberally construed in order that the humane purposes of the legislation shall not be defeated by narrow and technical construction, Tweedie v. Indus. Accident Bd., 101 M 256, 53 P2d 1145 (1936); and the intention of such a requirement is for the benefit and protection of the injured worker and the worker's beneficiaries. Gaffney v. Indus. Accident Bd., 129 M 394, 287 P2d 256 (1955); Levo v. General-Shea-Morrison, 128 M 570, 280 P2d 1086 (1955).

Deposition of Doctor: Where claimant petitioned for the granting of further compensation, which was denied, and the court admitted her testimony as to her physical condition subsequent to the hearing before the board, claimant was entitled to have admitted a doctor's deposition which had been taken while the appeal from the board's ruling was pending. Zachariasen v. Meeks, 133 M 278, 322 P2d 1115 (1958).

Scope of Employment: In determining whether or not an employee was acting within the scope of his employment, a fundamental rule is that in cases where some reasonably immediate service to the employer can be discerned the claim has been sustained, but where no immediate service is found the claim is denied. Morgan v. Indus. Accident Bd., 133 M 254, 321 P2d 232 (1958).

Accidents Occurring Outside of State: Employees who are resident citizens of the state, employed and paid in Montana through the only office of their employer, a Montana corporation, are entitled to the benefits of the workers' compensation laws of Montana although they were injured in another state. State ex rel. Morgan v. Indus. Accident Bd., 130 M 272, 300 P2d 954 (1956). (Dissenting opinion, 130 M 272, 300 P2d 954 (1956).)

Liberal Construction Not in Conflict With Other Rules of Construction: The liberal construction required by 39-71-104 (now repealed) is not one which violates 1-2-106 under which words shall be construed according to the context of a statute and approved usage of the language thereof. Section 1-2-101 says that the office of the judge is to ascertain and declare what has been omitted, not to omit what has been inserted or to favor the claimant regardless of the effect of the decision upon the Workers' Compensation Act as a whole or upon its application in future cases, but rather to give effect to the general legislative purposes of the Act as a whole. Hendy v. Indus. Accident Bd., 115 M 516, 146 P2d 324 (1944).

Denial of Compensation: A claim was filed within time required by 39-71-601 but was defective because it was not made under oath as required by the same statute. The claim was refiled under oath after the statutory period had run. Section 39-71-104 (now repealed) requires that Title 39, ch. 71, be liberally construed and therefore the board was in error in denying and dismissing the claim. Chisholm v. Vocational School for Girls, 103 M 503, 64 P2d 838 (1936).

Liberal Construction — Specific Mandate: Under 39-71-104 (now repealed), liberal construction of the general compensation law is a specific mandate. Koppang v. Sevier, 101 M 234, 53 P2d 455 (1936).

Amount of Compensation: In the course of his employment a coal miner lost his left eye and received full compensation under the provisions of the Workers' Compensation Act. Nine years later while working at the same occupation under a different employer he again suffered an accident destroying the vision of his right eye, thus rendering him totally blind. Under a liberal construction of the Act the coal miner was entitled to compensation for a total permanent disability for a period of 500 weeks, less payments previously received for 200 weeks rather than compensation for the loss of one eye. McDaniel v. Eagle Coal Co., 99 M 309, 43 P2d 655, 99 ALR 1492 (1935).

39-71-105. Declaration of public policy.

Compiler's Comments

2019 Amendment: Chapter 158 in (6)(a) inserted last sentence concerning presumptive occupational disease for firefighters; in (6)(b) in three places after reference to occupational disease inserted reference to presumptive occupational disease; and made minor changes in style. Amendment effective July 1, 2019.

Effective Date — Applicability: Section 8, Ch. 158, L. 2019, provided: "[This act] is effective July 1, 2019, and applies to presumptive occupational diseases diagnosed on or after July 1, 2019."

2011 Amendment: Chapter 167 in (1) in second sentence near end substituted "provide assistance to" for "assist". Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

2005 Amendments — Composite Section: Chapter 103 in (1) near middle of first sentence substituted "wage-loss" for "wage supplement"; and in (6)(a) near middle of fourth sentence after "present system" deleted "as is the case with repetitive injury claims"; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 416 in introductory clause near middle and in (5) near beginning after "Title 39" substituted "chapter 71" for "chapters 71 and 72"; inserted (6)(b) regarding occupational disease claims; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 448 inserted (2) regarding conclusive presumption; and made minor changes in style. Amendment effective April 28, 2005.

Preamble: The preamble attached to Ch. 448, L. 2005, provided: "WHEREAS, the Montana Supreme Court ruled in Wild v. Fregein Construction, 2003 MT 115, 315 Mont. 425, 68 P.3d 855, that the independent contractor exemption certificate does not raise a conclusive presumption as to the status of a person as an independent contractor and that an employer has an obligation to determine whether an individual is treated as an independent contractor or as an employee; and

WHEREAS, the Montana Supreme Court in the Wild decision ruled that it is against the public policy of the state for an employer to coerce a worker to work as an independent contractor by offering to pay an independent contractor at a rate higher than the employer pays employees; and

WHEREAS, the Montana Supreme Court in the Wild decision affirmed the twin determinants of independent contractor status as being "A" issues of control and "B" whether the individual is in an independent business, commonly known as the "A-B" test, and emphasized the necessity of both factors being present, with performing work for other persons being an indication of an independent business; and

WHEREAS, the concurring opinion in the Wild decision further suggested that the Department of Labor and Industry strengthen the certification process to provide a conclusive determination of independent contractor status; and

WHEREAS, the Wild decision created a great deal of uncertainty in matters involving independent contractors and employees in the business community, with employers and independent contractors coming together to propose a consensus solution after participating in a study required by Senate Bill 270, passed by the 58th Legislature; and

WHEREAS, the Montana Legislature considers enacting legislation appropriate to effectively reverse the Wild decision and to restore the conclusive presumption of an independent contractor exemption certificate as well as to allow employers to pay persons with the independent contractor exemption certificate at a rate higher than the rate paid to employees and additionally to allow a person with an independent contractor exemption certificate to work for only one employing unit without becoming an employee as well as to waive the benefits of the workers' compensation and occupational disease laws."

Effective Date — Applicability: Section 13, Ch. 103, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005."

Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

Section 15, Ch. 448, L. 2005, provided: "[This act] is effective on passage and approval and applies to all applications and renewals for the independent contractor exemption certificate submitted to the department after [the effective date of this act]." Approved April 28, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

1993 Amendment: Chapter 630 inserted (5) providing that stress claims are not compensable. Amendment effective May 11, 1993.

Severability: Section 15, Ch. 630, L. 1993, was a severability clause.

Saving Clause: Section 16, Ch. 630, L. 1993, was a saving clause.

Case Notes

Actual Wage Loss at Maximum Medical Healing Used to Determine Permanent Partial Disability Benefit Rate — Workers' Compensation Court Erred in Ruling Permanent Partial Disability Benefit Rate Is Aggregated From Both Time-of-Injury Concurrent Employments When Disability Precluded Only One Job — Public Policy of Wage Loss Benefit Relating to Actual Wages Lost. Barnhart v. Mont. St. Fund, 2022 MT 250, 411 Mont. 138, 522 P.3d 418.

Denial of Rehabilitation Benefits Based on Social Security Entitlement — Violation of Equal Protection: The plaintiff, a 77-year-old workers' compensation claimant, was denied rehabilitation benefits in accordance with 39-71-710 based exclusively on his age-based eligibility to receive Social Security retirement benefits. The Workers' Compensation Court ruled in favor of the plaintiff. In affirming the lower court, the Supreme Court held that 39-71-710 violated the right to equal protection because the statute created two classes of similarly situated persons, distinguished only by age. The court further concluded that cost-containment of the workers' compensation system alone is not sufficient to justify disparate treatment between the classes and that the automatic denial of rehabilitation benefits to those eligible for Social Security benefits did not rationally relate to any legitimate governmental interest. Caldwell v. MACo Workers' Compensation Trust, 2011 MT 162, 361 Mont. 140, 256 P.3d 923 (distinguishing Satterlee v. Lumberman's Mut. Cas. Co., 2009 MT 368, 353 Mont. 265, 222 P.2d 566).

Failure to Qualify as Treating Physician Through Expiration of Medical License Held No Bar to Consideration of Physician's Testimony - Purpose of Act Considered: Because Hansen's medical license expired prior to trial, the insurer objected to consideration of Hansen's testimony as the treating physician. The Supreme Court held that it would be absurd and not in keeping with the purposes of the Workers' Compensation Act for the Workers' Compensation Court not to consider Hansen's testimony at trial just because he could not technically qualify as the treating physician at the time of trial because his license expired without his knowledge before trial. Wright v. ACE Am. Ins. Co., 2011 MT 43, 359 Mont. 332, 249 P.3d 485.

Uninsured Employer Prohibited From Contribution or Indemnity Claim Against Third Party After Settling With Injured Employee: In response to a certified question from the federal District Court, the Supreme Court held that it is not equitable to require a stranger to the employer-employee relationship to indemnify an employer for liability that was wholly avoidable if the employer had simply obeyed the Workers' Compensation Act and provided coverage for its employees. Therefore, an uninsured employer is prohibited from bringing either a contribution claim or an indemnity claim against a third party after settling with an injured employee. St. Farm Fire & Cas. Co. v. Bush Hog, LLC, 2009 MT 349, 353 M 173, 219 P3d 1249 (2009).

Claimant's Lack of Knowledge of Disability — Time for Filing Claim to Run From Time of Knowledge of Disability: Tinker suffered a hip injury at work sometime in 2005, but the pain seemed to come and go, so Tinker reported the injury but continued to work. In 2007, the pain escalated to the point where Tinker had trouble getting in and out of a vehicle and performing his job. A visit to the doctor revealed a degenerative condition in the hip, and Tinker decided to file a workers' compensation claim. The State Fund denied the claim as untimely because it was not filed within 12 months of the injury as required by 39-71-601. Tinker contended that the claim should be compensable as an occupational disease or that the filing time should be waived. The Workers' Compensation Court concluded that the injury was not an occupational disease but held that Tinker lacked knowledge of the disability until he sought treatment in 2007, so Tinker's claim qualified for the waiver of the filing limitation and was thus compensable. The State Fund appealed, but the Supreme Court affirmed. The plain meaning of the Workers' Compensation Act clearly demonstrates that the term "disability" is tied to a wage loss or an impairment in the ability to earn wages through employment. Therefore, until a claimant knows that he or she is suffering some form of wage loss as a result of an injury, condition, or impairment, the claimant lacks knowledge of a disability. In this case, Tinker lacked knowledge of his disability until 2007 when he first sought medical treatment because his injury was preventing him from performing his job, so the Workers' Compensation Court did not err in waiving the filing requirement and compensating Tinker for the injury. Tinker v. Mont. St. Fund, 2009 MT 218, 351 M 305, 211 P3d 194 (2009). See also Dvorak v. Mont. St. Fund, 2013 MT 210, 371 Mont. 175, 305 P.3d 873.

Sole Use of Actual Wage Loss in Determining Permanent Partial Disability Benefits Not Violative of Equal Protection: Wilkes asserted that 39-71-703 violated equal protection guarantees by basing permanent partial disability benefits solely on actual wage loss, resulting in treatment of similarly situated classes of workers unequally by creating two classes of workers—one class with actual wage loss who suffer reduced earning capacity, and one class without actual wage loss who suffered reduced earning capacity. Wilkes contended that denying permanent partial disability benefits to workers who suffer reduced earning capacity without suffering actual wage loss impermissibly compensated similarly situated workers differently, in violation of equal protection. The Supreme Court disagreed. The Legislature's express public policy, as stated in 39-71-105, is that the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease, so the distinguishing factor of actual wage loss between the two classes plainly relates to the underlying justification of 39-71-703 and sufficiently distinguishes the two putative classes. Because the classes are not similarly situated, the equal protection claim failed. Wilkes v. Mont. St. Fund, 2008 MT 29, 341 M 292, 177 P3d 483 (2008), following Powell v. St. Comp. Ins. Fund, 2000 MT 321, 302 M 518, 15 P3d 877 (2000), and distinguishing Reesor v. Mont. St. Fund, 2004 MT 370, 325 M 1, 103 P3d 1019 (2004), and Snetsinger v. Mont. Univ. Sys., 2004 MT 390, 325 M 148, 104 P3d 445 (2004).

Use of Multiple Calculation Methods to Calculate Average Actual Wage From Concurrent Employments: Sturchio worked as an on-call certified nursing assistant for five different employers who all differed in their methods of paying compensation. Defendant insurer accepted Sturchio's claim when Sturchio injured her back in 2005. Sturchio subsequently filed a claim with the Workers' Compensation Court, asserting that she was entitled to higher benefits. The court applied the relevant 2003 version of 39-71-123(3) and calculated Sturchio's wages, considering each employer individually and using the method best suited to the particular circumstances. The insurer appealed the decision to the Supreme Court, alleging error in the use of multiple methods to calculate Sturchio's average actual wage from concurrent employments. The Supreme Court affirmed. In accord with the principle in this section (2003), that wage-loss benefits bear a reasonable relationship to actual wages lost, a reasonable reading of the plain language of 39-71-123 in its entirety supported the Workers' Compensation Court's interpretation that the calculation methods in subsection (3) should apply to each individual employment comprising the concurrent employments in the same manner that they apply to individual employments that are singular. Sturchio v. Wausau Underwriters Ins. Co., 2007 MT 311, 340 M 141, 172 P3d 1260 (2007).

Disparate Awards for Permanent Partial Disability and Permanent Total Disability Not Violative of Equal Protection: The statutory framework of the Workers' Compensation Act reveals distinctly different purposes served by permanent partial disability and permanent total disability benefits. Permanent partial disability benefits compensate a worker for sustaining a partial disability by a smaller impairment award and by supplementing wages earned when the claimant returns to work. Permanent total disability benefits do not contemplate a return to work and so provide a higher continuous benefit that is paid over the work life of the claimant. Because claimants in these classes are not similarly situated, denial of an impairment award to permanent partial disability claimants does not violate equal protection guarantees. Rausch v. St. Comp. Ins. Fund, 2005 MT 140, 327 M 272, 114 P3d 192 (2005).

Reduction of Disability Benefits Based on Social Security Entitlement Violation of Equal Protection: Providing disability benefits to a younger person while denying them to an older person eligible to receive Social Security benefits is a denial of equal protection. Reesor v. Mont. St. Fund, 2004 MT 370, 325 M 1, 103 P3d 1019 (2004).

Failure to Submit Medical Claims Within Sixty-Month Period Precluding Insurer Liability for Recurrence of Prior Injury: Wiard suffered a work-related injury in 1992, settled in 1994 with defendant who was the employer's insurer, including a reservation of future medical and hospital benefits, and returned to work. In 1995, Wiard was treated for additional pain from an injury on a different job, and defendant denied the claim because it was a new injury for which defendant was not the insurer. In 2000, Wiard began experiencing acute pain associated with the 1992 injury. Surgery was required, but defendant denied the claim because Wiard had not submitted a medical claim within 60 months, as required under 39-71-704 to avoid termination of benefits. The Workers' Compensation Court applied the 60-month limitation and denied benefits, and Wiard appealed, but the Supreme Court affirmed. The governing version of 39-71-741 in effect in 1991 contained no provision for closing medical benefits at the time of settlement of an accepted liability claim, so by law, reasonably necessary medical benefits were reserved and payable under the settlement agreement, except as capped by the 60-month rule. Wiard filed no medical claim within the 60-month period, so benefits were properly denied. Wiard v. Liberty NW. Ins. Corp., 2003 MT 295, 318 M 132, 79 P3d 281 (2003), distinguished in Newlon v. Teck Am., Inc., 2015 MT 317, 381 Mont. 378, 360 P.3d 1134.

Employer's Obligation to Ascertain Independent Contractor Status Prior to Employment — Test: Wild was injured while employed by defendant and sought workers' compensation benefits. The District Court found that because Wild had been previously issued a certificate of independent contractor exemption, any further inquiry into whether Wild was an independent contractor was precluded and that as an independent contractor, Wild was not eligible for workers' compensation benefits. Wild appealed, and the Supreme Court reversed. Nothing in 39-71-401(3) conclusively precludes, as a matter of law, any factual inquiry into whether an employer-employee relationship exists at the time that a worker is hired even if an independent contractor exemption has been previously granted. On the contrary, when read together with 39-71-120 (now repealed), the statutes establish that an employer has a clear obligation to make at least a cursory determination into whether a worker is an independent contractor in fact, as opposed to merely in name, before the employer can reasonably rely on the exemption, and an employer who fails to do so, with knowledge of the facts, may not hide behind the exemption. A two-part test is used to determine independent contractor status: (1) an analysis of whether the control factors are met, including consideration of direct evidence of right or exercise of control, method of payment, furnishing of equipment, and right to fire; and (2) whether the individual is engaged in an independently established trade, occupation, profession, or business. Wild v. Fregein Constr., 2003 MT 115, 315 M 425, 68 P3d 855 (2003), followed in Mathews v. BJS Constr., Inc., 2003 MT 116, 315 M 441, 68 P3d 865 (2003).

Employer's Offer to Pay Worker Higher Wage Based on Independent Contractor Exemption Violative of Public Policy: When Wild was hired by defendant for a construction job, Wild was given the choice of either working for $20 an hour as an independent contractor or for $15 an hour as a legitimate employee. Wild had been previously granted an independent contractor exemption while self-employed, so Wild chose to work as an independent contractor at the higher wage. The arrangement was also to defendant's economic advantage because treating Wild as an employee would have required payment of an additional $8 an hour in workers' compensation premiums. The Supreme Court held that when an employer offers to pay a worker a higher wage on condition that the worker present an independent contractor exemption at the time of hire, it violates the public policy in this section that underlies the Workers' Compensation Act. The practice encourages employers to avoid their obligations under the Act, puts employers who assume their legal obligations under the Act at a severe economic and competitive disadvantage, and allows employers to prey on blue collar workers who might reject the protections of the Act in order to earn a few dollars an hour more. Wild v. Fregein Constr., 2003 MT 115, 315 M 425, 68 P3d 855 (2003), followed in Mathews v. BJS Constr., Inc., 2003 MT 116, 315 M 441, 68 P3d 865 (2003).

Similarly Situated Classes of Workers Treated Differently Under Workers' Compensation Act and Occupational Disease Act (Now Repealed and Merged With Workers' Compensation Act) — Occupational Disease Permanent Impairment Award Violative of Equal Protection — Retroactive Applicability: Schmill suffered an occupational disease arising from employment, resulting in a 3% physical impairment rating. In spite of the limitations, Schmill did not suffer an actual wage loss as a result of the occupational disease, so Schmill requested an impairment award pursuant to the Workers' Compensation Act because the Occupational Disease Act of

Montana (now repealed and merged with Workers' Compensation Act) does not provide partial disability or impairment benefits. Schmill's petition alleged that plaintiff was entitled to the same impairment award available under the Workers' Compensation Act. Subsequently, the Workers' Compensation Court issued a decision (affirmed in Stavenjord v. Mont. St. Fund, 2003 MT 67, 314 M 466, 67 P3d 229 (2003)) requiring that permanent partial disability benefits be paid to occupational disease claimants pursuant to the Workers' Compensation Act. Based on that decision, the insurer agreed to pay Schmill's impairment award, but deducted 20% from the award for nonoccupational factors that contributed to the disability, pursuant to 39-72-706 (now repealed). Schmill claimed entitlement to full payment pursuant to the Workers' Compensation Act, and the Workers' Compensation Court agreed, concluding that full payment was warranted because 39-72-706 (now repealed) violated equal protection guarantees by providing disparate treatment to workers injured and workers with occupational diseases. The insurer appealed, but the Supreme Court affirmed. Apportioning a permanent impairment award under the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) while providing a full award for a permanent impairment under the Workers' Compensation Act is not rationally related to a legitimate government interest, and by treating similarly situated classes of workers differently, 39-72-706 (now repealed) is violative of the constitutional guarantee of equal protection. Schmill v. Liberty NW. Ins. Corp., 2003 MT 80, 315 M 51, 67 P3d 290 (2003). On remand, the Workers' Compensation Court held that the 2003 Schmill rule applied retroactively, and on appeal, the Supreme Court affirmed. A retroactive application of the rule that the former Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) cannot allow for apportionment deductions for nonoccupational factors if the Workers' Compensation Act does not allow apportionment deductions places workers whose occupational disease arose before the decision on equal footing with those whose occupational disease arose subsequently. A retroactive application of the Schmill rule does not retard the rule's operation, and future claimants will not find it more difficult to receive nonapportioned awards, so the 2003 Schmill decision applies retroactively to all cases not final or settled at the time of its issuance. Schmill v. Liberty NW. Ins. Corp., 2005 MT 144, 327 M 293, 114 P3d 204 (2005), following Dempsey v. Allstate Ins. Co., 2004 MT 391, 325 M 207, 104 P3d 483 (2004).

Following the 2005 Schmill decision, the Workers' Compensation Court issued summonses to over 500 insurers regarding their obligation to identify and pay past Schmill-type claims. Numerous insurers appealed on grounds that enforcement of the Schmill decisions violated the insurers' due process rights inasmuch as the summonses failed to satisfy notice requirements because the insurers were not parties to the Schmill cases. Nevertheless, the Supreme Court affirmed. Once all potential beneficiaries were granted a vested right pursuant to the Schmill decisions, a corresponding duty to pay on the part of all insurers arose as a matter of law. Schmill v. Liberty NW. Ins. Corp., 2009 MT 430, 354 M 88, 223 P3d 842 (2009), following Murer v. St. Comp. Mut. Ins. Fund, 283 M 210, 942 P2d 69 (1997), and Ruhd v. Liberty NW. Ins. Corp., 2004 MT 236, 322 M 478, 97 P3d 561 (2004).

Failure to Notify Employer of Injury Within Statutory Time Period — Claim Precluded — Occupational Disease Act (Now Repealed and Merged With Workers' Compensation Act) Inapplicable to Single Incident: Hanks suffered a back injury while working as a home-care aide, but did not report the incident to the employer until more than 5 years later, when Hanks sought workers' compensation benefits. Those benefits were denied because Hanks did not report the incident within 30 days as required by 39-71-603. Hanks was then granted an emergency trial, and she claimed that the Workers' Compensation Act did not apply because the incident was not caused by an injury, but rather by an occupational disease. That claim was also dismissed with prejudice because Hanks did not comply with the notice requirement, and Hanks appealed. The Supreme Court affirmed. Hanks' problem was properly characterized as an injury rather than an occupational disease because the incident was a single identifiable incident occurring in a single work shift. Hanks was not entitled to bring an occupational disease claim because the injury did not occur on more than a single day, so the occupational disease claim was properly dismissed with prejudice. Because Hanks failed to notify the employer of the injury within 30 days, the workers' compensation claim was also dismissed as untimely. Hanks v. Liberty NW. Ins. Corp., 2002 MT 334, 313 M 263, 62 P3d 710 (2002).

Liability of Employer for Tortious Act: Although the language of 39-71-413 provides for a cause of action only against a fellow employee for intentional or malicious injury, pursuant to Sitzman v. Schumaker, 221 M 304, 718 P2d 657, 43 St. Rep. 831 (1986), such an action may be brought against an employer as well. To fail to hold employers liable in the same manner as their employees by permitting an employer to commit an intentional and malicious act or omission that causes an injury to an employee and then to allow the employer to hide behind the exclusivity statutes would defeat the purpose of the Workers' Compensation Act. Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990, 57 St. Rep. 241 (2000). See also Enberg v. Anaconda Co., 158 M 135, 489 P2d 1036 (1971).

Failure to Provide Vocational Rehabilitation Benefits — Occupational Disease Act (Now Repealed and Merged With Workers' Compensation Act) Violative of Equal Protection: Henry's on-the-job injury claim was accepted under the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act), but his request for rehabilitation benefits after reaching maximum healing was denied. On appeal, the Supreme Court found that providing rehabilitation benefits to workers covered by the Workers' Compensation Act, but not to workers covered by the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act), was not rationally related to the legitimate government interest of returning workers to work as soon as possible after suffering a work-related injury. The historical justification for treating workers differently under the Workers' Compensation Act and the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) no longer exists. Therefore, to the extent that it fails to provide vocational rehabilitation benefits as are provided under the Workers' Compensation Act, the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) violates the equal protection clause, Art. II, sec. 4, of the Montana Constitution. Henry v. St. Comp. Ins. Fund, 1999 MT 126, 294 M 449, 982 P2d 456, 56 St. Rep. 506 (1999), distinguishing Eastman v. Atlantic Richfield Co., 237 M 332, 777 P2d 862, 46 St. Rep. 845 (1989).

Independent Medical Examination — Qualifications of Examining Physician — Determination of Applicable Law: In 1989, Blythe was stuck by a needle that had previously been used on an AIDS patient, and after that time, Blythe alleged that he was suffering from depression and hallucinations that prevented him from working. The Workers' Compensation Court determined that Blythe was malingering. The insurer required an independent medical examination (IME), and the Workers' Compensation Court allowed testimony on the issue of malingering from two Ph.D. clinical psychologists, one of whom conducted the IME by the order of the Workers' Compensation Court. Citing St. Comp. Ins. Fund v. Sky Country, Inc., 239 M 376, 780 P2d 1135 (1989), the Supreme Court held that the applicable substantive law is the law as it was at the time of injury and that the applicable law for procedural purposes is the law at the time of trial. The issue of who is qualified to conduct an IME is procedural rather than substantive, so the applicable law is the 1993 version of 39-71-605. The Supreme Court also held that the Workers' Compensation Court erred when it treated the listing of types of treating physicians in 39-71-116 to be exemplary rather than exclusive. The Supreme Court noted that even if the list of types of physicians included a clinical psychologist, which it did not, the law also required that the physicians be licensed in Montana. The psychologist who conducted the IME was not licensed as a physician. The testimony of one of the psychologists was therefore inadmissible, but because the Supreme Court could not determine whether the outcome of the trial would have been different without the inadmissible testimony, it remanded the case to the Workers' Compensation Court for that determination. EBI/Orion Group v. Blythe, 281 M 50, 931 P2d 38, 54 St. Rep. 54 (1997), followed in Murphy v. WestRock Co., 2018 MT 54, 390 Mont. 394, 414 P.3d 276.

Lack of Compensable Injury Precludes Exclusivity of Workers' Compensation Remedy — Definition of Injury — Tort Action Allowed: Lincoln County Deputy Sheriff Stratemeyer filed a tort action against Lincoln County for failing to properly train, debrief, and counsel him to cure his posttraumatic stress disorder incurred from observing a suicide victim. Citing case law from other states and the public policy expressed by the Legislature, the Supreme Court held that the refusal of the Legislature to provide coverage under the workers' compensation laws precluded the applicability of the exclusive remedy theory upon which those laws are based. The Supreme Court also held that because the definition of injury contained in 39-71-411 must be construed consistently with the definition of injury in 39-71-119, an injury excluded by the definition in 39-71-119 must also be excluded from the exclusive remedy provisions of 39-71-411. Because Stratemeyer did not suffer an injury covered by the exclusive remedy provision of the workers' compensation laws, he was free to bring a separate tort action against the county. Stratemeyer v. Lincoln County, 276 M 67, 915 P2d 175, 53 St. Rep 245 (1996), followed in Kleinhesselink v. Chevron, U.S.A., 277 M 158, 920 P2d 108, 53 St. Rep. 668 (1996), and Buerkley v. Aspen Meadows Ltd. Partnership, 1999 MT 97, 294 M 263, 980 P2d 1046, 56 St. Rep. 415 (1999). Stratemeyer and Kleinhesselink were distinguished in Maney v. La. Pac. Corp., 2000 MT 366, 303 M 398, 15 P3d 962, 57 St. Rep. 1561 (2000), and Walters v. Flathead Concrete Products, Inc., 2011 MT 45, 359 Mont. 346, 249 P.3d 913.

Waiver of Workers' Compensation Benefits Allowed — Distribution of Proportionate Share of Benefits: Decedent who died in the course of employment was survived by two children of a prior marriage and by the widow of a second marriage. Decedent's insurer and others with potential liability for death claims settled with the widow for substantial sums, but the children were not parties to the settlement. No workers' compensation claim was filed by the widow, though one was filed by decedent's employer. The compensation carrier began paying one-third of the compensation benefits to the widow and reserved two-thirds pending final determination of the children as beneficiaries. The widow advised the carrier that she did not wish to receive workers' compensation benefits and returned those she had been issued. The Workers' Compensation Court held that, as a matter of public policy, the widow could not waive death benefits and that the children's interest in the benefits would vest only if the widow died or remarried prior to the passing of 500 weeks after decedent's death. On rehearing, the court found the children to be stepchildren of the widow and therefore entitled to benefits, to be equally divided between the parties. The children appealed, contending that the widow should not be compelled to receive benefits she did not claim or intended to waive and that the children were each entitled to one-half of all available benefits. The Supreme Court held that under 1-3-204, the surviving widow could waive or abandon her right to benefits and that upon waiver the surviving children were entitled to no more than their proportionate share provided by law. In re Benefits of Gaither, 244 M 383, 797 P2d 208, 47 St. Rep. 1549 (1990).

39-71-106. No liability for reporting violation.

Compiler's Comments

2005 Amendment: Chapter 416 near end after "provisions of" deleted "chapter 72 or". Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

Effective Date: Section 30, Ch. 619, L. 1993, provided: "[This act] is effective July 1, 1993."

39-71-107. Insurers to act promptly on claims — in-state claims examiners — third-party agents — penalties.

Compiler's Comments

2017 Amendment: Chapter 433 in (5)(a) and (5)(b) substituted "39-71-704(5)" for "39-71-704(4)". Amendment effective July 1, 2017.

2015 Amendment: Chapter 123 inserted (6)(d) requiring notice to claimant of a change to claims examiner; and made minor changes in style. Amendment effective July 1, 2015.

2011 Amendment: Chapter 150 inserted (5) requiring workers' compensation insurers and their agents to pay medical providers on a timely and appropriate basis and providing penalties on the insurer for failure to do so; inserted (8) relating to contesting a penalty; and made minor changes in style. Amendment effective July 1, 2011.

2009 Amendment: Chapter 112 in (5)(b) after "benefits" deleted "requested by a claimant" and after "denied" inserted "to a claimant"; and made minor changes in style. Amendment effective July 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2007 Amendment: Chapter 117 inserted (4) concerning third-party claims examination notice and penalty; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendments — Composite Section: Chapter 103 deleted former (6) that read: "(6) An insurer may not make payments pursuant to 39-71-608 or any other reservation of rights for more than 90 days without:

(a) written consent of the claimant; or

(b) approval of the department"; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 140 in (2) in first sentence substituted "must be examined by a claims examiner" for "must be adjusted by a person" and in second sentence substituted "as examined by a claims examiner in Montana, the claims examiner examining the claim" for "as adjusted by a person in Montana, the person adjusting the claim" and near end substituted "examine" for "adjust"; and in (3) in first sentence substituted "of the claims examiner examining the claim" for "of the person adjusting the claim" and in third sentence substituted "claims examiner's office" for "adjuster's office". Amendment effective March 30, 2005.

Chapter 416 in (2) and (3) in first sentence near middle after "Workers' Compensation Act" deleted "and the Occupational Disease Act of Montana"; and made minor changes in style. Amendment effective July 1, 2005.

Effective Date — Applicability: Section 13, Ch. 103, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005."

Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

2001 Amendment: Chapter 214 inserted (2) requiring Workers' Compensation and Occupational Disease Acts claims to be adjusted by person in Montana and providing requirements for consideration as in-state adjustment; inserted (3) relating to required maintenance of documents at adjuster's office until claim settlement; in (8) inserted definition of settled claim; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 25, Ch. 214, L. 2001, was a severability clause.

1995 Statement of Intent: The statement of intent attached to Ch. 243, L. 1995, provided: "A statement of intent is required for this bill because [section 4] [39-71-107] authorizes the department of labor and industry to adopt rules to provide for prompt claims handling practices for injured workers, for employers, and for providers who are the customers of the workers' compensation system. It is the intent of the legislature that the department of labor and industry adopt rules providing claimants with written explanations of claims and the methodology of benefit calculation."

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

Effective Date: Section 29, Ch. 243, L. 1995, provided that this section is effective July 1, 1995.

Administrative Rules

ARM 24.29.804 Examiners and third-party administrators in Montana.
ARM 24.29.1406 Facility bills.

Case Notes

Retroactivity Dependent on Whether Claim Final or Settled — Settled Claim Defined: State Fund asserted that the Workers' Compensation Court erred by refusing to adopt the 2-year statute of limitations in 39-71-2905 as a limit on the retroactive effect of judicial decisions in workers' compensation claims. The Supreme Court held that retroactivity for workers' compensation claims is dependent on whether a claim is final or settled. A settled claim is a department-approved or court-ordered compromise of benefits between a claimant and an insurer, or a claim that was paid in full. The court refused to adopt a 2-year limit on retroactivity on all workers' compensation claims when the clear intent of 39-71-2905 is to apply the limit only to particular cases. There is no specific statutory cutoff point for most workers' compensation claims, and as stated in Dempsey v. Allstate Ins. Co., 2004 MT 391, 325 M 207, 104 P3d 483 (2004), the interests of fairness and finality are not generally served by drawing an arbitrary distinction between litigants based merely on the timing of their claims. Flynn v. Mont. St. Fund, 2008 MT 394, 347 M 146, 197 P3d 1007 (2008). See also Schmill v. Liberty NW. Ins. Corp., 2005 MT 144, 327 M 293, 114 P3d 204 (2005), and Flynn v. Montana State Fund, 2011 MT 300, 363 Mont. 55, 267 P.3d 23 (Flynn III). In Flynn III, the Supreme Court affirmed the Workers' Compensation Court's definition of "paid in full" for a "settled" workers' compensation claim. The actual payment of a benefit, and not the potential of a future benefit, makes a claim not "paid in full". Hence, a settled claim for purposes of retroactivity is either: (1) a settlement agreement ordered by a court or approved by the Department of Labor and Industry; or (2) a claim in which the claimant received all applicable benefits prior to a new judicial decision and has not received benefits on the predecision claims.

39-71-108. False statement on employment questionnaire.

Compiler's Comments

Effective Date: Section 3, Ch. 63, L. 2021, provided: "[This act] is effective July 1, 2021."

39-71-116. Definitions.

Compiler's Comments

2021 Amendment: Chapter 197 inserted definition of prosthetic device or prosthesis; and made minor changes in style. Amendment effective April 14, 2021.

2011 Amendment: Chapter 167 inserted definitions of direct result, health care provider, indemnity benefits, and regular employment; in definition of medical stability inserted "maximum medical improvement", after "material" inserted "functional", and at end substituted "services" for "treatment"; in definition of permanent partial disability in (a) in first sentence inserted reference to the sixth edition guides, at end of sentence inserted "for the ratable condition", and added last sentence relating to a direct result of injury or disease and not exclusively on complaints of pain; in definition of permanent total disability deleted former second sentence that read: "Regular employment means work on a recurring basis performed for remuneration in a trade, business, profession, or other occupation in this state"; in definition of primary medical services inserted "or occupational disease"; in definition of treating physician in lead-in substituted "the person who, subject to the requirements of 39-71-1101, is primarily responsible for delivery and coordination of the worker's medical services for the treatment of a worker's compensable injury or occupational disease" for "a person who is primarily responsible for the treatment of a worker's compensable injury"; and made minor changes in style. Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

2007 Amendment: Chapter 359 in definition of treating physician in (g) at end deleted "recognized by the board of nursing as a nurse practitioner or a clinical nurse specialist, and practicing in consultation with a physician licensed under Title 37, chapter 3, if there is not a treating physician, as provided for in subsection (37)(a), in the area in which the advanced practice registered nurse is located"; and made minor changes in style. Amendment effective October 1, 2007.

2005 Amendments — Composite Section: Chapter 26 deleted definition of average weekly wage that read: ""Average weekly wage" means the mean weekly earnings of all employees under covered employment, as defined and established annually by the department. It is established at the nearest whole dollar number and must be adopted by the department before July 1 of each year"; in definition of order after "arrived at" deleted "or decision made"; deleted definition of plant of the employer that read: "The "plant of the employer" includes the place of business of a third person while the employer has access to or control over the place of business for the purpose of carrying on the employer's usual trade, business, or occupation"; inserted definition of state's average weekly wage; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 140 inserted definition of claims examiner; and made minor changes in style. Amendment effective March 30, 2005.

Chapter 416 in definition of administer and pay near end after "Compensation Act" deleted "and the Occupational Disease Act of Montana"; inserted definition of occupational disease; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 519 in definition of treating physician in (c) in two places substituted "physician assistant" for "physician assistant-certified"; and made minor changes in style. Amendment effective October 1, 2005.

Effective Date — Applicability: Section 12, Ch. 26, L. 2005, provided that this section is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005.

Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

Directions to Code Commissioner: Pursuant to sec. 41, Ch. 416, L. 2005, in definition of claims examiner the code commissioner deleted reference to chapter 72.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

2003 Amendment: Chapter 224 in definition of treating physician in (d) substituted "chapter 3" for "chapter 5". Amendment effective July 1, 2003.

Severability: Section 34, Ch. 224, L. 2003, was a severability clause.

Saving Clause: Section 35, Ch. 224, L. 2003, was a saving clause.

1999 Amendment: Chapter 51 in definition of construction industry at end of first sentence substituted "group 23 in the North American Industry Classification System Manual" for "groups 15 through 17 in the Standard Industrial Classification Manual"; in definition of treating physician in (c) near middle before "physician" inserted "treating", and in (g) near end substituted "(36)(a)" for "(35)(a)"; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendments: Chapter 276 in definition of beneficiary, in (d), (e), and (f), inserted "as defined in 26 U.S.C. 152"; in definition of treating physician inserted (f) to include a treating physician licensed or certified in another state; and made minor changes in style. Except for subsection (36), amendment effective July 1, 1997. Subsection (36) defining treating physician effective April 16, 1997.

Chapter 404 in definition of treating physician inserted (g) concerning advanced practice registered nurse; and made minor changes in style.

Chapter 500 inserted definitions of business partner and work-based learning activity; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 276, L. 1997, provided: "WHEREAS, it is the intent of the state compensation insurance fund to assist all Montanans by reducing the unfunded liability of the old fund, terminating the old fund liability tax when the old fund is adequately funded, which is currently estimated to occur as early as June 30, 1999, providing for the payment of dividends to policyholders, and maintaining a viable state compensation insurance fund; and

WHEREAS, there was an unfunded liability of $355 million as of June 30, 1996, for claims for workers' compensation injuries occurring before July 1, 1990, in the old fund, which included $129 million in outstanding bond debt; and

WHEREAS, the old fund is funded with the old fund liability tax paid by employers, employees, and self-employed persons, generating as much as $50 million each year; and

WHEREAS, the surplus of $231 [sic] in the new fund as of June 30, 1996, allowed the Board of Directors of the State Fund to declare a dividend of up to $109 million to retire the outstanding bond debt in the old fund; and

WHEREAS, the unfunded liability in the old fund will be an estimated $200 million deficit by June 30, 1997, and the surplus or the excess of assets above the reserves that are set aside to meet the claim liability in the new fund will be an estimated $127 million by June 30, 1997; and

WHEREAS, current state law requires the State Fund to use dividends to be applied first to old fund outstanding liability rather than paying dividends directly to policyholders, the State Fund shall, no later than June 30, 1998, transfer $63.8 million to the old fund account to pay old fund claims to allow direct payment of dividends to policyholders; and

WHEREAS, the $20 million appropriation received by the State Fund from the general fund during the June 1989 Special Session partially addressed the unfunded liability issue existing at that time in the old fund and canceled a planned 22% rate increase; and

WHEREAS, the State Fund now agrees to repay the $20 million appropriation to the general fund by June 30, 1999, in lieu of transferring additional funds to the old fund account to provide the general fund with additional revenue and to remove any perception that the State Fund remains a burden on the general fund; and

WHEREAS, because decreases in premium rates totaled 35% in fiscal years 1996 and 1997 and legislative changes in benefit levels have resulted in the return of private carriers, the 15% limitation on administration expenses as a percent of the prior year's premium will significantly impact the State Fund's ability to provide service to policyholders and their injured workers; and

WHEREAS, the State Fund seeks to improve the level of services provided to customers without increasing existing State Fund staffing levels by working with private sector-licensed insurance producers; and

WHEREAS, in response to Haag v. Montana Schools Group Insurance Authority, 274 M 109, 906 P.2d 693 (1995), in which the Montana Supreme Court ruled that an insurer's failure to comply with the time limitations for accepting or denying a workers' compensation claim constituted acceptance of the claim, current law needs to be clarified to provide that the failure to comply with the time limitations does not constitute acceptance of the claim."

Severability: Section 32, Ch. 276, L. 1997, was a severability clause.

Section 3, Ch. 500, L. 1997, was a severability clause.

Retroactive Applicability: Section 33(1), Ch. 276, L. 1997, provided: "[Sections 6(35)(f) [39-71-116(36)(f)] and 10] apply retroactively, within the meaning of 1-2-109, to claims for injuries occurring prior to [the effective date of sections 6(35)(f) and 10]." Effective April 16, 1997.

Applicability: Section 4, Ch. 500, L. 1997, provided: "[This act] [39-71-116 and 39-71-118] is effective July 1, 1997, and applies to injuries occurring on or after [the effective date of this act]."

1995 Amendments — Composite Section: Chapter 234 in definition of temporary service contractor, after "association", inserted "partnership, limited liability company", after "business that" deleted "employs individuals directly for the purpose of furnishing the services of those individuals on a part-time or temporary basis to others", and inserted remainder of sentence relating to employees used for periods of employee absences, skill shortages, seasonal workloads, and special assignments and projects; in definition of temporary worker, after "temporary basis", substituted remainder of sentence relating to employees used for periods of employee absences, skill shortages, seasonal workloads, and special assignments and projects for "to substitute for a permanent employee on leave or to meet an emergency or short-term workload"; and made minor changes in style.

Chapter 243 inserted definition of actual wage loss; deleted definition of disability that read: ""Disability" means a condition in which a worker's ability to engage in gainful employment is diminished as a result of physical restrictions resulting from an injury. The restrictions may be combined with factors, such as the worker's age, education, work history, and other factors that affect the worker's ability to engage in gainful employment. Disability does not mean a purely medical condition"; inserted definition of objective medical findings; in definition of permanent partial disability, before "condition", inserted "physical", in (a) substituted current language concerning medical findings for "has a medically determined physical restriction as a result of an injury as defined in 39-71-119", in (b) substituted "permanent impairment" for "physical restriction", and inserted (c) requiring a wage loss; in definition of permanent total disability, near beginning before "condition", inserted "physical"; in definition of secondary medical services inserted (b) defining disability; in definition of temporary partial disability, before "condition", inserted "physical"; in definition of temporary total disability, before "condition", inserted "physical"; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 516 inserted definitions of aid or sustenance, household or domestic employment, limited liability company, and sole proprietor; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

Section 26, Ch. 516, L. 1995, was a severability clause.

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

1993 Amendments: Chapter 555 at end of definition of insurer deleted "or the uninsured employers' fund provided for in part 5 of this chapter"; and made minor changes in style. Amendment effective July 1, 1993.

Chapter 619 inserted definition of temporary partial disability; and made minor changes in style. Amendment effective July 1, 1993.

Chapter 628 throughout section, before "healing", inserted "medical"; inserted definitions of disability; maintenance care; medical stability, maximum healing, or maximum medical healing; palliative care; primary medical services; secondary medical services; and treating physician; deleted former definition of maximum healing that read: ""Maximum healing" means the status reached when a worker is as far restored medically as the permanent character of the work-related injury will permit"; deleted definition of physician that read: "The term "physician" includes "surgeon" and in either case means one authorized by law to practice his profession in this state"; and made minor changes in style. Amendment effective July 1, 1993.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

Section 16, Ch. 628, L. 1993, was a severability clause.

1991 Amendments: Chapter 323 inserted definitions of temporary service contractor and temporary worker. Amendment effective July 1, 1991.

Chapter 480 inserted definition of construction industry; and made minor changes in style. Amendment effective July 1, 1992.

Chapter 574 in definition of permanent partial disability, in (b) after "to work in", deleted "the worker's job pool pursuant to one of the options set forth in 39-71-1012 but suffers impairment or partial wage loss, or both" and inserted remainder of sentence concerning physical restrictions on ability to work; and in definition of permanent total disability, at end of first sentence after "in which a worker", substituted "has no reasonable prospect of performing regular employment" for "is unable to return to work in the worker's job pool after exhausting all options set forth in 39-71-1012" and inserted second and third sentences setting forth criteria for regular employment and excluding lack of immediate job openings. Amendment effective July 1, 1991.

Severability: Section 15, Ch. 574, L. 1991, was a severability section.

1990 Special Session Amendment: Inserted definition of administer and pay; in (3)(e) changed references to subsections (2)(a) through (2)(d) to references to subsections (3)(a) through (3)(d); and in (3)(f) changed references to subsections (2)(a) through (2)(e) to references to subsections (3)(a) through (3)(e). Amendment effective July 1, 1990.

1989 Amendments: Chapter 333 at end of definition of payroll inserted requirement that payroll be computed by calculating all wages, as defined in 39-71-123, that are paid by employer; and made minor changes in phraseology. Amendment effective July 1, 1989.

Chapter 613 throughout section changed "division of workers' compensation" and "division" to "department"; deleted definition of Division; and in definition of insurer changed "state compensation insurance fund" to "state fund". Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

1987 Amendment: In (2)(a) substituted "a surviving spouse living with or legally entitled to be supported by the deceased at the time of injury" for "a surviving wife or husband"; in (2)(c) decreased age from 25 years to 22 years and at end inserted "or is enrolled in an accredited apprenticeship program"; in (3) deleted second sentence that read: "Any person hauling or assisting in hauling of sugar beets or grains, in case of emergency, is considered engaged in casual employment"; in (4), at end, deleted "and an illegitimate child legitimized prior to the injury"; inserted definitions of days, Department, and maximum healing; deleted former (7) that read: "(7) "Husband" or "widower" means only a husband or widower living with or legally entitled to be supported by the deceased at the time of her injury"; in (9), near middle, substituted "state compensation insurance fund" for "industrial insurance account"; in (14) substituted language (see 1987 Session Law for text) for ""Permanent partial disability" means a condition resulting from injury as defined in this chapter that results in the actual loss of earnings or earning capability less than total that exists after the injured worker is as far restored as the permanent character of the injuries will permit. Disability shall be supported by a preponderance of medical evidence"; in (15) substituted language defining permanent total disability as condition resulting from injury in which worker has reached maximum healing but cannot work in his job pool after exhausting options in 39-71-1012 (now repealed) for ""Permanent total disability" means a condition resulting from injury as defined in this chapter that results in the loss of actual earnings or earning capability that exists after the injured worker is as far restored as the permanent character of the injuries will permit and which results in the worker having no reasonable prospect of finding regular employment of any kind in the normal labor market. Disability shall be supported by a preponderance of medical evidence"; in (21), at end, substituted "reaches maximum healing" for "is as far restored as the permanent character of the injuries will permit. A worker shall be paid temporary total disability benefits during a reasonable period of retraining. Disability shall be supported by a preponderance of medical evidence"; and deleted former (20) and (21) that read: "(20) "Wages" means the average gross earnings received by the employee at the time of the injury for the usual hours of employment in a week, and overtime is not to be considered. Sick leave benefits accrued by employees of public corporations, as defined by subsection (16) of this section, are considered wages.

(21) "Wife" or "widow" means only a wife or widow living with or legally entitled to be supported by the deceased at the time of the injury."

1985 Amendment: In definition of temporary total disability inserted second sentence allowing benefits during reasonable period of retraining.

1981 Amendments: Chapter 47 inserted "Disability shall be supported by a preponderance of medical evidence" in definitions of permanent partial disability, permanent total disability, and temporary total disability.

Chapter 349 deleted "the division of employment security of" before "the Montana department of labor and industry" in definition of average weekly wage.

Administrative Rules

ARM 24.29.205 Issuing orders — appeal.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Actual Wage Loss at Maximum Medical Healing Used to Determine Permanent Partial Disability Benefit Rate — Workers' Compensation Court Erred in Ruling Permanent Partial Disability Benefit Rate Is Aggregated From Both Time-of-Injury Concurrent Employments When Disability Precluded Only One Job — Public Policy of Wage Loss Benefit Relating to Actual Wages Lost. Barnhart v. Mont. St. Fund, 2022 MT 250, 411 Mont. 138, 522 P.3d 418.

Workers' Compensation Insurer Entitled to Restitution for Pecuniary Loss — Defendant's Financial Situation Made Payment of Restitution Unjust: The defendant pleaded guilty to the offense of misdemeanor assault for striking a peace officer while waiting for an initial appearance in Justice Court in another matter. The plea agreement called for the defendant to pay restitution to the Montana State Fund (MSF) for its workers' compensation payments to the peace officer and medical providers. The defendant argued at the restitution hearing that MSF was not a victim under 46-18-243 because it had not suffered a pecuniary loss, that the statute did not authorize payment of general damages, and that she was unable to afford and would be unduly burdened by the full amount of restitution suggested. The District Court held that MSF qualified as a victim insurer and thus was entitled to the full amount of restitution within 5 months of the sentence. On appeal, the Supreme Court affirmed, concluding that MSF was entitled to restitution for pecuniary loss. However, the Supreme Court reversed the District Court's failure to waive restitution pursuant to 46-18-246, reasoning that the uncontroverted evidence of the defendant's dire financial situation made it otherwise unjust to require the defendant to pay the restitution imposed. St. v. Lodahl, 2021 MT 156, 404 Mont. 362, 491 P.3d 661.

Occupational Disease — Employment Leading Cause of Advanced Arthritis When Employee Had Preexisting Condition: An employee who had a family history of arthritis sought workers' compensation benefits, claiming his arthritis was aggravated by his employment. As a part of his occupation as a truck driver, the employee had to manually unscrew 4-inch brass caps covering valves and chain up his truck with a set of triple chains in the winter. After the Montana State Fund denied liability, the employee filed a petition for hearing with the Workers' Compensation Court, which concluded that the employee suffered from a compensable occupational disease arising out of and in the course and scope of his employment as a truck driver. The State Fund appealed. The Supreme Court agreed that the employee's employment was the major contributing cause of the occupational disease even though the employee had a genetic predisposition to arthritis and had suffered from mild arthritis prior to his employment. Mont. St. Fund v. Grande, 2012 MT 67, 364 Mont. 333, 274 P.3d 728.

No Error by Workers' Compensation Court — Award of Benefits From Uninsured Employers' Fund Supported by Evidence: In 2002, Hopkins began working for Great Bear Adventures, a wildlife park where he would perform maintenance duties and feed the bears. In 2007, Hopkins traveled to the park at the request of Kilpatrick, the park's owner. Hopkins smoked marijuana on the way to the park. Once at the park, Kilpatrick asked Hopkins to work on a gate, but Hopkins was subsequently injured while feeding bears in the park. The Workers' Compensation Court awarded Hopkins workers' compensation benefits from the Uninsured Employers' Fund. Kilpatrick appealed. The Supreme Court affirmed, holding that Hopkins was employed by Kilpatrick at the time of the injury; that feeding the bears was one of Hopkins' regular employment duties even though testimony conflicted about whether he was asked to feed the bears on the day of the injury; that marijuana was not the major contributing factor of Hopkins' injuries, in part because there was no evidence about the level of impairment; and that Hopkins' services were not in exchange for aid or sustenance. Hopkins v. Uninsured Employers' Fund, 2011 MT 49, 359 Mont. 381, 251 P.3d 118.

Failure to Qualify as Treating Physician Through Expiration of Medical License Held No Bar to Consideration of Physician's Testimony - Purpose of Act Considered: Because Hansen's medical license expired prior to trial, the insurer objected to consideration of Hansen's testimony as the treating physician. The Supreme Court held that it would be absurd and not in keeping with the purposes of the Workers' Compensation Act for the Workers' Compensation Court not to consider Hansen's testimony at trial just because he could not technically qualify as the treating physician at the time of trial because his license expired without his knowledge before trial. Wright v. ACE Am. Ins. Co., 2011 MT 43, 359 Mont. 332, 249 P.3d 485.

Nontreating Physician Testimony Entitled to More Weight Than That of Treating Physician: After being injured, Wright was treated by several physicians. The testimony of Dr. Hansen, whose medical license expired before trial and who was not the treating physician at the time of trial, was given more weight by the Workers' Compensation Court than the treating physician's testimony. The Supreme Court held that under the circumstances, considering the specialties of each physician and distinguishing its holding in Nielson v. Mont. St. Fund, 2003 MT 95, 315 Mont. 194, 69 P.3d 1136, the Workers' Compensation Court did not err by giving Hansen's testimony greater weight than the treating physician's testimony. Wright v. ACE Am. Ins. Co., 2011 MT 43, 359 Mont. 332, 249 P.3d 485.

Determination of Exempt Casual Employment — House Construction: The facts and circumstances surrounding whether the alleged employment of a person working on a house under construction was by a business, and thus not exempt casual employment, involve an examination of the management and operation of the house and the construction operation, length of employment, manner of pay, other workers' status, and how the operator characterized the property for tax purposes. Weidow v. Uninsured Employers' Fund, 2010 MT 292, 359 Mont. 77, 246 P.3d 704.

Liability of Two or More Employers for Occupational Disease — Potentially Causal Standard — Last Injurious Exposure — Worker's Burden of Proof: For purposes of determining the initial liability for an occupational disease when two or more employers are potentially liable, the last injurious exposure to the hazard of the occupational disease occurs during the last employment at which a claimant was exposed to working conditions of the same type and kind that gave rise to the occupational disease. The claimant is not required to prove the degree to which working conditions with each employer have actually caused the disease in order to attribute initial liability. Rather, when the occupational disease has not been previously diagnosed, the claimant must present objective medical evidence demonstrating that the claimant has an occupational disease and that working conditions during employment at which the last injurious exposure was alleged to occur were the type and kind of conditions that would have caused the occupational disease. Liberty NW. Ins. Corp. v. Mont. St. Fund, 2009 MT 386, 353 M 299, 219 P3d 1267 (2009), distinguishing Caekaert v. St. Comp. Mut. Ins. Fund, 268 M 105, 885 P2d 495 (1994), and Lanes v. Mont. St. Fund, 2008 MT 306, 346 M 10, 192 P3d 1145 (2008), and followed in Banco v. Liberty NW. Ins. Corp., 2012 MT 3, 363 Mont. 290, 268 P.3d 13.

Claimant's Lack of Knowledge of Disability — Time for Filing Claim to Run From Time of Knowledge of Disability: Tinker suffered a hip injury at work sometime in 2005, but the pain seemed to come and go, so Tinker reported the injury but continued to work. In 2007, the pain escalated to the point where Tinker had trouble getting in and out of a vehicle and performing his job. A visit to the doctor revealed a degenerative condition in the hip, and Tinker decided to file a workers' compensation claim. The State Fund denied the claim as untimely because it was not filed within 12 months of the injury as required by 39-71-601. Tinker contended that the claim should be compensable as an occupational disease or that the filing time should be waived. The Workers' Compensation Court concluded that the injury was not an occupational disease but held that Tinker lacked knowledge of the disability until he sought treatment in 2007, so Tinker's claim qualified for the waiver of the filing limitation and was thus compensable. The State Fund appealed, but the Supreme Court affirmed. The plain meaning of the Workers' Compensation Act clearly demonstrates that the term "disability" is tied to a wage loss or an impairment in the ability to earn wages through employment. Therefore, until a claimant knows that he or she is suffering some form of wage loss as a result of an injury, condition, or impairment, the claimant lacks knowledge of a disability. In this case, Tinker lacked knowledge of his disability until 2007 when he first sought medical treatment because his injury was preventing him from performing his job, so the Workers' Compensation Court did not err in waiving the filing requirement and compensating Tinker for the injury. Tinker v. Mont. St. Fund, 2009 MT 218, 351 M 305, 211 P3d 194 (2009).

Retroactivity Dependent on Whether Claim Final or Settled — Settled Claim Defined: State Fund asserted that the Workers' Compensation Court erred by refusing to adopt the 2-year statute of limitations in 39-71-2905 as a limit on the retroactive effect of judicial decisions in workers' compensation claims. The Supreme Court held that retroactivity for workers' compensation claims is dependent on whether a claim is final or settled. A settled claim is a department-approved or court-ordered compromise of benefits between a claimant and an insurer, or a claim that was paid in full. The court refused to adopt a 2-year limit on retroactivity on all workers' compensation claims when the clear intent of 39-71-2905 is to apply the limit only to particular cases. There is no specific statutory cutoff point for most workers' compensation claims, and as stated in Dempsey v. Allstate Ins. Co., 2004 MT 391, 325 M 207, 104 P3d 483 (2004), the interests of fairness and finality are not generally served by drawing an arbitrary distinction between litigants based merely on the timing of their claims. Flynn v. Mont. St. Fund, 2008 MT 394, 347 M 146, 197 P3d 1007 (2008). See also Schmill v. Liberty NW. Ins. Corp., 2005 MT 144, 327 M 293, 114 P3d 204 (2005), and Flynn v. Montana State Fund, 2011 MT 300, 363 Mont. 55, 267 P.3d 23 (Flynn III). In Flynn III, the Supreme Court affirmed the Workers' Compensation Court's definition of "paid in full" for a "settled" workers' compensation claim. The actual payment of a benefit, and not the potential of a future benefit, makes a claim not "paid in full". Hence, a settled claim for purposes of retroactivity is either: (1) a settlement agreement ordered by a court or approved by the Department of Labor and Industry; or (2) a claim in which the claimant received all applicable benefits prior to a new judicial decision and has not received benefits on the predecision claims.

Disparate Awards for Permanent Partial Disability and Permanent Total Disability Not Violative of Equal Protection: The statutory framework of the Workers' Compensation Act reveals distinctly different purposes served by permanent partial disability and permanent total disability benefits. Permanent partial disability benefits compensate a worker for sustaining a partial disability by a smaller impairment award and by supplementing wages earned when the claimant returns to work. Permanent total disability benefits do not contemplate a return to work and so provide a higher continuous benefit that is paid over the work life of the claimant. Because claimants in these classes are not similarly situated, denial of an impairment award to permanent partial disability claimants does not violate equal protection guarantees. Rausch v. St. Comp. Ins. Fund, 2005 MT 140, 327 M 272, 114 P3d 192 (2005).

When Medical Stability Achieved: The Workers' Compensation Court found that medical stability was synonymous with maximum medical improvement and concluded that Hiett was not entitled to payment for prescription drugs unless the medications enabled Hiett to return to work and to continue working once employed. Based on the definition of medical stability in this section (see 2011 amendment), the Supreme Court acknowledged that maximum medical improvement is reached when the underlying condition has stabilized to the point that no further medical improvement would be reasonably expected from primary medical treatment. However, the question in this case was how or at what point does one achieve medical stability. Noting that more than one statutory interpretation was possible, the court opted for an interpretation that led to a reasonable result in favor of one that led to an unreasonable or absurd result and to one that gave effect to the legislative intent underlying the Workers' Compensation Act. The court concluded that medical stability is achieved when it can be sustained. Thus, a claimant is entitled to primary medical services that are necessary to permit medical stability to be sustained. Hiett v. Missoula County Pub. Schools, 2003 MT 213, 317 M 95, 75 P3d 341 (2003).

Erroneous Finding of No Permanent Partial Disability — Reversal Based on Medical Depositions: Nielson filed a workers' compensation petition, alleging that he suffered an occupational disease in his left arm and a work-related injury to his right arm and was permanently totally disabled. The Workers' Compensation Court found that the conflicting medical opinions accompanying the petition ultimately depended on Nielson's subjective complaints of pain, and because Nielson was not credible, the court was not persuaded that Nielson was incapable of holding at least light duty jobs and dismissed the petition. Nielson then filed a second petition, alleging the same background facts and claiming that he was at least entitled to permanent partial disability benefits. The second time the court added to its previous findings that there was a lack of persuasive medical evidence verifying Nielson's physical restrictions or that Nielson's ability to work was impaired and, based on the testimony of one member of a three-physician panel who examined Nielson, concluded that a permanent partial disability did not exist and dismissed the petition. Nielson appealed. The Supreme Court noted that it may not substitute its judgment for that of the trial court when the issue relates to the weight given to certain evidence or to the credibility of witnesses, but that when evidence is produced by medical deposition, the appellate court is in as good a position as the trial court to judge the weight given that testimony. The court also noted that the general rule is that the testimony of a treating physician is entitled to greater evidentiary weight than that of other doctors. The court found that Nielson had been examined by 10 physicians, an exercise physiologist, and a physical therapist, and with the exception of the physician upon whose testimony the Workers' Compensation Court relied, some form of injury was diagnosed by every doctor who saw Nielson, including Nielson's treating physician. Thus, without meaning to infer that objective evidence is always necessary or even available for diagnosis of an injury, the Supreme Court concluded that, based on the substantial evidence offered at trial, Nielson suffered a work-related permanent partial disability, and the court reversed for a determination of Nielson's permanent partial disability benefits. Nielson v. St. Comp. Ins. Fund, 2003 MT 95, 315 M 194, 69 P3d 1136 (2003).

Permanent Total Disability and Regular Employment Construed — Part-Time Work Not Substantial and Significant: After McFerran was injured at his job, his employer, Consolidated Freightways, hired Addy, a vocational consultant, to assess McFerran's employability. Addy found five job possibilities for McFerran. The Workers' Compensation Court found that one of those five, a job as a pharmacy delivery driver, constituted "regular employment" for the purposes of determining whether McFerran suffered from a permanent total disability. The Supreme Court, although agreeing with the analysis used by the Workers' Compensation Court to determine whether a worker is permanently and totally disabled, disagreed that the work as a pharmacy delivery driver was substantial and significant and that the work constituted regular employment. The Supreme Court pointed out that Addy's written report found that the period of work could vary between 1 to 4 hours a day, 6 days a week. The Supreme Court held that a job offering no assurance of more than 1 hour of work each day was not "substantial and significant" enough to be considered regular employment. The court therefore held that the Workers' Compensation Court erred when it concluded that McFerran was not totally and permanently disabled. McFerran v. Consol. Freightways, 2000 MT 365, 303 M 393, 15 P3d 935, 57 St. Rep. 1558 (2000).

Change in Circumstances of Treating Physician in Workers' Compensation Case — Equitable Estoppel Applied to Prevent Inequitable Result: Selley suffered a work-related injury, and Liberty Northwest Insurance Corporation (Liberty) began paying wage loss and medical benefits. Prior to beginning treatment for the injury, Selley's treating physician resigned his admitting privileges because of a move to an area outside that required by area hospitals. Liberty became aware of the situation after paying benefits for 2 years and notified Selley that payments would no longer be made to the same doctor as treating physician. The issue was submitted to the Workers' Compensation Court, which decided that Liberty was not equitably estopped from refusing reimbursement. The Supreme Court noted that estoppel generally arises when a party, through its acts, conduct, or acquiescence, has caused another party in good faith to change its position for the worse. Applying the elements of equitable estoppel outlined in Dagel v. Great Falls, 250 M 224, 819 P2d 186, 48 St. Rep. 919 (1991), the court invoked the doctrine in this case because it would be unconscionable to permit Liberty to maintain a position inconsistent with one in which it had acquiesced. Although Liberty's conduct did not amount to concealment of a material fact, nevertheless, Liberty's silence and acquiescence for 2 full years amounted to a misrepresentation that the treating physician was considered appropriate for Selley's work-related injuries. Further, it would not be fair to require Selley to determine whether the physician qualified as an appropriate treating physician because the burden of determining a physician's qualifications lies with the insurer. Requiring Selley to change physicians in the middle of the course of progressively favorable treatment would result in Selley effectively changing position for the worse and suffering a loss by being forced to forego the well-established physician-patient relationship. Thus, the Workers' Compensation Court committed reversible error in determining that Liberty was not estopped from asserting this section as a defense to Selley's claim. Selley v. Liberty NW. Ins. Corp., 2000 MT 76, 299 M 127, 998 P2d 156, 57 St. Rep. 333 (2000), following Smith v. Krutar, 153 M 325, 457 P2d 459 (1969), and distinguishing Elk Park Ranch, Inc. v. Park County, 282 M 154, 935 P2d 1131, 54 St. Rep. 293 (1997).

Workers Serving Daily Business as Core Workers Not Considered Temporary Employees: Some of Dahl's employees were supplied by an employment service, which also agreed to provide workers' compensation insurance for the employees whom it supplied. Dahl argued that because the workers were temporary and because the employment service provided insurance, Dahl was not an uninsured employer. However, the employees worked for Dahl between 6 and 15 weeks on one occasion and between 8 and 20 weeks on another occasion. The employees were not used to meet either an immediate unforeseen need or short-term demands, but rather were used as core workers to serve daily business functions, and thus could not be considered temporary employees. Dahl v. Uninsured Employers' Fund, 1999 MT 168, 295 M 173, 983 P2d 363, 56 St. Rep. 649 (1999), following C. Loney Concrete Constr., Inc. v. Employment Relations Div., 1998 MT 230, 291 M 41, 964 P2d 777, 55 St. Rep. 961 (1998).

Substantial Credible Evidence of Maximum Healing Prior to Nonwork-Related Injury — Claim Denied: Paterson sought temporary total disability benefits, claiming that a nonwork-related injury had exacerbated a prior work-related injury and was thus compensable. To determine whether maximum healing of the work-related injury had occurred, the insurer presented a hypothetical scenario to Paterson's physician, consisting of three components that the insurer intended to establish through its witnesses in subsequent testimony. Based on the hypothetical, the doctor agreed that Paterson did reach maximum healing prior to the nonwork-related injury. Paterson then paraphrased his version of events based on his witnesses' testimony, and the doctor opined that Paterson had not reached maximum healing. The Workers' Compensation Court found more credible the evidence presented in proving the hypothetical, including findings regarding Paterson's work history and back symptomology, his lack of fear of losing current employment or not obtaining future employment, and the affordability and availability of medical care. The court did not err in holding that Paterson had reached maximum healing prior to the nonwork-related injury. Paterson v. Mont. Contractor Comp. Fund, 1999 MT 158, 295 M 120, 983 P2d 300, 56 St. Rep. 623 (1999).

Definition of Temporary Worker Not Retroactively Applied: The 1991 version of the definition of temporary worker did not include a seasonal worker, which was added in 1995. The Workers' Compensation Court properly applied the 1991 definition, in effect at the time that the action accrued, because a retroactive application of the 1995 definition would have caused a different legal effect on the transaction than that under the law when the transaction occurred. C. Loney Concrete Constr., Inc. v. Employment Relations Div., 1998 MT 230, 291 M 41, 964 P2d 777, 55 St. Rep. 961 (1998), following Porter v. Galarneau, 275 M 174, 911 P2d 1143 (1996).

Independent Medical Examination — Qualifications of Examining Physician — Determination of Applicable Law: In 1989, Blythe was stuck by a needle that had previously been used on an AIDS patient, and after that time, Blythe alleged that he was suffering from depression and hallucinations that prevented him from working. The Workers' Compensation Court determined that Blythe was malingering. The insurer required an independent medical examination (IME), and the Workers' Compensation Court allowed testimony on the issue of malingering from two Ph.D. clinical psychologists, one of whom conducted the IME by the order of the Workers' Compensation Court. Citing St. Comp. Ins. Fund v. Sky Country, Inc., 239 M 376, 780 P2d 1135 (1989), the Supreme Court held that the applicable substantive law is the law as it was at the time of injury and that the applicable law for procedural purposes is the law at the time of trial. The issue of who is qualified to conduct an IME is procedural rather than substantive, so the applicable law is the 1993 version of 39-71-605. The Supreme Court also held that the Workers' Compensation Court erred when it treated the listing of types of treating physicians in this section to be exemplary rather than exclusive. The Supreme Court noted that even if the list of types of physicians included a clinical psychologist, which it did not, the law also required that the physicians be licensed in Montana. The psychologist who conducted the IME was not licensed as a physician. The testimony of one of the psychologists was therefore inadmissible, but because the Supreme Court could not determine whether the outcome of the trial would have been different without the inadmissible testimony, it remanded the case to the Workers' Compensation Court for that determination. EBI/Orion Group v. Blythe, 281 M 50, 931 P2d 38, 54 St. Rep. 54 (1997), followed in Murphy v. WestRock Co., 2018 MT 54, 390 Mont. 394, 414 P.3d 276.

Physical Inability to Perform Work as Triggering Entitlement to Total Disability Benefits: Only when a person is unable to physically perform any employment is that person entitled to either temporary total disability benefits or permanent total disability benefits under the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act). Notwithstanding Smart's argument regarding the definition of "worker's job pool" that was set out in a prior section and then repealed, even though Smart could not return to his former work, he was physically able to perform other available work for which he was qualified and thus was not entitled to permanent total disability benefits under 39-72-701 (now repealed). The Workers' Compensation Court properly limited Smart's compensation to an award of up to $10,000, pursuant to 39-72-405 (now repealed). Smart v. Mont. Historical Soc'y, 277 M 89, 918 P2d 670, 53 St. Rep. 554 (1996).

Pain Coupled With Lack of Motivation to Return to Work — Lack of Permanent Total Disability Upheld: Kloepfer injured her back while at work and had a lumbar fusion performed to cure the pain. The pain was not cured by the surgery. Her treating physician testified that because of the pain, Kloepfer could do only light work, with a high amount of absenteeism, and was therefore permanently and totally disabled. Kloepfer was examined by a panel of specialists who found that she could do light work. The Workers' Compensation Court found that she could do light work but was unmotivated to work. The Supreme Court noted that although some deference is paid to the opinion of a worker's treating physician, the Workers' Compensation Court is in the best position to judge the credibility of witnesses and that the standard is still whether there was substantial evidence to support the Workers' Compensation Court's decision. The Supreme Court held that there was substantial evidence to support the Workers' Compensation Court's opinion that Kloepfer was not permanently and totally disabled. Kloepfer v. Lumbermen's Mut. Cas. Co., 276 M 495, 916 P2d 1310, 53 St. Rep. 486 (1996).

Case Presented on Depositions — District Court Finding of Lack of Causal Connection Between Injury and Disability Sustained: Wilson was injured twice while working for United Parcel Service (UPS) and was treated pursuant to UPS's workers' compensation coverage. Later, while working for another employer, Wilson again suffered back pain and, despite conflicting medical evidence, was diagnosed by Dr. Chambers as no longer suffering as a result of the two earlier injuries. The Workers' Compensation Court denied permanent partial disability benefits based upon Dr. Chambers' findings. Citing Sciuchetti v. Hurt Constr., 238 M 170, 777 P2d 308 (1989), the Supreme Court held that although it could review the weight of the evidence given to Dr. Chambers' testimony by the Workers' Compensation Court because all of the testimony was presented by deposition, the Supreme Court would uphold the findings of the Workers' Compensation Court because those findings were supported by substantial credible evidence. Here, that evidence was in the form of Dr. Chambers' testimony and problematic testimony from Wilson's witnesses and in the form of other evidence contradicting Wilson's claims of continuing back pain. Wilson v. Liberty Mut. Fire Ins., 273 M 313, 903 P2d 785, 52 St. Rep. 990 (1995), followed in Taylor v. St. Comp. Ins. Fund, 275 M 432, 913 P2d 1242, 53 St. Rep. 201 (1996).

Job "No Longer Available": When the employer worked the employee beyond the employee's medical restrictions and caused the episode that triggered the employee's discharge, the Workers' Compensation Court did not err in determining that the employee's job was "no longer available" and therefore did not err in ruling that the employee was entitled to temporary total disability benefits. Ingbretson v. Louisiana-Pacific Corp., 272 M 294, 900 P2d 912, 52 St. Rep. 764 (1995).

Loss of Part of Toe, Fracture of Another, and Resultant Sensitivity to Cold as Permanent Partial Disability — Justifiable Dispute as to Benefits: The insurer did not act unreasonably in denying permanent partial disability benefits. Therefore, the court properly denied claimant legal fees and a 20% penalty. There was a valid factual dispute and a valid question of legal interpretation of the pertinent statute. Claimant lost part of his fifth toe and had a fracture of his largest toe. Cold temperatures caused the foot and toes to ache. He was given an impairment rating of 1% of the whole man. The treating doctor's treatment notes did not indicate impairment of work, and the doctor's deposition was not clear on the issue. Claimant and the insurer disagreed on whether there was work impairment, and the Workers' Compensation Court found impairment. The pertinent statute had been amended in 1991 to provide that a claimant was not entitled to permanent partial disability benefits unless the medically determined physical restriction impaired the claimant's ability to work. Claimant's interpretation of the statute was justifiably disputed by the insurer, and there was no case law to aid in interpretation. Williams v. Plum Creek Timber Co., 270 M 209, 891 P2d 502, 52 St. Rep. 148 (1995).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Casual Employment:

Colmore hired Forgey to do some fencing work on Colmore's ranch, and Forgey was killed while working an auger. Forgey's wife sought workers' compensation benefits, but since Colmore did not carry workers' compensation insurance, the uninsured employers' fund began paying benefits to the wife. The Workers' Compensation Court subsequently determined that Forgey was Colmore's employee, that Colmore was required to carry workers' compensation insurance, and that the wife was entitled to benefits. Colmore appealed on grounds that he was not engaged in a business, profession, or occupation because he did not lease the ranch to earn a livelihood, so Forgey was a casual employee. The Supreme Court disagreed. Colmore leased the property from his limited partnership for the express purpose of running an agricultural business and took significant tax deductions based on agricultural deductions and depreciation on the ranch equipment and expenses, including fencing expenses. These facts were sufficient to prove that Colmore was operating the ranch with a profit motive, thereby qualifying Forgey's employment for workers' compensation coverage rather than casual employment, so Forgey was entitled to workers' compensation benefits. Colmore v. Uninsured Employers' Fund, 2005 MT 239, 328 M 441, 121 P3d 1007 (2005).

Where a dentist also operated for gain a large apartment house, in the construction of an addition to which plaintiff employee was injured, the former's contention, in an action for damages, that the latter's employment was "casual", was without merit, since a person may be engaged in more than one business, trade, or profession. The building of the addition to the apartment house having been in furtherance of defendant's apartment house business, the plaintiff's employment was in the usual course of that business. Nelson v. Stukey, 89 M 277, 300 P 287, 78 ALR 483 (1931), followed in Colmore v. Uninsured Employers' Fund, 2005 MT 239, 328 M 441, 121 P3d 1007 (2005).

A truck driver's truck became mired in a mudhole from which, without help, he was unable to extricate it. He so informed the employer by phone, who advised him to procure help. The person procured to assist him was injured in an attempt to extricate the truck. Under the circumstances the helper was employed to work for the truck driver's employer in the course of the latter's business. The fact that the helper's employment was but temporary or casual was of no importance, and the injury sustained by the helper was compensable under the provisions of the Workmen's Compensation Act (now Workers' Compensation Act). Indus. Accident Bd. v. Brown Bros. Lumber Co., 88 M 375, 292 P 902 (1930).

Defendant company's business was that of generating and disposing of electric power. A watchman at its plant employed a miner to dig a well to secure water for use at the watchman's dwelling house and miner was killed while doing so. The company had elected not to come under the Workmen's Compensation Act (now Workers' Compensation Act). The employment of decedent by the watchman was not in the usual course of business of the company but was casual in its nature. Miller v. Granite County Power Co., 66 M 368, 213 P 604 (1923), distinguished in Nelson v. Stukey, 89 M 277, 300 P 287 (1931).

Necessary Elements to Prove Permanent Total Disability — Required Causal Connection Between Loss of Earning Capability and Disabling Condition: To be entitled to benefits for a permanent total disability, a claimant must prove that a condition resulted from injury and that it is the injurious condition that results in the loss of actual earnings or a loss of earnings capability. In this case, Fellenberg retired for reasons unrelated to his occupational disease, so his loss of earnings was not a result of the occupational disease but rather a result of his voluntary retirement. Thus, the Workers' Compensation Court did not err in denying permanent total disability benefits after concluding that Fellenberg's claim lacked the causal connection between the loss of earnings and the disabling injury. Further, because Fellenberg did not suffer a permanent total disability, he was also not entitled to a permanent partial disability benefit. Fellenberg v. Transp. Ins. Co., 2005 MT 90, 326 M 467, 110 P3d 464 (2005), following Hash v. St. Comp. Mut. Ins. Fund, 256 M 252, 846 P2d 981 (1993), and distinguishing Brurud v. Judge Moving & Storage, Inc., 172 M 249, 563 P2d 558 (1977), and Walker v. H.F. Johnson, Inc., 180 M 405, 591 P2d 181 (1978).

No Holton Award if Claimant Not Entitled to Partial Disability Award — Grimshaw Applied: Citing Rausch v. St. Comp. Ins. Fund, 2002 MT 203, 311 M 210, 54 P3d 25 (2002), Fellenberg contended that he was entitled to an impairment award in accordance with Holton v. F.H. Stoltze Land & Lumber Co., 195 M 263, 637 P2d 10 (1981). The Supreme Court disagreed. Pursuant to Grimshaw v. L. Peter Larson Co., 213 M 290, 691 P2d 805 (1984), if a claimant is not presently entitled to receive partial disability benefits, Holton does not apply. Grimshaw applied to Fellenberg's asbestos-related injury during employment that ended in 1986. Because Fellenberg was not entitled to partial disability benefits, denial of a Holton impairment award was proper. (Note: the definition of permanent partial disability was revised in 1991, statutorily superseding Holton and Grimshaw.) Fellenberg v. Transp. Ins. Co., 2005 MT 90, 326 M 467, 110 P3d 464 (2005).

No Increase in Disability Over That Which Existed Prior to Injury — Benefits for Permanent Partial Disability Denied: Kuntz was injured numerous times during his employment history. In this proceeding, Kuntz asserted that his 1987 back injury was an aggravation of a previous injury and thus compensable. After hearing testimony from the examining physicians and failing to find wholly credible Kuntz's testimony concerning the nature and extent of his pain and disability, the Workers' Compensation Court properly found that the 1987 injury was not material or significant on a permanent basis and did not increase Kuntz's disability over that which existed prior to the injury. Because Kuntz failed to prove by a preponderance of the evidence that the 1987 injury caused his current disability, the burden did not shift to the employer. Denial of permanent partial benefits was affirmed. Kuntz v. Nationwide Mut. Fire Ins. Co., 1998 MT 5, 287 M 142, 952 P2d 422, 55 St. Rep. 12 (1998), following Kloepfer v. Lumbermen's Mut. Cas. Co., 276 M 495, 916 P2d 1310 (1996).

Work-Related Injury Following Nonwork-Related Injury — Permanent Total Disability Found — Workers' Compensation Court's Findings of Fact Reviewed De Novo and Reversed: Larson, a parts manager for a truck dealership, suffered a nonwork-related heart attack in 1980 but returned to work full-time in 1981. Then, in July 1981, Larson suffered a left inguinal hernia after lifting a heavy truck spring at his job. The Workers' Compensation Court found that Larson's heart attack and other medical problems had rendered him totally disabled prior to the industrial injury. For that reason, Larson was not entitled to permanent total disability benefits. The court also found that even if Larson's employer had the burden of proving that Larson could still work, the employer's insurance company had proved that Larson was employable despite his industrial accident. The Supreme Court, applying the 1979 workers' compensation statutes liberally and in favor of the injured worker, noted that an employer takes an employee subject to the employee's existing physical condition at the time of employment. Citing McIntyre v. Glen Lake Irrigation District, 249 M 63, 813 P2d 451 (1991), and White v. Ford, Bacon & Davis Tex., Inc., 256 M 9, 843 P2d 787 (1992), the Supreme Court held that to the extent that the Workers' Compensation Court's findings of fact are based upon deposition testimony, the Supreme Court sits in as good a position as the Workers' Compensation Court to review the evidence de novo. The Supreme Court therefore reviewed the deposition testimony of the physicians and rehabilitation counselors and found that there was insufficient evidence from which the Workers' Compensation Court could determine that Larson had a reasonable prospect for employment. Larson v. Cigna Ins. Co., 276 M 283, 915 P2d 863, 53 St. Rep. 394 (1996), citing Larson v. Cigna Ins. Co., 271 M 98, 894 P2d 327 (1995).

Independent Disabling Conditions — One Work-Related, Another Not: The Workers' Compensation Court held that Larson was ineligible to receive permanent total disability benefits for a work-related hernia because he first became totally disabled by a preexisting, nonwork-related and independent heart condition. In a case of first impression, the Supreme Court, noting that the liberal construction provision in 39-71-104 (now repealed) favored the injured worker, relied on Bond v. St. Regis Paper Co., 174 M 417, 571 P2d 372 (1977), for the proposition that an employer takes an employee subject to the employee's physical condition at the time of employment and on Shea v. Dept. of Labor and Industry, 529 P2d 1131 (Wash. Ct. App. 1974), and Estate of Ensley v. Anglo Alaska Constr., 773 P2d 955 (Alaska 1989), in holding that if evidence showed that Larson's hernia produced a permanent total disability, total disability benefits were payable regardless of the fact that the preexisting, nonwork-related heart condition also could be considered a cause of the permanent total disability. Larson v. Cigna Ins. Co., 271 M 98, 894 P2d 327, 52 St. Rep. 369 (1995). See also Larson v. Cigna Ins. Co., 276 M 283, 915 P2d 863, 53 St. Rep. 394 (1996).

Thoracic Outlet Syndrome Causally Related to Injury: The testimony of Ferguson, his wife, and several doctors who saw Ferguson, coupled with the opinion of a thoracic specialist who recommended surgery for thoracic outlet syndrome, that Ferguson's current condition stemmed from a 1986 injury, constituted substantial evidence upon which the trial court could base its opinion that the condition resulted from that injury. The court did not err in finding that the surgery was reasonable and necessary as supported by the medical evidence. The court properly reinstated temporary total disability benefits until Ferguson's condition was restored as far as the permanent character of the injuries permitted. Ferguson v. Am. Stores, 268 M 421, 888 P2d 417, 51 St. Rep. 603 (1994).

Permanent Total Disability — Osteoarthritis — Benefits Denied: When microtrauma to the hand temporarily aggravated the symptoms of naturally occurring and progressing osteoarthritis, claimant failed to demonstrate by a preponderance of the evidence that her current condition was attributable to her employment. Without the causal connection, claimant did not meet the criteria of the statutory definition of permanent total disability that would qualify her to receive permanent disability benefits. Hash v. St. Comp. Mut. Ins. Fund, 256 M 252, 846 P2d 981, 50 St. Rep. 76 (1993).

Appropriate Rehabilitation Option for Permanent Partial Disability: In order to qualify as permanently totally disabled, claimant was required to show that after exhausting all rehabilitation options in 39-71-1012 (now repealed), he remained unable to return to work in his job pool. Absent such a showing, claimant's classification as permanently partially disabled was proper, and his return to a related occupation suited to his education and marketable skills was the appropriate rehabilitation option. Kelly v. St. Comp. Mut. Ins. Fund, 254 M 200, 835 P2d 774, 49 St. Rep. 699 (1992).

Ongoing Psychological Condition Precluding Termination of Benefits Until Maximum Healing Reached: Although much of claimant's physical condition relative to muscle contraction and pain was psychological in origin, the psychological condition was nevertheless related to the physical injury and the mixture of physical and psychological components was therefore compensable until maximum healing was reached. Meidinger v. W. Energy Co., 254 M 18, 834 P2d 1382, 49 St. Rep. 601 (1992).

Room and Board as Gross Earnings Includable in Postinjury Wages: Room and board provided to claimant as partial compensation for working on a ranch were not considered a reimbursement for out-of-pocket expenses but rather constituted a real economic gain. The value of the room and board was equivalent to gross earnings includable in claimant's postinjury wages. Anderson v. Hammer, 252 M 73, 826 P2d 931, 49 St. Rep. 165 (1992). See also Weaver v. Buttrey Food & Drug, 255 M 90, 841 P2d 476, 49 St. Rep. 897 (1992), when earnings from a bartending business, although not in the form of direct wages or benefits, constituted economic gain sufficient to preclude a claim of total loss of wages necessary to qualify claimant for temporary total disability.

Evidence Supports Permanent Disability Caused by Previous Accident: The Workers' Compensation Court found that the claimant's current condition was not the result of a 1979 shoulder injury, but rather was aggravated by a 1984 accident. On appeal, the Supreme Court ruled that there was sufficient evidence to establish that the claimant's shoulder condition was caused by the 1979 accident and that the claimant had become permanently disabled because of the arthritic condition of his shoulder. The Supreme Court remanded for a determination of whether the claimant's permanent disability is partial or total. Harmon v. Harmon, 249 M 387, 816 P2d 1032, 48 St. Rep. 698 (1991).

Failure to Prove Thoracic Outlet Syndrome Causally Related to Injury: The Supreme Court declined to substitute its judgment for the Workers' Compensation Court's judgment after finding substantial credible evidence to support the conclusion that claimant did not prove that his thoracic outlet syndrome was causally related to his prior industrial accident. McIntyre v. St. Comp. Ins. Fund, 249 M 63, 813 P2d 451, 48 St. Rep. 579 (1991).

Marijuana Farm Indication That Claimant's Injury Not Permanent: The Supreme Court upheld the lower court's finding that based on the claimant's conviction for operating a large and sophisticated marijuana growing operation, there was ample evidence to conclude that the claimant's injury was not of a permanent nature. Baldwin v. St. Comp. Ins. Fund, 242 M 373, 791 P2d 49, 47 St. Rep. 810 (1990).

Worker's Condition as Far Restored as Permanent Character of Injury Permits: The Supreme Court affirmed the lower court's finding that substantial evidence existed to justify changing the claimant's benefits to those due under permanent partial disability. Sharkey v. Atl. Richfield Co., 238 M 159, 777 P2d 870, 46 St. Rep. 1169 (1989).

Temporary Total Benefits Discontinued Upon Maximum Healing: Under the statutory scheme in place in 1983 when claimant was injured, temporary total disability did not exist past the time of maximum healing, as determined by the deposition of claimant's physician. Kimes v. Pac. Employees Ins. Co., 233 M 175, 759 P2d 986, 45 St. Rep. 1402 (1988), followed in Laber v. Skaggs Alpha Beta, 247 M 172, 805 P2d 1375, 48 St. Rep. 150 (1991).

Use of Sick Leave Benefits in Determining Wages — Public Corporation Employees Only: Claimant who sustained an industrial injury while employed by a private nursing home corporation contended the Workers' Compensation Court erred in excluding the value of sick leave and other fringe benefits in calculating her wage rate under the former definition of "wages" (deleted by 1987 amendment). The Supreme Court held that sick leave benefits were included in determining wages only when the claimant was an employee of a public corporation. Phelps v. Hillhaven Corp., 231 M 245, 752 P2d 737, 45 St. Rep. 582 (1988).

Incurable Anaphylactic Condition as Permanent Total Disability: An incurable anaphylactic condition that precluded claimant from returning to any job where she could not control her environment was properly designated a permanent total disability. Daniels v. EBI/Orion Group, 230 M 407, 750 P2d 455, 45 St. Rep. 310 (1988).

Inability to Return to Work, Not Inability to Perform Other Jobs, as Criteria in Award of Temporary Total Benefits: The trial court concluded that claimant must demonstrate an inability to "perform other jobs" before being awarded temporary total benefits. It was error to require claimant to show a total loss of earning capacity, as opposed to loss of wages, in order to receive temporary total benefits. Linton v. St. Comp. Ins. Fund, 230 M 122, 749 P2d 55, 45 St. Rep. 68 (1988).

Wages Not to Include Employer Contributions to Benefit Funds: The Supreme Court adopted the rationale of Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Comp. Programs, 461 US 624, 76 L Ed 2d 194, 103 S Ct 2045 (1983), and West Winds, Inc. v. M.V. Resolute, 720 F2d 1097 (9th Cir. 1983), in holding that wages under the Workers' Compensation Act do not include employer contributions to funds that provide health or life insurance, retirement, training, vacation, pension, or disability payments. Linton v. St. Comp. Ins. Fund, 230 M 122, 749 P2d 55, 45 St. Rep. 68 (1988), followed in Phelps v. Hillhaven Corp., 231 M 245, 752 P2d 737, 45 St. Rep. 582 (1988).

Treating Physician's Opinion Based on Incomplete Knowledge — Evidentiary Weight: Because the treating physician normally has more contact with and greater knowledge of an injured worker, the treating physician should generally be in the best position to give an informed opinion. However, when an initial conclusion was based on incomplete knowledge, it was error for the court to ignore the physician's subsequent acknowledgment of medical probability and rely on his initial conclusion. Snyder v. San Francisco Feed & Grain, 230 M 16, 748 P2d 924, 44 St. Rep. 2216 (1987), followed in White v. Ford, Bacon & Davis Tex., Inc., 256 M 9, 843 P2d 787, 49 St. Rep. 1117 (1992), and Wright v. ACE Am. Ins. Co., 2011 MT 43, 359 Mont. 332, 249 P.3d 485.

Employability Precluding Permanent Total Disability Rating: Where a claimant did not show by a preponderance of the evidence a complete inability to perform the jobs that constituted his normal labor market due to his work-related injury, permanent total disability benefits were properly denied. Sterns v. Dudley, 228 M 45, 741 P2d 407, 44 St. Rep. 1329 (1987), followed in Jaenish v. EBI/Orion Group, 248 M 383, 812 P2d 1241, 48 St. Rep. 474 (1991).

Denial of Temporary Total Disability Benefits During Retraining — Maximum Healing — No Total Loss of Wages: Where a claimant had reached maximum healing and testimony indicated he had a normal labor market even absent retraining, the Workers' Compensation Court properly found that claimant's injury did not result in a total loss of wages and that he was therefore not eligible for temporary total disability benefits during retraining. (This case was based on the definition of "temporary total disability" prior to a 1985 amendment allowing such benefits during periods of retraining.) Homme v. Rauenhorst Corp., 227 M 495, 740 P2d 1110, 44 St. Rep. 1262 (1987), followed in Hofferber v. Plago Min., Inc., 257 M 91, 848 P2d 468, 50 St. Rep. 171 (1993).

Temporary Total Disability — Maximum Healing: There is substantial evidence that claimant had not reached maximum healing and therefore is entitled to temporary total benefits. Cuellar v. Royal Ins. Co., 226 M 428, 736 P2d 130, 44 St. Rep. 778 (1987).

Exclusion of Periods of Forced Idleness From Calculation of Benefits: The Supreme Court reversed an award of survivorship benefits that was based on calculations including periods of forced idleness that resulted from equipment failures, finding that to include such periods unfairly penalized decedent. Sandahl v. James A. Slack, Inc., 225 M 208, 732 P2d 831, 44 St. Rep. 174 (1987).

Early Retirement as Voluntary: Claimant seeking additional benefits argued that his retirement was not voluntary because the employer offered the plan to its employees rather than the plan being inspired by the claimant himself and that because the employer encouraged early retirement, subtle pressure was exerted. The Workers' Compensation Court denied benefits because claimant could have continued working, was adequately performing his duties, and was under no threat of being fired. The Supreme Court affirmed that retirement was voluntary and uncoerced, noting that retirement was offered to all employees with no special focus on claimant and that claimant had received $12,180 as consideration for his early retirement. Gierke v. Billings Gazette, 224 M 446, 730 P2d 1143, 43 St. Rep. 2322 (1986).

"Preponderance of Medical Evidence" Test Not Met: Claimant who sought additional permanent total or, alternatively, permanent partial benefits did not meet the statutory "preponderance of medical evidence" test when he failed to report any pain to his supervisor from the date of injury to the date of retirement, when testimony of an orthopedic surgeon and an osteopath indicated claimant could do just about any kind of work, and when claimant pointed out in his own testimony that he intended to continue working and that his injury was not greatly disabling. Gierke v. Billings Gazette, 224 M 446, 730 P2d 1143, 43 St. Rep. 2322 (1986), followed in Garcia v. St. Comp. Mut. Ins. Fund, 253 M 196, 832 P2d 770, 49 St. Rep. 440 (1992).

"Metzger" Test and Statutory Requirements Met: Claimant's lifetime work history and medical evidence, plus his conclusive establishment of an inability to perform jobs in his normal labor market, led to the conclusion that claimant met the test outlined in Metzger v. Chemetron Corp., 212 M 351, 687 P2d 1033, 41 St. Rep. 1788 (1984), and the requirements of this section for permanent total disability. Brewington v. Employers' Fire Ins. Co., 222 M 505, 723 P2d 938, 43 St. Rep. 1458 (1986), followed in Larson v. Cigna Ins. Co., 276 M 283, 915 P2d 863, 53 St. Rep. 394 (1996).

Future Earning Capacity as Based on Estimated Payroll: Claimants established a partnership to buy and sell used furniture and purchased workers' compensation insurance through Rockwood Company (Rockwood). On their fourth day of business, both claimants were injured. Rockwood accepted liability and set the rates for temporary total disability benefits on the basis of annual wages of $12,000 per claimant, but claimants requested that the Workers' Compensation Court increase their benefits. Due to the brevity of employment, no evidence of actual earnings was available. The only documentary evidence presented was the business' application for insurance, which indicated the expectation of a total annual payroll of $30,000. The court increased the benefits based on the estimated annual income for each claimant of $15,000, or half the expected payroll shown on the application. In affirming the award, the Supreme Court concluded that, in the absence of better evidence, the Workers' Compensation Court arrived at a fair estimate of claimants' future earning capacity based on the estimated business payroll divided by the actual number of employees. (Term "wages" now defined in 39-71-123. See sec. 4, Ch. 464, L. 1987.) Wilkerson v. Rockwood Co., 221 M 250, 718 P2d 338, 43 St. Rep. 787 (1986).

Rancher's Temporary Total Disability — Based on Wages, Not Income: Appellant, Harmon, was injured while employed by his father as a ranch hand. He concurrently operated his own farm. The State Compensation Insurance Fund determined Harmon's temporary total disability rate based only on his salary as a ranch hand. Harmon maintained that earnings from his separate but identical self-employment on his own farm should have been combined with his earnings as a ranch hand to properly determine his disability rate. The Workers' Compensation Court found that Harmon failed to prove that he had additional wages beyond his monthly salary as a ranch hand which could be aggregated to increase his rate. Essentially, Harmon suggested on appeal that the gross income from his farm should be treated as wages; however, the Supreme Court found that under 39-71-116, the term "wages" is predicated on an employment relationship which generates income from employer to employee. (Term "wages" now defined in 39-71-123. See sec. 4, Ch. 464, L. 1987.) The record was clear that no such relationship existed in Harmon's position as a self-employed farmer. As stated in Gee v. St. Comp. Ins. Fund, 197 M 335, 642 P2d 1070 (1982), in providing compensation for a temporary total disability, the Legislature chose to restrict the compensation to that based on loss of wages rather than loss of earnings. Although Harmon clearly suffered a loss of earnings on his farm from his disability, this loss of earnings was held to be noncompensable for purposes of his temporary total disability. Harmon v. St. Comp. Ins. Fund, 220 M 445, 716 P2d 605, 43 St. Rep. 514 (1986).

Permanent Total Disability — Based on Actual Employment, Not Earning Capability: Claimant LaVe contended that the lower court erred in basing her permanent total disability benefits on her usual hours of employment rather than on her earning capability. At the time of injury, she was working 10 hours a week, but she asserted that since she had intended to get a job working 40 hours a week, her benefits should be based on her capability to work 40 hours a week. Notwithstanding the fact that 39-71-116 mentions earning capability in the definition of permanent total disability, under 39-71-702 benefits for such a disability are "66⅔% of the wages received at the time of the injury". Section 39-71-116 defines wages as "the average gross earnings received by the employee at the time of the injury for the usual hours of employment in a week". (Term "wages" now defined in 39-71-123. See sec. 4, Ch. 464, L. 1987.) Therefore, the Supreme Court affirmed the lower court's computation of benefits based on 10 hours a week actual employment rather than on an earning capability based on 40 hours a week. LaVe v. School District, 220 M 52, 713 P2d 546, 43 St. Rep. 165 (1986).

Benefits Based on Forty Hours a Week Despite Intermittent Nature of Roofing Job: Claimant worked in a roofing business typified by 40-hour workweeks unless interrupted by inclement weather. The Workers' Compensation Court, in awarding temporary total disability benefits, found that claimant was hired on a full-time basis and that claimant's usual hours of employment were 40 hours a week. Defendants contended on appeal that the court should use an averaging formula to establish claimant's base workweek. The court rejected the contention and appellants' citation to the definition of "wages" in 39-71-116(20) and the provisions of 39-71-701 as authority, finding that the Workers' Compensation Court decision was based on substantial evidence. Denend v. Bradford Roofing & Insulation, 218 M 505, 710 P2d 61, 42 St. Rep. 1778 (1985).

Permanent Total Disability — Nonmedical Components — Burden of Proof: Claimant injured her back in a fall from a ladder. The Workers' Compensation Court found that she had a 15% whole person impairment and that she was permanently totally disabled, until vocationally retrained, based on her medical condition and the presence of nonmedical elements of disability such as her lack of specialized training and limited work experience. The Supreme Court affirmed on the basis that there was substantial evidence to support the decision, particularly in light of the court's referral of the claimant for vocational rehabilitation. Once a claimant presents evidence showing there is no reasonable prospect of employment, the burden of proof shifts to the employer to show that suitable work is available. The employer failed to carry this burden when it did not introduce any evidence to establish that suitable work was available. Coles v. Seven Eleven Stores, 217 M 343, 704 P2d 1048, 42 St. Rep. 1238 (1985), followed in Wood v. Consol. Freightways, Inc., 248 M 26, 808 P2d 502, 48 St. Rep. 306 (1991), and in Ness v. Anaconda Minerals Co., 257 M 335, 849 P2d 1021, 50 St. Rep. 296 (1993). See also Madill v. St. Comp. Ins. Fund, 280 M 450, 930 P2d 665, 54 St. Rep. 4 (1997).

"Usual Hours of Employment" — Overtime — Ambiguity Construed in Favor of Worker: The Workers' Compensation Court did not err in determining that claimant's consistent and regular overtime hours should be included in the calculation of disability benefits. The reference to "overtime" in the statute is ambiguous because it does not indicate whether overtime earnings are not to be considered, overtime hours are not to be considered if regularly worked, or both. The Workers' Compensation Court is under a duty to construe the act liberally and to resolve any ambiguity in favor of the injured worker. Coles v. Seven Eleven Stores, 217 M 343, 704 P2d 1048, 42 St. Rep. 1238 (1985).

Average Gross Earnings: Claimant's average gross earnings under this section's definition of "wages" (Term "wages" now defined in 39-71-123. See sec. 4, Ch. 464, L. 1987.) are the amount he was earning at the time of his injury in October 1981, not the amount he was earning from a different employer at the time of an earlier injury in January 1981, even though he had not worked between January and October and the October employment was temporary. Where he was receiving compensation benefits as a result of the injury in January 1981, he was not entitled to include the amount of those benefits in the computation of his average gross earnings for the purpose of determining benefits due him for the second injury. Putnam v. Castle Mtn. Corp., 216 M 306, 702 P2d 333, 42 St. Rep. 833 (1985).

Permanent Partial Disability — Pain to Be Considered in Determining Disability — Standard of Review: The claimant injured his back on the job in 1980 and for the next 3 years underwent a series of unsuccessful operations designed to relieve the pain. On appeal, claimant argued that the District Court had failed to take proper account of his disabling pain in its determination of permanent partial rather than permanent total disability. The Supreme Court held that pain is "another factor" to be considered in determining disability and that the Supreme Court's function on review is to determine whether there is substantial evidence to support the findings and conclusions of the Workers' Compensation Court. The Supreme Court found there was substantial evidence on the record to support a finding of partial disability. Metzger v. Chemetron Corp., 212 M 351, 687 P2d 1033, 41 St. Rep. 1788 (1984).

Temporary Total Disability — "As Far Restored": The Supreme Court affirmed the holding of the Workers' Compensation Court that claimant had reached the medically stable condition necessary for a finding of either total or partial permanent disability. Claimant initially petitioned the court for a finding of permanent total disability, and only after the trial court's determination that he was partially rather than totally disabled did claimant seek to characterize his condition as temporary. The Supreme Court held that the phrase "as far restored" in the definition of temporary total disability does not translate into a requirement that claimant be "completely healed"; otherwise, the transition would be from temporary total disability to full recovery, making the provisions for permanent disability mere irrelevancies. Metzger v. Chemetron Corp., 212 M 351, 687 P2d 1033, 41 St. Rep. 1788 (1984), followed in Kramer v. EBI Co., Am. Asphalt, Inc., 265 M 525, 878 P2d 266, 51 St. Rep. 634 (1994).

Permanent Total Disability — Reasonable Prospect of Employment — Burden of Proof — "Odd Lot" Employee: The claimant injured his back on the job in 1980 and for the next 3 years underwent a series of unsuccessful operations designed to relieve the pain. Although claimant's therapist testified that claimant was able to engage in activities in his normal job market, he applied for only one job in the 4 years between injury and trial. Burden of proof shifts from claimant to employer to show suitable work is available once claimant has affirmatively shown that he cannot return to a job in his normal labor market. The Supreme Court held that claimant's own uncertainty, coupled with minimal job search, was insufficient to support a claim of no reasonable prospect of employment and that Workers' Compensation Court was correct in concluding claimant failed to meet his burden of proof and was not entitled to permanent total disability benefits. Claimant did not fall into the "odd lot" employee rule that would shift the burden of proof to the employer to show that some kind of suitable work is regularly and continuously available to the claimant. Metzger v. Chemetron Corp., 212 M 351, 687 P2d 1033, 41 St. Rep. 1788 (1984), cited in Gierke v. Billings Gazette, 224 M 446, 730 P2d 1143, 43 St. Rep. 2322 (1986), and followed in Laber v. Skaggs Alpha Beta, 247 M 172, 805 P2d 1375, 48 St. Rep. 150 (1991), Smith-Carter v. AMOCO Oil Co., 248 M 505, 813 P2d 405, 48 St. Rep. 532 (1991), Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994), Kramer v. EBI Co., Am. Asphalt, Inc., 265 M 525, 878 P2d 266, 51

St. Rep. 634 (1994), Larson v. Cigna Ins. Co., 276 M 283, 915 P2d 863, 53 St. Rep. 394 (1996), and Best v. St. Comp. Ins. Fund, 276 M 302, 916 P2d 108, 53 St. Rep. 405 (1996).

Test for Compensation for Permanent Partial Disability — Factors Other Than Earning Capacity Impairment: Factors other than earning capacity impairment are relevant only if the court is unable to determine independently the claimant's income earning ability impairment. Since the primary purpose of workers' compensation is to compensate a worker for reduced earning capabilities resulting from an industrial accident, the award should be based on that percentage reduction and not on the worker's percentage of physical impairment. Hafer v. Anaconda Aluminum Co., 211 M 345, 684 P2d 1114, 41 St. Rep. 1403 (1984).

Permanent Total Disability — Medical Evidence of Symptoms — Claimant's Testimony of Disabling Pain: Medical evidence of objective symptoms, together with the testimony of claimant translating those symptoms into pain that physically impaired his ability to move his shoulder, was found by the Supreme Court to support adequately an order of the Workers' Compensation Court granting permanent total disability payments to claimant. McCormack v. Sears, Roebuck & Co., 210 M 156, 682 P2d 1357, 41 St. Rep. 979 (1984).

Refusal to Submit to Low-Risk Surgery With High Probability of Success — Effect on Disability: The Workers' Compensation Court found that claimant was permanently totally disabled despite the fact that claimant refused low-risk surgery with a 92% chance of restoring working ability. The claimant had a manic-depressive disorder that distorted his powers of perception, comprehension, and judgment and constricted his mind with the possibility of failure, reinjury, and pain. His mental disorder prevented him from evaluating rationally the benefits of the proposed surgery. From this perspective, the claimant's refusal to submit to knee surgery was not unreasonable. In so holding, the Supreme Court overruled Dosen v. E. Butte Copper Min. Co., 78 M 579, 254 P 880 (1927). Small v. Transp. Ins. Co., 209 M 387, 681 P2d 1081, 41 St. Rep. 776 (1984).

When Temporary Total Disability Ends and Permanent Partial Disability Begins:

A worker is temporarily totally disabled until such time as the worker is as far restored as the permanent character of his injuries will permit. When the claimant has reached this stage in his healing process, temporary total disability ceases and partial disability begins. In making this determination, the compensation court should not rely exclusively on medical opinion of restoration when other credible evidence clearly demonstrates the healing process is not yet complete. McDanold v. B.N. Transp., Inc., 208 M 470, 679 P2d 1188, 41 St. Rep. 472 (1984).

"Temporary total disability" ceases when the worker's physical condition is restored to the point of maximum potential recovery; and at that point "permanent partial disability" begins if there is permanent partial impairment. The Worker's Compensation Court erred in allowing payments at the temporary disability compensation rate to a person whose physical healing was complete and for whom only subjective improvement was possible. Anderson v. Home Indem. Co., 178 M 290, 583 P2d 440, 35 St. Rep. 1332 (1978).

Temporary Total Disability Awarded During Period of Medical Testing: Where the Workers' Compensation Court ordered the claimant to undergo spinal nerve tests on the strength of medical testimony that the tests were needed in order to restore the claimant to his best physical condition, the court did not err in awarding the claimant temporary total disability payments during the period of testing. While he undergoes treatment, the claimant will of necessity experience a total loss of wages. Therefore the requirements of the statutory definition of "total temporary disability" were met and the award was proper. Wilson v. Glacier Gen. Assurance Co., 206 M 63, 670 P2d 931, 40 St. Rep. 1509 (1983).

Impediment to All Jobs in Which Claimant Has Experience as Permanent Total Disability: The Supreme Court affirmed the holding of the Workers' Compensation Court that claimant was permanently and totally disabled when the medical evidence indicated that due to claimant's condition of phlebitis she could not engage in any occupation that would require standing or sitting for any length of time and her only work experience had been as a janitress/bartender, a sales clerk, and a motel clerk. Wise v. Perkins, 202 M 157, 656 P2d 816, 40 St. Rep. 1 (1983).

Inability to Resume Former Employment Alone Not Constituting Permanent Total Disability: The plaintiff, a boilermaker, was injured at his place of work and after losing several jobs because of pain resulting from that injury, several physicians recommended that he seek less strenuous work in order to relieve the pain. The Workers' Compensation Court erred in holding that the plaintiff was permanently and totally disabled because, consistent with his doctors' advice, he could not return to his former occupation as a boilermaker. In order for him to be considered permanently and totally disabled, the court must have found that the plaintiff had no reasonable prospect of finding regular employment of any kind in the normal labor market. The court failed to make such a finding. Keene v. Anaconda Co., 201 M 102, 652 P2d 216, 39 St. Rep. 1982 (1982).

Permanent Total Disability — Medical Evidence — Prospects of Reentering Job Market: The claimant was injured while employed as an auto mechanic. In order to qualify for permanent total disability, medical evidence and evidence of the claimant's particular employment status must show that the claimant has no reasonable prospect of reentering the normal labor market. Because medical testimony indicated that claimant could reenter the labor market in a sedentary job and because the claimant was also qualified to teach vocational skills, the claimant did not qualify for permanent total disability. Bundtrock v. Duff Chevrolet, 199 M 128, 647 P2d 856, 39 St. Rep. 1211 (1982).

Temporary Total Disability — Further Medical Treatment: The claimant was injured while employed as an auto mechanic. Because medical testimony established that further treatment would allow the claimant to return to the normal labor market in a sedentary capacity and because the claimant was qualified for some types of sedentary work, a finding of temporary total disability was upheld. Bundtrock v. Duff Chevrolet, 199 M 128, 647 P2d 856, 39 St. Rep. 1211 (1982).

Computation of Award Based on Concurrent Employment: Earnings from concurrent employments may be combined in computing workers' compensation award if the employments are sufficiently similar so that a disabling injury at one employment would necessarily disable the employee in respect to the other employment. However, where appellant had terminated the concurrent employment prior to his injury and was merely receiving a 2-month continuation of salary because of length of service in the concurrent employment, such earnings from that former employment should not be included in computing temporary total disability award. Gee v. St. Compensation Ins. Fund, 197 M 335, 642 P2d 1070, 39 St. Rep. 597 (1982), followed in Milender v. Carpenter, 230 M 1, 748 P2d 932, 44 St. Rep. 2204 (1987).

Workers' Compensation Lump-Sum Advance — Guardian Ad Litem Appointments: A mother received a lump-sum workers' compensation advance payment. Her minor child had a separate, legally cognizable interest in present and future benefits, which might be prejudiced by any lump-sum payment to the mother; therefore, the Workers' Compensation Court should have either appointed a guardian ad litem to represent the child or made a finding stating why appointment was not necessary, and it was error to fail to do so. However, reversal was not required as there was a mutual benefit to mother and child in the payment of the benefits and the method of lump-sum advance repayment presented a very limited chance of financial loss to the child. Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981).

Standard of Review: In cases involving application of a well-defined statutory term to a given set of facts, the issue for the reviewing court is whether the lower court's application is legally correct. The reviewing court is not required to affirm simply because the lower court's application is not unreasonable. Therefore, in reviewing the Workers' Compensation Court's application of the definition of "temporary total disability" to its own findings of fact, the reviewing court determined whether the application was legally correct. Anderson v. Home Indem. Co., 178 M 290, 583 P2d 440, 35 St. Rep. 1332 (1978).

Denial of Substantial Rights Not Found: Holding of Workers' Compensation Court refusing to extend temporary total disability was upheld. Substantial rights were not denied. McAlear v. McKee, 171 M 462, 558 P2d 1134 (1976).

"Any Employer": The use of the word "insurer" in this Workers' Compensation Act should be construed as referring to insurers "under any plan", which includes employers who are their own insurers under plan No. 1. McMillen v. Arthur G. McKee & Co., 166 M 400, 533 P2d 1095 (1975).

Right of Husband to Compensation:

The right of a husband to compensation on the ground that he was incapable of supporting himself is a question of fact, and where his wife was injured and died while engaged in employment covered by the Workers' Compensation Act, and where the husband worked steadily during the period in question losing only an occasional week, the evidence was sufficient to support the finding of the trial court and Industrial Accident Board (now Department of Labor and Industry) that he was not incapable of supporting himself at that time and therefore not entitled to compensation. Kyyny v. Sherman & Reed, 111 M 593, 113 P2d 337 (1941).

A surviving husband incapable of supporting himself, and living with or legally entitled to be supported by the deceased wife at the time of the injury sustained by the latter in an employment covered by the Workmen's Compensation Act (now Worker's Compensation Act) and from which injury she died, is a beneficiary under the provisions of the Act. Kearney v. Indus. Accident Bd., 90 M 228, 1 P2d 69 (1931), distinguished in Kyyny v. Sherman & Reed, 111 M 593, 113 P2d 337 (1941).

Plant of the Employer:

Injury sustained by foreman of company which was employed by railroad to operate certain of railroad's coal docks, in stepping through hole in floor of pumphouse owned by railroad but controlled by company under its contract, was result of a cause "directly connected with his regular employment", within meaning of this section, so as to preclude foreman from recovering from railroad after acceptance of benefits from company under the Workers' Compensation Act. Recovery for injuries against a third party tortfeasor in addition to receiving compensation is permitted if cause of injury has no "direct connection with the regular employment". Sullivan v. N. Pac. Ry., 24 F. Supp. 822 (D.C. Minn. 1938), affirmed in Sullivan v. N. Pac. Ry., 104 F2d 517 (8th Cir. 1939).

Where a railroad company delivered empty cars and transported loaded ones over a spur track constructed to a point near a coal mine, and the portion of the track where the coal company placed loaded cars was indispensable to the conduct of its business, and one of the latter company's employees was injured while attempting to set a defective brake on a loaded car which he was moving while in the course of his employment, the injury occurred at the "plant" of his employer, entitling him to compensation. Black v. N. Pac. Ry., 66 M 538, 214 P 82 (1923).

Legally Entitled to Support: Under this section, compensation for injury to the husband may be awarded to a wife or widow only if at the time of the injury she was legally entitled to his support, i.e., if at that time she could have compelled him under the laws of the state to support her. Goodwin v. Elm Orlu Min. Co., 83 M 152, 269 P 403 (1928).

39-71-117. Employer defined.

Compiler's Comments

2017 Amendment: Chapter 89 inserted (1)(e) concerning an approved and authorized fiduciary, agent, or other person; inserted (6) concerning the status of fiscal agents and clients of fiscal agents with respect to Workers' Compensation Act; and made minor changes in style. Amendment effective October 1, 2017.

2015 Amendment: Chapter 364 in (1)(d) at beginning inserted "subject to subsection (5)" and after "nonmembers for" deleted "agricultural production"; in (1)(d)(i) substituted "construction activities conducted" for "construction project conducted" and substituted "property owned or leased by the religious corporation" for "property of the religious corporation"; inserted (1)(d)(ii) regarding certain agricultural labor and services; inserted (5) regarding limitation for definition of employer; and made minor changes in style. Amendment effective October 1, 2015.

2009 Amendment: Chapter 112 inserted (1)(d) including religious corporations, religious organizations, and religious trusts as employers under certain conditions; and made minor changes in style. Amendment effective July 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2005 Amendment: Chapter 448 in (4)(a) substituted "39-71-417" for "39-71-401(3)". Amendment effective April 28, 2005.

Preamble: The preamble attached to Ch. 448, L. 2005, provided: "WHEREAS, the Montana Supreme Court ruled in Wild v. Fregein Construction, 2003 MT 115, 315 Mont. 425, 68 P.3d 855, that the independent contractor exemption certificate does not raise a conclusive presumption as to the status of a person as an independent contractor and that an employer has an obligation to determine whether an individual is treated as an independent contractor or as an employee; and

WHEREAS, the Montana Supreme Court in the Wild decision ruled that it is against the public policy of the state for an employer to coerce a worker to work as an independent contractor by offering to pay an independent contractor at a rate higher than the employer pays employees; and

WHEREAS, the Montana Supreme Court in the Wild decision affirmed the twin determinants of independent contractor status as being "A" issues of control and "B" whether the individual is in an independent business, commonly known as the "A-B" test, and emphasized the necessity of both factors being present, with performing work for other persons being an indication of an independent business; and

WHEREAS, the concurring opinion in the Wild decision further suggested that the Department of Labor and Industry strengthen the certification process to provide a conclusive determination of independent contractor status; and

WHEREAS, the Wild decision created a great deal of uncertainty in matters involving independent contractors and employees in the business community, with employers and independent contractors coming together to propose a consensus solution after participating in a study required by Senate Bill 270, passed by the 58th Legislature; and

WHEREAS, the Montana Legislature considers enacting legislation appropriate to effectively reverse the Wild decision and to restore the conclusive presumption of an independent contractor exemption certificate as well as to allow employers to pay persons with the independent contractor exemption certificate at a rate higher than the rate paid to employees and additionally to allow a person with an independent contractor exemption certificate to work for only one employing unit without becoming an employee as well as to waive the benefits of the workers' compensation and occupational disease laws."

Effective Date — Applicability: Section 15, Ch. 448, L. 2005, provided: "[This act] is effective on passage and approval and applies to all applications and renewals for the independent contractor exemption certificate submitted to the department after [the effective date of this act]." Approved April 28, 2005.

2001 Amendment: Chapter 214 in three places in (4) and (4)(b) substituted reference to employees or workers for reference to drivers; in (4) in first sentence after "carrier" substituted "that maintains a place of business in this state" for "doing business in this state" and after "employer" inserted "of that employee"; in (4)(a) at beginning substituted "worker" for "driver"; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 25, Ch. 214, L. 2001, was a severability clause.

1997 Amendment: Chapter 172 in (1)(a), (1)(b), (1)(c), (3), (3)(a), (3)(b), and (4)(b), after "limited liability company", inserted "limited liability partnership"; and made minor changes in style. Amendment effective July 1, 1997.

Transition: Section 10, Ch. 172, L. 1997, provided: "Any surplus funds remaining in the underinsured employers' fund on [the effective date of this section] must be deposited in the uninsured employers' fund provided in 39-71-502 [now repealed]." Section 12(2), Ch. 172, L. 1997, provided that sec. 10 was effective on passage and approval. Approved March 28, 1997.

1995 Amendments: Chapter 308 in (1)(c) substituted "described in 39-71-118(1)(e)" for "defined in 39-71-118(1)(f)"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 344 in (3), at beginning, inserted exception clause; and in (4), at beginning, deleted "Notwithstanding the provisions of subsection (3)". Amendment effective July 1, 1995.

Chapter 516 throughout section inserted references to limited liability company; and made minor changes in style. Amendment effective July 1, 1995.

1995 Statement of Intent: The statement of intent attached to Ch. 344, L. 1995, provided: "A statement of intent is required for this bill because [section 3] [39-8-201] authorizes the department of labor and industry to adopt rules regarding professional employer organization and group licensing. It is intended that the department develop rules similar to those adopted by other states that regulate professional employer licensing organizations and groups and develop rules to provide for the reciprocal licensing provisions provided for in [this act] [Title 39, ch. 8]."

Severability: Section 21, Ch. 344, L. 1995, was a severability clause.

Section 26, Ch. 516, L. 1995, was a severability clause.

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

1993 Amendment: Chapter 458 in (4), before "common", inserted "interstate or intrastate"; and made minor changes in style. Amendment effective April 21, 1993.

Saving Clause: Section 5, Ch. 458, L. 1993, was a saving clause.

1991 Amendments: Chapter 323 inserted (2) to provide that a temporary service contractor is the employer of a temporary worker for premium and loss experience purposes; inserted (3) establishing presumption and evidentiary criteria to rebut a presumption that a temporary service contractor is the employer; inserted (4) regarding liability of a common or contract motor carrier to provide workers' compensation premiums; and made minor changes in style. Amendment effective July 1, 1991.

Chapter 813 inserted (1)(c) relating to organizations that place community service participants; and made minor changes in style. Amendment effective July 1, 1991.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1985 Amendment: Inserted (2) including group that is allowed to operate as self-insurer.

1985 Statement of Intent: Chapter 480, L. 1985, which enacted subsection (2) of this section and subsection (2) of 39-71-2103, included the following statement of intent: "A statement of intent is required for this bill because it requires the adoption of rules by the workers' compensation division of the department of labor and industry.

The legislature intends that the division adopt only those rules required by section 4 of this bill [an uncodified extension of existing rulemaking authority].

The rules adopted by the division to implement section 4 should require the submission of information regarding the following:

(1) the requirements for formation and certification of an association, corporation, or organization of employers to operate as a group self-insured employer, including provisions for the addition of new members and the withdrawal of existing members;

(2) requirements for proof of solvency of the group self-insurer and to maintain security to insure payment of obligations under the act;

(3) requirements for an indemnity agreement and power of attorney between the individual employers within the group, including the requirement that all members of the group remain jointly and severally liable;

(4) requirements for and confirmation of excess liability insurance;

(5) requirements for management of the association and annual reports to the division;

(6) requirements for auditing the group self-insurer to determine that it is meeting its obligations under the Workers' Compensation Act;

(7) provisions for the termination of group self-insurance by the group on request and for termination by the division upon determination that the group no longer meets the requirements for certification as self-insured and for determining responsibility for pending claims.

The legislature intends that all group self-insured employers must comply with the provisions of the act and rules enacted thereunder. In developing rules, the legislature intends that employees of the group self-insurer have as much assurance as reasonably possible of the benefits to which they are entitled under the act."

Case Notes

Inclusion of Religious Organization Employers Receiving Remuneration for Certain Services — No Violation of Constitutional Protections: In 2009, the Legislature broadened the definition of "employer" in 39-71-117 to include religious organizations that receive remuneration for commercial activities from nonmembers, and it revised the definition of "employee" to include religious organization members performing commercial activities. A Hutterite colony claimed these definitions violated the free exercise clause, the establishment clause, and the equal protection clause of the U.S. and Montana Constitutions. Because the Workers' Compensation Act regulates the colony's voluntary commercial activities and was not intended to regulate religious practices, the expanded definition of "employer" did not violate the free exercise clause. The Act's revised definitions of "employer" and "employee" did not violate the establishment clause because the promotion of the health, safety, and welfare of workers is a secular purpose, the Legislature's inclusion of religious organizations in the workers' compensation system could not be reasonably interpreted as disapproval of religion, and the Act's requirements affected only the commercial activities of the colony undertaken for a business purpose. Likewise, because similarly situated employers and employees are treated similarly regardless of their religious affiliation, the Act did not violate the equal protection clause. Big Sky Colony, Inc. v. Dept. of Labor and Industry, 2012 MT 320, 368 Mont. 66, 291 P.3d 1231, certiorari denied, 571 US 817, 134 S Ct 59 (2013).

No Error by Workers' Compensation Court — Award of Benefits From Uninsured Employers' Fund Supported by Evidence: In 2002, Hopkins began working for Great Bear Adventures, a wildlife park where he would perform maintenance duties and feed the bears. In 2007, Hopkins traveled to the park at the request of Kilpatrick, the park's owner. Hopkins smoked marijuana on the way to the park. Once at the park, Kilpatrick asked Hopkins to work on a gate, but Hopkins was subsequently injured while feeding bears in the park. The Workers' Compensation Court awarded Hopkins workers' compensation benefits from the Uninsured Employers' Fund. Kilpatrick appealed. The Supreme Court affirmed, holding that Hopkins was employed by Kilpatrick at the time of the injury; that feeding the bears was one of Hopkins' regular employment duties even though testimony conflicted about whether he was asked to feed the bears on the day of the injury; that marijuana was not the major contributing factor of Hopkins' injuries, in part because there was no evidence about the level of impairment; and that Hopkins' services were not in exchange for aid or sustenance. Hopkins v. Uninsured Employers' Fund, 2011 MT 49, 359 Mont. 381, 251 P.3d 118.

Trucking Company Not Considered Employer When Driver Not "Used" by Company: Geiger was injured after a fall from a truck and filed an injury report with the Department of Labor and Industry. The claim was forwarded to the uninsured employer's fund because the interstate trucking business that was Geiger's alleged employer was uninsured. Geiger was determined to be ineligible for benefits after the Workers' Compensation Court found that the trucking company was not an employer. Geiger appealed, but the Supreme Court affirmed. Under the definition in this section, an interstate motor carrier who uses drivers in this state is considered an employer. The word "use" means to employ or put into service or apply for a purpose. The fact that Geiger made a number of monthly installment payments under a purchase contract and lease did not mean that the company used Geiger to serve its trucking business. The parties' relationship more closely resembled that of a debtor and creditor. The Workers' Compensation Court correctly found that the company did not use Geiger, so the company could not be construed as an employer; thus, Geiger was not eligible for benefits. Geiger v. Uninsured Employers' Fund, 2002 MT 332, 313 M 242, 62 P3d 259 (2002).

Failure of Out-of-State Leasing Company to Procure Workers' Compensation Coverage for In-State Clients — Penalties Properly Assessed: An Arizona employee leasing company contracted with 13 Montana client employees to act as a coemployer, assuming responsibility for employee-related functions, including workers' compensation coverage. Following entry into the contract, the clients canceled the workers' compensation coverage that they had previously held. Despite the company's claim that it had procured retroactive insurance, the Workers' Compensation Court ultimately determined that the company did not have legal coverage and assessed penalties against the client employees for the period that coverage did not exist. The company and the clients appealed. The Supreme Court affirmed. The state met its burden of proof that the company was not the employer and that the company was uninsured during the period in question, notwithstanding the findings of the hearings officer that the company was insured because policy filing cards were signed. Because the company was not insured, the Workers' Compensation Court did not incorrectly apply the insurance law by assessing penalties against the clients for the time that no insurance existed. Total Mechanical Heating & Air Conditioning v. Employment Relations Div., 2002 MT 55, 309 M 84, 50 P3d 108 (2002), following St. Comp. Mut. Ins. Fund v. Lee Rost Logging, 252 M 97, 827 P2d 85 (1992). See also Dahl v. Uninsured Employers' Fund, 1999 MT 168, 295 M 173, 983 P2d 363 (1999).

Failure to Provide Workers' Compensation Insurance — Ambiguity of Insurance Contract Not at Issue: An employee leasing company failed to provide workers' compensation insurance for its client companies. The employee leasing company argued that the Workers' Compensation Court failed to apply Montana law regarding the interpretation of insurance contracts by strictly construing any ambiguity in the insurance contract in favor of the insured and against the insurer. The Supreme Court did not disagree that this is a correct statement of insurance law; however, that contract principle did not apply here because there was no question of ambiguity regarding the insurance contracts in this case. Rather, the applicable contract principle here was that for coverage by an insurance policy to apply, there must be a named insured. The employee leasing company was not an insured under the contracts; therefore, the Workers' Compensation Court did not incorrectly apply insurance law. Total Mechanical Heating & Air Conditioning v. Employment Relations Div., 2002 MT 55, 309 M 84, 50 P3d 108 (2002).

Uninsured Employee Leasing Company — Burden of Proof Met in Establishing Client Companies as Employers: The initial burden is on the state to prove whether an entity is a statutory employer and, if it is, whether the employer is uninsured for workers' compensation coverage. In the case of an employee leasing company, the definition of employer presumes that the individual client companies are the statutory employees, but that presumption is rebuttable. To rebut the presumption and find that the employee leasing company is the employer, one of the conditions that must be met is that the employee leasing company provided workers' compensation coverage to its clients from the inception of its Montana operations. Here, it was undisputed that when an Arizona company began operating in Montana, it did not have state-approved workers' compensation coverage. Therefore, the determination that the employee leasing company was uninsured removed it from the definition of employer altogether and rendered the individual client companies the employers. The state met its burden of establishing that the client companies, and not the employee leasing company, were the employers and as such were legally responsible for providing workers' compensation coverage for their employees at all times. Total Mechanical Heating & Air Conditioning v. Employment Relations Div., 2002 MT 55, 309 M 84, 50 P3d 108 (2002).

Out-of-State Motor Carrier Doing Business in Montana Considered Employer — Liability for Workers' Compensation Premiums: Schimmel, a Montana resident, was injured loading a truck while employed by Jasper Express, Inc. (Jasper), a long-haul trucking business incorporated in and operating out of Washington state. Jasper did not have Schimmel covered under a Montana workers' compensation plan, so Schimmel filed a claim with the Montana uninsured employers' fund (fund), but the claim was denied. Schimmel then filed a petition for benefits against Jasper and the fund in Workers' Compensation Court, seeking a determination that Jasper should have provided coverage. The court held that Schimmel was not an employee, as defined in 39-71-118(10), because his employment duties were neither primarily carried out nor controlled within Montana; therefore, the fund was not liable for Schimmel's claim. Schimmel appealed and the Supreme Court reversed. The Workers' Compensation Court should have applied the definition of employee in 39-71-118(1)(a) instead of the definition of employee or worker in this state in 39-71-118(10), which applies to an employee who is furnished by one business to another as contemplated in 39-71-118(8). Schimmel was not an employee furnished by one business to another, so the definition in 39-71-118(10) did not apply. The use of the phrase "motor carrier" in subsection (4) of this section does not apply only to Montana-based motor carriers. Jasper used a Montana resident driver to pick up and drop off loads in Montana, so Jasper should have provided workers' compensation coverage for Schimmel. Schimmel v. Uninsured Employers' Fund, 2001 MT 280, 307 M 344, 38 P3d 788 (2001).

Transfer of Company Operation: Where milling company transferred its trucking facilities to a different location where they were operated on a break-even basis under supervision of assistant to the president of the company in order to avoid inclusion of truck drivers in union bargaining unit with rest of its employees, truck driver's employment had not been transferred so as to entitle him to bring common-law negligence action against the trucking operation as a separate employer since control remained in the company which supervised activities of its presidential assistant. State ex rel. Ferguson v. District Court, 164 M 84, 519 P2d 151 (1974).

Joint Ventures: Individual members of joint venture are "employers" within meaning of act and as such are immune from tort actions for death of employees of joint venture. Hamman v. U.S., 267 F. Supp. 420 (D.C. Mont. 1967).

Attorney General's Opinions

Water Commissioner Employee of District Court Judge: When a District Court Judge appoints a Water Commissioner under Title 85, ch. 5, the District Court Judge, rather than the water users, is considered the employer for the purpose of payment of workers' compensation. 40 A.G. Op. 56 (1984).

39-71-118. Employee, worker, volunteer, volunteer firefighter, and volunteer emergency care provider defined — election of coverage.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 264, L. 2023. Amendment effective October 1, 2023.

2021 Amendments — Composite Section: Chapter 14 in (1)(c) near end of first sentence substituted "subsection (7)" for "subsection (9)". Amendment effective October 1, 2021.

Chapter 136 in (7)(b) substituted current text concerning coverage for a student who is not paid wages for former text that read: "A student who is not paid wages by the business partner or the educational institution is a volunteer and is subject to the provisions of this chapter"; and made minor changes in style. Amendment effective October 1, 2021.

2019 Amendments — Composite Section: Chapter 41 in (1)(h) in two places substituted "cash assistance" for "financial assistance". Amendment effective July 1, 2019.

Chapter 220 throughout (10) substituted references to emergency care provider for references to emergency medical technician; in (10)(f)(i) after "means a person who" substituted "is licensed" for "has received a certificate issued"; and made minor changes in style. Amendment effective July 1, 2019.

2017 Amendment: Chapter 95 inserted (10)(e) concerning notification of workers' compensation coverage; and made minor changes in style. Amendment effective October 1, 2017.

2015 Amendments — Composite Section: Chapter 330 in (3) after "subsection (2)(b)" deleted "a volunteer emergency medical technician as defined in subsection (10)" and deleted former last sentence that read: "An ambulance service not otherwise covered by subsection (1)(g) or a paid or volunteer nontransporting medical unit, as defined in 50-6-302, in service to a town, city, or county may elect to include as an employee under the provisions of this chapter a volunteer emergency medical technician"; in (10)(a) at beginning deleted "With the approval of the insurer" and inserted last sentence concerning the purchase of workers' compensation coverage by an ambulance service or nontransporting medical unit; and made minor changes in style. Amendment effective July 1, 2015.

Chapter 364 in (1)(i) at beginning inserted "subject to subsection (11)"; and inserted (11) regarding limitation for definition of employee or worker. Amendment effective October 1, 2015.

2013 Amendment: Chapter 412 in (3) in first sentence after "subsection (2)(b)" inserted "a volunteer emergency medical technician as defined in subsection (10), or a volunteer firefighter as defined in 7-33-4510" and in second sentence at beginning deleted "A fire district, fire service area, or volunteer fire department formed under Title 7, chapter 33" and after "chapter" deleted "a volunteer firefighter or"; in (4) deleted definition that read: "The term "volunteer firefighter" means a firefighter who is an enrolled and active member of a governmental fire agency organized under Title 7, chapter 33, except 7-33-4109" and moved other definitions; deleted former (7) that read: "(7) (a) The trustees of a rural fire district, a county governing body providing rural fire protection, or the county commissioners or trustees for a fire service area may elect to include as an employee within the provisions of this chapter any volunteer firefighter. A volunteer firefighter who receives workers' compensation coverage under this section may not receive disability benefits under Title 19, chapter 17.

(b) In the event of an election, the employer shall report payroll for all volunteer firefighters for premium and weekly benefit purposes based on the number of volunteer hours of each firefighter, but no more than 60 hours, times the state's average weekly wage divided by 40 hours.

(c) A self-employed sole proprietor or partner who has elected not to be covered under this chapter, but who is covered as a volunteer firefighter pursuant to subsection (7)(a), and when injured in the course and scope of employment as a volunteer firefighter may in addition to the benefits described in subsection (7)(b) be eligible for benefits at an assumed wage of the minimum wage established under Title 39, chapter 3, part 4, for 2,080 hours a year. The trustees of a rural fire district, a county governing body providing rural fire protection, or the county commissioners or trustees for a fire service area may make an election for benefits. If an election is made, payrolls must be reported and premiums must be assessed on the assumed wage"; in (10)(a) at beginning inserted "With the approval of the insurer"; in (10)(c) at beginning of first sentence before "self-employed" inserted language regarding separate election, in second sentence substituted "a member may instead of the benefits" for "may in addition to the benefits", and in third sentence substituted "the separate election" for "an election" and substituted "payroll information for those self-employed sole proprietors or partners" for "payrolls"; inserted (10)(e)(ii) concerning noninclusion of term; in (10)(f) before "a volunteer emergency" deleted "a volunteer firefighter or"; and made minor changes in style. Amendment effective July 1, 2013.

2011 Amendments — Composite Section: Chapter 167 deleted former (2)(a) that read: "(a) participating in recreational activity and who at the time is relieved of and is not performing prescribed duties, regardless of whether the person is using, by discount or otherwise, a pass, ticket, permit, device, or other emolument of employment"; and made minor changes in style. Amendment effective April 12, 2011.

Chapter 255 inserted (3)(b) regarding election to include a volunteer firefighter or volunteer emergency medical technician as an employee; inserted (4)(a) defining volunteer emergency medical technician; in (4)(c) after "firefighter" inserted "or a volunteer emergency medical technician" and after "an employer" inserted "or as a volunteer for a town, city, or county"; in (6)(d) at beginning of first sentence inserted "For the purposes of an election under this subsection (6)"; in (7)(b) near middle after "hours of each firefighter" inserted "but no more than 60 hours", before "average" inserted "state's", and near end after "40 hours" deleted "subject to a maximum of 1½ times the state's average weekly wage"; inserted (12) regarding volunteer emergency medical technicians; and made minor changes in style. Amendment effective July 1, 2011.

Chapter 262 inserted (2)(d) excluding temporary agricultural workers from the definition of employee. Amendment effective July 1, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

2009 Amendments — Composite Section: Chapter 112 inserted (1)(i) including members of religious corporations, religious organizations, and religious trusts as employees under certain conditions; and made minor changes in style. Amendment effective July 1, 2009.

Chapter 312 in (1)(f) at end substituted "53-30-132" for "53-1-301". Amendment effective October 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

Section 8, Ch. 312, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to any money that Montana correctional enterprises collected from inmates for room and board reimbursement before October 1, 2009."

2007 Amendment: Chapter 449 in (1)(g) at beginning after "a" substituted "volunteer firefighter" for "person who is an enrolled member of a volunteer fire department"; in (4)(a) at end after "member of a" substituted "governmental fire agency organized under Title 7, chapter 33, except 7-33-4109" for "fire company organized and funded by a county, a rural fire district, or a fire service area"; and made minor changes in style. Amendment effective June 1, 2007.

2005 Amendment: Chapter 26 in (1) at beginning inserted "As used in this chapter"; in (1)(c) near middle of first sentence and in (1)(e) near end of first sentence substituted "39-71-117" for "this chapter"; in (5)(d) and (6)(d) near middle of second sentence after "elect" inserted "an amount of" and at end substituted "state's average weekly wage" for "average weekly wage, as defined in this chapter"; in (7)(b) at end substituted "state's average weekly wage" for "average weekly wage"; and made minor changes in style. Amendment effective July 1, 2005.

Effective Date — Applicability: Section 12, Ch. 26, L. 2005, provided that this section is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005.

2001 Amendments — Composite Section: Chapter 238 inserted (7)(c) establishing the rate for elected workers' compensation coverage for self-employed volunteer firefighters. Amendment effective April 13, 2001.

Chapter 465 in (1)(h) near middle of second sentence after "workers' compensation coverage for" substituted "recipients of financial assistance, as defined in 53-4-201, or for participants in the food stamp program, as defined in 53-2-902" for "participants in the FAIM project" and in third sentence after "entity's" substituted "public assistance" for "FAIM" and after "participant's training" substituted "while receiving financial assistance or while participating in the food stamp program" for "in the FAIM project"; and made minor changes in style. Amendment effective July 1, 2001.

Retroactive Applicability: Section 45, Ch. 465, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to payments made after January 1, 2001, for mental health services provided to children with serious emotional disturbances for whom mental health services are not provided by any other public mental health services program and whose family income is at or below 150% of the federal poverty level."

1999 Amendment: Chapter 124 substituted (1)(h) regarding placement of a person pursuant to the FAIM project for former text that read: "a person placed at the employer's worksite as a participant in a public assistance program authorized by Title 53, chapter 4, parts 6 and 7, for workers' compensation purposes only. A person placed at an employer's worksite under Title 53, chapter 4, parts 6 and 7, may not be considered an independent contractor under 39-71-120. An employer may be reimbursed for the premium cost as provided in 53-4-603"; and made minor changes in style. Amendment effective July 1, 1999.

Applicability: Section 7, Ch. 124, L. 1999, provided: "[This act] applies to individuals participating in the FAIM project on and after July 1, 1999."

1997 Amendments: Chapter 172 in (5)(a), in three places after "partnership", inserted reference to limited liability partnership; in (8), near middle of first sentence after "limited liability company", inserted "limited liability partnership"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 500 in (1)(c), near middle after "as defined in this chapter, and", inserted exception clause; inserted (9) concerning student who is paid wages by educational institution or business partner; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 515 inserted (1)(h) relating to a person placed at an employer's worksite under a welfare program under Title 53, chapter 4, parts 6 and 7, providing that the person is not an independent contractor, and allowing the employer to be reimbursed for the premium cost; inserted (2)(d) relating to a licensed foster parent providing care without wage compensation to fewer than seven children in the person's residence; and made minor changes in style. Amendment effective May 2, 1997.

Transition: Section 10, Ch. 172, L. 1997, provided: "Any surplus funds remaining in the underinsured employers' fund on [the effective date of this section] must be deposited in the uninsured employers' fund provided in 39-71-502 [now repealed]." Section 12(2), Ch. 172, L. 1997, provided that sec. 10 was effective on passage and approval. Approved March 28, 1997.

Severability: Section 3, Ch. 500, L. 1997, was a severability clause.

Applicability: Section 4, Ch. 500, L. 1997, provided: "[This act] [39-71-116 and 39-71-118] is effective July 1, 1997, and applies to injuries occurring on or after [the effective date of this act]."

Saving Clause: Section 4, Ch. 515, L. 1997, was a saving clause.

1995 Amendments — Composite Section: Chapter 131 inserted (4)(b) defining volunteer hours; inserted (7)(b) relating to formula for computing employer's payroll report for volunteer firefighters; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 308 deleted former (1)(d) that read: "(d) students enrolled and in attendance in programs of vocational-technical education at designated vocational-technical centers"; and adjusted subsection references. Amendment effective July 1, 1995.

Chapter 344 in (8), at beginning, inserted exception clause. Amendment effective July 1, 1995.

Chapter 424 in former (1)(d) substituted "vocational-technical program within a unit of the university system" for "vocational-technical centers"; inserted (1)(g) concerning enrolled member of a volunteer fire department or person who provides ambulance services; inserted (2)(c) concerning a volunteer and defining the term; inserted (3) authorizing coverage of a volunteer; adjusted internal references; and made minor changes in style. Amendment effective April 13, 1995. The compiler has not codified the amendment in (1)(d) by Ch. 424 because the amendment was in the nature of a name change and this subsection was deleted by Ch. 308.

Chapter 516 in (1)(a), in second sentence after "corporations", inserted "except those officers identified in 39-71-401(2)" and in fourth sentence substituted "employment" for "service"; in (5)(a), after "sole", substituted "proprietor" for "proprietorship" and inserted references to limited liability companies and their members; in (5)(b), after "proprietor", inserted references to members; inserted (6) relating to a quasi-public corporation, private corporation, or manager-managed limited liability company electing to include as an employee an officer or manager exempted under 39-71-401(2); in (8) inserted reference to limited liability company; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

1995 Statement of Intent: The statement of intent attached to Ch. 344, L. 1995, provided: "A statement of intent is required for this bill because [section 3] [39-8-201] authorizes the department of labor and industry to adopt rules regarding professional employer organization and group licensing. It is intended that the department develop rules similar to those adopted by other states that regulate professional employer licensing organizations and groups and develop rules to provide for the reciprocal licensing provisions provided for in [this act] [Title 39, ch. 8]."

Severability: Section 21, Ch. 344, L. 1995, was a severability clause.

Section 26, Ch. 516, L. 1995, was a severability clause.

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

1993 Amendments: Chapter 154 inserted (2) clarifying that a person injured while participating in a recreational activity or while performing voluntary service at a recreational facility is not entitled to workers' compensation; and made minor changes in style.

Chapter 279 substituted reference to aircrew for reference to airman.

Chapter 458 in (1), (6), and (7), after "employee", deleted "workman"; inserted (7)(c) to include nonresident construction workers; inserted (7)(d) to include certain nonresident employees whose employer elects coverage with an insurer that allows certain elections; inserted (8) allowing an insurer to require coverage for certain nonresident employees who do not meet the statutory requirements as a condition of approving the election; and made minor changes in style. Amendment effective April 21, 1993.

Chapter 471 inserted (1)(g) relating to prison inmates; and made minor changes in style.

Chapter 561 in (1), (6), and (7), after "employee", deleted "workman"; at beginning of (1)(b) deleted "a recipient of general relief who is performing work for a county of this state under the provisions of 53-3-303 through 53-3-305 and"; and made minor changes in style. Amendment effective July 1, 1993.

Saving Clause: Section 5, Ch. 458, L. 1993, was a saving clause.

1991 Amendments: Chapter 129 inserted (2) defining volunteer firefighter; in (3)(b) changed subsection reference; and inserted (4) allowing inclusion of volunteer firefighter as employee for workers' compensation coverage and excluding disability benefit coverage.

Chapter 323 inserted (5) regarding employment of a worker whose services are furnished by an entity other than a temporary service contractor; and inserted (6) defining employee, workman, or worker. Amendment effective July 1, 1991.

Chapter 813 inserted (1)(f) relating to persons who perform community service; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendment: In (2)(b), at end of first sentence, inserted "and stating the level of compensation coverage desired by electing the amount of wages to be reported, subject to the limitations in subsection (2)(d)"; inserted (2)(c) requiring change in elected wages to be in writing and effective at start of next quarter following notification; in (2)(d) inserted first sentence requiring weekly benefits to be based on amount of elected wages, subject to minimum and maximum limitations of this subsection and near middle of second sentence substituted "the electing employer may elect not less than" for "the insurance carrier shall assume a salary or wage of such electing employee to be not less than"; and made minor changes in form and phraseology. Amendment effective July 1, 1989.

1987 Amendments: Chapter 370 in (1)(d) substituted "state superintendent of public instruction" for "state board of public education". Chapter 370 made this change to clarify that the State Superintendent gave approval under the former law. Chapter 658 transferred governance of the vocational-technical centers to the Board of Regents, so the Ch. 370 amendment has not been codified.

Chapter 464 in (1)(a) deleted subsection reference to 39-71-116.

Chapter 658 in (1)(d), after "education", deleted "approved by the state board of public education" and before "vocational-technical" deleted "postsecondary".

1985 Amendments: Chapter 336 inserted (1)(e) including airmen and volunteers under 67-2-105.

Chapter 670 in (1)(b) substituted "53-3-303" for "53-3-302".

1981 Amendment: Substituted "not less than $900 a month and not more than 1½ times the average weekly wage as defined in this chapter" for "$900 per month" in (2).

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Injured Independent Contractor — No Duty of Safety Imposed on Employer — Loaned Servant Doctrine Argument Rejected: The plaintiff, an independent contractor, was injured on a worksite while helping another contractor move a wall. On a summary judgment motion, the District Court determined that the Montana Occupational Safety and Health Act does not create a duty of safety running from an employer to an independent contractor. The Supreme Court affirmed, reasoning that the plain language of the statute excludes an independent contractor from the definition of "employee". Additionally, the plaintiff's claim that he was an employee under the loaned servant doctrine was rejected because he was responsible for his own work and hours. McDonald v. Ponderosa Enterprises, Inc., 2015 MT 160, 379 Mont. 379, 352 P.3d 14.

No Error by Workers' Compensation Court — Award of Benefits From Uninsured Employers' Fund Supported by Evidence: In 2002, Hopkins began working for Great Bear Adventures, a wildlife park where he would perform maintenance duties and feed the bears. In 2007, Hopkins traveled to the park at the request of Kilpatrick, the park's owner. Hopkins smoked marijuana on the way to the park. Once at the park, Kilpatrick asked Hopkins to work on a gate, but

Hopkins was subsequently injured while feeding bears in the park. The Workers' Compensation Court awarded Hopkins workers' compensation benefits from the Uninsured Employers' Fund. Kilpatrick appealed. The Supreme Court affirmed, holding that Hopkins was employed by Kilpatrick at the time of the injury; that feeding the bears was one of Hopkins' regular employment duties even though testimony conflicted about whether he was asked to feed the bears on the day of the injury; that marijuana was not the major contributing factor of Hopkins' injuries, in part because there was no evidence about the level of impairment; and that Hopkins' services were not in exchange for aid or sustenance. Hopkins v. Uninsured Employers' Fund, 2011 MT 49, 359 Mont. 381, 251 P.3d 118.

Injury at Company Picnic in Course of Employment: Michalak was injured while riding a wave runner at the annual company picnic and was unable to return to work. The insurer denied Michalak's claim for benefits, but the Workers' Compensation Court applied the "course and scope" factors in Courser v. Darby School District, 214 M 13, 692 P2d 417 (1984), and held that because Michalak was injured within the course and scope of employment, the injury was compensable. The insurer appealed. The Courser factors for determining whether a person is performing prescribed duties include whether: (1) the activity was undertaken at the employer's request; (2) the employer, either directly or indirectly, compelled the employee's attendance at the activity; (3) the employer controlled or participated in the activity; and (4) both employer and employee mutually benefited from the activity. The Supreme Court noted that the Workers' Compensation Court correctly focused its analysis on the company picnic as the applicable activity, rather than Michalak's ride on the wave runner, to determine whether the injury occurred within the course and scope of employment. The court found substantial evidence that: (1) the employer compelled Michalak's attendance at the picnic; (2) the employer controlled and participated in the picnic; and (3) the picnic provided mutual benefit to the employer and its employees. The Workers' Compensation Court properly applied the Courser factors and did not err in concluding that Michalak was injured within the course and scope of employment, and that decision was affirmed. (See 2011 amendment.) Michalak v. Liberty NW. Ins. Corp., 2008 MT 3, 341 M 63, 175 P3d 893 (2008).

Unpaid Emergency Medical Technician Trainees, Volunteers, and Students Not Considered Employees: The definition of emergency medical services personnel in 50-6-202 does not include an unpaid emergency medical technician (EMT) trainee. Therefore, an unpaid EMT trainee who has not been certified to provide medical services is not considered an employee, as defined in this section, for workers' compensation purposes. Further, because volunteers are generally not considered employees unless designated by law, a volunteer involved in ambulance services is also not considered an employee, as defined in this section, for workers' compensation purposes. Similarly, an unpaid student, such as an unpaid EMT trainee, who is learning skills in a work environment is considered a volunteer and is not considered an employee, as defined in this section, for workers' compensation purposes. The general statement of public policy in Great W. Sugar Co. v. District Court, 188 M 1, 610 P2d 717 (1980), that all forms of employment are subject to the Workers' Compensation Act, does not apply to unpaid EMT trainees and volunteers because those persons are not considered employees. (See 2011 amendment.) Dyess v. Meagher County, 2003 MT 78, 315 M 35, 67 P3d 281 (2003).

Trucking Company Not Considered Employer When Driver Not "Used" by Company: Geiger was injured after a fall from a truck and filed an injury report with the Department of Labor and Industry. The claim was forwarded to the uninsured employer's fund because the interstate trucking business that was Geiger's alleged employer was uninsured. Geiger was determined to be ineligible for benefits after the Workers' Compensation Court found that the trucking company was not an employer. Geiger appealed, but the Supreme Court affirmed. Under the definition in 39-71-117, an interstate motor carrier who uses drivers in this state is considered an employer. The word "use" means to employ or put into service or apply for a purpose. The fact that Geiger made a number of monthly installment payments under a purchase contract and lease did not mean that the company used Geiger to serve its trucking business. The parties' relationship more closely resembled that of a debtor and creditor. The Workers' Compensation Court correctly found that the company did not use Geiger, so the company could not be construed as an employer; thus, Geiger was not eligible for benefits. Geiger v. Uninsured Employers' Fund, 2002 MT 332, 313 M 242, 62 P3d 259 (2002).

Employee of Montana-Based Company Performing Business Out of State Considered Employee in This State for Workers' Compensation Purposes: Fliehler worked for a restaurant installation company based in Montana. The company installed kitchens for three restaurant chains in other states but never undertook projects in Montana. The company owner considered employees to be independent contractors and so did not maintain workers' compensation coverage for the business. Fliehler was injured on a job in Oklahoma and filed for uninsured employer benefits in Montana. The uninsured employers' fund (Fund) argued that Fliehler was not an employee or worker in this state pursuant to this section, so coverage should be denied. The Workers' Compensation Court concluded that Fliehler was an employee of a Montana company rather than an independent contractor and was thus entitled to benefits and costs from the Fund. The Fund appealed, but the Supreme Court affirmed. When faced with multiple locations where the company owner controlled employment duties, the Workers' Compensation Court was correct in comparing all of the owner's activities at the various locations and concluding that the primary, principal, and ultimate control of the work took place in Montana. Montana was the state where the work crew was hired, where the crew left for their jobs, where they returned to live between jobs, where the company truck and tools were kept between jobs, where some job plans were received, and where the crew was paid upon completion of a job. Thus, Fliehler's employment duties were primarily controlled in Montana, and Montana uninsured employer benefits were appropriate. Fliehler v. Uninsured Employers' Fund, 2002 MT 125, 310 M 99, 48 P3d 746 (2002).

Out-of-State Motor Carrier Doing Business in Montana Considered Employer — Liability for Workers' Compensation Premiums: Schimmel, a Montana resident, was injured loading a truck while employed by Jasper Express, Inc. (Jasper), a long-haul trucking business incorporated in and operating out of Washington state. Jasper did not have Schimmel covered under a Montana workers' compensation plan, so Schimmel filed a claim with the Montana uninsured employers' fund (fund), but the claim was denied. Schimmel then filed a petition for benefits against Jasper and the fund in Workers' Compensation Court, seeking a determination that Jasper should have provided coverage. The court held that Schimmel was not an employee, as defined in subsection (10) of this section, because his employment duties were neither primarily carried out nor controlled within Montana; therefore, the fund was not liable for Schimmel's claim. Schimmel appealed and the Supreme Court reversed. The Workers' Compensation Court should have applied the definition of employee in subsection (1)(a) of this section instead of the definition of employee or worker in this state in subsection (10) of this section, which applies to an employee who is furnished by one business to another as contemplated in subsection (8) of this section. Schimmel was not an employee furnished by one business to another, so the definition in subsection (10) of this section did not apply. The use of the phrase "motor carrier" in 39-71-117(4) does not apply only to Montana-based motor carriers. Jasper used a Montana resident driver to pick up and drop off loads in Montana, so Jasper should have provided workers' compensation coverage for Schimmel. Schimmel v. Uninsured Employers' Fund, 2001 MT 280, 307 M 344, 38 P3d 788 (2001).

Recreational Activity Exclusion — Not Applicable to Ski Instructor During Warmup Run — Traditional Course and Scope Analysis: A ski instructor who was injured on a warmup run prior to teaching a lesson was performing a prescribed duty of employment. The recreational activity exclusion was not applicable, and the injury occurred during the course and scope of employment, making the injury a compensable industrial accident. (See 2011 amendment.) Connery v. Liberty NW. Ins. Corp., 280 M 115, 929 P2d 222, 53 St. Rep. 1324 (1996).

Immunity of Covered Employee for Work-Related Injury to Coemployee Regardless of Employer's Election Not to Cover Injured Coemployee: Malek was a compensated director and president of the corporation that employed Hankins. Hankins unintentionally injured Malek in the course of employment. Hankins was covered by the corporation's workers' compensation insurance, but an election was made by the corporation not to cover Malek. In a subsequent negligence action, Hankins was granted summary judgment based on the principle of exclusivity. The Supreme Court affirmed summary judgment because the Workers' Compensation Act provides immunity to a covered employee for work-related injuries to a coemployee regardless of the employer's election not to cover the injured coemployee under workers' compensation. Malek v. Hankins, 275 M 97, 911 P2d 1127, 53 St. Rep. 55 (1996). See also Kelly v. Mile Hi Single Ply, Inc., 890 P2d 1161 (Colo. 1995).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Wages Distinguishable From Income From Profits: Since his accident, claimant had not drawn a salary from or performed the physical activities of the plumbing business, which he had insured under this section. State Fund discontinued his benefits on the grounds that because his business remained profitable and even increased its income since his accident, claimant had not suffered a total loss of wages. The Supreme Court held that although the concepts of wages and income from profits are used interchangeably, the terms are not synonymous. Following its decision in

Chatfield v. Indus. Accident Bd., 140 M 516, 374 P2d 226 (1962), the court noted that the ability to acquire income is not equivalent to the ability to work. The point ". . . is not that the individual is able, through alternative business arrangements, to make a profit from their business, but that they can no longer perform the activities which State Fund insured". The increase in business and profit was not attributable to claimant's capacity as a plumber but rather to the efforts of his family, who performed the work necessary to enhance the business's success and the resulting profits; therefore, claimant did suffer a total loss of wages from the job for which he was insured and was entitled to a continuation of benefits. Tehle v. St. Comp. Mut. Ins. Fund, 254 M 25, 835 P2d 1, 49 St. Rep. 608 (1992).

Worker Injured Going to Job on Drilling Rig Within Scope of Employment — Transportation as Reasonable Belief of Employment: An oil driller contacted claimant and arranged transportation to the rig, with work to begin upon arrival. Claimant was injured on the way to the job and filed for benefits. The Supreme Court ruled that claimant had a reasonable belief as to employment and since the single purpose of his trip was to go to the site of employment in a transportation mode furnished by the employer, coverage was appropriate. Lassabe v. Simmons Drilling, Inc., 228 M 94, 743 P2d 568, 44 St. Rep. 1369 (1987), distinguished in Roberts v. Pegasus Gold Corp., 273 M 266, 903 P2d 782, 52 St. Rep. 967 (1995).

Furnishing Valuable Equipment as Suggestive of Employment Relationship: The fact that an employer furnished valuable equipment necessary to perform employment obligations and enjoyed the right to fire if proper equipment maintenance was not performed satisfied the test of direct employment status despite a contract provision designating the employment as being within independent contractor status. Schrock v. Evans Transfer & Storage, 225 M 348, 732 P2d 848, 44 St. Rep. 292 (1987).

Unqualified Driver Not Contractual Employee: An agency agreement between Evans Transfer and Storage (Evans) and North American Van Lines (North American) authorized Evans to provide qualified drivers and necessary additional helpers and obligated North American to maintain workers' compensation coverage for those helpers. Evans hired Schrock as a driver and went to great lengths to obscure the fact from North American since Schrock's employment application to North American as a driver was rejected. It was not error to conclude that Schrock was not a contractual employee of North American. The fact that drivers help load and unload shipments did not turn Schrock into a helper for workers' compensation coverage purposes. Schrock v. Evans Transfer & Storage, 225 M 348, 732 P2d 848, 44 St. Rep. 292 (1987).

"Control Test" Not Met — Independent Contractor Status Affirmed: A telephone repairman who was told that there might be a limited amount of periodic work with no representation of the actual amount of work available, who was paid on a piece-rate basis while free to accept or reject any repair work offered, and who was free to perform repairs at a location away from the business and to use his own tools and method of repair without being required to be at the business during any specific hours did not meet the "control test" set out in Carlson v. Hartford Accident & Indem. Co., infra, and was therefore an independent contractor. Foster v. Comm'r of Labor & Indus., 225 M 246, 731 P2d 1313, 44 St. Rep. 207 (1987).

Factors to Be Considered — Control Test: In Montana the "control test", under which the right to control details of the individual's work is decisive, may be used to determine whether employee status exists and also to determine who the employer is. The four factors to be considered under the "control test" are: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. Employment status can be established on the strength of any one of the factors. Carlson v. Hartford Accident & Indem. Co., 204 M 311, 664 P2d 913, 40 St. Rep. 865 (1983).

Fiancee's Expectancy — Gratuitous Employment Precluded: Cain had a contract with the Billings Gazette to deliver papers to outlying areas. He met claimant, and she moved in with him. They later became engaged. Cain furnished claimant with room, board, and the use of an automobile. Claimant began delivering papers for Cain without compensation although he normally paid others $30 a day for the same work. Claimant was injured in an auto accident while delivering papers. Claimant was awarded workers' compensation. Both Cain and the Gazette challenged the finding that claimant was Cain's employee and asserted that even if she was, she fell within the exemption from coverage of 39-71-401(2)(f). The Supreme Court found that though there was no express agreement for compensation, claimant worked virtually full-time for Cain. She expected to marry Cain and that her participation in the business would provide for her future security. The court found sufficient evidence in the record to establish a contract for hire. Carlson v. Hartford Accident & Indem. Co., 204 M 311, 664 P2d 913, 40 St. Rep. 865 (1983).

Test for Independent Contractor When No Written Contract: When there is no written contract between the parties, the court will look to the facts alone to determine whether the employer has the right to control the work of the person whose status is in question. Sharp v. Aetna Cas. & Sur. Co., 178 M 419, 584 P2d 1298, 35 St. Rep. 1430 (1978), followed in Morris v. St. Comp. Mut. Ins. Fund, 245 M 153, 799 P2d 1063, 47 St. Rep. 1942 (1990).

Gratuitous Services: Where claimant's deceased, who was the friend of a bulk oil plant operator and was making deliveries for him at a compensation of 1 cent per gallon delivered during the latter's absence on active duty in the army reserve, was severely burned while loading a gasoline truck from which injury he subsequently died, his services were not gratuitous and there was evidence to sustain a finding that decedent was defendant's employee within the meaning of the Workers' Compensation Act. Kimball v. Cont. Oil Co., 170 M 86, 550 P2d 912 (1976).

Employer Control Through Supervisor: Where ultimate control of all details of work performed by plaintiff was in Yellowstone Pine, and plaintiff was supervised by another employee of same company, control over plaintiff was in Yellowstone Pine and therefore plaintiff was employee of Yellowstone Pine, receiving benefits from workers' compensation, and could not pursue common-law action against his employer. State ex rel. Ferguson v. District Court, 164 M 84, 519 P2d 151 (1974).

Airport Employee: Plaintiff under a contract of employment with the city-county airport was not an "actual" employee of the State of Montana under the accepted definitions. Kelleher v. St., 160 M 365, 503 P2d 29 (1972).

Oral Employment Contract: A tileworker in Utah, contacted on the telephone and offered a job on a project in Montana by an authorized agent of subcontractor having contract for the tile flooring in the project, was an employee of the subcontractor at the time that he met his death in a one-car accident on a highway in Montana while driving to the site of his proposed employment, as he was to receive monetary compensation for the time spent traveling to the job. Guarascio v. Indus. Accident Bd., 140 M 497, 374 P2d 84 (1962).

Lumberman — Not an Employee: A lumberman who contracted with lumber company to cut, log, and mill certain timber was not an employee of the lumber company. Kimball v. Indus. Accident Bd., 138 M 445, 357 P2d 688 (1960).

Independent Contractor:

In an action to recover an assessment made on compensation paid to truck drivers whom employer claimed were the employees of an independent contractor, it was proper to give an instruction that the Board was not a party to the contract with the independent contractor and was not bound to recognize the contracting parties but could assert its rights against "party employing the laborer". Jeffries Coal Co. v. Indus. Accident Bd., 131 M 511, 312 P2d 128 (1957).

An "independent contractor", excluded from the benefits of the Workmen's Compensation Act (now Workers' Compensation Act) by this section, is one employed to perform work on condition that he is free from the control of the employer as respects the manner in which the details are to be executed. Nelson v. Stukey, 89 M 277, 300 P 287, 78 ALR 483 (1931).

Accidents Occurring Outside of State: Employees who are resident citizens of the state, employed and paid in Montana through the only office of their employer, a Montana corporation, are entitled to the benefits of the workers' compensation laws of Montana although they were injured in another state. State ex rel. Morgan v. Indus. Accident Bd., 130 M 272, 300 P2d 954 (1956). (Dissenting opinion, 130 M 272, 300 P2d 954 (1956).)

Not Municipal Employee: Plaintiff, who was employed by contractor employed by city and who had entered into no contract of hire with city and was not on city's payroll, was not an employee of the city within the meaning of this section. Sullivan v. Butte, 117 M 215, 157 P2d 479 (1945).

Minors — Capacity to Contract and Lawfulness of Employment Immaterial: This section, defining the term "employee" to include minors unlawfully employed, dispenses with the necessity of a valid contract of employment, making wholly immaterial the age or competency of the minor and the capacity of the minor to contract, as well as the lawfulness of the employment, rendering employers insured under the act immunity from common-law or statutory suits for damages, even where injury or death results under employment in violation of 41-2-101 (now repealed), the child labor law. Tarrant v. Helena Building & Realty Co., 116 M 319, 156 P2d 168 (1944).

Termination of Employment: Plaintiff having predicated his cause of action upon the relation of master and servant, his contention that his detention in the mine after 8 hours had expired constituted false imprisonment as well as a violation of the 8-hour law thus terminating his employment, is without merit since his employment could not be terminated in any such manner. Wirta v. N. Butte Min. Co., 64 M 279, 210 P 332, 30 ALR 964 (1922).

Attorney General's Opinions

OPINIONS PRIOR TO 1987 GENERAL REVISION

Firefighters — Rural Fire Districts: A firefighter in a rural fire district is not an "employee" for the purposes of workers' compensation, but he receives similar benefits under the provisions of Title 19, ch. 12 (renumbered Title 19, ch. 17). 40 A.G. Op. 9 (1983).

Law Review Articles

Hensley v. Montana State Fund: A Shift in the Grand Bargain of Workers' Compensation, Hagan, 83 Mont. L. Rev. 159 (2022).

39-71-119. Injury and accident defined.

Compiler's Comments

2021 Amendment: Chapter 197 in (1)(c) at beginning substituted "damage to appliances" for "or appliances"; and made minor changes in style. Amendment effective April 14, 2021.

1995 Amendment: Chapter 243 in (1)(a), at end, inserted "that is established by objective medical findings"; in (5)(a), in two places, substituted "condition" for "harm"; inserted (5)(b) defining primary cause; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

1987 Amendment: Substituted section (see 1987 Session Law for text) for former section that read: ""Injury" or "injured" means:

(1) a tangible happening of a traumatic nature from an unexpected cause or unusual strain resulting in either external or internal physical harm and such physical condition as a result therefrom and excluding disease not traceable to injury, except as provided in subsection (2) of this section;

(2) cardiovascular or pulmonary or respiratory diseases contracted by a paid firefighter employed by a municipality, village, or fire district as a regular member of a lawfully established fire department, which diseases are caused by overexertion in times of stress or danger in the course of his employment by proximate exposure or by cumulative exposure over a period of 4 years or more to heat, smoke, chemical fumes, or other toxic gases. Nothing herein shall be construed to exclude any other working person who suffers a cardiovascular, pulmonary, or respiratory disease while in the course and scope of his employment.

(3) death resulting from injury."

Inconsistent Acts Repealed: Section 2, Ch. 270, L. 1967, repealed all acts and parts of acts in conflict therewith.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Objective Medical Findings Required to Establish Injury and Causation: The claimant contended that evidence regarding causation or aggravation of a preexisting condition can be established through factors other than medical expertise or opinion and that the Workers' Compensation Court erred by relying solely on medical opinions. The Supreme Court upheld the use of medical opinions and determined that, pursuant to workers' compensation laws in effect since July 1, 1995, a claimant is required to establish injury and causation through objective medical findings. Ford v. Sentry Cas. Co., 2012 MT 156, 365 Mont. 405, 282 P.3d 687.

Opinion of Treating Physician Generally Accorded Greater Weight — Causation Not Proved: The claimant contended that an industrial accident caused his spinal condition and that the Workers' Compensation Court (WCC) erred by concluding that he failed to prove a causal connection between the accident and the condition. The Supreme Court evaluated medical opinions of treating physicians, a psychological evaluation, and two independent medical examinations in determining that no grounds existed for weighing the opinion of an independent medical examiner more heavily than the opinions of the claimant's treating physicians. The Supreme Court affirmed the judgment of the WCC, holding that while not conclusive, the opinions of treating physicians are entitled to greater weight than the opinions of other expert witnesses. Ford v. Sentry Cas. Co., 2012 MT 156, 365 Mont. 405, 282 P.3d 687, citing EBI/Orion Group v. Blythe, 1998 MT 90, 288 Mont. 356, 957 P.2d 1134.

Standard of Proof — More Probable Than Not: The claimant contended that the Workers' Compensation Court erred by using the term "reasonable degree of medical certainly" instead of the "more probable than not" burden of proof when analyzing his claim for benefits. The Supreme Court determined that regardless of "reasonable degree" reference, the Worker's Compensation Court ultimately reached the correct result under the "more probable than not" standard. The standard of proof in determining whether there was an accident in the course of employment, an injury or an aggravation of a preexisting condition, and a causal connection between the accident and the injury or aggravation is "more probable than not". Ford v. Sentry Cas. Co., 2012 MT 156, 365 Mont. 405, 282 P.3d 687.

Benefits Due for Cognitive Impairment From Carbon Monoxide Exposure: Russell alleged that he was exposed to carbon monoxide while working for defendant employer, resulting in a variety of physical problems. The Workers' Compensation Court granted Russell's claim but did not specify the time period for which indemnity benefits were awarded. The employer appealed, but the Supreme Court found that the employer failed to demonstrate that the Workers' Compensation Court's findings were not supported by substantial credible evidence or that its conclusions of law were erroneous, so the Workers' Compensation Court's finding that Russell was entitled to medical and indemnity benefits for the occupational disease claim for cognitive impairment caused by carbon monoxide exposure was affirmed. However, the case was remanded for the Workers' Compensation Court to determine the appropriate period for which indemnity benefits were due. Russell v. Watkins & Shepard Trucking Co., 2009 MT 217, 351 M 297, 211 P3d 864 (2009).

Error in Rescinding Workers' Compensation Settlement Agreement Based on Mutual Mistake of Fact: In 2004, some 16 years after Kruzich suffered a traumatic brain injury in an industrial accident, Kruzich began developing signs of Parkinson's disease, which was determined was likely a result of the brain injury. Kruzich had entered a settlement agreement with the insurer in 1994 that expressly closed all present and future domiciliary care benefits while reserving medical and hospital benefits. When Parkinson's disease developed, Kruzich petitioned the Workers' Compensation Court to rescind the settlement agreement and reopen the claim, which the court did, on grounds that a material mutual mistake of fact had occurred regarding the nature of Kruzich's injuries. The insurer appealed, and the Supreme Court reversed. Under contract law, parties make a mutual mistake of fact only if they are unconsciously ignorant or forgetful of a fact that existed prior to or at the time of settlement, but ignorance of a future event does not constitute a mistake of fact. In this case, there was no evidence that at the time that the settlement agreement was executed, Kruzich suffered an injury of Parkinson's disease or that Kruzich would develop the disease 16 years later. The parties could not have been mutually mistaken about a fact that did not exist prior to or at the time of settlement, so the Workers' Compensation Court erred in reopening Kruzich's case based on mutual mistake of fact. Kruzich v. Old Republic Ins. Co., 2008 MT 205, 344 M 126, 188 P3d 983 (2008).

Injury at Company Picnic in Course of Employment: Michalak was injured while riding a wave runner at the annual company picnic and was unable to return to work. The insurer denied Michalak's claim for benefits, but the Workers' Compensation Court applied the "course and scope" factors in Courser v. Darby School District, 214 M 13, 692 P2d 417 (1984), and held that because Michalak was injured within the course and scope of employment, the injury was compensable. The insurer appealed. The Courser factors for determining whether a person is performing prescribed duties include whether: (1) the activity was undertaken at the employer's request; (2) the employer, either directly or indirectly, compelled the employee's attendance at the activity; (3) the employer controlled or participated in the activity; and (4) both employer and employee mutually benefited from the activity. The Supreme Court noted that the Workers' Compensation Court correctly focused its analysis on the company picnic as the applicable activity, rather than Michalak's ride on the wave runner, to determine whether the injury occurred within the course and scope of employment. The court found substantial evidence that: (1) the employer compelled Michalak's attendance at the picnic; (2) the employer controlled and participated in the picnic; and (3) the picnic provided mutual benefit to the employer and its employees. The Workers' Compensation Court properly applied the Courser factors and did not err in concluding that Michalak was injured within the course and scope of employment, and that decision was affirmed. Michalak v. Liberty NW. Ins. Corp., 2008 MT 3, 341 M 63, 175 P3d 893 (2008).

Refusal of Workers' Compensation Court to Reopen Case for Introduction of Further Evidence of Historical and Anatomical Differences Between Injuries and Occupational Diseases Not Abuse of Discretion: After an occupational disease case was submitted to the Workers' Compensation Court, the state sought to reopen the case for the introduction of further evidence of the historical and anatomical differences between injuries and occupational diseases. The court declined to reopen the record, and the state appealed. The Supreme Court affirmed, noting that the state could have offered the evidence prior to the close of evidence. Further, the state did not demonstrate the materiality of the evidence in support of the motion to reopen the case. The Workers' Compensation Court did not abuse its discretion in declining to reopen the case for additional evidence. Stavenjord v. Mont. St. Fund, 2003 MT 67, 314 M 466, 67 P3d 229 (2003). See also Cole v. Helena Light & Ry., 49 M 443, 143 P 974 (1914).

Failure to Notify Employer of Injury Within Statutory Time Period — Claim Precluded — Occupational Disease Act (Now Repealed and Merged With Workers' Compensation Act) Inapplicable to Single Incident: Hanks suffered a back injury while working as a home-care aide, but did not report the incident to the employer until more than 5 years later, when Hanks sought workers' compensation benefits. Those benefits were denied because Hanks did not report the incident within 30 days as required by 39-71-603. Hanks was then granted an emergency trial, and she claimed that the Workers' Compensation Act did not apply because the incident was not caused by an injury, but rather by an occupational disease. That claim was also dismissed with prejudice because Hanks did not comply with the notice requirement, and Hanks appealed. The Supreme Court affirmed. Hanks' problem was properly characterized as an injury rather than an occupational disease because the incident was a single identifiable incident occurring in a single work shift. Hanks was not entitled to bring an occupational disease claim because the injury did not occur on more than a single day, so the occupational disease claim was properly dismissed with prejudice. Because Hanks failed to notify the employer of the injury within 30 days, the workers' compensation claim was also dismissed as untimely. Hanks v. Liberty NW. Ins. Corp., 2002 MT 334, 313 M 263, 62 P3d 710 (2002).

District Court Jurisdiction to Determine Whether Tort Claim Barred by Workers' Compensation Exclusivity Provisions — Posttraumatic Stress Disorder Not Compensable: Onstad was assaulted on the job and sued the employer, Payless Shoesource (Payless), for failure to provide a safe workplace. Onstad did not file a workers' compensation claim; nevertheless, Payless contended that the claim was precluded by the exclusivity provision of the Workers' Compensation Act and that the Workers' Compensation Court, rather than the District Court, should have made the initial determination whether Onstad's injuries were covered by workers' compensation. The Supreme Court noted that in accord with prior case law, the District Court did have jurisdiction to determine whether Onstad's tort claim was barred by the exclusivity provision, then went on to hold that Onstad's injury was not compensable under the Workers' Compensation Act because it was primarily a posttraumatic mental injury related to Onstad's stress of contending with the attack. Thus, Payless's exclusivity defense failed as a matter of law. Onstad v. Payless Shoesource, 2000 MT 230, 301 M 259, 9 P3d 38, 57 St. Rep. 943 (2000). See also Yarborough v. Mont. Municipal Ins. Authority, 282 M 475, 938 P2d 679 (1997).

Spoliation of Evidence Claim Not Barred by Exclusivity of Workers' Compensation Act: As part of an industrial accident case, Olivers requested that equipment involved in the accident remain intact so that it could be examined by an expert. The equipment was subsequently altered, and Olivers brought an action for negligent and intentional spoliation of evidence. The District Court determined that the exclusive remedy provisions of the Workers' Compensation Act barred Olivers from bringing a claim for spoliation of evidence. The Supreme Court disagreed, noting that by definition, injuries that trigger an exclusive remedy under the Act are internal or external harm to a worker's body, but the loss or impairment of a person's ability to bring an action against a third party for spoliation of evidence is not an injury covered by the Act. Thus, Olivers' claim was not barred by the Act's exclusivity provisions. Oliver v. Stimson Lumber Co., 1999 MT 328, 297 M 336, 993 P2d 11, 56 St. Rep. 1303 (1999).

Necessity for Objective Medical Findings to Prove Compensable Injury: For injuries occurring after the 1995 amendments to 39-71-407 and the decision in Chaney v. U.S. Fidelity & Guar., 276 M 513, 917 P2d 912, 53 St. Rep. 499 (1996), the claimant must show through objective medical findings that an injury occurred. Matthews v. St. Comp. Ins. Fund, 1999 MT 225, 296 M 76, 985 P2d 741, 56 St. Rep. 888 (1999).

Finding of Malingering Affirmed Notwithstanding Expert Testimony: Blythe was accidentally stuck with an AIDS-contaminated needle while working in 1989. Evidence was uncontroverted that if Blythe had been infected with the virus, he would have tested positive within 3 to 6 months after the needle stick. However, Blythe has consistently tested negative. Nevertheless, Blythe contended that he suffered anxiety attacks and depression, that his educational efforts were adversely affected, and that his mental condition had deteriorated. Despite conflicting expert testimony as to the extent of Blythe's injuries, sufficient findings existed to affirm the Workers' Compensation Court's decision that Blythe was malingering, that he was not disabled, and that he was not entitled to compensation or benefits for the accident. EBI/Orion Group v. Blythe, 1998 MT 90, 288 M 356, 957 P2d 1134, 55 St. Rep. 359 (1998).

Posttraumatic Stress Disorder Not Compensable Injury: Yarborough was injured while employed as a firefighter. Following the accident, he was diagnosed with posttraumatic stress disorder (PTSD), and he sought compensation. The Workers' Compensation Court properly found no evidence that the PTSD was caused by physical injuries received in the accident, which were healed within several weeks of the accident, but rather that the PTSD was a mental condition arising from emotional or mental stress of the accident combined with preexisting psychological distress and thus was excluded from the definition of injury and was noncompensable. Yarborough v. Mont. Municipal Ins. Authority, 282 M 475, 938 P2d 679, 54 St. Rep. 438 (1997), following Stratemeyer v. Lincoln County, 276 M 67, 915 P2d 175 (1996), and Kleinhesselink v. Chevron, U.S.A., 277 M 158, 920 P2d 108 (1996).

Constitutionality of Workers' Compensation Provision Disallowing Coverage for Mental Stress Injury: After holding that Stratemeyer did not qualify for workers' compensation coverage under this section because his injury was mental stress-related rather than having a physical component, the Workers' Compensation Court went on to declare the portion of the statute precluding stress-related coverage to be a violation of the constitutional guarantee of equal protection. However, the court did not first presume the statute to be constitutional and did not look to any possible legitimate purpose for the law, which is the proper analysis under an equal protection challenge. Applying the rational basis test, the Supreme Court found that the exclusion of mental claims was rationally related to the possible goal of reducing costs and providing a viable program for the state, employers, and employees in the workers' compensation field, which is a legitimate government objective warranting various classifications of work-related injuries and not an equal protection violation. The order of the lower court was reversed. Stratemeyer v. Lincoln County, 259 M 147, 855 P2d 506, 50 St. Rep. 731 (1993).

Workers' Compensation Not Exclusive Remedy for Sexual Harassment on the Job: Sexual harassment on the job is an intentional act not arising from an accident, and the Workers' Compensation Act is not an exclusive remedy for a claim for damages for emotional pain and suffering. Vainio v. Brookshire, 258 M 273, 852 P2d 596, 50 St. Rep. 529 (1993).

Aggravation of Preexisting Condition Included in Definition of Injury: The insurer argued that the term "physical harm" in the statute refers to the claimant's cumulative present condition. The Supreme Court disagreed, holding that it would be impossible for a claimant to prove that his cumulative health condition was caused primarily by his exposure at work. The court went on to state that a claimant had only to show that the primary cause of the aggravation of a preexisting condition was exposure or injury in the workplace. Gaumer v. St. Comp. Ins. Fund, 243 M 414, 795 P2d 77, 47 St. Rep. 1202 (1990).

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GENERAL

Automatic Acceptance of Claim — Error to Deny Benefits With No Finding of Maximum Healing or Intervening Event: Chaney claimed that he was injured in 1983 when he slipped and fell at his employing sawmill, which was then insured by USF&G. Chaney also consulted several physicians between 1989 and 1992 concerning numbness in his hands. In 1992, Chaney had surgery to correct carpal tunnel syndrome. State Fund paid benefits while reserving its rights against Chaney and USF&G, but the Workers' Compensation Court held that Chaney was not entitled to benefits. The Supreme Court held that USF&G automatically accepted the claim when it failed to deny it and that by accepting the claim in this fashion, Chaney had satisfied his initial burden to prove that he sustained a compensable injury and that there was a causal connection between his injury and his current condition. Citing Walker v. United Parcel Serv., 262 M 450, 865 P2d 1113 (1993), and Haag v. Mont. School Group Ins. Authority, 274 M 109, 906 P2d 693 (1995), the Supreme Court held that without any proof of maximum healing or an intervening event, it was error for the Workers' Compensation Court to deny benefits. Chaney v. U.S. Fidelity & Guar., 276 M 513, 917 P2d 912, 53 St. Rep. 499 (1996).

Lack of Compensable Injury Precludes Exclusivity of Workers' Compensation Remedy — Definition of Injury — Tort Action Allowed: Lincoln County Deputy Sheriff Stratemeyer filed a tort action against Lincoln County for failing to properly train, debrief, and counsel him to cure his posttraumatic stress disorder incurred from observing a suicide victim. Citing case law from other states and the public policy expressed by the Legislature, the Supreme Court held that the refusal of the Legislature to provide coverage under the workers' compensation laws precluded the applicability of the exclusive remedy theory upon which those laws are based. The Supreme Court also held that because the definition of injury contained in 39-71-411 must be construed consistently with the definition of injury in this section, an injury excluded by the definition in this section must also be excluded from the exclusive remedy provisions of 39-71-411. Because Stratemeyer did not suffer an injury covered by the exclusive remedy provision of the workers' compensation laws, he was free to bring a separate tort action against the county. Stratemeyer v. Lincoln County, 276 M 67, 915 P2d 175, 53 St. Rep 245 (1996), followed in Kleinhesselink v. Chevron, U.S.A., 277 M 158, 920 P2d 108, 53 St. Rep. 668 (1996), and Buerkley v. Aspen Meadows Ltd. Partnership, 1999 MT 97, 294 M 263, 980 P2d 1046, 56 St. Rep. 415 (1999). Stratemeyer and Kleinhesselink were distinguished in Maney v. La. Pac. Corp., 2000 MT 366, 303 M 398, 15 P3d 962, 57 St. Rep. 1561 (2000).

Constitutionality of Workers' Compensation Provision Disallowing Coverage for Mental Stress Injury: After holding that Stratemeyer did not qualify for workers' compensation coverage under this section because his injury was mental stress-related rather than having a physical component, the Workers' Compensation Court went on to declare the portion of the statute precluding stress-related coverage to be a violation of the constitutional guarantee of equal protection. However, the court did not first presume the statute to be constitutional and did not look to any possible legitimate purpose for the law, which is the proper analysis under an equal protection challenge. Applying the rational basis test, the Supreme Court found that the exclusion of mental claims was rationally related to the possible goal of reducing costs and providing a viable program for the state, employers, and employees in the workers' compensation field, which is a legitimate government objective warranting various classifications of work-related injuries and not an equal protection violation. The order of the lower court was reversed. Stratemeyer v. Lincoln County, 259 M 147, 855 P2d 506, 50 St. Rep. 731 (1993).

Spondylolysis Untraceable to Injury Noncompensable: Claimant's spondylolysis, a congenital back condition, was not traceable to any injury and was therefore not compensable despite claimant's contention that the back problems were a preexisting condition exacerbated by her employment. Hash v. St. Comp. Mut. Ins. Fund, 248 M 155, 810 P2d 1174, 48 St. Rep. 364 (1991), distinguishing Shepard v. Midland Foods, Inc., 205 M 146, 666 P2d 758 (1983), and Hoehne v. Granite Lumber Co., 189 M 221, 615 P2d 863 (1980).

Lower Court's Finding That Claimant Suffered Injury Only to His Knee Affirmed: After reviewing the overall record, the Supreme Court concluded that the lower court's findings were not in stark contrast to the evidence presented at trial and that the Workers' Compensation Court did not err in refusing to hold that the claimant had injured his back as well as his knee. Sciuchetti v. Hurt Constr., 238 M 170, 777 P2d 308, 46 St. Rep. 1177 (1989).

Claimant Suffering Occupational Disease: Claimant, who has a history of asthma, was exposed to an unusually large and concentrated dose of fumes while working as a welder. He was hospitalized briefly, and, following treatment, his health was returned to its preexacerbation state. Claimant is not entitled to compensation under the Workers' Compensation Act for the injury he suffered when he inhaled the fumes because his health was returned to its preexacerbation state. However, he is entitled to compensation under the Occupational Disease Act (now repealed and merged with Workers' Compensation Act). Eastman v. Atl. Richfield Co., 237 M 332, 777 P2d 862, 46 St. Rep. 845 (1989), distinguished in Henry v. St. Comp. Ins. Fund, 1999 MT 126, 294 M 449, 982 P2d 456, 56 St. Rep. 506 (1999).

Pain From Work Activities — Compensable Injury: Following the amputation of his lower leg, claimant returned to work but was unable to perform his job because of pain and discomfort caused by his work-related activities. He consequently was discharged by his employer. The evidence was sufficient to support a finding that the claimant suffered a compensable injury following his return to work after surgery. Varela v. Petroleum Cas. Co., 237 M 300, 773 P2d 299, 46 St. Rep. 819 (1989).

Evidence of Exposure to Chemical Sufficient to Prove Cardiovascular Disease: The medical evidence in the case was submitted entirely through depositions, enabling the Supreme Court to review the evidence and reach its own conclusions without relying on the lower court's findings. Upon review, the Supreme Court affirmed the lower court's ruling that sufficient evidence existed to find that the claimant's heart disease was a result of his exposure to the chemical toluene. Roadarmel v. Royal Ins. Co., 237 M 163, 772 P2d 1259, 46 St. Rep. 705 (1989).

Insubstantial Evidence to Support Claim: Claimant who failed to prove by a preponderance of the probative credible medical evidence that his work-related injury was the cause of his present condition was properly denied medical benefits. Martin v. Phillips Petroleum Co., 229 M 529, 747 P2d 1363, 44 St. Rep. 2193 (1987).

Failure to Establish Thoracic Outlet Syndrome as Injury: Claimant failed to prove that a work-related incident was a contributing cause of his thoracic outlet syndrome when he failed to report to his employer or physicians any injury and when three physicians who treated him all testified that the syndrome was a gradually developing problem that could not have been caused by a single traumatic incident, but rather existed for a considerable period prior to the alleged accident. Nelson v. Asarco, Inc., 227 M 272, 739 P2d 943, 44 St. Rep. 1074 (1987).

Depression Caused by Termination of Employment — Not Work-Related Physical Harm: When an employee appeared to be happy in her job but suffered depression and related problems 9 days after being terminated from employment, she did not prove a physical harm stemming from an incident at the workplace absent proof that the job aggravated the depression. Gulbraa v. Alco Energy Prod., 225 M 220, 731 P2d 1302, 44 St. Rep. 185 (1987).

Suicide — Compensable When Traceable to Work-Connected Injury: Suicide is compensable under the Workers' Compensation Act if a work-connected injury produces mental derangement and the mental derangement causes suicide. Campbell v. Federated Mut. Ins., 211 M 68, 684 P2d 1101, 41 St. Rep. 1218 (1984).

Long-Term Exposure to Fumes — No Injury: During McMahon's employment at the Anaconda Company's refinery in Great Falls, he was continuously exposed to moderate levels of sulphuric acid, organic arsenic, zinc, lead, copper, tellurium, asbestos, silver, dust, and other compounds. McMahon's ailments result from smoking cigarettes and exposure to fumes at his work. The court held that the claimant's impairment caused by exposure to a hostile environment for a period of years is a "disease" and not a compensable injury. McMahon v. The Anaconda Co., 208 M 482, 678 P2d 661, 41 St. Rep. 480 (1984), followed in Wear v. Buttrey Foods Inc., 234 M 477, 764 P2d 139, 45 St. Rep. 2063 (1988).

Evidence of Lack of Injury: An employee had severe back pain at work and went home at the end of his shift. He later called his supervisor and stated he had hurt his back and was going to see a doctor and would not be at work for his next shift. Evidence that he failed to notify his employer at that time that he had been injured in an accident on the job was evidence that employee may not have believed he had suffered an on-the-job injury but was not evidence that employee did not suffer an on-the-job injury. Employee had 60 days to give employer notice of an on-the-job injury; that requirement was met by employee's written notice less than 3 weeks after the alleged injury, and there was no requirement that he notify employer of an accident or injury within hours or days of its occurrence. Jones v. St. Regis Paper Co., 196 M 138, 639 P2d 1140, 38 St. Rep. 2201 (1981).

Scope and Course of Employment: The District Court properly rejected defendant's contention that claimant failed to establish an injury incurred in the scope and course of employment because she was unable to relate the unusual strain to a tangible happening of a traumatic nature related to any particular task or function she was required to perform and could not relate the strain to any particular time period within the working day. Hutchison v. Liberty Mut. Ins. Co., 178 M 81, 582 P2d 1203, 35 St. Rep. 1126 (1978).

Inability to Work Without Pain: The evidence was sufficient to support a determination that claimant was totally and permanently disabled when, as a result of two injuries, claimant could not work without pain and could not endure the pain to work. Robins v. Anaconda Aluminum Co., 175 M 514, 575 P2d 67 (1978), followed in Larson v. Cigna Ins. Co., 276 M 283, 915 P2d 863, 53 St. Rep. 394 (1996), and Killoy v. Reliance Nat'l Indem., 278 M 88, 923 P2d 531, 53 St. Rep. 838 (1996).

Relationship Between Accident and Disability: Claimant's disability resulting from arteriosclerosis obliterans was the result of a disease not traceable to injury, and was not a compensable injury within the meaning of this section. McAndrews v. Schwartz, 164 M 402, 523 P2d 1379 (1974).

Burden of Proof:

Claimant who injured hand and received compensation for such injury was properly denied compensation for alleged "disabling cardiac damage" and "cardiac neurosis" since claimant could produce no substantial evidence to support such claim. Verdi v. Am. Smelting & Ref. Co., 154 M 208, 461 P2d 845 (1969).

Burden is on claimant to prove by a preponderance of the evidence that worker died as the result of an accidental injury, but it was not incumbent upon widow to have an autopsy performed to establish the cause of death. Birdwell v. Three Forks Portland Cement Co., 98 M 483, 40 P2d 43 (1935).

Assault by Coemployee: Injury to an employee, resulting from assault by coemployee against whom employee used vulgar language, was the result of an industrial accident. McGrew v. Consol. Freightways, Inc., 141 M 324, 377 P2d 350 (1963).

Heart Failure — Industrial Accident: An employee who died of coronary heart disease did not suffer an industrial accident. Bergan v. Gallatin Valley Milling Co., 138 M 27, 353 P2d 320 (1960).

Neurosis Compensable: A disabling neurosis which had been caused by an accidental injury is compensable under the Workmen's Compensation Act (now Workers' Compensation Act). O'Neil v. Indus. Accident Bd., 107 M 176, 81 P2d 688 (1938); Best v. London Guar. & Accident Co., 100 M 332, 47 P2d 656 (1935); Sykes v. Republic Coal Co., 94 M 239, 22 P2d 157 (1933).

Heat Stroke Constitutes Accidental Injury: Death of state highway employee caused by heat prostration while working on oil-surfaced highway on mid-July afternoon was compensable under Workmen's Compensation Act (now Workers' Compensation Act), and fact he lived 11 days after injury did not affect widow's right to recover compensation. Ryan v. Indus. Accident Bd., 100 M 143, 45 P2d 775 (1935).

Heat Prostration — Death Compensable Although Heart Disease Also Present: Death of worker caused by extreme heat from cement kilns which he was attending prior to his collapse was compensable under Workmen's Compensation Act (now Workers' Compensation Act), and fact that decedent was suffering from heart disease previous to and on the day of his death did not prevent recovery by his widow. Birdwell v. Three Forks Portland Cement Co., 98 M 483, 40 P2d 43 (1935), distinguished in Woin v. Anaconda Copper Min. Co., 99 M 163, 43 P2d 663 (1935), and Ryan v. Indus. Accident Bd., 100 M 143, 45 P2d 775 (1935).

TANGIBLE HAPPENING OF A TRAUMATIC NATURE

Uncontested Facts Proving Injury: The Workers' Compensation Court found that the claimant had not suffered a work-related injury to his wrist. The Supreme Court ruled that the decision was not supported by substantial evidence. Uncontested facts presented by the claimant showed that the injury was work-induced. The court reversed the decision and remanded the case for a determination of the amount to be paid to the claimant. Kraft v. St. Comp. Ins. Fund, 243 M 363, 792 P2d 1094, 47 St. Rep. 1057 (1990).

Inhalation of Welding Fumes and Smoke Not Injury: The fact that claimant had chronic obstructive pulmonary disease, smoked, and breathed fumes and smoke during a 28-year career as a welder did not mean he suffered an injury that would qualify him for workers' compensation benefits since he failed to identify an unexpected tangible happening that occurred on a specific date. Claimant's malady was properly compensated as an occupational disease rather than an injury. Whittington v. Ramsey Constr. & Fabrication, 229 M 115, 744 P2d 1251, 44 St. Rep. 1823 (1987).

Respiratory Disease — Coverage Excluded: Although 39-71-119(1) excludes diseases not traceable to injury, 39-71-119(2) does not automatically exclude respiratory diseases contracted during employment. However, where sufficient medical evidence showed that the incident alleged to be a tangible happening of a traumatic nature lacked medical significance, the claimant did not establish that he had suffered an industrial injury that would entitle him to workers' compensation benefits. Phillips v. Spectrum Enterprises, 224 M 407, 730 P2d 1131, 43 St. Rep. 2288 (1986).

Allergic Contact Dermatitis as Injury and Disease — Claimant's Election of Remedy: Claimant developed allergic contact dermatitis unexpectedly after a single exposure to chemicals that triggered an immunological response creating antibodies that were his allergy, even though he had been exposed to the chemicals for many years without any response. This reaction met the tests of this section, constituting the allergy as an injury within the meaning of the Workers' Compensation Act, as well as an occupational disease within the meaning of the Occupational Disease Act (now repealed and merged with Workers' Compensation Act). Claimant could elect his remedy between the Acts. Bremer v. Buerkle, 223 M 495, 727 P2d 529, 43 St. Rep. 1942 (1986).

Heart Attack — May Be Compensable: In certain cases heart attacks are compensable injuries under the Montana Workers' Compensation Act. Davis v. Jones, 216 M 300, 701 P2d 351, 42 St. Rep. 840 (1985).

Tangible Happening With No Physical Harm: The trial court concluded that an incident was a tangible happening of a traumatic nature from an unexpected cause and thus satisfied the first element of the definition of injury. Any injury related to the "tangible happening" in this case was found to produce no harm because no time was lost from work, no medical expenses were incurred, and no disability or impairment of any kind was found causally related to the industrial accident. Morley v. The Anaconda Co., 212 M 184, 686 P2d 917, 41 St. Rep. 1679 (1984).

Phlebitis Caused by Excessive Work Schedule Considered "Injury", Not Occupational Disease: Medical evidence indicated that claimant's phlebitis was caused by her excessive work schedule during 1 week of her employment as janitress/bartender and developed during that period, rather than over 4 months as her employer asserted. Therefore, since the phlebitis was caused at a definite time and was unexpected, the Workers' Compensation Court was correct in its decision that claimant suffered an "injury" within the meaning of this section. Wise v. Perkins, 202 M 157, 656 P2d 816, 40 St. Rep. 1 (1983).

Perceptible "Snap" in Back While Lifting Patient: Where there is evidence in the record that claimant, a nurse, "felt a snap" while lifting a patient weighing approximately 50 pounds, is a tangible, perceptible happening. A "tangible happening of a traumatic nature", within the meaning of this section, is some action or incident that is a perceptible happening, which may be perceived as a contributing cause of the resulting injury. Harmon v. Deaconess Hosp., 191 M 285, 623 P2d 1372, 38 St. Rep. 65 (1981).

Chain of Actions or Incidents as Compensable Injury: Claimant's job consisted of removing 2- by 4-inch studs from a conveyor system and stacking them in a pile. He developed bilateral carpal tunnel syndrome, which required surgery as a result of the continued strain involved in lifting and stacking lumber. The Supreme Court held that a condition that arises and gradually becomes worse over a period of time and was attributable to a chain of actions or incidents is a "tangible happening of a traumatic nature from an unexpected cause or unusual strain" and is therefore a compensable injury within the meaning of this section. Hoehne v. Granite Lumber Co., 189 M 221, 615 P2d 863, 37 St. Rep. 1307 (1980).

Heart Attack Symptoms Insufficient: Although medical records and testimony showed that decedent first felt the symptoms of a heart attack while at work and then continued to work, there was nothing in the record to indicate that it was suffered as a result of a tangible happening of a traumatic nature. Under Ness v. Diamond Asphalt Co., 143 M 560, 393 P2d 43 (1964), a heart attack occurring at work but not as a result of work is not an injury under the statute. Therefore, there was no compensable injury. Moen v. Employers Mut. Liab. Ins. Co., 185 M 79, 604 P2d 765, 36 St. Rep. 2220 (1979).

Nonstrenuous Activity: In order to recover death benefits under the Workers' Compensation Act, the claimant must show an injury as defined by the Act and that such injury was causally related to the decedent's death. A claimant must show that a tangible happening of a traumatic nature was the cause of decedent's death. Here, there was no tangible happening of a traumatic nature. The Workers' Compensation Court found that claimant had been engaged in activity of a nonstrenuous nature (cleaning light fixtures) prior to his demise. There is no evidence in the record of any real, perceptible, or identifiable incident, action, or happening of a traumatic nature within the definition of injury, under the Workers' Compensation Act. Stamatis v. Bechtel Power Corp., 184 M 64, 601 P2d 403, 36 St. Rep. 1866 (1979).

Pulmonary Fibrosis as Product of Injury: Pulmonary fibrosis is a disease, progressive in nature, and is not "traceable to injury" within the requirement of this section. Miller v. Billings, 171 M 91, 555 P2d 747 (1976).

Traumatic Cause of Injury: There are two elements in this section which must be met: (1) there must be a tangible happening of a traumatic nature, and (2) this must be shown to be the cause of physical harm. Hurlbut v. Vollstedt Kerr Co. & Indus. Indem. Co., 167 M 303, 538 P2d 344 (1975), followed in Ferdinand v. Intermtn. Ins. Co., 221 M 436, 719 P2d 775, 43 St. Rep. 955 (1986).

Heart Attack — No Tangible Happening: Widow of mailer was not entitled to workers' compensation for his death from heart attack on July 29, 1961, while engaged in his usual activities as there was no tangible happening involving trauma from an unexpected cause. Lupien v. Mont. Record Publishing Co., 143 M 415, 390 P2d 455 (1964).

UNUSUAL STRAIN

Aneurysm:

Employee suffered a ruptured congenital brain aneurysm while performing his work duties at the family-owned business during a period of unusually stressful working conditions. Medical and other evidence supported the conclusion that his death was the result of a compensable injury. Winchell v. St. Comp. Ins. Fund, 235 M 299, 766 P2d 1313, 46 St. Rep. 1 (1989).

Worker who suffered aneurysm when right middle cerebral artery ruptured did not suffer compensable injury as defined in statute in light of evidence that at time of injury he was engaged in performing ordinary activities of employment which would not cause aneurysm. Miller v. Sundance Recreation, Inc., 151 M 223, 441 P2d 194 (1968).

Compensable Injury Arising From Stress:

Employee argued that the kind of stress he worked under was a tangible happening of a traumatic nature. He cited instances of having to please lodge members and their wives, of being under fire for not paying certain bills when funds were unavailable, of being castigated by a lodge officer for failure to pay lodge bills at a time when that officer's IOUs were in the till unpaid, of not having enough help at the bar at times, and of the fear of being terminated. The Supreme Court held, however, that this kind of stress did not constitute a tangible, real happening related to employment which caused his heart attack. Ferdinand v. Intermtn. Ins. Co., 221 M 436, 719 P2d 775, 43 St. Rep. 955 (1986).

In order to prove a compensable injury arising from job-related stress, claimant must show an unusual strain resulting from a tangible happening of a traumatic nature. Dumont v. Aetna Fire Underwriters, 183 M 190, 598 P2d 1099, 36 St. Rep. 1471 (1979), followed in Hall v. Cigna Ins. Co., 248 M 484, 812 P2d 1262, 48 St. Rep. 522 (1991).

Heart Attack — Work Related: There was insufficient medical testimony to support a Workers' Compensation Court denial of a claim based on claimant's allegation that his heart attack resulted from work-related stress or strain. Leary v. The Anaconda Co., 175 M 451, 574 P2d 1008 (1978).

Nervous Breakdown: Where employee, who performed unpopular work for his employer and was subject to taunts and threats from coworkers, suffered a nervous breakdown and resulting schizophrenia, there was no compensable injury under this section since examining physician could not say for certain whether the employee's job created an "unusual strain" leading to the breakdown, and the record as a whole did not indicate that he was entitled to compensation. Erhart v. Great W. Sugar Co., 169 M 375, 546 P2d 1055 (1976).

Showing Required: Where employee seeks compensation for an injury resulting from an "unusual strain", he must show (1) a strain which was unusual either in cause or effect, and (2) that the strain resulted from a tangible happening of a traumatic nature. Erhart v. Great W. Sugar Co., 169 M 375, 546 P2d 1055 (1976), followed in Ferdinand v. Intermtn. Ins. Co., 221 M 436, 719 P2d 775, 43 St. Rep. 955 (1986).

Sufficient Evidence: Claimant's testimony supporting two specific injuries, the first of which occurred while trying to lift a part of a meat grinder from a low sink and the second of which occurred 1½ months later while attempting to lift a 50-pound casing on a meat saw, coupled with evidence of a herniated disc which required surgery, constituted sufficient evidence of an unusual strain caused by a tangible happening of a traumatic nature. Love v. Ralph's Food Store, Inc., 163 M 234, 516 P2d 598 (1973).

Lifting as Unusual Strain:

Back injury consisting of a herniated disc, sustained when employee lifted mop pail full of water, resulted from a compensable "unusual strain" within meaning of this section. Robins v. Ogle, 157 M 328, 485 P2d 692 (1971).

Evidence that claimant, while in course and scope of employment, picked up heavy tray of dirty dishes from floor and suffered back strain and testimony of doctor that subsequent back condition resulted from unusual strain was sufficient to support claim of accidental injury within meaning of phrase "unusual strain" as used in statute. Jones v. Bair's Cafes, 152 M 13, 445 P2d 923 (1968), explained in Robins v. Ogle, 157 M 328, 485 P2d 692 (1971).

Pulmonary Embolism — Death Compensable Although No Unusual Strain Beyond the Mere Employment Itself: Where death resulted from a pulmonary embolism which occurred while the employee was engaged in his usual employment, it was compensable, even though there was no unusual strain or exertion involved. Murphy v. The Anaconda Co., 133 M 198, 321 P2d 1094 (1958).

Heart Failure as an Industrial Accident: Heart failure brought about by unusual stress and strain in employment amounts to an industrial accident for which an award of compensation should be made. Rathbun v. Taber Tank Lines, Inc., 129 M 121, 283 P2d 966 (1955), explained in Murphy v. The Anaconda Co., 133 M 198, 321 P2d 1094 (1958).

PREEXISTING CONDITION

Prior Overuse Syndrome Not Considered Disability Due to Industrial Injury: Gerlach performed repetitive upper body movements in his lumber mill job. By 1984, he was experiencing physical problems involving his neck and back and sought chiropractic treatment. In 1986, his employer modified its operation to increase production, requiring Gerlach to increase his repetitive actions, and he shortly reached a point at which his right arm was in constant pain, whereupon he filed for compensation. His current claim was properly denied based on the fact that his overuse syndrome existed as early as 1984 and was not caused by and did not result from the increased work activity in 1986. Gerlach v. Champion Int'l, 254 M 137, 836 P2d 35, 49 St. Rep. 670 (1992).

Physical Results of Trauma Over Long Time Manifested in Short Time — Time Definiteness Requirement Met: In deciding that claimant suffered a compensable injury that aggravated a preexisting condition, the time definiteness requirement articulated in McMahon v. Anaconda Co., 208 M 482, 678 P2d 661 (1984), was satisfied by the fact that the physical results of the traumas that claimant experienced over a protracted period of time manifested themselves over a relatively short period of time. The requirement may be satisfied by applying it to either the time period over which the physical condition is caused or the time period over which the disability results. Bodily v. John Jump Trucking, Inc., 250 M 274, 819 P2d 1262, 48 St. Rep. 929 (1991).

Degenerative Knee Aggravated by Injury: Claimant had a degenerative knee prior to injury. The Workers' Compensation Court properly compensated claimant because the condition was aggravated by the injury and because the injury and subsequent surgery were significant factors in the degenerative condition. Weigand v. Anderson-Meyer Drilling Co., 232 M 390, 758 P2d 260, 45 St. Rep. 1138 (1988).

Work Injury Not Contributory to Disability — Preexisting Osteoarthritis: Medical evidence was conflicting as to whether a work-related injury caused or contributed to claimant's disability; however, the lower court properly found that a preexisting osteoarthritis condition, rather than a series of work-related microtraumas, was the cause of claimant's disability. Snyder v. The Anaconda Co., 231 M 198, 757 P2d 740, 45 St. Rep. 542 (1988).

Aggravated Aneurysm as Compensable Injury: Rupture of a preexisting aneurysm, aggravated by stressful working conditions, was found compensable. This section does not require that an injury arise from a specific instance of physical impact. (Decision based on law prior to 1987 amendment that excluded stress as a cause of injury.) Snyder v. San Francisco Feed & Grain, 230 M 16, 748 P2d 924, 44 St. Rep. 2216 (1987).

Claimant's Bid to Submit New Evidence: The Workers' Compensation Court did not abuse its discretion in denying claimant's motion for a rehearing to submit additional medical evidence of claimant's condition. The court determined that the evidence presented at hearing was insufficient to prove claimant's claim, and that decision will not be overturned absent an abuse of discretion. Currey v. St. Comp. Ins. Fund, 226 M 445, 736 P2d 113, 44 St. Rep. 790 (1987).

Evidence Taken as Whole: The claimant was not entitled to temporary total benefits because the evidence did not establish that his industrial accident either caused or aggravated his preexisting condition. The medical possibility that an industrial accident or injury aggravated a preexisting condition may, together with other evidence, establish a compensable injury, although it did not in this case. Currey v. St. Comp. Ins. Fund, 226 M 445, 736 P2d 113, 44 St. Rep. 790 (1987), followed in Ballard v. St. Comp. Ins. Fund, 235 M 447, 767 P2d 1327, 46 St. Rep. 128 (1989), Eastman v. Transport Ins. Co., 255 M 262, 843 P2d 300, 49 St. Rep. 936 (1992), Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994), and Kramer v. EBI Co., Am. Asphalt, Inc., 265 M 525, 878 P2d 266, 51 St. Rep. 634 (1994).

Decedent's Blood Pressure and Arteriosclerosis Aggravated by Stress: Decedent, a refuse hauler, had a temporary job helping the "lead man". On March 7, he was told he was to be his route's lead man on March 9. On March 9, he was under emotional stress as he wished to do well and perhaps receive a permanent position. He worked especially hard and was ahead of schedule when he died of heart failure while lifting a heavy object. The helper usually did most of the lifting. Decedent had the most difficult and confusing route in the city of Great Falls. He had high blood pressure and narrowing of the arteries at the time he was hired by the city. One doctor testified that his physical and emotional stress may have played a very direct role in his sudden death by aggravating his preexisting conditions, and the other two testifying doctors stated this was at least medically possible. The Workers' Compensation Court properly found this to have occurred and properly found a compensable injury. Tocco v. Great Falls, 220 M 221, 714 P2d 160, 43 St. Rep. 310 (1986).

Medically Possible Aggravation of Preexisting Condition Sufficient to Grant Compensation: Proof that it is medically possible that an industrial accident or injury aggravated a preexisting condition may, together with other evidence, establish a compensable disability. Bykonen v. Mont. Power Co., 217 M 169, 703 P2d 856, 42 St. Rep. 1112 (1985), following Jones v. St. Regis Paper Co., 196 M 138, 639 P2d 1140, 38 St. Rep. 2201 (1981), clarified, in that medical possibility evidence in and of itself does not necessarily extinguish claimant's burden to prove the case by a preponderance of the evidence, in Laber v. Skaggs Alpha Beta, 247 M 172, 805 P2d 1375, 48

St. Rep. 150 (1991), and followed in Houts v. Kare-Mor, Inc., 257 M 65, 847 P2d 701, 50 St. Rep. 158 (1993).

Minor Traumas Aggravating Preexisting Arthritis in Knees: Plaintiff had degenerative arthritis in his knees prior to beginning work for defendant in 1973. Plaintiff's job involved very heavy lifting, which can speed up the degenerative process. Plaintiff fell at work in 1980, dislocating his left knee. When he returned to work, he wore a knee brace and limped. Plaintiff contended he then had to put more weight on his right knee, which hastened its deterioration. Plaintiff was forced to retire 6 weeks after returning to work after his accident. There was a marked increase in bone deformity in both knees between 1972 and 1980. On appeal, the Supreme Court reversed the Workers' Compensation Court's conclusions that plaintiff's knees had deteriorated for other than work-related reasons and that plaintiff had completely recovered from his accident at the time he returned to work. The court found that plaintiff's preexisting condition was aggravated by a series of minor traumas (heavy lifting) which were work-related. The 1980 accident was also an aggravation. This was sufficient to be a tangible happening of a traumatic nature. Shepard v. Midland Foods, Inc., 205 M 146, 666 P2d 758, 40 St. Rep. 1177 (1983).

Grain Dust Inhalation — Obstructive Pulmonary Disease Aggravated: Substantial evidence existed to support the District Court's finding that claimant suffered an injury within the meaning of 39-71-119 since medical evidence indicated that he had a preexisting condition, chronic obstructive pulmonary disease, that was made worse by his inhalation of air containing a high concentration of grain dust. Ridenour v. Equity Supply Co., 204 M 473, 665 P2d 783, 40 St. Rep. 1012 (1983).

Preexisting Condition — Irrelevant Whether Caused by Injury or Disease: For the purposes of determining whether a preexisting condition was so aggravated or accelerated by a particular employment that the employee is eligible for workers' compensation benefits, there is no distinction between a preexisting condition caused by an injury and one caused by disease. Ridenour v. Equity Supply Co., 204 M 473, 665 P2d 783, 40 St. Rep. 1012 (1983).

Finding of Aggravation of Preexisting Disease Sustained: Where the Workers' Compensation Court finding that preexisting spinal disease was aggravated or accelerated by the accident was based on conflicting evidence, the Supreme Court's function on review was confined to determining whether there was substantial evidence on the whole record supporting the finding. The finding was supported and was upheld where the evidence consisted of claimant's testimony that he received a back injury and production of shirt showing holes where tines of a front-end loader pinned him between the loader and the steering wheel of tractor he was operating, nurse's notes and charts indicating claimant had complained about his back following the accident, and the depositions of the attending physician and another physician stating they found no aggravation by the accident of the preexisting spinal disease. Wight v. Hughes Livestock Co., Inc., 194 M 109, 634 P2d 1189, 38 St. Rep. 1632 (1981).

Acceptable Proof: Proof that it was medically possible for an industrial accident to aggravate a preexisting condition is acceptable proof of disability. Strandberg v. Reber Co., 179 M 173, 587 P2d 18, 35 St. Rep. 1742 (1978).

Aggravation of Preexisting Condition in Other Part of Body: A person injured in an industrial accident is entitled to compensation when an injury to one part of his body results in the aggravation of a preexisting condition in another part of the body. Strandberg v. Reber Co., 179 M 173, 587 P2d 18, 35 St. Rep. 1742 (1978), distinguished in Wheeler v. Ins. Co. of N. Amer., 217 M 254, 704 P2d 49, 42 St. Rep. 1177 (1985).

New Injury Required: A four-year-old back injury aggravated by lifting a heavy piece of material on the job was not an injury within the purview of this statute since claimant must establish that the injury for which he seeks to recover is a new injury resulting from an unexpected cause. Phelan v. Vogel, 148 M 422, 422 P2d 80 (1966).

Leg Injury Aggravating Arthritis: Employee who injured leg while loading freight car was entitled to workers' compensation where disability was due to accident which aggravated and accelerated arthritic condition. Birnie v. U.S. Gypsum Co., 134 M 39, 328 P2d 133 (1958).

Employer Takes Employee as He Finds Him: The rule that the employer takes the employee as he finds him is well established. The fact that an employee was suffering from a preexisting disease or disability does not preclude compensation if the disease or disability was aggravated or accelerated by an industrial injury which arose out of and in the course of the employment. Gaffney v. Indus. Accident Bd., 129 M 394, 287 P2d 256 (1955).

Disease Aggravated or Accelerated: Death of a coal miner, who was predisposed to heart disease, from shock while coming from work in the mine in which the temperature was very high and passing through an air course into which ice-cold air was being forced by means of a fan, rendering the temperature therein very low, was due to an "industrial" accident arising out of and in the course of his employment. Nicholson v. Roundup Coal Min. Co., 79 M 358, 257 P 270 (1927).

Existence of Disease — Compensation Not Precluded: Though death or injury resulting from disease and not proximately caused by an accident arising out of and in the course of an employment is not compensable under the Workmen's Compensation Act (now Workers' Compensation Act), the fact that the employee at the time was suffering from disease does not preclude compensation if the disease was aggravated or accelerated by the accidental injury. Nicholson v. Roundup Coal Min. Co., 79 M 358, 257 P 270 (1927).

CAUSE OF INJURY

Insurer at Risk During Claimant's Last Occupational Exposure Liable for Benefits: Murray suffered knee injuries in 1967 and 1974 that required removal of cartilage in both knees, but Murray remained active in both his jobs and vigorous recreational activities. In 1982, Murray was employed by MSE Technology Applications (MSE) and worked for MSE for the next 18½ years while continuing to have episodes of knee complications in connection with his recreational activities. MSE was insured by Indemnity Insurance Company (Indemnity) until 2000, when State Fund became the insurer. In late 2000, Murray's surgeon told Murray that working while standing on concrete or asphalt at MSE contributed to the need for Murray's knee replacement. Murray filed an occupational disease claim, and State Fund began paying benefits, but State Fund then petitioned the Workers' Compensation Court for a determination that Indemnity was liable for compensation. The court held that Murray's work at MSE significantly aggravated the preexisting knee condition and led to or accelerated Murray's need for surgery and that as the insurer at risk during Murray's last occupational exposure, State Fund was liable for paying benefits. On appeal, the Supreme Court affirmed. The Workers' Compensation Court properly relied on the surgeon's testimony, and there was substantial credible evidence that Murray's employment at MSE contributed to the knee condition. Absent evidence that Murray was aware of the connection between his knee problems and employment at MSE prior to filing the claim, State Fund was properly found to be the liable workers' compensation insurer. Mont. St. Fund v. Murray, 2005 MT 97, 326 M 516, 111 P3d 210 (2005).

Negligent or Intentional Infliction of Emotional Distress Claim Barred by Exclusive Remedy Provision of Workers' Compensation — Burden Not Met for Separate Cause of Action for Intentional or Malicious Act: Maney's son, who worked for Cheff clearing timber on property belonging to the Louisiana Pacific Corporation, was killed when a tree fell on him. Maney brought an action against Cheff and the Louisiana Pacific Corporation for negligent and intentional infliction of emotional distress after seeing her son die in the hospital as a result of the accident. The Supreme Court held that the District Court did not err in dismissing Maney's claim. Citing the comprehensive language in the applicable Montana statutes and cases from other jurisdictions, the Supreme Court held that the intent of the Montana Legislature in providing the exclusive remedy of workers' compensation was to preclude any employer liability whatever for compensation as a result of or concerning an employee's injury or death. The Supreme Court also held that Maney had not met her burden under 39-71-413 because she had alleged no facts demonstrating an intentional or malicious infliction of emotional distress. The court also held that the District Court had correctly dismissed the Louisiana Pacific Corporation's cross-claim against Cheff for indemnity and contribution because those claims were also barred by the exclusive remedy provisions of 39-71-411. Maney v. La. Pac. Corp., 2000 MT 366, 303 M 398, 15 P3d 962, 57 St. Rep. 1561 (2000).

Cardiovascular Death Unrelated to Specific Event on Single Day Not Considered Compensable Injury Absent Nexus Between Work-Related Activity and Cardiovascular Event: King was a long-haul trucker for TTC Illinois, Inc. (TCC), a company insured under the Workers' Compensation Act. King stopped at a plant in Maryland to pick up heating units for TCC and, after helping move some tarps and laying out straps, went to lie down in the truck cab, where he died. A medical examiner stated that King died of chronic severe atherosclerotic cardiovascular disease that had been present for some time and that was preceded by sudden arrhythmia, which could have occurred spontaneously or have been triggered by King's physical activities. The King family's claim for workers' compensation benefits was denied because the Workers' Compensation Court was unpersuaded that King's work activities triggered either the heart arrhythmia or King's death. The family appealed, asserting that because King died on the job and because, by definition, death is considered an injury, they were entitled to benefits because they proved that King's work-related activity resulted in an unusual strain or effect. The Supreme Court noted that for an injury to be compensable, all the definitional elements of an accident must be proved, including a showing that the accident was caused by a specific event on a single day or during a single work shift. In order for a cardiovascular accident to be compensable, there must be a clear relationship between work-related activity and the cardiovascular event. Here, the claim was properly denied because it was not established that King's death was caused by a specific event on a single day or during a single work shift. King v. TTC Ill., Inc., 2000 MT 260, 301 M 527, 11 P3d 1199, 57 St. Rep. 1089 (2000). See also Stamatis v. Bechtel Power Corp., 184 M 64, 601 P2d 403 (1979), and Tocco v. Great Falls, 220 M 221, 714 P2d 160 (1986).

Compensable Back Injury Related to Leg Injury: Weaver injured her leg while working at a grocery store checkout and, about 3 years later, discovered that she also had a damaged disc in her lower spine, which the Workers' Compensation Court found was caused by the accident or by the change in her gait due to her leg pain. Evidence did not establish what caused the back injury, but whether it was caused by or merely aggravated by the accident, it was held to be a compensable injury. Weaver v. Buttery Food & Drug, 255 M 90, 841 P2d 476, 49 St. Rep. 897 (1992).

Evidence That Injury Not Proximately Caused by Industrial Accident: Following the injury of her back in her initial industrial accident, claimant returned to work and soon began performing preinjury duties. After leaving employment, she entered college where she played varsity basketball, worked part-time, and carried a full credit load of classes. However, she never reported back problems during the required basketball physical. Following college, she played soccer and ran. She eventually applied for a lifting job but stated on the employment application that she did not have a physical disability that would restrict her ability to perform the job. She was injured on the lifting job and received temporary total benefits. She then took a job with a geotechnical service company that required her to hike hilly terrain, dig holes for survey monuments, and carry a 25- to 30-pound pack frame. In light of her activities and medical testimony that she had achieved maximum healing in the months after her initial injury, it was not error for the Workers' Compensation Court to conclude that her ongoing back problems were not proximately caused by the initial accident. Smith v. Liberty Mut. Ins. Co., 254 M 71, 835 P2d 717, 49 St. Rep. 629 (1992).

Deep Foot Infection Caused by Work Boots as Compensable Injury: Welch requested and was provided a new pair of boots for his mine work. The first day he wore them, their snug fit caused sores on two toes, which developed into deep infection, necessitating hospitalization and the eventual amputation of a toe. Welch's insurer contended that the requirements for determining a compensable injury were not met because the infection took 19 days to develop, was not unexpected, and was the end result of a number of factors, including Welch's diabetes. However, the incident that ultimately caused the infection occurred during an identifiable time at an identifiable place, was a specific event during a single work shift, and constituted an identifiable occurrence of physical harm caused by the traumatic stimulus of ill-fitting boots. The definitional requirements of this section having been met, the injury was properly held to be compensable. Welch v. Am. Mine Serv., Inc., 253 M 76, 831 P2d 580, 49 St. Rep. 378 (1992).

Failure to Prove Causal Connection Between Injury and Inability to Work — Relief From Liability for Total Disability: Claimant failed to show that a 1987 injury caused the condition that resulted in his total loss of wages. Because the findings and conclusions of the Workers' Compensation Court were supported by substantial credible evidence and because that court's decisions regarding claimant's injuries were specific and consistent, the order denying temporary total benefits was affirmed and the city that employed claimant was relieved of liability for claimant's total disability. Norman v. Whitefish, 248 M 490, 812 P2d 1259, 48 St. Rep. 525 (1991).

Failure to Establish Industrial Injury: Claimant suffered a cervical injury in 1984, for which he was compensated. He suffered an elbow injury in 1987, and although he failed to mention any cervical problems when examined by physicians in 1987, 2½ years later he claimed the elbow injury had aggravated his previous cervical injury. Based on the depositions of five physicians and the medical reports of seven other physicians showing that the cervical problems were a natural progression of degeneration resulting from the 1984 injury and an overlapping of symptomatology between the 1984 and 1987 injuries, the Workers' Compensation Court correctly determined that claimant failed to establish that he had suffered an industrial injury to his neck or cervical spine in 1987. Richardson v. St. Comp. Mut. Ins. Fund, 248 M 41, 808 P2d 500, 48 St. Rep. 313 (1991).

Carbon Monoxide Inhalation Precipitating Heart Attack — Compensable Injury: Testimony of a physician, corroborated by the wife, comprised evidence sufficient to support the decision that husband's inhalation of carbon monoxide fumes while working as a car mechanic aggravated his coronary artery disease and precipitated development of a myocardial infarction. Although the disease developed over time, the fact that the event that deprived his heart of enough oxygen to continue pumping probably occurred on his last day of work met the test of time definiteness. Wood v. St. Comp. Ins. Fund, 236 M 353, 769 P2d 1264, 46 St. Rep. 419 (1989).

Break in Chain of Causation — Degree of Misconduct Required: Insurer contended that claimant failed to follow his medical treatment and that this conduct prolonged the period of his disability. The Supreme Court held that the degree of claimant's misconduct required to break the chain of causation must be intentional conduct that is clearly unreasonable. Although evidence on the degree of claimant's cooperation was conflicting, the Workers' Compensation Court reasonably assumed claimant did not intentionally endure 2 years of pain, embarrassment, and multiple surgeries. His actions did not rise to the level of intentional misconduct or break the causal connection to his original injury. Giacoletto v. Indus. Indem. Co., 231 M 191, 751 P2d 1059, 45 St. Rep. 536 (1988).

Anaphylactic Condition as Injury: Claimant's development of an anaphylactic condition triggered by a reaction to talc powder on surgical gloves was a condition marked by a time definite and was unexpected, thus qualifying as an injury. Daniels v. EBI/Orion Group, 230 M 407, 750 P2d 455, 45 St. Rep. 310 (1988).

Greater Weight Given to Testimony of Attending Physician Than to Expert in Determining Cause of Injury: It was proper for the Workers' Compensation Court to give greater weight to the testimony of claimant's treating physician, who had treated claimant on numerous occasions and concluded that claimant's headaches were caused by a work-related accident, rather than to testimony of a neurologist who had examined claimant only once for 30 minutes, based his opinion on limited information, and came to a conclusion that was less than unequivocal. Lauderdale v. St. Comp. Ins. Fund, 229 M 188, 745 P2d 690, 44 St. Rep. 1883 (1987).

Compensable Subsequent Injury — Benefits Receivable: When medical testimony showed a causal connection between an original injury and surgery performed 3 years later due to a subsequent injury, claimant was entitled to receive benefits payable because of medical treatment necessitated by the original injury, including any medical benefits reserved. Rightnour v. Kare-Mor, Inc., 225 M 187, 732 P2d 829, 44 St. Rep. 141 (1987), order and judgment of the Workers' Compensation Court after final settlement was reopened affirmed in Rightnour v. Intermtn. Ins. Co., 236 M 108, 768 P2d 871, 46 St. Rep. 220 (1989), and followed in Guild v. Rockwood Ins. Co., 229 M 466, 747 P2d 217, 44 St. Rep. 2139 (1987).

Idiopathic Fall Theory Not Applicable to Auto Accident: Claimant urged the court to consider his accident a "type of idiopathic fall", compensable under workers' compensation law. However, the theory does not apply because claimant was not injured in any type of fall; he was injured in an automobile accident. Further, claimant was not in a travel status at the time and was not in the course of employment, thus his injury, idiopathic or otherwise, was not compensable. Correa v. Rexroat Tile, 217 M 126, 703 P2d 160, 42 St. Rep. 1075 (1985).

Substantial Evidence That Industrial Accident Caused Seizures: The Supreme Court upheld the Workers' Compensation Court's decision that claimant's epileptic seizures stemmed from an industrial accident which also resulted in a brain concussion. The Supreme Court reviewed critical medical testimony entered through depositions and found substantial evidence to support the Workers' Compensation Court's findings of fact. The Supreme Court declined appellant's directive to accord greater weight to one witness as the most qualified expert witness. Where findings are based on conflicting evidence, the Supreme Court's function on review is confined to determining whether there is substantial evidence to support the findings and not to determining whether there is sufficient evidence to support contrary findings. Lamb v. Universal Ins. Co., 211 M 360, 684 P2d 498, 41 St. Rep. 1414 (1984), followed in Hengel v. Pac. Hide & Fur Depot, 224 M 525, 730 P2d 1163, 43 St. Rep. 2387 (1986).

Firefighting Not Cause of Heart Disease: The Supreme Court held that substantial credible evidence supported the judgment of the Workers' Compensation Court denying claimant benefits under this section. Claimant sought full benefits for coronary heart disease allegedly developed or aggravated by his work as a firefighter. Expert medical testimony established that the probable causes of the condition were claimant's personal risk factors such as heavy smoking, high blood pressure, and a strong family history of heart disease. Schieno v. St. Comp. Ins. Fund, 210 M 457, 683 P2d 953, 41 St. Rep. 1157 (1984).

Lack of Medical Evidence on Cause of Disability — Burden of Proof in Light of Purposes of Act — Standard of Appellate Review: Where the claimant and insurer presented medical evidence as to the uncertainty of the cause of the claimant's multiple sclerosis (MS) but it was shown that the onset of claimant's MS coincided with a job-related injury, the Supreme Court held that there was substantial evidence to support the findings of the Workers' Compensation Court that the claimant's MS was caused by that injury. Under the rationale of Moffett v. Bozeman Canning Co., 95 M 347, 26 P2d 973 (1933), the Workers' Compensation Court properly considered the timing of the claimant's traumatic injury and the purposes of the Workers' Compensation Act along with the evidence of a lack of medical certainty as to the cause of the claimant's disease. Given all these factors and the standard of appellate review of decisions of the Workers' Compensation Court established in McGee v. Bechtel Corp., 182 M 149, 595 P2d 1156 (1979), the Supreme Court could not conclude that the Workers' Compensation Court was clearly erroneous. Conway v. Missoula Serv. Co., 205 M 459, 669 P2d 225, 40 St. Rep. 1427 (1983), followed in Hengel v. Pac. Hide & Fur Depot, 224 M 525, 730 P2d 1163, 43 St. Rep. 2387 (1986).

Causal Relationship — Degree of Proof Required: In workers' compensation cases, medical proof of causation of injury must be greater than a mere showing that causation was "possible". The court distinguished Close v. St. Regis Paper Co., 175 M 158, 573 P2d 163 (1977), and Gaffney v. Indus. Accident Bd., 129 M 394, 287 P2d 256 (1955), stating that what is medically possible is more reliable in proving aggravation of an injury or disease than in proving cause and effect. Viets v. St. Comp. Ins. Fund, 178 M 337, 583 P2d 1070, 35 St. Rep. 1364 (1978), followed in Hash v. St. Comp. Mut. Ins. Fund, 248 M 155, 810 P2d 1174, 48 St. Rep. 364 (1991). See also Lakey v. Kerrian's, 228 M 139, 741 P2d 416, 44 St. Rep. 1405 (1987), and Eastman v. Transport Ins. Co., 255 M 262, 843 P2d 300, 49 St. Rep. 936 (1992).

Heart Attack:

Where claimant, supervisor of mill, opened mill on unusually cold day and suffered myocardial infarction while performing his usual duties, there was no proof that myocardial infarction had any causal connection to claimant's employment, and workers' compensation was denied. Hurlbut v. Vollstedt Kerr Co. & Indus. Indem. Co., 167 M 303, 538 P2d 344 (1975).

Where employee suffered fatal myocardial infarction at work but expert cardiologist testified that the attack was not a result of his employment, recovery was denied even though absolute proof was not possible. Ness v. Diamond Asphalt Co., 143 M 560, 393 P2d 43 (1964).

Relationship Between Accident and Disability:

Evidence of claimant's mental problems existing prior to accident and doctor's testimony that it was speculation that claimant's failure to return to work was caused by accident was sufficient to sustain judgment denying recovery under statute for claimant's failure to establish direct relationship between industrial accident and physical condition after such accident. Schwartzkopf v. Indus. Accident Bd., 149 M 488, 428 P2d 468 (1967). See also Brown v. St. Comp. Ins. Fund, 231 M 158, 752 P2d 171, 45 St. Rep. 508 (1988), Ballard v. St. Comp. Ins. Fund, 235 M 447, 767 P2d 1327, 46 St. Rep. 128 (1989), and White v. Ford, Bacon & Davis Tex., Inc., 256 M 9, 843 P2d 787, 49 St. Rep. 1117 (1992).

Where claimant was being treated for bursitis prior to time she lifted box which allegedly caused injury to her shoulder, and surgeon who had operated on shoulder admitted only to the "possibility" of a supraspinatus tendon tear, there was insufficient evidence upon which either the Industrial Accident Board (now Department of Labor and Industry) or District Court could base award. La Forest v. Safeway Stores, Inc., 147 M 431, 414 P2d 200 (1966).

Spinal Cancer: Workers' compensation was properly denied where claimant's decedent's death resulted from a spinal cancer that was neither caused by nor contributed to by accident in which decedent fractured his dorsal spine, there being no causal connection between the fracture and the cancerous tumor of the spine which caused death. Stordahl v. Rush Implement Co., 148 M 13, 417 P2d 95 (1966). (Dissenting opinion, 148 M 13, 417 P2d 95 (1966).)

Unexpected Cause: Claimant, whose routine job was lifting 15-pound blocks, was not entitled to compensation for back injury since strain from lifting blocks was not an injury resulting from an "unexpected cause". James v. V.K.V. Lumber Co., 145 M 466, 401 P2d 282 (1965), distinguished in Jones v. Bair's Cafes, 152 M 13, 445 P2d 923 (1968).

Law Review Articles

The Definition of Injury Under the Worker's Compensation Act: Revisited and Redefined, Kuzda, 49 Mont. L. Rev. 341 (1988).

39-71-123. Wages defined.

Compiler's Comments

2017 Amendment: Chapter 329 in (1)(a) at beginning inserted "monetary"; in (1)(d) before "money" deleted "substitute for"; deleted former (1)(e) that read: "(e) board, lodging, rent, or housing if it constitutes a part of the employee's remuneration and is based on its actual value"; inserted (1)(f) regarding board if it constitutes part of employee's remuneration; inserted (1)(g) concerning lodging, rent, or housing if it constitutes part of employee's remuneration"; in (2)(d) after "special" inserted "monetary"; in (4)(b) and (4)(c) near middle before "wages" inserted "monetary"; and made minor changes in style. Amendment effective October 1, 2017.

2013 Amendment: Chapter 412 in (4)(b) substituted "39-71-118(10)(c)" for "39-71-118(7)(c) and (12)(c)". Amendment effective July 1, 2013.

2011 Amendment: Chapter 255 in (4)(b) near beginning substituted "39-71-118(7)(c) and (12)(c)" for "39-71-118(7)(c)". Amendment effective July 1, 2011.

2009 Amendment: Chapter 112 inserted (5) concerning calculation of benefits for employees of and premiums on wages paid by religious organizations. Amendment effective July 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2001 Amendments — Composite Section: Chapter 238 at beginning of (4)(b) inserted exception clause; and made minor changes in style. Amendment effective April 13, 2001.

Chapter 465 in (2)(e) at end after "public assistance" substituted "as defined in 53-4-201" for "provided through the FAIM project, as defined in 53-4-702"; and made minor changes in style. Amendment effective July 1, 2001.

Retroactive Applicability: Section 45, Ch. 465, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to payments made after January 1, 2001, for mental health services provided to children with serious emotional disturbances for whom mental health services are not provided by any other public mental health services program and whose family income is at or below 150% of the federal poverty level."

1999 Amendments — Composite Section: Chapter 124 inserted (2)(e) regarding benefits paid to a person through the FAIM project; and made minor changes in style. Amendment effective July 1, 1999.

Chapter 377 in (4)(c) substituted "except for the wages earned by individuals while engaged in the employments outlined in 39-71-401(3)(a)" for "except self-employment as a sole proprietor or partner". Amendment effective April 20, 1999.

Applicability: Section 7, Ch. 124, L. 1999, provided: "[This act] applies to individuals participating in the FAIM project on and after July 1, 1999."

Severability: Section 24, Ch. 377, L. 1999, was a severability clause.

1997 Amendment: Chapter 491 in (1), in first sentence near beginning, substituted "all remuneration" for "the gross remuneration" and after "remuneration paid" deleted "in money, or in a substitute for money" and in second sentence inserted "the cash value of all remuneration paid in any medium other than cash. The term includes"; in (1)(b) substituted current text concerning backpay for "board, lodging, rent, or housing if it constitutes a part of the employee's remuneration and is based on its actual value"; in (1)(c) substituted "tips or other gratuities received by the employee, to the extent that tips or gratuities are documented by the employee to the employer for tax purposes" for "payments made to an employee on any basis other than time worked, including but not limited to piecework, an incentive plan, or profitsharing arrangement"; inserted (1)(e) and (1)(f) concerning board, lodging, rent, or housing and payments made on basis other than time worked; inserted (2)(b) concerning payments made for retirement or pension, sickness or accident disability, medical or hospitalization expenses, and death; deleted former (2)(c) and (2)(d) that read: "(c) tips and other gratuities received by the employee in excess of those documented to the employer for tax purposes;

(d) contributions made by the employer to a group insurance or pension plan"; and made minor changes in style. Amendment effective January 1, 1998.

Preamble: The preamble attached to Ch. 491, L. 1997, provided: "WHEREAS, House Bill No. 98 (Ch. 48, L. 1995), enacted by the 54th Legislature, excluded direct sellers from minimum wage, overtime, unemployment insurance, and workers' compensation requirements; and

WHEREAS, the Legislature in House Bill No. 98 adopted the federal definition of direct seller to apply to relevant Montana statutes; and

WHEREAS, ARM 24.11.831 narrowed the scope of the federal definition of direct seller; and

WHEREAS, an original purpose of this House Bill No. 561 was to codify the narrower definition of direct seller; and

WHEREAS, this House Bill No. 561 is the appropriate place to repeal Rule 24.11.831, Administrative Rules of Montana."

Severability: Section 36, Ch. 491, L. 1997, was a severability clause.

Saving Clause: Section 37, Ch. 491, L. 1997, was a saving clause.

1995 Amendments: Chapter 131 deleted (5) that read: "(5) The compensation benefits and the payroll, for premium purposes, for a volunteer firefighter covered pursuant to 39-71-118 must be based upon a wage of not less than $900 a month and not more than 1½ times the average weekly wage as defined in this chapter." Amendment effective July 1, 1995.

Chapter 243 in (3)(a), at beginning, inserted exception clause; in (3)(b), after "good cause shown", substituted current language concerning calculation of wage using additional period up to 1 year for "by the claimant, the use of the four pay periods does not accurately reflect the claimant's employment history with the employer, in which case the insurer may use additional pay periods"; in (4)(a) inserted second sentence defining concurrent employment; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

1993 Amendments: Chapter 154 in (5) substituted "39-71-118" for "39-71-118(4)"; and made minor changes in style.

Chapter 619 in (1), after "employee", inserted "or income provided for in subsection (1)(d)"; inserted (1)(d) relating to wages, including income or payment in draw, wage, net profit, or money substitute received or taken by sole proprietor or partner; and made minor changes in style. Amendment effective July 1, 1993.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

1991 Amendments: Chapter 129 inserted (5) establishing compensation benefits and payroll for premium purposes for volunteer firefighter.

Chapter 261 in (2)(a), before "expense reimbursements", deleted "travel" and after "subsistence" inserted reference to other expenses and Department rules; and made minor change in style.

1989 Amendment: Inserted (4) requiring that for purpose of calculating compensation benefits for employee working concurrent employments, average actual earnings must be calculated as provided in subsection (3) and stating methods for calculating benefits for covered volunteer and employee working two or more concurrent employments. Amendment effective July 1, 1989.

Administrative Rules

ARM 24.29.720 Payments that are not wages — employee expenses.

Case Notes

Actual Wage Loss at Maximum Medical Healing Used to Determine Permanent Partial Disability Benefit Rate — Workers' Compensation Court Erred in Ruling Permanent Partial Disability Benefit Rate Is Aggregated From Both Time-of-Injury Concurrent Employments When Disability Precluded Only One Job — Public Policy of Wage Loss Benefit Relating to Actual Wages Lost. Barnhart v. Mont. St. Fund, 2022 MT 250, 411 Mont. 138, 522 P.3d 418.

Use of Multiple Calculation Methods to Calculate Average Actual Wage From Concurrent Employments: Sturchio worked as an on-call certified nursing assistant for five different employers who all differed in their methods of paying compensation. Defendant insurer accepted Sturchio's claim when Sturchio injured her back in 2005. Sturchio subsequently filed a claim with the Workers' Compensation Court, asserting that she was entitled to higher benefits. The court applied the relevant 2003 version of subsection (3) of this section and calculated Sturchio's wages, considering each employer individually and using the method best suited to the particular circumstances. The insurer appealed the decision to the Supreme Court, alleging error in the use of multiple methods to calculate Sturchio's average actual wage from concurrent employments. The Supreme Court affirmed. In accord with the principle in 39-71-105 (2003), that wage-loss benefits bear a reasonable relationship to actual wages lost, a reasonable reading of the plain language of this section in its entirety supported the Workers' Compensation Court's interpretation that the calculation methods in subsection (3) should apply to each individual employment comprising the concurrent employments in the same manner that they apply to individual employments that are singular. Sturchio v. Wausau Underwriters Ins. Co., 2007 MT 311, 340 M 141, 172 P3d 1260 (2007).

Seasonal Employment — Wages Not to Be Aggregated: A worker who was injured during the off-season was not entitled to have summer job and winter job wages aggregated for the calculation of disability benefits. Under the statutory language of "actually employed", a claimant is concurrently employed if when the claimant is injured at one job, the claimant has a second job, which, in fact, exists at that time. The court distinguished prior cases that were decided before the Legislature enacted the statutory definition of concurrent employment. Dunnington v. State Comp. Ins. Fund, 2000 MT 349, 303 M 252, 15 P3d 475, 57 St. Rep. 1488 (2000).

Injury on First Day of Work — Remand Based on Improper Calculation of Number of Hours Claimant Hired to Work: The claimant was hurt the first day on the job. In determining benefits, the Workers' Compensation Court's findings were inconsistent regarding the number of hours that the claimant would have worked had employment continued. The court found that the claimant's wage was properly calculated using a 40-hour workweek, applying Robertson v. Aero Power-Vac, Inc., 272 M 85, 899 P2d 1078 (1995), but also found that if the claimant had continued working, employment would have included overtime. However, Robertson does not stand for the proposition that overtime hours cannot be included in the hours a week for which an employee was hired to work, unless those hours were guaranteed or scheduled, nor did the speculative nature of the number of overtime hours in the present case preclude the consideration of overtime in calculating the claimant's wage. The case was remanded for a redetermination of hours that the claimant would have worked and to address attorney fees and penalties. Flink v. Am. Alternative Ins. Co., 2000 MT 224, 301 M 223, 7 P3d 416, 57 St. Rep. 925 (2000).

Use of Fewer Than Four Preinjury Pay Periods in Calculating Rate Prohibited: Neither this section nor case law authorizes the use of fewer than four preinjury pay periods in calculating an employee's permanent partial disability benefit rate when the employee has worked for four or more pay periods. King v. St. Comp. Ins. Fund, 282 M 335, 938 P2d 607, 54 St. Rep. 373 (1997).

Court Correct in Determining Number of Hours in Claimant's Workweek: Robertson was hired to work 12-hour shifts and was told that the job might last 5 to 6 days. After being injured on the job, he filed a claim and alleged that his benefits should have been awarded by the Workers' Compensation Court based on a 72-hour workweek. The Supreme Court held that the 5 to 6 days were the outside estimate for the duration of the job and that the lower court had not erred in calculating the benefits based on a 47-hour workweek. Robertson v. Aero Power-Vac, Inc., 272 M 85, 899 P2d 1078, 52 St. Rep. 673 (1995). See also Flink v. Am. Alternative Ins. Co., 2000 MT 224, 301 M 223, 7 P3d 416, 57 St. Rep. 925 (2000).

Wage Supplement Claim — Use of Pay Period Average for Calculating Preinjury Wages: A wage supplement claim, like any other workers' compensation claim, is a claim for a type of compensation benefits. Therefore, this section mandates the use of the four-pay period average for calculating preinjury wages unless one of the enumerated exceptions is met. Multiplying a worker's hourly rate by the number of scheduled working hours is permitted only when a worker has been employed at a job for less than four pay periods. Also, additional pay periods may be used if the four-pay period method does not accurately reflect the claimant's employment history. Further, under 39-71-703, the wages that a worker is qualified to earn, not what are actually earned, are used in calculating wage supplement benefits. In the case at hand, the Workers' Compensation Court found that because Perryman was capable of earning as much if not more than he was earning at the time of injury, he was not entitled to wage supplement benefits under 39-71-703. Perryman v. St. Comp. Mut. Ins. Fund, 269 M 140, 887 P2d 254, 51 St. Rep. 1523 (1994).

Income Earned by Sole Proprietor Properly Excluded From Benefit Calculations: Claimant argued that this section required that claimant's income from a massage business be included when calculating benefits for an injury that claimant received while working a single day as an employee on a ranch. However, interpreting the section as a whole, the massage business income was properly excluded from the calculations under subsection (4)(c) because claimant was a sole proprietor who elected not to be covered. David v. St. Comp. Mut. Ins. Fund, 267 M 435, 884 P2d 778, 51 St. Rep. 1105 (1994), distinguishing Lovell v. St. Comp. Ins. Fund, 260 M 279, 860 P2d 95 (1993). Lovell was distinguished in Dunnington v. St. Comp. Ins. Fund, 2000 MT 349, 303 M 252, 15 P3d 475, 57 St. Rep. 1488 (2000).

Higher Hourly Wage at Time of Injury Overrides Wage Earned in Four Previous Pay Periods: Although the claimant was earning $7.25 an hour at the time of injury, the Workers' Compensation Court awarded an amount of total temporary disability compensation based on the $6-an-hour salary that the claimant had earned in the four pay periods preceding the injury. On appeal, the Supreme Court reversed, ruling that because subsection (3)(b) of this section (1991) allowed use of additional pay periods if a claimant can show good cause why use of the four pay periods does not accurately reflect the claimant's employment history, the Workers' Compensation Court should have used the $7.25-an-hour pay period because it bore a more reasonable relationship to actual wages lost due to injury than did the $6-an-hour rate. (See 1995 amendment.) Deshner v. Town & Country Foods, Inc., 266 M 352, 880 P2d 1300, 51 St. Rep. 787 (1994).

Aggregation of Wages for Determination of Benefits — No Legislative Intent to Change Preexisting Law: Lovell, who was a painter, roofer, and lawn mower, stopped by the Oak Room Bar for a drink after work and was asked by the owner to help unload a truck. In the process, Lovell injured his knee and was found by the State Fund to be temporarily totally disabled. The State Fund paid disability benefits of $8.26 per week based upon the bar owner's testimony that he intended to pay Lovell $4.75 per hour for a 2-hour job. The Workers' Compensation Court refused to consider earnings from Lovell's other jobs in determining his weekly wage for temporary total disability benefits. Citing Cattyson v. Falls Mobile Home Center, 183 M 284, 599 P2d 341 (1979), and other cases, the Supreme Court found that it was the well-established practice under the law prior to 1987 to aggregate wages from concurrent employments for the purposes of determining disability benefits. The Supreme Court found nothing in the language of this section, especially the phrase "same employer", that created a material change in the definition of "wages" that could be construed as a legislative intent to change that prior practice. The Workers' Compensation Court erred as a matter of law when it held that subsection (3) of this section prevents aggregation of wages. Lovell v. St. Comp. Mut. Ins. Fund, 260 M 279, 860 P2d 95, 50 St. Rep. 1043 (1993), distinguished in Dunnington v. St. Comp. Ins. Fund, 2000 MT 349, 303 M 252, 15 P3d 475, 57 St. Rep. 1488 (2000).

Benefit Calculation — Sporadic, Seasonal Job: Claimant worked at a seasonal, sporadic job during 31 of a total of 59 weeks, for a total of 967 hours. It was proper under the provisions of subsection (3)(b) of this section for the Workers' Compensation Court to consider additional pay periods and to exclude 18 weeks of idleness forced by weather, then divide the total number of actual hours by the actual number of weeks worked to arrive at a fair approximation of claimant's average weekly salary rather than to strictly consider only the four pay periods immediately preceding the injury, which would have provided an average monthly amount higher than the total amount earned in any of the 4 preceding months except 1. It was not error for the court to take into account the seasonal nature of the employment by including time off in its calculations. Gregory v. Michael Bailey & Sons Logging, 255 M 190, 841 P2d 525, 49 St. Rep. 966 (1992).

Wages Distinguishable From Income From Profits: Since his accident, claimant had not drawn a salary from or performed the physical activities of the plumbing business, which he had insured under 39-71-118. State Fund discontinued his benefits on the grounds that because his business remained profitable and even increased its income since his accident, claimant had not suffered a total loss of wages. The Supreme Court held that although the concepts of wages and income from profits are used interchangeably, the terms are not synonymous. Following its decision in Chatfield v. Indus. Accident Bd., 140 M 516, 374 P2d 226 (1962), the court noted that the ability to acquire income is not equivalent to the ability to work. The point ". . . is not that the individual is able, through alternative business arrangements, to make a profit from their business, but that they can no longer perform the activities which State Fund insured". The increase in business and profit was not attributable to claimant's capacity as a plumber but rather to the efforts of his family, who performed the work necessary to enhance the business's success and the resulting profits; therefore, claimant did suffer a total loss of wages from the job for which he was insured and was entitled to a continuation of benefits. Tehle v. St. Comp. Mut. Ins. Fund, 254 M 25, 835 P2d 1, 49 St. Rep. 608 (1992).

Truck Driver's Three Cents a Mile Per Diem as Wages: A long haul truck driver was paid 14 cents a mile plus 3 cents a mile per diem. How the parties treated the per diem for tax purposes was not determinative as to whether the per diem was wages. The per diem was wages because it was a thing of value received as consideration for the driver's work and constituted real economic gain to him. It was not actual reimbursement for his out-of-pocket expenses for board and meals. He slept in the sleeper compartment of his truck, and while he ate meals on the road, that expense was not tied exclusively to his job, as one always has to eat. His employer did not require him to keep track of his expenses, and he could spend the per diem on anything he wished. Scyphers v. H&H Lumber, 237 M 424, 774 P2d 393, 46 St. Rep. 919 (1989). See also Anderson v. Hammer, 252 M 73, 826 P2d 931, 49 St. Rep. 165 (1992).

Wages Determined by Four Preceding Pay Periods — Injury Prior to 1987 Amendment: The Supreme Court used subsection (3) of this section as guidance for a definition of fair and reasonable compensation even though it was enacted after the injury occurred. Stuber v. John Deere Ins. Co., 236 M 189, 769 P2d 1205, 46 St. Rep. 287 (1989).

Attorney General's Opinions

Public Employee Supplementing Workers' Compensation With Sick Leave Classified Under Leave-With-Pay Status — Accrual of Vacation and Sick Leave Credits on Prorated Basis: Employees who supplement their workers' compensation benefits with accrued sick leave are classified under leave-with-pay status as to the sick leave hours converted to pay. As such, the employees are entitled to accrue vacation and sick leave credits for the converted hours on a prorated basis. 56 A.G. Op. 1 (2016).

Supplementation of Workers' Compensation Benefits With Annual Leave Not Allowed: Section 39-71-701 provides that a worker is eligible for temporary total disability benefits after suffering a total loss of wages. The term "wages" is defined in this section to include remuneration at the regular hourly rate for vacations and sickness periods. If annual leave benefits are paid, then the employee is not suffering a total loss of wages and is not eligible for workers' compensation benefits. Therefore, a state agency may not supplement workers' compensation wage loss benefits with annual leave upon the request of an employee. 44 A.G. Op. 33 (1992).

39-71-124. Applicability of Workers' Compensation Act — exceptions.

Compiler's Comments

2019 Amendment: Chapter 158 after "39-71-603" inserted "and as specified in 39-71-1401". Amendment effective July 1, 2019.

Effective Date — Applicability: Section 8, Ch. 158, L. 2019, provided: "[This act] is effective July 1, 2019, and applies to presumptive occupational diseases diagnosed on or after July 1, 2019."

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

Part 2
Administrative Provisions

Part Administrative Rules

Title 24, chapter 29, subchapter 2, ARM Procedural rules.

39-71-201. Workers' compensation administration fund.

Compiler's Comments

Termination Provision Repealed: Section 1, Ch. 394, L. 2023, repealed sec. 7, Ch. 400, L. 2019, which terminated the 2019 amendment to this section June 30, 2023. Effective May 3, 2023.

2019 Amendment: Chapter 400 in (1) inserted second sentence concerning reimbursements of premiums for high-quality work-based learning programs; in (5)(d) at end and in (7)(d) at end inserted "and may be used to pay the reimbursement of premiums required under 39-71-319"; and in (11) inserted second sentence concerning reimbursement of premiums under 39-71-319 being a debit on the fund. Amendment effective July 1, 2019, and terminates June 30, 2023.

2015 Amendment: Chapter 365 in (1) near middle of first sentence after "Workers' Compensation Act" deleted "and the statutory occupational safety and health acts that the department is required to administer"; deleted former (1)(b) that read: "(b) all penalties assessed under 50-71-119"; in (4) near middle of first sentence after "Workers' Compensation Act" deleted "and the statutory occupational safety acts that the department is required to administer"; in (5)(a), (5)(b), (6)(a), and (8) increased assessment maximum rate from 3% to 4%; in (7)(b) in first sentence in two places increased premium surcharge maximum rate from 3% to 4%; and made minor changes in style. Amendment effective July 1, 2015.

2009 Amendments — Composite Section: Chapter 27 in (1) near middle of first sentence after "safety" inserted "and health"; inserted (1)(b) requiring the department to collect and deposit penalties assessed under 50-71-119; and made minor changes in style. Amendment effective July 1, 2009.

Chapter 112 in (1)(c) substituted "assessment on paid losses" for "assessment of 3% of paid losses"; in (4) near beginning after "proportionate share" inserted reference to paid losses in preceding calendar year; in (5)(a) in second sentence near beginning substituted "may be up to 3%" for "is equal to 3%" and at end after "employer" deleted "or $500, whichever is greater"; in (5)(b) in second sentence substituted "may be up to 3%" for "is equal to 3%"; in (5)(c) inserted first sentence requiring notification to plan No. 1 employers; in (6)(a) in second sentence substituted "may be up to 3%" for "is equal to 3%"; in (7)(b) in first sentence after "surcharge" substituted "may be up to 3%" for "is equal to 3%" and near middle inserted "may be up to"; in (7)(f) in first sentence substituted "assessment on the paid losses" for "3% of paid losses", in second sentence near beginning inserted "excess" and after "collected" deleted "in excess of the 3%", and in third sentence near middle substituted "assessed amount" for "3%"; in (8) in first sentence at beginning substituted "By July 1" for "On or before April 30 of each year, upon a determination by the department", near middle substituted "of up to 3%" for "equal to 3%", and at end deleted "subject to a minimum assessment of $500, that is due on July 1", and inserted second sentence requiring determination of amount due and notification by April 30; and made minor changes in style. Amendment effective July 1, 2009.

Preamble: The preamble attached to Ch. 27, L. 2009, provided: "WHEREAS, Montana's general occupational safety act, the Montana Safety Act, was enacted in 1969, prior to the adoption of the federal Occupational Safety and Health Act of 1970; and

WHEREAS, as a result of the enactment of the federal Occupational Safety and Health Act of 1970, federal law has become the basis for occupational safety and health regulation in the private sector; and

WHEREAS, states have responsibility for nonfederal public sector compliance with occupational safety and health regulations; and

WHEREAS, since the creation of the federal Occupational Safety and Health Administration, the Montana Safety Act and the Occupational Health Act of Montana do not reflect the reality of federal occupational safety and health regulation and enforcement in Montana's private sector; and

WHEREAS, the Montana Safety Act contains various archaic rulemaking and hearings provisions because it was enacted prior to the adoption of the Montana Administrative Procedure Act; and

WHEREAS, the Occupational Health Act of Montana, enacted in 1971, suffers from many of the same jurisdictional and procedural flaws as does the Montana Safety Act; and

WHEREAS, it is appropriate to modernize Montana's occupational safety and health laws for occupations other than those in mining and consolidate them into a unified body of law that reflects the scope of state regulation of general occupational safety and health matters as limited to public sector employment."

Saving Clause: Section 25, Ch. 27, L. 2009, was a saving clause.

Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2007 Amendment: Chapter 117 in (1)(a) near beginning inserted "39-71-107"; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendments — Composite Section: Chapter 103 in (1)(a) deleted reference to 39-71-308; in (12) near middle after "administration" substituted "fund" for "money"; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 133 in (1) and (4) in first sentence near middle inserted "certification of independent contractors provided for in Title 39, chapter 71, part 4" and at end inserted "provided for in 39-71-503"; and made minor changes in style. Amendment effective March 30, 2005.

Chapter 416 in (1) in first sentence near beginning after "Workers' Compensation" substituted "Act" for "and Occupational Disease Acts"; in (2) in introductory clause near middle, in (4) near middle, and in (13) in first sentence at end after "Workers' Compensation Act" deleted "and the Occupational Disease Act of Montana"; in (8) substituted "April 30 of each year" for "April 30, 2001, and on each succeeding April 30"; and made minor changes in style. Amendment effective July 1, 2005.

Effective Date — Applicability: Section 13, Ch. 103, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005."

Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

2001 Amendments — Composite Section: Chapter 7 in (1) near end substituted "workers' compensation administration fund" for "workers' compensation administrative fund". Amendment effective October 1, 2001.

Chapter 214 at end of (1)(b) substituted "of 3% of paid losses, plus administrative fines and interest provided by this section" for "on each plan No. 1 employer, plan No. 2 insurer, and plan No. 3, the state fund. The assessments must be 3% of the following"; at beginning of (2) inserted "For the purposes of this section, paid losses include the following"; substituted language in (4) through (9) regarding assessments and premium surcharge for former (3) through (5) that read: "(3) An assessment of the plan No. 1 employer or plan No. 2 insurer may not be less than $500. If at any time during the fiscal year a plan No. 1 employer is granted permission to self-insure or a plan No. 2 insurer is authorized to insure employers under this chapter, that plan No. 1 employer or plan No. 2 insurer is subject to an initial assessment equal to the minimum assessment against plan No. 1 employers and plan No. 2 insurers.

(4) Payment of the assessment required by this section must be submitted by the employer or insurer under plan No. 1, plan No. 2, or plan No. 3 in:

(a) one installment made on or before July 1; or

(b) two equal installments made on or before July 1 and December 31 of each year. If an employer or insurer fails to pay the assessment required under this section, the department may impose a fine of $100 plus interest on the delinquent amount at the annual interest rate of 12%.

(5) (a) Beginning July 1, 2000, each plan No. 2 insurer providing workers' compensation insurance and plan No. 3, the state fund, shall collect from the insurer's policyholders an amount equal to the insurer's assessment through a surcharge based on premium. When collected, assessments may not constitute an element of loss for the purpose of establishing rates for workers' compensation insurance but, for the purpose of collection, must be treated as separate costs imposed upon insured employers.

(b) The total of this assessment must be stated as a separate cost on an insured employer's policy or on a separate document submitted to the insured employer and must be identified as "workers' compensation regulatory assessment surcharge". Each assessment surcharge must be shown as a percentage of the total workers' compensation policyholder premium.

(c) The portion of the plan No. 2 assessment identified as a premium surcharge for an individual plan No. 2 insured employer must be calculated as a percentage to be applied to premium. The percentage applied must be determined by the amount of the plan No. 2 assessment, as determined in subsection (1)(b), divided by the total net premium as calculated under 33-2-705 paid by all plan No. 2 insured employers during the preceding calendar year.

(d) The portion of the plan No. 3 assessment identified as a premium surcharge for an individual plan No. 3 insured employer must be calculated as a percentage to be applied to premium. The percentage applied must be determined by the amount of the plan No. 3 assessment, as determined in subsection (1)(b), divided by the total net premium as calculated under 33-2-705 paid by all plan No. 3 insured employers during the preceding fiscal year.

(e) On or before March 31, 2000, and each March 31 thereafter, the department, in consultation with the advisory organization designated pursuant to 33-16-1023, shall notify plan No. 2 insurers and plan No. 3, the state fund, of the insurer assessment identified as the premium surcharge percentage to be effective for policies written or renewed annually on and after July 1 of that year.

(f) The assessment provided for in subsection (1)(b), which will be identified as a premium surcharge, must be collected at the same time and in the same manner that the premium for the coverage is collected. This premium surcharge must be excluded from the definition of premiums for all purposes, including computation of insurance producers' commissions or premium taxes, except that an insurer may cancel a workers' compensation policy for nonpayment of the premium surcharge. Cancellation must be in accordance with the procedures applicable to the nonpayment of premium"; inserted (10) requiring deposit of funds in state treasury; inserted (13) authorizing department to assess and collect assessment surcharge from uninsured employers for deposit in the workers' compensation administration fund; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 25, Ch. 214, L. 2001, was a severability clause.

Effective Date — Retroactive Applicability: Section 26, Ch. 214, L. 2001, provided: "(1) [This act] is effective July 1, 2001.

(2) [Sections 5(7)(c) and (8) and 13(3)][39-71-201(7)(c) and (8) and 39-71-915(3)] apply retroactively, within the meaning of 1-2-109, to assessments and assessment premium surcharges calculated by the department of labor and industry before March 30, 2001."

1999 Amendment: Section 4, Ch. 377, in (1)(b) substituted "3%" for "2.6%"; in (2) substituted "March 1" for "March 31"; in (4) after "employer" inserted "or insurer"; inserted (5) requiring plan No. 2 insurers and state fund to collect premium surcharge; and made minor changes in style. Amendment effective July 1, 1999.

1999 Amendments Not Codified: Because of the temporary nature of the changes made by sec. 3, Ch. 377, L. 1999, the code commissioner has not codified the following amendments: (Temporary version terminating June 30, 1999) Section 3, Ch. 377, in (1)(b) in fifth sentence substituted "fund the costs of the department's administration of the Workers' Compensation and Occupational Disease Acts and the statutory occupational safety acts administered by the department" for "direct costs identified to the three plans and an equitable portion of the indirect costs based on the ratio of the preceding fiscal year's indirect costs distributed to the plans, using proper accounting and cost allocation procedures. Plan No. 3 must be assessed an amount sufficient to fund the direct costs and an equitable portion of the indirect costs of regulating plan No. 3" and inserted sixth sentence requiring assessment to be equitably apportioned between three plans; and made minor changes in style. Amendment effective April 20, 1999, and terminates June 30, 1999.

Severability: Section 24, Ch. 377, L. 1999, was a severability clause.

Retroactive Applicability: Section 26, Ch. 377, L. 1999, provided: "[Section 3] [39-71-201] applies retroactively, within the meaning of 1-2-109, to occurrences after June 30, 1991."

1997 Amendment: (Temporary version) Chapter 385 in (1), in first sentence of introductory clause before "occupational", substituted "statutory" for "various" and after "department" deleted "and the boiler inspections the department of commerce" and at end of second sentence deleted "and must be used for the administrative expenses of the department and for the administrative expenses of the department of commerce for the purposes of 50-74-101"; in (1)(a), after "39-71-205", inserted "39-71-223" and after "39-71-304" inserted "39-71-307, 39-71-308, 39-71-315, 39-71-316, 39-71-401(6), 39-71-2204, 39-71-2205, and 39-71-2337"; deleted former (1)(b) that read: "all fees paid for inspection of boilers as required by law"; in (1)(b), at end of third sentence, increased minimum assessment from $200 to $500; and made minor changes in style. Amendment effective April 24, 1997, and terminates June 30, 1999.

(Version effective July 1, 1999) In (1), in first sentence of introductory clause before "occupational", substituted "statutory" for "various" and after "department" deleted "and the boiler inspections the department of commerce" and at end of second sentence deleted "and must be used for the administrative expenses of the department and for the administrative expenses of the department of commerce for the purposes of 50-74-101"; in (1)(a), after "39-71-205", inserted "39-71-223" and after "39-71-304" inserted "39-71-307, 39-71-308, 39-71-315, 39-71-316, 39-71-401(6), 39-71-2204, 39-71-2205, and 39-71-2337"; deleted former (1)(b) that read: "(b) all fees paid for inspection of boilers as required by law"; in (1)(b), near beginning of second sentence after "assessments", substituted "must be 2.6% of the following benefits paid during the preceding calendar year for injuries covered by the Workers' Compensation Act and the Occupational Disease Act without regard to the application of any deductible whether the employer or the insurer pays the losses:

(i) total compensation benefits paid; and

(ii) except for medical benefits in excess of $200,000 per occurrence that are exempt from assessment, total medical benefits paid for medical treatment rendered to an injured worker, including hospital treatment and prescription drugs" for "must be levied against the preceding calendar year's gross annual payroll of the plan No. 1 employers and the gross annual direct premiums collected in Montana on the policies of the plan No. 2 insurers, insuring employers covered under the chapter, during the preceding calendar year"; inserted (2) requiring filing of annual reports of paid losses; in (3), at end of first sentence, substituted "$500" for "$200" and in second sentence, after "subject to", inserted "an initial" and after "assessment" inserted "equal to the minimum assessment against plan No. 1 employers and plan No. 2 insurers"; substituted (4) regarding payment of assessments for former language that read: "The assessments must be sufficient to fund the direct costs identified to the three plans and an equitable portion of the indirect costs based on the ratio of the preceding fiscal year's indirect costs distributed to the plans, using proper accounting and cost allocation procedures. Plan No. 3 must be assessed an amount sufficient to fund the direct costs and an equitable portion of the indirect costs of regulating plan No. 3. Other sources of revenue, including unexpended funds from the preceding fiscal year, must be used to reduce the costs before levying the assessments"; and made minor changes in style. Amendment effective July 1, 1999.

Transfer and Credit of Excess Subsequent Injury Funds: Section 6, Ch. 284, L. 1997, provided: "On or before September 1, 1997, the department of labor and industry shall transfer $3.5 million of the funds retained in the fund to the fund in 39-71-201 and credit the amount to offset the insurer's assessment for the administration fund as follows:

(1) plan No. 1, $490,000;
(2) plan No. 2, $612,500; and
(3) plan No. 3, $2,397,500."

Required Report: Section 5, Ch. 385, L. 1997, provided: "For purposes of fees assessed on or after July 1, 1999, each plan No. 1 employer, plan No. 2 insurer, and plan No. 3, the state fund, shall file on March 31, 1999, in the form and containing the information required by the department of labor and industry a report of paid losses." (Terminates June 30, 1999—sec. 8, Ch. 385, L. 1997.)

Applicability: Section 7(2), Ch. 385, L. 1997, provided: "[Section 1] [amending temporary version of 39-71-201] applies to fees assessed on insurers on or before June 30, 1999."

Section 7(3), Ch. 385, L. 1997, provided: "[Section 2] [amending effective July 1, 1999, version of 39-71-201] is effective July 1, 1999, and applies to fees assessed on insurers on or after July 1, 1999."

Termination: Section 8, Ch. 385, L. 1997, provided that the temporary version of this section terminates June 30, 1999.

1995 Amendment: Chapter 514 in (1), in first sentence after "department", inserted "and the boiler inspections the department of commerce" and in second sentence, at end, inserted "and for the administrative expenses of the department of commerce for the purposes of 50-74-101"; and in (1)(b), after "boilers", deleted "and issuance of licenses to operating engineers". Amendment effective July 1, 1995.

1993 Amendment: Chapter 555 near middle of (1), after "administer", inserted "with the exception of the subsequent injury fund, as provided for in 39-71-907, and the uninsured employers' fund"; inserted fourth sentence of (1)(c) that read: "If at any time during the fiscal year a plan No. 1 employer is granted permission to self-insure or a plan No. 2 insurer is authorized to insure employers under this chapter, that plan No. 1 employer or plan No. 2 insurer is subject to assessment"; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendment: In (1)(c), at end of second to last sentence after "costs", substituted "of regulating plan No. 3" for "as referred to above"; and made minor change in style. Amendment effective July 1, 1991.

Applicability: Section 15, Ch. 558, L. 1991, provided: "[This act] applies to injuries that occur on or after [the effective date of this act]." Effective July 1, 1991.

1989 Amendment: Throughout section changed "division" to "department"; in (1)(c) changed "state insurance fund" to "state fund"; and made minor changes in phraseology. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

1987 Amendment: In (1)(a) substituted "penalties" for "fines".

39-71-202. Office of department.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

39-71-203. Powers of department — rules.

Compiler's Comments

1989 Amendment: In two places changed "division" to "department"; deleted former (3), (4), and (5) relating to staffing levels, funding, and operation plan (see 1987 MCA for former text); and made minor change in phraseology. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

1987 Amendments: Chapter 464 inserted (2) allowing Division to adopt rules to implement the chapter; and made minor changes in phraseology.

Chapter 525 inserted (3) through (5) requiring Division to use money from special revenue fund to employ sufficient staff to meet goals of 39-71-604 and to report to Executive and Legislative Branches regarding changes in staffing requirements.

Administrative Rules

Title 24, chapter 29, subchapter 6, ARM Plan 1 self-insurance.

Title 24, chapter 29, subchapter 7, ARM Workers' compensation employer insurance requirements.

Title 24, chapter 29, subchapter 8, ARM Rules of practice.

Title 24, chapter 29, subchapter 9, ARM Workers' compensation administrative assessment.

Title 24, chapter 29, subchapter 14, ARM General medical rules and facility service rules.
Title 24, chapter 29, subchapter 17, ARM Rehabilitation.
Title 24, chapter 29, subchapter 20, ARM Chiropractic service rules.
Title 24, chapter 35, subchapter 1, ARM Independent contractor exemption certificate.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

No Authority for Departmental Resolution of Workers' Compensation Attorney Fee Disputes — Administrative Rule Ineffective: Plaintiff had a dispute over attorney fees payable pursuant to a workers' compensation claim. Plaintiff argued that the Workers' Compensation Court lacked authority to resolve the dispute because A.R.M. 24.29.3802 required the court to transfer the dispute to the Department of Labor and Industry for resolution. The Supreme Court disagreed. An administrative agency does not have the power to create or divest a court of subject matter jurisdiction. Thus, to the extent that the administrative provision attempted to divest the Workers' Compensation Court of jurisdiction over the attorney fee dispute, the provision was ineffective. Pinnow v. Mont. St. Fund, 2007 MT 332, 340 M 217, 172 P3d 1273 (2007), following Kelleher Law Office v. St. Comp. Ins. Fund, 213 M 412, 691 P2d 823 (1984).

No Authority for District Judge to Substitute for Workers' Compensation Court Judge Upon Recusal: There is no statutory authority for a District Court Judge to substitute for a Workers' Compensation Court Judge upon recusal, nor does an administrative rule, of itself, provide a source of authority by which a District Court Judge may assume jurisdiction over a case in Workers' Compensation Court. Absent that authority, a District Court Judge who assumed jurisdiction over a workers' compensation case had no more authority than any member of the general public, and all orders issued by the District Court Judge in the case were of no legal effect. (See 2009 amendment to 39-71-2901.) Pinnow v. Mont. St. Fund, 2007 MT 332, 340 M 217, 172 P3d 1273 (2007).

Conflict Between Workers' Compensation Statute and Administrative Rule — Fiscal Health Not Justification for Discrimination: Under 33-22-111, a workers' compensation claimant is entitled to freedom of choice in selecting a treating physician, but under ARM 24.29.1511 (now repealed), an injured worker cannot change physicians without the approval of the State Fund. The Workers' Compensation Court correctly found that pursuant to 33-1-102, the freedom of choice under 33-22-111 is not extended to workers' compensation cases. However, in reality, the exemption extends to cases involving coverage by the State Fund under Plan No. 1 or 3 but not to workers covered under Plan No. 2. The State Fund argued that the differentiation did not present an equal protection problem because the disparate treatment was rationally related to the legitimate governmental goal of controlling workers' compensation costs. The Supreme Court found that the policy of discriminating among injured workers based solely on which insurance plan supplied coverage was an equal protection violation because it was not rationally related to a legitimate government objective. Offering services to some while excluding others always results in lower costs, but cost control alone does not justify disparate treatment that violates an individual's right to equal protection of the law. Discrimination is not allowed merely for the sake of fiscal health. Heisler v. Hines Motor Co., 282 M 270, 937 P2d 45, 54 St. Rep. 345 (1997), distinguishing Stratemeyer v. Lincoln County, 259 M 147, 855 P2d 506 (1993), and Chiropractors for Justice v. Alaska, 895 P2d 962 (Alaska 1995).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Deposing of Nonresident Claims Adjuster: A nonresident claims adjuster can be compelled by the Workers' Compensation Court to be deposed in Montana as a logical extension of an insurer's obligation to designate a resident adjuster under ARM 24.29.804. Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

Choice of Physician Proper Under Requirements of Administrative Rules: The defendant insurance company argued that the claimant had changed physicians without obtaining the permission of the insurer as required by an administrative rule. The Supreme Court held that the administrative rule allowed the claimant to select her initial physician but required the insurer's permission to subsequently change physicians. The Supreme Court stated that although the claimant saw several doctors before deciding on one to treat her, the initial treating physician was the physician who began a course of treatment rather than the first one to examine the claimant. Chapman v. Research Cottrell, 248 M 353, 811 P2d 1283, 48 St. Rep. 468, (1991).

Failure to Adopt Procedural Rules — Coverage Mandatory: Defendant established Bennett Well Service in 1975 and enrolled in the Workers' Compensation program, including an election to cover himself as a sole employer. In June 1979, his son began work for him. On June 26, the son fractured his leg. An injury report was filed July 2, 1979. On July 13, 1979, defendant elected coverage for his son and on July 31, 1979, the end of the quarter, sent in quarterly reports and premiums, including a premium for his son. This section gives the Division (now Department of Labor and Industry) the authority to administer the Workers' Compensation Act. Section 39-71-2303 (renumbered 39-71-2336) orders the Division (now Department) to prescribe procedures by which employers may elect to be bound by compensation plan No. 3, including the effective time of the election. The Division (now Department) failed to adopt rules prescribing the proper procedure other than reporting and paying procedures, which defendant followed. Because it had not adopted rules governing the election procedure, the Division (now Department) could not deny coverage of plaintiff. Bennett v. Bennett, 196 M 22, 637 P2d 512, 38 St. Rep. 2091 (1981).

Rule Adopted: A rule adopted by the Division of Workers' Compensation (now Department of Labor and Industry) under the authority of this section, requiring an injured worker to seek prior authorization to change physicians, was properly adopted. Garland v. The Anaconda Co., 177 M 240, 581 P2d 431 (1978).

Hearing Examiner Employed as Insurance Adjuster: The Industrial Accident Board (now Department of Labor and Industry) was not prohibited from further consideration of a record taken at a hearing before a referee although such hearing examiner was not a regular employee of the Board (now Department) and was engaged in private enterprise as insurance adjuster whose principal business was the settlement and adjustment of workers' compensation claims. State ex rel. Fish v. Indus. Accident Bd., 139 M 246, 362 P2d 852 (1961).

Awarding Fees to Physician: This section does not give the Board (now Department of Labor and Industry) jurisdiction to consider or pass upon the petition of a physician for an award of fees for services rendered an injured worker where compensation had been paid in full and the insurer had paid to a hospital and another doctor who treated the claimant the full amount required. Liest v. USF&G Co., 100 M 152, 48 P2d 772 (1935).

Judicial Powers Excluded: While the Industrial Accident Board (now Department of Labor and Industry), created as a purely administrative body, exercises many functions that are judicial in character, it is not vested with judicial power in the sense in which that expression is used in the constitution, wherein it means the power of a court to decide, pronounce a judgment, and carry it into effect between persons and parties who bring a case before it for decision. Shea v. North-Butte Min. Co., 55 M 522, 179 P 499 (1919).

39-71-204. Hearings — rules of evidence — appeal, rescission, alteration, or amendment by department of its orders, decisions, or awards — effect — appeal.

Compiler's Comments

2005 Amendment: Chapter 103 inserted (1) providing that statutory and common-law rules of evidence do not apply at hearing; inserted (2) authorizing telephone or videoconference hearings; and made minor changes in style. Amendment effective July 1, 2005.

Effective Date — Applicability: Section 13, Ch. 103, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005."

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1987 Amendment: In (1), at beginning, deleted "Except as provided in subsection (2)"; deleted former (2) that read: "(2) The division or the workers' compensation judge shall not have power to rescind, alter, or amend any final settlement or award of compensation more than 4 years after the same has been approved by the division. Rescinding, altering, or amending a final settlement within the 4-year period shall be by agreement between the claimant and the insurer. If the claimant and the insurer cannot agree, the dispute shall be considered a dispute for which the workers' compensation judge has jurisdiction to make a determination. Except as provided in 39-71-2908, the division or the workers' compensation judge shall not have the power to rescind, alter, or amend any order approving a full and final compromise settlement of compensation"; inserted (3) allowing appeal of Division order to the Workers' Compensation Judge; and made minor changes in phraseology.

Administrative Rules

ARM 24.29.206 Administrative review.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Sufficient Evidence for Rescission of Workers' Compensation Settlement Agreement Based on Mutual Mistake of Material Fact Not Discovered Until After Settlement: Gamble was injured on the job, the parties entered a settlement agreement, and the employer began paying benefits based on a medical diagnosis, yet Gamble's condition worsened. Finally, Gamble went to a specialist who ran additional tests and discovered that Gamble had suffered an odontoid fracture of the spine that was consistent with the job injury but that had been unnoticed at the time of the settlement. Gamble's request for additional medical benefits was denied by the employer because payment for the fracture was not part of the settlement. The Workers' Compensation Court held that the fracture was compensable, and the employer appealed, but the Supreme Court affirmed. If Gamble's fracture existed at the time of settlement, the parties were mutually mistaken regarding the material fact concerning the nature of Gamble's injury, requiring that the agreement be rescinded. The Supreme Court reviewed the findings and found that substantial credible evidence supported the facts that: (1) the fracture was consistent with and caused by the on-the-job injury; (2) Gamble's symptoms were consistent with the injury; (3) there was a basis for ruling out other potential causes of injury; and (4) there was an explanation as to why the injury was not diagnosed at the time of settlement. Because the mutual mistake of fact existed, the settlement agreement was properly rescinded. Gamble v. Sears, 2007 MT 131, 337 M 354, 160 P3d 537 (2007).

Mutual Mistake of Any Material Fact as Warranting Rescission of Workers' Compensation Settlement: South injured her back on the job and underwent surgery twice to correct the problems. She entered into a full and final compromise settlement agreement with her insurer. The agreement listed seven jobs that both parties felt were acceptable for South to do. One of the jobs was massage therapy. South began training as a massage therapist but began experiencing back pain again, forcing her to quit the training and to undergo back surgery a third time. South then petitioned the Workers' Compensation Court to rescind the settlement agreement on grounds of mutual mistake of fact. The court denied her petition, treating the current problem as a new and different injury. The Supreme Court clarified Kienas v. Peterson, 191 M 325, 624 P2d 1 (1980), in holding that under fundamental contract principles for rescission, a mutual mistake regarding the nature or extent of a claimant's injury is not the only mutual mistake sufficient to set aside a final settlement agreement. Rather, if a party can show a mutual mistake of any material fact that impacts the contract to such an extent that the intended bargain of the parties is defeated, the contract may be rescinded. The operative question is whether a mutual mistake existed that justified rescission, without limitation to how or when the mistake was made. Even though the parties were not mistaken regarding the nature and extent of South's injury at the time that the contract was formed, both parties mistakenly believed that massage therapy was an appropriate job for South to pursue, and she relied on that fact to her detriment. It was error for the Workers' Compensation Court to fail to consider South's contention of mutual mistake regarding the propriety of the job approved for her to do; thus, she was entitled to rescission of the settlement agreement. South v. Transp. Ins. Co., 275 M 397, 913 P2d 233, 53 St. Rep. 196 (1996).

No Record or Evidence on Appeal of Failure Below to Set Aside Final Settlement: A petition to the Workers' Compensation Court requesting that a final settlement be set aside was decided by granting the insurer's motion for summary judgment on grounds of lack of jurisdiction. The Supreme Court had no record of facts and no evidence that would enable the Supreme Court to conclude whether the settlement should be set aside. The Supreme Court declined to set aside the settlement and to decide whether to grant claimant costs, attorney fees, and a statutory penalty. The case was remanded for further proceedings. Martin v. St. Comp. Ins. Fund, 275 M 190, 911 P2d 848, 53 St. Rep. 128 (1996).

Workers' Compensation Court Jurisdiction of Petition to Set Aside Final Settlement: The Workers' Compensation Court had jurisdiction to consider a January 1995 petition to set aside a final settlement. That court decided that provisions in 39-71-2909 and this section, stating that the Workers' Compensation Court could not change a final settlement more than 4 years after the settlement, which provisions were deleted by 1987 amendments, were substantive rather than procedural in nature and acted as a statute of limitations, which could not be retroactively changed. The Supreme Court reversed the decision and barred the petition in this case. Martin v. St. Comp. Ins. Fund, 275 M 190, 911 P2d 848, 53 St. Rep. 128 (1996).

No Statutory Authority for Setting Aside Workers' Compensation Court Judgment: Although under some circumstances the Workers' Compensation Court may have inherent equitable power to set aside its judgment, under this section, authority to rescind awards extends only to the Workers' Compensation Division (now Department of Labor and Industry). The only reference to the court is in the context of limitations on its authority to review settlements or awards approved by the Department. This section serves a limited purpose and provides no authority for setting aside a judgment entered by the court. St. Comp. Ins. Fund v. Chapman, 267 M 484, 885 P2d 407, 51 St. Rep. 1070 (1994).

Authority of Workers' Compensation Court to Reopen Final Compromise Settlement Agreement Based on Mutual Mistake: Settlement agreements for workers' compensation benefits, like other agreements, are subject to the law of contracts. A Montana court that is not otherwise limited by statute, including the Workers' Compensation Court, has the authority to set those contracts aside based upon a mutual mistake regarding the nature and extent of a claimant's injuries even when express language in the settlement agreement purports to prohibit setting the agreement aside. Wolfe v. Webb, 251 M 217, 824 P2d 240, 49 St. Rep. 1 (1992), distinguishing Hutchinson v. Pierce Packing Co., 219 M 18, 710 P2d 64 (1985), and Bowen v. Anaconda Co., 220 M 185, 714 P2d 142 (1986), and followed in Gamble v. Sears, 2007 MT 131, 337 M 354, 160 P3d 537 (2007).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

No Mutual Mistake in Workers' Compensation Settlement: Claimant sought to have his workers' compensation settlement reopened on grounds of mutual mistake. The Supreme Court affirmed the District Court's denial of the request after finding: (1) claimant was capable of understanding the terms of the settlement agreement; (2) although claimant may have experienced an increased level of pain, there was no evidence to indicate the parties were mutually mistaken about the condition of claimant's back at the time of settlement; (3) there was no evidence to link claimant's personality disorder to his back injury; and (4) the claim was barred by the statute of limitations. Whitcher v. Pac. Employers Ins. Co., 236 M 289, 769 P2d 1215, 46 St. Rep. 367 (1989).

Adequate Evidence of Impairment to Reopen Settlement Agreement: An impairment rating increase from 20% to 35%, together with lifting restrictions and testimony of a rehabilitation consultant, was sufficient evidence to enable the Workers' Compensation Court to reopen a settlement agreement within the 4-year time period authorized under a prior version of 39-71-2909. Rightnour v. Intermtn. Ins. Co., 236 M 108, 768 P2d 871, 46 St. Rep. 220 (1989).

Claims of Constructive Fraud — No Jurisdiction to Rescind Final Settlement: It was reversible error for the Workers' Compensation Court to rescind a final settlement more than 4 years after it was approved, despite claimant's assertion that the claims adjuster did not adequately inform him of the extent of his disability, a fact the Workers' Compensation Court considered fraudulent enough to prevent the entering of a valid final settlement agreement and running of the Statute of Limitations. Holcomb v. Low Temp Insulation, 224 M 425, 731 P2d 899, 43 St. Rep. 2302 (1986).

Full and Final Compromise Settlement — Effect of Annulment: Under 39-71-204 and 39-71-2909, the Workers' Compensation Court has no authority to rescind, alter, or amend a full and final settlement agreement except on a showing of fraud, mutual mistake of fact, or personal incapacity of claimant to make a binding contract. However, when the Division of Workers' Compensation (now Department of Labor and Industry), in entering an order approving the compromise settlement as required by 39-71-741, perceived an inconsistency in the settlement agreement as originally drafted by the parties and in its approval order revised the agreement, the Division (now Department) exceeded its authority under 39-71-741 and such order became a nullity, even though subsequently approved by the Workers' Compensation Court. In this situation, the Workers' Compensation Court is not precluded from reconsidering the settlement agreement and approving it as originally drafted. Bowen v. The Anaconda Co., 220 M 185, 714 P2d 142, 43 St. Rep. 278 (1986).

Final Settlement — Rescission for Good Cause or Change in Disability: The claimant was injured in April 1981 and executed a final settlement in September 1981. In December 1982, he petitioned the Workers' Compensation Court for a rescission of the settlement agreement and reinstatement of benefits. The Workers' Compensation Court set aside the settlement on the basis of the doctrine of mutual mistake. The Supreme Court affirmed on different grounds, holding that a claimant has alternate theories available for rescission, i.e., for good cause under 39-71-204 and on the grounds that the disability has changed under 39-71-2909. The Supreme Court found that the findings of fact of the Workers' Compensation Court afforded a sufficient basis for rescission by the Workers' Compensation Judge under either theory. Hutchinson v. Pierce Packing Co., 219 M 18, 710 P2d 64, 42 St. Rep. 1810 (1985).

Workers' Compensation Settlement — Lack of Foresight of Future Symptoms Not Basis for Rescission: Claimant entered a final settlement agreement on September 8, 1981, and on December 27, 1982, petitioned the Workers' Compensation Court for rescission of the agreement. The District Court rescinded the agreement and awarded permanent total disability benefits on the ground of mistake. The Supreme Court reversed and stated that a mistake justifying rescission must be a mistake made in unconscious ignorance of a past or present fact and that because speculation as to later symptoms is a conscious ignorance of future fact, an error of foresight cannot justify a finding of rescission for mistake. The Supreme Court found claimant's reported symptoms were not credible evidence of past or present disability or a change in disability and distinguished Kienas v. Peterson, 191 M 325, 624 P2d 1, 37 St. Rep. 1747 (1980), in which medical evidence became available later as to true extent of injury at time of settlement. Supreme Court also held that claimant did not suffer economic duress in freely accepting offer of settlement. Claimant must rely on statutory scheme of award modification despite fact that he entered into settlement only months before Supreme Court ruling making tender of value of an undisputed impairment rating mandatory. Claimant could not claim detrimental reliance on "good cause" clause in agreement when agreement was a standard form prepared by the Workers' Compensation Division (now Department of Labor and Industry) and not the insurer. When there was no medical evidence in record that claimant's disability had changed, the Workers' Compensation Court was statutorily without power to reopen the settlement. Veterans' Administration (now Veterans Affairs) disability ratings are irrelevant under Montana workers' compensation laws. Hutchinson v. Pierce Packing Co., 41 St. Rep. 2298 (1984), opinion withdrawn and replaced by 219 M 18, 710 P2d 64, 42 St. Rep. 1810 (1985).

No Mutual Mistake of Fact — Insurance Compromise Settlement: The Workers' Compensation Court concluded that claimant had testified that his back was in much the same condition in 1982 as it had been on the date of his insurance compromise settlement in 1979. Accordingly, the parties to the settlement were not laboring under a mutual mistake of fact as to the nature and extent of injuries when they entered into a full and final compromise. This case was distinguished from Kienas v. Peterson, 191 M 325, 624 P2d 1, 37 St. Rep. 1747 (1980), in which it was held that the lack of knowledge that the industrial accident possibly aggravated preexisting cerebral palsy, leading to a worsening condition, was a mutual mistake of fact. The court reiterated in this instant case that 39-71-204 and 39-71-2908 (now repealed) preclude reopening of workers' compensation settlements. Sollie v. Travelers Indem. Co., 212 M 197, 686 P2d 920, 41 St. Rep. 1684 (1984).

Workers' Compensation — Disaffirmation of Settlement Agreement by Minor: A minor was injured while working and filed for workers' compensation benefits. He subsequently signed a settlement agreement after negotiating with a claims adjuster. The claimant's filing of a petition to reopen his claim resulted in a hearing and the conclusion that the case was closed. The claimant appealed, based on his minority status at the time of the settlement and his concomitant right to disaffirm contracts. The Supreme Court held that the close relationship and continuing awareness of the claimant's mother during the claims negotiations were of no avail to the defendants because only the minor claimant had signed the settlement. The defendant should have required the claimant's legal guardian to sign as well as the claimant. Accordingly, the final compromise settlement was set aside. Parrent v. Midway Toyota, 192 M 118, 626 P2d 848, 38 St. Rep. 559 (1981).

Finality of Workers' Compensation Decision — Grounds for Overturning: A full and final compromise settlement agreement between an injured worker and the Workers' Compensation State Fund was set aside because of mutual mistake of material fact by both parties. Kienas v. Peterson, 191 M 325, 624 P2d 1, 37 St. Rep. 1747 (1980), distinguished in Sollie v. Travelers Indem. Co., 212 M 197, 686 P2d 920, 41 St. Rep. 1684 (1984), and followed in Weldele v. Medley Dev., 227 M 257, 738 P2d 1281, 44 St. Rep. 1062 (1987). A petition for rehearing was filed. The Supreme Court reaffirmed the decision. The petitioner argued the Workers' Compensation Court had no power to alter or rescind the agreement 4 years after its execution. The Supreme Court pointed out that it, not the Workers' Compensation Court, set aside the agreement. It noted the scope of its appellate power and also the code provision on lack of consent through mutual mistake of material fact. The Supreme Court was not broadening the possibilities of reopening such settlements; it merely found that no contract existed initially. Kienas v. Peterson, 38 St. Rep. 320 (1981) (apparently not reported in Montana Reports or Pacific 2d Reporter), followed in Kimes v. Pac. Employers Ins. Co., 233 M 175, 759 P2d 986, 45 St. Rep. 1402 (1988).

Effect of Section: The effect of this section was noted in Flansburg v. Pack River Co., 172 M 163, 561 P2d 1329 (1977).

Final Order — Statute of Limitations: Where final award was made in industrial accident compensation case 14 years before claimant sought to reopen claim, 4-year Statute of Limitations barred reopening claim. Rassley v. Sec. Transport, 168 M 314, 542 P2d 1214 (1975).

Fraudulent Claim: Award of lump-sum settlement based on a petition forged by employer's claims manager did not determine injured employee's right to lump-sum settlement, and employee had no cause of action against the employer arising out of claims manager's subsequent forgery and conversion of the lump-sum check. Lewis v. The Anaconda Co., 160 M 478, 503 P2d 535 (1972).

Additional Evidence: Where a final decision to stop payments under workers' compensation had been made by the Industrial Accident Board (now Department of Labor and Industry), testimony of claimant's personal physician as to his examination of her more than 6 years earlier was relevant and should have been reconsidered by the Board (now Department), "good cause" thus having been shown. Johnson v. Indus. Accident Bd., 157 M 221, 483 P2d 918 (1971).

Full and Final Compromise Settlements Grounds for Reopening: In the absence of a showing of fraud, a full and final compromise settlement of a workers' compensation claim cannot be reopened. State ex rel. Mont. Phosphate Prod. v. Indus. Accident Bd., 156 M 466, 481 P2d 684 (1971); Moffett v. Indus. Accident Bd., 130 M 303, 301 P2d 340 (1956); Elich v. Indus. Accident Bd., 116 M 144, 154 P2d 793 (1944); Williams v. Indus. Accident Bd., 109 M 235, 97 P2d 1115 (1939).

Degree of Permanent Physical Impairment Unknown: Where the board found that a compensable impairment existed but the degree of permanent physical impairment was unknown, it was proper to award nominal disability indemnity under this section. Benoit v. Murphy Corp., 143 M 463, 391 P2d 350 (1964).

Findings on Remand: Where order of Industrial Accident Board (now Department of Labor and Industry), issued on December 26, 1956, stated explicitly that compensation was to be delayed until claimant made a showing of such loss to the Board (now Department), the Board (now Department) had power to make findings as to loss of earning ability when case was remanded by District Court on October 29, 1962, since no final disposition had taken place. Lind v. Lind, 142 M 211, 383 P2d 808 (1963).

Rights of Claimant Not Waived: A claimant does not surrender his right to seek modification under this section by merely signing a receipt containing language suggesting that the intention is to close the case, when there has been no discussion or hearing purporting to give the award any semblance of finality. Infelt v. Horen, 136 M 217, 346 P2d 556 (1959).

Position of Trust: The Industrial Accident Board (now Department of Labor and Industry) occupies a position of trust in relation to injured workers and dependents and this trust extends to the general public. Such a relationship calls for a full and complete understanding of all the facts in any case and from such understanding of the facts and the applicable law the Division (now Department) is to exercise a very high degree of good faith, impartiality, and fairness in dealing with each application for settlement in such exercise of its sound discretion. Moffett v. Indus. Accident Bd., 130 M 303, 301 P2d 340 (1956).

Unreasoned Allowance of Settlement: The Supreme Court declared that this case is a glaring example of unreasoned haste by the Industrial Accident Board (now Department of Labor and Industry) in granting a full and final compromise settlement of a worker's claim and there was a regrettable lack of diligence on the part of the Board (now Department) in protecting the interests of the claimant where it approved a compromise settlement approximately 9 months after claimant's injury in which he had been severely burned, and even though claimant needed further compensation, the law dictated that claimant's case could not be reopened. Moffett v. Indus. Accident Bd., 130 M 303, 301 P2d 340 (1956).

Additional Compensation for Continuing Disability: Where compensation had been awarded to an injured worker for temporary total and permanent partial disability for an amount less than the statutory maximum allowable, the Industrial Accident Board (now Department of Labor and Industry) had jurisdiction under this section to entertain a petition of claimant for additional compensation covering continuing disability. Paulich v. Republic Coal Co., 110 M 174, 102 P2d 4 (1940).

Continuing Jurisdiction — Final Settlement: Under this section an order of the Industrial Accident Board (now Department of Labor and Industry) made on application for additional compensation, allowing such compensation but declaring that it should be "in full and final settlement" was unauthorized and did not preclude the Board (now Department) on a later application for compensation from exercising its continuing jurisdiction. Meznarich v. Republic Coal Co., 101 M 78, 53 P2d 82 (1935).

Final Settlement — When Claim Closed: A claim that is settled on a "final settlement" basis is closed after the period of time stated in this section, from the date the order is made, has expired. Meznarich v. Republic Coal Co., 101 M 78, 53 P2d 82 (1935).

Denial of Claim — Failure to File Notice of Accident: Where the Industrial Accident Board (now Department of Labor and Industry) makes a final order, such as that because of the failure of the injured worker to file written notice of the accident resulting in his injury with his employer (insurer) as required by 39-71-603, his claim is denied, as distinguished from an order interlocutory in character over which it, under this section, has continuing jurisdiction, and the claimant fails to appeal therefrom, the matter becomes res judicata and may not thereafter be reopened. State ex rel. Roundup Coal Min. Co. v. Indus. Accident Bd., 94 M 386, 23 P2d 253 (1933).

Continuing Jurisdiction — Changed Condition of Injured Party: Under this section the Industrial Accident Board (now Department of Labor and Industry) has continuing jurisdiction over its orders and awards, and may amend and alter them to meet changed conditions of the injured party, even to the extent of entertaining a petition asking for a lump-sum settlement after decision by the District and Supreme Courts upholding the award of the Board. State ex rel. Mulholland v. District Court, 88 M 400, 293 P 291 (1930).

39-71-205. Department authorized to charge certain fees — disposition of.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Section 64, Ch. 613, L. 1989, provided that in this section the Code Commissioner is directed to change the term "administrator" or "his" to "department", meaning the Department of Labor and Industry.

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

1981 Amendment: Rewrote (1) to provide for a fee to cover costs rather than 15 cents per folio for noncertified documents and 20 cents per folio for certified documents.

39-71-206. Legal advisers of department and state fund — investigative and prosecution services.

Compiler's Comments

2005 Amendment: Chapter 416 in (2) at end substituted "this chapter" for "Title 39, chapters 71 and 72". Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

1993 Amendment: Chapter 296 inserted (2) requiring the Attorney General to provide certain services to the State Fund. Amendment effective July 1, 1993.

1989 Amendment: In first sentence substituted references to Department and state fund for reference to Division; substituted second sentence allowing Department and state fund to employ attorneys or legal advisers as they consider necessary for language allowing Division to employ legal assistance for work relating to plan No. 3 cases and pay for it from industrial insurance account; and made minor changes in form and phraseology. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

1983 Amendment: At end of section, substituted "expendable trust fund" for "agency fund".

39-71-208. Blank forms, minutes, and records.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

39-71-209. Publication of reports and bulletins authorized.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1983 Amendment: Near middle of section, before "such further reports" deleted "in addition to its report required by 2-7-102".

39-71-211. Fraud detection and prevention unit — expenditure accounting.

Compiler's Comments

2005 Amendment: Chapter 416 in (1) in second sentence near end after "Title 39" substituted "chapter 71" for "chapters 71 and 72". Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

Effective Date: Section 9, Ch. 296, L. 1993, provided: "[This act] is effective July 1, 1993."

Case Notes

Dissemination of Confidential Criminal Justice Information — Videos of Workers' Compensation Claimant — Release to Montana State Fund Upheld: After the respondent was injured in the course and scope of his employment, Montana State Fund (MSF), which provided workers' compensation insurance to the respondent's employer, accepted the respondent's claim, settled with the respondent, and continued to pay the respondent's medical benefits. While performing a routine verification of the respondent's disabilities, MSF investigators recorded multiple videos of the respondent that indicated that the respondent may have faked or exaggerated his injuries and that were classified as confidential criminal justice information. MSF petitioned the District Court for the release of the videos pursuant to 44-5-303, and the District Court granted the petition. The respondent appealed, arguing that MSF lacked standing to bring the petition and that the District Court erred when balancing the demands of individual privacy against the merits of disclosure. The Supreme Court affirmed, concluding that MSF had standing to bring the petition under 44-5-303(6), which allows an organization to file any action for the release of information that the organization believes is appropriate and permissible. The Supreme Court examined the two-part balancing test to determine whether the respondent's right to privacy clearly exceeded the merits of disclosure and concluded that the District Court adequately engaged in the balancing of competing concerns. The respondent's actions that were documented in the videos took place in public locations in which the respondent did not have a subjective or actual expectation of privacy and in which society would not view the respondent's expectation of privacy as reasonable, and the proper operation of the workers' compensation system constitutes a substantial interest. Mont. St. Fund v. Simms, 2012 MT 22, 364 Mont. 14, 270 P.3d 64.

39-71-223. Certified copies of public records — fees.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Section 64, Ch. 613, L. 1989, provided that in this section the Code Commissioner is directed to change the term "administrator" or "his" to "department", meaning the Department of Labor and Industry.

39-71-224. Records exempt from disclosure — separation of exempt material from nonexempt.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Section 64, Ch. 613, L. 1989, provided that in this section the Code Commissioner is directed to change the term "administrator" or "his" to "department", meaning the Department of Labor and Industry.

Attorney General's Opinions

Confidential Criminal Justice Information: As 53-9-104 was written before 1987 legislative changes, the Workers' Compensation Division had authority to obtain confidential criminal justice information, which it had to keep confidential. 41 A.G. Op. 92 (1986).

39-71-225. Workers' compensation database system.

Compiler's Comments

2011 Amendment: Chapter 167 in (1) in second sentence substituted "health care providers" for "medical providers". Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

2007 Amendment: Chapter 48 inserted (2)(d) requiring provision of information identifying whether a claimant is disabled to an insurer that is at risk for a claim; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendment: Chapter 140 in (1) in second sentence substituted "claims examiners" for "adjusters"; in (2)(b) in second sentence substituted "claims examiner" for "claim adjuster"; at beginning of (7) deleted "Beginning July 1, 2000"; and made minor changes in style. Amendment effective March 30, 2005.

1999 Amendment: Chapter 377 inserted (7) requiring certain reports by insurers to be electronically submitted; and inserted (8) allowing department to adopt rules. Amendment effective July 1, 1999.

Severability: Section 24, Ch. 377, L. 1999, was a severability clause.

1997 Amendment: Chapter 310 inserted (2)(b) requiring release of current and prior claim information to a requesting insurer that is at risk on a claim or is alleged to be at risk in a proceeding, stating what can be disclosed, and providing that the information must be kept confidential by the insurer, except to determine claim liability or for fraud investigation; inserted (2)(c) requiring release of current and prior claim information to law enforcement agencies for fraud prevention and prosecution; deleted (5)(a) that read: "(a) The department shall take all steps necessary to have the workers' compensation data base system fully operational by July 1, 1995"; and at beginning of (5) requiring publication of an annual report deleted "After the workers' compensation data base system is operational" and after "annual report" deleted "and may publish quarterly reports"; inserted (6) making users of database information obtained under this section liable for damages arising from misuse or unlawful dissemination of the information; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 14, Ch. 310, L. 1997, was a severability clause.

Effective Date: Section 3, Ch. 512, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 24, 1993.

Administrative Rules

Title 24, chapter 29, subchapter 43, ARM Workers' compensation database system.

Part 3
Miscellaneous Provisions

Part Case Notes

Premiums Payable on Reimbursements to Employees for Use of Personal Equipment on Job: Logging employer Rost found it less expensive to reimburse employees for using their own vehicles to travel to remote job sites and for furnishing their own chain saws than to supply transportation and equipment himself. The workers' compensation plan did not require an employer to report travel allowances made to reimburse employees for their expenses and required reporting of only 75% of the total remuneration for furnishing a chain saw. An audit revealed that Rost had insufficient documentation to justify vehicle rentals and that he had excluded excessive saw rental payments. Following conflicting decisions during the administrative process, the Workers' Compensation Court essentially affirmed the audit findings. On appeal, the Supreme Court reversed on the issue of vehicle rentals, holding that the rental payments constituted a reasonable reimbursement for employment-related expenses, but affirmed on the issue of saw rentals because Rost had deducted amounts in excess of 25% from gross payroll for saw rentals. St. Comp. Mut. Ins. Fund v. Lee Rost Logging, 252 M 97, 827 P2d 85, 49 St. Rep. 102 (1992).

39-71-301. Certificates and certified copies as evidence.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

39-71-304. Books, records, and payrolls to be open to inspection — penalty for refusal — subpoenas.

Compiler's Comments

2001 Amendment: Chapter 214 in (1) in second sentence near end in (1) substituted "civil action" for "workers' compensation court action"; near end of first sentence after "apply" substituted "to a district court" for "to the workers' compensation court"; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 25, Ch. 214, L. 2001, was a severability clause.

1999 Amendment: Chapter 442 in (1) in second sentence substituted "workers' compensation court action" for "civil action"; near end of second sentence in (2) substituted "workers' compensation court" for "district court"; and made minor changes in style. Amendment effective April 23, 1999.

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 28, Ch. 442, L. 1999, was a severability clause.

1993 Amendment: Chapter 555 inserted (2) regarding Department's subpoena power. Amendment effective July 1, 1993.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Composite Section: This section was amended by Ch. 103 and Ch. 397, L. 1979, and a composite was prepared by the Code Commissioner, 1979. Chapter 397 was a Code Commissioner bill and was not intended to make substantive changes in the law. Consequently, a conflict of language between Ch. 103 and Ch. 641 has been resolved in favor of the language used in Ch. 103.

39-71-306. Insurers to file summary reports of benefits paid for injuries and miscellaneous expenses and statements of medical expenditures.

Compiler's Comments

2005 Amendment: Chapter 69 in (2) near beginning after "report" substituted "required by this section or the annual paid losses report required in 39-71-201 within 5 days" for "after a 5-day grace period" and near middle after "which" substituted "either" for "the". Amendment effective July 1, 2005.

2001 Amendment: Chapter 214 in (1) after "quarter" inserted "ends"; inserted (1)(c) requiring insurer to file with department statements of certain miscellaneous amounts paid to or on behalf of injured workers during previous state fiscal quarter; inserted (2) authorizing penalty against insurer failing to file summary report; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 25, Ch. 214, L. 2001, was a severability clause.

1991 Amendment: In introductory clause substituted "after each state government fiscal quarter" for "of each and every month"; in (1), before "payments", inserted "compensation"; in (1) and (2) substituted "state fiscal quarter" for "month"; and in (2) substituted "all medical services" for "medical, surgical, and hospital services" and at end deleted "and for the burial of deceased workers". Amendment effective July 1, 1991.

Applicability: Section 15, Ch. 558, L. 1991, provided: "[This act] applies to injuries that occur on or after [the effective date of this act]." Effective July 1, 1991.

1989 Amendment: In introductory clause substituted "insurer" for reference to plan No. 1 employers and plan No. 2 insurers and changed "division" to "department"; and in (1) substituted "summary reports of benefits" for "duplicate receipts". Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

39-71-307. Employers and insurers to file reports — penalty.

Compiler's Comments

2009 Amendment: Chapter 112 in (3) near beginning after "insurer" deleted "or claims examiner"; and made minor changes in style. Amendment effective July 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2005 Amendments — Composite Section: Chapter 103 in (1) near beginning after "employer" substituted "insured by a plan No. 2 or a plan No. 3 insurer" for "and every insurer", near middle after "file with the" substituted "employer's insurer" for "department", after "accident" inserted "injury, or occupational disease", and at end deleted "and resulting in loss of life or injury to the employee" and deleted former second and third sentences that read: "The reports must be furnished to the department in the form and detail as the department prescribes and must provide specific answers to all questions required by the department under its rules. However, if an employer is unable to answer a question, the employer shall state the reason for the employer's inability to answer"; in (2) near middle substituted "under rules adopted by the department" for "at the time and in the manner prescribed by the department" and at end substituted "every injury or occupational disease" for "accidents as the department requires"; in (3) in first sentence near beginning after "insurer" deleted "or adjuster", after "submit" deleted "to the department", and after "(1)" inserted "or (2)" and at beginning of third sentence inserted "employer or"; and made minor changes in style. Amendment effective October 1, 2005.

Chapter 140 in (3) near beginning substituted "claims examiner" for "adjuster". Amendment effective March 30, 2005.

Effective Date — Applicability: Section 13, Ch. 103, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005."

1993 Amendment: Chapter 619 in (3), in first sentence after "proper", inserted "filing and" and after "(1)", substituted "shall" for "may"; and made minor changes in style. Amendment effective July 1, 1993.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

1989 Amendments: Chapter 333 inserted (3) allowing assessment by Division (now Department) of penalty against employer, insurer, or adjuster for not filing reports of accidents and allowing insurer to contest assessment. Amendment effective July 1, 1989.

Chapter 613 throughout section changed "division" to "department"; and made minor changes in phraseology. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

Administrative Rules

ARM 24.29.801 Accident reporting.

Case Notes

Failure to File Report: Failure of employer to file a first report of injury does not constitute an election by the employer not to be bound by this chapter or subject him to a common-law tort action. Jacques v. Nelson, 180 M 415, 591 P2d 181, 36 St. Rep. 287 (1979).

Duty of Board to Advise Employee: Where the Industrial Accident Board (now Department of Labor and Industry) had received a notice of injury from the employer, and a letter from the employee asking what he should do and the Board (now Department) advised the employee that he could get medical treatment, the Board (now Department) recognized that the employee suffered a compensable accident and there was a duty to notify the employee that he was required to file a claim under oath. Yurkovich v. Indus. Accident Bd., 132 M 77, 314 P2d 866 (1957).

39-71-315. Prohibited actions — penalty.

Compiler's Comments

2011 Amendment: Chapter 167 in (1) substituted "health care provider" for "medical provider". Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

2005 Amendments — Composite Section: Chapter 69 in (1)(a) at beginning after "failing to" substituted "certify" for "document, under oath". Amendment effective July 1, 2005.

Chapter 416 in (1)(a) near end after "claimed under" and in (1)(b) near middle after "compensable under" deleted "chapter 72 or". Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

1999 Amendment: Chapter 442 in (2) inserted third through fifth sentences concerning penalty payment, jurisdiction, and nonmediation. Amendment effective April 23, 1999.

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 28, Ch. 442, L. 1999, was a severability clause.

1995 Amendment: Chapter 516 inserted (3) providing that subsection (1)(b) does not apply to medical services for a worker by a physician with an ownership interest in a managed care organization certified by the Department. Amendment effective July 1, 1995.

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

Severability: Section 26, Ch. 516, L. 1995, was a a severability clause.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

Effective Date: Section 30, Ch. 619, L. 1993, provided: "[This act] is effective July 1, 1993."

39-71-316. Filing true claim — obtaining benefits through deception or other fraudulent means.

Compiler's Comments

2005 Amendment: Chapter 416 in (1) near beginning after "a claim under", in (2)(a) in first sentence near middle after "entitled under", and in (4) near end after "the provisions of" deleted "chapter 72 or". Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

1999 Amendment: Chapter 442 in second sentence of (3)(a) after "may" substituted "petition the workers' compensation court" for "institute suit"; and made minor changes in style. Amendment effective April 23, 1999.

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 28, Ch. 442, L. 1999, was a severability clause.

1993 Amendments: Chapter 296 in first sentence of (2)(a), after "theft", inserted "and may be prosecuted", in second sentence, after "county attorney", inserted "or the attorney general", and inserted third sentence applying criminal liability to persons receiving enumerated benefits; and made minor changes in style. Amendment effective July 1, 1993.

Chapter 618 in (2)(a), before "under", inserted "or who obtains or assists another person in obtaining benefits to which the other person is not entitled"; inserted (2)(b) defining person; and inserted (3) authorizing fine up to $50,000, relating to use of fine money, and authorizing additional civil remedies for insurers.

Chapter 619 inserted (4) relating to suspension, revocation, or denial of license. Amendment effective July 1, 1993.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

39-71-317. Employer not to terminate worker for filing claim — preference — jurisdiction over dispute.

Compiler's Comments

2005 Amendment: Chapter 416 in (1) in first sentence near end after "a claim under" deleted "chapter 72 or". Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

1999 Amendment: Chapter 442 in (1) inserted second sentence concerning exclusive jurisdiction; in first sentence of (4) after "The" deleted "department and", after "court" substituted "has exclusive" for "do not have", and after "dispute" inserted "concerning the reemployment preference" and inserted second sentence concerning nonmediation and no contested case hearing for former sentence that read: "Exclusive jurisdiction is with the district court"; and made minor changes in style. Amendment effective April 23, 1999.

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 28, Ch. 442, L. 1999, was a severability clause.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Case Notes

Adverse Stress Reaction and Occupational Disease Insufficient to Trigger Injury Preference: Lueck alleged that when a vacancy occurred in a position that he had previously held before leaving because of stress-related problems, the employer was required to extend the hiring preference to him under this section. However, Lueck's adverse stress reaction, which he characterized as an occupational disease, did not meet the statutory definition of injury; therefore, his preference claim failed. Lueck v. United Parcel Serv., 258 M 2, 851 P2d 1041, 50 St. Rep. 401 (1993).

Failure to Raise Genuine Issue of Material Fact Regarding Motive for Termination — Summary Judgment Proper: To prove retaliatory discharge under this section, an employee must show: (1) that the employee was discharged; and (2) that the employer's motive in discharging the employee was to retaliate for the employee having filed a claim under the Workers' Compensation Act. Mere assertions of a retaliatory motive are not enough; the employee must provide facts that support a reasonable inference that the motive was retaliation. Summary judgment is proper in the case of failure to raise a genuine issue of material fact regarding the motive for termination. Lueck v. United Parcel Serv., 258 M 2, 851 P2d 1041, 50 St. Rep. 401 (1993).

39-71-319. State to reimburse certain premium costs for learning programs — rulemaking.

Compiler's Comments

Termination Provision Repealed: Section 1, Ch. 394, L. 2023, repealed sec. 7, Ch. 400, L. 2019, which terminated this section June 30, 2023. Effective May 3, 2023.

Effective Date: Section 6, Ch. 400, L. 2019, provided: "[This act] is effective July 1, 2019."

Termination: Section 7, Ch. 400, L. 2019, provided: "[This act] terminates June 30, 2023."

39-71-320. Certification program for claims examiners — purpose — rulemaking — advisory committee — continuing education — fee.

Compiler's Comments

2019 Amendment: Chapter 371 in (1) in two places, (2), and (8) before "certification program" deleted "voluntary"; deleted former (3)(e) that read: "(e) a waiver of the examination requirement for an individual requesting certification as a claims examiner within the first 12 months after the department has adopted the initial rules under this subsection (3). The waiver is available only to an individual who has been actively engaged in the work of a claims examiner in this state, working on workers' compensation claims for 5 of the 7 years immediately preceding the individual's application for certification under this section"; inserted (3)(e) regarding the process by which a claims examiner who is newly hired or is in training may perform specified claims functions prior to certification; inserted (3)(f) regarding the 12-month grace period for existing noncertified individuals; and made minor changes in style. Amendment effective July 1, 2019.

2011 Amendment: Chapter 167 in (1) in first sentence substituted "health care providers" for "medical providers". Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

Preamble: The preamble attached to Ch. 125, L. 2009, provided: "WHEREAS, section 39-71-105, MCA, states that it is public policy for the workers' compensation system to provide protections for employees that are at "reasonably constant rates" for employers; and

WHEREAS, over time the types of occupations, persons, and businesses that are exempt from the coverage requirements of the Workers' Compensation Act have continually expanded; and

WHEREAS, solvency of the workers' compensation system requires a broad base of coverage."

Effective Date: Section 5, Ch. 125, L. 2009, provided that this section is effective July 1, 2009.

39-71-325. Claim summary and actuarial documentation for impaired insurer.

Compiler's Comments

Effective Date: Section 18, Ch. 117, L. 2007, provided: "[This act] is effective July 1, 2007."

Part 4

Coverage, Liability, and Subrogation

Part Case Notes

Insurer at Risk During Claimant's Last Occupational Exposure Liable for Benefits: Murray suffered knee injuries in 1967 and 1974 that required removal of cartilage in both knees, but Murray remained active in both his jobs and vigorous recreational activities. In 1982, Murray was employed by MSE Technology Applications (MSE) and worked for MSE for the next 18 ½ years while continuing to have episodes of knee complications in connection with his recreational activities. MSE was insured by Indemnity Insurance Company (Indemnity) until 2000, when State Fund became the insurer. In late 2000, Murray's surgeon told Murray that working while standing on concrete or asphalt at MSE contributed to the need for Murray's knee replacement. Murray filed an occupational disease claim, and State Fund began paying benefits, but State Fund then petitioned the Workers' Compensation Court for a determination that Indemnity was liable for compensation. The court held that Murray's work at MSE significantly aggravated the preexisting knee condition and led to or accelerated Murray's need for surgery and that as the insurer at risk during Murray's last occupational exposure, State Fund was liable for paying benefits. On appeal, the Supreme Court affirmed. The Workers' Compensation Court properly relied on the surgeon's testimony, and there was substantial credible evidence that Murray's employment at MSE contributed to the knee condition. Absent evidence that Murray was aware of the connection between his knee problems and employment at MSE prior to filing the claim, State Fund was properly found to be the liable workers' compensation insurer. Mont. St. Fund v. Murray, 2005 MT 97, 326 M 516, 111 P3d 210 (2005).

Workers' Compensation Benefit Reduction Provision Violative of Right to Full Legal Redress: Under 39-71-416(1) (now repealed), an insurer was entitled to reduce by 30% the benefits otherwise payable to an injured worker if the worker received anything short of full legal redress. The effect of this provision was to transfer dollars recovered from a third-party tortfeasor back to the insurer, which plainly violates the constitutional entitlement to full legal redress. The statute did not create a new class of benefits or eliminate any benefits, nor was it dictated by federal law; rather, it simply allowed the automatic and arbitrary reduction of benefits whenever a worker obtained a third-party settlement or award. The District Court did not err in finding the benefit reduction provision to be an unconstitutional violation of the right to full legal redress. Connery v. Liberty NW. Ins. Corp., 1998 MT 125, 289 M 94, 960 P2d 288, 55 St. Rep. 496 (1998), distinguishing Watson v. Seekins, 234 M 309, 763 P2d 328 (1988), Stratemeyer v. Lincoln County, 259 M 147, 855 P2d 506 (1993), and Murer v. St. Comp. Mut. Ins. Fund, 267 M 516, 885 P2d 428 (1994).

Allocation of Settlement Funds Affirmed: Wildin was injured in a car accident during her employment, and her employer's insurer, CNA Insurance Company (CNA), paid over $35,000 to her in medical and disability benefits. Wildin then sued State Farm Fire and Casualty Company (State Farm), the insurer of the other driver, and contacted CNA to see if it would join the suit. No answer was received, so Wildin and State Farm proceeded to settle her suit for $15,000. CNA would not agree to the settlement. Wildin then filed a petition with the Department of Labor and Industry to have the settlement funds allocated. The examiner concluded that the Department had jurisdiction to allocate the funds and allocated one-third to CNA and two-thirds to Wildin, after deducting attorney fees. The Workers' Compensation Court and the Supreme Court affirmed. CNA argued that the Workers' Compensation Court ignored principles of equity and fairness in the disposition of the case. However, the Supreme Court cited Bay v. St., 212 M 258, 688 P2d 1 (1984), for the principle that it was its duty only to construe and apply the law as written and that there was no room for construction of the statutes when they are plain and unambiguous. Wildin v. CNA Insurance Co., 256 M 354, 846 P2d 1022, 50 St. Rep. 108 (1993).

Application of Certain Workers' Compensation Act Provisions to MODA (Now Repealed and Merged With Workers' Compensation Act): With respect to the Montana Occupational Disease Act (MODA) (now repealed and merged with Workers' Compensation Act), the same rationale that applies to workers' compensation cases should apply, specifically: (1) the MODA (now repealed and merged with Workers' Compensation Act) statutes in effect on the last actual day of work of claimant are controlling; (2) because both Acts involve the same employer-employee relationship, the same rules of liberal construction apply; (3) MODA (now repealed and merged with Workers' Compensation Act) is to be administered so as to give the employee the greatest possible protection within the purposes of the Act; and (4) when MODA (now repealed and merged with Workers' Compensation Act) statutes are open to more than one interpretation, one of which is favorable to the employee and another against him, the statutes may be properly construed in a manner most favorable to the employee. Therefore, in liberally construing the statute in effect on the last actual day of work of claimant in the present case, section 92-1331, R.C.M. 1947 (39-72-308, MCA, repealed L. 1979), allowed a common-law right of action although the claimant was not eligible for compensation under MODA (now repealed and merged with Workers' Compensation Act). Gidley v. W.R. Grace & Co., 221 M 36, 717 P2d 21, 43 St. Rep. 616 (1986), overruling The Anaconda Co. v. District Court, 161 M 318, 506 P2d 81 (1973). Gidley was followed in Nelson v. Cenex, Inc., 2008 MT 108, 342 M 371, 181 P3d 619 (2008), and in Fleming v. Int'l Paper Co., 2008 MT 327, 346 M 141, 194 P3d 77 (2008), in that statutes in effect on the last actual day of work of claimant are controlling. However, see Murphy v. WestRock Co., 2018 MT 54, 390 Mont. 394, 414 P.3d 276, concluding that statements made in Fleming — that no exception exists to the general rule applying workers' compensation statutes in effect on the date of the injury — were overly broad and incorrect.

39-71-401. Employments covered and exemptions — elections — notice.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 293, L. 2023. Amendment effective October 1, 2023.

Termination Provision Repealed: Section 2, Ch. 369, L. 2019, repealed sec. 5, Ch. 315, L. 2015, which terminated the 2015 amendment to this section on June 30, 2019. Effective May 7, 2019.

2015 Amendment: Chapter 315 in (1) in second sentence inserted "unless the provisions of 39-71-442 apply". Amendment effective July 1, 2015, and terminates June 30, 2019.

2013 Amendment: Chapter 412 in (2)(w) substituted "39-71-118(8)" for "39-71-118(10)". Amendment effective July 1, 2013.

2011 Amendment: Chapter 200 in (2)(r) inserted exception clause; inserted (3)(c)(v) referring to manager of manager-managed company engaged in construction industry; and made minor changes in style. Amendment effective July 1, 2011.

2009 Amendments — Composite Section: Chapter 234 in (2)(v) after "broker" inserted "or freight forwarder". Amendment effective April 16, 2009.

Chapter 450 inserted (2)(z) relating to musician performing under written contract; and made minor changes in style. Amendment effective May 5, 2009.

2007 Amendments — Composite Section: Chapter 179 inserted (2)(v) concerning employment as intrastate or interstate common motor carrier; and made minor changes in style. Amendment effective July 1, 2007.

Chapter 288 inserted (2)(y) concerning athletes engaged in contact sports. Amendment effective April 26, 2007.

2005 Amendments — Composite Section: Chapter 26 in (1) in first sentence after "employers" deleted "as defined in 39-71-117" and after "employees" deleted "as defined in 39-71-118"; in (2)(a) substituted "or" for "and"; in (2)(b) at end deleted "as defined in 39-71-116"; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 133 inserted (3)(a)(ii) relating to deposit of fees; deleted former (3)(b) that read: "(b) The application must be made in accordance with the rules adopted by the department. There is a $17 fee for the initial application. Any subsequent application renewal must be accompanied by a $17 application fee. The application fee must be deposited in the administration fund established in 39-71-201 to offset the costs of administering the program"; and made minor changes in style. Amendment effective March 30, 2005.

Chapter 448 in (2)(l) near end substituted "referred to" for "defined"; inserted (2)(w) regarding employment of person working under exemption certificate; in (3)(a)(i) substituted text requiring person to be bound by plan unless rights and benefits have been waived for former text that read: "(3) (a) A sole proprietor, a working member of a partnership, a working member of a limited liability partnership, or a working member of a member-managed limited liability company who represents to the public that the person is an independent contractor shall elect to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3 but may apply to the department for an exemption from the Workers' Compensation Act"; in (3)(b) and (3)(c) substituted text regarding purchase of workers' compensation insurance policy and definition of person for former (3)(b) through (3)(f) that read: "(b) The application must be made in accordance with the rules adopted by the department. There is a $17 fee for the initial application. Any subsequent application renewal must be accompanied by a $17 application fee. The application fee must be deposited in the administration fund established in 39-71-201 to offset the costs of administering the program.

(c) When an application is approved by the department, it is conclusive as to the status of an independent contractor and precludes the applicant from obtaining benefits under this chapter.

(d) The exemption, if approved, remains in effect for 2 years following the date of the department's approval. To maintain the independent contractor status, an independent contractor shall submit a renewal application every 2 years. The renewal application and the $17 renewal application fee must be received by the department at least 30 days before the anniversary date of the previously approved exemption.

(e) A person who makes a false statement or misrepresentation concerning that person's status as an exempt independent contractor is subject to a civil penalty of $1,000. The department may impose the penalty for each false statement or misrepresentation. The penalty must be paid to the uninsured employers' fund. The lien provisions of 39-71-506 apply to the penalty imposed by this section.

(f) If the department denies the application for exemption, the applicant may, after mediation pursuant to department rules, contest the denial by petitioning the workers' compensation court"; and made minor changes in style. Amendment effective April 28, 2005.

Preamble: The preamble attached to Ch. 448, L. 2005, provided: "WHEREAS, the Montana Supreme Court ruled in Wild v. Fregein Construction, 2003 MT 115, 315 Mont. 425, 68 P.3d 855, that the independent contractor exemption certificate does not raise a conclusive presumption as to the status of a person as an independent contractor and that an employer has an obligation to determine whether an individual is treated as an independent contractor or as an employee; and

WHEREAS, the Montana Supreme Court in the Wild decision ruled that it is against the public policy of the state for an employer to coerce a worker to work as an independent contractor by offering to pay an independent contractor at a rate higher than the employer pays employees; and

WHEREAS, the Montana Supreme Court in the Wild decision affirmed the twin determinants of independent contractor status as being "A" issues of control and "B" whether the individual is in an independent business, commonly known as the "A-B" test, and emphasized the necessity of both factors being present, with performing work for other persons being an indication of an independent business; and

WHEREAS, the concurring opinion in the Wild decision further suggested that the Department of Labor and Industry strengthen the certification process to provide a conclusive determination of independent contractor status; and

WHEREAS, the Wild decision created a great deal of uncertainty in matters involving independent contractors and employees in the business community, with employers and independent contractors coming together to propose a consensus solution after participating in a study required by Senate Bill 270, passed by the 58th Legislature; and

WHEREAS, the Montana Legislature considers enacting legislation appropriate to effectively reverse the Wild decision and to restore the conclusive presumption of an independent contractor exemption certificate as well as to allow employers to pay persons with the independent contractor exemption certificate at a rate higher than the rate paid to employees and additionally to allow a person with an independent contractor exemption certificate to work for only one employing unit without becoming an employee as well as to waive the benefits of the workers' compensation and occupational disease laws."

Effective Date — Applicability: Section 12, Ch. 26, L. 2005, provided that this section is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005.

Section 15, Ch. 448, L. 2005, provided: "[This act] is effective on passage and approval and applies to all applications and renewals for the independent contractor exemption certificate submitted to the department after [the effective date of this act]." Approved April 28, 2005.

2003 Amendments — Composite Section: Chapter 83 inserted (2)(u) regarding companionship or respite care services; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 193 inserted (2)(v) exempting out-of-state workers; in (3)(b) in two places reduced fee from $25 to $17; and in (3)(d) in first sentence reduced 3 years to 2 years, at end of second sentence substituted "shall submit a renewal application every 2 years" for "shall every 3 years submit a renewal application", deleted former third sentence that read: "A renewal application must be submitted for all independent contractor exemptions approved on or after July 1, 1995", and in third sentence reduced fee from $25 to $17. Amendment effective July 1, 2003.

Severability: Section 13, Ch. 193, L. 2003, was a severability clause.

Saving Clause: Section 14, Ch. 193, L. 2003, was a saving clause.

2001 Amendments — Composite Section: Chapter 14 inserted (2)(o) exempting licensed trainers, assistant trainers, exercise persons, and pony persons from Workers' Compensation Act; and made minor changes in style. Amendment effective February 14, 2001.

Chapter 43 at end of (2)(j) substituted "referee, umpire, or judge, at an amateur athletic event" for "referee, or judge, at a school amateur athletic event, unless the person is otherwise employed by a school district". Amendment effective March 16, 2001.

Chapter 339 substituted (2)(e) concerning employment of a real estate, securities, or insurance salesperson paid by commission without a guarantee of earnings for former text that read: "employment of a broker or salesperson performing under a license issued by the board of realty regulation". Amendment effective April 21, 2001.

1999 Amendment: Chapter 442 in (3)(f) after "may" inserted "after mediation pursuant to department rules" and after "petitioning" substituted "the workers' compensation court" for "for review of the decision by an appeals referee in the manner provided for in 39-51-1109" and deleted former second sentence that read: "An applicant dissatisfied with the decision of the appeals referee may appeal the decision in accordance with the procedure established in 39-51-2403 and 39-51-2404." Amendment effective April 23, 1999.

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 28, Ch. 442, L. 1999, was a severability clause.

Retroactive Applicability: Section 31(1), Ch. 442, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to claims for injuries occurring before April 23, 1999, unless a party elects, after notification by the department of labor and industry, to remain in the contested case process.

1997 Amendments: Chapter 172 in (2)(d), in introductory clause after "partnership", inserted "working members of a limited liability partnership"; in (2)(q)(i), after "manager is", inserted "not"; in (3)(a), after "partnership", inserted "a working member of a limited liability partnership"; in (5), after "partnership", inserted "a partner in a limited liability partnership"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 310 in (3)(b), in second sentence, provided for a $25 fee for an initial application and in third sentence, after "application", inserted "renewal"; in (3)(d), in first sentence, substituted "3 years" for "1 year" and in second sentence substituted "every 3 years" for "annually"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 386 in (2)(q)(iii), at end, inserted "either"; inserted (2)(q)(iii)(B) regarding an officer or manager who owns less than 20% of the number of shares that totals 20% or more of the total shares; in (2)(q)(iv), at end, substituted "meets the requirements of subsection (2)(q)(iii)(A) or (2)(q)(iii)(B)" for "owns 20% or more of the number of shares of stock in the corporation or who owns 20% or more of the limited liability company"; inserted (2)(r) regarding a ditch company officer or manager; and made minor changes in style.

Chapter 491 in (2)(f) substituted "as a direct seller" for "of a direct seller"; in (2)(l) substituted "39-51-204(1)(e)" for "39-51-204(1)(l)"; inserted (2)(r) concerning service performed by minister of church; and made minor changes in style. Amendment effective January 1, 1998.

Chapter 548 in (3)(b), in second sentence, substituted "There is a $25 fee" for "There is no fee" and in third sentence, after "subsequent application", inserted "renewal"; and in (3)(d), near beginning, increased length of exemption to 3 years from 1 year and in second sentence increased time period for independent contractor renewals to 3 years from annually. Amendment effective July 1, 1997.

Transition: Section 10, Ch. 172, L. 1997, provided: "Any surplus funds remaining in the underinsured employers' fund on [the effective date of this section] must be deposited in the uninsured employers' fund provided in 39-71-502 [now repealed]." Section 12(2), Ch. 172, L. 1997, provided that sec. 10 was effective on passage and approval. Approved March 28, 1997.

Severability: Section 14, Ch. 310, L. 1997, was a severability clause.

Section 36, Ch. 491, L. 1997, was a severability clause.

Section 13, Ch. 548, L. 1997, was a severability clause.

Preamble: The preamble attached to Ch. 491, L. 1997, provided: "WHEREAS, House Bill No. 98 (Ch. 48, L. 1995), enacted by the 54th Legislature, excluded direct sellers from minimum wage, overtime, unemployment insurance, and workers' compensation requirements; and

WHEREAS, the Legislature in House Bill No. 98 adopted the federal definition of direct seller to apply to relevant Montana statutes; and

WHEREAS, ARM 24.11.831 narrowed the scope of the federal definition of direct seller; and

WHEREAS, an original purpose of this House Bill No. 561 was to codify the narrower definition of direct seller; and

WHEREAS, this House Bill No. 561 is the appropriate place to repeal Rule 24.11.831, Administrative Rules of Montana."

The preamble attached to Ch. 548, L. 1997, is printed with the compiler's comments for 39-9-101.

Saving Clause: Section 37, Ch. 491, L. 1997, was a saving clause.

1995 Amendments — Composite Section: Chapter 48 at end of (1)(f), after "direct seller", substituted "as defined in 26 U.S.C. 3508" for "engaged in the sale of consumer products, primarily in the customer's home"; and made minor changes in style. Amendment effective February 9, 1995.

Chapter 95 inserted (2)(p) concerning services performed by a petroleum land professional; and made minor changes in style. Amendment effective March 9, 1995.

Chapter 112 inserted (2)(o) concerning employment of an employer's spouse; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 142 inserted (2)(n) exempting jockey licensed by Board of Horseracing from workers' compensation coverage; and made minor changes in style. Amendment effective March 15, 1995.

Chapter 516 in (2)(d) inserted reference to working members of a member-managed limited liability company; in (2)(k), at beginning, substituted "employment of a" for "any"; in (2)(m) substituted "or an association, business, corporation, or other entity that is at least 51% owned by an enrolled tribal member or members, whose business is conducted" for "who operates"; inserted (2)(q) relating to an officer of a quasi-public or private corporation or a manager of a manager-managed limited liability company who qualifies under one or more provisions set forth in subsections (2)(q)(i) through (2)(q)(iv); in (3)(a), in first sentence, inserted reference to a working member of a member-managed limited liability company; in (3)(b) inserted second through fourth sentences requiring a $25 fee for a subsequent application, to be used to offset administrative costs of the program, and deleted former second sentence providing that the application may be denied only if the Department determines that the applicant is not an independent contractor; in (3)(d) substituted current provision that the election remains in effect for a year, but may be renewed every year for $25, for former provision that the election is in effect until the Department is notified by the independent contractor of a change in status; inserted (3)(e) providing a civil penalty of $1,000 for a false statement or misrepresentation as to exempt independent contractor status; in (4)(a) inserted two references to a manager-managed limited liability company, in first sentence, near beginning before "corporation", deleted "private", and in second sentence deleted provision for Department rules and approval as to an election, inserted reference to a quasi-public corporation, and substituted provision that the entity could elect coverage for otherwise exempt officers or managers for provision allowing an officer to elect not to be bound as an employee; in (4)(a)(i) and (4)(a)(ii) substituted "corporation or to the management organization of the manager-managed limited liability company" for reference to the employer and the Department; in (4)(b) substituted "employer's previous election" for "officer's previous election" and substituted "employer shall again serve notice to its insurer and to its board of directors or the management organization of the manager-managed limited liability company if the employer elects to be bound" for "as provided if the officer elects not to be bound"; in (5), near beginning, inserted reference to a partner in a partnership and a member in or manager of a limited liability company, substituted "exempting" for "excluding", after "does not entitle the officer" inserted "partner, member, or manager", substituted "to exemption from coverage" for "to elect not to be bound as an employee under this chapter", and deleted provision that the officer had to sign a notice of election and could be penalized for false swearing; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

Severability: Section 26, Ch. 516, L. 1995, was a severability clause.

1993 Amendment: Chapter 555 inserted (2)(m) that read: "(m) a person who is employed by an enrolled tribal member who operates solely within the exterior boundaries of an Indian reservation"; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendments: Chapter 16 in (3)(a) removed brackets from the phrase "and who is not contracting" (rendered void by Ch. 573); and made minor changes in style.

Chapter 573 inserted (2)(l) providing that Workers' Compensation Act does not apply to cosmetologist's services and barber's services, as defined in 39-51-204(1)(l); and in (3)(a), after "contractor", deleted "[and who is not contracting] for cosmetologist's services or barber's services as defined in 39-51-204(1)(l)". Amendment effective July 1, 1991.

Applicability: Section 5, Ch. 573, L. 1991, provided: "[This act] applies to all claims filed on or after [the effective date of this act] [effective July 1, 1991]."

1989 Amendment: Chapter 33 in (2)(c) substituted "a dependent member of an employer's family for whom an exemption may be claimed by the employer under the federal Internal Revenue Code" for "members of an employer's family dwelling in the employer's household". Amendment effective July 1, 1989.

Preamble: The preamble to Ch. 33, L. 1989, provided: "WHEREAS, section 39-71-401(2)(a), MCA, excludes employment of members of an employer's family dwelling in the employer's household from application of the Workers' Compensation Act unless the employer elects coverage; and

WHEREAS, the Montana Supreme Court determined in Cottrill v. State Compensation Insurance Fund, 44 St. Rep. 1762 (1987), that the Legislature failed to indicate a legitimate state interest or objective in excluding such employments from the Workers' Compensation Act and therefore voided the statutory family member exemption; and

WHEREAS, a person has both legal and moral duties to provide for the needs of members of his family who are dependent upon him for support; and

WHEREAS, the obligation of providing workers' compensation insurance for dependent family member employees in addition to other family support obligations creates an undue economic hardship on family employers and may discourage and inhibit such employment; and

WHEREAS, workers' compensation insurance may overlap coverage provided under other nonwork-related insurance that the family employer may wish to provide for dependent members of his family; and

WHEREAS, the distinction between performance of normal family responsibilities and "employment" for which workers' compensation coverage is required is in many instances difficult to determine within a family unit, and the uncertainty of what constitutes family employment may result in many employers being unintentionally uninsured, resulting in unknown liabilities for the state compensation insurance fund and the uninsured employer's fund.

THEREFORE, the Legislature of the State of Montana finds it is reasonable and necessary to exclude from the Workers' Compensation Act employment of dependent members of the employer's immediate family for whom an exemption may be claimed under the federal Internal Revenue Code."

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1987 Amendments: Chapter 148 inserted (2)(k) excluding employment of newspaper carrier and free-lance correspondent.

Chapter 290 divided former (3) into (3)(a) through (3)(c); and inserted (3)(d) providing that election approved by Division remains effective until the independent contractor notifies Division of a change in his status.

Chapter 314 inserted (3)(e) stating appeal procedure for denial of exemption.

Chapter 464 in (2)(b) deleted reference to subsection (3) of 39-71-116 and "except employment of a volunteer under 67-2-105"; in (2)(d) substituted "except as provided in subsection (3)" for "other than those who consider themselves or hold themselves out as independent contractors and who are not contracting for agricultural services to be performed on a farm or ranch, or for broker or salesman services performed under a license issued by the board of realty regulation, or for services as a direct seller engaged in the sale of consumer products to customers primarily in the home"; inserted (2)(e) and (2)(f) excluding employment of real estate broker and salesman and of a direct seller of consumer products; in (2)(h), at beginning, inserted "employment of"; in (3)(a), after "independent contractor", deleted "and who is not contracting for agricultural services to be performed on a farm or ranch, or for broker or salesman services performed under a license issued by the board of realty regulation, or for services as a direct seller engaged in the sale of consumer products to customers primarily in the home"; inserted (4) requiring a corporation to provide coverage for its officers and employees but allowing an officer to elect exemption; and made minor changes in phraseology.

Chapter 526 in (3)(a) inserted "[and who is not contracting] for cosmetologist's services or barber's services as defined in 39-51-204(1)(l)". In (3)(a) the Code Commissioner has reinserted the language "and who is not contracting" that was deleted by Ch. 464 in order to retain the meaning intended by the amendment in Ch. 526.

1985 Amendments: Chapter 94 at end of (2)(d) and in first sentence of (3), inserted "or for services as a direct seller engaged in the sale of consumer products to customers primarily in the home".

Chapter 100 inserted (2)(h) excluding employment of certain officials at school amateur athletic event.

Chapter 336 at end of (2)(b) and (2)(f) inserted "except employment of a volunteer under 67-2-105".

Applicability of School Athletic Official Exemption: Section 2, Ch. 100, L. 1985 (section 1 of which enacted this section's provision that this chapter does not apply to employment of school amateur athletic event officials not otherwise employed by a school district), provided: "This act applies to all claims arising from injuries sustained on or after October 1, 1985."

1983 Amendment: In (2)(d), inserted language following "partnership" providing exception for certain independent contractors; inserted (3) requiring coverage of employees of independent contractor who may seek exemption for himself upon application to and approval by Division; and inserted (4) requiring employer to post notice of provision of coverage and providing penalty for failure to post.

Statement of Intent: The statement of intent attached to HB 277 (Ch. 470, L. 1983) provided: "Under the law in effect prior to the enactment of this act, independent contractors were exempt from coverage under the Workers' Compensation laws. Many times, the determination of whether a worker is an independent contractor is made after a worker, for whom no contributions have been made, is injured and files a claim. This act provides a method for a before-the-fact determination of the independent contractor status. The act is not intended to make independent contractors subject to the Workers' Compensation Act but requires that they apply for that status to be exempt.

This bill authorizes the Division of Workers' Compensation of the Department of Labor and Industry to adopt rules to implement this act. It is the intent of the Legislature that the Division will provide an application form and provide for a hearing if the applicant disagrees with the Division's initial determination. Any substantive rules adopted pursuant to this act must be consistent with the statutory definition of "independent contractor."

It is also the intent of the Legislature that the Division will provide employers with signs and determine an economical and convenient method of distribution and disposal of such signs through insurers when the employer is properly covered under one of the three compensation plans or when a policy is canceled in accordance with 39-71-2205, MCA, or through the Division directly when a policy is canceled in accordance with 39-71-2307 [renumbered 39-71-2339], MCA, when self-insurance status is revoked in accordance with 39-71-2105, MCA, when an employer is exempt from coverage under this chapter, or when an employer lacks coverage and has been ordered to cease operations in accordance with 39-71-507, MCA, and that the Division will maintain procedures to control the distribution and disposal of such signs to prevent their improper use and to accommodate the changing coverage employers may have from time to time."

Administrative Rules

ARM 24.29.704 Who must be bound.

Title 24, chapter 35, ARM Independent contractors.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Employer's Insurer Insolvent After Workers' Compensation Claim Adjusted — Employer Not "Uninsured Employer": The plaintiff's employee filed a workers' compensation claim that was accepted and adjusted by the plaintiff's insurer. The insurer was later declared insolvent, and the defendant agency assumed handling of the claim. Later, however, the defendant notified the plaintiff that it was seeking the recovery of the benefits paid to the employee, and the plaintiff filed a declaratory action. The District Court granted the plaintiff summary judgment, concluding that the Workers' Compensation Act provides an exclusive remedy that frees an employer from potential liability claims by an employee. On appeal, the Supreme Court affirmed, holding that the insurer's insolvency did not render the plaintiff an "uninsured employer". Asurion Serv., LLC v. Mont. Ins. Guar. Ass'n, 2017 MT 140, 387 Mont. 483, 396 P.3d 140.

No Error by Workers' Compensation Court — Award of Benefits From Uninsured Employers' Fund Supported by Evidence: In 2002, Hopkins began working for Great Bear Adventures, a wildlife park where he would perform maintenance duties and feed the bears. In 2007, Hopkins traveled to the park at the request of Kilpatrick, the park's owner. Hopkins smoked marijuana on the way to the park. Once at the park, Kilpatrick asked Hopkins to work on a gate, but Hopkins was subsequently injured while feeding bears in the park. The Workers' Compensation Court awarded Hopkins workers' compensation benefits from the Uninsured Employers' Fund. Kilpatrick appealed. The Supreme Court affirmed, holding that Hopkins was employed by Kilpatrick at the time of the injury; that feeding the bears was one of Hopkins' regular employment duties even though testimony conflicted about whether he was asked to feed the bears on the day of the injury; that marijuana was not the major contributing factor of Hopkins' injuries, in part because there was no evidence about the level of impairment; and that Hopkins' services were not in exchange for aid or sustenance. Hopkins v. Uninsured Employers' Fund, 2011 MT 49, 359 Mont. 381, 251 P.3d 118.

Determination of Exempt Casual Employment — House Construction: The facts and circumstances surrounding whether the alleged employment of a person working on a house under construction was by a business, and thus not exempt casual employment, involve an examination of the management and operation of the house and the construction operation, length of employment, manner of pay, other workers' status, and how the operator characterized the property for tax purposes. Weidow v. Uninsured Employers' Fund, 2010 MT 292, 359 Mont. 77, 246 P.3d 704.

Substantial Evidence of Independent Contractor Status: Defendant employer presented substantial evidence that plaintiff served as an independent contractor, including the fact that plaintiff was paid on a lump-sum basis, provided identical services to other employing physicians, and was free to decline work offered by defendant. Although the evidence may have been somewhat less than a preponderance, it was a convincing accumulation of undisputed evidence, and the Supreme Court declined to disturb the findings. In re Wage Claim of Ramsey v. Yellowstone Neurosurgical Associates, P.C., 2005 MT 317, 329 M 489, 125 P3d 1091 (2005), distinguishing Wild v. Fregein Constr., 2003 MT 115, 315 M 425, 68 P3d 855 (2003).

Employer's Obligation to Ascertain Independent Contractor Status Prior to Employment — Test: Wild was injured while employed by defendant and sought workers' compensation benefits. The District Court found that because Wild had been previously issued a certificate of independent contractor exemption, any further inquiry into whether Wild was an independent contractor was precluded and that as an independent contractor, Wild was not eligible for workers' compensation benefits. Wild appealed, and the Supreme Court reversed. Nothing in subsection (3) of this section conclusively precludes, as a matter of law, any factual inquiry into whether an employer-employee relationship exists at the time that a worker is hired even if an independent contractor exemption has been previously granted. On the contrary, when read together with 39-71-120 (now repealed), the statutes establish that an employer has a clear obligation to make at least a cursory determination into whether a worker is an independent contractor in fact, as opposed to merely in name, before the employer can reasonably rely on the exemption, and an employer who fails to do so, with knowledge of the facts, may not hide behind the exemption. A two-part test is used to determine independent contractor status: (1) an analysis of whether the control factors are met, including consideration of direct evidence of right or exercise of control, method of payment, furnishing of equipment, and right to fire; and (2) whether the individual is engaged in an independently established trade, occupation, profession, or business. Wild v. Fregein Constr., 2003 MT 115, 315 M 425, 68 P3d 855 (2003), followed in Mathews v. BJS Constr., Inc., 2003 MT 116, 315 M 441, 68 P3d 865 (2003).

Employer's Offer to Pay Worker Higher Wage Based on Independent Contractor Exemption Violative of Public Policy: When Wild was hired by defendant for a construction job, Wild was given the choice of either working for $20 an hour as an independent contractor or for $15 an hour as a legitimate employee. Wild had been previously granted an independent contractor exemption while self-employed, so Wild chose to work as an independent contractor at the higher wage. The arrangement was also to defendant's economic advantage because treating Wild as an employee would have required payment of an additional $8 an hour in workers' compensation premiums. The Supreme Court held that when an employer offers to pay a worker a higher wage on condition that the worker present an independent contractor exemption at the time of hire, it violates the public policy in 39-71-105 that underlies the Workers' Compensation Act. The practice encourages employers to avoid their obligations under the Act, puts employers who assume their legal obligations under the Act at a severe economic and competitive disadvantage, and allows employers to prey on blue collar workers who might reject the protections of the Act in order to earn a few dollars an hour more. Wild v. Fregein Constr., 2003 MT 115, 315 M 425, 68 P3d 855 (2003), followed in Mathews v. BJS Constr., Inc., 2003 MT 116, 315 M 441, 68 P3d 865 (2003).

Rejection of Petition for Extraterritorial Reciprocity by Out-of-State Corporation Doing Construction Business in Montana Without Montana Workers' Compensation Coverage — Penalty Affirmed: Plaintiff was a Wyoming construction company qualified to do business in Montana. Plaintiff purchased workers' compensation coverage from Wyoming, paying a premium calculated based on the company's entire payroll, including its employees who worked outside Wyoming. The company never purchased workers' compensation in Montana, believing that the Wyoming policy provided valid coverage for all its employees. One of the company's employees was injured while working in Montana, and plaintiff petitioned the Department of Labor and Industry for extraterritorial reciprocity under its Wyoming policy. The petition was denied, and plaintiff was fined $94,484.86. Plaintiff appealed the penalty, but the Supreme Court affirmed. Generally, workers' compensation coverage purchased in another state will enjoy extraterritorial application and reciprocity in Montana. However, an exception applies to out-of-state employers engaged in the construction industry. Because plaintiff was in violation of this section by not carrying workers' compensation coverage for its construction employees in Montana, plaintiff was not entitled to reciprocity under 39-71-402, and the Workers' Compensation Court correctly upheld the penalty. Williams Insulation Co., Inc. v. Dept. of Labor and Industry, 2003 MT 72, 314 M 523, 67 P3d 262 (2003).

Conclusive Presumption Raised From Approved Application Does Not Survive Claim of Fraud in Obtaining Application: Although this section plainly states that an approved application is conclusive as to the status of independent contractor, in this action, the plaintiff worker offered sworn testimony on the defendant employers' motion for summary judgment that her application was fraudulently obtained by the employers and submitted by them without her knowledge. She claimed that an employer had her fill out the application and helped her do so because she could not read English and that the employer did not explain the application to her and told her it was for tax purposes. This raised a genuine issue of material fact, and the worker met her burden in opposing summary judgment. This section's presumption presupposes that the applicant knowingly and voluntarily completed and submitted the application. That presumption does not survive in the face of proof that the exemption was obtained by fraud. Gonzales v. Walchuk, 2002 MT 262, 312 M 240, 59 P3d 377 (2002).

Fraudulently Obtained Independent Contractor Exemption First Raised in Opposition to Affirmative Defense and Motion for Summary Judgment: A worker fell from a carport roof that she was painting and sued the contractor who hired her and the people who hired the contractor to paint the house, claiming failure to provide a safe workplace and workers' compensation insurance. The defendants who hired the contractor pleaded the affirmative defense that the worker was an independent contractor, and the worker responded that the approved application for an independent contractor exemption was fraudulently obtained. Although former Rule 9(b), M.R.Civ.P. (now superseded), requires a claim of fraud to be pleaded with particularity, in this case, evidence of fraud raised by the worker in her brief in opposition to summary judgment was properly before the court and should have been considered in the summary judgment proceeding. Gonzales v. Walchuk, 2002 MT 262, 312 M 240, 59 P3d 377 (2002).

Failure of Out-of-State Leasing Company to Procure Workers' Compensation Coverage for In-State Clients — Penalties Properly Assessed: An Arizona employee leasing company contracted with 13 Montana client employees to act as a coemployer, assuming responsibility for employee-related functions, including workers' compensation coverage. Following entry into the contract, the clients canceled the workers' compensation coverage that they had previously held. Despite the company's claim that it had procured retroactive insurance, the Workers' Compensation Court ultimately determined that the company did not have legal coverage and assessed penalties against the client employees for the period that coverage did not exist. The company and the clients appealed. The Supreme Court affirmed. The state met its burden of proof that the company was not the employer and that the company was uninsured during the period in question, notwithstanding the findings of the hearings officer that the company was insured because policy filing cards were signed. Because the company was not insured, the Workers' Compensation Court did not incorrectly apply the insurance law by assessing penalties against the clients for the time that no insurance existed. Total Mechanical Heating & Air Conditioning v. Employment Relations Div., 2002 MT 55, 309 M 84, 50 P3d 108 (2002), following St. Comp. Mut. Ins. Fund v. Lee Rost Logging, 252 M 97, 827 P2d 85 (1992). See also Dahl v. Uninsured Employers' Fund, 1999 MT 168, 295 M 173, 983 P2d 363 (1999).

Out-of-State Motor Carrier Doing Business in Montana Considered Employer — Liability for Workers' Compensation Premiums: Schimmel, a Montana resident, was injured loading a truck while employed by Jasper Express, Inc. (Jasper), a long-haul trucking business incorporated in and operating out of Washington state. Jasper did not have Schimmel covered under a Montana workers' compensation plan, so Schimmel filed a claim with the Montana uninsured employers' fund (fund), but the claim was denied. Schimmel then filed a petition for benefits against Jasper and the fund in Workers' Compensation Court, seeking a determination that Jasper should have provided coverage. The court held that Schimmel was not an employee, as defined in 39-71-118(10), because his employment duties were neither primarily carried out nor controlled within Montana; therefore, the fund was not liable for Schimmel's claim. Schimmel appealed and the Supreme Court reversed. The Workers' Compensation Court should have applied the definition of employee in 39-71-118(1)(a) instead of the definition of employee or worker in this state in 39-71-118(10), which applies to an employee who is furnished by one business to another as contemplated in 39-71-118(8). Schimmel was not an employee furnished by one business to another, so the definition in 39-71-118(10) did not apply. The use of the phrase "motor carrier" in 39-71-117(4) does not apply only to Montana-based motor carriers. Jasper used a Montana resident driver to pick up and drop off loads in Montana, so Jasper should have provided workers' compensation coverage for Schimmel. Schimmel v. Uninsured Employers' Fund, 2001 MT 280, 307 M 344, 38 P3d 788 (2001).

Issue of Department of Labor and Industry Jurisdiction Raised in Two Separate Hearings — Collateral Estoppel Applicable — Due Process Rights Not Implicated When Party Fails to Pursue Available Remedies: The Workers' Compensation Court concluded that the Department of Labor and Industry should have allowed plaintiff to raise the argument that State Fund had improperly canceled plaintiff's policy for nonpayment of a premium as a defense to the claim by the Uninsured Employers' Fund for assessments and penalties. The court said that the issue was not barred by collateral estoppel because an order from a first hearing only determined whether the Department had subject matter jurisdiction over contract disputes between an insurance carrier and its policyholder (a determination that plaintiff did not appeal) and did not address the issue raised in a second hearing, which was whether the Department had jurisdiction to determine coverage in a proceeding seeking a penalty and indemnification. The court held that collateral estoppel did not apply because the issues in the two hearings were not identical. The court went on to hold that the Department did have jurisdiction, through its quasi-judicial power, to resolve the dispute regarding whether State Fund had rightfully canceled the policy. The Supreme Court disagreed. In the first case, a hearings officer determined that the Department did not have subject matter jurisdiction over the contractual dispute between plaintiff and State Fund, noting that proper adjudication would be in the District Court. The Department only has jurisdiction granted to it by statute, and the adjudication of insurance contracts does not fall within its jurisdiction. Plaintiff's failure to appeal the issue from the first hearing precluded it from arguing that the Department did have jurisdiction over the insurance contract dispute regarding a penalty and indemnification in the second hearing, so relitigation of the jurisdiction question in the second proceeding was barred by collateral estoppel. Further, it was error to give the Department jurisdiction to adjudicate the insurance contract dispute pursuant to its general quasi-judicial powers because an administrative agency may not assume jurisdiction without express delegation by the Legislature and there is no statutory delegation of authority to the Department to resolve contract disputes. Rather, regulation of insurance contracts is governed by the Insurance Commissioner and the relevant statutes relating to insurance disputes. The Department cannot and should not be adjudicating disputes between insurance companies and employers. The Workers' Compensation Court's conclusion that plaintiff was denied due process when it was prevented from presenting evidence relating to the insurance contract between itself and State Fund was also erroneous. Plaintiff had the opportunity to appeal the initial Department order to the Workers' Compensation Court, but failed to do so. Plaintiff also had the opportunity to pursue its remedies against State Fund in District Court, but again failed to do so. There is no denial of due process when a party fails to pursue the remedies provided. Auto Parts of Bozeman v. Employment Relations Div. Uninsured Employers' Fund, 2001 MT 72, 305 M 40, 23 P3d 193 (2001).

Uninsured Employers' Fund Not Required to Resolve Insurance Disputes — Burden of Proving That Employer Uninsured Properly Met: Plaintiff carried a workers' compensation policy with State Fund. Following nonpayment of a premium, State Fund canceled plaintiff's coverage effective February 1, 1996. Plaintiff issued a premium check, but did not mail it until after the cancellation date. State Fund received the check and cashed it, applying the amount to the unpaid portion of the policy. Plaintiff believed that because the check was cashed, coverage was continued. Two months later, one of plaintiff's employees was injured on the job and filed a claim with State Fund, which again informed plaintiff that coverage had been canceled and sent plaintiff an application to reenroll. Coverage became effective shortly thereafter. Upon a request for review, State Fund determined that it had complied with the contract terms and properly canceled the policy and refused to backdate the new policy. Because plaintiff was not covered under the original policy at the time of the accident, the claim was forwarded to the Employment Relations Division's Uninsured Employers' Fund (UEF). Following a determination that the employee was not covered at the time of the accident, UEF paid the employee's medical bills, assessed a penalty against plaintiff for the period of noncoverage, and presented plaintiff with a claim for indemnification for the medical bills. Plaintiff requested a contested case hearing before the Department of Labor and Industry, arguing that State Fund had improperly canceled the policy. The hearings officer dismissed the request on grounds that the Department lacked subject matter jurisdiction over the issue because plaintiff was seeking a remedy or the enforcement of a right founded in the insurance contract, thus giving the District Court jurisdiction. Plaintiff did not appeal the decision to the Workers' Compensation Court, but instead requested another contested case hearing with the Department to challenge UEF's determination that plaintiff was an uninsured employer and also contested the penalty and raised two other issues related to the propriety of State Fund's policy cancellation. The hearings officer again refused to consider plaintiff's contention that it was insured at the time of the injury, based on plaintiff's failure to appeal the prior jurisdictional decision. At the hearing, a UEF compliance specialist testified that national and state databases both showed that coverage had been canceled, and plaintiff did not present evidence of any other coverage, so the hearings officer concluded that UEF met its burden of proof that plaintiff was uninsured and held plaintiff liable for the penalty and medical benefits. On appeal, the Workers' Compensation Court reversed, holding that in order to meet its burden of proof, UEF needed to prove not only that the insurance was canceled but also that State Fund's cancellation of the policy was legally correct. The court found that the hearings officer had improperly shifted the burden of proof from UEF to plaintiff, resulting in a violation of plaintiff's due process rights to contest the allegation that it was uninsured. The Supreme Court reversed, agreeing instead with the hearings officer that UEF met its burden by establishing that plaintiff was not insured on the date of the injury. The responsibility of sorting through claims and defenses between an employer and its insurer does not fall on UEF, which is merely a safety net for injured workers of uninsured employers, but rather it is the responsibility of the employer to resolve disputes with the insurance carrier. To impose any more onerous requirement on UEF would frustrate the intent of UEF. Having confirmed that plaintiff was uninsured, UEF was statutorily required to pay the injured employee the same benefits that would have been received had plaintiff been insured and was not obligated to do more. Thus, the Workers' Compensation Court erred in holding that UEF failed to prove that plaintiff was an uninsured employer. Auto Parts of Bozeman v. Employment Relations Div. Uninsured Employers' Fund, 2001 MT 72, 305 M 40, 23 P3d 193 (2001).

Entity Separate From Employer Precluded From Providing Workers' Compensation: Some of Dahl's employees were supplied by an employment service, which also agreed to provide workers' compensation insurance for the employees whom it supplied. Dahl argued that because the workers were temporary and because the employment service provided insurance, Dahl was not an uninsured employer. However, the clear and unambiguous language of this section requires an employer to elect to be bound by one of the three compensation plans, precluding a separate entity from providing workers' compensation insurance for an employer's employees. Thus, Dahl was required to provide the insurance in his own name. Dahl v. Uninsured Employers' Fund, 1999 MT 168, 295 M 173, 983 P2d 363, 56 St. Rep. 649 (1999). See also Buerkley v. Aspen Meadows Ltd. Partnership, 1999 MT 97, 294 M 263, 980 P2d 1046, 56 St. Rep. 415 (1999).

Failure to Acknowledge Employee on Payroll — Employer Uninsured — Exclusive Remedy Unavailable: Defendant employer hired plaintiff employee Buerkley "under the table". Buerkley did not submit an employment application and was not required to comply with any existing hiring procedures; he did not use a time clock as did other employees; his paycheck was not drawn from the employer's payroll account, and no deductions were taken from his paycheck; he was not held out to others as an employee; and he was not reported as an employee on the payroll reports provided to the trust by which employees were provided coverage for work-related injuries. Buerkley was injured on the job, after which he submitted the proper application paperwork, backdated to a date prior to the injury; he began using the timeclock; and his paychecks began to reflect deductions for workers' compensation coverage. The trust adjusters found that Buerkley was entitled to compensation, but Buerkley rejected a settlement offer and sought damages in District Court, at which time the trust adjusters discovered the falsified employment records. Buerkley contended that an employer who has not properly complied with the requirements of this section is an uninsured employer pursuant to 39-71-501 and, therefore, subject to the civil remedies provided in 39-71-508 and 39-71-515. He also contended that the employer should not, as a matter of law and public policy, be allowed to rely on the exclusive remedy in 39-71-411. Defendant's argued, and the District Court agreed, that whether or not plaintiff's employment was reported to the trust by which they were self-insured, they elected coverage under the Workers' Compensation Act, and thus the Workers' Compensation Act was Buerkley's exclusive remedy. The Supreme Court noted that the purpose of the Workers' Compensation Act is to effectuate a compromise between industry and labor and cited 2A Larson, The Law of Workman's Compensation 65.40 (1998), for the premise that workers' compensation statutes are often described as a quid pro quo exchange of rights and remedies. However, the requisite quid pro quo is absent when an employer has deliberately avoided the cost of insuring an employee by failing to acknowledge the employee's existence in payroll records. In those cases, the employer should not be able to take refuge behind the exclusive remedy provision. Thus, for purposes of the remedies in Title 39, ch. 71, part 5, Buerkley's employer was uninsured at the time of the injury and the exclusive remedy provision did not apply. Buerkley v. Aspen Meadows Ltd. Partnership, 1999 MT 97, 294 M 263, 980 P2d 1046, 56 St. Rep. 415 (1999), following Stratemeyer v. Lincoln County, 259 M 147, 855 P2d 506 (1993).

Immunity of Covered Employee for Work-Related Injury to Coemployee Regardless of Employer's Election Not to Cover Injured Coemployee: Malek was a compensated director and president of the corporation that employed Hankins. Hankins unintentionally injured Malek in the course of employment. Hankins was covered by the corporation's workers' compensation insurance, but an election was made by the corporation not to cover Malek. In a subsequent negligence action, Hankins was granted summary judgment based on the principle of exclusivity. The Supreme Court affirmed summary judgment because the Workers' Compensation Act provides immunity to a covered employee for work-related injuries to a coemployee regardless of the employer's election not to cover the injured coemployee under workers' compensation. Malek v. Hankins, 275 M 97, 911 P2d 1127, 53 St. Rep. 55 (1996). See also Kelly v. Mile Hi Single Ply, Inc., 890 P2d 1161 (Colo. 1995).

Operator of Bar — Employee Not Sole Proprietor: Loos was killed during the robbery of a bar that he was operating. The insurer argued that Loos was the owner of the bar and because he was a sole proprietor and not an employee, his widow was not entitled to workers' compensation benefits. The Supreme Court affirmed the lower court's finding that although Loos ran the bar, a sale of the bar had never been completed and that because the liquor license was still in Waldo's name, that constituted sufficient control by Waldo over Loos to make Loos an employee and not a sole proprietor. Loos v. Waldo, 257 M 266, 849 P2d 166, 50 St. Rep. 262 (1993).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Failure to Apply for Exemption — "Statutory Employee" Status Not Created: This section allows an independent contractor to elect to be bound by a compensation plan or to apply to the Division of Workers' Compensation for an exemption; however, nowhere in the statutes or Division rules is the exemption made mandatory in order for independent contractor status to exist. The fact that an independent contractor neither applies for nor receives an exemption does not imply independent contractor status or automatically create a "statutory employee" by operation of law. Doig v. St. Comp. Ins. Fund, 248 M 59, 809 P2d 12, 48 St. Rep. 323 (1991).

Failure to Comply With Statute Not Negligence Per Se — Workers' Compensation Statutes as Social Insurance: Failure of an employer to carry insurance required by this section does not constitute negligence per se. To constitute negligence per se, a statutory violation must also be the proximate cause of the injuries sustained. Workers' compensation statutes were enacted as social insurance rather than to provide for damages in tort-connected liability cases. (Decision based on law prior to 1985 enactment of 39-71-515, which established prima facie liability of noninsured employers.) Hunnewell v. Syme, 229 M 525, 747 P2d 875, 44 St. Rep. 2189 (1987), citing Kudrna v. Comet Corp., 175 M 29, 572 P2d 183 (1977), and Mahlum v. Broeder, 147 M 386, 412 P2d 572 (1966.)

Self-Insured Employer Not Uninsured Employer Despite Subsequent Bankruptcy: Claimant suffered an industrial accident while working for a self-insured employer who accepted liability and paid temporary total benefits until going bankrupt, at which time benefits ceased. After benefits ceased, claimant petitioned for coverage from the uninsured employers' fund. Benefits were properly denied because at the time of injury and thereafter the employer was properly enrolled under plan No. 1 and paid benefits for approximately 2 years. Caldwell v. Great W. Sugar Co., 229 M 448, 746 P2d 627, 44 St. Rep. 2123 (1987).

Unconstitutionality of Workers' Compensation Exclusion of Coverage for Members of Employer's Family: Subsection (2)(c) of this section, excluding workers' compensation coverage of employment of members of an employer's family dwelling in the employer's household, is an unconstitutional statutory classification that violates the equal protection provisions of Art. II, sec. 4, Mont. Const., by creating a distinction with no reasonable or readily identifiable state interest. Cottrill v. Cottrill Sodding Serv., 229 M 40, 744 P2d 895, 44 St. Rep. 1762 (1987). (Decision based on law prior to 1989 amendment excluding coverage for a dependent family member for whom employer claims federal tax exemption.)

Fiancee's Expectancy — Gratuitous Employment Precluded: Cain had a contract with the Billings Gazette to deliver papers to outlying areas. He met claimant, and she moved in with him. They later became engaged. Cain furnished claimant with room, board, and the use of an automobile. Claimant began delivering papers for Cain without compensation although he normally paid others $30 a day for the same work. Claimant was injured in an auto accident while delivering papers. Claimant was awarded workers' compensation. Both Cain and the Gazette challenged the finding that claimant was Cain's employee and asserted that even if she was, she fell within the exemption from coverage of 39-71-401(2)(f). The Supreme Court found that though there was no express agreement for compensation, claimant worked virtually full-time for Cain. She expected to marry Cain and that her participation in the business would provide for her future security. The court found sufficient evidence in the record to establish a contract for hire. Carlson v. Hartford Accident & Indem. Co., 204 M 311, 664 P2d 913, 40 St. Rep. 865 (1983).

Failure to Adopt Procedural Rules — Coverage Mandatory: Defendant established Bennett Well Service in 1975 and enrolled in the Workers' Compensation program, including an election to cover himself as a sole employer. In June 1979, his son began work for him. On June 26, the son fractured his leg. An injury report was filed July 2, 1979. On July 13, 1979, defendant elected coverage for his son and on July 31, 1979, the end of the quarter, sent in quarterly reports and premiums, including a premium for his son. Section 39-71-203 gives the Division (now Department of Labor and Industry) the authority to administer the Workers' Compensation Act. Section 39-71-2303 (renumbered 39-71-2336) orders the Division (now Department) to prescribe procedures by which employers may elect to be bound by compensation plan No. 3, including the effective time of the election. The Division (now Department) failed to adopt rules prescribing the proper procedure other than reporting and paying procedures, which defendant followed. Because it had not adopted rules governing the election procedure, the Division (now Department) could not deny coverage of plaintiff. Bennett v. Bennett, 196 M 22, 637 P2d 512, 38 St. Rep. 2091 (1981).

Agricultural Employment: Custom combiner who hired out his services to farmers and harvested crops he did not raise or own was not engaged in agricultural employment and was not exempt from workers' compensation laws. State ex rel. Romero v. District Court, 162 M 358, 513 P2d 265 (1973).

Equal Protection: Exclusion of employers engaged in farming and stockraising from the requirements of this act by section 92-202, R.C.M. 1947 (now repealed), was a legitimate classification by the Legislature and not in conflict with the 14th amendment, United States Constitution. State ex rel. Hammond v. Hager, 160 M 391, 503 P2d 52 (1972), appeal dismissed 411 US 912, 36 L Ed 2d 303, 93 S Ct 1548 (1973).

Attorney General's Opinions

OPINIONS PRIOR TO 1987 GENERAL REVISION

Water Commissioner Employee of District Court Judge: When a District Court Judge appoints a Water Commissioner under Title 85, ch. 5, the District Court Judge, rather than the water users, is considered the employer for the purpose of payment of workers' compensation. 40 A.G. Op. 56 (1984).

Law Review Articles

Hensley v. Montana State Fund: A Shift in the Grand Bargain of Workers' Compensation, Hagan, 83 Mont. L. Rev. 159 (2022).

39-71-402. Extraterritorial applicability and reciprocity of coverage — agreements with other states — rulemaking.

Compiler's Comments

2013 Amendment: Chapter 74 in (1)(a) at beginning inserted "In the absence of an agreement under subsection (2)"; in (1)(b) substituted "subsection (1)(c) and in the absence of an agreement under subsection (2)" for "subsection (5)"; in (1)(b)(i) after "while they are" inserted "temporarily engaged in work"; in (1)(b)(ii) substituted "temporarily engaged in work" for "temporarily employed"; inserted (1)(c) regarding out-of-state construction industry employers that employ out-of-state workers; inserted (2)(a) through (2)(e) regarding reciprocal agreements; in (2)(f) inserted "After an agreement has been entered into pursuant to this subsection (2)" and after "of the employer while" inserted "engaged in work"; in (2)(f)(i) inserted "applies to the employer and its employees while engaged in work in Montana"; inserted (2)(f)(ii) regarding prima facie evidence the employer is insured as of the date of the certification; in (3) substituted "The department may adopt rules to implement this section" for "The department may, with the approval of the governor, enter into agreements with workers' compensation agencies of other states for the purpose of promulgating regulations not inconsistent with the provisions of this chapter to carry out the extraterritorial application of the workers' compensation laws of the agreeing states"; deleted former (5) that read: "(5) Employers from another state that are engaged in the construction industry, as defined in 39-71-116, and that employ workers from another state shall obtain coverage for those workers under the provisions of this chapter"; and made minor changes in style. Amendment effective March 20, 2013.

Effective Date — Applicability: Section 2, Ch. 74, L. 2013, provided: "[This act] is effective on passage and approval [approved March 20, 2013] and applies to agreements entered into on or after [the effective date of this act]." Effective March 20, 2013.

1993 Amendment: Chapter 458 at beginning of (2) inserted exception clause; substituted present (5) requiring construction industry employers that employ workers from another state to obtain coverage for former language that read: "The provisions of this section do not apply to the construction industry as defined in 39-71-116"; and made minor changes in style. Amendment effective April 21, 1993.

Saving Clause: Section 5, Ch. 458, L. 1993, was a saving clause.

1991 Amendment: Inserted (5) excepting the construction industry from the provisions of this section. Amendment effective July 1, 1992.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Case Notes

Rejection of Petition for Extraterritorial Reciprocity by Out-of-State Corporation Doing Construction Business in Montana Without Montana Workers' Compensation Coverage — Penalty Affirmed: Plaintiff was a Wyoming construction company qualified to do business in Montana. Plaintiff purchased workers' compensation coverage from Wyoming, paying a premium calculated based on the company's entire payroll, including its employees who worked outside Wyoming. The company never purchased workers' compensation in Montana, believing that the Wyoming policy provided valid coverage for all its employees. One of the company's employees was injured while working in Montana, and plaintiff petitioned the Department of Labor and Industry for extraterritorial reciprocity under its Wyoming policy. The petition was denied, and plaintiff was fined $94,484.86. Plaintiff appealed the penalty, but the Supreme Court affirmed. Generally, workers' compensation coverage purchased in another state will enjoy extraterritorial application and reciprocity in Montana. However, an exception applies to out-of-state employers engaged in the construction industry. Because plaintiff was in violation of 39-71-401 by not carrying workers' compensation coverage for its construction employees in Montana, plaintiff was not entitled to reciprocity under this section, and the Workers' Compensation Court correctly upheld the penalty. Williams Insulation Co., Inc. v. Dept. of Labor and Industry, 2003 MT 72, 314 M 523, 67 P3d 262 (2003).

Material Issue of Fact Concerning Exclusivity: Two workers injured in a Montana automobile accident while returning home from the job site in North Dakota sued their employer for damages caused by the negligence of their fellow employee who was driving the car. The employer paid workers' compensation assessments for the two workers in North Dakota but not in Montana, pursuant to a multistate agreement between Montana and North Dakota that coverage would be controlled by the site of the work. The trial court granted summary judgment for the employer on the ground that the Montana workers' compensation fund provided the exclusive remedy. The appellate court held that summary judgment is precluded because there is a material issue of fact as to whether the fund provided the exclusive remedy. Webb v. Tom Brown, Inc., 807 F2d 783 (9th Cir. 1987).

Employee Temporarily Out of State: Claimant is eligible for benefits for an injury suffered in Idaho as an employee working temporarily out of the state. Montana has a sufficient interest in his case to justify application of this extraterritorial statute because claimant had been employed by the employer in this state for 4 years immediately before his injury, had established his residence in this state, and had only gone to work in Idaho after being "bumped" from his local position. When claimant previously had been "bumped" in similar fashion, he had worked outside the state only temporarily for a short period. At the time of his injury, he intended to return to this state as soon as he was able to regain his former position. McGaha v. Greyhound Lines, Inc., 226 M 345, 735 P2d 521, 44 St. Rep. 708 (1987).

Reciprocity — Certificate of Coverage: The judgment of the Workers' Compensation Court, based on a finding that a reciprocity agreement between states controlled the issues, was erroneous because no certificate was introduced to show that the Idaho Industrial Accident Board would exercise extraterritorial coverage while claimant was in Montana. Vigue v. Argonaut NW. Ins. Co., 175 M 425, 574 P2d 994 (1978).

39-71-403. Plan three exclusive for state agencies — election of plan by public corporations — financing of self-insurance fund — exemption for university system — definitions — rulemaking.

Compiler's Comments

2011 Amendment: Chapter 167 inserted (1)(b)(iv) relating to state agency premiums and the reduction of an appropriation. Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

2009 Amendment: Chapter 17 inserted (1)(b) authorizing the department of administration to manage workers' compensation insurance coverage for all state agencies; in (5) substituted

"For the purposes of subsection (1)(b), the judicial branch or the legislative branch may choose not to have the department of administration manage its workers' compensation policy" for "The provisions of subsection (1) do not apply to the Montana university system"; inserted (6) allowing the department of administration to adopt rules to implement workers' compensation insurance coverage for state agencies; in (7) in introductory clause after "As used in" substituted "this section, the following definitions apply" for "subsections (2) through (4)" and inserted (7)(b) defining state agency; and made minor changes in style. Amendment effective July 1, 2009.

2005 Amendment: Chapter 416 in (1) in third sentence near beginning after "The agency shall" deleted "make appropriation of and"; and in (3)(a) in first sentence near middle after "benefits provided for in" and in second sentence near middle after "claims covered by" deleted "chapter 72 and". Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

2001 Amendments — Composite Section: Chapter 29 in (3)(b)(i) in second sentence after "exceeding" substituted "0.18% of the total assessed value of taxable property, determined as provided in 15-8-111" for "3% of the taxable valuation"; in (3)(b)(iv) at beginning of second sentence after "Subject to the" substituted "total assessed value" for "3% of taxable valuation"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 574 in (3)(b)(i) in fourth sentence after "limitation" inserted "including 15-10-420". Amendment effective July 1, 2001.

Saving Clause: Section 33, Ch. 29, L. 2001, was a saving clause.

Applicability: Section 35, Ch. 29, L. 2001, provided: "(1) [This act] applies to the authorization and issuance of bonds occurring on or after July 1, 2001.

(2) Debt limits established under [this act] do not apply to bonds authorized before July 1, 2001, regardless of when the bonds are issued."

1999 Amendment: Chapter 560 at beginning of (1) inserted exception clause; inserted (5) exempting Montana university system from subsection (1); inserted (6) defining public corporation; and made minor changes in style. Amendment effective July 1, 2000.

Preamble: The preamble attached to Ch. 560, L. 1999, provided: "WHEREAS, throughout the 1990s, the Montana Legislature has directed the Montana University System to act more like a business; and

WHEREAS, during that time, the Legislature has continuously stressed the need to improve the quality of the University System; and

WHEREAS, the Legislature has urged the University System to take all possible steps to control costs and to utilize savings to improve the system's quality for student customers and to guarantee access for qualified Montana students; and

WHEREAS, the Board of Regents has identified the injection of competition into the University System's workers' compensation coverage as a positive step in controlling costs and in continuing the Board of Regents' efforts to operate as a public business."

1989 Amendments: Chapter 613 in (1), in first sentence, inserted reference to "state fund" and in third sentence substituted "state fund" for "state compensation insurance fund"; in (2), in first sentence, substituted "state fund" for "state insurance fund"; and made minor changes in phraseology. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

Chapter 665 in first sentence of (2), after "plan No. 1", deleted "employer", after "plan No. 2" deleted "insurer", and after "plan No. 3" deleted "state insurance fund"; at end of second sentence of (2) inserted "or issue bonds or notes pursuant to subsection (3)(b)"; at end of (3)(a) inserted "including debt service on any bonds and notes issued pursuant to subsection (3)(b)"; inserted (3)(b) relating to the sale of bonds and notes to establish a self-insurance workers' compensation fund; in (4) substituted reference to subsection (3)(a) for reference to subsection (3) and in middle inserted "or the joint board created by two or more public corporations as provided in subsection (3)(b)(iii)"; and made minor changes in phraseology. Amendment effective May 12, 1989.

1987 Amendment: In (4) changed "subsection (2)" to "subsection (3)".

1981 Amendment: Substituted "state compensation insurance fund" for "accident or administration fund, as the case may be" in (1).

Administrative Rules

ARM 24.29.608 Election to be bound by compensation plan No. 1 — eligibility.

Case Notes

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Exclusive as to Cities: As to a private employer, such as a contractor and his truck driver, the Workmen's Compensation Act (now Workers' Compensation Act) is contractual in character and became binding on them at their election but not otherwise. As to the city and its employees, the Act is exclusive, compulsory, and obligatory. Sullivan v. Butte, 117 M 215, 157 P2d 479 (1945).

Compensation plan No. 3 is, as to a city, exclusive, compulsory, and obligatory upon both employer and employee. Butte v. Indus. Accident Bd., 52 M 75, 156 P 130 (1916).

National Forest Service Not a Public Corporation: The national forest service is not a public corporation within the meaning of the Workmen's Compensation Act (now Workers' Compensation Act) and is not covered by this section, providing that where a public corporation is the employer, or any contractor doing contract work for such corporation, the provisions of compensation plan No. 3 shall be exclusive and compulsory upon employer and employee. State ex rel. Loney v. Indus. Accident Bd., 87 M 191, 286 P 408 (1930).

Attorney General's Opinions

Joint Solid Waste Management District as Political Subdivision — No Authority to Issue Bonds for Workers' Compensation Reserve Fund: Because a joint solid waste management district has been vested with broad plenary powers that may be exercised independent of a city or county governing body, a joint district must be considered a political subdivision within the meaning of 2-9-211. However, a joint solid waste management district or similar political subdivision does not have specific or express authority under this section to participate in workers' compensation plan No. 1 or to issue bonds to establish a workers' compensation self-insurance fund. The bonding authority in 2-9-211 may not be used as a basis for issuance of bonds for the establishment of a reserve fund to guarantee payment of workers' compensation claims. 45 A.G. Op. 22 (1994).

39-71-405. Liability of employer who contracts work out.

Case Notes

Independent Contractor's Contractual Rather Than Statutory Duty to Comply With Workers' Compensation Act — Trigger of Prime Contractor's Obligation to Provide Coverage: McClure was injured while working for a tribal-owned business, Smith Enterprises, on the Flathead Indian Reservation. Smith Enterprises was working as an independent contractor for Blaze Construction. Blaze's contract with the BIA required Blaze to ensure that all operations performed under the contract were covered by workers' compensation. Smith Enterprises did not obtain coverage, and McClure argued that because his employer had not complied with the requirements of the Workers' Compensation Act, then under this section Blaze was liable for providing workers' compensation benefits. Blaze argued that because Smith Enterprises was a tribal-owned business performing work on a reservation, Smith Enterprises had no obligation to comply with the Act and that therefore its failure to do so did not trigger any duty on Blaze's part under the statute to provide benefits to McClure. The Supreme Court held that although Smith Enterprises did not have a statutory obligation to comply with the Act, it did have a contractual obligation to comply and Blaze's failure to ensure that Smith Enterprises complied with its contractual obligation did trigger Blaze's duty to provide workers' compensation benefits to McClure. McClure v. St. Comp. Ins. Fund, 272 M 94, 899 P2d 1093, 52 St. Rep. 685 (1995).

Survival of Motion for Judgment for Failure to State Claim — Set of Facts Under Which Recovery Possible: All that needs to be shown to survive a motion for judgment for failure to state a claim is that there is a set of facts under which a claimant could recover. Thus, in this case, reversal of the Workers' Compensation Court's dismissal of a claimant's petition for failure to state a claim was proper because under a set of facts yet to be adduced in the court, claimant might be able to recover under the petition. Glaude v. St. Comp. Ins. Fund, 271 M 136, 894 P2d 940, 52 St. Rep. 367 (1995).

General Contractor Not Required to Provide Benefits for Independent Subcontractor: A subcontractor was injured on the job and claimed workers' compensation benefits as an employee of the general contractor. The Supreme Court held that to determine employee status, a four-part test had to be applied to determine whether the general contractor had sufficient right of control to render the subcontractor an employee. The court applied the test of exercise of control, method of payment, furnishing of equipment, and right to fire. The court found that the subcontractor was not an employee. The court held that the law required only that the general contractor provide benefits for a nonindependent contractor. Walling v. Hardy Constr., 247 M 441, 807 P2d 1335, 48 St. Rep. 250 (1991).

Cement Contractor Not Subcontractor — No Contractual Relationship: A cement contractor was hired to do excavation work for certain property owners and suggested that another contractor contact the owners concerning other work needed on the project. The second contractor was hired, and some of the cement contractor's work was done at the direction of the second contractor. An employee of the cement contractor was injured on the job, and when he learned that the cement contractor was without coverage, he sought compensation from the second contractor's insurer on the theory that the cement contractor was an uninsured subcontractor. The Supreme Court held that there was no contractual relationship between the two contractors. Both had been hired directly by the owners, and the second contractor had no authority to fire the cement contractor. Therefore, the second contractor's insurer had no duty towards the injured employee. Andrews v. St. Farm Fire & Cas. Co., 241 M 203, 786 P2d 18, 47 St. Rep. 203 (1990).

No Workers' Compensation Act Limitation on Contractor Liability to Compensate Employee of Uninsured Subcontractor: When a general contractor is compelled, pursuant to this section, to pay workers' compensation benefits to an employee of an uninsured subcontractor, the general contractor's liability is not limited by 39-71-411 to compensation under the Workers' Compensation Act. Therefore, the Supreme Court held that the employee could maintain an action for negligence against the general contractor, despite the subcontractor's failure to provide workers' compensation coverage. Webb v. Mont. Masonry Constr. Co., 233 M 198, 761 P2d 343, 45 St. Rep. 1420 (1988).

Subsection (2) Interpretation — No Coverage for Indemnity by One Insurance Carrier Against Another: Subsection (2) of this section holds liable for benefits the employer of a nonindependent contractor engaged in work which is a part of or process in the business of the employer. The subsection essentially grants workers' compensation coverage to a nonindependent contractor employee in the same manner as if there were no intervening nonindependent contractor, but it was not intended to address situations in which the contractor is sufficiently independent to carry its own workers' compensation insurance. Further, the subsection does not cover a claim for indemnity by one insurance carrier against another. St. Comp. Ins. Fund v. Castle Mtn. Corp., 227 M 236, 739 P2d 461, 44 St. Rep. 1045 (1987), distinguishing Carlson v. Cain, 204 M 311, 664 P2d 913, 40 St. Rep. 865 (1983).

Insurer Liable to Noncovered Subcontractor Entitled to Subrogation: Claimant was injured while delivering newspapers for her fiance, who had contracted with the Billings Gazette to deliver its newspaper. The Gazette's insurer, Hartford Accident and Indemnity Company, became liable under 39-71-405 when it was determined that the fiance failed to provide workers' compensation coverage for his employee, the claimant. When Hartford denied the compensation claim, claimant settled with a third party suspected of causing the automobile accident, for a sum much less than might have been expected from a trial and judgment. After settlement, Hartford claimed subrogation against the amount received in settlement. The Workers' Compensation Court awarded benefits to claimant, and the Supreme Court affirmed. On remand to the lower court to determine costs and attorney fees, the Workers' Compensation Court held that Hartford was entitled to the proceeds of subrogation under 39-71-414. The Supreme Court affirmed on the basis that a claimant is bound by all provisions of the Workers' Compensation Act which provide for subrogation. Carlson v. Cain, 216 M 129, 700 P2d 607, 42 St. Rep. 695 (1985).

Trucker's Status as Independent Contractor Affirmed — Ability to Terminate Contract: The plaintiff owner of a semitrailer truck who contracted with the defendant to haul the defendant's hay to another ranch was injured while unloading the hay. The plaintiff appealed the findings of the Workers' Compensation Court that he was an independent contractor and not entitled to workers' compensation. The Supreme Court applied the four-part test used in Sharp v. Hoerner Waldorf Corp., 178 M 419, 584 P2d 1298 (1978), to determine the issue of control over the plaintiff's trucking business and held, inter alia, that inasmuch as the plaintiff's employment could not be terminated in the middle of hauling a load of hay, the employer did not have complete control over the employee and the plaintiff's relationship with the defendant was that of an independent contractor. Solheim v. Tom Davis Ranch, 208 M 265, 677 P2d 1034, 41 St. Rep. 326 (1984), overruled on other grounds in Haag v. Mont. Schools Group Ins. Authority, 274 M 109, 906 P2d 693, 52 St. Rep. 1146 (1995).

Fiancee's Expectancy — Gratuitous Employment Precluded: Cain had a contract with the Billings Gazette to deliver papers to outlying areas. He met claimant, and she moved in with him. They later became engaged. Cain furnished claimant with room, board, and the use of an automobile. Claimant began delivering papers for Cain without compensation although he normally paid others $30 a day for the same work. Claimant was injured in an auto accident while delivering papers. Claimant was awarded workers' compensation. Both Cain and the Gazette challenged the finding that claimant was Cain's employee and asserted that even if she was, she fell within the exemption from coverage of 39-71-401(2)(f). The Supreme Court found that though there was no express agreement for compensation, claimant worked virtually full-time for Cain. She expected to marry Cain and that her participation in the business would provide for her future security. The court found sufficient evidence in the record to establish a contract for hire. Carlson v. Hartford Accident & Indem. Co., 204 M 311, 664 P2d 913, 40 St. Rep. 865 (1983).

Test for Independent Contractor or Employee:

In Montana the "control test", under which the right to control details of the individual's work is decisive, may be used to determine whether employee status exists and also to determine who the employer is. The four factors to be considered under the "control test" are: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. Employment status can be established on the strength of any one of the factors. Carlson v. Hartford Accident & Indem. Co., 204 M 311, 664 P2d 913, 40 St. Rep. 865 (1983).

This section provides a two-part test, both parts of which must be met before a person can be found to be an independent contractor. The section also reiterates the basic test in Montana, namely the right of control over the person doing the work involved. The court will consider four factors when attempting to determine the issue of right of control. Those factors are: (1) direct evidence of right or exercise of control, (2) method of payment, (3) furnishing of equipment, and (4) right to fire. Independent contractorship is established usually only by a convincing accumulation of these and other tests, while employment can be proved on the strength of one of the four factors. Sharp v. Aetna Cas. & Sur. Co., 178 M 419, 584 P2d 1298, 35 St. Rep. 1430 (1978).

Indemnification for Amount of Settlement Under Specific Contract Provisions: When, under the terms of a contract between two interstate trucking firms, the appellant agreed to provide workers' compensation coverage and to save the appellee's carrier harmless from any liability arising out of the relationship between the appellant and his employees, the appellee's carrier was entitled to be indemnified for an amount paid in settlement of a workers' compensation claim. Indus. Indem. Co. v. McIntosh, 185 M 158, 604 P2d 1233, 37 St. Rep. 14 (1980).

Independent Contractor Status Supported by Substantial Evidence: The trial court's finding that a general contractor did not lose his independent contractor status when the defendants began making direct payments to the contractor's employees and subcontractors in order to keep them from walking off the job was supported by substantial evidence. Kosmerl v. Barbour, 180 M 208, 589 P2d 1017, 36 St. Rep. 210 (1979).

Test for Independent Contractor When No Written Contract: When there is no written contract between the parties, the court will look to the facts alone to determine whether the employer has the right to control the work of the person whose status is in question. Sharp v. Aetna Cas. & Sur. Co., 178 M 419, 584 P2d 1298, 35 St. Rep. 1430 (1978).

Independent Contractor's Coverage: Bank which required independent contractor to provide workers' compensation coverage against the claims of employees of a subcontractor was immune from suit by employee of subcontractor to recover damages suffered, allegedly due to bank's negligence. State ex rel. First Nat'l Bank & Trust Co. v. District Court, 161 M 127, 505 P2d 408 (1973).

Common-Law Remedy: Where independent contractor defense is not applicable to general employer, general employer is substituted for immediate employer of claimant and is liable under Workmen's Compensation Act (now Workers' Compensation Act), so that claimant cannot maintain common-law personal injury action against general employer. Campbell v. Shell Oil Co., 329 F. Supp. 846 (D.C. Mont. 1971).

Lumberman — Not an Employee: A lumberman who contracted with lumber company to cut, log, and mill certain timber was not an employee of the lumber company. Kimball v. Indus. Accident Bd., 138 M 445, 357 P2d 688 (1960).

Independent Contractor:

In an action to recover an assessment made on compensation paid to truck drivers whom employer claimed were the employees of an independent contractor, it was proper to give an instruction that the Board (now Department of Labor and Industry) was not a party to the contract with the independent contractor and was not bound to recognize the contracting parties but could assert its rights against "party employing the laborer". Jeffries Coal Co. v. Indus. Accident Bd., 131 M 511, 312 P2d 128 (1957).

An "independent contractor", excluded from the benefits of the Workmen's Compensation Act (now Workers' Compensation Act) by this section, is one employed to perform work on condition that he is free from the control of the employer as respects the manner in which the details are to be executed. Nelson v. Stukey, 89 M 277, 300 P 287, 78 ALR 483 (1931).

39-71-406. Deduction from wages of any part of premium a misdemeanor.

Compiler's Comments

1997 Amendment: (Version effective on occurrence of contingency) Chapter 276 deleted second sentence that read: "The workers' compensation old fund liability tax under 39-71-2503 is not a premium for the purpose of this section"; and made minor changes in style. Amendment effective on the date that the budget director certifies that the old fund liability tax is terminated pursuant to 39-71-2505 (now repealed).

Preamble: The preamble attached to Ch. 276, L. 1997, provided: "WHEREAS, it is the intent of the state compensation insurance fund to assist all Montanans by reducing the unfunded liability of the old fund, terminating the old fund liability tax when the old fund is adequately funded, which is currently estimated to occur as early as June 30, 1999, providing for the payment of dividends to policyholders, and maintaining a viable state compensation insurance fund; and

WHEREAS, there was an unfunded liability of $355 million as of June 30, 1996, for claims for workers' compensation injuries occurring before July 1, 1990, in the old fund, which included $129 million in outstanding bond debt; and

WHEREAS, the old fund is funded with the old fund liability tax paid by employers, employees, and self-employed persons, generating as much as $50 million each year; and

WHEREAS, the surplus of $231 [sic] in the new fund as of June 30, 1996, allowed the Board of Directors of the State Fund to declare a dividend of up to $109 million to retire the outstanding bond debt in the old fund; and

WHEREAS, the unfunded liability in the old fund will be an estimated $200 million deficit by June 30, 1997, and the surplus or the excess of assets above the reserves that are set aside to meet the claim liability in the new fund will be an estimated $127 million by June 30, 1997; and

WHEREAS, current state law requires the State Fund to use dividends to be applied first to old fund outstanding liability rather than paying dividends directly to policyholders, the State Fund shall, no later than June 30, 1998, transfer $63.8 million to the old fund account to pay old fund claims to allow direct payment of dividends to policyholders; and

WHEREAS, the $20 million appropriation received by the State Fund from the general fund during the June 1989 Special Session partially addressed the unfunded liability issue existing at that time in the old fund and canceled a planned 22% rate increase; and

WHEREAS, the State Fund now agrees to repay the $20 million appropriation to the general fund by June 30, 1999, in lieu of transferring additional funds to the old fund account to provide the general fund with additional revenue and to remove any perception that the State Fund remains a burden on the general fund; and

WHEREAS, because decreases in premium rates totaled 35% in fiscal years 1996 and 1997 and legislative changes in benefit levels have resulted in the return of private carriers, the 15% limitation on administration expenses as a percent of the prior year's premium will significantly impact the State Fund's ability to provide service to policyholders and their injured workers; and

WHEREAS, the State Fund seeks to improve the level of services provided to customers without increasing existing State Fund staffing levels by working with private sector-licensed insurance producers; and

WHEREAS, in response to Haag v. Montana Schools Group Insurance Authority, 274 M 109, 906 P.2d 693 (1995), in which the Montana Supreme Court ruled that an insurer's failure to comply with the time limitations for accepting or denying a workers' compensation claim constituted acceptance of the claim, current law needs to be clarified to provide that the failure to comply with the time limitations does not constitute acceptance of the claim."

Severability: Section 32, Ch. 276, L. 1997, was a severability clause.

Delayed Effective Date — Contingency: Section 34(3), Ch. 276, L. 1997, provided: "[Sections 8 [39-71-406], 19, 22, 24, and 31(2)] are effective on the date that the budget director certifies that the old fund liability tax is terminated pursuant to [section 28] [39-71-2505, now repealed]." On September 16, 1998, the budget director certified that the old fund liability tax terminates effective January 1, 1999.

1993 Amendment: Chapter 637 inserted second sentence providing that old fund liability tax is not a premium; and made minor changes in style. Amendment effective May 13, 1993.

Severability: Section 10, Ch. 637, L. 1993, was a severability clause.

Retroactive Applicability: Section 14, Ch. 637, L. 1993, provided: "The workers' compensation old fund liability tax imposed on sole proprietors, subchapter S. corporation shareholders, partners of partnerships, and members and managers of limited liability companies applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1992."

1985 Amendment: At the end of the section, deleted "except that nothing in this section shall be construed as prohibiting contributions by employees to a hospital fund, as elsewhere in this chapter provided".

39-71-407. Liability of insurers — limitations.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 84, L. 2023. Amendment effective March 23, 2023.

2021 Amendments — Composite Section — Code Commissioner Correction: Chapter 555 inserted (5)(b) relating to drug tests; and made minor changes in style. Amendment effective July 1, 2021.

Chapter 576 in (6)(a) substituted reference to 16-12-502 for reference to 50-46-302; and in (6)(b), (6)(c), and (6)(d) substituted reference to 16-12-102 for reference to 50-46-302. Amendment effective January 1, 2022.

The Code Commissioner removed brackets around references to 16-12-102 that were erroneously included.

Severability: Section 113, Ch. 576, L. 2021, was a severability clause.

2019 Amendment: Chapter 158 in (3)(a) at beginning inserted exception clause; inserted (3)(c) concerning presumptive occupational disease; in (10) at beginning inserted exception clause; inserted (11)(b) concerning presumptive occupational disease; in (12)(b) inserted last sentence distinguishing occupational diseases from presumptive occupational diseases; in (13), (14)(a), and (14)(b) after references to occupational disease inserted reference to presumptive occupational disease; and made minor changes in style. Amendment effective July 1, 2019.

Effective Date — Applicability: Section 8, Ch. 158, L. 2019, provided: "[This act] is effective July 1, 2019, and applies to presumptive occupational diseases diagnosed on or after July 1, 2019."

2011 Amendments — Composite Section — Code Commissioner Instruction: Chapter 167 inserted (2) relating to circumstances that do not constitute course of employment; in (3)(a) in lead-in after "39-71-119" inserted "only"; in (3)(a)(ii) after "injury" inserted "has occurred and"; in (11) at end substituted "if the employee is diagnosed with a compensable occupational disease" for "with an occupational disease that arises out of or is contracted in the course and scope of employment"; in (12) substituted "An insurer is liable for an occupational disease only if the occupational disease:

(a) is established by objective medical findings; and

(b) arises out of or is contracted in the course and scope of employment. An occupational disease is considered to arise out of or be contracted in the course and scope of employment if the events" for "Occupational diseases are considered to arise out of employment or be contracted in the course and scope of employment if:

(a) the occupational disease is established by objective medical findings; and

(b) the events"; in (14)(a) substituted "health care provider" for "treating physician or medical panel"; and made minor changes in style. Amendment effective April 12, 2011.

Chapter 315 in (5) at beginning inserted exception clause, and at end deleted "However, if the employer had knowledge of and failed to attempt to stop the employee's use of alcohol or drugs, this subsection does not apply"; inserted (6) relating to use of marijuana; inserted (7) relating to use of alcohol or drugs not prescribed by a physician; and made minor changes in style. Amendment effective May 6, 2011.

Pursuant to sec. 38(1), Ch. 419, L. 2011, the Code Commissioner in (6)(a), (6)(b), (6)(c), (6)(d), and (7) substituted "use of marijuana for a debilitating medical condition" for "medical use of marijuana".

Pursuant to sec. 38(2), Ch. 419, L. 2011, the Code Commissioner in (6)(a), (6)(b), (6)(c), and (6)(d) substituted "50-46-302" for "50-46-102".

Preamble: The preamble attached to Ch. 315, L. 2011, provided: "WHEREAS, employers who are concerned about public and workplace safety have increasingly faced issues associated with employees and potential employees who are approved for or associated with the medical use of marijuana; and

WHEREAS, clarifications are necessary to affirm employers' rights in the hiring and termination process, drug testing, and other issues related to the medical use of marijuana in an employee's course and scope of employment."

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

2005 Amendments — Composite Section: Chapter 103 inserted (5) concerning liability dispute without an injury dispute; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 416 in (1) at beginning inserted "For workers' compensation injuries" and near middle after "of an employer" inserted reference to plans 1, 2, and 3; inserted (8) through (12) regarding liability for occupational disease; and made minor changes in style. Amendment effective July 1, 2005.

Effective Date — Applicability: Section 13, Ch. 103, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005."

Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

2003 Amendment: Chapter 435 inserted (3)(b) concerning payments that are not wages but designated as an incentive; and made minor changes in style. Amendment effective April 21, 2003.

Effective Date — Applicability: Section 2, Ch. 435, L. 2003, provided: "[This act] is effective on passage and approval [approved April 21, 2003] and applies to claims for injuries that occur on or after [the effective date of this act]."

1995 Amendment: Chapter 243 in (2)(a), after "39-71-119", inserted "if the injury is established by objective medical findings and"; inserted (6) requiring that entitlement be established by objective medical findings; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

1993 Amendment: Chapter 619 in (4), in first sentence before "cause", substituted "major contributing" for "sole and exclusive" and after "cause of the" substituted "accident" for "injury or death"; inserted (6) defining major contributing cause; and made minor changes in style. Amendment effective July 1, 1993.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

1989 Amendment: Inserted (5) relating to a nonwork-related injury.

1987 Amendment: Inserted (2) through (4) (see 1987 Session Law for text).

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

General 394
Injury in Course of Employment 397
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Going and Coming Rule 400

GENERAL

Multiple Insurers and Single Employer — Last Injurious Exposure Inquiry Irrelevant: An employee developed carpal tunnel syndrome (CTS) while working for a lumber company. The lumber company's insurer accepted liability for the CTS as an occupational disease. The employee changed positions within the same lumber company and her CTS symptoms dissipated. She changed positions again and her CTS symptoms reemerged. Meanwhile, the lumber company switched to a different insurer. When the employee sought medical treatment for the reemergence of her CTS, both insurers denied liability. The Workers' Compensation Court granted summary judgment in favor of the first insurer, holding that the second insurer was liable under 39-71-407(13). On appeal, the Supreme Court reversed, finding that because there were multiple insurers and only one employer, 39-71-407(14) controlled and the decision in Abfalder v. Nationwide Mut. Fire Ins. Co., 2003 MT 180, 316 Mont. 415, 75 P.3d 1246, was directly applicable. The Supreme Court noted that the worsening or aggravation of an underlying condition is insufficient to shift liability in a single employer scenario. The only way the originally liable insurer can avoid liability is by demonstrating that the injured employee is suffering from a new and different occupational disease. Mont. St. Fund v. Liberty NW. Ins. Corp., 2018 MT 188, 392 Mont. 221, 425 P.3d 646.

Objective Medical Findings Required to Establish Injury and Causation: The claimant contended that evidence regarding causation or aggravation of a preexisting condition can be established through factors other than medical expertise or opinion and that the Workers' Compensation Court erred by relying solely on medical opinions. The Supreme Court upheld the use of medical opinions and determined that, pursuant to workers' compensation laws in effect since July 1, 1995, a claimant is required to establish injury and causation through objective medical findings. Ford v. Sentry Cas. Co., 2012 MT 156, 365 Mont. 405, 282 P.3d 687.

Standard of Proof — More Probable Than Not: The claimant contended that the Workers' Compensation Court erred by using the term "reasonable degree of medical certainly" instead of the "more probable than not" burden of proof when analyzing his claim for benefits. The Supreme Court determined that regardless of "reasonable degree" reference, the Worker's Compensation Court ultimately reached the correct result under the "more probable than not" standard. The standard of proof in determining whether there was an accident in the course of employment, an injury or an aggravation of a preexisting condition, and a causal connection between the accident and the injury or aggravation is "more probable than not". Ford v. Sentry Cas. Co., 2012 MT 156, 365 Mont. 405, 282 P.3d 687.

Occupational Disease — Employment Leading Cause of Advanced Arthritis When Employee Had Preexisting Condition: An employee who had a family history of arthritis sought workers' compensation benefits, claiming his arthritis was aggravated by his employment. As a part of his occupation as a truck driver, the employee had to manually unscrew 4-inch brass caps covering valves and chain up his truck with a set of triple chains in the winter. After the Montana State Fund denied liability, the employee filed a petition for hearing with the Workers' Compensation Court, which concluded that the employee suffered from a compensable occupational disease arising out of and in the course and scope of his employment as a truck driver. The State Fund appealed. The Supreme Court agreed that the employee's employment was the major contributing cause of the occupational disease even though the employee had a genetic predisposition to arthritis and had suffered from mild arthritis prior to his employment. Mont. St. Fund v. Grande, 2012 MT 67, 364 Mont. 333, 274 P.3d 728.

No Error by Workers' Compensation Court — Award of Benefits From Uninsured Employers' Fund Supported by Evidence: In 2002, Hopkins began working for Great Bear Adventures, a wildlife park where he would perform maintenance duties and feed the bears. In 2007, Hopkins traveled to the park at the request of Kilpatrick, the park's owner. Hopkins smoked marijuana on the way to the park. Once at the park, Kilpatrick asked Hopkins to work on a gate, but Hopkins was subsequently injured while feeding bears in the park. The Workers' Compensation Court awarded Hopkins workers' compensation benefits from the Uninsured Employers' Fund. Kilpatrick appealed. The Supreme Court affirmed, holding that Hopkins was employed by Kilpatrick at the time of the injury; that feeding the bears was one of Hopkins' regular employment duties even though testimony conflicted about whether he was asked to feed the bears on the day of the injury; that marijuana was not the major contributing factor of Hopkins' injuries, in part because there was no evidence about the level of impairment; and that Hopkins' services were not in exchange for aid or sustenance. Hopkins v. Uninsured Employers' Fund, 2011 MT 49, 359 Mont. 381, 251 P.3d 118.

Liability of Two or More Employers for Occupational Disease — Potentially Causal Standard — Last Injurious Exposure — Worker's Burden of Proof: For purposes of determining the initial liability for an occupational disease when two or more employers are potentially liable, the last injurious exposure to the hazard of the occupational disease occurs during the last employment at which a claimant was exposed to working conditions of the same type and kind that gave rise to the occupational disease. The claimant is not required to prove the degree to which working conditions with each employer have actually caused the disease in order to attribute initial liability. Rather, when the occupational disease has not been previously diagnosed, the claimant must present objective medical evidence demonstrating that the claimant has an occupational disease and that working conditions during employment at which the last injurious exposure was alleged to occur were the type and kind of conditions that would have caused the occupational disease. Liberty NW. Ins. Corp. v. Mont. St. Fund, 2009 MT 386, 353 M 299, 219 P3d 1267 (2009), distinguishing Caekaert v. St. Comp. Mut. Ins. Fund, 268 M 105, 885 P2d 495 (1994), and Lanes v. Mont. St. Fund, 2008 MT 306, 346 M 10, 192 P3d 1145 (2008), and followed in Banco v. Liberty NW. Ins. Corp., 2012 MT 3, 363 Mont. 290, 268 P.3d 13.

Material Misunderstanding of Nature and Extent of Injury at Time of Settlement — Reopening of Settlement Agreement Warranted: Prior to execution of a settlement agreement regarding Harrison's injury incurred at Stillwater Mining Company, Harrison was diagnosed with early degenerative changes in his lumbar spine, but was told by the attending physicians that surgical intervention was not indicated at that time. Following treatment and maximum medical improvement, Harrison and Stillwater entered a settlement agreement under which medical rights were reserved. Harrison then went to work for a construction company and suffered an industrial injury. A more comprehensive diagnosis was made, and it was medically determined that corrective surgery was required. The contractor's insurer paid Harrison's medical benefits, including spinal surgery, under a reservation of rights. Harrison then petitioned the Workers' Compensation Court for a determination of whether Stillwater or the contractor was responsible for the claim. The court held that Stillwater was liable, and Stillwater appealed, but the Supreme Court affirmed. The fact that it was ultimately determined that surgery was necessary, coupled with the Workers' Compensation Court's conclusion that the operable condition stemmed from the earlier Stillwater injury, demonstrated that there was a material misunderstanding of the nature and extent of Harrison's condition at the time of settlement with Stillwater, warranting a reopening of the settlement agreement. The Workers' Compensation Court did not err in imposing liability for Harrison's medical costs and disability benefits on Stillwater. Harrison v. Liberty NW. Ins. Corp., 2008 MT 102, 342 M 326, 181 P3d 590 (2008). See also Caekaert v. St. Comp. Mut. Ins. Fund, 268 M 105, 885 P2d 495 (1994), and Liberty NW. Ins. Corp. v. Champion Int'l Corp., 285 M 76, 945 P2d 433 (1997).

Insurer at Risk During Claimant's Last Occupational Exposure Liable for Benefits: Murray suffered knee injuries in 1967 and 1974 that required removal of cartilage in both knees, but Murray remained active in both his jobs and vigorous recreational activities. In 1982, Murray was employed by MSE Technology Applications (MSE) and worked for MSE for the next 18½ years while continuing to have episodes of knee complications in connection with his recreational activities. MSE was insured by Indemnity Insurance Company (Indemnity) until 2000, when State Fund became the insurer. In late 2000, Murray's surgeon told Murray that working while standing on concrete or asphalt at MSE contributed to the need for Murray's knee replacement. Murray filed an occupational disease claim, and State Fund began paying benefits, but State Fund then petitioned the Workers' Compensation Court for a determination that Indemnity was liable for compensation. The court held that Murray's work at MSE significantly aggravated the preexisting knee condition and led to or accelerated Murray's need for surgery and that as the insurer at risk during Murray's last occupational exposure, State Fund was liable for paying benefits. On appeal, the Supreme Court affirmed. The Workers' Compensation Court properly relied on the surgeon's testimony, and there was substantial credible evidence that Murray's employment at MSE contributed to the knee condition. Absent evidence that Murray was aware of the connection between his knee problems and employment at MSE prior to filing the claim, State Fund was properly found to be the liable workers' compensation insurer. Mont. St. Fund v. Murray, 2005 MT 97, 326 M 516, 111 P3d 210 (2005).

Necessity for Objective Medical Findings to Prove Compensable Injury: For injuries occurring after the 1995 amendments to this section and the decision in Chaney v. U.S. Fidelity & Guar., 276 M 513, 917 P2d 912, 53 St. Rep. 499 (1996), the claimant must show through objective medical findings that an injury occurred. Matthews v. St. Comp. Ins. Fund, 1999 MT 225, 296 M 76, 985 P2d 741, 56 St. Rep. 888 (1999).

Right to Temporary Total Disability After Prior Claim of Total Disability — Estoppel Issues: A worker's claim that a 1988 back injury forced him to quit working and left him with no earning capacity could not be considered a claim that he was permanently totally disabled because he was merely describing his physical condition following the injury and he is not a medical professional capable of anticipating the duration of his disability from that injury. He later developed carpal tunnel syndrome and testified that he was able to work in spite of ongoing carpal tunnel syndrome symptoms. Thus, he was not estopped from claiming and receiving benefits for temporary total disability arising from a later case of carpal tunnel syndrome. Caekaert v. St. Comp. Mut. Ins. Fund, 268 M 105, 885 P2d 495, 51 St. Rep. 1202 (1994), followed, with regard to applicability of the last injurious exposure rule, in Liberty NW. Ins. Corp. v. Champion Int'l Corp., 285 M 76, 945 P2d 433, 54 St. Rep. 1051 (1997).

Worsening of Carpal Tunnel Syndrome After Payment for Operations: State Fund paid for early 1988 carpal tunnel surgical procedures but refused to pay for further late 1992 and early 1993 surgeries, claiming that a second injury occurred in the worker's independent poultry business not covered by State Fund. The Workers' Compensation Court erred when it agreed with State Fund. State Fund offered no substantial evidence that maximum healing had been reached or that a second event or exposures caused the necessity for the second set of surgeries. In addition, the medical testimony showed that the claimant suffered worsening symptoms caused by the originally occurring carpal tunnel syndrome. Caekaert v. St. Comp. Mut. Ins. Fund, 268 M 105, 885 P2d 495, 51 St. Rep. 1202 (1994), followed, with regard to applicability of the last injurious exposure rule, in Liberty NW. Ins. Corp. v. Champion Int'l Corp., 285 M 76, 945 P2d 433, 54 St. Rep. 1051 (1997), and distinguished by Mont. St. Fund v. Liberty NW. Ins. Corp., 2018 MT 188, 392 Mont. 221, 425 P.3d 646, determining that worsening or aggravation of symptoms is not a relevant consideration when the employer remains the same. See also Briney v. Pac. Employers Ins. Co., 283 M 346, 942 P2d 81, 54 St. Rep. 608 (1997), and Burglund v. Liberty Mut. Fire Ins. Co., 286 M 134, 950 P2d 1371, 54 St. Rep. 1339 (1997).

Temporary Abandonment of Course of Employment — Substantial Deviation From Employer's Business: The District Court erred in determining that claimant was injured during the course and scope of his employment when claimant had stopped to visit his family during a 5-day trip to haul a load of lumber and was injured in a car crash after 6 hours of drinking with his brother. The continuity of claimant's employment was severed by the 6-hour abandonment of the course of employment and remained severed until claimant returned to the point of deviation from the path of duty. Dale v. Trade Street, Inc., 258 M 349, 854 P2d 828, 50 St. Rep. 359 (1993).

INJURY IN COURSE OF EMPLOYMENT

Benefit Claim Involving Employee's Intoxication Wrongfully Denied — Employer Knowledge Exception Construed: Heth was involved in an auto accident while on the job. Heth was also intoxicated at the time of the accident. Heth filed for workers' compensation benefits, but State Fund denied the claim on grounds that Heth's intoxication precluded benefits. The Workers' Compensation Court determined that under the employer knowledge exception in this section, State Fund was liable for the claim. State Fund appealed, but the Supreme Court affirmed. Heth's father employed Heth in the family business and knew of Heth's drinking, but he failed to attempt to stop Heth's drinking because "it wouldn't do any good", and rather encouraged Heth to moderate the drinking and to not drink while dealing with customers. The exception language in 39-71-407(4) does not require that an employer have knowledge of alcohol or drug use immediately prior to the employee's accident. The evidence supported the factual findings of the Workers' Compensation Court, including its finding that Heth's drinking while working was regular or recurrent. Heth v. Mont. St. Fund, 2009 MT 149, 350 M 376, 208 P3d 394 (2009), distinguishing Van Vleet v. Mont. Ass'n of Counties, 2004 MT 367, 324 M 517, 103 P3d 544 (2004).

Aggravation of Unknown Preexisting Condition by Industrial Accident — Burden of Proof of Causality Satisfied — Attorney Fees, Costs, and Statutory Penalty Affirmed: Narum injured his hip in an industrial accident and filed a workers' compensation claim. Defendant insurer accepted liability and began paying benefits. Although Narum had never experienced hip pain prior to the accident, medical examination revealed the existence of a degenerative joint disease in the hip. The insurer's examining physician opined that the degenerative condition was aggravated by the accident and that the injury was not connected to the workers' compensation claim because it was more than likely a preexisting condition that was exacerbated by work. The insurer continued making payments until Narum was determined to have reached maximum medical improvement based on an 8% impairment. The parties then negotiated a settlement, which provided $25,000 and allowed Narum to reserve medical benefits because possible hip surgery was anticipated. Narum later underwent hip surgery, but the insurer refused any subsequent payments, so Narum filed a workers' compensation claim seeking medical and hospital benefits, attorney fees and costs, and a statutory penalty based on the insurer's refusal to pay benefits. The Workers' Compensation Court found that the insurer was bound by the settlement to pay medical and hospital costs and that Narum was entitled to attorney fees and costs and a statutory penalty award based on the insurer's unreasonable refusal to pay benefits. The insurer appealed, but the

Supreme Court affirmed on all issues. Narum met the burden of proof in this case by showing that the injury was established by objective medical findings and that it was more probable than not that the claimed injury aggravated a preexisting condition, causing the need for the hip surgery and for other treatment before and after the surgery. An award of attorney fees and costs was affirmed because the insurer denied liability for a claim that was later judged compensable, and the insurer's actions in denying liability were unreasonable in that the insurer originally agreed to pay for the hip surgery in the settlement and then denied liability and suddenly stopped paying benefits for treatment, without notice, after initially accepting liability for Narum's condition. Lastly, a statutory penalty was warranted based on the substantial credible evidence of unreasonableness. Narum v. Liberty NW. Ins. Corp., 2009 MT 127, 350 M 252, 206 P3d 964 (2009), distinguished in Stewart v. Liberty NW. Ins. Corp., 2013 MT 107, 370 Mont. 19, 299 P.3d 820. See also Best v. St. Comp. Ins. Fund, 276 M 302, 916 P2d 108 (1996).

Injury at Company Picnic in Course of Employment: Michalak was injured while riding a wave runner at the annual company picnic and was unable to return to work. The insurer denied Michalak's claim for benefits, but the Workers' Compensation Court applied the "course and scope" factors in Courser v. Darby School District, 214 M 13, 692 P2d 417 (1984), and held that because Michalak was injured within the course and scope of employment, the injury was compensable. The insurer appealed. The Courser factors for determining whether a person is performing prescribed duties include whether: (1) the activity was undertaken at the employer's request; (2) the employer, either directly or indirectly, compelled the employee's attendance at the activity; (3) the employer controlled or participated in the activity; and (4) both employer and employee mutually benefited from the activity. The Supreme Court noted that the Workers' Compensation Court correctly focused its analysis on the company picnic as the applicable activity, rather than Michalak's ride on the wave runner, to determine whether the injury occurred within the course and scope of employment. The court found substantial evidence that: (1) the employer compelled Michalak's attendance at the picnic; (2) the employer controlled and participated in the picnic; and (3) the picnic provided mutual benefit to the employer and its employees. The Workers' Compensation Court properly applied the Courser factors and did not err in concluding that Michalak was injured within the course and scope of employment, and that decision was affirmed. Michalak v. Liberty NW. Ins. Corp., 2008 MT 3, 341 M 63, 175 P3d 893 (2008).

Compensability of Injury Occurring During Employee's Break Period: BeVan was injured in an automobile accident during her 15-minute break period. The Workers' Compensation Court concluded that BeVan was injured during the course of employment and that the injury was therefore compensable. The insurer appealed, but the Supreme Court affirmed. The court applied the factors in Carrillo v. Liberty NW. Ins., 278 M 1, 922 P2d 1189 (1996), to determine whether an injury that occurred during an authorized break was compensable, including whether: (1) the employee was paid during the break; (2) the employment contract entitled the employee to the break; (3) restrictions limited where the employee could go during the break; and (4) the employee's activity constituted a substantial personal deviation. In this case, BeVan was paid during break periods, and the employer authorized and encouraged employees to take breaks. The employer set boundaries within which breaks could be taken and limited the duration of breaks, but did not require employees to remain on the premises. BeVan regularly left the premises on breaks, so leaving the premises on the day of the injury was not a deviation in BeVan's personal routine. The employer retained control over its employees' breaks, and even though BeVan left work to go home and care for her dog during the break, the accident nevertheless occurred during the course of employment and was compensable. BeVan v. Liberty NW. Ins. Corp., 2007 MT 357, 340 M 357, 174 P3d 518 (2007), distinguishing Strickland v. St. Comp. Mut. Ins. Fund, 273 M 254, 901 P2d 1391 (1995), with regard to applicability of the coming and going rule.

Drinking by Deputy at Law Enforcement Conference Within Scope of Employment — Death Compensable: Deputy Van Vleet was injured at a law enforcement conference after drinking in a hospitality room and then falling from a hotel balcony. He later died. The Workers' Compensation Count held that Van Vleet's intoxication did not bar a claim, but that because Van Vleet was acting outside the course and scope of employment at the time of the accident, Van Vleet's widow and child were not entitled to workers' compensation death benefits. The Supreme Court agreed that this section did not bar the claim because Van Vleet was intoxicated, but the court disagreed as to whether Van Vleet was acting outside the course and scope of employment at the time of the accident. The burden of proving that an employee deviated from the scope of employment is on the employer or workers' compensation insurer. In this case, any drinking that occurred in the hospitality room with colleagues was not a deviation from the course or scope of Van Vleet's employment. Rather, the drinking was a continuation of the same activity, in the same manner, in the same place, for the same purposes, and with the same sanctions of the employer, up until the time of Van Vleet's fall. It was foreseeable to the employer that drinking would occur in the hospitality room and at other times during the conference. Thus, dismissal of the claim was error, and the Supreme Court reversed for entry of an award of death benefits. Van Vleet v. Mont. Ass'n of Counties, 2004 MT 367, 324 M 517, 103 P3d 544 (2004). See also Gordon v. H. C. Smith Constr. Co., 188 M 166, 612 P2d 668 (1980).

Coverage for Injury Incurred During Travel to Employer-Authorized Home Employment: Bentz was employed by a printing company. Under the terms of employment, Bentz was required to come into the office weekly to perform several job duties but allowed to work at home on a straight commission basis. While returning from the office to work at home, Bentz stopped to check his mail, slipped on the ice, and injured his hip. The employer's insurer, Liberty Northwest, denied any liability for the injury, claiming that it occurred during travel that was not within the scope of Bentz's employment. The Workers' Compensation Court concluded that the injury was work-related and held Liberty Northwest liable for Bentz's costs. Liberty Northwest appealed, but the Supreme Court affirmed. To be compensable generally, an injury must occur within the course and scope of employment, and travel to work and coming home from work is not considered to be within the scope of employment. However, Bentz's travel from his home office to the employer's office was required under the terms of Bentz's employment agreement and thus was covered under subsection (3) of this section because the injury occurred during travel between two jobsites. Bentz v. Liberty NW., 2002 MT 221, 311 M 361, 57 P3d 832 (2002), distinguishing St. Comp. Mut. Ins. Fund v. James, 257 M 348, 849 P2d 187 (1993).

Coffee Break — Employee Injuries Within Scope of Employment: Blue Cross Blue Shield (BCBS) provides its employees with a 15-minute break both morning and afternoon and allows employees to leave the building for walks or to shop during these breaks. An employee, who sustained injuries when struck by an automobile while walking across a street to purchase a coworker's gift during her afternoon break, filed for workers' compensation benefits, claiming that her injuries occurred during employment. In denying benefits, the Workers' Compensation Court concluded that the injuries suffered by the employee while traveling away from her employer did not arise out of and in the course of employment. On appeal, the Supreme Court reversed, ruling that because the employee usually walked during breaks that were provided and paid for by BCBS and would have been on a normal break if not injured, the employee's activity during the break did not constitute a substantial personal deviation from employment. Carrillo v. Liberty NW. Ins., 278 M 1, 922 P2d 1189, 53 St. Rep. 829 (1996).

Animosity Underlying Employer's Policies — Injury Reasonably Connected With Employment: Pinyerd was assaulted by another employee in the sales yard of a car dealership. Relying on Penny v. Anaconda Co., 194 M 409, 632 P2d 1114 (1981), the Workers' Compensation Court found that the assault resulted from personal animosity unrelated to employment and that Pinyerd's injury was not compensable. The Supreme Court held that the injury occurred in the course of employment, having occurred on the employer's premises during work hours, when both employees were supposed to be performing work duties. The fact that employees sometimes quarrel and fight while at work does not make a resulting injury one that arises out of employment. There must be some reasonable connection between the injury suffered and the employment or the conditions under which it is pursued. In determining whether the injury arose out of employment, the court found that the intensely competitive atmosphere of the workplace, pitting employees against each other for sales quotas and commissions without any framework within which to compete, created daily friction among the sales staff, including resentment of Pinyerd's success in sales, that resulted in a substantial cause for animosity and the subsequent assault. The reasonable connection between injury and employment having been established, Pinyerd's injury was held to be compensable. Pinyerd v. St. Comp. Ins. Fund, 271 M 115, 894 P2d 932, 52 St. Rep. 332 (1995).

Determination of Work-Related Injury — Controlling Factors: Controlling factors relied on to determine a work-related injury include whether: (1) the activity was undertaken at the employer's request; (2) the employer, either directly or indirectly, compelled the employee's attendance at the activity; (3) the employer controlled or participated in the activity; and (4) both employer and employee mutually benefited from the activity. The presence or absence of each factor may or may not be determinative, and the significance of each factor must be considered in the totality of all attendant circumstances. Barthule v. Karman, 268 M 477, 886 P2d 971, 51 St. Rep. 1423 (1994), affirming Courser v. Darby School District, 214 M 13, 692 P2d 417 (1984), and Dale v. Trade Street, Inc., 258 M 349, 854 P2d 828 (1993).

Inconsistent Testimony Regarding Injury — Burden of Proof Not Met: The Workers' Compensation Court correctly held that Rose failed to meet the burden of proof by a preponderance of the evidence that he was entitled to benefits under this section. That holding was based on inconsistencies in Rose's testimony regarding: (1) a preexisting medical condition; (2) fabrications about how a previous injury occurred; (3) his denial on hospital forms that the present problem was work-related; and (4) the fact that the employer was not given notice of any disability or injury until after Rose was laid off and the possible sale of his business fell through. Rose v. Burdick's Locksmith, 265 M 178, 875 P2d 337, 51 St. Rep. 447 (1994).

Workers' Compensation Not Exclusive Remedy for Sexual Harassment on the Job: Sexual harassment on the job is an intentional act not arising from an accident, and the Workers' Compensation Act is not an exclusive remedy for a claim for damages for emotional pain and suffering. Vainio v. Brookshire, 258 M 273, 852 P2d 596, 50 St. Rep. 529 (1993).

INJURY NOT IN COURSE OF EMPLOYMENT

Substantial Credible Evidence of Maximum Healing Prior to Nonwork-Related Injury — Claim Denied: Paterson sought temporary total disability benefits, claiming that a nonwork-related injury had exacerbated a prior work-related injury and was thus compensable. To determine whether maximum healing of the work-related injury had occurred, the insurer presented a hypothetical scenario to Paterson's physician, consisting of three components that the insurer intended to establish through its witnesses in subsequent testimony. Based on the hypothetical, the doctor agreed that Paterson did reach maximum healing prior to the nonwork-related injury. Paterson then paraphrased his version of events based on his witnesses' testimony, and the doctor opined that Paterson had not reached maximum healing. The Workers' Compensation Court found more credible the evidence presented in proving the hypothetical, including findings regarding Paterson's work history and back symptomology, his lack of fear of losing current employment or not obtaining future employment, and the affordability and availability of medical care. The court did not err in holding that Paterson had reached maximum healing prior to the nonwork-related injury. Paterson v. Mont. Contractor Comp. Fund, 1999 MT 158, 295 M 120, 983 P2d 300, 56 St. Rep. 623 (1999).

GOING AND COMING RULE

Police Dispatcher's Slip and Fall on Public Sidewalk Outside Police Station While on Way to Work: On April 2, a police department dispatcher slipped and fell on the public sidewalk in front of the police station while on her way to work. She was on the sidewalk that paralleled the street and not on the sidewalk that ran from the sidewalk paralleling the street to the door of the police station. At the time of the fall, her shift had not begun, she was not being paid, and she was not performing work-related duties. She clearly did not meet any of this section's exceptions to the general rule that injuries during travel are not compensable. She had not yet reached her place of employment. Although the city maintained the public sidewalk on which she fell, she was not on a sidewalk used only by her employer's employees and persons conducting city business. The general public used the sidewalk, and she was subject to an ordinary hazard common to all pedestrians, not just persons working at and conducting affairs with the police department. Heath v. Mont. Municipal Ins. Authority, 1998 MT 111, 288 M 463, 959 P2d 480, 55 St. Rep. 437 (1998).

Personal Errand Coverage Rejected: Strickland was seriously injured while returning to work from an errand when the car that she was driving was struck by another. The Supreme Court held that although there was conflicting evidence as to whether the errand was personal or for Strickland's employer, there need be only substantial evidence to support the findings of the Workers' Compensation Court. The Supreme Court also held that coverage for injuries received while on a personal errand is prohibited by this section of law because none of the conditions for coverage set forth in this section were satisfied by the facts of the case. Strickland v. St. Comp. Mut. Ins. Fund, 273 M 254, 901 P2d 1391, 52 St. Rep. 962 (1995), distinguished in BeVan v. Liberty NW. Ins. Corp., 2007 MT 357, 340 M 357, 174 P3d 518 (2007), with regard to an injury suffered by an employee during an authorized break.

Temporary Abandonment of Course of Employment — Substantial Deviation From Employer's Business: The District Court erred in determining that claimant was injured during the course and scope of his employment when claimant had stopped to visit his family during a 5-day trip to haul a load of lumber and was injured in a car crash after 6 hours of drinking with his brother. The continuity of claimant's employment was severed by the 6-hour abandonment of the course of employment and remained severed until claimant returned to the point of deviation from the path of duty. Dale v. Trade Street, Inc., 258 M 349, 854 P2d 828, 50 St. Rep. 359 (1993).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

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GENERAL

State Fund Entitled to Indemnification From Previous Insurer — No Showing of Maximum Healing and Later Injury by Previous Insurer: Chaney claimed that he was injured in 1983 when he slipped and fell at his employing sawmill, which was then insured by USF&G. Chaney also consulted several physicians between 1989 and 1992 concerning numbness in his hands. In 1992, Chaney had surgery to correct carpal tunnel syndrome. State Fund paid benefits while reserving its rights against Chaney and USF&G, but the Workers' Compensation Court held that State Fund was not entitled to indemnification by USF&G. The Supreme Court reversed, holding that USF&G had the burden of proving that Chaney suffered an injury during subsequent employment after he had reached maximum healing but that it failed to provide the proof. Chaney v. U.S. Fidelity & Guar., 276 M 513, 917 P2d 912, 53 St. Rep. 499 (1996).

Claimant Need Not Rely on Medical Testimony to Prove That It Was "More Probable Than Not" That Injury Occurred: The lower court denied Plainbull's claim on the basis that there was conflicting medical testimony pertaining to when Plainbull had injured his eye and that therefore he had not met his burden of proving medically that it was "more probable than not" that an injury had occurred to his eye. The Supreme Court held that the statute does not require medical proof of probability and that Plainbull had introduced other evidence that met his burden of showing that it was more probable than not that he had suffered an injury. Plainbull v. Transamerica Ins. Co., 264 M 120, 870 P2d 76, 51 St. Rep. 181 (1994), followed in Prillaman v. Community Medical Center, 264 M 134, 870 P2d 82, 51 St. Rep. 189 (1994), and distinguished in Matthews v. St. Comp. Ins. Fund, 1999 MT 225, 296 M 76, 985 P2d 741, 56 St. Rep. 888 (1999).

Stroke — Claim Denied: Claimant suffered a stroke while on the job. The Workers' Compensation Court properly denied his claim for benefits and properly gave greater weight to testimony of the doctors who treated claimant for his stroke and managed his care afterward as opposed to testimony of doctors who saw claimant 4 to 6 years after the stroke on referral by claimant's attorney. Pepion v. Blackfeet Tribal Indus., 257 M 485, 850 P2d 299, 50 St. Rep. 374 (1993).

Claimant Liable for Restitution for Benefits Paid Under Order Reversed on Appeal: Reil was granted about $13,750 in benefits by the Workers' Compensation Court, of which $3,000 was retained by Reil's counsel for costs and fees. On appeal, the Supreme Court in Reil v. Billings Processors, Inc., 229 M 305, 746 P2d 617 (1987), reversed the award after finding that Reil failed to provide his employer with timely notice of his injury. In a subsequent declaratory action, the Workers' Compensation Court ruled that restitution was proper, denied Reil's joinder of counsel as a third-party defendant, and ordered Reil to reimburse State Fund for all compensation benefits and medical expenses received. Although there is nothing in the Workers' Compensation Act that specifically refers to restitution, neither do the exclusivity provisions of the Act preclude restitution. Therefore, Reil was properly ordered to reimburse State Fund for compensation and benefits paid pursuant to the lower court judgment that was subsequently reversed on appeal. Reil v. St. Comp. Mut. Ins. Fund, 254 M 274, 837 P2d 1334, 49 St. Rep. 734 (1992).

Failure to Prove Causal Connection Between Injury and Inability to Work — Relief From Liability for Total Disability: Claimant failed to show that a 1987 injury caused the condition that resulted in his total loss of wages. Because the findings and conclusions of the Workers' Compensation Court were supported by substantial credible evidence and because that court's decisions regarding claimant's injuries were specific and consistent, the order denying temporary total benefits was affirmed and the city that employed claimant was relieved of liability for claimant's total disability. Norman v. Whitefish, 248 M 490, 812 P2d 1259, 48 St. Rep. 525 (1991).

Maximum Healing Not Reached Prior to Subsequent Accident: The Supreme Court held that the defendant insurance company was liable to the claimant for permanent partial disability payments because there was substantial evidence to support a finding that there had not been maximum healing of the claimant's condition before he found a new job and was injured a second time. O'Brien v. Guar. Fund Serv., 241 M 267, 786 P2d 1169, 47 St. Rep. 251 (1990).

First Insurer Entitled to Indemnification for Subsequent Injuries When First Injury Subject to "Maximum Healing": A private insurance company settled with the claimant on his workers' compensation claim and then sought indemnification from the State Fund, arguing that the claimant's first injury had reached the point of maximum healing and any additional benefits were due to a second injury that occurred after the State Fund had become the claimant's insurer. The Supreme Court ruled that if any portion of the funds paid by the insurance company were in reality the State Fund's responsibility, then the insurance company could seek indemnification and it had not waived its right to do so by entering into a compromise with the claimant. EBI/Orion Group v. St. Comp. Ins. Fund, 240 M 99, 782 P2d 1276, 46 St. Rep. 1973 (1989), followed in Chaney v. U.S. Fidelity & Guar., 276 M 513, 917 P2d 912, 53 St. Rep. 499 (1996).

Aneurysm: Employee suffered a ruptured congenital brain aneurysm while performing his work duties at the family-owned business during a period of unusually stressful working conditions. Medical and other evidence supported the conclusion that his death was the result of a compensable injury. Winchell v. St. Comp. Ins. Fund, 235 M 299, 766 P2d 1313, 46 St. Rep. 1 (1989).

Compensable Subsequent Injury — Benefits Receivable: When medical testimony showed a causal connection between an original injury and surgery performed 3 years later due to a subsequent injury, claimant was entitled to receive benefits payable because of medical treatment necessitated by the original injury, including any medical benefits reserved. Rightnour v. Kare-Mor, Inc., 225 M 187, 732 P2d 829, 44 St. Rep. 141 (1987), order and judgment of the Workers' Compensation Court after final settlement was reopened affirmed in Rightnour v. Intermtn. Ins. Co., 236 M 108, 768 P2d 871, 46 St. Rep. 220 (1989), and followed in Guild v. Rockwood Ins. Co., 229 M 466, 747 P2d 217, 44 St. Rep. 2139 (1987). (Decisions based on law prior to 1989 amendment related to nonwork-related injury.)

Decedent's Blood Pressure and Arteriosclerosis Aggravated by Stress: Decedent, a refuse hauler, had a temporary job helping the "lead man". On March 7, he was told he was to be his route's lead man on March 9. On March 9, he was under emotional stress as he wished to do well and perhaps receive a permanent position. He worked especially hard and was ahead of schedule when he died of heart failure while lifting a heavy object. The helper usually did most of the lifting. Decedent had the most difficult and confusing route in the city of Great Falls. He had high blood pressure and narrowing of the arteries at the time he was hired by the city. One doctor testified that his physical and emotional stress may have played a very direct role in his sudden death by aggravating his preexisting conditions, and the other two testifying doctors stated this was at least medically possible. The Workers' Compensation Court properly found this to have occurred and properly found a compensable injury. Tocco v. Great Falls, 220 M 221, 714 P2d 160, 43 St. Rep. 310 (1986).

Employment at Two Other Places Following Injury: The Workers' Compensation Court did not err in determining that the claimant's disability was proximately caused by an industrial accident while she was employed by the appellant's insured even though the claimant was employed after the injury by two other employers before filing a claim against the insured. There was substantial credible evidence to support the Workers' Compensation Court's decision. Tenderholt v. Travel Lodge Int'l, 218 M 523, 709 P2d 1011, 42 St. Rep. 1792 (1985).

Medically Possible Aggravation of Preexisting Condition Sufficient to Grant Compensation: Proof that it is medically possible that an industrial accident or injury aggravated a preexisting condition may, together with other evidence, establish a compensable disability. Bykonen v. Mont. Power Co., 217 M 169, 703 P2d 856, 42 St. Rep. 1112 (1985), following Jones v. St. Regis Paper Co., 196 M 138, 639 P2d 1140, 38 St. Rep. 2201 (1981), and clarified, in that medical possibility evidence in and of itself does not necessarily extinguish claimant's burden to prove the case by a preponderance of the evidence, in Laber v. Skaggs Alpha Beta, 247 M 172, 805 P2d 1375, 48 St. Rep. 150 (1991).

Liability for Failure to Notify of Claim Denial Subject to Existence of Employer/Employee Relationship: The plaintiff owner of a semitrailer truck who was injured while unloading the defendant's hay brought an action in the Workers' Compensation Court for payment for his injuries. On appeal of that court's judgment, the Supreme Court affirmed, holding that the plaintiff's argument that the insurer was liable for benefits because of its failure to deny benefits within 30 days ignored the fact that there was no employer/employee relationship between the parties. The 20% penalty provided in 39-71-2907 for paying unreasonably delayed claims applies to delays in denial longer than the 30 days specified in 39-71-606 and provides sufficient protection for persons in the position of the plaintiff. That section is therefore inapplicable in the absence of the requisite employee relationship. Solheim v. Tom Davis Ranch, 208 M 265, 677 P2d 1034, 41 St. Rep. 326 (1984), overruled in Haag v. Mont. Schools Group Ins. Authority, 274 M 109, 906 P2d 693, 52 St. Rep. 1146 (1995).

Election by Claimant Between Occupational Disease Act (Now Repealed and Merged With Workers' Compensation Act) and Workers' Compensation Act Permissible: The fact that a person may have a compensable disease under the Occupational Disease Act (now repealed and merged with Workers' Compensation Act) does not preclude eligibility under the Workers' Compensation Act. Thus a claimant who meets the requirements of both acts may choose his remedy. The phrase "exclusive remedy" in 39-72-305 (now repealed) means that an employee does not have a common-law action against his employer. Ridenour v. Equity Supply Co., 204 M 473, 665 P2d 783, 40 St. Rep. 1012 (1983).

Preexisting Condition — Caused by Injury or Disease: For the purposes of determining whether a preexisting condition was so aggravated or accelerated by a particular employment that the employee is eligible for workers' compensation benefits, there is no distinction between a preexisting condition caused by an injury and one caused by disease. Ridenour v. Equity Supply Co., 204 M 473, 665 P2d 783, 40 St. Rep. 1012 (1983).

Medical Evidence Indicating Phlebitis Caused by Requirements of Claimant's Janitress/Bartender Duties: The Supreme Court affirmed the Workers' Compensation Court's award to claimant despite employer's assertion that claimant's thrombosis was caused by factors other than claimant's employment as a janitress/bartender. The reviewing court reasoned that the medical evidence at trial supported claimant's theory that her phlebitis was caused by the standing required by her employment rather than by her outside activities of sitting and sewing, and the Supreme Court will not substitute its judgment for that of the Workers' Compensation Court when there is substantial evidence to support its findings of fact. Wise v. Perkins, 202 M 157, 656 P2d 816, 40 St. Rep. 1 (1983).

Aggravation of Preexisting Injury — Burden of Proof of Insurers: Plaintiff injured his back while working for one company in 1977 and again while working for another company in 1979. There was a question of whether claimant had reached a medically stable condition at the time of the second injury. On remand, the Supreme Court held that the burden of proof is properly placed on the insurance company which is at risk at the time of the accident in which a compensable injury is claimed. If it is later determined that the previous insurer should pay the benefits, the later insurer has a right to seek indemnity for benefits already paid. Belton v. Hartford Accident & Indem. Co., 202 M 384, 658 P2d 405, 40 St. Rep. 158 (1983), followed in Intermtn. Ins. Co. v. Church Mut. Ins. Co., 228 M 32, 740 P2d 682, 44 St. Rep. 1317 (1987), Stangler v. Home Ins. Co., 229 M 251, 746 P2d 99, 44 St. Rep. 1944 (1987), Richter v. Indus. Indem. Co., 241 M 518, 788 P2d 308, 47 St. Rep. 467 (1990), Allen v. Employers Commercial Union, 246 M 105, 803 P2d 644, 47 St. Rep. 2280 (1990), and Chaney v. U.S. Fidelity & Guar., 276 M 513, 917 P2d 912, 53 St. Rep. 499 (1996). See also Eastman v. Transport Ins. Co., 255 M 262, 843 P2d 300, 49 St. Rep. 936 (1992).

Medically Stable Condition — New Liability for Previous Injury: Plaintiff injured his back while working for one company in 1977 and again while working for a different company in 1979. The trial court, relying on the "completely healed" language in Little v. Structural Sys., 188 M 482, 614 P2d 516, 37 St. Rep. 1187 (1980), found that the 1977 injury had been aggravated by the 1979 injury and held the insurer at the time of the 1977 injury liable for disability benefits. On appeal, the Supreme Court overruled the "completely healed" holding of Little and held that new liability arises on a previous injury when it has reached a point of "maximum healing" or a "medically stable condition", terms which are medically determinable. A person may never be "completely healed" from an injury. The case was remanded for a new evidentiary hearing. Belton v. Hartford Accident & Indem. Co., 202 M 384, 658 P2d 405, 40 St. Rep. 158 (1983), followed in Intermtn. Ins. Co. v. Church Mut. Ins. Co., 228 M 32, 740 P2d 682, 44 St. Rep. 1317 (1987), Stangler v. Home Ins. Co., 229 M 251, 746 P2d 99, 44 St. Rep. 1944 (1987), Lee v. Group W Cable TCI of Mont., 245 M 292, 800 P2d 702, 47 St. Rep. 2116 (1990), and in Kelly v. St. Comp. Mut. Ins. Fund, 254 M 200, 835 P2d 774, 49 St. Rep. 699 (1992). See also Ballard v. St. Comp. Ins. Fund, 235 M 447, 767 P2d 1327, 46 St. Rep. 128 (1989), and Briney v. Pac. Employers Ins. Co., 283 M 346, 942 P2d 81, 54 St. Rep. 608 (1997).

Rights of Decedent's Relatives and Dependents — Law at Time of Injury as Governing: Generally, the compensation rights of the relatives and dependents of a deceased employee are controlled by the law in effect at the time of the injury and not the law in effect upon the employee's death or at the time of the grant of an award. This rule is based on the theory that the Workers' Compensation Act does not create new rights of action in the relatives or dependents of an employee on his death, but rather, his right merely survives for their benefit. Iverson v. Argonaut Ins. Co., 198 M 340, 645 P2d 1366, 39 St. Rep. 1040 (1982).

Apportionment Among Successive Insurers — Rejected: Montana has never recognized the doctrine of apportioning loss among successive insurers under the Montana Workers' Compensation Act, and the Supreme Court found no compelling reason to adopt it in this case. Hartl v. Commercial Union Assurance Co., 176 M 540, 579 P2d 1239 (1978).

Preexisting Condition — Aggravation — Evidence: There was sufficient evidence to support the decision to allow Workers' Compensation Court's recovery for injury suffered by the claimant in the course of employment that aggravated a preexisting condition. Close v. St. Regis Paper Co., 175 M 158, 573 P2d 163 (1977). See also Perry v. Tomahawk Transp., 226 M 318, 735 P2d 308, 44 St. Rep. 686 (1987).

Partnership: A carpenter was denied compensation for injury sustained while working on a new residence constructed by partner where he was in employ of partner as an individual and not in employ of partnership, a covered employer under this section. Marker v. Zeiler, 140 M 44, 367 P2d 311 (1961). (Dissenting opinion, 140 M 44, 367 P2d 311 (1961).)

Poliomyelitis: Death of street department foreman from polio was attributed to his employment. Hines v. Indus. Accident Bd., 138 M 588, 358 P2d 447 (1960).

Unusual Strain or Exertion Not Necessary: An unexpected injury received in the ordinary performance of a duty in the usual manner is an injury by accident and, if there is medical causation, it is compensable. Murphy v. The Anaconda Co., 133 M 198, 321 P2d 1094 (1958).

Aggravation or Acceleration of Disease: The rule that the employer takes the employee as he finds him is well established. The fact that an employee was suffering from a preexisting disease or disability does not preclude compensation if the disease or disability was aggravated or accelerated by an industrial injury which arose out of and in the course of the employment. Gaffney v. Indus. Accident Bd., 129 M 394, 287 P2d 256 (1955).

Decision of Board — Presumption: Where a decision of the Board (now Department of Labor and Industry) as to whether an accident arose out of or in the course of the employment involved the consideration of conflicting evidence as to essential facts or the deduction of permissible but diverse inferences therefrom, its solution of such conflict is presumed to be correct and the burden of proof is upon the party attacking it to show they were erroneous. Partoll v. Anaconda Copper Min. Co., 122 M 305, 203 P2d 974 (1949).

Employers Not Insurers of Employees at All Times:

Employers are not made insurers of their employees at all times during their period of employment under the Workmen's Compensation Act (now Workers' Compensation Act), and unless claimants for compensation under that Act received injuries arising out of and in the course of their employment, there can be no recovery of compensation. Griffin v. Indus. Accident Fund, 111 M 110, 106 P2d 346 (1940), explained in Guarascio v. Indus. Accident Bd., 140 M 497, 374 P2d 84 (1962).

While Workmen's Compensation Act (now Workers' Compensation Act) must be liberally construed, it does not contemplate that employer is insurer of employee at all times during his period of employment, nor is it founded on the theory of life insurance or a social insurance law. Sullivan v. Roman Catholic Bishop of Helena, 103 M 117, 61 P2d 838 (1936).

Pneumonia:

Evidence in which claimant asserted that the death of the worker was caused by bronchopneumonia induced by a fall while unloading ties, which caused a rectal abscess necessitating an operation from which he made normal recovery but left him so weak that after returning to work in a mine he contracted pneumonia from which he died a few days later, was so unsubstantial as to warrant a finding of the Industrial Accident Board (now Department of Labor and Industry) that there was no connection between the alleged fall and the death of the worker, thus justifying dismissal of the claim. Nigretto v. Indus. Accident Fund, 111 M 83, 106 P2d 178 (1940).

Where evidence disclosed no fracture of rib or crushing and no discoloration of the skin from the blow, it was insufficient to establish that pneumonia, which caused death, was the result of accidental injury claimed to have been suffered when plow handle held by worker struck his chest. Doty v. Indus. Accident Fund, 102 M 511, 59 P2d 783 (1936).

Neurosis Compensable: A disabling neurosis which has been caused by an accidental injury is compensable under the Workmen's Compensation Act (now Workers' Compensation Act). O'Neil v. Indus. Accident Bd., 107 M 176, 81 P2d 688 (1938); Best v. London Guar. & Accident Co., 100 M 332, 47 P2d 656 (1935); Sykes v. Republic Coal Co., 94 M 239, 22 P2d 157 (1933).

Act Does Not Provide Measure of Damages in Tort Action: In action by employee for negligence of employer who had not elected to be bound by the Workmen's Compensation Act (now Workers' Compensation Act), the compensation provided by the Act is not to be taken as a yardstick to measure plaintiff's damages, since the compensation is not based upon a cause of action for tort and omits entirely the element of pain and suffering. Chancellor v. Hines Motor Supply Co., 104 M 603, 69 P2d 764 (1937).

Lightning — Act of God:

In a lightning case the question for decision is whether accident arose out of and in the course of employment, or if by reason of his employment the employee was exposed to greater danger of being struck than others in same locality. Where employee was ordered to place metal pipe on iron scrap pile, after rain, near trees, pole, and wire fence where lightning struck more frequently, his employment increased danger and his widow was entitled to compensation for his death. Sullivan v. Roman Catholic Bishop of Helena, 103 M 117, 61 P2d 838 (1936).

The terms of the Workmen's Compensation Act (now Workers' Compensation Act) are sufficiently comprehensive to include injury resulting from an act of God. Thus, death resulting to an employee of a county from lightning while he is engaged at work on a public road is death resulting from an industrial accident, but there can be no recovery therefor without proof that the injury causing death arose "out of" and "in the course of" the employment. Wiggins v. Indus. Accident Bd., 54 M 335, 170 P 9 (1918).

Heat Prostration: Death of state highway employee caused by heat prostration while working on oil-surfaced highway on mid-July afternoon was compensable under Workmen's Compensation Act (now Workers' Compensation Act), and fact he lived 11 days after injury did not affect widow's right to recover compensation. Ryan v. Indus. Accident Bd., 100 M 143, 45 P2d 775 (1935).

Burden of Proof: Burden is on claimant to prove by a preponderance of the evidence that worker died as the result of an accidental injury, but it was not incumbent upon widow to have an autopsy performed to establish the cause of death. Birdwell v. Three Forks Portland Cement Co., 98 M 483, 40 P2d 43 (1935).

Industrial Accident Not Proximate Cause of Death: A laborer about an ore sampler had for a number of years been suffering from a large ulcer on the front of one of his legs between the knee and the ankle. Physicians grafted skin on the denuded area of the ulcer successfully and he returned to work, the healed area being bandaged. A week thereafter he died from blood poisoning. His widow, asserting that death was due to an injury sustained by decedent shortly after returning to work in that a rock had struck the healed ulcerous area causing an abrasion through which the infectious germs had entered into the bloodstream, made claim for compensation under the Workmen's Compensation Act (now Workers' Compensation Act). The claim was properly rejected where evidence warranted the conclusion that decedent did not sustain an injury to the leg as claimed, but that if he did, such injury was not the proximate cause of his death, but, as found by both the Board (now Department of Labor and Industry) and District Court, the blood poisoning was due to infection from the ulcer prior to the time of the alleged injury. Kerns v. Anaconda Copper Min. Co., 87 M 546, 289 P 563 (1930).

Exclusive Remedy: The Workmen's Compensation Act (now Workers' Compensation Act), insofar as it provides compensation to an injured employee for injuries received from an accident growing out of and in the course of his employment, is exclusive of all other remedies. Wirta v. N. Butte Min. Co., 64 M 279, 210 P 332, 30 ALR 964 (1922).

Determination of Dependency: In determining whether a claimant was a dependent, the board is not concerned with problematical future conditions, but only with the condition of the claimant at the time of the injury to the decedent. Morgan v. Butte Cent. Min. & Milling Co., 58 M 633, 194 P 496 (1920).

INJURY IN COURSE OF EMPLOYMENT

Food Transfers — Injuries Sustained in Course of Employment: A Glacier Park hotel manager suffered complete paralysis below the waist and a serious head injury resulting in memory loss and diminished intellectual capacity in an automobile accident while returning from another lodge within the park where he returned borrowed food, obtained money for the operating tills of his hotel, and met with employees to discuss the evening's food transfers. During the meeting, alcohol was consumed. Affirming the Workers' Compensation Court decision, the Supreme Court ruled that the manager's injuries arose out of and in the course of his employment. Parker v. Glacier Park, Inc., 249 M 225, 815 P2d 583, 48 St. Rep. 687 (1991), distinguished in St. Comp. Mut. Ins. Fund v. James, 257 M 348, 849 P2d 187, 50 St. Rep. 302 (1993).

Lack of Medical Evidence on Cause of Disability — Burden of Proof in Light of Purposes of Act — Standard of Appellate Review: Where the claimant and insurer presented medical evidence as to the uncertainty of the cause of the claimant's multiple sclerosis (MS) but it was shown that the onset of claimant's MS coincided with a job-related injury, the Supreme Court held that there was substantial evidence to support the findings of the Workers' Compensation Court that the claimant's MS was caused by that injury. Under the rationale of Moffett v. Bozeman Canning Co., 95 M 347, 26 P2d 973 (1933), the Workers' Compensation Court properly considered the timing of the claimant's traumatic injury and the purposes of the Workers' Compensation Act along with the evidence of a lack of medical certainty as to the cause of the claimant's disease. Given all these factors and the standard of appellate review of decisions of the Workers' Compensation Court established in McGee v. Bechtel Corp., 182 M 149, 595 P2d 1156 (1979), the Supreme Court could not conclude that the Workers' Compensation Court was clearly erroneous. Conway v. Missoula Serv. Co., 205 M 459, 669 P2d 225, 40 St. Rep. 1427 (1983), followed in Hengel v. Pac. Hide & Fur Depot, 224 M 525, 730 P2d 1163, 43 St. Rep. 2387 (1986).

Medical Evidence Indicating Phlebitis Caused by Requirements of Claimant's Janitress/ Bartender Duties: The Supreme Court affirmed the Workers' Compensation Court's award to claimant despite employer's assertion that claimant's thrombosis was caused by factors other than claimant's employment as a janitress/bartender. The reviewing court reasoned that the medical evidence at trial supported claimant's theory that her phlebitis was caused by the standing required by her employment rather than by her outside activities of sitting and sewing, and the Supreme Court will not substitute its judgment for that of the Workers' Compensation Court when there is substantial evidence to support its findings of fact. Wise v. Perkins, 202 M 157, 656 P2d 816, 40 St. Rep. 1 (1983).

Course of Employment: Sufficient evidence was present to support the finding and conclusion that decedent's death arose out of and in the course of his employment, whether applying the "deviation" rule, "dual purpose" rule, or "going and coming" rule. Steffes v. USF&G Co., 177 M 83, 580 P2d 450 (1978), distinguished in Strickland v. St. Comp. Mut. Ins. Fund, 273 M 254, 901 P2d 1391, 52 St. Rep. 962 (1995).

Injury Arising Out of and in the Course of Employment — Going to and From Work: The death of a tileworker, hired in Utah for a construction project in Montana, in a one-car accident on a highway in Montana while driving to the site of the proposed employment, who was to receive monetary compensation for the time spent in traveling to the job, arose out of and in the course of his employment. Guarascio v. Indus. Accident Bd., 140 M 497, 374 P2d 84 (1962).

No Particular Tasks at Time of Injury: Where an employee was injured while riding on a conveyor belt during a period when he had no particular tasks to perform and the evidence showed that the action was one which could be reasonably contemplated by the employment, the injury arose out of as well as in the course of employment. Richardson v. J. Neils Lumber Co., 136 M 601, 341 P2d 900 (1959).

No Formula for "Out of and in the Course of Employment": No exact formula can be laid down which will automatically solve every case involving the question whether an accident arises out of and in the course of the employment, but each case must depend upon its particular facts and circumstances. Partoll v. Anaconda Copper Min. Co., 122 M 305, 203 P2d 974 (1949).

Lunch Period: Where employees of defendant were permitted to play handball in garage and had played such game daily during their lunch hour for a period of about 3 months, and employees were required to eat their lunches on the premises so as to be there if a call came, and only employees participated in the game, an injury caused when an employee, while jumping for the ball, accidentally struck another breaking his glasses, was sufficiently incidental to the employment to have arisen out of and in the course of his employment. Geary v. Anaconda Copper Min. Co., 120 M 485, 188 P2d 185 (1947).

Causal Connection:

To entitle a worker to compensation under this Act he must be able to prove by a preponderance of the evidence the following essential elements: (1) the injury must have resulted from an industrial accident (2) arising out of and in the course of his employment; the term arising "out of" presupposing a causal connection between the employment and the injury, and the words "in the course of" referring to the time, place, and circumstances under which the accident took place. Landeen v. Toole County Ref. Co., 85 M 41, 277 P 615 (1929).

It was the duty of an employee of a coal company each morning before the arrival of others employed at the coalyard to open a gate in the fence surrounding it; for that purpose he had been entrusted with a key. To reach the gate it had been his custom with the knowledge of his employer and without objection on the part of the employer, after alighting from a streetcar, to cross premises adjacent to those of the employer. Alighting from the car on the morning of the accident, some 900 feet from the gate, and moving toward it he was struck by an automobile, his injuries resulting in death the following day. Since there was a causal connection between his injuries and the duties imposed upon him by his employer, his widow was entitled to compensation. Herberson v. Great Falls Wood & Coal Co., 83 M 527, 273 P 294 (1929).

Exposure to More Than Normal Risk: An injury to a worker arises "out of" his employment if it is the result of exposure to a hazard peculiar to the employment, or of exposure to more than the normal risk to which the people of the community generally are subject. Wiggins v. Indus. Accident Bd., 54 M 335, 170 P 9 (1918).

Terms Employed Conjunctively: The phrase "injury arising out of and in the course of his employment" means that to warrant payment of compensation the facts must disclose that the injury or death, as the case may be, resulted from an industrial accident arising out of and in the course of the employment. These terms are employed conjunctively, and not disjunctively, and the burden of proof is upon the claimant to establish, by a preponderance of the evidence, that these conditions are met. Wiggins v. Indus. Accident Bd., 54 M 335, 170 P 9 (1918).

INJURY NOT IN COURSE OF EMPLOYMENT

Bellboy Driving Guest's Car to Charge Battery: The Workers' Compensation Court was affirmed in its decision that injuries to a seasonal bellboy at a resort hotel caused by an accident during speeding and reckless driving of an automobile owned by a hotel guest did not arise out of and in the course of his employment. The claimant was driving the automobile to charge its battery. Other than the fact that the incident occurred during hours of employment, there was nothing to indicate that operation of a guest's car was within the course of employment. The Supreme Court held that the action constituted a deviation from the course of employment. Hicks v. CNA Ins. Co., 236 M 113, 768 P2d 346, 46 St. Rep. 224 (1989).

Failure to Establish Thoracic Outlet Syndrome as Injury: Claimant failed to prove that a work-related incident was a contributing cause of his thoracic outlet syndrome when he failed to report to his employer or physicians any injury and when three physicians who treated him all testified that the syndrome was a gradually developing problem that could not have been caused by a single traumatic incident, but rather existed for a considerable period prior to the alleged accident. Nelson v. Asarco, Inc., 227 M 272, 739 P2d 943, 44 St. Rep. 1074 (1987).

Injury After Retrieving Keys and Money Not Within Course and Scope of Employment: A convenience store clerk received injuries in an automobile accident after retrieving store keys and money from a night clerk. He left the store items at his apartment and was injured returning to a night club. His injuries did not occur within the course and scope of his employment, and he therefore was not eligible for compensation benefits under the Worker's Compensation Act. Hetland v. Magnum Petroleum, 225 M 389, 733 P2d 343, 44 St. Rep. 326 (1987).

No Reasonably Immediate Service to Employer: The underlying principle to consider in construing course of employment is whether the employee was performing some reasonably immediate service to the employer at the time of injury, Morgan v. Indus. Accident Bd., 133 M 254, 321 P2d 232 (1958). Emphasizing the personal nature of deceased's trip, the Supreme Court decided that driving late at night to meet a morning business meeting was not a reasonably immediate service to employer. Ogren v. Orion Group, Inc., 222 M 515, 723 P2d 944, 43 St. Rep. 1467 (1986), followed in Dale v. Trade Street, Inc., 258 M 349, 854 P2d 828, 50 St. Rep. 359 (1993).

Personal Nature of Trip — Benefits Precluded: Claimant's husband flew an employee in a company plane from Missoula to Great Falls, then flew alone to Wyoming to pick up his daughter. The plane broke down, and the husband was killed in a car accident on the return trip. Despite the fact that travel expenses were paid by the employer, the solely personal nature of the trip to Wyoming prevented application of the dual purpose rule and exceptions to the going-and-coming rule. Deviation from business purposes was so substantial as to sever the employment connection. Ogren v. Orion Group, Inc., 222 M 515, 723 P2d 944, 43 St. Rep. 1467 (1986).

Injury From Fighting Not Compensable — Connection to Employment Required: Plaintiff suffered a back injury in an industrial accident in February 1978. He suffered intermittent periods when he was unable to work as a result of the injuries, during which he was compensated under the Workers' Compensation Act. In November 1979, plaintiff was engaged in an altercation with a fellow employee at work, as a result of which his injuries were aggravated. He was denied compensation for the aggravated injury. Unless some reasonably immediate service to the employer can be discerned, a determination of whether an injury arises out of and occurs in the course of employment is controlled by the particular facts of the case. The Supreme Court adopted the rule that the fact that employees sometimes quarrel and fight while at work does not make the injury that may result one that arises out of their employment. There must be some reasonable connection between the injury suffered and the employment or the conditions under which employment was pursued. That did not exist here as only personal animosity was involved. Penny v. The Anaconda Co., 194 M 409, 632 P2d 1114, 38 St. Rep. 1429 (1981), distinguished in Pinyerd v. St. Comp. Ins. Fund, 271 M 115, 894 P2d 932, 52 St. Rep. 332 (1995).

Travel Pay — Effect on Workers' Compensation: Since claimant was not entitled to travel pay under this section, she was not entitled to workers' compensation for an injury sustained en route to work. Hagerman v. Galen St. Hosp., 174 M 249, 570 P2d 893 (1977), followed in Buhl v. St. Comp. Ins. Fund, 236 M 363, 769 P2d 1258, 46 St. Rep. 428 (1989).

Injury Arising Out of and in the Course of Employment: Injury, resulting from a mauling by a grizzly bear in a national park, occurring away from employer's premises while the claimant was on personal recreation not connected with his activities as an employee and not incidental to nor required by his employment, did not arise out of nor was it in the course of his employment. Williams v. Glacier Park Co., 140 M 440, 373 P2d 517 (1962).

GOING AND COMING RULE

Injury While Helping Fellow Employee Get to Work — No Special Benefit Exception to General Rule: Claimant argued that her case fit the special benefit exception to the going and coming rule because at the time she was injured she was conferring a reasonably immediate service to her employer through her attempt to help a fellow employee get to work. The Workers' Compensation Court properly found no exception to the general rule under the rationale that if merely securing an employee's presence at work is in every case a special benefit, the exception swallows up the rule. Buhl v. St. Comp. Ins. Fund, 236 M 363, 769 P2d 1258, 46 St. Rep. 428 (1989), followed in St. Comp. Mut. Ins. Fund v. James, 257 M 348, 849 P2d 187, 50 St. Rep. 302 (1993), and Strickland v. St. Comp. Mut. Ins. Fund, 273 M 254, 901 P2d 1391, 52 St. Rep. 962 (1995).

Worker Injured Going to Job on Drilling Rig Within Scope of Employment — Transportation as Reasonable Belief of Employment: An oil driller contacted claimant and arranged transportation to the rig, with work to begin upon arrival. Claimant was injured on the way to the job and filed for benefits. The Supreme Court ruled that claimant had a reasonable belief as to employment and since the single purpose of his trip was to go to the site of employment in a transportation mode furnished by the employer, coverage was appropriate. Lassabe v. Simmons Drilling, Inc., 228 M 94, 743 P2d 568, 44 St. Rep. 1369 (1987), distinguished in Roberts v. Pegasus Gold Corp., 273 M 266, 903 P2d 782, 52 St. Rep. 967 (1995).

Travel Allowance to Go Home on Weekend — Weekday Trip Home: Claimant, working away from his home base, received a travel allowance for trips to his home on the weekend. His employer also provided claimant with a subsistence allowance and intended for him to remain at the work site during the workweek. After finishing work on a midweek evening, claimant, driving his car, set off for his home to visit his wife. He subsequently was involved in an automobile accident and was charged with driving under the influence of alcohol. Claimant filed a claim in which he contended he was injured in connection with his employment. His injuries were not compensable because, although he was receiving a travel allowance, he was not receiving an allowance for the type of travel he was engaged in at the time of his accident. His injuries were not suffered while he was traveling to or from work, nor was he injured in the course of his employment. He did not come within the "travel status" exception which provides for compensation for injuries sustained when an employee is required to travel away from home on his employer's business. There was no benefit or service to the employer in claimant's midweek trip. Correa v. Rexroat Tile, 217 M 126, 703 P2d 160, 42 St. Rep. 1075 (1985).

Teacher — Weekend Visit Home From Graduate Program: Claimant, a teacher attending a master program during summer session, suffered permanent total disablement when he fell from his motorcycle while returning to classes after a weekend visit home. The Workers' Compensation Court ruled the injury was work-related and compensable on basis that graduate program was substantially related to claimant's teaching and administrative responsibilities. The Supreme Court found claimant within the paid travel exception to the going and coming rule and affirmed Workers' Compensation Court decision. The Supreme Court applied the substantial credible evidence standard of review. Courser v. Darby School District, 214 M 13, 692 P2d 417, 41 St. Rep. 2283 (1984).

When Deviation Removes Employee From Course of Employment: An identifiable deviation from a business trip for personal reasons takes the employee out of the course of his employment until he returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial. Here, a boomer electrician, miles out into a rural area, without his family, who stopped for a beer and a game of pool after completing his workday and then resumed his journey, had not deviated so from his trip as to remove him from the course of his employment, where he was within the travel pay exception to the "going and coming" rule. Gordon v. H. C. Smith Constr. Co., 188 M 166, 612 P2d 668, 37 St. Rep. 593 (1980).

When Employee Covered Under "Going and Coming" Rule: Under workers' compensation cases, the "going and coming" rule states that travel by an employee to and from work is generally regarded as outside the course and scope of employment. The exception of this rule is that where a deliberate and substantial payment is made for the expense of travel, the journey to and from work is held to be in the course of employment. In McMillen v. McKee & Co., 166 M 400, 533 P2d 1095 (1975), the court held that when transportation payment is singled out in the employment contract, the travel to and from work is brought within the course of employment. Injuries sustained en route are therefore compensable. Appellant claims that since the employment contract called the additional compensation "subsistence" pay and "travel" pay, the deceased was not in the course of employment. The test to be applied to determine coverage under the exception to the "going and coming" rule really becomes a simple matter of substance over form. In this instance, there can be no question that the underlying consideration singled out in the employment contract was travel and that coverage is proper. Gordon v. H. C. Smith Constr. Co., 188 M 166, 612 P2d 668, 37 St. Rep. 593 (1980), distinguished in Dale v. Trade Street, Inc., 258 M 349, 854 P2d 828, 50 St. Rep. 359 (1993).

"Arising Out of and in the Course of" Employment — Travel:

When transportation is a subject in the employment contract, travel to and from work is brought within the course of employment and injuries sustained en route are compensable. Ellingson v. Crick Co., 166 M 431, 533 P2d 1100 (1975).

When an employee was injured while traveling to work due to a mechanical failure of his vehicle and a union contract between the employer and the employee's union provided for a travel allowance, the travel allowance was for the benefit of the employer and the employee's injury "arose out of and in the course of" his employment. McMillen v. Arthur G. McKee & Co., 166 M 400, 533 P2d 1095 (1975).

Employee Subject to Call: Injuries sustained after the completion of the regular work by an employee subject to call may in a proper case be compensable as an injury arising out of and in the course of employment. Geary v. Anaconda Copper Min. Co., 120 M 485, 188 P2d 185 (1947).

Firemen Returning Home: Where a city fireman upon completing his 8-hour night shift and while on his way home fell on an ice-covered sidewalk sustaining injuries from which he died, his widow was not entitled to compensation under plan No. 3 of the Workmen's Compensation Act (now Workers' Compensation Act), the injuries not having arisen in the course of his employment. Griffin v. Indus. Accident Fund, 111 M 110, 106 P2d 346 (1940), explained in Guarascio v. Indus. Accident Bd., 140 M 497, 374 P2d 84 (1962).

Injured While Going to Work: Where an employee, while on his way to work, was struck by an automobile, his injury did not arise out of and in the course of his employment, and he was neither entitled to compensation nor to hospitalization under the general provisions of the Workmen's Compensation Act (now Workers' Compensation Act). Murray Hosp. v. Angrove, 92 M 101, 10 P2d 577 (1932).

HEART ATTACK

Tangible Happening of Traumatic Nature — Heart Attack Symptoms Insufficient: Although medical records and testimony showed that decedent first felt the symptoms of a heart attack while at work and then continued to work, there was nothing in the record to indicate that it was suffered as a result of a tangible happening of a traumatic nature. Under Ness v. Diamond Asphalt Co., 143 M 560, 393 P2d 43 (1964), a heart attack occurring at work but not as a result of work is not an injury under the statute. Therefore, there was no compensable injury. Moen v. Employers Mut. Liab. Ins. Co., 185 M 79, 604 P2d 765, 36 St. Rep. 2220 (1979).

Heart Failure: Heart failure may be classified as an industrial accident where it is brought about by unusual stress and strain in employment. Rathbun v. Taber Tank Lines, Inc., 129 M 121, 283 P2d 966 (1955), explained in Murphy v. The Anaconda Co., 133 M 198, 321 P2d 1094 (1958).

Heat Prostration — Death Compensable Although Heart Disease Also Present: Death of worker caused by extreme heat from cement kilns which he was attending prior to his collapse was compensable under Workmen's Compensation Act (now Workers' Compensation Act) and fact that decedent was suffering from heart disease previous to and on the day of his death did not prevent recovery by his widow. Birdwell v. Three Forks Portland Cement Co., 98 M 483, 40 P2d 43 (1935), distinguished in Woin v. Anaconda Copper Min. Co., 99 M 163, 43 P2d 663 (1935), and Ryan v. Indus. Accident Bd., 100 M 143, 45 P2d 775 (1935).

Aggravation or Acceleration of Disease: The death of a coal miner, who was predisposed to heart disease, from shock while coming from work in the mine in which the temperature was very high and passing through an air course into which ice-cold air was being forced by means of a fan, rendering the temperature therein very low, was due to an "industrial" accident arising out of and in the course of his employment. Nicholson v. Roundup Coal Min. Co., 79 M 358, 257 P 270 (1927).

Law Review Articles

Workers' Compensation: Should Intoxication Bar Recovery?, Heringer, 46 Mont. L. Rev. 419 (1985).

Workers' Compensation and Occupational Disease, LaPlante & Opp, 43 Mont. L. Rev. 75 (Winter 1982).

39-71-409. Waivers by employee invalid.

Compiler's Comments

2005 Amendment: Chapter 448 inserted (2) regarding waiver of rights and benefits of Workers' Compensation Act; and made minor changes in style. Amendment effective April 28, 2005.

Preamble: The preamble attached to Ch. 448, L. 2005, provided: "WHEREAS, the Montana Supreme Court ruled in Wild v. Fregein Construction, 2003 MT 115, 315 Mont. 425, 68 P.3d 855, that the independent contractor exemption certificate does not raise a conclusive presumption as to the status of a person as an independent contractor and that an employer has an obligation to determine whether an individual is treated as an independent contractor or as an employee; and

WHEREAS, the Montana Supreme Court in the Wild decision ruled that it is against the public policy of the state for an employer to coerce a worker to work as an independent contractor by offering to pay an independent contractor at a rate higher than the employer pays employees; and

WHEREAS, the Montana Supreme Court in the Wild decision affirmed the twin determinants of independent contractor status as being "A" issues of control and "B" whether the individual is in an independent business, commonly known as the "A-B" test, and emphasized the necessity of both factors being present, with performing work for other persons being an indication of an independent business; and

WHEREAS, the concurring opinion in the Wild decision further suggested that the Department of Labor and Industry strengthen the certification process to provide a conclusive determination of independent contractor status; and

WHEREAS, the Wild decision created a great deal of uncertainty in matters involving independent contractors and employees in the business community, with employers and independent contractors coming together to propose a consensus solution after participating in a study required by Senate Bill 270, passed by the 58th Legislature; and

WHEREAS, the Montana Legislature considers enacting legislation appropriate to effectively reverse the Wild decision and to restore the conclusive presumption of an independent contractor exemption certificate as well as to allow employers to pay persons with the independent contractor exemption certificate at a rate higher than the rate paid to employees and additionally to allow a person with an independent contractor exemption certificate to work for only one employing unit without becoming an employee as well as to waive the benefits of the workers' compensation and occupational disease laws."

Effective Date — Applicability: Section 15, Ch. 448, L. 2005, provided: "[This act] is effective on passage and approval and applies to all applications and renewals for the independent contractor exemption certificate submitted to the department after [the effective date of this act]." Approved April 28, 2005.

Case Notes

Employer's Obligation to Ascertain Independent Contractor Status Prior to Employment — Test: Wild was injured while employed by defendant and sought workers' compensation benefits. The District Court found that because Wild had been previously issued a certificate of independent contractor exemption, any further inquiry into whether Wild was an independent contractor was precluded and that as an independent contractor, Wild was not eligible for workers' compensation benefits. Wild appealed, and the Supreme Court reversed. Nothing in 39-71-401(3) conclusively precludes, as a matter of law, any factual inquiry into whether an employer-employee relationship exists at the time that a worker is hired even if an independent contractor exemption has been previously granted. On the contrary, when read together with 39-71-120 (now repealed), the statutes establish that an employer has a clear obligation to make at least a cursory determination into whether a worker is an independent contractor in fact, as opposed to merely in name, before the employer can reasonably rely on the exemption, and an employer who fails to do so, with knowledge of the facts, may not hide behind the exemption. A two-part test is used to determine independent contractor status: (1) an analysis of whether the control factors are met, including consideration of direct evidence of right or exercise of control, method of payment, furnishing of equipment, and right to fire; and (2) whether the individual is engaged in an independently established trade, occupation, profession, or business. Wild v. Fregein Constr., 2003 MT 115, 315 M 425, 68 P3d 855 (2003), followed in Mathews v. BJS Constr., Inc., 2003 MT 116, 315 M 441, 68 P3d 865 (2003).

Waiver of Workers' Compensation Benefits Allowed — Distribution of Proportionate Share of Benefits: Decedent who died in the course of employment was survived by two children of a prior marriage and by the widow of a second marriage. Decedent's insurer and others with potential liability for death claims settled with the widow for substantial sums, but the children were not parties to the settlement. No workers' compensation claim was filed by the widow, though one was filed by decedent's employer. The compensation carrier began paying one-third of the compensation benefits to the widow and reserved two-thirds pending final determination of the children as beneficiaries. The widow advised the carrier that she did not wish to receive workers' compensation benefits and returned those she had been issued. The Workers' Compensation Court held that, as a matter of public policy, the widow could not waive death benefits and that the children's interest in the benefits would vest only if the widow died or remarried prior to the passing of 500 weeks after decedent's death. On rehearing, the court found the children to be stepchildren of the widow and therefore entitled to benefits, to be equally divided between the parties. The children appealed, contending that the widow should not be compelled to receive benefits she did not claim or intended to waive and that the children were each entitled to one-half of all available benefits. The Supreme Court held that under 1-3-204, the surviving widow could waive or abandon her right to benefits and that upon waiver the surviving children were entitled to no more than their proportionate share provided by law. In re Benefits of Gaither, 244 M 383, 797 P2d 208, 47 St. Rep. 1549 (1990).

39-71-411. Provisions of chapter exclusive remedy — nonliability of insured employer.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Employer's Insurer Insolvent After Workers' Compensation Claim Adjusted — Employer Not "Uninsured Employer": The plaintiff's employee filed a workers' compensation claim that was accepted and adjusted by the plaintiff's insurer. The insurer was later declared insolvent, and the defendant agency assumed handling of the claim. Later, however, the defendant notified the plaintiff that it was seeking the recovery of the benefits paid to the employee, and the plaintiff filed a declaratory action. The District Court granted the plaintiff summary judgment, concluding that the Workers' Compensation Act provides an exclusive remedy that frees an employer from potential liability claims by an employee. On appeal, the Supreme Court affirmed, holding that the insurer's insolvency did not render the plaintiff an "uninsured employer". Asurion Serv., LLC v. Mont. Ins. Guar. Ass'n, 2017 MT 140, 387 Mont. 483, 396 P.3d 140.

Exclusivity Provision Properly Applied: One of the plaintiffs was employed by Carpets Plus, a corporation whose sole shareholder/president and secretary/treasurer were the defendants. This plaintiff was injured while assembling carpet racks at the Carpets Plus warehouse, which was owned by the defendants individually, and he claimed and received workers' compensation benefits for his injuries through Carpets Plus's compensation insurance. Later, the plaintiffs sued the defendants, alleging that they were negligent and failed to provide a safe workplace under the Montana Occupational Safety and Health Act. The District Court granted the defendants summary judgment, concluding that the defendants were acting at all relevant times in their capacities as corporate officers of Carpets Plus and were immune from suit under the exclusivity provision of the Workers' Compensation Act. The plaintiffs appealed, arguing that the exclusivity provision applies only to an employer and its employees and that because the defendants were the property owners of the warehouse, they were separate legal entities from Carpets Plus and the exclusivity provision should not apply. The Supreme Court affirmed, concluding that the defendants were protected from suit by the exclusivity provision because undisputed evidence demonstrated that the defendants were acting within the course and scope of their employment for Carpets Plus when they allegedly failed to provide the employee plaintiff with a safe work environment. George v. Bowler, 2015 MT 209, 380 Mont. 155, 354 P.3d 585.

Employer Not Expressly Identified on Workers' Compensation Policy — Inadvertent Error — Employer Entitled to Tort Immunity: The plaintiff was injured at work and received workers' compensation benefits. He then filed a civil lawsuit against the defendant, his employer, claiming that the defendant was uninsured and therefore not entitled to tort immunity. The defendant argued that even though it was not expressly identified on the workers' compensation insurance policy, its absence from the policy was inadvertent. The District Court ruled that the defendant was entitled to tort immunity. On appeal, the Supreme Court affirmed, finding that because both the defendant and the defendant's insurer agreed that the defendant was insured at the time of the plaintiff's injury, the defendant was entitled to tort immunity. Stokes v. Golden Triangle, Inc., 2015 MT 199, 380 Mont. 93, 353 P.3d 500.

Sole Remedy Aspect of Workers' Compensation Held Not to Deny Substantive Due Process or Full Legal Redress: The decedent, an unmarried worker with no children, was killed in an at-work accident and his mother, who was not his dependent, was paid $3,000 for his death. The mother then filed suit challenging the constitutionality (fundamental fairness) of the workers' compensation statutes, arguing that the quid pro quo of giving up the remedy of a legal action in exchange for only a $3,000 payment was insufficient to sustain the constitutionality of the statutes and citing Stratemeyer v. Lincoln County, 276 Mont. 67, 915 P.2d 175 (1996). The Supreme Court held that Stratemeyer was distinguishable, that the Legislature made a constitutional distinction in payable benefits between dependents and nondependents of injured or killed workers, and that the mother had not met her burden of proving beyond a reasonable doubt that the statutes were unconstitutional. Walters v. Flathead Concrete Products, Inc., 2011 MT 45, 359 Mont. 346, 249 P.3d 913.

Exception to Exclusivity Provision for Inferred Intentional Harm by Employer: If deliberate and intentional conduct by the employer can be inferred from factual allegations indicating that the employer knew that an employee was being harmed, failed to warn the employee of the harm, and intentionally continued to expose the employee to the harm, then the exclusivity clause of this section does not protect the employer. Alexander v. Bozeman Motors, Inc., 2010 MT 135, 356 Mont. 439, 234 P.3d 880.

Uninsured Employer Prohibited From Contribution or Indemnity Claim Against Third Party After Settling With Injured Employee: In response to a certified question from the federal District Court, the Supreme Court held that it is not equitable to require a stranger to the employer-employee relationship to indemnify an employer for liability that was wholly avoidable if the employer had simply obeyed the Workers' Compensation Act and provided coverage for its employees. Therefore, an uninsured employer is prohibited from bringing either a contribution claim or an indemnity claim against a third party after settling with an injured employee. St. Farm Fire & Cas. Co. v. Bush Hog, LLC, 2009 MT 349, 353 M 173, 219 P3d 1249 (2009).

No Duty of Insurer to Defend or Indemnify Contractor Protected From Liability: An employee of a subcontractor sued plaintiff for negligence, but plaintiff's insurers and the contractor's insurer refused to defend and indemnify against the claim. The District Court granted summary judgment to the contractor's insurer, and the employee appealed. The Supreme Court affirmed. The contractor was protected from liability under 39-71-411. Because the contractor was not sued for its own negligence or found liable for any tortious conduct, its insurer had no duty to defend or indemnify plaintiff under the insurance policy or its endorsements. Plum Creek Marketing, Inc. v. Am. Economy Ins. Co., 2009 MT 264, 352 M 56, 214 P3d 1238 (2009), followed in F.H. Stoltze Land & Lumber Co. v. Am. States Ins. Co., 2015 MT 165, 379 Mont. 409, 352 P.3d 612.

Failure to Prove Facts Beyond Ordinary Negligence — Exclusivity Provision Applicable: Wise suffered an on-the-job injury and contended that the employer's negligent conduct allowed an additional claim for damages beyond benefits provided under the Workers' Compensation Act. However, Wise failed to prove any set of facts that the employer committed any intentional and deliberate act with the intent to cause Wise's injury or any element necessary to allege anything more than ordinary negligence. Thus, the exclusivity provision of this section applied, and the damages claim was properly dismissed. Wise v. CNH America, LLC, 2006 MT 194, 333 M 181, 142 P3d 774 (2006), distinguishing Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), in light of the 2001 amendment to 39-71-413. See also Harris v. Dept. of Corrections, 2013 MT 16, 368 Mont. 276, 294 P.3d 382.

Employer Unaware That Employee Would Be Injured During Routine Job Activity — No Showing of Employer Malice Under Sherner Standard: Olszewski was seriously injured while loading building trusses onto a flatbed truck. Olszewski recovered workers' compensation benefits but also brought an action alleging that the injury was covered under the 1999 intentional act exception in 39-71-413, which was in effect when the injury occurred. The District Court found no showing of malicious action on the part of the employer or foreman and granted summary judgment to the employer and foreman. On appeal, the Supreme Court applied the malicious intent standard in Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), and affirmed. Olszewski was unable to provide evidence that the employer knew that employees would actually be injured by a routine that was usually performed without incident, and absent a showing of that material fact, the statutory exception did not apply and summary judgment was proper. Olszewski v. BMC W. Corp., 2004 MT 187, 322 M 192, 94 P3d 739 (2004).

No Showing of Malicious Act or Omission by Coworker in Death of Employee — Workers' Compensation Exclusivity Doctrine Applicable under 1999 Statute: Under the 1999 version of 39-71-413 and Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), a plaintiff was required to show both an intentional and malicious act or omission in order to avoid the workers' compensation exclusivity doctrine (revised in 2001 to require only the showing of an intentional act or omission). Here Everhard, a mine worker, was killed by a train driven by Aafedt after signaling that Aafedt could proceed. Everhard's estate sued Aafedt and the mining company. The District Court concluded that Aafedt's conduct was intentional when he moved the train without seeing Everhard, but there was no showing that Everhard suffered an injury caused by actual malice by Aafedt or the company, so summary judgment was granted to defendants. The Supreme Court affirmed. As a matter of law, it could not be said that Aafedt deliberately proceeded to act in conscious or intentional disregard or even indifference to the high probability of injury to Everhard under the definition of actual malice, so the estate failed to overcome the workers' compensation exclusive remedy rule, and summary judgment was proper. Blain v. Stillwater Min. Co., 2004 MT 141, 321 M 403, 92 P3d 4 (2004).

No Recovery of Wrongful Death Stipulated Judgment From Employer's Insurer — Workers' Compensation Act Exclusive Remedy: Plaintiff's wife was killed in an automobile accident in the course of her employment, striking a vehicle driven by a coemployee of the same employer. Plaintiff received workers' compensation benefits under the employer's coverage. The employer settled for $1,250,000 in a stipulated judgment, which included $500,000 for wrongful death. Plaintiff then sued the employer's insurer to collect the $500,000 wrongful death judgment under an uninsured motorist policy. The District Court granted summary judgment to the insurer, holding that plaintiff could not recover a stipulated judgment from the insurer because plaintiff's exclusive remedy was under the Workers' Compensation Act. On appeal, plaintiff asserted that Sullivan v. Doe, 159 M 50, 495 P2d 193 (1972), precluded the offset of uninsured motorist benefits by workers' compensation benefits. The Supreme Court applied Hubbel v. W. Fire Ins. Co., 218 M 21, 706 P2d 111 (1985), and affirmed. To recover under 33-23-201, two conditions must be met: (1) a claimant must be legally entitled to recover damages from the owner or operator of the uninsured vehicle; and (2) the driver of the vehicle must be uninsured. Under this section, an employer is not liable for the death of an employee covered by the Workers' Compensation Act, so plaintiff was barred from recovering from the coemployee and the employer. Because plaintiff was not legally entitled to recover damages under 33-23-201, plaintiff's exclusive remedy was under the Worker's Compensation Act, and recovery was limited to damages received under the Act. Okuly v. USF&G Ins. Co., 2003 MT 291, 318 M 88, 78 P3d 877 (2003).

Employer's Liability Exclusion Provision Barring Coverage for Claims Arising From Employee's Death: Defendant's employee was killed in an on-the-job accident, and the employee's spouse sued for damages. Defendant's insurance policy contained an employer's liability exclusion provision that excluded liability for bodily injury to employees of the insured. The District Court found that the employee's injuries were excepted from coverage under the exclusion provisions of the policy, but the spouse appealed on grounds that the exclusion applied only to injuries sustained by leased workers, that the employer reasonably expected that the insurer would defend employment-related claims not precluded by the workers' compensation exclusivity rule, and that the employer's conduct, which contributed to the injury, did not satisfy the definition of intentional act for purposes of the intentional act exclusion provision in the insurance policy, rendering the exclusion inapplicable. The Supreme Court noted that the pivotal issue was whether the liability exclusion was clear and unambiguous and concluded that because it was, the remaining issues would not be addressed. A common sense interpretation of the term "employee" would lead the average consumer of insurance to understand that the term clearly and unambiguously refers to all persons engaged in services for wages and salary by another, and because the injured worker was an employee, the employer's liability exclusion provision barred coverage for that worker's injuries. Farmers Union Mut. Ins. Co. v. Horton, 2003 MT 79, 315 M 43, 67 P3d 285 (2003).

Negligent or Intentional Infliction of Emotional Distress Claim Barred by Exclusive Remedy Provision of Workers' Compensation — Burden Not Met for Separate Cause of Action for Intentional or Malicious Act: Maney's son, who worked for Cheff clearing timber on property belonging to the Louisiana Pacific Corporation, was killed when a tree fell on him. Maney brought an action against Cheff and the Louisiana Pacific Corporation for negligent and intentional infliction of emotional distress after seeing her son die in the hospital as a result of the accident. The Supreme Court held that the District Court did not err in dismissing Maney's claim. Citing the comprehensive language in the applicable Montana statutes and cases from other jurisdictions, the Supreme Court held that the intent of the Montana Legislature in providing the exclusive remedy of workers' compensation was to preclude any employer liability whatever for compensation as a result of or concerning an employee's injury or death. The Supreme Court also held that Maney had not met her burden under 39-71-413 because she had alleged no facts demonstrating an intentional or malicious infliction of emotional distress. The court also held that the District Court had correctly dismissed the Louisiana Pacific Corporation's cross-claim against Cheff for indemnity and contribution because those claims were also barred by the exclusive remedy provisions of this section. Maney v. La. Pac. Corp., 2000 MT 366, 303 M 398, 15 P3d 962, 57 St. Rep. 1561 (2000).

District Court Jurisdiction to Determine Whether Tort Claim Barred by Workers' Compensation Exclusivity Provisions — Posttraumatic Stress Disorder Not Compensable: Onstad was assaulted on the job and sued the employer, Payless Shoesource (Payless), for failure to provide a safe workplace. Onstad did not file a workers' compensation claim; nevertheless, Payless contended that the claim was precluded by the exclusivity provision of the Workers' Compensation Act and that the Workers' Compensation Court, rather than the District Court, should have made the initial determination whether Onstad's injuries were covered by workers' compensation. The Supreme Court noted that in accord with prior case law, the District Court did have jurisdiction to determine whether Onstad's tort claim was barred by the exclusivity provision, then went on to hold that Onstad's injury was not compensable under the Workers' Compensation Act because it was primarily a posttraumatic mental injury related to Onstad's stress of contending with the attack. Thus, Payless's exclusivity defense failed as a matter of law. Onstad v. Payless Shoesource, 2000 MT 230, 301 M 259, 9 P3d 38, 57 St. Rep. 943 (2000). See also Yarborough v. Mont. Municipal Ins. Authority, 282 M 475, 938 P2d 679 (1997).

Liability of Employer for Tortious Act: Although the language of 39-71-413 provides for a cause of action only against a fellow employee for intentional or malicious injury, pursuant to Sitzman v. Schumaker, 221 M 304, 718 P2d 657, 43 St. Rep. 831 (1986), such an action may be brought against an employer as well. To fail to hold employers liable in the same manner as their employees by permitting an employer to commit an intentional and malicious act or omission that causes an injury to an employee and then to allow the employer to hide behind the exclusivity statutes would defeat the purpose of the Workers' Compensation Act. Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990, 57 St. Rep. 241 (2000). See also Enberg v. Anaconda Co., 158 M 135, 489 P2d 1036 (1971).

New Standard for Determining Whether Intentional or Malicious Act by Employer Constitutes Tortious Conduct — Summary Judgment Improper: Sherner was injured on the job and sued his employer, Conoco, Inc. (Conoco), for damages on grounds that Conoco was guilty of malicious acts or omissions that caused the injuries. The District Court ruled that the tort claim against Conoco was barred by the exclusivity provision in this section. Citing Calcaterra v. Mont. Resources, 1998 MT 187, 289 M 424, 962 P2d 590 (1998), the court concluded that Sherner was required to allege and establish that Conoco had actual knowledge that Sherner was being harmed in order to establish that Conoco's acts were malicious and, absent sufficient facts to raise a genuine issue of material fact that Conoco directed intentional harm at Sherner, granted summary judgment for Conoco. In District Court, Sherner sufficiently raised the issue of the proper standard for determining whether Conoco's act was malicious to allow the Supreme Court to address the issue on appeal, so the court proceeded to create a new standard, applying the plain meaning of the statutory definitions, by which to judge whether an act or omission is intentional or malicious. Applying common definitions of "intentional" and "act" and the appropriate definition of "malice" for use in 39-71-413—the one provided in 27-1-221, rather than the one in 1-1-204—the Supreme Court reversed, finding that genuine issues of material facts existed, regarding whether Conoco acted maliciously, as to preclude summary judgment. A worker need show only that an employer's act or omission, which caused the injury, was intentional or malicious to bring a tort action against the employer under 39-71-413. Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990, 57 St. Rep. 241 (2000), following Sitzman v. Schumaker, 221 M 304, 718 P2d 657, 43 St. Rep.

831 (1986). See also Enberg v. Anaconda Co., 158 M 135, 489 P2d 1036 (1971), and Olszewski v. BMC W. Corp., 2004 MT 187, 322 M 192, 94 P3d 739 (2004), in which summary judgment was held to be proper under the Sherner standard absent evidence that an employer knew that an employee would actually be injured by a routine that was usually performed without incident.

Spoliation of Evidence Claim Not Barred by Exclusivity of Workers' Compensation Act: As part of an industrial accident case, Olivers requested that equipment involved in the accident remain intact so that it could be examined by an expert. The equipment was subsequently altered, and Olivers brought an action for negligent and intentional spoliation of evidence. The District Court determined that the exclusive remedy provisions of the Workers' Compensation Act barred Olivers from bringing a claim for spoliation of evidence. The Supreme Court disagreed, noting that by definition, injuries that trigger an exclusive remedy under the Act are internal or external harm to a worker's body, but the loss or impairment of a person's ability to bring an action against a third party for spoliation of evidence is not an injury covered by the Act. Thus, Olivers' claim was not barred by the Act's exclusivity provisions. Oliver v. Stimson Lumber Co., 1999 MT 328, 297 M 336, 993 P2d 11, 56 St. Rep. 1303 (1999). However, see Harris v. Dept. of Corrections, 2013 MT 16, 368 Mont. 276, 294 P.3d 382, in which the District Court lacked authority to address the plaintiff's spoliation of evidence claim because the plaintiff's underlying personal injury claim was barred by this section.

Constitutionality of Section Allowing Setoff to Claim Against Uninsured Employers' Fund: Thayer died from an injury on the job, after incurring medical expenses of $253,207.98. Because the employer did not carry workers' compensation insurance, Thayer's wife, Phyllis, was entitled to receive medical benefits and death benefits provided by the uninsured employers' fund, pursuant to 39-71-503. The fund paid $85,000 in medical cost reimbursement, which the state accepted in full satisfaction of its claim. Phyllis subsequently brought negligence actions against the employer and a coemployee and product liability actions against the retail seller and the manufacturer of the product that Thayer was using when he was fatally injured. The uninsured employers' fund discharged Phyllis's claim for wage loss benefits following her receipt of a $100,000 settlement from the employer, applying the setoff pursuant to 39-71-511 in order to discharge the remaining future benefits that Phyllis would have been entitled to receive from the fund, but did not seek recovery of any of the benefits paid to Phyllis prior to receipt of the settlement or the benefits paid based on the amounts recovered from third parties. Phyllis asserted that the setoff essentially gave the fund a subrogation interest in her settlement from the employer, that the fund could not subrogate until she was made whole, and that to hold otherwise would be a violation of her constitutional right to full legal redress. The Supreme Court disagreed. Because the fund is merely a legislatively provided safety net standing in place of the employer to provide some basis for recovery when the employer is impecunious, it is reasonable to condition the fund's obligations on the extent to which the employer fails to provide compensation. Further, because the fund is not an insurer, limiting the fund's obligation to the extent of the uninsured employer's ability to compensate the employee or the employee's family does not diminish the employee's right to full legal redress. The plain language of Art. II, sec. 16, Mont. Const., does not distinguish between third parties and uninsured employers. In this case, the employee was uninsured, so the exclusive remedy provision in this section did not apply, and Phyllis could pursue benefits from the fund up to the amount of workers' compensation benefits that she would have received if the employer were insured. Also, pursuant to 39-71-509, Phyllis could bring a tort action against the employer in addition to any responsible third party. Thayer v. Uninsured Employers' Fund, 1999 MT 304, 297 M 179, 991 P2d 447, 56 St. Rep. 1223 (1999), following Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997), and followed in Shattuck v. Kalispell Regional Medical Center, Inc., 2011 MT 229, 362 Mont. 100, 261 P.3d 1021.

Failure to Acknowledge Employee on Payroll — Employer Uninsured — Exclusive Remedy Unavailable: Defendant employer hired plaintiff employee Buerkley "under the table". Buerkley did not submit an employment application and was not required to comply with any existing hiring procedures; he did not use a time clock as did other employees; his paycheck was not drawn from the employer's payroll account, and no deductions were taken from his paycheck; he was not held out to others as an employee; and he was not reported as an employee on the payroll reports provided to the trust by which employees were provided coverage for work-related injuries. Buerkley was injured on the job, after which he submitted the proper application paperwork, backdated to a date prior to the injury; he began using the timeclock; and his paychecks began to reflect deductions for workers' compensation coverage. The trust adjusters found that Buerkley was entitled to compensation, but Buerkley rejected a settlement offer and sought damages in District Court, at which time the trust adjusters discovered the falsified employment records.

Buerkley contended that an employer who has not properly complied with the requirements of 39-71-401 is an uninsured employer pursuant to 39-71-501 and, therefore, subject to the civil remedies provided in 39-71-508 and 39-71-515. He also contended that the employer should not, as a matter of law and public policy, be allowed to rely on the exclusive remedy in this section. Defendant's argued, and the District Court agreed, that whether or not plaintiff's employment was reported to the trust by which they were self-insured, they elected coverage under the Workers' Compensation Act, and thus the Workers' Compensation Act was Buerkley's exclusive remedy. The Supreme Court noted that the purpose of the Workers' Compensation Act is to effectuate a compromise between industry and labor and cited 2A Larson, The Law of Workman's Compensation 65.40 (1998), for the premise that workers' compensation statutes are often described as a quid pro quo exchange of rights and remedies. However, the requisite quid pro quo is absent when an employer has deliberately avoided the cost of insuring an employee by failing to acknowledge the employee's existence in payroll records. In those cases, the employer should not be able to take refuge behind the exclusive remedy provision. Thus, for purposes of the remedies in Title 39, ch. 71, part 5, Buerkley's employer was uninsured at the time of the injury and the exclusive remedy provision did not apply. Buerkley v. Aspen Meadows Ltd. Partnership, 1999 MT 97, 294 M 263, 980 P2d 1046, 56 St. Rep. 415 (1999), following Stratemeyer v. Lincoln County, 276 M 67, 915 P2d 175 (1996).

Principles Controlling When Allegations Sufficient to Avoid Exclusive Remedy Provisions — Employer's Knowledge of Employee's Risk and Violations of Safety Standards Insufficient Basis for Intentional Tort: While the language of 39-71-413 provides for a cause of action only against a fellow employee or other servant who intentionally and maliciously injures an employee, an action of this nature may be brought against an employer as well, pursuant to Sitzman v. Shumaker, 221 M 304, 718 P2d 657 (1986). Allegations of negligence, no matter how wanton, are insufficient to avoid the exclusive remedy of the Workers' Compensation Act, as set out in this section. A plaintiff who attempts to avoid the exclusive remedy provisions must establish that an intentional act with malice caused the injury at issue. An employer's violation of safety statutes or regulations is insufficient to avoid exclusivity because that violation would at most constitute negligence and does not serve as a basis for an intentional tort. Even an employer's knowledge of a high degree of risk to an employee working under dangerous conditions does not, in itself, establish the intentional act necessary to avoid exclusivity. Allegations or evidence that an employer knew that its act created a high degree of harm to an employee is sufficient to meet the intentional act requirement of 39-71-413; however, the employee must allege and establish that the employer had actual knowledge that the employee was being harmed, because mere allegations that the employer had ample reason to know of the harm are insufficient. In the present case, the employer's knowledge that Calcaterra was working 10 feet above the floor on an unsecured ladder and without a safety belt and lanyard, thus risking injury, was insufficient to raise a genuine issue of material fact that the employer directed intentional harm at Calcaterra. The employer's motion for summary judgment was properly granted, absent a genuine issue of material fact, and the claim was barred by the exclusivity provision. Calcaterra v. Mont. Resources, 1998 MT 187, 289 M 424, 962 P2d 590, 55 St. Rep. 762 (1998), distinguishing Lockwood v. W.R. Grace & Co., 272 M 202, 900 P2d 314 (1995). See also Calcaterra v. Mont. Resources, 2001 MT 193, 306 M 249, 32 P3d 764 (2001), in which it was held that a decisional law change regarding the definition of intentional and malicious in Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), did not constitute sufficient extraordinary circumstances under former Rule 60(b)(6), M.R.Civ.P. (now superseded), so as to allow reopening the 1998 Calcaterra decision.

Negligence Insufficient to Avoid Exclusive Remedy Provision of Workers' Compensation Coverage — Violation of Safety Statute Only Evidence of Negligence: Schmidt's husband was killed on the job, and she argued that the state, his employer, was liable for damages beyond workers' compensation coverage because the state's employee, her husband's supervisor, had acted intentionally and maliciously in ordering her husband to use an old tractor to accomplish a certain task, resulting in her husband's death. Schmidt additionally argued that the state violated provisions of the Montana Safety Act, which also constituted an intentional act. The Supreme Court stated that although there was a split in the holdings of its previous cases, without resolving the conflict, it was going to follow the line of cases that stated that allegations of negligence, no matter how wanton, are insufficient to avoid the exclusive remedy of workers' compensation provisions and that to succeed in avoiding the exclusivity, the plaintiff must show that the employer's employee or agent intended the result of any intentional act. The Supreme Court further held that a violation of a safety statute by itself only indicates negligence, not an intentional act. Schmidt v. St., 286 M 98, 951 P2d 23, 54 St. Rep. 1321 (1997), following Great W. Sugar Co. v. District Court, 188 M 1, 610 P2d 717 (1980).

Corporate Shareholder Landlords Not Protected by Exclusive Remedy: The District Court dismissed an action filed by an employee, who was injured on property owned by the defendants, who were shareholders as well as landlords of the property, ruling that the exclusive remedy rule protected the shareholders from liability. On appeal, the Supreme Court reversed, ruling that the exclusive remedy provision provided no protection because the claim was filed against the defendants in their capacity as landlords, not as shareholders in the corporate employer. Welton v. Lucas, 283 M 202, 940 P2d 112, 54 St. Rep. 562 (1997), distinguished in George v. Bowler, 2015 MT 209, 380 Mont. 155, 354 P.3d 585.

Exclusive Remedy:

Lincoln County Deputy Sheriff Stratemeyer filed a tort action against Lincoln County for failing to properly train, debrief, and counsel him to cure his posttraumatic stress disorder incurred from observing a suicide victim. Citing case law from other states and the public policy expressed by the Legislature, the Supreme Court held that the refusal of the Legislature to provide coverage under the workers' compensation laws precluded the applicability of the exclusive remedy theory upon which those laws are based. The Supreme Court also held that because the definition of injury contained in this section must be construed consistently with the definition of injury in 39-71-119, an injury excluded by the definition in 39-71-119 must also be excluded from the exclusive remedy provisions of this section. Because Stratemeyer did not suffer an injury covered by the exclusive remedy provision of the workers' compensation laws, he was free to bring a separate tort action against the county. Stratemeyer v. Lincoln County, 276 M 67, 915 P2d 175, 53 St. Rep 245 (1996), followed in Kleinhesselink v. Chevron, U.S.A., 277 M 158, 920 P2d 108, 53 St. Rep. 668 (1996), and Buerkley v. Aspen Meadows Ltd. Partnership, 1999 MT 97, 294 M 263, 980 P2d 1046, 56 St. Rep. 415 (1999). Stratemeyer and Kleinhesselink were distinguished in Maney v. La. Pac. Corp., 2000 MT 366, 303 M 398, 15 P3d 962, 57 St. Rep. 1561 (2000), and Walters v. Flathead Concrete Products, Inc., 2011 MT 45, 359 Mont. 346, 249 P.3d 913.

Where both employer and employee elected to come under the Montana Workmen's Compensation Act (now Workers' Compensation Act), the provisions of the Act were exclusive. If benefits provided by the Act were not paid by the employer, the employee's sole remedy was with the Workers' Compensation Division (now Department of Labor and Industry). Carlson v. The Anaconda Co., 165 M 413, 529 P2d 356 (1974).

Employer's immunity from common-law liability remains even when there have been wanton, willful, and intentional violations of safety statutes, and the immunity is abrogated only if the injury itself was intentionally inflicted. Enberg v. The Anaconda Co., 158 M 135, 489 P2d 1036 (1971).

Where electric company's independent contractor was specifically required to carry workers' compensation insurance, an employee of the contractor could not bring an action in tort against the electric company for injuries he suffered when a pole broke. Buerkle v. Mont. Power Co., 157 M 57, 482 P2d 564 (1971).

Where independent contractor defense is not applicable to general employer, general employer is substituted for immediate employer and is liable for injury under Workmen's Compensation Act (now Workers' Compensation Act) and claimant cannot maintain common-law personal injury action against general employer. Campbell v. Shell Oil Co., 329 F. Supp. 846 (D.C. Mont. 1971).

Where employee was injured while performing work assigned to him under contract between his employer and second company, failure of second company to file timely injury report with Industrial Accident Board (now Department of Labor and Industry) prevented it from invoking exclusive jurisdiction in Board as "exclusive remedy" after employee filed civil suit in District Court. State ex rel. Broesder v. Indus. Accident Bd., 154 M 178, 461 P2d 456 (1969).

Employee, having elected to be bound by workers' compensation law, and being compensated thereunder, was not entitled to maintain an action against employer for negligence, notwithstanding contention that employer's actions were willful and therefore not within statute barring employee's action against employer for common-law negligence. Employee was not third-party beneficiary of safety clauses in contract between employer and United States and could not maintain action against employer for common-law negligence in absence of express promise in contract between employer and United States to pay damages to employee for employer's negligence. Hensley v. U.S., 279 F. Supp. 548 (D.C. Mont. 1968).

Exclusive Remedy Provisions Precluding Negligence Suit Following Successful Remedy Under Occupational Disease Act (Now Repealed and Merged With Workers' Compensation Act): Torres was injured by chemicals while pursuing a doctorate of philosophy in chemistry at Montana State University. She filed a workers' compensation claim, which was denied, but the parties later entered into a disputed liability settlement under the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act). Torres then brought suit against the state for negligence. The District Court correctly dismissed the negligence claim, holding that the exclusivity provisions of the Workers' Compensation Act and the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) precluded pursuit of the tort claim. The only exception to the exclusivity provisions is in 39-71-413, regarding intentional or malicious acts or omissions by the employer or a coemployee. Torres v. St., 273 M 83, 902 P2d 999, 52 St. Rep. 833 (1995).

Failure to Install or Maintain Safety Device — No Allegation of Intentional or Malicious Acts — Exclusivity Provision of Workers' Compensation Act Prevails: Plaintiff sued, alleging that her son's death, which was covered by workers' compensation insurance, was caused by the negligence of defendant in not installing or maintaining a safety device. The District Court granted defendant's motion to dismiss on the grounds that the Workers' Compensation Act provided the exclusive remedy. Plaintiff urged the court to carve out judicial exception to the Act to provide tort liability when a worker is killed because of failure to install or maintain a required safety device. The Supreme Court declined to make a judicial exception and relied on the legislative determination that absent intentional and malicious conduct, employees cannot sue their employers for injuries sustained during the course of their employment that are covered by the Workers' Compensation Act. Kortes v. Pool Co., 270 M 474, 893 P2d 322, 52 St. Rep. 291 (1995). See also Maney v. La. Pac. Corp., 2000 MT 366, 303 M 398, 15 P3d 962, 57 St. Rep. 1561 (2000).

Subject Matter Jurisdiction of District Court to Determine Liability of Coemployee: Section 27-1-703 provides that to the extent a coemployee has immunity from liability under the Workers' Compensation Act, a trier of fact cannot consider or determine negligence by the coemployee. The existence of immunity must be determined by the District Court. No statute or rule requires pleading the inapplicability of the Workers' Compensation Act because the jurisdiction of the District Court over common-law personal injury claims is indisputable. Brown v. Ehlert, 255 M 140, 841 P2d 510, 49 St. Rep. 940 (1992), distinguishing Mitchell v. Banking Corp. of Mont., 83 M 581, 273 P 1055 (1929), and Massey v. Selensky, 212 M 68, 685 P2d 938 (1984).

Workers' Compensation Exclusivity and Coemployee Immunity Matters to Be Pleaded Affirmatively — Timeliness: Workers' compensation exclusivity and coemployee immunity are matters of avoidance that, pursuant to former Rule 8(c), M.R.Civ.P. (now superseded), must be pleaded affirmatively. When these matters were raised only after plaintiff's case in chief rather than in initial pleadings, after opportunity for discovery, or at the pretrial conference, the procedure did not provide appropriate notice to plaintiff or apprise the District Court that the issues were before it. Consideration of the matters was thus waived as not timely raised. Brown v. Ehlert, 255 M 140, 841 P2d 510, 49 St. Rep. 940 (1992).

Claimant Liable for Restitution for Benefits Paid Under Order Reversed on Appeal: Reil was granted about $13,750 in benefits by the Workers' Compensation Court, of which $3,000 was retained by Reil's counsel for costs and fees. On appeal, the Supreme Court in Reil v. Billings Processors, Inc., 229 M 305, 746 P2d 617 (1987), reversed the award after finding that Reil failed to provide his employer with timely notice of his injury. In a subsequent declaratory action, the Workers' Compensation Court ruled that restitution was proper, denied Reil's joinder of counsel as a third-party defendant, and ordered Reil to reimburse State Fund for all compensation benefits and medical expenses received. Although there is nothing in the Workers' Compensation Act that specifically refers to restitution, neither do the exclusivity provisions of the Act preclude restitution. Therefore, Reil was properly ordered to reimburse State Fund for compensation and benefits paid pursuant to the lower court judgment that was subsequently reversed on appeal. Reil v. St. Comp. Mut. Ins. Fund, 254 M 274, 837 P2d 1334, 49 St. Rep. 734 (1992).

Joint Venturer Immune From Liability: A company engaged in a joint venture with the primary employer is also considered an employer and is immune from negligence liability following an award of workers' compensation benefits. Papp v. Rocky Mtn. Oil & Minerals, Inc., 236 M 330, 769 P2d 1249, 46 St. Rep. 400 (1989), followed in Ramsbacher v. Jim Palmer Trucking, 2018 MT 118, 391 Mont. 298, 417 P.3d 313, in which a professional employer organization and its client business were both held to be immediate employers entitled to protection from third-party liability via Art. II, sec. 16, Mont. Const.

No Workers' Compensation Act Limitation on Contractor Liability to Compensate Employee of Uninsured Subcontractor: When a general contractor is compelled, pursuant to 39-71-405, to pay workers' compensation benefits to an employee of an uninsured subcontractor, the general contractor's liability is not limited by this section to compensation under the Workers' Compensation Act. Therefore, the Supreme Court held that the employee could maintain an action for negligence against the general contractor, despite the subcontractor's failure to provide workers' compensation coverage. Webb v. Mont. Masonry Constr. Co., 233 M 198, 761 P2d 343, 45 St. Rep. 1420 (1988).

Material Issue of Fact Concerning Exclusivity: Two workers injured in a Montana automobile accident while returning home from the job site in North Dakota sued their employer for damages caused by the negligence of their fellow employee who was driving the car. The employer paid workers' compensation assessments for the two workers in North Dakota but not in Montana, pursuant to a multistate agreement between Montana and North Dakota that coverage would be controlled by the site of the work. The trial court granted summary judgment for the employer on the ground that the Montana workers' compensation fund provided the exclusive remedy. The appellate court held that summary judgment is precluded because there is a material issue of fact as to whether the fund provided the exclusive remedy. Webb v. Tom Brown, Inc., 807 F2d 783 (9th Cir. 1987).

Trench Collapse Not Intentional Harm — Workers' Compensation Exclusive Remedy: When a trench collapsed on a worker installing pipe, there was nothing to indicate an intentional and malicious act on the part of the employer. The conduct was, at most, gross negligence; therefore, the exclusivity clause of the Workers' Compensation Act applied. Adsem v. Roske, 224 M 269, 728 P2d 1352, 43 St. Rep. 2188 (1986).

Exception to Exclusiveness of Compensation Remedy: The election referred to in this section is the election to come under the Workers' Compensation Act made by an employer not specifically covered pursuant to 39-71-401(2) and has no reference to an employee seeking to recover for injuries suffered as the result of an assault and battery committed personally by an employer, even though the employee may have filed for and received workers' compensation benefits. The Supreme Court provided coverage when the injury is by the employer in a manner similar to coverage provided by the Legislature in 39-71-413 when the injury is by a fellow employee. The court held that a narrow exception to the exclusiveness of the compensation remedy exists when the employer personally commits an assault and battery upon an employee. Sitzman v. Schumaker, 221 M 304, 718 P2d 657, 43 St. Rep. 831 (1986). See also Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990, 57 St. Rep. 241 (2000), in which Sitzman's "narrow exception" to the exclusiveness of the compensation remedy, existing when the employer personally committed an assault and battery upon the employee, was used as precedent for the holding that although 39-71-413 provides for an action only against a fellow employee for intentional or malicious injury, such an action may be brought against an employer as well—in this case, a major oil company. See also Oedewaldt v. J.C. Penney Co., Inc., 687 F. Supp. 517, 45 St. Rep. 1366 (D.C. Mont. 1988). However, see Blythe v. Radiometer America, Inc., 262 M 464, 866 P2d 218, 50 St. Rep. 1640 (1993).

No Exception for Express Contractual Indemnity — Immunity Defense Asserted: Farmers Union Elevator Company (Farmers), as lessee, signed an indemnity provision in a lease agreeing to indemnify the lessor, Burlington Northern, for any loss, damage, injury, or death from any act or omission of Farmers, its employees, or agent, to the person or property of the parties to the lease and their employees. When an injured Farmers employee sued Burlington Northern for personal injuries suffered on the job, Burlington Northern brought Farmers into the suit as a third-party defendant, seeking contribution or indemnity. On certification from federal District Court, the Montana Supreme Court held that Farmers can properly assert 39-71-411 as a complete defense to a third-party action for express indemnity. Although 39-71-411 is a substantial impairment of the contractual relationship between Farmers and Burlington Northern, the section is constitutional. The purpose of the prohibition against contribution or indemnity, to perpetuate Montana's workers' compensation system in light of recent tort law development, is a significant and legitimate public purpose. The Supreme Court further found that it is not an appropriate distinction under Montana's Workers' Compensation Act to hold that an action to enforce an indemnity contract is an action separate from the original claim for the injury of the employee. An employer should not be held liable for damages sustained by an injured employee, whether such damages are sought by the employee directly or indirectly through recovery from a third party. Raisler v. Burlington N., 219 M 254, 717 P2d 535, 42 St. Rep. 1997 (1985), distinguishing Wright Constr. Co. v. DeBeer Mechanical Constr. Co., 185 M 47, 604 P2d 323, 36 St. Rep. 2385 (1979).

Contribution and Indemnity Claim Barred — Constitutionality: In a federal diversity case, an injured worker sued a third party who joined the insured employer as a third-party defendant, seeking contribution or indemnity on the basis of an express indemnity agreement. The federal court certified the case to the Montana Supreme Court for its interpretation of 39-71-411. The Supreme Court held that it is constitutional for an employer to use 39-71-411 as a complete defense to a third-party claim for contribution or indemnity. A strict scrutiny analysis does not apply because an employer's immunity from tort liability is constitutionally recognized in Art. II, sec. 16, Mont. Const. Raisler v. Burlington N., 219 M 254, 717 P2d 535, 42 St. Rep. 1997 (1985), distinguishing Wright Constr. Co. v. DeBeer Mechanical Constr. Co., 185 M 47, 604 P2d 323, 36 St. Rep. 2385 (1979).

Injury in Auto Accident Caused by Insured Coemployee — Workers' Compensation Exclusive Remedy: The decedent employee was killed in an automobile accident while in the course of his employment. It was alleged that his coemployee's negligence was the sole cause of the accident. The decedent's heirs applied for and received workers' compensation benefits. In an action by the decedent's heirs to recover damages from the coemployee's insurance company under a policy's uninsured motorist provisions, the trial court improperly held that the negligent driver was an uninsured motorist. The court reasoned, first, that 39-71-411 required that the heirs' exclusive remedy was the Workers' Compensation Act, thus the driver's insurance was not applicable and the driver was operating an uninsured vehicle. Second, the insurer's refusal to provide coverage under the "bodily injury" portion of its policy qualified the driver as an uninsured motorist. However, the Supreme Court reversed, holding that the driver was an insured motorist as he had coverage under legally adequate insurance policies, but recovery from him was dependent on and denied by the exclusive remedy provisions of the Workers' Compensation Act. Hubbel v. W. Fire Ins. Co., 218 M 21, 706 P2d 111, 42 St. Rep. 1365 (1985).

Dual Capacity Doctrine — Alleged Negligence in Maintenance of Truck: The plaintiff filed a wrongful death and survival action when Robert Herron died in a truck crash. Herron purportedly died because of negligent maintenance of the truck's brakes by the company's service department. The Supreme Court upheld the trial court's dismissal based on the exclusive remedy provision of this section. The Supreme Court cited a similar case in Illinois in which significance was placed on the fact that the employer furnished the truck to the employee. Because the operation of the truck was an incident of the injured man's employment, the court rejected the dual capacity exception to the exclusivity provision. Herron v. Pack & Co., 217 M 429, 705 P2d 587, 42 St. Rep. 1303 (1985), distinguished in George v. Bowler, 2015 MT 209, 380 Mont. 155, 354 P.3d 585.

No Proof Harm Directed at Plaintiff — No Cause Outside Exclusive Remedy Statute: When an injured employee's allegations go no further than to charge an employer with knowledge of a hazardous machine, the complaint does not state a cause of action outside the purview of this exclusive remedy statute. The facts as set forth by the injured worker cannot be interpreted to show that harm was specifically directed at him. The trial court correctly construed the intentional harm exception to the exclusivity provision. Noonan v. Spring Creek Forest Prod., Inc., 216 M 221, 700 P2d 623, 42 St. Rep. 759 (1985), followed in Blythe v. Radiometer America, Inc., 262 M 464, 866 P2d 218, 50 St. Rep. 1640 (1993), and Lockwood v. W.R. Grace & Co., 272 M 202, 900 P2d 314, 52 St. Rep. 705 (1995).

State Fund Liable for Bad Faith in Settlement: Plaintiff suffered an injury compensable under the state Workers' Compensation Act. His employer was insured by the state fund in accordance with Plan III, under Title 39, ch. 71, part 23. After plaintiff achieved maximum healing, settlement negotiations were begun. After unsuccessful attempts at settlement, the state fund's counteroffer was reduced to writing and a formal petition for full and final settlement was submitted to plaintiff. Plaintiff's attorney, after initially rejecting the offer, waived his fees and drafted a cover letter accepting the terms of the petition. Plaintiff went to the state fund office to accept the offer, but the state fund withdrew its previous offer because it took exception to the language of the cover letter. Plaintiff filed suit alleging bad faith by the state fund. The District Court granted summary judgment to the state fund, relying on the exclusive remedy provisions of 39-71-411 and 39-71-2905. The Supreme Court reversed, relying on the reasoning of its opinions in Hayes v. Aetna Fire Underwriters, 187 M 148, 609 P2d 257 (1980), and Vigue v. Evans Products Co., 187 M 1, 608 P2d 488 (1980), relating to Plan I and Plan II insurers. The court held that the tortious conduct did not arise within the employment relationship and was not work-related and was therefore not covered by the exclusive remedy provisions. The court said that since the insurance code played no part in the Hayes and Vigue cases, those decisions were equally applicable to the state fund. Birkenbuel v. Mont. St. Comp. Ins. Fund, 212 M 139, 687 P2d 700, 41 St. Rep. 1647 (1984).

Dual Capacity Doctrine — Products Liability Suit by Employee Against Employer — Employer Not a Manufacturer or Seller of the Product: A worker injured on an oil rig sued his employer, the owner of the rig, for products liability, claiming the rig was defective. The dual capacity doctrine is invoked in workers' compensation cases when the employer may be said to owe some duty to an injured employee distinct from his duties as an employer, commonly, when an employee is injured by a piece of equipment manufactured by the employer. Whether this doctrine exists in Montana is not clear; but the question need not be answered because, even assuming that the doctrine applies in Montana, the facts do not support products liability as to the employer. The employer did not manufacture oil rigs to sell to the public and did not place in the stream of commerce the rig involved or any other rig. Montana law requires one held liable for products liability to have been a seller of the defective product. Mitchell v. Shell Oil Co., 579 F. Supp. 1326, 41 St. Rep. 278 (D.C. Mont. 1984).

Punitive or Exemplary Damages for Employer's Negligence — Barred by Section: This section bars any claim by an employee against his employer for punitive or exemplary damages for negligence leading to employee's injury. Mitchell v. Shell Oil Co., 579 F. Supp. 1326, 41 St. Rep. 278 (D.C. Mont. 1984).

Election by Claimant Between Occupational Disease Act (Now Repealed and Merged With Workers' Compensation Act) and Workers' Compensation Act Permissible: The fact that a person may have a compensable disease under the Occupational Disease Act (now repealed and merged with Workers' Compensation Act) does not preclude eligibility under the Workers' Compensation Act. Thus a claimant who meets the requirements of both acts may choose his remedy. The phrase "exclusive remedy" in 39-72-305 (now repealed) means that an employee does not have a common-law action against his employer. Ridenour v. Equity Supply Co., 204 M 473, 665 P2d 783, 40 St. Rep. 1012 (1983).

Rights of Decedent's Relatives and Dependents — Law at Time of Injury as Governing: Generally, the compensation rights of the relatives and dependents of a deceased employee are controlled by the law in effect at the time of the injury and not the law in effect upon the employee's death or at the time of the grant of an award. This rule is based on the theory that the Workers' Compensation Act does not create new rights of action in the relatives or dependents of an employee on his death, but rather, his right merely survives for their benefit. Iverson v. Argonaut Ins. Co., 198 M 340, 645 P2d 1366, 39 St. Rep. 1040 (1982).

"Intentional Harm" Exclusivity Exclusion — Definition: "Intentional harm" removes an employer from the protection of the exclusivity clause of this section. Pleading negligence, however wanton or malicious, will not suffice; there must be harm maliciously and specifically directed at an employee or class of employees out of which specific intentional harm is received by the employee as a proximate result. Great W. Sugar Co. v. District Court, 188 M 1, 610 P2d 717, 37 St. Rep. 874 (1980), followed in Herron v. Pack & Co., 217 M 429, 705 P2d 587, 42 St. Rep. 1303 (1985), and distinguished in Noonan v. Spring Creek Forest Prod., Inc., 216 M 221, 700 P2d 623, 42 St. Rep. 759 (1985), and Lockwood v. W.R. Grace & Co., 272 M 202, 900 P2d 314, 52 St. Rep. 705 (1995). See also Oedewaldt v. J.C. Penney Co., Inc., 687 F. Supp. 517, 45 St. Rep. 1366 (D.C. Mont. 1988), Alexander v. Bozeman Motors, Inc., 2010 MT 135, 356 Mont. 439, 234 P.3d 880, and Harris v. Dept. of Corrections, 2013 MT 16, 368 Mont. 276, 294 P.3d 382.

Not a Prohibited Exculpatory Clause: The exclusionary clause of this section, as part of virtually all employment contracts in the state, is not a contract prohibited by 28-2-702, which declares exculpatory contracts contrary to the policy of the law. Great W. Sugar Co. v. District Court, 188 M 1, 610 P2d 717, 37 St. Rep. 874 (1980).

Intentional Torts Arising During Workers' Compensation Settlement: An injured employee brought suit against the workers' compensation insurance carrier and the insurance adjuster for the intentional torts of fraud, conversion, and infliction of emotional distress. The suit was brought after the injured employee prevailed in his claim for workers' compensation. The Supreme Court said this suit is not barred by the exclusivity provision of this section. The claimed injury is distinct from the original on-the-job injury; it occurred after the employment relation terminated, and it is not covered by the Workers' Compensation Act. Hayes v. Aetna Fire Underwriters, 187 M 148, 609 P2d 257, 37 St. Rep. 485 (1980), followed in Spadaro v. Midland Claims Serv., Inc., 227 M 445, 740 P2d 1105, 44 St. Rep. 1221 (1987).

Exclusive Jurisdiction — Exception: A claimant who sustains an injury covered by the Workers' Compensation Act may assert a separate action for damages in District Court against an insurer and its adjuster for the commission of intentional torts in the processing and handling of a workers' compensation claim. Vigue v. Evans Prod. Co., 187 M 1, 608 P2d 488, 37 St. Rep. 474 (1980).

Contract to Indemnify — Upheld Where No Defense Asserted Under This Section: The contract between the general contractor and a subcontractor contained an indemnity provision. An employee of the subcontractor was injured and recovered a judgment against the general contractor. The contractor then sued to enforce the indemnity clause. The subcontractor was forced to indemnify. The Supreme Court held that a contract of indemnity falls within the "other legal transaction" exception to the general rule that an employer who has paid an employee benefits pursuant to a workers' compensation claim is not subject to further liability arising out of injuries as to third parties claiming contribution for indemnity. Wright Constr. Co. v. De Beer Mechanical Constr. Co., 185 M 47, 604 P2d 323, 36 St. Rep. 2385 (1979), distinguished in Raisler v. Burlington N., 219 M 254, 717 P2d 535, 42 St. Rep. 1997 (1985).

No Third-Party Right to Noncontractual Indemnity or Contribution: A third party, sued by an injured employee, has no right to indemnity or contribution from a negligent employer if the employer and the employee are covered by the Montana Workers' Compensation Act unless such a right were to arise out of some other legal transaction between the employer and third party. Cordier v. Stetson-Ross, Inc., 184 M 502, 604 P2d 86, 36 St. Rep. 2107 (1979).

Assault by Supervisor: Where discharged probationary employee had allegedly been "patted on the rear" and called obscene names by supervisory employee prior to discharge, employee's sole remedy for alleged acts constituting assault was under Workmen's Compensation Act (now Workers' Compensation Act), and court held that "pat on the rear" was legal trifle, and nominal damages of $1 were sufficient. Brown v. Stauffer Chem. Co., 167 M 418, 539 P2d 374 (1975).

General Contractor's Liability:

General employer was immune from suit by independent contractor's employee for injuries sustained in performing work on the general employer's electrical lines where contractor provided workers' compensation coverage although general employer did not require it to do so in the contract. Fiscus v. Beartooth Elec., 164 M 319, 522 P2d 87 (1974).

Bank which required independent contractor to provide workers' compensation coverage against the claims of employees of a subcontractor was immune from suit by employee of subcontractor to recover damages suffered, allegedly due to bank's negligence. State ex rel. First Nat'l Bank & Trust Co. v. District Court, 161 M 127, 505 P2d 408 (1973).

Joint Venture as Employer: Individual members of joint venture are "employers" within act and as such are immune from tort actions for death of employees of joint venture. Hamman v. U.S., 267 F. Supp. 420 (D.C. Mont. 1967).

Law Review Articles

Tort Liability for Employers Who Create Workplace Conditions "Substantially Certain" to Cause Injury or Death, Tucker, 50 Mont. L. Rev. 371 (1989).

The Exclusivity Rule: Dual Capacity and the Reckless Employer, Bohyer, 47 Mont. L. Rev. 157 (1986).

Massey v. Selensky: Workers' Compensation and Coemployee Immunity in Montana, Axelberg, 46 Mont. L. Rev. 217 (1985).

Hensley v. Montana State Fund: A Shift in the Grand Bargain of Workers' Compensation, Hagan, 83 Mont. L. Rev. 159 (2022).

39-71-412. Liability of third party other than employer or fellow employee — additional cause of action.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Exclusivity Provision Properly Applied: One of the plaintiffs was employed by Carpets Plus, a corporation whose sole shareholder/president and secretary/treasurer were the defendants. This plaintiff was injured while assembling carpet racks at the Carpets Plus warehouse, which was owned by the defendants individually, and he claimed and received workers' compensation benefits for his injuries through Carpets Plus's compensation insurance. Later, the plaintiffs sued the defendants, alleging that they were negligent and failed to provide a safe workplace under the Montana Occupational Safety and Health Act. The District Court granted the defendants summary judgment, concluding that the defendants were acting at all relevant times in their capacities as corporate officers of Carpets Plus and were immune from suit under the exclusivity provision of the Workers' Compensation Act. The plaintiffs appealed, arguing that the exclusivity provision applies only to an employer and its employees and that because the defendants were the property owners of the warehouse, they were separate legal entities from Carpets Plus and the exclusivity provision should not apply. The Supreme Court affirmed, concluding that the defendants were protected from suit by the exclusivity provision because undisputed evidence demonstrated that the defendants were acting within the course and scope of their employment for Carpets Plus when they allegedly failed to provide the employee plaintiff with a safe work environment. George v. Bowler, 2015 MT 209, 380 Mont. 155, 354 P.3d 585.

Workers' Compensation Claimant's Comparative Negligence Not Applicable in Determining Eligibility — Subrogation Appropriate Only After Claimant Made Whole: McMillan was injured in January 1987 while his employer was performing logging work for the U.S. government. McMillan filed a worker's compensation claim in Montana for which the state did not dispute liability, and he then filed an action under the Federal Tort Claims Act. The federal District Court determined that McMillan was entitled to recover $4,762,686 in damages from the United States, diminished by 45% for McMillan's comparative negligence to $2,619,477. The State Compensation Insurance Fund (State Fund) then sought a determination from the Workers' Compensation Court that the State Fund could assert a subrogation claim against McMillan's recovery from the United States and cease paying benefits. The Workers' Compensation Court held that the full measure of McMillan's loss was $4,762,686, the total amount of damages determined by the federal District Court, and that pursuant to the equitable "made whole" doctrine articulated in In re Zacher v. Am. Ins. Co., 243 M 226, 794 P2d 335 (1990), McMillan must recover that amount, plus the costs of recovery, before the State Fund was entitled to subrogation. The State Fund appealed, contending that the amount necessary to make McMillan whole was actually $2,619,477 after taking into account McMillan's comparative negligence, plus attorney fees and costs of recovery. The Supreme Court affirmed. The Zacher formula does not contemplate a deduction from a claimant's entire loss for comparative negligence, in accordance with state law, which does not consider a claimant's fault in determining eligibility. Reducing the calculation of McMillan's entire loss, and thus his eligibility for benefits, for comparative negligence would introduce a claimant's fault into the workers' compensation system in violation of Montana law. Thus, the State Fund's subrogation interest could be properly asserted only after McMillan recovered the full amount of the total amount of damages determined by the federal District Court. St. Comp. Ins. Fund v. McMillan, 2001 MT 168, 306 M 155, 31 P3d 347 (2001).

Physician's Standard of Care Toward Examinee Sent to Physician by Examinee's Employer or Insurer or by Some Other Third Party: At the request of the workers' compensation insurer of an injured worker's employer, a physician examined the worker. He reported his findings to, and his fee was paid by, the insurer. He wrote the worker a letter telling her that she had a back sprain, that no treatment was needed, and that she had an impairment rating of 2% of the whole person. She went back to work, suffered a severely herniated disc in her back, and has significant physical limitations as a result. She sued the doctor for negligence. He claimed that he did not have a physician-patient relationship with her and therefore had no duty of care toward her. The Supreme Court held that based on 27-1-701, a physician who performs an examination of an employee, insured, or other person at the request of a third party has a duty to exercise the level of care required by the physician's professional training and experience and the duty to exercise ordinary care to: (1) discover those conditions that pose imminent danger to the examinee's physical and mental well-being; (2) take reasonable steps to communicate any such condition to the examinee; and (3) ensure that when the physician advises an examinee about a condition, the advice comports with the standard of care for the profession. The court stated that it was not thereby concluding that the physician has the same duty of care as toward a patient. Webb v. T.D., 287 M 68, 951 P2d 1008, 54 St. Rep. 1502 (1997).

Question of Fact as to Whether Claimant Made Whole — Subrogation Interests: An insurer is not entitled to invade a claimant's paid third-party claim via subrogation until the claimant has been made whole. The question of whether a claimant has been made whole is a question of fact, not a question of law, dependent on the level of the claimant's physical recovery and the extent of the claimant's compensation through benefits paid or damages recouped. Pursuant to Zacher v. Am. Ins. Co., 243 M 266, 794 P2d 335 (1990), no distinction is made between voluntary and nonvoluntary settlements when articulating the rule regarding an insurer's right to subrogation. In this case, a third-party settlement that did not in fact represent the amount necessary to make the claimant whole could not be relied on to entitle an insurer as a matter of law to a subrogation interest in the settlement proceeds. Ness v. Anaconda Minerals Co., 279 M 472, 929 P2d 205, 53 St. Rep. 1241 (1996), overruling Brandner v. Travelers Ins. Co., 179 M 208, 587 P2d 933 (1978), and Getten v. Liberty Mut. Ins. Co., 240 M 90, 782 P2d 1267 (1989).

Jurisdiction to Allocate Settlement Funds Affirmed — Maximum Healing Not Required: Wildin was injured in a car accident during her employment, and her employer's insurer, CNA

Insurance Company (CNA), paid over $35,000 to her in medical and disability benefits. Wildin then sued State Farm Fire and Casualty Company (State Farm), the insurer of the other driver, and contacted CNA to see if it would join the suit. No answer was received, so Wildin and State Farm proceeded to settle her suit for $15,000. CNA would not agree to the settlement. Wildin then filed a petition with the Department of Labor and Industry to have the settlement funds allocated. The examiner concluded that the Department had jurisdiction to allocate the funds and allocated one-third to CNA and two-thirds to Wildin, after deducting attorney fees. The Workers' Compensation Court and the Supreme Court affirmed. The Supreme Court held that there is no provision in this section that requires an insurer to consent before suit can be brought and no requirement in 39-71-414 that an insurer consent to settlement of the suit. Moreover, as far as Wildin and State Farm were concerned, they had done everything necessary under 39-71-414(5) (prior to 1991 amendment) to settle the suit before Wildin petitioned to allocate the funds. Citing 39-71-414 and First Interstate Bank v. Tom Sherry Tire, 235 M 48, 764 P2d 1287 (1988), the Supreme Court also held that maximum healing does not have to occur before a claimant can settle a claim. The Department therefore had jurisdiction to issue the allocation order. Wildin v. CNA Insurance Co., 256 M 354, 846 P2d 1022, 50 St. Rep. 108 (1993).

Subject Matter Jurisdiction of District Court to Determine Liability of Coemployee: Section 27-1-703 provides that to the extent a coemployee has immunity from liability under the Workers' Compensation Act, a trier of fact cannot consider or determine negligence by the coemployee. The existence of immunity must be determined by the District Court. No statute or rule requires pleading the inapplicability of the Workers' Compensation Act because the jurisdiction of the District Court over common-law personal injury claims is indisputable. Brown v. Ehlert, 255 M 140, 841 P2d 510, 49 St. Rep. 940 (1992), distinguishing Mitchell v. Banking Corp. of Mont., 83 M 581, 273 P 1055 (1929), and Massey v. Selensky, 212 M 68, 685 P2d 938 (1984).

Workers' Compensation Exclusivity and Coemployee Immunity Matters to Be Pleaded Affirmatively — Timeliness: Workers' compensation exclusivity and coemployee immunity are matters of avoidance that, pursuant to former Rule 8(c), M.R.Civ.P. (now superseded), must be pleaded affirmatively. When these matters were raised only after plaintiff's case in chief rather than in initial pleadings, after opportunity for discovery, or at the pretrial conference, the procedure did not provide appropriate notice to plaintiff or apprise the District Court that the issues were before it. Consideration of the matters was thus waived as not timely raised. Brown v. Ehlert, 255 M 140, 841 P2d 510, 49 St. Rep. 940 (1992).

Coemployee Immunity: The negligent act of parking in a restricted zone on the employer's property while punching in does not take an employee outside the course and scope of employment so as to remove the employee from coemployee immunity that protects him from common law liability. Massey v. Selensky, 225 M 101, 731 P2d 906, 44 St. Rep. 71 (1987).

Contribution and Indemnity Claim Barred — Constitutionality: In a federal diversity case, an injured worker sued a third party who joined the insured employer as a third-party defendant, seeking contribution or indemnity on the basis of an express indemnity agreement. The federal court certified the case to the Montana Supreme Court for its interpretation of 39-71-411. The Supreme Court held that it is constitutional for an employer to use 39-71-411 as a complete defense to a third-party claim for contribution or indemnity. A strict scrutiny analysis does not apply because an employer's immunity from tort liability is constitutionally recognized in Art. II, sec. 16, Mont. Const. Raisler v. Burlington N., 219 M 254, 717 P2d 535, 42 St. Rep. 1997 (1985), distinguishing Wright Constr. Co. v. De Beer Mechanical Constr. Co., 185 M 47, 604 P2d 323, 36 St. Rep. 2385 (1979).

No Exception for Express Contractual Indemnity — Immunity Defense Asserted: Farmers Union Elevator Company (Farmers), as lessee, signed an indemnity provision in a lease agreeing to indemnify the lessor, Burlington Northern, for any loss, damage, injury, or death from any act or omission of Farmers, its employees, or agent, to the person or property of the parties to the lease and their employees. When an injured Farmers employee sued Burlington Northern for personal injuries suffered on the job, Burlington Northern brought Farmers into the suit as a third-party defendant, seeking contribution or indemnity. On certification from federal District Court, the Montana Supreme Court held that Farmers can properly assert 39-71-411 as a complete defense to a third-party action for express indemnity. Although 39-71-411 is a substantial impairment of the contractual relationship between Farmers and Burlington Northern, the section is constitutional. The purpose of the prohibition against contribution or indemnity, to perpetuate Montana's workers' compensation system in light of recent tort law development, is a significant and legitimate public purpose. The Supreme Court further found that it is not an appropriate distinction under Montana's Workers' Compensation Act to hold that an action to enforce an indemnity contract is an action separate from the original claim for the injury of the employee. An employer should not be held liable for damages sustained by an injured employee, whether such damages are sought by the employee directly or indirectly through recovery from a third party. Raisler v. Burlington N., 219 M 254, 717 P2d 535, 42 St. Rep. 1997 (1985), distinguishing Wright Constr. Co. v. DeBeer Mechanical Constr. Co., 185 M 47, 604 P2d 323, 36 St. Rep. 2385 (1979).

No Subrogation Unless Claimant Made Whole: The insurer is not entitled to subrogation rights under 39-71-414 when, in a case of reasonably clear liability, the claimant is forced to settle a third-party claim for the amount of the insurance policy limits of the third-party tortfeasor and when the amount of the settlement, together with the claimant's workers' compensation award, does not grant full legal redress to the claimant. Hall v. St. Comp. Ins. Fund, 218 M 180, 708 P2d 234, 42 St. Rep. 1502 (1985).

Employee Suit Against Employer's Parent Corporation — Mere Holding Company Not Liable: Under the workers' compensation law provision that an employee may sue a third party in tort for causing injury to an employee, the employee may sue the parent corporation of a subsidiary corporation for which the employee works, but must establish that the parent corporation had an independent duty toward the employee. In the present case the facts failed to establish that any duty was breached by the parent corporation. The parent corporation was simply a holding company that carried on no business other than operating through its subsidiaries. Any negligence of the subsidiary employer in regard to employee's products liability theory could not be passed on to the parent corporation. Mitchell v. Shell Oil Co., 579 F. Supp. 1326, 41 St. Rep. 278 (D.C. Mont. 1984).

Contract to Indemnify — Upheld Where No Immunity Defense Asserted: The contract between the general contractor and a subcontractor contained an indemnity provision. An employee of the subcontractor was injured and recovered a judgment against the general contractor. The contractor then sued to enforce the indemnity clause. The subcontractor was forced to indemnify. The Supreme Court held that a contract of indemnity falls within the "other legal transaction" exception to the general rule that an employer who has paid an employee benefits pursuant to a workers' compensation claim is not subject to further liability arising out of injuries as to third parties claiming contribution for indemnity. Wright Constr. Co. v. DeBeer Mechanical Constr. Co., 185 M 47, 604 P2d 323, 36 St. Rep. 2385 (1979), distinguished in Raisler v. Burlington N., 219 M 254, 717 P2d 535, 42 St. Rep. 1997 (1985).

No Third-Party Right to Noncontractual Indemnity or Contribution:

A third party, sued by an injured employee, has no right to indemnity or contribution from a negligent employer if the employer and the employee are covered by the Montana Workers' Compensation Act unless such a right were to arise out of some other legal transaction between the employer and third party. Cordier v. Stetson-Ross, Inc., 184 M 502, 604 P2d 86, 36 St. Rep. 2107 (1979).

Provision in 39-71-411 for exclusive remedy under this Act does not preclude a defendant who is liable at common law to employee from seeking indemnity from plaintiff's employer as third-party defendant on an indemnity agreement. DeShaw v. Johnson, 155 M 355, 472 P2d 298 (1970).

General Contractor's Liability:

General employer was immune from suit by independent contractor's employee for injuries sustained in performing work on the general employer's electrical lines where contractor provided workers' compensation coverage although general employer did not require it to do so in the contract. Fiscus v. Beartooth Elec., 164 M 319, 522 P2d 87 (1974).

Bank which required independent contractor to provide workers' compensation coverage against the claims of employees of a subcontractor was immune from suit by employee of subcontractor to recover damages suffered, allegedly due to bank's negligence. State ex rel. First Nat'l Bank & Trust Co. v. District Court, 161 M 127, 505 P2d 408 (1973).

No Reduction of Insurance Coverage by Workers' Compensation Benefits: The amount of injured worker's recovery from uninsured motorist coverage cannot be reduced by any workers' compensation benefits received by him; Insurance Commissioner had no authority to approve a policy providing for such reduction. Sullivan v. Doe, 159 M 50, 495 P2d 193 (1972).

Right to Sue Third Party:

Plaintiff, who received workers' compensation benefits for injuries sustained while in the employ of independent contractor, was denied claim against the landowners since they exercised no control over work area. Baird v. Chokatos, 156 M 32, 473 P2d 547 (1970).

Employee of joint venture was entitled to sue engineering firm in relation of independent contractor as to joint venture for engineering firm's negligence causing injury to employee under that portion of statute (prior to 1969 amendment) giving right of action against third parties when injuries are caused by act of some person other than employer. Hamman v. U.S., 267 F. Supp. 420 (D.C. Mont. 1967).

Law Review Articles

Massey v. Selensky: Workers' Compensation and Coemployee Immunity in Montana, Axelberg, 46 Mont. L. Rev. 217 (1985).

39-71-413. Liability of employer or fellow employee for intentional and deliberate acts — additional cause of action — intentional injury defined.

Compiler's Comments

2013 Amendment: Chapter 148 inserted (1)(b) concerning the standard of proof; and made minor changes in style. Amendment effective July 1, 2013.

2001 Amendment: Chapter 229 in (1) at beginning substituted "If an employee is intentionally injured by an intentional and deliberate act of the employee's employer or by the intentional and deliberate act of a fellow employee" for "If an employee receives an injury", near middle after "duties of employment" deleted "and the injury or injuries so received by the employee are caused by the intentional and malicious act or omission of a servant or employee of his employer, then", and at end substituted "person whose intentional and deliberate act caused the intentional injury" for "servants or employees of his employer causing the injury"; inserted (2) providing that an employer is not vicariously liable for the intentional and deliberate acts of an employee; inserted (3) defining intentional injury; and made minor changes in style. Amendment effective April 12, 2001.

Preamble: The preamble attached to Ch. 229, L. 2001, provided: "WHEREAS, Montana's workers' compensation law is the exclusive remedy for an employee injured or killed in the scope of employment, as included in Article II, section 16, of the Montana Constitution and implemented by the Legislature in section 39-71-411, MCA; and

WHEREAS, the exclusive remedy provision of workers' compensation can be described as a quid pro quo exchange of rights and remedies, which is intended to relieve an injured employee of the responsibility of undertaking lengthy and expensive legal action to recover compensation for job-related injuries by proving an employer's negligence while relieving the employer of the burden of defending against work-related claims through the traditional common-law defenses of contributory negligence, assumption of risk, and the fellow servant rule to defeat the employee's claim; and

WHEREAS, in 1973, the Montana Legislature enacted section 39-71-413, MCA, which allowed an injured employee to sue a servant or employee of the employer when the injury was the result of an intentional or malicious act by the servant or employee of the injured employee's employer; and

WHEREAS, in a 2000 decision, Sherner v. Conoco, Inc., 2000 MT 50, 298 Mont. 401 (2000), the Montana Supreme Court revisited the standard used for determining whether an employer's act or omission was protected under the exclusive remedy; and

WHEREAS, the court applied section 39-71-413, MCA, to employers and held that actual malice, as described in section 27-1-221, MCA, which provides that a person acts with malice if an employer has knowledge of facts or intentionally disregards facts that create a high probability of injury and deliberately acts with conscious or intentional disregard or indifference to that high probability, would be the standard applied; and

WHEREAS, the exclusive remedy provision in the Workers' Compensation Act should provide that an injured employee has a cause of action for damages against an employer or the employer's employee only if the employer or fellow employee causes an intentional injury."

Effective Date — Applicability: Section 2, Ch. 229, L. 2001, provided: "[This act] [39-71-413] is effective on passage and approval [approved April 12, 2001] and applies to injuries that occur on or after [the effective date of this act]."

Case Notes

Employer's Knowledge of Risk of Injury Insufficient to Establish Actual Knowledge That Injury Certain to Occur: The plaintiff worked for the Department of Corrections (Department) for approximately 13 years, including serving on the Special Response Team (SRT) at Montana State Prison. In 2006, the warden issued a policy requiring all employees who sought authorization to use a taser to first complete taser training, which included undergoing a 5-second taser exposure. As a member of the SRT, the plaintiff was required to undergo the taser training. The plaintiff received training materials that specifically addressed the risks of taser exposure, including various possible injuries. Following the presentation of the training materials, the plaintiff signed a written consent form that outlined these risks, and all SRT members underwent the 5-second exposure. Subsequently, the plaintiff claimed to have sustained spinal injuries due to the taser exposure and received workers' compensation benefits. Three years later, the plaintiff filed suit against the Department, alleging that he suffered an intentional infliction of personal injury when he was tased at the training. The District Court held that the plaintiff's suit was barred by the exclusive remedy provision of the Workers' Compensation Act and granted the Department's motion for summary judgment. On appeal, the Supreme Court agreed with the District Court and held that the plaintiff failed to establish that his claim fell within the narrow exception to the exclusive remedy provision because he could not show that the Department intended to cause him injury or that the Department had actual knowledge that subjecting the plaintiff to the taser exposure was certain to injure him. While the Department knew that the employees who chose to participate in the taser training would face a risk of harm, nothing in the record indicated that the Department had certain knowledge that any employee would be harmed. Harris v. Dept. of Corrections, 2013 MT 16, 368 Mont. 276, 294 P.3d 382.

Employee's Equal Protection Claim Dismissed Based on Mootness — Employer Not Vicariously Liable if Employees Not Liable: An employee who filed a negligence action against a former corporate employer as well as other employees of the corporation claimed that 39-71-413 violated the equal protection clause provided for under Art. II, sec. 4, Mont. Const., by treating employees of a partnership differently from employees of a corporation. The Supreme Court held that the employee's constitutional question was moot since the jury in the District Court trial determined that the other employees were not liable, thereby making it impossible for the corporate employer to be vicariously liable. Alexander v. Bozeman Motors, Inc., 2012 MT 301, 367 Mont. 401, 291 P.3d 1120, citing Allmaras v. Yellowstone Basin Properties, 248 Mont. 477, 812 P.2d 770 (1991).

Genuine Issue if There Is Inferred Intentional Harm by Employer: If deliberate and intentional conduct by the employer can be inferred from factual allegations indicating that the employer knew that an employee was being harmed, failed to warn the employee of the harm, and intentionally continued to expose the employee to the harm, then there is a genuine issue of material fact as to whether there was "intentional injury" as defined in this section. Alexander v. Bozeman Motors, Inc., 2010 MT 135, 356 Mont. 439, 234 P.3d 880.

No Demonstration Beyond a Reasonable Doubt That the Statute is Unconstitutional: Plaintiffs argued that 39-71-413 of the Workers' Compensation Act violated various Montana constitutional provisions including the right to equal protection, the prohibition against legislation conferring any irrevocable grant of special privileges, franchises, or immunities, and the prohibition against special legislation. Statutes are presumed to be constitutional, and the court concluded that the plaintiffs failed to meet their burden of demonstrating beyond a reasonable doubt that 39-71-413 is unconstitutional. Alexander v. Bozeman Motors, Inc., 2010 MT 135, 356 Mont. 439, 234 P.3d 880.

Failure to Prove Facts Beyond Ordinary Negligence — Exclusivity Provision Applicable: Wise suffered an on-the-job injury and contended that the employer's negligent conduct allowed an additional claim for damages beyond benefits provided under the Workers' Compensation Act. However, Wise failed to prove any set of facts that the employer committed any intentional and deliberate act with the intent to cause Wise's injury or any element necessary to allege anything more than ordinary negligence. Thus, the exclusivity provision of 39-71-411 applied, and the damages claim was properly dismissed. Wise v. CNH America, LLC, 2006 MT 194, 333 M 181, 142 P3d 774 (2006), distinguishing Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), in light of the 2001 amendment to this section. See also Harris v. Dept. of Corrections, 2013 MT 16, 368 Mont. 276, 294 P.3d 382.

No Genuine Issue Whether Employer Acted With Intention or Malice in Employee's Injury — Summary Judgment Proper Under Sherner Standard: Roy contended that his employer was liable for damages beyond workers' compensation coverage by failing to provide training in ladder safety, having no policy concerning the use of safety belts on aerial ladders, and failing to abide by a letter from the federal Occupational Safety and Health Administration (OSHA) giving notice that there was a high probability that employees would be injured while performing midline work on aerial ladders without a safety belt. The District Court summarily dismissed the claims, and on appeal, the Supreme Court affirmed. Although the employer did not provide training in the use of safety belts, there was no evidence that the employer failed to train Roy in the face of knowledge that Roy would be injured if a safety belt was not used, nor was there a genuine issue of fact whether the employer had a policy requiring the use of safety belts on aerial ladders. Roy also failed to show that the employer was aware of the OSHA letter, and given the unclear language of federal regulations on the issue, Roy could not prove that the employer acted with malice, as defined in 27-1-221. Applying Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), the Supreme Court concluded that absent a showing that the employer had knowledge of a high probability of injury and acted with intentional indifference to or disregard of that knowledge, summary judgment was proper. Roy v. Blackfoot Tel. Co-op, Inc., 2004 MT 316, 324 M 30, 101 P3d 301 (2004). See also Gee v. Egbert, 209 M 1, 679 P2d 1194 (1984).

Employer Unaware That Employee Would Be Injured During Routine Job Activity — No Showing of Employer Malice Under Sherner Standard: Olszewski was seriously injured while loading building trusses onto a flatbed truck. Olszewski recovered workers' compensation benefits but also brought an action alleging that the injury was covered under the 1999 intentional act exception in this section, which was in effect when the injury occurred. The District Court found no showing of malicious action on the part of the employer or foreman and granted summary judgment to the employer and foreman. On appeal, the Supreme Court applied the malicious intent standard in Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), and affirmed. Olszewski was unable to provide evidence that the employer knew that employees would actually be injured by a routine that was usually performed without incident, and absent a showing of that material fact, the statutory exception did not apply and summary judgment was proper. Olszewski v. BMC W. Corp., 2004 MT 187, 322 M 192, 94 P3d 739 (2004).

No Showing of Malicious Act or Omission by Coworker in Death of Employee — Workers' Compensation Exclusivity Doctrine Applicable under 1999 Statute: Under the 1999 version of this section and Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), a plaintiff was required to show both an intentional and malicious act or omission in order to avoid the workers' compensation exclusivity doctrine (revised in 2001 to require only the showing of an intentional act or omission). Here Everhard, a mine worker, was killed by a train driven by Aafedt after signaling that Aafedt could proceed. Everhard's estate sued Aafedt and the mining company. The District Court concluded that Aafedt's conduct was intentional when he moved the train without seeing Everhard, but there was no showing that Everhard suffered an injury caused by actual malice by Aafedt or the company, so summary judgment was granted to defendants. The Supreme Court affirmed. As a matter of law, it could not be said that Aafedt deliberately proceeded to act in conscious or intentional disregard or even indifference to the high probability of injury to Everhard under the definition of actual malice, so the estate failed to overcome the workers' compensation exclusive remedy rule, and summary judgment was proper. Blain v. Stillwater Min. Co., 2004 MT 141, 321 M 403, 92 P3d 4 (2004).

Insufficient Facts in Certification Order to Render Precedential Opinion — Dismissal Without Prejudice: The Supreme Court accepted a certified question from the U.S. District Court regarding the constitutionality of this section. However, after receiving briefs, including amicus curiae briefs, and conducting an oral hearing, the court determined that it had improvidently accepted the certified question and that there were not sufficient relevant facts in the certification order to permit a decision on the important constitutional issues presented. The matter was dismissed without prejudice. Brady v. PPL Mont., LLC, 2003 MT 262, 317 M 425, 77 P3d 523 (2003). See also Brady v. PPL Mont., LLC, 2008 MT 177, 343 M 405, 183 P3d 330 (2008), in which the Supreme Court again dismissed a certified question from the Ninth Circuit Court regarding the constitutionality of this section because of a lack of sufficient facts upon which to base a precedential opinion on the constitutional question.

Negligent or Intentional Infliction of Emotional Distress Claim Barred by Exclusive Remedy Provision of Workers' Compensation — Burden Not Met for Separate Cause of Action for Intentional or Malicious Act: Maney's son, who worked for Cheff clearing timber on property belonging to the Louisiana Pacific Corporation, was killed when a tree fell on him. Maney brought an action against Cheff and the Louisiana Pacific Corporation for negligent and intentional infliction of emotional distress after seeing her son die in the hospital as a result of the accident. The Supreme Court held that the District Court did not err in dismissing Maney's claim. Citing the comprehensive language in the applicable Montana statutes and cases from other jurisdictions, the Supreme Court held that the intent of the Montana Legislature in providing the exclusive remedy of workers' compensation was to preclude any employer liability whatever for compensation as a result of or concerning an employee's injury or death. The Supreme Court also held that Maney had not met her burden under this section because she had alleged no facts demonstrating an intentional or malicious infliction of emotional distress. The court also held that the District Court had correctly dismissed the Louisiana Pacific Corporation's cross-claim against Cheff for indemnity and contribution because those claims were also barred by the exclusive remedy provisions of 39-71-411. Maney v. La. Pac. Corp., 2000 MT 366, 303 M 398, 15 P3d 962, 57 St. Rep. 1561 (2000).

Liability of Employer for Tortious Act: Although the language of this section provides for a cause of action only against a fellow employee for intentional or malicious injury, pursuant to Sitzman v. Schumaker, 221 M 304, 718 P2d 657, 43 St. Rep. 831 (1986), such an action may be brought against an employer as well. To fail to hold employers liable in the same manner as their employees by permitting an employer to commit an intentional and malicious act or omission that causes an injury to an employee and then to allow the employer to hide behind the exclusivity statutes would defeat the purpose of the Workers' Compensation Act. Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990, 57 St. Rep. 241 (2000). See also Enberg v. Anaconda Co., 158 M 135, 489 P2d 1036 (1971).

New Standard for Determining Whether Intentional or Malicious Act by Employer Constitutes Tortious Conduct — Summary Judgment Improper: Sherner was injured on the job and sued his employer, Conoco, Inc. (Conoco), for damages on grounds that Conoco was guilty of malicious acts or omissions that caused the injuries. The District Court ruled that the tort claim against Conoco was barred by the exclusivity provision in 39-71-411. Citing Calcaterra v. Mont. Resources, 1998 MT 187, 289 M 424, 962 P2d 590 (1998), the court concluded that Sherner was required to allege and establish that Conoco had actual knowledge that Sherner was being harmed in order to establish that Conoco's acts were malicious and, absent sufficient facts to raise a genuine issue of material fact that Conoco directed intentional harm at Sherner, granted summary judgment for Conoco. In District Court, Sherner sufficiently raised the issue of the proper standard for determining whether Conoco's act was malicious to allow the Supreme Court to address the issue on appeal, so the court proceeded to create a new standard, applying the plain meaning of the statutory definitions, by which to judge whether an act or omission is intentional or malicious. Applying common definitions of "intentional" and "act" and the appropriate definition of "malice" for use in this section—the one provided in 27-1-221, rather than the one in 1-1-204—the Supreme Court reversed, finding that genuine issues of material facts existed, regarding whether Conoco acted maliciously, as to preclude summary judgment. A worker need show only that an employer's act or omission, which caused the injury, was intentional or malicious to bring a tort action against the employer under this section. Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990, 57 St. Rep. 241 (2000), following Sitzman v. Schumaker, 221 M 304, 718 P2d 657, 43 St. Rep. 831 (1986). See also Enberg v. Anaconda Co., 158 M 135, 489 P2d 1036 (1971), and Olszewski v. BMC W. Corp., 2004 MT 187, 322 M 192, 94 P3d 739 (2004), in which summary judgment was held to be proper under the Sherner standard absent evidence that an employer knew that an employee would actually be injured by a routine that was usually performed without incident.

Principles Controlling When Allegations Sufficient to Avoid Exclusive Remedy Provisions — Employer's Knowledge of Employee's Risk and Violations of Safety Standards Insufficient Basis for Intentional Tort: While the language of this section provides for a cause of action only against a fellow employee or other servant who intentionally and maliciously injures an employee, an action of this nature may be brought against an employer as well, pursuant to Sitzman v. Shumaker, 221 M 304, 718 P2d 657 (1986). Allegations of negligence, no matter how wanton, are insufficient to avoid the exclusive remedy of the Workers' Compensation Act, as set out in 39-71-411. A plaintiff who attempts to avoid the exclusive remedy provisions must establish that an intentional act with malice caused the injury at issue. An employer's violation of safety statutes or regulations is insufficient to avoid exclusivity because that violation would at most constitute negligence and does not serve as a basis for an intentional tort. Even an employer's knowledge of a high degree of risk to an employee working under dangerous conditions does not, in itself, establish the intentional act necessary to avoid exclusivity. Allegations or evidence that an employer knew that its act created a high degree of harm to an employee is sufficient to meet the intentional act requirement of this section; however, the employee must allege and establish that the employer had actual knowledge that the employee was being harmed, because mere allegations that the employer had ample reason to know of the harm are insufficient. In the present case, the employer's knowledge that Calcaterra was working 10 feet above the floor on an unsecured ladder and without a safety belt and lanyard, thus risking injury, was insufficient to raise a genuine issue of material fact that the employer directed intentional harm at Calcaterra. The employer's motion for summary judgment was properly granted, absent a genuine issue of material fact, and the claim was barred by the exclusivity provision. Calcaterra v. Mont. Resources, 1998 MT 187, 289 M 424, 962 P2d 590, 55 St. Rep. 762 (1998), distinguishing Lockwood v. W.R. Grace & Co., 272 M 202, 900 P2d 314 (1995). See also Calcaterra v. Mont.

Resources, 2001 MT 193, 306 M 249, 32 P3d 764 (2001), in which it was held that a decisional law change regarding the definition of intentional and malicious in Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), did not constitute sufficient extraordinary circumstances under former Rule 60(b)(6), M.R.Civ.P. (now superseded), so as to allow reopening the 1998 Calcaterra decision.

Negligence Insufficient to Avoid Exclusive Remedy Provision of Workers' Compensation Coverage — Violation of Safety Statute Only Evidence of Negligence: Schmidt's husband was killed on the job, and she argued that the state, his employer, was liable for damages beyond workers' compensation coverage because the state's employee, her husband's supervisor, had acted intentionally and maliciously in ordering her husband to use an old tractor to accomplish a certain task, resulting in her husband's death. Schmidt additionally argued that the state violated provisions of the Montana Safety Act, which also constituted an intentional act. The Supreme Court stated that although there was a split in the holdings of its previous cases, without resolving the conflict, it was going to follow the line of cases that stated that allegations of negligence, no matter how wanton, are insufficient to avoid the exclusive remedy of workers' compensation provisions and that to succeed in avoiding the exclusivity, the plaintiff must show that the employer's employee or agent intended the result of any intentional act. The Supreme Court further held that a violation of a safety statute by itself only indicates negligence, not an intentional act. Schmidt v. St., 286 M 98, 951 P2d 23, 54 St. Rep. 1321 (1997), following Great W. Sugar Co. v. District Court, 188 M 1, 610 P2d 717 (1980).

Failure to Install or Maintain Safety Device — No Allegation of Intentional or Malicious Acts — Exclusivity Provision of Workers' Compensation Act Prevails: Plaintiff sued, alleging that her son's death, which was covered by workers' compensation insurance, was caused by the negligence of defendant in not installing or maintaining a safety device. The District Court granted defendant's motion to dismiss on the grounds that the Workers' Compensation Act provided the exclusive remedy. Plaintiff urged the court to carve out judicial exception to the Act to provide tort liability when a worker is killed because of failure to install or maintain a required safety device. The Supreme Court declined to make a judicial exception and relied on the legislative determination that absent intentional and malicious conduct, employees cannot sue their employers for injuries sustained during the course of their employment that are covered by the Workers' Compensation Act. Kortes v. Pool Co., 270 M 474, 893 P2d 322, 52 St. Rep. 291 (1995). See also Maney v. La. Pac. Corp., 2000 MT 366, 303 M 398, 15 P3d 962, 57 St. Rep. 1561 (2000).

Malice as Applied to Intentional Injury: The definition of actual malice in 27-1-221, adopted in 1987 for purposes of punitive damages, did not change the standard used to determine whether an injury was intentional for purposes of the exclusivity provision of the Workers' Compensation Act. The definition of malice in 1-1-204 is still applicable to workers' compensation cases. Blythe v. Radiometer America, Inc., 262 M 464, 866 P2d 218, 50 St. Rep. 1640 (1993), followed in Lockwood v. W.R. Grace & Co., 272 M 202, 900 P2d 314, 52 St. Rep. 705 (1995).

Trench Collapse Not Intentional Harm — Workers' Compensation Exclusive Remedy: When a trench collapsed on a worker installing pipe, there was nothing to indicate an intentional and malicious act on the part of the employer. The conduct was, at most, gross negligence; therefore, the exclusivity clause of the Workers' Compensation Act applied. Adsem v. Roske, 224 M 269, 728 P2d 1352, 43 St. Rep. 2188 (1986).

Intentional Act — Scope of Policy Exclusion: Alfred Elwell was injured when defendant squirted chemical smoke into the air chamber of Elwell's respirator. The action was outside the coverage of the Workers' Compensation Act because premised on an intentional act. Plaintiff brought declaratory judgment action to determine rights, liabilities, and duties under a home owner's policy it issued to defendant. Plaintiff contended a clause in its policy referring to "bodily injury or property damage which is either expected or intended" was the same as the intentional act exclusion under workers' compensation. Defendant contended the act was a practical joke, and no injury was intended. The Supreme Court held that 39-71-413 permits the filing of a third-party action where acts of an employee are intentional, irrespective of whether the results of the act were intended. The agreed facts in this case form the basis for such a third-party action. These same facts are not excluded by the insurance policy language relating to intended injury or damage. Millers Mut. Ins. Co. v. Strainer, 204 M 162, 663 P2d 338, 40 St. Rep. 743 (1983). See also Schmidt v. St., 286 M 98, 951 P2d 23, 54 St. Rep. 1321 (1997).

Failure to Award Exemplary Damages: The jury's failure to award exemplary or punitive damages was not equivalent to a finding of no malice so as to bar the award of actual or compensatory damages. Poeppel v. Fisher, 175 M 136, 572 P2d 912 (1977).

No Intentional and Malicious Act as Matter of Law: Where injured employee had gotten along well with defendant foreman up to the time of accident, and could not say that the foreman had anything personal against him, and where it appeared that the foreman was away from the jobsite at the time of the accident, the provision permitting an injured worker to bring suit against a coworker if his injuries were the result of the coworker's "intentional and malicious act or omission", was inapplicable as a matter of law. Boyer v. Kloepfer, 170 M 472, 554 P2d 1116 (1976).

Employee's Remedy Against Employer for Assault: When employee's coworker's claim of assault consisted merely of "pats on the rear" and being called "sweetheart", nominal damages were justified because in a working environment a "pat on the rear" is hardly actionable assault and battery, for the law disregards trifles. Brown v. Stauffer Chem. Co., 167 M 418, 539 P2d 374 (1975).

Exclusive Remedy:

Where electric company's independent contractor was specifically required to carry workers' compensation insurance, an employee of the contractor could not bring an action in tort against the electric company for injuries he suffered when a pole broke. Buerkle v. Mont. Power Co., 157 M 57, 482 P2d 564 (1971).

Employee who had received workers' compensation benefits for personal injury was precluded from maintaining action against owner of 98% of corporate stock on theory he was coemployee, since act granted immunity to coemployees. Baird v. Remoir, 156 M 348, 480 P2d 186 (1971).

Injured employee receiving workers' compensation benefits was barred from seeking damages for same injuries in negligence action against coemployee. Madison v. Pierce, 156 M 209, 478 P2d 860 (1970).

Where employee was injured while performing work assigned to him under contract between his employer and second company, failure of second company to file timely injury report with Industrial Accident Board (now Department of Labor and Industry) prevented it from invoking exclusive jurisdiction in Board as "exclusive remedy" after employee filed civil suit in District Court. State ex rel. Broesder v. Indus. Accident Bd., 154 M 178, 461 P2d 456 (1969).

Law Review Articles

Massey v. Selensky: Workers' Compensation and Coemployee Immunity in Montana, Axelberg, 46 Mont. L. Rev. 217 (1985).

39-71-414. Subrogation.

Compiler's Comments

1997 Amendment: Chapter 172 in (5), at end of second sentence deleted "and may not be reopened by the department" and inserted third sentence concerning mediation of subrogation dispute; and in (7), at end of second sentence after "subrogation", deleted "and may not be reopened by the department" and inserted third sentence regarding mediation of subrogation dispute. Amendment effective July 1, 1997.

Transition: Section 10, Ch. 172, L. 1997, provided: "Any surplus funds remaining in the underinsured employers' fund on [the effective date of this section] must be deposited in the uninsured employers' fund provided in 39-71-502 [now repealed]." Section 12(2), Ch. 172, L. 1997, provided that sec. 10 was effective on passage and approval. Approved March 28, 1997.

1993 Amendment: Chapter 459 substituted second sentence of (6)(a) regarding insurer subrogation rights for former sentence that read: "The insurer may subrogate against the entire settlement or award of a third-party claim brought by the claimant or his personal representative, without regard to the nature of the damages"; and made minor changes in style.

1991 Amendments: Chapter 323 substituted (5) regarding stipulation of the proportion of a third-party settlement allocable under subrogation for former (5) that read: "(5) If the amount of compensation and other benefits payable under the Workers' Compensation Act have not been fully determined at the time the employee, the employee's heirs or personal representatives, or the insurer have settled in any manner the action as provided for in this section, the department shall determine what proportion of the settlement shall be allocated under subrogation. The department's determination may be appealed to the workers' compensation judge". Amendment effective July 1, 1991.

Chapter 574 inserted (7) relating to stipulations covering third-party settlements. Amendment effective July 1, 1991.

Severability: Section 15, Ch. 574, L. 1991, was a severability section.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation",

"division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1987 Amendment: Inserted (6) permitting insurer full subrogation even though claimant is not fully compensated and allowing full subrogation upon settlement of wrongful death claim.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Workers' Compensation Insurer Entitled to Restitution for Pecuniary Loss — Defendant's Financial Situation Made Payment of Restitution Unjust: The defendant pleaded guilty to the offense of misdemeanor assault for striking a peace officer while waiting for an initial appearance in Justice Court in another matter. The plea agreement called for the defendant to pay restitution to the Montana State Fund (MSF) for its workers' compensation payments to the peace officer and medical providers. The defendant argued at the restitution hearing that MSF was not a victim under 46-18-243 because it had not suffered a pecuniary loss, that the statute did not authorize payment of general damages, and that she was unable to afford and would be unduly burdened by the full amount of restitution suggested. The District Court held that MSF qualified as a victim insurer and thus was entitled to the full amount of restitution within 5 months of the sentence. On appeal, the Supreme Court affirmed, concluding that MSF was entitled to restitution for pecuniary loss. However, the Supreme Court reversed the District Court's failure to waive restitution pursuant to 46-18-246, reasoning that the uncontroverted evidence of the defendant's dire financial situation made it otherwise unjust to require the defendant to pay the restitution imposed. St. v. Lodahl, 2021 MT 156, 404 Mont. 362, 491 P.3d 661.

Uninsured Employer Prohibited From Contribution or Indemnity Claim Against Third Party After Settling With Injured Employee: In response to a certified question from the federal District Court, the Supreme Court held that it is not equitable to require a stranger to the employer-employee relationship to indemnify an employer for liability that was wholly avoidable if the employer had simply obeyed the Workers' Compensation Act and provided coverage for its employees. Therefore, an uninsured employer is prohibited from bringing either a contribution claim or an indemnity claim against a third party after settling with an injured employee. St. Farm Fire & Cas. Co. v. Bush Hog, LLC, 2009 MT 349, 353 M 173, 219 P3d 1249 (2009).

No Collateral Source Reduction of Judgment for Workers' Compensation Payments: Because a workers' compensation insurer is entitled under this section to subrogation for all compensation and benefits paid or to be paid, payments may not be deducted from a judgment as a collateral source under 27-1-308, which allows a collateral source deduction from a judgment, but not if the collateral source payor has a subrogation right. Therefore, the trial court properly refused to deduct ongoing workers' compensation death benefits and erroneously deducted workers' compensation medical and funeral expense payments. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000), followed, with regard to a claim brought against a third-party tortfeasor pursuant to 39-71-412, in Haman v. Maco Ins. Co., 2004 MT 44, 320 M 108, 86 P3d 34 (2004).

Question of Fact as to Whether Claimant Made Whole — Subrogation Interests: An insurer is not entitled to invade a claimant's paid third-party claim via subrogation until the claimant has been made whole. The question of whether a claimant has been made whole is a question of fact, not a question of law, dependent on the level of the claimant's physical recovery and the extent of the claimant's compensation through benefits paid or damages recouped. Pursuant to Zacher v. Am. Ins. Co., 243 M 266, 794 P2d 335 (1990), no distinction is made between voluntary and nonvoluntary settlements when articulating the rule regarding an insurer's right to subrogation. In this case, a third-party settlement that did not in fact represent the amount necessary to make the claimant whole could not be relied on to entitle an insurer as a matter of law to a subrogation interest in the settlement proceeds. Ness v. Anaconda Minerals Co., 279 M 472, 929 P2d 205, 53 St. Rep. 1241 (1996), overruling Brandner v. Travelers Ins. Co., 179 M 208, 587 P2d 933 (1978), and Getten v. Liberty Mut. Ins. Co., 240 M 90, 782 P2d 1267 (1989).

Jurisdiction to Allocate Settlement Funds Affirmed — Maximum Healing Not Required: Wildin was injured in a car accident during her employment, and her employer's insurer, CNA Insurance Company (CNA), paid over $35,000 to her in medical and disability benefits. Wildin then sued State Farm Fire and Casualty Company (State Farm), the insurer of the other driver, and contacted CNA to see if it would join the suit. No answer was received, so Wildin and State Farm proceeded to settle her suit for $15,000. CNA would not agree to the settlement. Wildin then filed a petition with the Department of Labor and Industry to have the settlement funds allocated. The examiner concluded that the Department had jurisdiction to allocate the funds and allocated one-third to CNA and two-thirds to Wildin, after deducting attorney fees. The Workers' Compensation Court and the Supreme Court affirmed. The Supreme Court held that there is no provision in 39-71-412 that requires an insurer to consent before suit can be brought and no requirement in this section that an insurer consent to settlement of the suit. Moreover, as far as Wildin and State Farm were concerned, they had done everything necessary under subsection (5) of this section (prior to 1991 amendment) to settle the suit before Wildin petitioned to allocate the funds. Citing this section and First Interstate Bank v. Tom Sherry Tire, 235 M 48, 764 P2d 1287 (1988), the Supreme Court also held that maximum healing does not have to occur before a claimant can settle a claim. The Department therefore had jurisdiction to issue the allocation order. Wildin v. CNA Insurance Co., 256 M 354, 846 P2d 1022, 50 St. Rep. 108 (1993).

Portion of Workers' Compensation Subrogation Statute Unconstitutional Impairment of Right to Full Redress: Subsection (6)(a) of this section, which directs that an insurer has a right to subrogate even though the injured worker's damages exceed his total recoveries, has the effect of legislatively overruling the equitable theory that subrogation cannot begin until the injured worker is made whole, and that subsection is in violation of the constitutional right to legal redress expressed in Art. II, sec. 16, Mont. Const., in that it restricts an injured worker's right to full redress against third-party tortfeasors. In a case of reasonably clear liability in which a claimant is forced to settle for the limits of an insurance policy that, together with claimant's workers' compensation award, do not grant full legal redress to claimant under general tort law, an insurer is not entitled to subrogation rights under workers' compensation law. Francetich v. St. Comp. Mut. Ins. Fund, 252 M 215, 827 P2d 1279, 49 St. Rep. 222 (1992), following Skauge v. Mtn. St. Tel. & Tel., 172 M 521, 565 P2d 628 (1977), and White v. St., 203 M 363, 661 P2d 1272 (1983), distinguishing Meech v. Hillhaven W., Inc., 238 M 21, 776 P2d 488 (1989), and overruling Brandner v. Travelers Ins. Co., 179 M 208, 587 P2d 933 (1978). See also Hall v. St. Comp. Ins. Fund, 218 M 180, 708 P2d 234 (1985), and Zacher v. Am. Ins. Co., 243 M 226, 794 P2d 335 (1990).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Workers' Compensation Claimant's Comparative Negligence Not Applicable in Determining Eligibility — Subrogation Appropriate Only After Claimant Made Whole: McMillan was injured in January 1987 while his employer was performing logging work for the U.S. government. McMillan filed a worker's compensation claim in Montana for which the state did not dispute liability, and he then filed an action under the Federal Tort Claims Act. The federal District Court determined that McMillan was entitled to recover $4,762,686 in damages from the United States, diminished by 45% for McMillan's comparative negligence to $2,619,477. The State Compensation Insurance Fund (State Fund) then sought a determination from the Workers' Compensation Court that the State Fund could assert a subrogation claim against McMillan's recovery from the United States and cease paying benefits. The Workers' Compensation Court held that the full measure of McMillan's loss was $4,762,686, the total amount of damages determined by the federal District Court, and that pursuant to the equitable "made whole" doctrine articulated in In re Zacher v. Am. Ins. Co., 243 M 226, 794 P2d 335 (1990), McMillan must recover that amount, plus the costs of recovery, before the State Fund was entitled to subrogation. The State Fund appealed, contending that the amount necessary to make McMillan whole was actually $2,619,477 after taking into account McMillan's comparative negligence, plus attorney fees and costs of recovery. The Supreme Court affirmed. The Zacher formula does not contemplate a deduction from a claimant's entire loss for comparative negligence, in accordance with state law, which does not consider a claimant's fault in determining eligibility. Reducing the calculation of McMillan's entire loss, and thus his eligibility for benefits, for comparative negligence would introduce a claimant's fault into the workers' compensation system in violation of Montana law. Thus, the State Fund's subrogation interest could be properly asserted only after McMillan recovered the full amount of the total amount of damages determined by the federal District Court. St. Comp. Ins. Fund v. McMillan, 2001 MT 168, 306 M 155, 31 P3d 347 (2001).

Statute of Limitations Applicable to Workers' Compensation Subrogation Right Created by Statute — Subrogation Agreement Not Created by Correspondence Between Attorneys for Claimant and Insurer: Roadarmel suffered an industrial injury and filed a workers' compensation claim against his employer, and the claim was defended by Royal Insurance Company (Royal). Roadarmel received a judgment and then filed a third-party action against two companies that had supplied the chemicals that injured him. Roadarmel's attorney, White, properly notified Royal that the third-party action was being commenced. Pursuant to this section, Roadarmel requested that Royal pay a portion of the costs, and Royal agreed to participate in the costs rather than waive its subrogation rights, tendering a check for $5,000 toward the costs. Roadarmel was successful in the third-party action, and White advised Royal that the third parties would appeal. The appeal was upheld, and White notified Royal of that fact, attaching copies of the settlement check and jury verdict forms, a breakdown of the actual costs of the third-party action, and a request that Royal determine its subrogation interest in a portion of the third-party proceeds. Royal independently computed the amount that it contended that it was owed and advised Roadarmel in letters that an action would be filed to determine Royal's subrogation interests. White did not respond to the letters, and 3 ½ years passed before Royal filed a petition to determine its subrogation rights. Royal later learned through discovery that White had disbursed the third-party proceeds on the same day that Royal had been requested to determine its subrogation interest, allegedly instructing Roadarmel to hold the funds pending a subrogation determination. Royal then also filed a separate count against White for an alleged breach of the duty of trust owed Royal as a third-party beneficiary of the trust imposed on the third-party proceeds. The Workers' Compensation Court determined that a subrogation agreement had been formed in the exchange of letters between White and Royal's counsel, that the statute of limitations on the contract had not expired, and that Roadarmel and White were jointly and severally liable for $63,864.79 for breaching the subrogation contract and failing to honor Royal's first lien of the third-party judgment. Roadarmel and White appealed, contending that Royal's subrogation action was based on a statutory liability that was time-barred by the 2-year statute of limitations in 27-2-211 and that the 3-year statute of limitations in 72-34-511 (now repealed), which governs actions based on an alleged breach of trust, also barred Royal's action against White. Royal argued that the correspondence between the parties formed an enforceable contract that was subject to the longer statute of limitations in 27-2-202. The Supreme Court agreed with Roadarmel and White. The correspondence only confirmed in writing that which was required by and took place entirely in the context of the mandatory statutory procedures and did not create an enforceable contract. Although the court recognized the rights of equitable subrogation at common law, those rights were conceptually distinguished from an insurer's first lien against third-party proceeds recovered by an injured employee, which constitutes a statutory liability amounting to an unqualified right of reimbursement not found at common law. As set out in St. Paul Fire & Marine Ins. Co. v. Glassing, 269 M 76, 887 P2d 218 (1994), the concept of subrogation merely gives the insurer the right to prosecute the cause of action that the insurer possessed, so the insurer's claim by subrogation, being purely derivative, is subject to the same statute of limitations as though the cause of action were sued upon by the insured. The statutory right to reimbursement or recoupment is distinguishable from the insurer's right of subrogation proper. Thus, Royal's claim against Roadarmel, being based on a liability created by statute, was time-barred under 27-2-211(1)(c). Further, Royal's breach of trust claim against White was time-barred by 72-34-511 (now repealed). Because Royal's statutory lien was extinguished as a matter of law 2 years after Royal received notice that the third-party action was settled, by the time that the statute of limitations on White's actions began to run, even if that time was determined to be the date on which he disbursed the third-party funds, he could no longer be characterized as a trustee, constructive or otherwise, of the third-party proceeds. The case was reversed and remanded for summary judgment in favor of Roadarmel and White. Royal Ins. Co. v. Roadarmel, 2000 MT 259, 301 M 508, 11 P3d 105, 57 St. Rep. 1080 (2000).

Contract Based Upon Mutual Mistake as to Workers' Compensation Law on Subrogation Rights of Insurer: Brown entered into a settlement agreement with the State Fund for $52,329.17, less $18,666.67 characterized as the "subrogation due the State Fund". Brown then pursued a third-party claim and settled for less than the policy limits. After the Supreme Court's decision in Zacher v. Am. Ins. Co., 243 M 226, 794 P2d 335 (1990), holding that an insurer is not entitled to subrogation unless the claimant is fully compensated for the injury, Brown sued to recover the money withheld by the State Fund. The Supreme Court held that Brown was entitled to rescind the agreement because the parties had made a mutual mistake as to state law that pertains to subrogation rights. However, the Supreme Court refused to award Brown the money retained by the State Fund on the basis that the whole agreement was void and that the lower court would have to determine the amount of money that Brown was entitled to receive. Brown v. Richard A. Murphy, Inc., 261 M 275, 862 P2d 406, 50 St. Rep. 1330 (1993).

No Subrogation Unless Claimant Made Whole:

Under the law of this section as it read at the time of injury in 1983 (but prior to the 1987 general revision), when a claimant recovers against a third party, an insurer has no subrogation rights until the claimant has been made whole for his entire loss and any costs of recovery, including attorney fees. In determining whether a claimant has been whole, the amounts received and to be received under the claim must be added to amounts received or to be received from third party claims and also added to the costs of recovery, including attorney fees. When that total equals claimant's entire loss, the insurer is entitled to subrogation from all amounts received by the claimant in excess of his entire loss pursuant to this section. In re Zacher v. Am. Ins. Co., 243 M 226, 794 P2d 335, 47 St. Rep. 1167 (1990), followed in Brown v. Richard A. Murphy, Inc., 261 M 275, 862 P2d 406, 50 St. Rep. 1330 (1993), and expressly overruling Hall v. St. Comp. Ins. Fund, 218 M 180, 708 P2d 234 (1985), and Getten v. Liberty Mut. Ins. Co., 240 M 90, 782 P2d 1267, 46 St. Rep. 1967 (1989), to the extent those cases contain requirements that may be interpreted as adding to this holding. The Zacher decision was clarified and expanded in Francetich v. St. Comp. Mut. Ins. Fund, 252 M 215, 827 P2d 1279, 49 St. Rep. 222 (1992). Zacher was also followed in St. Comp. Ins. Fund v. McMillan, 2001 MT 168, 306 M 155, 31 P3d 347 (2001).

The insurer is not entitled to subrogation rights under 39-71-414 when, in a case of reasonably clear liability, the claimant is forced to settle a third-party claim for the amount of the insurance policy limits of the third-party tortfeasor and when the amount of the settlement, together with the claimant's workers' compensation award, does not grant full legal redress to the claimant. Hall v. St. Comp. Ins. Fund, 218 M 180, 708 P2d 234, 42 St. Rep. 1502 (1985).

Jurisdiction Prior to Division Determination of Subrogation Rights: The claimant received $25,000 from his own insurer, and the State Fund ordered him to pay $12,500 of those funds over to the Fund under its subrogation rights. The Workers' Compensation Court ordered the money returned, stating that the Fund had no right to any of the money until the Division made a determination as to subrogation rights. The Supreme Court affirmed, ruling that although the Workers' Compensation Court did not have jurisdiction to determine subrogation rights, it did have jurisdiction to determine that the Fund had no right to claim any subrogation funds prior to a ruling by the Division. Malek v. St. Comp. Ins. Fund, 242 M 311, 709 P2d 965, 47 St. Rep. 568 (1990).

Jurisdiction of Division to Compute Amount of Subrogation Prior to Settlement of Third-Party Claim: Representatives of the deceased brought a third-party wrongful death action against the driver of the other vehicle in an accident resulting in the decedent's death. The insurer sought subrogation against the economic portion of the wrongful death recovery. The Supreme Court ruled that the Division had jurisdiction to determine the subrogation rights of the insurer because in the case before it, the third-party claim had not yet been settled. Getten v. Liberty Mut. Ins. Co., 240 M 90, 782 P2d 1267, 46 St. Rep. 1967 (1989).

Settling Claim Well Within Policy Limits — Full Legal Redress: The representatives of the deceased argued that the insurer was not entitled to subrogation because the estate had not received full legal redress in the wrongful death action brought on the decedent's behalf. The Supreme Court ruled that subrogation was available because the wrongful death suit had been settled for $1.5 million when more than $6 million was available and that settling well within the policy limits constituted full legal redress. Getten v. Liberty Mut. Ins. Co., 240 M 90, 782 P2d 1267, 46 St. Rep. 1967 (1989).

Forum for Determination of Subrogation Rights — Third Party Action: When the settlement of a third-party action precedes full determination of the claim, the Workers' Compensation Division is the proper forum for resolving the issue of the proper amount of subrogation allocated to the insurer. First Interstate Bank of Missoula v. EBI Co./Orion Group, 235 M 48, 764 P2d 1287, 45 St. Rep. 2150 (1988).

Subrogation Rights Based on Full Legal Redress: The Workers' Compensation Court, relying on 39-71-414(1), concluded that Elwell's employer, ASARCO, was entitled to subrogation against Elwell's third-party settlement from a coemployee. On appeal, Elwell contended that although he was receiving the maximum benefits allowed under the Workers' Compensation Act, they were not sufficient to compensate him for his injury, so ASARCO was not entitled to subrogation. The Supreme Court, citing its decision in Hall v. St. Comp. Ins. Fund, 218 M 180, 708 P2d 234, 42 St. Rep. 1502 (1985), held that when a claimant is forced, in a case of clear liability, because of maximum limits of an insurance policy, into a settlement with a third-party tortfeasor, the amount of which settlement, together with claimant's workers' compensation award, does not give the claimant full legal redress, the insurer or the employer is not entitled to subrogation rights under 39-71-414 until the claimant has attained full legal redress. A question of fact exists as to whether the total prospective workers' compensation benefits, plus the recovery from the third-party insurer, will give the claimant full legal redress. The judgment of the Workers' Compensation Court was reversed and the cause remanded for a determination of whether full legal redress was obtained, and if that is the case, ASARCO would then be entitled to subrogation for that portion which exceeded full legal redress. Elwell v. Am. Smelting & Ref., Inc., 219 M 248, 711 P2d 819, 42 St. Rep. 1992 (1985).

Who Entitled to Interest on Funds in Escrow: Claimant Elwell negotiated a third-party settlement against a coemployee for $50,000, the policy limit. He incurred attorney fees of $16,500 and costs of $30, leaving a net recovery of $33,470. Pursuant to 39-71-414(2)(d), Elwell was entitled to one-third, or $11,157. Employer ASARCO asserted a subrogation right to the $22,313 balance, which right was disputed by Elwell. The parties invested the disputed money in a tax-exempt money market fund, drawing interest at a variable rate. The Workers' Compensation Court concluded that Elwell was entitled to the interest on the disputed amount, but on appeal ASARCO claimed the court was in error in awarding Elwell the interest. The Supreme Court held that since Elwell's right to the $22,313 was dependent on whether his benefits plus his recovery from the third-party insurer constituted full legal redress, a determination of which of the parties is entitled to the interest is dependent upon who has the right to the proceeds or any portion thereof. In the event the Workers' Compensation Court, on remand, determines ASARCO is entitled to a portion or all of the $22,313, it will also be entitled to the interest earned in the same proportion. Otherwise, Elwell is entitled to the interest accumulation. Elwell v. Am. Smelting & Ref., Inc., 219 M 248, 711 P2d 819, 42 St. Rep. 1992 (1985).

Insurer Liable to Noncovered Subcontractor Entitled to Subrogation: Claimant was injured while delivering newspapers for her fiance, who had contracted with the Billings Gazette to deliver its newspaper. The Gazette's insurer, Hartford Accident and Indemnity Company, became liable under 39-71-405 when it was determined that the fiance failed to provide workers' compensation coverage for his employee, the claimant. When Hartford denied the compensation claim, claimant settled with a third party suspected of causing the automobile accident, for a sum much less than might have been expected from a trial and judgment. After settlement, Hartford claimed subrogation against the amount received in settlement. The Workers' Compensation Court awarded benefits to claimant, and the Supreme Court affirmed. On remand to the lower court to determine costs and attorney fees, the Workers' Compensation Court held that Hartford was entitled to the proceeds of subrogation under 39-71-414. The Supreme Court affirmed on the basis that a claimant is bound by all provisions of the Workers' Compensation Act which provide for subrogation. Carlson v. Cain, 216 M 129, 700 P2d 607, 42 St. Rep. 695 (1985).

Full Subrogation Denied — Equivocal Notice of Election to Participate: That insurer was entertaining a reservation about whether it would participate in the payment of attorney fees was buttressed by correspondence from the adjuster which stated: "I can appreciate your concern over our principal's refusal to make a substantial advance to cover costs, as I am sure that Mrs. Sorum [claimant] does not have the funds available to readily advance these funds. However, we would be agreeable to participating on a pro rata basis, the incurred costs of discovery, and would also furnish the services of our own attorney to assist you. I would question very seriously that we would have any obligation to participate in the cost of attorney's fees incurred to prosecute the declaratory judgment action. I wish to point out that the law clearly states that we are entitled to a 50% recovery of the total benefits we have paid, regardless of whether we participate in any manner. This, understandably, is one of the reasons why the company is not agreeable to making advances along the lines you have previously suggested." No other interpretation of the foregoing language is possible except that the company was hedging with respect to sharing the payment of attorney fees. Therefore, the insurer was only entitled to a 50% subrogation. Sorum v. Rieder & Co., 205 M 98, 666 P2d 1221, 40 St. Rep. 1120 (1983).

No Right of Insurer to Prosecute or Impose Attorney's Services Unless Claimant Fails to Institute: The claimant has a right to his own attorney in a third-party action, and the employer and its insurer have no right to impose another attorney's services or prosecute such an action unless the claimant refuses or fails to institute the action within 1 year from the date of the injury. Sorum v. Rieder & Co., 205 M 98, 666 P2d 1221, 40 St. Rep. 1120 (1983).

Requisites for Election of Insurer to Participate — Speed, Explicitness, and Limitations: It should be apparent that when a request is made upon an insurer under this section for payment of a share of the attorney fees and costs of an action against a responsible third party, the response of the insurer as to its intention should be explicit, immediate, and without reservation. Such a response is necessary because it will aid the claimant's attorney to evaluate the claim from his client's viewpoint and will give assurance to the claimant that costs will be shared as incurred if the suit is unsuccessful. Further, it means that attorney fees in the third-party suit will be shared in those cases where the claimant is responsible for fees. Sorum v. Rieder & Co., 205 M 98, 666 P2d 1221, 40 St. Rep. 1120 (1983).

No Subrogation From Wrongful Death Action: Swanson's husband was killed in the course of his employment. The Workers' Compensation insurer paid Swanson in full satisfaction of its obligation. Swanson then brought an action against a third party for the death of her husband and reached a settlement. The Workers' Compensation insurer then sought subrogation out of the settlement. After discussing the difference between a survival action and wrongful death and distinguishing Fisher v. Missoula White Pine Sash Co., 164 M 41, 518 P2d 759 (1974), the Supreme Court concluded that the subrogation rights of the insurer do not extend to recoveries made under wrongful death unless the death was instantaneous and there is no survival action. If the death is instantaneous, the insurer is entitled to subrogation from that portion of the judgment or settlement that represents economic loss as opposed to noneconomic loss. Swanson v. Champion Int'l Corp., 197 M 509, 646 P2d 1166, 39 St. Rep. 639 (1982). See also Sorum v. Rieder & Co., 205 M 98, 666 P2d 1221, 40 St. Rep. 1120 (1983), for discussion of the Swanson rule.

Contract to Indemnify — Other Legal Transaction: The contract between the general contractor and a subcontractor contained an indemnity provision. An employee of the subcontractor was injured and recovered a judgment against the general contractor. The contractor then sued to enforce the indemnity clause. The subcontractor was forced to indemnify. The Supreme Court held that a contract of indemnity falls within the "other legal transaction" exception to the general rule that an employer who has paid an employee benefits pursuant to a workers' compensation claim is not subject to further liability arising out of injuries as to third parties claiming contribution for indemnity. Wright Constr. Co. v. De Beer Mechanical Constr. Co., 185 M 47, 604 P2d 323, 36 St. Rep. 2385 (1979).

Subcontractor to Indemnify Contractor: The contract between Wright, the general contractor, and De Beer, the subcontractor, contained an indemnity provision. An employee of De Beer's was injured and recovered a judgment against Wright. Wright sued to enforce the indemnity clause. The Supreme Court found that the clause included not only the negligence of De Beer but also that of Wright. It made no difference whether Wright was actively or passively negligent. Further, a covenant not to sue between the employee and De Beer had no effect on the operation of the clause. Wright Constr. Co. v. De Beer Mechanical Constr. Co., 185 M 47, 604 P2d 323, 36 St. Rep. 2385 (1979).

No Conflict Between Statutes — Subrogation: If an employer is not liable by way of indemnity or contribution to a third party, he may, even though himself negligent, recover from the third person through the injured employee under the subrogation rights created by law. There is no conflict between 27-1-703 and this section. Cordier v. Stetson-Ross, Inc., 184 M 502, 604 P2d 86, 36 St. Rep. 2107 (1979). (Comment: 27-1-703 was amended in 1981.)

Allocation When Insurer Elects Not to Participate in Third-Party Costs: When the insurer does not participate in the costs of the third-party action, it is entitled to 50% of the subrogation rights, but the recovery is limited to and hinged upon the right of the injured worker to receive one-third of the amount recovered in the third-party action, after costs and attorney fees have been deducted. Brandner v. Travelers Ins. Co., 179 M 208, 587 P2d 933 (1978), distinguished in Hall v. St. Comp. Ins. Fund, 218 M 180, 708 P2d 234, 42 St. Rep. 1502 (1985), and overruled in Francetich v. St. Comp. Mut. Ins. Fund, 252 M 215, 827 P2d 1279, 49 St. Rep. 222 (1992). See also Butori v. Bruce Metcalf Sportsman 66, 228 M 52, 740 P2d 1126, 44 St. Rep. 1335 (1987).

Constitutionality: Since the allowance of subrogation in workers' compensation cases is in the furtherance of equity and justice, the claimant is not thereby deprived of his full legal redress, and the law is constitutional. Brandner v. Travelers Ins. Co., 179 M 208, 587 P2d 933 (1978).

Allocation When Insurer Participates in Third-Party Costs: A Division (now Department of Labor and Industry) order that the insurer must pay costs and attorney fees on a continuous basis in proportion to the insurer's recovery against a third-party judgment was correct. Tuttle v. Argonaut Ins. Co., 177 M 166, 580 P2d 1379 (1978).

Purpose of Subrogation Provision: The purpose of the subrogation provisions of the Workers' Compensation Act is to compensate the employer and insurer to some extent for the additional liability they assume under the Act for wrongful actions of third-party tortfeasors. Tuttle v. Argonaut Ins. Co., 177 M 166, 580 P2d 1379 (1978).

Subrogation — Oral Agreement: Where there was oral contract to compromise subrogation rights alleged, there was issue of fact concerning its existence, and plaintiff was entitled to trial by jury. Therefore, action for declaratory judgment to construe alleged contract was improper. State ex rel. Indus. Indem. Co. v. District Court, 169 M 10, 544 P2d 438 (1975).

Subrogation to Wrongful Death Settlement: Subrogation rights of employer's insurer extended to wrongful death benefits recovered from third-party tortfeasor by worker's surviving kin.

Fisher v. Missoula White Pine Sash Co., 164 M 41, 518 P2d 795 (1974), holding that statement in Hardware Mutual Cas. Co. v. Butler, 116 M 73, 148 P2d 563 (1944), that subrogation rights of employer and insurer against third-party tortfeasor may exist independently of the Workmen's Compensation Act (now Workers' Compensation Act) was dictum and should be disregarded.

Uninsured Motorist Coverage Receipts: It is not permissible for an insurance company to reduce its liability under an uninsured motorist clause by workers' compensation benefits, and the Insurance Commissioner had no authority to approve a policy providing for such a reduction. Sullivan v. Doe, 159 M 50, 495 P2d 193 (1972).

39-71-415. Procedure for resolving disputes regarding independent contractor status.

Compiler's Comments

2007 Amendment: Chapter 117 deleted former (1) that read: "(1) If an individual, employer, or insurer has a dispute as to whether an individual is an independent contractor or an employee, any party may, after mediation pursuant to department rules, petition the workers' compensation court for resolution of the dispute"; in (2)(a) near beginning substituted "dispute involving an employer, a worker, or the department and involving" for "dispute between an employer and the department involving"; in (2)(b)(i) near middle substituted "requests mediation pursuant to department rules" for "appeals by filing a petition with the workers' compensation court" and substituted "15 days" for "30 days"; inserted (2)(b)(ii) concerning mediator report; inserted (2)(c) concerning appeal of independent contractor central unit decision; in (2)(d) near end substituted "subsection (2)" for "part"; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendment: Chapter 448 in (1) near middle after "or an employee" and in (2) near middle after "or employee" deleted "as defined in this chapter"; in (3) at end of second sentence after "filing a petition" substituted remainder of sentence regarding filing with workers' compensation court for "for mediation within 10 days of service of the decision. A party may petition the workers' compensation court for resolution of the dispute within 45 days of the mailing of the mediator's report"; deleted former (4) that read: "(4) Notwithstanding the provisions of subsection (1), an individual may apply to the department for an exemption from the Workers' Compensation Act in accordance with 39-71-401"; and made minor changes in style. Amendment effective April 28, 2005.

Preamble: The preamble attached to Ch. 448, L. 2005, provided: "WHEREAS, the Montana Supreme Court ruled in Wild v. Fregein Construction, 2003 MT 115, 315 Mont. 425, 68 P.3d 855, that the independent contractor exemption certificate does not raise a conclusive presumption as to the status of a person as an independent contractor and that an employer has an obligation to determine whether an individual is treated as an independent contractor or as an employee; and

WHEREAS, the Montana Supreme Court in the Wild decision ruled that it is against the public policy of the state for an employer to coerce a worker to work as an independent contractor by offering to pay an independent contractor at a rate higher than the employer pays employees; and

WHEREAS, the Montana Supreme Court in the Wild decision affirmed the twin determinants of independent contractor status as being "A" issues of control and "B" whether the individual is in an independent business, commonly known as the "A-B" test, and emphasized the necessity of both factors being present, with performing work for other persons being an indication of an independent business; and

WHEREAS, the concurring opinion in the Wild decision further suggested that the Department of Labor and Industry strengthen the certification process to provide a conclusive determination of independent contractor status; and

WHEREAS, the Wild decision created a great deal of uncertainty in matters involving independent contractors and employees in the business community, with employers and independent contractors coming together to propose a consensus solution after participating in a study required by Senate Bill 270, passed by the 58th Legislature; and

WHEREAS, the Montana Legislature considers enacting legislation appropriate to effectively reverse the Wild decision and to restore the conclusive presumption of an independent contractor exemption certificate as well as to allow employers to pay persons with the independent contractor exemption certificate at a rate higher than the rate paid to employees and additionally to allow a person with an independent contractor exemption certificate to work for only one employing unit without becoming an employee as well as to waive the benefits of the workers' compensation and occupational disease laws."

Effective Date — Applicability: Section 15, Ch. 448, L. 2005, provided: "[This act] is effective on passage and approval and applies to all applications and renewals for the independent contractor exemption certificate submitted to the department after [the effective date of this act]." Approved April 28, 2005.

2001 Amendment: Chapter 214 inserted (3) relating to venue, petition, and appeal of dispute between employer and department on issue of independent contractor status; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 25, Ch. 214, L. 2001, was a severability clause.

1999 Amendment: Chapter 442 in (1) after "may" inserted "after mediation pursuant to department rules" and after "petition" substituted "the workers' compensation court for resolution of the dispute" for "a department of labor and industry appeals referee for resolution of the dispute in accordance with 39-51-1109 and may appeal from a decision of the appeals referee in the same manner as prescribed in 39-51-2403 and 39-51-2404"; and in (2) after "chapter" inserted "and after mediating pursuant to department rule". Amendment effective April 23, 1999.

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 28, Ch. 442, L. 1999, was a severability clause.

Retroactive Applicability: Section 31(1), Ch. 442, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to claims for injuries occurring before April 23, 1999, unless a party elects, after notification by the department of labor and industry, to remain in the contested case process.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Case Notes

Administrative Procedure Applicable to Determining Questions of Status of Workers: The legislative intent of this section was to create a single administrative procedure for settling disputes over the status of workers as employees or independent contractors. Worker status implicates more than just collection of workers' compensation premiums; it also involves the right of the state to collect unemployment compensation contributions and has other state and federal implications. The Supreme Court found that this procedure was established as a more comprehensive examination of worker status and was the appropriate procedure to follow in determining status questions. St. Comp. Ins. Fund v. Sky Country, Inc., 239 M 376, 780 P2d 1135, 46 St. Rep. 1760 (1989).

39-71-417. Independent contractor certification.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 224, L. 2023. Amendment effective October 1, 2023.

2011 Amendment: Chapter 200 inserted (1)(c)(v) referring to manager of manager-managed company engaged in construction industry; and made minor changes in style. Amendment effective July 1, 2011.

2009 Amendment: Chapter 120 inserted (5)(b) concerning retention schedule for documents; inserted (5)(c) concerning previously submitted documents; and made minor changes in style. Amendment effective October 1, 2009.

2007 Amendments — Composite Section: Chapter 117 in (9) near beginning substituted "department's independent contractor central unit" for "department" and at end substituted "that decision as provided in 39-71-415(2)" for "the denial by petitioning the workers' compensation court within 30 days of the mailing of the denial". Amendment effective July 1, 2007.

Chapter 340 in (1)(a)(i) at beginning inserted exception clause; inserted (1)(a)(ii) providing that officer or manager exempt from obtaining workers' compensation is not required to apply for contractor exemption certificate; and made minor changes in style. Amendment effective July 1, 2007.

Preamble: The preamble attached to Ch. 448, L. 2005, provided: "WHEREAS, the Montana Supreme Court ruled in Wild v. Fregein Construction, 2003 MT 115, 315 Mont. 425, 68 P.3d 855, that the independent contractor exemption certificate does not raise a conclusive presumption as to the status of a person as an independent contractor and that an employer has an obligation to determine whether an individual is treated as an independent contractor or as an employee; and

WHEREAS, the Montana Supreme Court in the Wild decision ruled that it is against the public policy of the state for an employer to coerce a worker to work as an independent contractor by offering to pay an independent contractor at a rate higher than the employer pays employees; and

WHEREAS, the Montana Supreme Court in the Wild decision affirmed the twin determinants of independent contractor status as being "A" issues of control and "B" whether the individual is in an independent business, commonly known as the "A-B" test, and emphasized the necessity of both factors being present, with performing work for other persons being an indication of an independent business; and

WHEREAS, the concurring opinion in the Wild decision further suggested that the Department of Labor and Industry strengthen the certification process to provide a conclusive determination of independent contractor status; and

WHEREAS, the Wild decision created a great deal of uncertainty in matters involving independent contractors and employees in the business community, with employers and independent contractors coming together to propose a consensus solution after participating in a study required by Senate Bill 270, passed by the 58th Legislature; and

WHEREAS, the Montana Legislature considers enacting legislation appropriate to effectively reverse the Wild decision and to restore the conclusive presumption of an independent contractor exemption certificate as well as to allow employers to pay persons with the independent contractor exemption certificate at a rate higher than the rate paid to employees and additionally to allow a person with an independent contractor exemption certificate to work for only one employing unit without becoming an employee as well as to waive the benefits of the workers' compensation and occupational disease laws."

Effective Date — Applicability: Section 15, Ch. 448, L. 2005, provided: "[This act] is effective on passage and approval and applies to all applications and renewals for the independent contractor exemption certificate submitted to the department after [the effective date of this act]." Approved April 28, 2005.

39-71-418. Suspension or revocation of independent contractor exemption certificate.

Compiler's Comments

2011 Amendment: Chapter 150 in (2)(a) at beginning substituted "made" for "provided"; inserted (2)(d) relating to having an independently established business; and made minor changes in style. Amendment effective July 1, 2011.

2007 Amendment: Chapter 117 in (4) near beginning substituted "department's independent contractor central unit" for "department", near middle substituted "contested" for "appealed", and at end substituted "39-71-415(2)" for "39-71-417(9) for denial of an application for an independent contractor exemption certificate". Amendment effective July 1, 2007.

Preamble: The preamble attached to Ch. 448, L. 2005, provided: "WHEREAS, the Montana Supreme Court ruled in Wild v. Fregein Construction, 2003 MT 115, 315 Mont. 425, 68 P.3d 855, that the independent contractor exemption certificate does not raise a conclusive presumption as to the status of a person as an independent contractor and that an employer has an obligation to determine whether an individual is treated as an independent contractor or as an employee; and

WHEREAS, the Montana Supreme Court in the Wild decision ruled that it is against the public policy of the state for an employer to coerce a worker to work as an independent contractor by offering to pay an independent contractor at a rate higher than the employer pays employees; and

WHEREAS, the Montana Supreme Court in the Wild decision affirmed the twin determinants of independent contractor status as being "A" issues of control and "B" whether the individual is in an independent business, commonly known as the "A-B" test, and emphasized the necessity of both factors being present, with performing work for other persons being an indication of an independent business; and

WHEREAS, the concurring opinion in the Wild decision further suggested that the Department of Labor and Industry strengthen the certification process to provide a conclusive determination of independent contractor status; and

WHEREAS, the Wild decision created a great deal of uncertainty in matters involving independent contractors and employees in the business community, with employers and independent contractors coming together to propose a consensus solution after participating in a study required by Senate Bill 270, passed by the 58th Legislature; and

WHEREAS, the Montana Legislature considers enacting legislation appropriate to effectively reverse the Wild decision and to restore the conclusive presumption of an independent contractor exemption certificate as well as to allow employers to pay persons with the independent contractor exemption certificate at a rate higher than the rate paid to employees and additionally to allow a person with an independent contractor exemption certificate to work for only one employing unit without becoming an employee as well as to waive the benefits of the workers' compensation and occupational disease laws."

Effective Date — Applicability: Section 15, Ch. 448, L. 2005, provided: "[This act] is effective on passage and approval and applies to all applications and renewals for the independent contractor exemption certificate submitted to the department after [the effective date of this act]." Approved April 28, 2005.

39-71-419. Independent contractor violations — penalty.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 505, L. 2023. Amendment effective May 18, 2023.

2021 Amendment: Chapter 345 in (1)(e) inserted second and third sentences: "A person who falsely claimed, either in writing or through credible evidence, to have an independent contractor certification may not be considered to be an employee solely based on not actually having an independent contractor exemption certificate. The burden of proof that an independent contractor is certified rests with the independent contractor and not the hiring entity." Amendment effective October 1, 2021.

Applicability: Section 3, Ch. 345, L. 2021, provided: "[This act] applies to employment determinations for the purposes of unemployment insurance and workers' compensation on or after [the effective date of this act]." Effective October 1, 2021.

Preamble: The preamble attached to Ch. 345, L. 2021, provided: "WHEREAS, the Department of Labor and Industry's rule ARM 24.35.203 provides that when a worker does not have an independent contractor certificate, the worker is conclusively determined by the Department to be an employee for the purposes of wages and hours, unemployment insurance, workers' compensation, and income tax; and

WHEREAS, this interpretation is overly broad, does not correctly consider Montana Supreme Court caselaw, leads to confusion, conflicts with established law, and results in unfair determinations."

Preamble: The preamble attached to Ch. 448, L. 2005, provided: "WHEREAS, the Montana Supreme Court ruled in Wild v. Fregein Construction, 2003 MT 115, 315 Mont. 425, 68 P.3d 855, that the independent contractor exemption certificate does not raise a conclusive presumption as to the status of a person as an independent contractor and that an employer has an obligation to determine whether an individual is treated as an independent contractor or as an employee; and

WHEREAS, the Montana Supreme Court in the Wild decision ruled that it is against the public policy of the state for an employer to coerce a worker to work as an independent contractor by offering to pay an independent contractor at a rate higher than the employer pays employees; and

WHEREAS, the Montana Supreme Court in the Wild decision affirmed the twin determinants of independent contractor status as being "A" issues of control and "B" whether the individual is in an independent business, commonly known as the "A-B" test, and emphasized the necessity of both factors being present, with performing work for other persons being an indication of an independent business; and

WHEREAS, the concurring opinion in the Wild decision further suggested that the Department of Labor and Industry strengthen the certification process to provide a conclusive determination of independent contractor status; and

WHEREAS, the Wild decision created a great deal of uncertainty in matters involving independent contractors and employees in the business community, with employers and independent contractors coming together to propose a consensus solution after participating in a study required by Senate Bill 270, passed by the 58th Legislature; and

WHEREAS, the Montana Legislature considers enacting legislation appropriate to effectively reverse the Wild decision and to restore the conclusive presumption of an independent contractor exemption certificate as well as to allow employers to pay persons with the independent contractor exemption certificate at a rate higher than the rate paid to employees and additionally to allow a person with an independent contractor exemption certificate to work for only one employing unit without becoming an employee as well as to waive the benefits of the workers' compensation and occupational disease laws."

Effective Date — Applicability: Section 15, Ch. 448, L. 2005, provided: "[This act] is effective on passage and approval and applies to all applications and renewals for the independent contractor exemption certificate submitted to the department after [the effective date of this act]." Approved April 28, 2005.

39-71-421. Financial incentives to institute safety programs.

Compiler's Comments

1989 Amendment: Substituted "insurers" and "insurer" for references to plan No. 2, plan No. 3, and insurance carrier. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

39-71-432. Definitions.

Compiler's Comments

1999 Amendment: Chapter 377 in definition of group after "join together" deleted "with the approval of the department"; and made minor changes in style. Amendment effective July 1, 1999.

Severability: Section 24, Ch. 377, L. 1999, was a severability clause.

1997 Amendment: Chapter 172 in definition of business entity, after "limited liability company", inserted "limited liability partnership". Amendment effective July 1, 1997.

Transition: Section 10, Ch. 172, L. 1997, provided: "Any surplus funds remaining in the underinsured employers' fund on [the effective date of this section] must be deposited in the uninsured employers' fund provided in 39-71-502 [now repealed]." Section 12(2), Ch. 172, L. 1997, provided that sec. 10 was effective on passage and approval. Approved March 28, 1997.

1995 Amendment: Chapter 516 in definition of business entity inserted "limited liability company".

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

Severability: Section 26, Ch. 516, L. 1995, was a severability clause.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

Effective Date: Section 30, Ch. 619, L. 1993, provided: "[This act] is effective July 1, 1993."

39-71-433. Group purchase of workers' compensation insurance.

Compiler's Comments

1997 Amendment: Chapter 310 in (1), at beginning, deleted "On receiving approval of the department"; deleted former (2) through (5) that read: "(2) To be eligible to join a new group that is forming, the department shall determine that a business entity is engaged in a business pursuit that is the same as or similar to the business pursuits of the other entities participating in the group.

(3) The department shall establish a certification program for groups organized under this section and shall issue to eligible business entities certificates of approval that authorize formation and maintenance of a group.

(4) The department by rule shall adopt forms, criteria, and procedures for the issuance of certificates of approval to groups under this section.

(5) A group certified under this section may add additional members without approval from the department if the additional members meet the specific criteria identified in the original application and any modifications to the criteria, as approved by the department"; in (2), near beginning, substituted "formed" for "certified"; at end of (4) deleted "A group shall file a copy of its plan of operation with the department"; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 14, Ch. 310, L. 1997, was a severability clause.

1995 Amendment: Chapter 516 in (2) substituted "new group that is forming" for "group"; inserted (5) allowing a certified group to add members without Department approval if they meet the criteria in the original application and any modifications to the criteria; and in (8), near middle of first sentence, inserted "the eligibility requirements to join the group".

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

Severability: Section 26, Ch. 516, L. 1995, was a severability clause.

1993 Statement of Intent: The statement of intent attached to Ch. 619, L. 1993, provided: "A statement of intent is required for this bill because [section 21] [39-71-433] requires the department by rule to adopt forms, criteria, and procedures for the issuance of certificates of approval for groups eligible to purchase group insurance. The rules adopted by the department must:

(1) be consistent with the provisions of Title 39, chapter 71, and [this act]; and

(2) address who may be in a group, how a member may be removed from the group, the criteria for certification, the apportionment of dividends or discounts, the requirements for a plan of operation, and any reporting requirements that may be necessary."

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

Effective Date: Section 30, Ch. 619, L. 1993, provided: "[This act] is effective July 1, 1993."

39-71-434. Deductible insurance policy provision for medical benefits.

Compiler's Comments

1993 Amendment: Chapter 248 inserted (5) requiring reporting of medical losses to the insurer without regard to application of any medical deductible, regardless of whether the employer or insurer pays the losses. Amendment effective July 1, 1993.

1991 Amendment: In (1), near middle of first sentence after "plan No. 2", substituted "must" for "may" and at end of second sentence, after "amounts of", substituted "at least $500" for "$500 increments, up to a total of $2,500 per claim"; and in (2), near beginning after "chooses to", substituted "accept" for "offer". Amendment effective July 1, 1991.

Applicability: Section 2, Ch. 666, L. 1991, provided: "[This act] applies to workers' compensation insurance policies issued or renewed on or after July 1, 1991."

Applicability: Section 5, Ch. 641, L. 1989, provided: "[This act] applies to workers' compensation policies issued after September 30, 1989, unless an employer and insurer agree to renegotiate a workers' compensation policy in effect on [the effective date of this act] to include a term allowing for a medical deductible." Effective October 1, 1989.

39-71-435. Workers' compensation and employers' liability insurance — optional deductibles.

Compiler's Comments

2015 Amendment: Chapter 365 in (5) near beginning inserted reference to 50-71-128; and made minor changes in style. Amendment effective July 1, 2015.

2001 Amendment: Chapter 214 in first sentence in (5) after "39-71-201" inserted "and 39-71-915" and after "ascertained" substituted "without regard to application of any deductible, whether the employer or insurer pays the losses" for "based on premiums collected, in the case of policies written under plan No. 2, or on the assessment levied, in the case of policies written under plan No. 3, for which the policyholder would have been obligated without the deductible". Amendment effective July 1, 2001.

Severability: Section 25, Ch. 214, L. 2001, was a severability clause.

1995 Amendment: Chapter 186 at beginning of (2) substituted "The advisory organization designated under 33-16-1023" for "A rating organization"; and in (4) substituted "designated advisory organization" for "rating organization".

Saving Clause: Section 32, Ch. 186, L. 1995, was a saving clause.

Severability: Section 33, Ch. 186, L. 1995, was a severability clause.

Applicability: Section 34, Ch. 186, L. 1995, provided: "[This act] applies to rate filings by the advisory organization on or after [the effective date of this act] [effective October 1, 1995] and to rates filed by insurers on or after the effective date of the advisory organization's initially approved loss cost filing."

Name Change — Directions to Code Commissioner: Section 14, Ch. 630, L. 1993, provided: "Wherever the name "state compensation mutual insurance fund", meaning the fund established in 39-71-2313, appears in the Montana Code Annotated or in legislation enacted by the 1993 legislature, the code commissioner is directed to change the name to "state compensation insurance fund"." The phrase appeared in this section and was changed by the Code Commissioner as directed.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

Effective Date: Section 30, Ch. 619, L. 1993, provided: "[This act] is effective July 1, 1993."

39-71-441. Tribal employment coverage.

Compiler's Comments

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Effective Date: Section 29(1), Ch. 112, L. 2009, provided that this section is effective July 1, 2009.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

39-71-442. Employer option for extraterritorial coverage.

Compiler's Comments

Termination Provision Repealed: Section 2, Ch. 369, L. 2019, repealed sec. 5, Ch. 315, L. 2015, which terminated this section June 30, 2019. Effective May 7, 2019.

Effective Date: Section 4, Ch. 315, L. 2015, provided: "[This act] is effective July 1, 2015."

Termination: Section 5, Ch. 315, L. 2015, provided: "[This act] terminates June 30, 2019."

Part 5
Uninsured Employers

Part Compiler's Comments

Saving Clause: Section 11, Ch. 172, L. 1997, provided: "[Section 9] [repealing 39-71-531 through 39-71-534] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of section 9]." Section 12(2), Ch. 172, L. 1997, provided that sec. 9, repealing 39-71-531 through 39-71-534, was effective on passage and approval. Approved March 28, 1997.

Preamble: The preamble to Ch. 601, L. 1985, which amended 39-71-504, 39-71-508 through 39-71-510, and 39-71-2905 and enacted 39-71-511 and 39-71-515 through 39-71-519, provided: "WHEREAS, it is the public policy of the State of Montana to ensure that every employee who is required to be covered under the state's workers' compensation laws, or his beneficiaries, receive, in the event of compensable injury or death, the monetary compensation to which they are entitled or are adjudged to be entitled under Title 39, chapter 71, part 7; and

WHEREAS, under current laws, an employee of an uninsured employer or the employee's beneficiaries are significantly impeded in the ability to recover full or partial compensation for a compensable injury or death; and

WHEREAS, this situation exists because of all of the following factors:

(1) There is a significant number of uninsured employers in Montana.

(2) The uninsured employers' fund is, for all practical purposes, insolvent.

(3) Existing remedies for an injured employee or his beneficiaries are inadequate, particularly when the negligence of the employer is not or cannot be proven to be the proximate cause of the injury or death."

Part Administrative Rules

Title 24, chapter 29, subchapter 28, ARM Uninsured employers' fund.

Part Case Notes

Business Entitled to Consequential Damages for Wrongful Collection Action — Measure of Damages Based on Hardship in Obtaining Financing: The uninsured employers' fund (UEF) breached a contract by turning over to collections an employer that did not have workers' compensation insurance, despite the fact that late payments were being accepted from the employer by UEF. Accordingly, the District Court awarded consequential damages to the employer based on a loss of financing, a higher origination fee, unsold inventory, a restocking fee, and lost profits. On appeal, the Supreme Court affirmed, reasoning that UEF should have foreseen that referring a claim to collections could create difficulties in obtaining financing and cause substantial barriers. Elk Mtn. Motor Sports, Inc. v. Dept. of Labor and Industry, 2012 MT 261, 367 Mont. 36, 289 P.3d 165.

Substantial Credible Evidence Supported Calculation of Damages — Further Damages Not Reasonably Certain to Occur: The uninsured employers' fund breached a contract and the District Court awarded consequential damages to the prevailing party. On appeal, the prevailing party claimed that the District Court failed to award further damages, including future lost profits of $1.3 million over 10 years. On appeal, the Supreme Court determined that substantial credible evidence supported the District Court's conclusion and that further damages were not reasonably certain to occur. Elk Mtn. Motor Sports, Inc. v. Dept. of Labor and Industry, 2012 MT 261, 367 Mont. 36, 289 P.3d 165.

Proof of Fault or Breach of Duty as Necessary for Recovery: In an action for damages against an uninsured employer pursuant to 39-71-508, an employee must establish a prima facie case of fault or breach of duty before he can recover for his injuries. Normally the action will be one in negligence; however, strict or vicarious liability may also apply in appropriate situations. Boehm v. Alanon Club, 222 M 373, 722 P2d 1160, 43 St. Rep. 1341 (1986), followed in Hunnewell v. Syme, 229 M 525, 747 P2d 875, 44 St. Rep. 2189 (1987).

Uninsured Employers' Fund — Effective Date: An employee who was injured prior to the effective date of 39-71-501 through 39-71-507, which date was set out in section 92-214, R.C.M. 1947 (not codified in the MCA), may not collect benefits from the Uninsured Employers' Fund. Payouts from that Fund were not to be made for injuries which occurred before it attained a level of $150,000 or January 1, 1979, whichever came first. Shannon v. Keller, 188 M 224, 612 P2d 1293, 37 St. Rep. 1079 (1980).

39-71-501. Definition of uninsured employer.

Compiler's Comments

2009 Amendment: Chapter 112 near middle inserted reference to 39-71-541; and made minor changes in style. Amendment effective April 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

1999 Amendment: Chapter 377 near beginning substituted "39-71-501, 39-71-503 through 39-71-511" for "39-71-501 through 39-71-511"; and made minor changes in style. Amendment effective July 1, 1999.

Severability: Section 24, Ch. 377, L. 1999, was a severability clause.

1997 Amendment: Chapter 42 near middle substituted "39-71-520" for "39-71-519". Amendment effective March 12, 1997.

Case Notes

Uninsured Employer Prohibited From Contribution or Indemnity Claim Against Third Party After Settling With Injured Employee: In response to a certified question from the federal District Court, the Supreme Court held that it is not equitable to require a stranger to the employer-employee relationship to indemnify an employer for liability that was wholly avoidable if the employer had simply obeyed the Workers' Compensation Act and provided coverage for its employees. Therefore, an uninsured employer is prohibited from bringing either a contribution claim or an indemnity claim against a third party after settling with an injured employee. St. Farm Fire & Cas. Co. v. Bush Hog, LLC, 2009 MT 349, 353 M 173, 219 P3d 1249 (2009).

Improper Retroactive Application of Statute — Failure to Timely Address Medical Evaluator's Report — Reversal Warranted: The Workers' Compensation Court determined that the 1999 version of 39-72-602 applied to Hand's case and that, upon receipt of a medical evaluator's report, Hand's case was considered a dispute subject to jurisdiction of the Workers' Compensation Court. However, the court improperly applied the 1999 version of the statute because the 1997 version governed the proceedings in Hand's case. The 1997 version required the court to address the issuance of the medical evaluator's report, which was received 4 months prior to the effective date of the 1999 version of 39-72-602, and required parties to request a hearing within 20 days pursuant to 39-72-612 (now repealed). Hand perfected the appeal, but the uninsured employers' fund did not, so the fund lost the opportunity to request a review of the Department's findings and the court erred in allowing the fund to raise substantive affirmative defenses on an unperfected appeal. For these reasons, the case was remanded to the Workers' Compensation Court for further proceedings. Hand v. Uninsured Employers' Fund, 2004 MT 336, 324 M 196, 103 P3d 994 (2004), following Epperson v. Willis Corroon Administrative Serv. Corp., 281 M 373, 934 P2d 1034 (1997).

Issue of Department of Labor and Industry Jurisdiction Raised in Two Separate Hearings — Collateral Estoppel Applicable — Due Process Rights Not Implicated When Party Fails to Pursue Available Remedies: The Workers' Compensation Court concluded that the Department of Labor and Industry should have allowed plaintiff to raise the argument that State Fund had improperly canceled plaintiff's policy for nonpayment of a premium as a defense to the claim by the Uninsured Employers' Fund for assessments and penalties. The court said that the issue was not barred by collateral estoppel because an order from a first hearing only determined whether the Department had subject matter jurisdiction over contract disputes between an insurance carrier and its policyholder (a determination that plaintiff did not appeal) and did not address the issue raised in a second hearing, which was whether the Department had jurisdiction to determine coverage in a proceeding seeking a penalty and indemnification. The court held that collateral estoppel did not apply because the issues in the two hearings were not identical. The court went on to hold that the Department did have jurisdiction, through its quasi-judicial power, to resolve the dispute regarding whether State Fund had rightfully canceled the policy. The Supreme Court disagreed. In the first case, a hearings officer determined that the Department did not have subject matter jurisdiction over the contractual dispute between plaintiff and State Fund, noting that proper adjudication would be in the District Court. The Department only has jurisdiction granted to it by statute, and the adjudication of insurance contracts does not fall within its jurisdiction. Plaintiff's failure to appeal the issue from the first hearing precluded it from arguing that the Department did have jurisdiction over the insurance contract dispute regarding a penalty and indemnification in the second hearing, so relitigation of the jurisdiction question in the second proceeding was barred by collateral estoppel. Further, it was error to give the Department jurisdiction to adjudicate the insurance contract dispute pursuant to its general quasi-judicial powers because an administrative agency may not assume jurisdiction without express delegation by the Legislature and there is no statutory delegation of authority to the Department to resolve contract disputes. Rather, regulation of insurance contracts is governed by the Insurance Commissioner and the relevant statutes relating to insurance disputes. The Department cannot and should not be adjudicating disputes between insurance companies and employers. The Workers' Compensation Court's conclusion that plaintiff was denied due process when it was prevented from presenting evidence relating to the insurance contract between itself and State Fund was also erroneous. Plaintiff had the opportunity to appeal the initial Department order to the Workers' Compensation Court, but failed to do so. Plaintiff also had the opportunity to pursue its remedies against State Fund in District Court, but again failed to do so. There is no denial of due process when a party fails to pursue the remedies provided. Auto Parts of Bozeman v. Employment Relations Div. Uninsured Employers' Fund, 2001 MT 72, 305 M 40, 23 P3d 193 (2001).

Uninsured Employers' Fund Not Required to Resolve Insurance Disputes — Burden of Proving That Employer Uninsured Properly Met: Plaintiff carried a workers' compensation policy with State Fund. Following nonpayment of a premium, State Fund canceled plaintiff's coverage effective February 1, 1996. Plaintiff issued a premium check, but did not mail it until after the cancellation date. State Fund received the check and cashed it, applying the amount to the unpaid portion of the policy. Plaintiff believed that because the check was cashed, coverage was continued. Two months later, one of plaintiff's employees was injured on the job and filed a claim with State Fund, which again informed plaintiff that coverage had been canceled and sent plaintiff an application to reenroll. Coverage became effective shortly thereafter. Upon a request for review, State Fund determined that it had complied with the contract terms and properly canceled the policy and refused to backdate the new policy. Because plaintiff was not covered under the original policy at the time of the accident, the claim was forwarded to the Employment Relations Division's Uninsured Employers' Fund (UEF). Following a determination that the employee was not covered at the time of the accident, UEF paid the employee's medical bills, assessed a penalty against plaintiff for the period of noncoverage, and presented plaintiff with a claim for indemnification for the medical bills. Plaintiff requested a contested case hearing before the Department of Labor and Industry, arguing that State Fund had improperly canceled the policy. The hearings officer dismissed the request on grounds that the Department lacked subject matter jurisdiction over the issue because plaintiff was seeking a remedy or the enforcement of a right founded in the insurance contract, thus giving the District Court jurisdiction. Plaintiff did not appeal the decision to the Workers' Compensation Court, but instead requested another contested case hearing with the Department to challenge UEF's determination that plaintiff was an uninsured employer and also contested the penalty and raised two other issues related to the propriety of State Fund's policy cancellation. The hearings officer again refused to consider plaintiff's contention that it was insured at the time of the injury, based on plaintiff's failure to appeal the prior jurisdictional decision. At the hearing, a UEF compliance specialist testified that national and state databases both showed that coverage had been canceled, and plaintiff did not present evidence of any other coverage, so the hearings officer concluded that UEF met its burden of proof that plaintiff was uninsured and held plaintiff liable for the penalty and medical benefits. On appeal, the Workers' Compensation Court reversed, holding that in order to meet its burden of proof, UEF needed to prove not only that the insurance was canceled but also that State Fund's cancellation of the policy was legally correct. The court found that the hearings officer had improperly shifted the burden of proof from UEF to plaintiff, resulting in a violation of plaintiff's due process rights to contest the allegation that it was uninsured. The Supreme Court reversed, agreeing instead with the hearings officer that UEF met its burden by establishing that plaintiff was not insured on the date of the injury. The responsibility of sorting through claims and defenses between an employer and its insurer does not fall on UEF, which is merely a safety net for injured workers of uninsured employers, but rather it is the responsibility of the employer to resolve disputes with the insurance carrier. To impose any more onerous requirement on UEF would frustrate the intent of UEF. Having confirmed that plaintiff was uninsured, UEF was statutorily required to pay the injured employee the same benefits that would have been received had plaintiff been insured and was not obligated to do more. Thus, the Workers' Compensation Court erred in holding that UEF failed to prove that plaintiff was an uninsured employer. Auto Parts of Bozeman v. Employment Relations Div. Uninsured Employers' Fund, 2001 MT 72, 305 M 40, 23 P3d 193 (2001).

Failure to Acknowledge Employee on Payroll — Employer Uninsured — Exclusive Remedy Unavailable: Defendant employer hired plaintiff employee Buerkley "under the table". Buerkley did not submit an employment application and was not required to comply with any existing hiring procedures; he did not use a time clock as did other employees; his paycheck was not drawn from the employer's payroll account, and no deductions were taken from his paycheck; he was not held out to others as an employee; and he was not reported as an employee on the payroll reports provided to the trust by which employees were provided coverage for work-related injuries. Buerkley was injured on the job, after which he submitted the proper application paperwork, backdated to a date prior to the injury; he began using the timeclock; and his paychecks began to reflect deductions for workers' compensation coverage. The trust adjusters found that Buerkley was entitled to compensation, but Buerkley rejected a settlement offer and sought damages in District Court, at which time the trust adjusters discovered the falsified employment records. Buerkley contended that an employer who has not properly complied with the requirements of 39-71-401 is an uninsured employer pursuant to this section and, therefore, subject to the civil remedies provided in 39-71-508 and 39-71-515. He also contended that the employer should not, as a matter of law and public policy, be allowed to rely on the exclusive remedy in 39-71-411. Defendant's argued, and the District Court agreed, that whether or not plaintiff's employment was reported to the trust by which they were self-insured, they elected coverage under the Workers' Compensation Act, and thus the Workers' Compensation Act was Buerkley's exclusive remedy. The Supreme Court noted that the purpose of the Workers' Compensation Act is to effectuate a compromise between industry and labor and cited 2A Larson, The Law of Workman's Compensation 65.40 (1998), for the premise that workers' compensation statutes are often described as a quid pro quo exchange of rights and remedies. However, the requisite quid pro quo is absent when an employer has deliberately avoided the cost of insuring an employee by failing to acknowledge the employee's existence in payroll records. In those cases, the employer should not be able to take refuge behind the exclusive remedy provision. Thus, for purposes of the remedies in part 5 of this chapter, Buerkley's employer was uninsured at the time of the injury and the exclusive remedy provision did not apply. Buerkley v. Aspen Meadows Ltd. Partnership, 1999 MT 97, 294 M 263, 980 P2d 1046, 56 St. Rep. 415 (1999), following Stratemeyer v. Lincoln County, 259 M 147, 855 P2d 506 (1993).

Limitation on Entitlement to Uninsured Employers' Fund Benefits Not Equal Protection Violation or Restriction on Access to Courts: Zempel was injured while working for an enrolled tribal member on a reservation. Although the tribe carried insurance covering tribal members, Zempel's employer was not covered by workers' compensation insurance, nor was Zempel an enrolled tribal member. Zempel sought benefits from the tribe's insurer through tribal court, but it was determined that the employer was not required to carry insurance. Zempel then sought benefits under the uninsured employers' fund, but the claim was denied because the employer was not an uninsured employer as defined in this section. Zempel appealed on the grounds that this section deprived him of equal protection and violated his constitutional right of access to courts. However, equal protection does not require that all persons be treated alike regardless of whether their circumstances are the same but only that all persons be treated alike under like circumstances. Only injured employees of employers meeting the definition of uninsured employer contained in this section are entitled to the substitute workers' compensation benefits that the uninsured employers' fund was created to provide to injured employees of employers who have failed to properly comply with the law. The limitation on entitlement to uninsured employers' fund benefits bears a reasonable relationship to the purpose of that law because it is only those employers subject to the law in the first place upon whom the state can impose the reimbursement and penalty obligations that provide the source of the uninsured employers' fund benefits. Applying the rational basis test, the Supreme Court found no constitutional violation under this section on either issue because Zempel failed to meet the burden of establishing the invalidity of the statute. Zempel was not precluded from pursuing other remedies outside the Workers' Compensation Act. The Supreme Court offered a further observation that when Montana citizens avail themselves of jobs on Indian reservations, they agree to abide by tribal rules. Zempel v. Uninsured Employers' Fund, 282 M 424, 938 P2d 658, 54 St. Rep. 415 (1997).

Self-Insured Employer Not Uninsured Employer Despite Subsequent Bankruptcy: Claimant suffered an industrial accident while working for a self-insured employer who accepted liability and paid temporary total benefits until going bankrupt, at which time benefits ceased. After benefits ceased, claimant petitioned for coverage from the uninsured employers' fund. Benefits were properly denied because at the time of injury and thereafter the employer was properly enrolled under plan No. 1 and paid benefits for approximately 2 years. Caldwell v. Great W. Sugar Co., 229 M 448, 746 P2d 627, 44 St. Rep. 2123 (1987).

39-71-503. Uninsured employers' fund — purpose and administration of fund — maintaining balance for administrative costs — appropriation.

Compiler's Comments

2007 Amendment: Chapter 48 inserted (3)(c) limiting the maximum aggregate medical benefits expenditure for a single claim to $100,000; and in (4) near beginning after "necessary for" deleted "the administration of the fund and for". Amendment effective July 1, 2007.

Applicability Date: Section 11, Ch. 48, L. 2007, provided: "[Sections 4 and 6] [amending 39-71-503 and 39-71-510] apply to injuries and occupational diseases occurring on or after July 1, 2007."

2003 Amendment: Chapter 193 at beginning of (3)(a) inserted exception clause; inserted (3)(b) requiring maintenance of balance for administrative costs; in (4) near middle inserted reference to administration of fund; and made minor changes in style. Amendment effective July 1, 2003.

Severability: Section 13, Ch. 193, L. 2003, was a severability clause.

Saving Clause: Section 14, Ch. 193, L. 2003, was a saving clause.

1999 Amendments — Composite Section: Chapter 377 deleted former (1) that read: "(1) The department shall administer the fund and shall pay from it all expenses of administering the fund, all loss adjustment expenses for claims of injured employees of uninsured employers, and all proper benefits to injured employees of underinsured and uninsured employers"; inserted (1) establishing uninsured employers' fund as state special revenue account; inserted (2) authorizing department to refer certain cases to workers' compensation fraud office; and made minor changes in style. Amendment effective July 1, 1999.

Chapter 389 in (1) near beginning before "fund" inserted "uninsured employers'". Amendment effective July 1, 1999. The amendment by Ch. 377 rendered the amendment by Ch. 389 void.

Severability: Section 24, Ch. 377, L. 1999, was a severability clause.

1997 Amendments: Chapter 310 in (1) inserted "from it all expenses of administering the fund, all loss adjustment expenses for claims of injured employees of uninsured employers, and"; and in (2), in third sentence, substituted "precedence" for "preference" and at end deleted "The cost of administration of the fund must be paid out of the money in the fund." Amendment effective July 1, 1997.

Chapter 422 in (1), near end after "employees of", inserted "underinsured and". Amendment effective July 1, 1997.

Severability: Section 14, Ch. 310, L. 1997, was a severability clause.

1995 Amendment: Chapter 516 in (2), at end of fifth sentence, inserted "and the investment income must be deposited in the fund"; and made minor changes in style.

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

Severability: Section 26, Ch. 516, L. 1995, was a severability clause.

Retroactive Applicability: Section 27(1), Ch. 516, L. 1995, provided that this section applies retroactively to all occurrences beginning after October 1, 1977.

1993 Amendment: Chapter 555 inserted (3) statutorily appropriating amounts necessary to pay benefits; and made minor changes in style. Amendment effective July 1, 1993.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1987 Amendment: In (2) deleted former first sentence that read: "Proper surpluses and reserves shall be kept for the fund" and inserted first through fourth sentences (see 1987 Session Law for text).

Administrative Rules

ARM 24.29.2851 Limitation on expenditures for medical benefits payable by UEF — applicability.

ARM 24.29.2853 Rights of third-party providers after UEF reaches $100,000 medical benefit expenditure limitation — applicability.

ARM 24.29.2855 Rights of third-party providers upon UEF's proportionate reduction in benefit payments — applicability.

Case Notes

Constitutionality of Section Allowing Setoff to Claim Against Uninsured Employers' Fund: Thayer died from an injury on the job, after incurring medical expenses of $253,207.98. Because the employer did not carry workers' compensation insurance, Thayer's wife, Phyllis, was entitled to receive medical benefits and death benefits provided by the uninsured employers' fund, pursuant to this section. The fund paid $85,000 in medical cost reimbursement, which the state accepted in full satisfaction of its claim. Phyllis subsequently brought negligence actions against the employer and a coemployee and product liability actions against the retail seller and the manufacturer of the product that Thayer was using when he was fatally injured. The uninsured employers' fund discharged Phyllis's claim for wage loss benefits following her receipt of a $100,000 settlement from the employer, applying the setoff pursuant to 39-71-511 in order to discharge the remaining future benefits that Phyllis would have been entitled to receive from the fund, but did not seek recovery of any of the benefits paid to Phyllis prior to receipt of the settlement or the benefits paid based on the amounts recovered from third parties. Phyllis asserted that the setoff essentially gave the fund a subrogation interest in her settlement from the employer, that the fund could not subrogate until she was made whole, and that to hold otherwise would be a violation of her constitutional right to full legal redress. The Supreme Court disagreed. Because the fund is merely a legislatively provided safety net standing in place of the employer to provide some basis for recovery when the employer is impecunious, it is reasonable to condition the fund's obligations on the extent to which the employer fails to provide compensation. Further, because the fund is not an insurer, limiting the fund's obligation to the extent of the uninsured employer's ability to compensate the employee or the employee's family does not diminish the employee's right to full legal redress. The plain language of Art. II, sec. 16, Mont. Const., does not distinguish between third parties and uninsured employers. In this case, the employee was uninsured, so the exclusive remedy provision in 39-71-411 did not apply, and Phyllis could pursue benefits from the fund up to the amount of workers' compensation benefits that she would have received if the employer were insured. Also, pursuant to 39-71-509, Phyllis could bring a tort action against the employer in addition to any responsible third party. Thayer v. Uninsured Employers' Fund, 1999 MT 304, 297 M 179, 991 P2d 447, 56 St. Rep. 1223 (1999), following Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997), and followed in Shattuck v. Kalispell Regional Medical Center, Inc., 2011 MT 229, 362 Mont. 100, 261 P.3d 1021.

39-71-504. Funding of fund — option for agreement between department and injured employee.

Compiler's Comments

2005 Amendment: Chapter 69 in (1)(b) near middle after "fund to" inserted "or on behalf of"; and in (2)(b) near middle of first sentence after "part" deleted "for penalties or claim reimbursement". Amendment effective March 24, 2005.

2003 Amendment: Chapter 193 inserted (1)(c) providing $200 penalty for failure to obtain insurance within 30 days; inserted (2) providing late fee, accrual of interest, and use of late fees and interest for administrative expenses and benefits; and made minor changes in style. Amendment effective July 1, 2003.

Severability: Section 13, Ch. 193, L. 2003, was a severability clause.

Saving Clause: Section 14, Ch. 193, L. 2003, was a saving clause.

1997 Amendments: Chapter 284 deleted former (3) that read: "(3) The department may determine that the $1,000 assessments that are charged against an insurer in each case of an industrial death under 39-71-902(1) must be paid to the uninsured employers' fund rather than the subsequent injury fund"; and made minor changes in style. Amendment effective January 1, 1998.

Chapter 310 in (1)(a), in middle of second sentence after "assessment", inserted "based"; in (1)(b) substituted "collect" for "receive"; in (2) substituted "collected" for "received"; deleted (3) that provided that the Department may determine that the $1,000 assessment charged against an insurer under 39-71-902(1) for an industrial death must be paid to the uninsured employers' fund and not the subsequent injury fund; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1997.

Transfer and Credit of Excess Subsequent Injury Funds: Section 6, Ch. 284, L. 1997, provided: "On or before September 1, 1997, the department of labor and industry shall transfer $3.5 million of the funds retained in the fund to the fund in 39-71-201 and credit the amount to offset the insurer's assessment for the administration fund as follows:

(1) plan No. 1, $490,000;
(2) plan No. 2, $612,500; and
(3) plan No. 3, $2,397,500."

Severability: Section 14, Ch. 310, L. 1997, was a severability clause.

1995 Amendment: Chapter 516 at end of (1) deleted provision that an assessment for payroll paid by the uninsured employer for any time prior to July 1, 1977, may not be made; in (2) deleted provision that the uninsured employer's liability under the subsection may not exceed $50,000; deleted (2)(b) providing that such dollar limitation did not apply to an uninsured employer's liability to an injured employee or the employee's beneficiaries under 39-71-509 or 39-71-515; adjusted subsection references; and made minor changes in style.

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

Severability: Section 26, Ch. 516, L. 1995, was a severability clause.

1991 Amendment: In (1), at beginning of first sentence, substituted "department may" for "department shall" and after "penalty of either" inserted "up to"; and made minor change in style.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1985 Amendment: At end of (2)(a) increased liability limit from $30,000 to $50,000; inserted (2)(b) providing that limitation does not apply to employer's liability to claimant or his beneficiaries; and inserted (4) allowing for assignment to injured employee of benefits from fund.

Case Notes

Waiver of Contract Rights — Late Payments Not Considered Breach Based on Prior Acceptance: The uninsured employers' fund (UEF) sought indemnity from an employer that did not have workers' compensation insurance using a monthly payment arrangement that was agreed to by the parties. The UEF accepted four late payments before turning the employer over to collections, at which point the employer sued UEF for breach of contract. The Supreme Court held that UEF waived its right to terminate the contract based on late payment when it accepted late payments without objection. Consequently, it was a breach of contract for the UEF to turn the employer over to collections and the employer was entitled to damages. Elk Mtn. Motor Sports, Inc. v. Dept. of Labor and Industry, 2012 MT 261, 367 Mont. 36, 289 P.3d 165.

Rejection of Petition for Extraterritorial Reciprocity by Out-of-State Corporation Doing Construction Business in Montana Without Montana Workers' Compensation Coverage — Penalty Affirmed: Plaintiff was a Wyoming construction company qualified to do business in Montana. Plaintiff purchased workers' compensation coverage from Wyoming, paying a premium calculated based on the company's entire payroll, including its employees who worked outside Wyoming. The company never purchased workers' compensation in Montana, believing that the Wyoming policy provided valid coverage for all its employees. One of the company's employees was injured while working in Montana, and plaintiff petitioned the Department of Labor and Industry for extraterritorial reciprocity under its Wyoming policy. The petition was denied, and plaintiff was fined $94,484.86. Plaintiff appealed the penalty, but the Supreme Court affirmed. Generally, workers' compensation coverage purchased in another state will enjoy extraterritorial application and reciprocity in Montana. However, an exception applies to out-of-state employers engaged in the construction industry. Because plaintiff was in violation of 39-71-401 by not carrying workers' compensation coverage for its construction employees in Montana, plaintiff was not entitled to reciprocity under 39-71-402, and the Workers' Compensation Court correctly upheld the penalty. Williams Insulation Co., Inc. v. Dept. of Labor and Industry, 2003 MT 72, 314 M 523, 67 P3d 262 (2003).

Issue of Department of Labor and Industry Jurisdiction Raised in Two Separate Hearings — Collateral Estoppel Applicable — Due Process Rights Not Implicated When Party Fails to Pursue Available Remedies: The Workers' Compensation Court concluded that the Department of Labor and Industry should have allowed plaintiff to raise the argument that State Fund had improperly canceled plaintiff's policy for nonpayment of a premium as a defense to the claim by the Uninsured Employers' Fund for assessments and penalties. The court said that the issue was not barred by collateral estoppel because an order from a first hearing only determined whether the Department had subject matter jurisdiction over contract disputes between an insurance carrier and its policyholder (a determination that plaintiff did not appeal) and did not address the issue raised in a second hearing, which was whether the Department had jurisdiction to determine coverage in a proceeding seeking a penalty and indemnification. The court held that collateral estoppel did not apply because the issues in the two hearings were not identical. The court went on to hold that the Department did have jurisdiction, through its quasi-judicial power, to resolve the dispute regarding whether State Fund had rightfully canceled the policy. The Supreme Court disagreed. In the first case, a hearings officer determined that the Department did not have subject matter jurisdiction over the contractual dispute between plaintiff and State Fund, noting that proper adjudication would be in the District Court. The Department only has jurisdiction granted to it by statute, and the adjudication of insurance contracts does not fall within its jurisdiction. Plaintiff's failure to appeal the issue from the first hearing precluded it from arguing that the Department did have jurisdiction over the insurance contract dispute regarding a penalty and indemnification in the second hearing, so relitigation of the jurisdiction question in the second proceeding was barred by collateral estoppel. Further, it was error to give the Department jurisdiction to adjudicate the insurance contract dispute pursuant to its general quasi-judicial powers because an administrative agency may not assume jurisdiction without express delegation by the Legislature and there is no statutory delegation of authority to the Department to resolve contract disputes. Rather, regulation of insurance contracts is governed by the Insurance Commissioner and the relevant statutes relating to insurance disputes. The Department cannot and should not be adjudicating disputes between insurance companies and employers. The Workers' Compensation Court's conclusion that plaintiff was denied due process when it was prevented from presenting evidence relating to the insurance contract between itself and State Fund was also erroneous. Plaintiff had the opportunity to appeal the initial Department order to the Workers' Compensation Court, but failed to do so. Plaintiff also had the opportunity to pursue its remedies against State Fund in District Court, but again failed to do so. There is no denial of due process when a party fails to pursue the remedies provided. Auto Parts of Bozeman v. Employment Relations Div. Uninsured Employers' Fund, 2001 MT 72, 305 M 40, 23 P3d 193 (2001).

Uninsured Employers' Fund Not Required to Resolve Insurance Disputes — Burden of Proving That Employer Uninsured Properly Met: Plaintiff carried a workers' compensation policy with State Fund. Following nonpayment of a premium, State Fund canceled plaintiff's coverage effective February 1, 1996. Plaintiff issued a premium check, but did not mail it until after the cancellation date. State Fund received the check and cashed it, applying the amount to the unpaid portion of the policy. Plaintiff believed that because the check was cashed, coverage was continued. Two months later, one of plaintiff's employees was injured on the job and filed a claim with State Fund, which again informed plaintiff that coverage had been canceled and sent plaintiff an application to reenroll. Coverage became effective shortly thereafter. Upon a request for review, State Fund determined that it had complied with the contract terms and properly canceled the policy and refused to backdate the new policy. Because plaintiff was not covered under the original policy at the time of the accident, the claim was forwarded to the Employment Relations Division's Uninsured Employers' Fund (UEF). Following a determination that the employee was not covered at the time of the accident, UEF paid the employee's medical bills, assessed a penalty against plaintiff for the period of noncoverage, and presented plaintiff with a claim for indemnification for the medical bills. Plaintiff requested a contested case hearing before the Department of Labor and Industry, arguing that State Fund had improperly canceled the policy. The hearings officer dismissed the request on grounds that the Department lacked subject matter jurisdiction over the issue because plaintiff was seeking a remedy or the enforcement of a right founded in the insurance contract, thus giving the District Court jurisdiction. Plaintiff did not appeal the decision to the Workers' Compensation Court, but instead requested another contested case hearing with the Department to challenge UEF's determination that plaintiff was an uninsured employer and also contested the penalty and raised two other issues related to the propriety of State Fund's policy cancellation. The hearings officer again refused to consider plaintiff's contention that it was insured at the time of the injury, based on plaintiff's failure to appeal the prior jurisdictional decision. At the hearing, a UEF compliance specialist testified that national and state databases both showed that coverage had been canceled, and plaintiff did not present evidence of any other coverage, so the hearings officer concluded that UEF met its burden of proof that plaintiff was uninsured and held plaintiff liable for the penalty and medical benefits. On appeal, the Workers' Compensation Court reversed, holding that in order to meet its burden of proof, UEF needed to prove not only that the insurance was canceled but also that State Fund's cancellation of the policy was legally correct. The court found that the hearings officer had improperly shifted the burden of proof from UEF to plaintiff, resulting in a violation of plaintiff's due process rights to contest the allegation that it was uninsured. The Supreme Court reversed, agreeing instead with the hearings officer that UEF met its burden by establishing that plaintiff was not insured on the date of the injury. The responsibility of sorting through claims and defenses between an employer and its insurer does not fall on UEF, which is merely a safety net for injured workers of uninsured employers, but rather it is the responsibility of the employer to resolve disputes with the insurance carrier. To impose any more onerous requirement on UEF would frustrate the intent of UEF. Having confirmed that plaintiff was uninsured, UEF was statutorily required to pay the injured employee the same benefits that would have been received had plaintiff been insured and was not obligated to do more. Thus, the Workers' Compensation Court erred in holding that UEF failed to prove that plaintiff was an uninsured employer. Auto Parts of Bozeman v. Employment Relations Div. Uninsured Employers' Fund, 2001 MT 72, 305 M 40, 23 P3d 193 (2001).

Jurisdiction and Nature of Workers' Compensation Court: A driver was injured while operating a tractor-trailer owned by one company and leased to another company that was in turn a division of a third company. The driver was awarded workers' compensation benefits. When the Workers' Compensation Uninsured Employers' Fund sought to collect the amount of the benefits from the company that owned the rig and from the third company, both companies denied any responsibility for the employment of the injured man. The Workers' Compensation Court and the Fund could not agree on the court's jurisdiction, and the instant appeal followed. The Supreme Court determined that the dispute involved benefits payable to the claimant, the Workers' Compensation Court has exclusive jurisdiction, the legislative history relied upon by the Fund and the history of the court indicated that the jurisdiction of the Workers' Compensation Court went beyond adjudication of workers' claims only when a dispute is related to benefits payable to a claimant, and that the Workers' Compensation Court has declaratory power under the Montana Administrative Procedure Act. State ex rel. St. Uninsured Employers' Fund v. Hunt, 191 M 514, 625 P2d 539, 38 St. Rep. 421 (1981).

39-71-506. Lien for payment of unpaid penalties, fees, and interest — levy and execution.

Compiler's Comments

2009 Amendment: Chapter 112 in (1)(a) in first sentence inserted references to subsections (1)(a), (1)(c), and (2) of 39-71-504 and after "interest" deleted "and claims", in second sentence near beginning inserted reference to order requiring payment of penalties, fees, and interest, in third sentence near end inserted "uninsured", and in fourth sentence at beginning deleted "After satisfying any due process requirements"; inserted (1)(b) allowing renewal of judgment lien; at end of (2) substituted "subsection (1)" for "39-71-504"; and made minor changes in style. Amendment effective April 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2003 Amendment: Chapter 193 in (1) deleted reference to subsections (1) and (2) of 39-71-504 and inserted reference to fees and interest. Amendment effective July 1, 2003.

Severability: Section 13, Ch. 193, L. 2003, was a severability clause.

Saving Clause: Section 14, Ch. 193, L. 2003, was a saving clause.

1993 Amendment: Chapter 555 in first sentence of (1), after "39-71-504", substituted "the unpaid penalties and claims have the effect of a judgment against the employer at the time the payments become due" for "the sums may be collected by the department through suit" and inserted second through fourth sentences regarding enforcement of the judgment; and made minor changes in style. Amendment effective July 1, 1993.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Case Notes

Waiver of Contract Rights — Late Payments Not Considered Breach Based on Prior Acceptance: The uninsured employers' fund (UEF) sought indemnity from an employer that did not have workers' compensation insurance using a monthly payment arrangement that was agreed to by the parties. The UEF accepted four late payments before turning the employer over to collections, at which point the employer sued UEF for breach of contract. The Supreme Court held that UEF waived its right to terminate the contract based on late payment when it accepted late payments without objection. Consequently, it was a breach of contract for the UEF to turn the employer over to collections and the employer was entitled to damages. Elk Mtn. Motor Sports, Inc. v. Dept. of Labor and Industry, 2012 MT 261, 367 Mont. 36, 289 P.3d 165.

39-71-507. Department to order uninsured employer to cease operations — noncompliance with order a misdemeanor — coordination of remedies.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 505, L. 2023. Amendment effective May 18, 2023.

1995 Amendment: Chapter 516 inserted (2) relating to a Department order that a prime contractor that has subcontracted for services of an uninsured employer stop operations by the uninsured employer until the uninsured employer has elected to be bound by a compensation plan and allowing the Department to order the prime contractor to stop all operations at the worksite if the order is not complied with in 3 business days; inserted (4) making each day's failure to comply with the order a misdemeanor and allowing other civil actions and a civil penalty of up to $1,000 for each day of violation; in (6) substituted "subsections (3) through (5)" for "subsections (2) and (3)"; and made minor changes in style.

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

Severability: Section 26, Ch. 516, L. 1995, was a severability clause.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation",

"division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1987 Amendment: In (2) inserted last three sentences (see 1987 Session Law for text); inserted (3) allowing Division to seek enforcement of its cease operations order by civil remedy; and inserted (4) providing that the remedies in 39-71-506 and this section may be pursued concurrently.

39-71-508. Coordination of remedies — limitation of liability of employee to third-party providers — rights of third-party providers.

Compiler's Comments

2007 Amendment: Chapter 48 inserted (2) providing that an employee who recovers for an injury is not liable to any third-party provider for services that are not reimbursed by the uninsured employers' fund; inserted (3) allowing a third-party provider that is not fully reimbursed by the fund to bring an action directly against the uninsured employer for the amount of services that were not paid by the fund; and made minor changes in style. Amendment effective July 1, 2007.

1985 Amendment: In introductory clause, at end, substituted "pursue all remedies concurrently, including but not limited to" for "elect to either receive"; substituted (1) and (2) allowing employee or his beneficiaries to concurrently pursue a claim for benefits and a damage action for former text that read: "benefits from the uninsured employers' fund or pursue a damage action against the employer. However, once an election has been made to either take from the fund or pursue a damage action, the election is final and binding on the employee or the employee's beneficiaries, heirs, and personal representatives. An injured employee or the employee's beneficiaries may not receive both benefits from the fund and pursue a damage action"; and inserted (3) and (4) allowing action against employer under 39-71-515 and any other civil remedy provided by law.

Administrative Rules

ARM 24.29.2851 Limitation on expenditures for medical benefits payable by UEF — applicability.

ARM 24.29.2853 Rights of third-party providers after UEF reaches $100,000 medical benefit expenditure limitation — applicability.

ARM 24.29.2855 Rights of third-party providers upon UEF's proportionate reduction in benefit payments — applicability.

Case Notes

Injured Employee Who Receives All Allowable Benefits From Uninsured Employers' Fund Not Permitted to Also Collect Compensation From Uninsured Employer — Double Dipping Disallowed: Daughenbaugh was injured while working at the Olsons' ranch. The Olsons did not carry workers' compensation insurance on Daughenbaugh, but the parties negotiated a settlement agreement that paid Daughenbaugh's salary and medical expenses and allowed him to continue to live at the ranch and continue his duties there for a specific period of time. In turn, Daughenbaugh signed a general release and indemnification agreement releasing all claims against the Olsons and agreeing to indemnify them against any claims arising from the injury. Daughenbaugh then filed a workers' compensation claim with the state, and because the Olsons were uninsured, the uninsured employers' fund (UEF) processed the claim and paid wage loss and other benefits to Daughenbaugh. The Olsons then sought a declaratory judgment holding that the general release and indemnification agreement was valid and enforceable. Daughenbaugh responded that the agreement was unenforceable and counterclaimed that, pursuant to the independent cause of action provided in 39-71-515, he was entitled to recover from the Olsons damages in the amount of compensation that he would have received if the Olsons had been properly enrolled in a workers' compensation plan. Daughenbaugh subsequently agreed to accept $5,000 from the Olsons for attorney fees and $38,820.88 from the UEF (inclusive of sums already paid by the UEF), acknowledging that that amount represented his full entitlement to workers' compensation benefits had the Olsons been properly enrolled in a plan, and agreed to fully release and discharge the Olsons and the UEF from all obligations and benefits under the Workers' Compensation Act. The Olsons agreed to reimburse the UEF for $38,820.88 and to pay a penalty for failure to enroll in a plan. However, Daughenbaugh reserved the counterclaim against the Olsons, alleging that he was entitled to direct compensation from the Olsons under 39-71-515. The District Court summarily dismissed the counterclaim, finding that Daughenbaugh was not entitled to receive the benefits that he would have received from the Olsons in an independent action because he had admittedly already received all those benefits to which he was entitled from the UEF. The Supreme Court agreed. Pursuant to the legislative history of 39-71-515, Neustrom v. St., 283 M 179, 939 P2d 990 (1997), and Thayer v. Uninsured Employers' Fund, 1999 MT

304, 297 M 179, 991 P2d 447 (1999), 39-71-515 does not allow for a double recovery of workers' compensation benefits. Daughenbaugh was allowed to pursue a benefit claim from the UEF and an independent action against the Olsons at the same time, but pursuant to the doctrine of res judicata, Daughenbaugh was bound by the decision of the first venue to arrive at a decision, and was not allowed to double-dip workers' compensation benefits and receive full compensation twice for the same work-related injury. (See 2007 amendment.) Olson v. Daughenbaugh, 2001 MT 284, 307 M 371, 38 P3d 154 (2001).

Applicability of Tort Statute of Limitations to Independent Cause of Action for Failure to Maintain Workers' Compensation Insurance: Under 39-71-601, a statutory time limit is established for filing a claim with the Department; however, no limit is established within which a claim must be filed in District Court. As established in Boehm v. Alanon Club, 222 M 373, 722 P2d 1160 (1986), an independent cause of action authorized by this section is ordinarily considered a negligence action, but strict liability may apply in certain situations. Therefore, the applicable statute of limitations for such actions is the tort statute of limitations of 3 years provided in 27-2-204. Barthule v. Karman, 268 M 477, 886 P2d 971, 51 St. Rep. 1423 (1994).

Employee Claim Options Against Uninsured Employer — Concurrent Pursuit of Remedies Not Required: Employer sought dismissal of an action for failure to maintain workers' compensation insurance based on lack of subject matter jurisdiction, arguing that because the Workers' Compensation Court has exclusive jurisdiction, all remedies must be pursued at the same time. An employee has several options for bringing claims against an uninsured employer pursuant to this section. However, the language regarding concurrent pursuit of remedies is permissive rather than mandatory. Therefore, a claimant is not required to file and pursue all claims at exactly the same time, and the receipt of benefits from the uninsured employers' fund does not bar a later action in District Court. Barthule v. Karman, 268 M 477, 886 P2d 971, 51 St. Rep. 1423 (1994).

Self-Insured Employer Not Uninsured Employer Despite Subsequent Bankruptcy: Claimant suffered an industrial accident while working for a self-insured employer who accepted liability and paid temporary total benefits until going bankrupt, at which time benefits ceased. After benefits ceased, claimant petitioned for coverage from the uninsured employers' fund. Benefits were properly denied because at the time of injury and thereafter the employer was properly enrolled under plan No. 1 and paid benefits for approximately 2 years. Caldwell v. Great W. Sugar Co., 229 M 448, 746 P2d 627, 44 St. Rep. 2123 (1987).

Proof of Fault or Breach of Duty as Necessary for Recovery: In an action for damages against an uninsured employer pursuant to this section, an employee must establish a prima facie case of fault or breach of duty before he can recover for his injuries. Normally the action will be one in negligence; however, strict or vicarious liability may also apply in appropriate situations. Boehm v. Alanon Club, 222 M 373 722 P2d 1160, 43 St. Rep. 1341 (1986), followed in Hunnewell v. Syme, 229 M 525, 747 P2d 875, 44 St. Rep. 2189 (1987).

Substantive Amendment to Law Regarding Uninsured Employer — Not Retroactive: Appellant contended that the 1985 amendment to this section and enactment of 39-71-515 were designed to remedy deficiencies in the prior law so that an uninsured employer would not be able to completely escape liability. He argued that since the 1985 legislation was essentially procedural or remedial, it should apply retroactively under 1-2-109, even though the legislation occurred subsequent to his accident. The Supreme Court disagreed, noting that the statutes imposed a new liability or obligation upon employers and granted employees a new cause of action or right that did not exist prior to enactment. This result fit exactly within the definition of a substantive law, and the court declined to apply the statutes retroactively. Boehm v. Alanon Club, 222 M 373, 722 P2d 1160, 43 St. Rep. 1341 (1986), followed in Donahue v. Convenience Disposal, Inc., 250 M 261, 818 P2d 839, 48 St. Rep. 916 (1991).

39-71-509. Action against uninsured employer — limitation of employer's defenses.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1985 Amendment: In introductory clause, after "beneficiaries", deleted "elect to".

Case Notes

Uninsured Employer Prohibited From Contribution or Indemnity Claim Against Third Party After Settling With Injured Employee: In response to a certified question from the federal District Court, the Supreme Court held that it is not equitable to require a stranger to the employer-employee relationship to indemnify an employer for liability that was wholly avoidable if the employer had simply obeyed the Workers' Compensation Act and provided coverage for its employees. Therefore, an uninsured employer is prohibited from bringing either a contribution claim or an indemnity claim against a third party after settling with an injured employee. St. Farm Fire & Cas. Co. v. Bush Hog, LLC, 2009 MT 349, 353 M 173, 219 P3d 1249 (2009).

Constitutionality of Section Allowing Setoff to Claim Against Uninsured Employers' Fund: Thayer died from an injury on the job, after incurring medical expenses of $253,207.98. Because the employer did not carry workers' compensation insurance, Thayer's wife, Phyllis, was entitled to receive medical benefits and death benefits provided by the uninsured employers' fund, pursuant to 39-71-503. The fund paid $85,000 in medical cost reimbursement, which the state accepted in full satisfaction of its claim. Phyllis subsequently brought negligence actions against the employer and a coemployee and product liability actions against the retail seller and the manufacturer of the product that Thayer was using when he was fatally injured. The uninsured employers' fund discharged Phyllis's claim for wage loss benefits following her receipt of a $100,000 settlement from the employer, applying the setoff pursuant to 39-71-511 in order to discharge the remaining future benefits that Phyllis would have been entitled to receive from the fund, but did not seek recovery of any of the benefits paid to Phyllis prior to receipt of the settlement or the benefits paid based on the amounts recovered from third parties. Phyllis asserted that the setoff essentially gave the fund a subrogation interest in her settlement from the employer, that the fund could not subrogate until she was made whole, and that to hold otherwise would be a violation of her constitutional right to full legal redress. The Supreme Court disagreed. Because the fund is merely a legislatively provided safety net standing in place of the employer to provide some basis for recovery when the employer is impecunious, it is reasonable to condition the fund's obligations on the extent to which the employer fails to provide compensation. Further, because the fund is not an insurer, limiting the fund's obligation to the extent of the uninsured employer's ability to compensate the employee or the employee's family does not diminish the employee's right to full legal redress. The plain language of Art. II, sec. 16, Mont. Const., does not distinguish between third parties and uninsured employers. In this case, the employee was uninsured, so the exclusive remedy provision in 39-71-411 did not apply, and Phyllis could pursue benefits from the fund up to the amount of workers' compensation benefits that she would have received if the employer were insured. Also, pursuant to this section, Phyllis could bring a tort action against the employer in addition to any responsible third party. Thayer v. Uninsured Employers' Fund, 1999 MT 304, 297 M 179, 991 P2d 447, 56 St. Rep. 1223 (1999), following Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997), and followed in Shattuck v. Kalispell Regional Medical Center, Inc., 2011 MT 229, 362 Mont. 100, 261 P.3d 1021.

39-71-510. Limitation on benefit entitlement under fund.

Compiler's Comments

2007 Amendment: Chapter 48 in (1) near beginning of first sentence after "39-71-503" inserted "and subsection (2) of this section"; inserted (2) limiting maximum medical benefits entitlement for a single claim to an aggregate amount of $100,000; and made minor changes in style. Amendment effective July 1, 2007.

Applicability Date: Section 11, Ch. 48, L. 2007, provided: "[Sections 4 and 6] [amending 39-71-503 and 39-71-510] apply to injuries and occupational diseases occurring on or after July 1, 2007."

1999 Amendment: Chapter 377 near beginning of first sentence deleted "39-71-502"; and made minor changes in style. Amendment effective July 1, 1999.

Severability: Section 24, Ch. 377, L. 1999, was a severability clause.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1985 Amendment: In first sentence near middle after "beneficiaries who", substituted "pursue a claim for" for "elect to receive".

Administrative Rules

ARM 24.29.2851 Limitation on expenditures for medical benefits payable by UEF — applicability.

ARM 24.29.2853 Rights of third-party providers after UEF reaches $100,000 medical benefit expenditure limitation — applicability.

ARM 24.29.2855 Rights of third-party providers upon UEF's proportionate reduction in benefit payments — applicability.

Case Notes

Failure to Pay Any Benefit Because of Insufficient Funds: A worker was injured in September of 1984, filed an uninsured employers' fund claim in October of 1984, and was told that the fund was not paying claims because the fund was insolvent. The law required proportionate reductions in benefits payments if the fund could not pay all claims in full. In 1992, the worker again filed a claim with the fund, and it was denied for failure to file within the statutorily required 1 year after the injury. She claimed that the fund should be equitably estopped from raising the 1 year statute of limitations to deny the claim because the fund was not insolvent and should have paid claims on a proportionately reduced basis rather than not paying anything on any claim. She claimed that the fund misrepresented a material fact, the first element in establishing equitable estoppel. According to the fund's interpretation of the law requiring it to maintain surpluses and reserves and according to its accounting practices, the fund was insolvent. There was no misrepresentation of a material fact, and the claim was time-barred. Lako v. Employment Relations Div., 2004 MT 290, 323 M 334, 100 P3d 142 (2004).

39-71-511. Setoffs to claim against fund.

Case Notes

Constitutionality of Section Allowing Setoff to Claim Against Uninsured Employers' Fund: Thayer died from an injury on the job, after incurring medical expenses of $253,207.98. Because the employer did not carry workers' compensation insurance, Thayer's wife, Phyllis, was entitled to receive medical benefits and death benefits provided by the uninsured employers' fund, pursuant to 39-71-503. The fund paid $85,000 in medical cost reimbursement, which the state accepted in full satisfaction of its claim. Phyllis subsequently brought negligence actions against the employer and a coemployee and product liability actions against the retail seller and the manufacturer of the product that Thayer was using when he was fatally injured. The uninsured employers' fund discharged Phyllis's claim for wage loss benefits following her receipt of a $100,000 settlement from the employer, applying the setoff pursuant to this section in order to discharge the remaining future benefits that Phyllis would have been entitled to receive from the fund, but did not seek recovery of any of the benefits paid to Phyllis prior to receipt of the settlement or the benefits paid based on the amounts recovered from third parties. Phyllis asserted that the setoff essentially gave the fund a subrogation interest in her settlement from the employer, that the fund could not subrogate until she was made whole, and that to hold otherwise would be a violation of her constitutional right to full legal redress. The Supreme Court disagreed. Because the fund is merely a legislatively provided safety net standing in place of the employer to provide some basis for recovery when the employer is impecunious, it is reasonable to condition the fund's obligations on the extent to which the employer fails to provide compensation. Further, because the fund is not an insurer, limiting the fund's obligation to the extent of the uninsured employer's ability to compensate the employee or the employee's family does not diminish the employee's right to full legal redress. The plain language of Art. II, sec. 16, Mont. Const., does not distinguish between third parties and uninsured employers. In this case, the employee was uninsured, so the exclusive remedy provision in 39-71-411 did not apply, and Phyllis could pursue benefits from the fund up to the amount of workers' compensation benefits that she would have received if the employer were insured. Also, pursuant to 39-71-509, Phyllis could bring a tort action against the employer in addition to any responsible third party. Thayer v. Uninsured Employers' Fund, 1999 MT 304, 297 M 179, 991 P2d 447, 56 St. Rep. 1223 (1999), following Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997), and followed in Shattuck v. Kalispell Regional Medical Center, Inc., 2011 MT 229, 362 Mont. 100, 261 P.3d 1021.

39-71-515. Independent cause of action.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Preamble: The preamble to Ch. 601, L. 1985, which enacted this section, 39-71-511, and 39-71-516 through 39-71-519 and amended 39-71-504, 39-71-508 through 39-71-510, and 39-71-2905, provided: "WHEREAS, it is the public policy of the State of Montana to ensure that every employee who is required to be covered under the state's workers' compensation laws, or his beneficiaries, receive, in the event of compensable injury or death, the monetary compensation to which they are entitled or are adjudged to be entitled under Title 39, chapter 71, part 7; and

WHEREAS, under current laws, an employee of an uninsured employer or the employee's beneficiaries are significantly impeded in the ability to recover full or partial compensation for a compensable injury or death; and

WHEREAS, this situation exists because of all of the following factors:

(1) There is a significant number of uninsured employers in Montana.

(2) The uninsured employers' fund is, for all practical purposes, insolvent.

(3) Existing remedies for an injured employee or his beneficiaries are inadequate, particularly when the negligence of the employer is not or cannot be proven to be the proximate cause of the injury or death."

Case Notes

Fraudulently Obtained Independent Contractor Exemption First Raised in Opposition to Affirmative Defense and Motion for Summary Judgment: A worker fell from a carport roof that she was painting and sued the contractor who hired her and the people who hired the contractor to paint the house, claiming failure to provide a safe workplace and workers' compensation insurance. The defendants who hired the contractor pleaded the affirmative defense that the worker was an independent contractor, and the worker responded that the approved application for an independent contractor exemption was fraudulently obtained. Although former Rule 9(b), M.R.Civ.P. (now superseded), requires a claim of fraud to be pleaded with particularity, in this case, evidence of fraud raised by the worker in her brief in opposition to summary judgment was properly before the court and should have been considered in the summary judgment proceeding. Gonzales v. Walchuk, 2002 MT 262, 312 M 240, 59 P3d 377 (2002).

Injured Employee Who Receives All Allowable Benefits From Uninsured Employers' Fund Not Permitted to Also Collect Compensation From Uninsured Employer — Double Dipping Disallowed: Daughenbaugh was injured while working at the Olsons' ranch. The Olsons did not carry workers' compensation insurance on Daughenbaugh, but the parties negotiated a settlement agreement that paid Daughenbaugh's salary and medical expenses and allowed him to continue to live at the ranch and continue his duties there for a specific period of time. In turn, Daughenbaugh signed a general release and indemnification agreement releasing all claims against the Olsons and agreeing to indemnify them against any claims arising from the injury. Daughenbaugh then filed a workers' compensation claim with the state, and because the Olsons were uninsured, the uninsured employers' fund (UEF) processed the claim and paid wage loss and other benefits to Daughenbaugh. The Olsons then sought a declaratory judgment holding that the general release and indemnification agreement was valid and enforceable. Daughenbaugh responded that the agreement was unenforceable and counterclaimed that, pursuant to the independent cause of action provided in this section, he was entitled to recover from the Olsons damages in the amount of compensation that he would have received if the Olsons had been properly enrolled in a workers' compensation plan. Daughenbaugh subsequently agreed to accept $5,000 from the Olsons for attorney fees and $38,820.88 from the UEF (inclusive of sums already paid by the UEF), acknowledging that that amount represented his full entitlement to workers' compensation benefits had the Olsons been properly enrolled in a plan, and agreed to fully release and discharge the Olsons and the UEF from all obligations and benefits under the Workers' Compensation Act. The Olsons agreed to reimburse the UEF for $38,820.88 and to pay a penalty for failure to enroll in a plan. However, Daughenbaugh reserved the counterclaim against the Olsons, alleging that he was entitled to direct compensation from the Olsons under this section. The District Court summarily dismissed the counterclaim, finding that Daughenbaugh was not entitled to receive the benefits that he would have received from the Olsons in an independent action because he had admittedly already received all those benefits to which he was entitled from the UEF. The Supreme Court agreed. Pursuant to the legislative history of this section, Neustrom v. St., 283 M 179, 939 P2d 990 (1997), and Thayer v. Uninsured Employers' Fund, 1999 MT 304, 297 M 179, 991 P2d 447 (1999), this section does not allow for a double recovery of workers' compensation benefits. Daughenbaugh was allowed to pursue a benefit claim from the UEF and an independent action against the Olsons at the same time, but pursuant to the doctrine of res judicata, Daughenbaugh was bound by the decision of the first venue to arrive at a decision, and was not allowed to double-dip workers' compensation benefits and receive full compensation twice for the same work-related injury. Olson v. Daughenbaugh, 2001 MT 284, 307 M 371, 38 P3d 154 (2001).

Properly Invoked District Court Jurisdiction Over Independent Action Held Exclusive: After suffering a work-related injury and finding out from the Department of Labor and Industry that his employer had not made the required election regarding workers' compensation insurance, Dunn filed an independent action in District Court pursuant to 39-71-516 and this section against his employer. Thereafter, the employer's attorney, on behalf of CNA Insurance, petitioned the Workers' Compensation Court for a determination that the employer was indeed insured by CNA. Citing Bohmer v. Uninsured Employers' Fund, 266 M 289, 880 P2d 816 (1994), the Supreme Court held that the Workers' Compensation Court properly dismissed CNA's petition. However, the Supreme Court held that the District Court had exclusive jurisdiction over the independent action once its jurisdiction was properly invoked because the employer constituted an uninsured employer. The Supreme Court held that failure of an employer to insure itself is an essential element of the cause of action provided for by this section. The Supreme Court also applied sanctions against the insurer and its attorney for bringing a frivolous action and appeal. CNA Ins. Co. v. Dunn, 273 M 295, 902 P2d 1014, 52 St. Rep. 981 (1995).

Uninsured Employer — Jurisdiction: Petitioner filed an independent cause of action against an employer not enrolled in a workers' compensation plan and then petitioned the Workers' Compensation Court for a hearing. The District Court stayed its proceedings pending a determination by the Workers' Compensation Court of the extent of injuries and calculation of damages. The Workers' Compensation Court dismissed the petition on the grounds that it lacked jurisdiction over the action. On appeal, the Supreme Court affirmed. The Workers' Compensation Court does not have jurisdiction over actions filed in the District Court, and the District Court's jurisdiction is not confined to liability issues. Bohmer v. Uninsured Employers' Fund, 266 M 289, 880 P2d 816, 51 St. Rep. 824 (1994), distinguished in Neustrom v. St., 283 M 179, 939 P2d 990, 54 St. Rep. 552 (1997).

Substantive Amendment to Law Regarding Uninsured Employer — Not Retroactive: Appellant contended that the 1985 amendment to 39-71-508 and enactment of this section were designed to remedy deficiencies in the prior law so that an uninsured employer would not be able to completely escape liability. He argued that since the 1985 legislation was essentially procedural or remedial, it should apply retroactively under 1-2-109, even though the legislation occurred subsequent to his accident. The Supreme Court disagreed, noting that the statutes imposed a new liability or obligation upon employers and granted employees a new cause of action or right that did not exist prior to enactment. This result fit exactly within the definition of a substantive law, and the court declined to apply the statutes retroactively. Boehm v. Alanon Club, 222 M 373, 722 P2d 1160, 43 St. Rep. 1341 (1986), followed in Donahue v. Convenience Disposal, Inc., 250 M 261, 818 P2d 839, 48 St. Rep. 916 (1991).

39-71-516. District court venue and jurisdiction for independent cause of action.

Compiler's Comments

1995 Amendment: Chapter 516 at end inserted "The court may request the workers' compensation judge to determine the amount of recoverable damages due to the employee"; and made minor changes in style. Amendment effective April 25, 1995.

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

Severability: Section 26, Ch. 516, L. 1995, was a severability clause.

Case Notes

Properly Invoked District Court Jurisdiction Over Independent Action Held Exclusive: After suffering a work-related injury and finding out from the Department of Labor and Industry that his employer had not made the required election regarding workers' compensation insurance, Dunn filed an independent action in District Court pursuant to 39-71-515 and this section against his employer. Thereafter, the employer's attorney, on behalf of CNA Insurance, petitioned the Workers' Compensation Court for a determination that the employer was indeed insured by CNA. Citing Bohmer v. Uninsured Employers' Fund, 266 M 289, 880 P2d 816 (1994), the Supreme Court held that the Workers' Compensation Court properly dismissed CNA's petition. However, the Supreme Court held that the District Court had exclusive jurisdiction over the independent action once its jurisdiction was properly invoked because the employer constituted an uninsured employer. The Supreme Court held that failure of an employer to insure itself is an essential element of the cause of action provided for by 39-71-515. The Supreme Court also applied sanctions against the insurer and its attorney for bringing a frivolous action and appeal. CNA Ins. Co. v. Dunn, 273 M 295, 902 P2d 1014, 52 St. Rep. 981 (1995).

Venue for Action for Failure to Maintain Workers' Compensation Insurance: Under this section, an independent cause of action for failure to maintain workers' compensation insurance must be brought in the District Court in the district in which the claimant resides or in which the alleged violation occurs. As established in Melroe v. Doyle, 239 M 524, 781 P2d 1134 (1989), a defendant may not change venue to a different county when a suit may be commenced in more than one county and the plaintiff files in one of the permissible locations. Barthule v. Karman, 268 M 477, 886 P2d 971, 51 St. Rep. 1423 (1994).

Uninsured Employer — Jurisdiction: Petitioner filed an independent cause of action against an employer not enrolled in a workers' compensation plan and then petitioned the Workers' Compensation Court for a hearing. The District Court stayed its proceedings pending a determination by the Workers' Compensation Court of the extent of injuries and calculation of damages. The Workers' Compensation Court dismissed the petition on the grounds that it lacked jurisdiction over the action. On appeal, the Supreme Court affirmed. The Workers' Compensation Court does not have jurisdiction over actions filed in the District Court, and the District Court's jurisdiction is not confined to liability issues. Bohmer v. Uninsured Employers' Fund, 266 M 289, 880 P2d 816, 51 St. Rep. 824 (1994), distinguished in Neustrom v. St., 283 M 179, 939 P2d 990, 54 St. Rep. 552 (1997).

39-71-517. Requirement to serve papers.

Compiler's Comments

1999 Amendment: Chapter 377 near beginning substituted "39-71-501, 39-71-503 through 39-71-511" for "39-71-501 through 39-71-511"; and made minor changes in style. Amendment effective July 1, 1999.

Severability: Section 24, Ch. 377, L. 1999, was a severability clause.

1997 Amendment: Chapter 42 near beginning substituted "39-71-520" for "39-71-519"; and made minor changes in style. Amendment effective March 12, 1997.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Case Notes

Failure to File All Pleadings With Department — Court Not Divested of Jurisdiction: Employer argued that the District Court did not acquire jurisdiction of an action for failure to maintain workers' compensation insurance because claimant did not file all pleadings with the Department as required by this section. Even though the papers were not served on the Department at the same time that they were filed in District Court, that failure does not divest the court of jurisdiction. The purpose of this section is to ensure that the state is aware of its right to subrogation through the filing of pleadings. Barthule v. Karman, 268 M 477, 886 P2d 971, 51 St. Rep. 1423 (1994).

39-71-518. Setoffs against remaining liability.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Case Notes

Uninsured Employer Prohibited From Contribution or Indemnity Claim Against Third Party After Settling With Injured Employee: In response to a certified question from the federal District Court, the Supreme Court held that it is not equitable to require a stranger to the employer-employee relationship to indemnify an employer for liability that was wholly avoidable if the employer had simply obeyed the Workers' Compensation Act and provided coverage for its employees. Therefore, an uninsured employer is prohibited from bringing either a contribution claim or an indemnity claim against a third party after settling with an injured employee. St. Farm Fire & Cas. Co. v. Bush Hog, LLC, 2009 MT 349, 353 M 173, 219 P3d 1249 (2009).

39-71-519. Settlement.

Compiler's Comments

1999 Amendment: Chapter 377 near end of first sentence substituted "39-71-501, 39-71-503 through 39-71-511" for "39-71-501 through 39-71-511"; and made minor changes in style. Amendment effective July 1, 1999.

Severability: Section 24, Ch. 377, L. 1999, was a severability clause.

1997 Amendment: Chapter 42 near end of first sentence substituted "39-71-520" for "39-71-519"; and made minor changes in style. Amendment effective March 12, 1997.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation",

"division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

39-71-520. Time limit to appeal to mediation — petitioning workers' compensation court — failure to settle or petition.

Compiler's Comments

2009 Amendment: Chapter 112 in (1) inserted reference to department and after "or" deleted "the date that"; in (2)(a) after "party" inserted reference to disagreement with department's determination; and inserted (2)(d) clarifying finality of department determination. Amendment effective July 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2003 Amendment: Chapter 193 inserted (2) providing time limit for petitioning workers' compensation court after mediator's report filed; and made minor changes in style. Amendment effective July 1, 2003.

Severability: Section 13, Ch. 193, L. 2003, was a severability clause.

Saving Clause: Section 14, Ch. 193, L. 2003, was a saving clause.

Effective Date: Section 23, Ch. 555, L. 1993, provided: "[This act] is effective July 1, 1993."

Case Notes

Equitable Tolling of Time Bar — Requirements: If a claimant has reasonably pursued claims in good faith and the other party had notice of the substantive claims, then the doctrine of equitable tolling may apply to procedural time requirements such as the procedural time bar for petitioning for review of a mediation decision provided for in this section. (See 2009 amendment.) Weidow v. Uninsured Employers' Fund, 2010 MT 292, 359 Mont. 77, 246 P.3d 704.

Time Period to Request Mediation on Uninsured Employer Claim Not Extended by Procedural Rule Granting Additional Time Following Service: Flynn filed a request for mediation 93 days after an uninsured employer workers' compensation claim was denied. Flynn contended that the provisions of former Rule 6(e), M.R.Civ.P. (now superseded), should apply to add an additional 3 days to the prescribed period because service was by mail. The Supreme Court disagreed. The time limit in this section begins to run at the time that a decision on a claim is finalized, not when notice of the decision is served. (See 2009 amendment.) Thus, former Rule 6(e) does not apply to final decisions made pursuant to this section. Flynn v. Uninsured Employers' Fund, 2005 MT 269, 329 M 122, 122 P3d 1216 (2005), distinguishing MCI Telecommunications Corp. v. Dept. of Public Service Regulation, 260 M 175, 858 P2d 364 (1993).

Failure to Dispute Benefit Calculation Within Statutory Time Limit — Amendment of Final Calculation Error: Under this section, a limit is set on the time within which a claimant may dispute a determination of benefits regardless of the merits of the claimant's position, and the time limit is mandatory and jurisdictional. In this case, an error was made in a death benefit calculation, but failure of the parties to exercise ordinary diligence to seek correction of the error within 90 days rendered the erroneous calculation final and not subject to revision by the Workers' Compensation Court. Colmore v. Uninsured Employers' Fund, 2005 MT 239, 328 M 441, 121 P3d 1007 (2005).

39-71-521. Burden of proof — insurance coverage.

Compiler's Comments

Severability: Section 25, Ch. 214, L. 2001, was a severability clause.

Effective Date: Section 26(1), Ch. 214, L. 2001, provided that this section is effective July 1, 2001.

39-71-522. Inspection of construction sites — public policy — penalty.

Compiler's Comments

Effective Date: Section 10, Ch. 48, L. 2007, provided that this section is effective July 1, 2007.

39-71-525. Confidentiality of records — exception for use by public employees.

Compiler's Comments

2005 Amendment: Chapter 416 near middle after "Title 39" substituted "chapter 71" for "chapters 71 and 72". Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

Severability: Section 24, Ch. 377, L. 1999, was a severability clause.

Effective Date: Section 25(2), Ch. 377, L. 1999, provided that this section is effective July 1, 1999.

39-71-535. Collection of penalties, claim costs, late fees, and interest — liability for payment of collection costs.

Compiler's Comments

Severability: Section 13, Ch. 193, L. 2003, was a severability clause.

Saving Clause: Section 14, Ch. 193, L. 2003, was a saving clause.

Effective Date: Section 15, Ch. 193, L. 2003, provided that this section is effective July 1, 2003.

39-71-541. Uninsured employer as party to benefits disputes — indemnification by uninsured employer for benefits paid — lien for payment — levy and execution.

Compiler's Comments

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Effective Date: Section 29(2), Ch. 112, L. 2009, provided that this section is effective April 1, 2009.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

Case Notes

Waiver of Contract Rights — Late Payments Not Considered Breach Based on Prior Acceptance: The uninsured employers' fund (UEF) sought indemnity from an employer that did not have workers' compensation insurance using a monthly payment arrangement that was agreed to by the parties. The UEF accepted four late payments before turning the employer over to collections, at which point the employer sued UEF for breach of contract. The Supreme Court held that UEF waived its right to terminate the contract based on late payment when it accepted late payments without objection. Consequently, it was a breach of contract for the UEF to turn the employer over to collections and the employer was entitled to damages. Elk Mtn. Motor Sports, Inc. v. Dept. of Labor and Industry, 2012 MT 261, 367 Mont. 36, 289 P.3d 165.

Part 6
Claims for Benefits

Part Case Notes

Federal Statute of Limitations Applied to FELA Claim — Affirmative Duty to Investigate Cause of Injury Under FELA: The plaintiff filed a complaint under the Federal Employers' Liability Act (FELA) against his employer. The District Court granted the employer's motion for summary judgment on the basis that the plaintiff's claim was time-barred by FELA's 3-year statute of limitations. On appeal, the Supreme Court affirmed, holding that in addition to the 3-year statute of limitations, FELA also imposes an affirmative duty to investigate the cause of an injury upon notice that it might be job-connected. Because the plaintiff's doctor had discussed the possibility that his work contributed to his condition more than 10 years before the plaintiff filed his complaint, the claim was timed-barred and the employer was entitled to summary judgment. Bridgman v. Union Pac. RR Co., 2013 MT 289, 372 Mont. 124, 311 P.3d 416.

Limitation of Action — Workers' Compensation Third Party and Bad Faith Claims: A third-party claimant may not bring an action pursuant to Title 33, ch. 18, commonly known as the Unfair Trade Practices Act, until the underlying claim has been settled or a judgment entered in favor of the claimant on the underlying claim. The statute of limitations on such a claim is 1 year from the date of settlement or entry of judgment on the underlying claim, even though the Act does not define what constitutes an underlying claim. A common-law bad faith claim accrues when: (1) all of the elements of the claim or cause exist or have occurred; (2) the right to maintain an action on the claim or cause is complete; or (3) a court or other agency is authorized to accept jurisdiction of the action. The statute of limitations for a common-law bad faith claim is 3 years and begins to run when the claim or action accrues. The accrual date of a bad faith claim arising out of a separate and independent disputed issue is established by determining whether that particular issue has been ultimately resolved, regardless of the existence or absence of a resolution of other issues within the workers' compensation case. Therefore, for statute of limitations purposes, statutory and common-law bad faith claims against an insurer that are predicated on actions taken in adjusting a workers' compensation claim accrue when the Workers' Compensation Court enters a judgment ordering the insurer to pay for a previously denied benefit but leaves unresolved the ultimate determinations of the extent and duration of the worker's disability. O'Connor v. Nat'l Union Fire Ins. Co., 2004 MT 65, 320 M 301, 87 P3d 454 (2004), following Grenz v. Orion Group, Inc., 243 M 486, 795 P2d 444 (1990), Poteat v. St. Paul Mercury Ins. Co., 277 M 117, 918 P2d 677 (1996), and Brewington v. Employers Fire Ins. Co., 1999 MT 312, 297 M 243, 992 P2d 237 (1999), and distinguishing Fode v. Farmers Ins. Exch., 221 M 282, 719 P2d 414 (1986).

Application of Certain Workers' Compensation Act Provisions to MODA (Now Repealed and Merged With Workers' Compensation Act): With respect to the Montana Occupational Disease Act (MODA) (now repealed and merged with Workers' Compensation Act), the same rationale that applies to workers' compensation cases should apply, specifically: (1) the MODA (now repealed and merged with Workers' Compensation Act) statutes in effect on the last actual day of work of claimant are controlling; (2) because both Acts involve the same employer-employee relationship, the same rules of liberal construction apply; (3) MODA (now repealed and merged with Workers' Compensation Act) is to be administered so as to give the employee the greatest possible protection within the purposes of the Act; and (4) when MODA (now repealed and merged with Workers' Compensation Act) statutes are open to more than one interpretation, one of which is favorable to the employee and another against him, the statutes may be properly construed in a manner most favorable to the employee. Therefore, in liberally construing the statute in effect on the last actual day of work of claimant in the present case, section 92-1331, R.C.M. 1947 (39-72-308, MCA, repealed L. 1979), allowed a common-law right of action although the claimant was not eligible for compensation under MODA (now repealed and merged with Workers' Compensation Act). Gidley v. W.R. Grace & Co., 221 M 36, 717 P2d 21, 43 St. Rep. 616 (1986), overruling The Anaconda Co. v. District Court, 161 M 318, 506 P2d 81 (1973). Gidley was followed in Nelson v. Cenex, Inc., 2008 MT 108, 342 M 371, 181 P3d 619 (2008), and in Fleming v. Int'l Paper Co., 2008 MT 327, 346 M 141, 194 P3d 77 (2008), in that statutes in effect on the last actual day of work of claimant are controlling. However, see Murphy v. WestRock Co., 2018 MT 54, 390 Mont. 394, 414 P.3d 276, concluding that statements made in Fleming — that no exception exists to the general rule applying workers' compensation statutes in effect on the date of the injury — were overly broad and incorrect.

Application of MAPA to Workers' Compensation Court — Court to Be Guided by Rules of Civil Procedure: Proceedings in the Workers' Compensation Court are governed not by the Rules of Civil Procedure but by the Montana Administrative Procedure Act. The Workers' Compensation Court may, however, be guided by the Rules of Civil Procedure to the extent that reference to those rules lies within the discretion of the court under ARM 2.52.224 (now 24.5.349). Moen v. Peter Kiewit & Sons' Co., 201 M 425, 655 P2d 482, 39 St. Rep. 2209 (1982).

Award of Costs on Appeal Where Claimant's Appearance Unnecessary: On appeal, where essentially the only question of liability is as between two insurers and where the claimant is assured of compensation, it is unnecessary for him to make an appearance other than the filing of a short brief stating his position and that he will not appear. Therefore, claimant will not be awarded attorney fees or costs for the appeal. Little v. Structural Systems, 188 M 482, 614 P2d 516, 37 St. Rep. 1187 (1980).

39-71-601. Statute of limitation on presentment of claim — waiver.

Compiler's Comments

2009 Amendment: Chapter 112 in (3) near beginning inserted requirement of signature of claimant or representative; and made minor changes in style. Amendment effective July 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2005 Amendment: Chapter 416 in (1) at beginning substituted exception clause for "In case of personal injury or death" and after "all claims" inserted "in the case of personal injury or death"; inserted (3) regarding claim for benefits for occupational disease; and made minor changes in style. Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

1999 Amendment: Chapter 442 near beginning of (2) substituted "insurer" for "department"; and inserted (3) concerning statute of limitations dispute. Amendment effective April 23, 1999.

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 28, Ch. 442, L. 1999, was a severability clause.

Retroactive Applicability: Section 31(1), Ch. 442, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to claims for injuries occurring before April 23, 1999, unless a party elects, after notification by the department of labor and industry, to remain in the contested case process.

1993 Amendment: Chapter 619 in (1), near beginning after "unless", inserted "signed by the claimant or the claimant's representative"; and made minor changes in style. Amendment effective July 1, 1993.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

1989 Amendment: Chapter 254 at beginning of (2), after "The department may", deleted "upon a reasonable showing by the claimant of lack of knowledge of disability" and at end inserted "upon a reasonable showing by the claimant of"; inserted (2)(a), (2)(b), and (2)(c) qualifying "reasonable showing"; and made minor change in phraseology.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Case Notes

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GENERAL

Claim Filed Almost Four Years After Injury — Untimely Filing: A worker was injured while working as a security guard. He reported the incident to his supervisor but was advised that he did not need to fill out paperwork unless he was seeking medical attention. Almost 2 years later, his doctor attributed his chronic symptoms to the injury and he had surgery, for which the employer told him it was too late to file a workers' compensation claim. Almost 4 years after the injury, he filed a first report of injury. The District Court found that because more than 36 months had passed since the injury, the report was untimely filed, even taking the applicable tolling provisions into account. On appeal, the Supreme Court affirmed. Richardson v. Indem. Ins. Co. of N. America, 2019 MT 160, 396 Mont. 325, 444 P.3d 1019.

Federal Statute of Limitations Applied to FELA Claim — Affirmative Duty to Investigate Cause of Injury Under FELA: The plaintiff filed a complaint under the Federal Employers' Liability Act (FELA) against his employer. The District Court granted the employer's motion for summary judgment on the basis that the plaintiff's claim was time-barred by FELA's 3-year statute of limitations. On appeal, the Supreme Court affirmed, holding that in addition to the 3-year statute of limitations, FELA also imposes an affirmative duty to investigate the cause of an injury upon notice that it might be job-connected. Because the plaintiff's doctor had discussed the possibility that his work contributed to his condition more than 10 years before the plaintiff filed his complaint, the claim was timed-barred and the employer was entitled to summary judgment. Bridgman v. Union Pac. RR Co., 2013 MT 289, 372 Mont. 124, 311 P.3d 416.

Applicability of Tort Statute of Limitations to Independent Cause of Action for Failure to Maintain Workers' Compensation Insurance: Under this section, a statutory time limit is established for filing a claim with the Department; however, no limit is established within which a claim must be filed in District Court. As established in Boehm v. Alanon Club, 222 M 373, 722 P2d 1160 (1986), an independent cause of action authorized by 39-71-508 is ordinarily considered a negligence action, but strict liability may apply in certain situations. Therefore, the applicable statute of limitations for such actions is the tort statute of limitations of 3 years provided in 27-2-204. Barthule v. Karman, 268 M 477, 886 P2d 971, 51 St. Rep. 1423 (1994).

Knowledge of Injury to Be Accompanied by Recognition of Compensable Character of Injury: The Workers' Compensation Court refused to waive the statute of limitations for filing a claim on the basis that the claimant was aware of his injury. The Supreme Court reversed, holding that it must also be shown that the claimant knew the injury was compensable and that in the case before it, it was clear the claimant lacked that knowledge. Hueth v. Mark Johnson Masonry, 246 M 281, 805 P2d 1312, 47 St. Rep. 2019 (1990). See also Dvorak v. Mont. St. Fund, 2013 MT 210, 371 Mont. 175, 305 P.3d 873.

Waiver of Workers' Compensation Benefits Allowed — Distribution of Proportionate Share of Benefits: Decedent who died in the course of employment was survived by two children of a prior marriage and by the widow of a second marriage. Decedent's insurer and others with potential liability for death claims settled with the widow for substantial sums, but the children were not parties to the settlement. No workers' compensation claim was filed by the widow, though one was filed by decedent's employer. The compensation carrier began paying one-third of the compensation benefits to the widow and reserved two-thirds pending final determination of the children as beneficiaries. The widow advised the carrier that she did not wish to receive workers' compensation benefits and returned those she had been issued. The Workers' Compensation Court held that, as a matter of public policy, the widow could not waive death benefits and that the children's interest in the benefits would vest only if the widow died or remarried prior to the passing of 500 weeks after decedent's death. On rehearing, the court found the children to be stepchildren of the widow and therefore entitled to benefits, to be equally divided between the parties. The children appealed, contending that the widow should not be compelled to receive benefits she did not claim or intended to waive and that the children were each entitled to one-half of all available benefits. The Supreme Court held that under 1-3-204, the surviving widow could waive or abandon her right to benefits and that upon waiver the surviving children were entitled to no more than their proportionate share provided by law. In re Benefits of Gaither, 244 M 383, 797 P2d 208, 47 St. Rep. 1549 (1990).

Insurer Seeking Indemnification Not Subject to One-Year Statute of Limitations: The State Fund argued that the plaintiff insurer was not entitled to seek indemnification for payments made to the claimant because the insurer had not brought its claim within 1 year of the date of the accident. The Supreme Court ruled that the statute imposed the time limit on claims brought on behalf of the claimant and that the insurer was seeking compensation on its own behalf and therefore was not subject to the 1-year requirement. EBI/Orion Group v. St. Comp. Ins. Fund, 240 M 99, 782 P2d 1276, 46 St. Rep. 1973 (1989), affirmed in 249 M 449, 816 P2d 1070, 48 St. Rep. 791 (1991).

Applicability of Amendment: The 1973 amendment to this section applies to all claims existing at its effective date, without retroactive effect. Since claimant's action had not been barred by the amendment's effective date, the Division (now Department of Labor and Industry) had the power to consider his petition for an extension of time. Williams v. Hartford Accident & Indem. Co., 174 M 387, 571 P2d 90 (1977).

Liberal Construction Statute Applied: When no effort was made by claimant to comply with the statute, the claimant cannot turn to the liberal construction statute for relief. Klein v. Independent Wholesale Assoc. Grocers, 167 M 341, 538 P2d 1358 (1975).

Refusal to Give Notice: Where plaintiff suffered compensable injury but failed to fill out Form 54 for workers' compensation after three warnings that he had to fill it out in order to receive benefits, Division's (now State Fund's) refusal to grant benefits was correct, in light of this section, before the 1973 amendment. Klein v. Independent Wholesale Assoc. Grocers, 167 M 341, 538 P2d 1358 (1975).

Duty to Advise Employee: While it may not be the duty of the Division (now State Fund) to solicit claims, it is the Division's (now State Fund's) duty when the Division (now State Fund) is the insurer to fully advise an injured worker when the worker asks for information as to what to do, and the Division (now State Fund) is under a legal and moral duty to deal fairly with employees. Yurkovich v. Indus. Accident Bd., 132 M 77, 314 P2d 866 (1957).

Statutory Provision Mandatory: Compliance with the provisions of this section, requiring an injured worker seeking compensation under the Workmen's Compensation Act (now Workers' Compensation Act) to present his claim within a specified period from the date of the happening of the accident, is indispensable to the existence of the right to maintain proceedings to compel payment. Williams v. Anaconda Copper Min. Co., 96 M 204, 29 P2d 649 (1934).

FORM AND CONTENT OF CLAIM

Failure of Injured Worker to File Claim Within Twelve Months of Injury — Insurer Absolved From Defending Claim: A North Dakota company with Montana workers' compensation coverage hired Reynolds, an Oklahoma man, to perform work on a construction project in Montana. Reynolds was injured on the job on January 16, 2001. Reynolds filed a complaint in the Oklahoma Workers' Compensation Court on July 12, 2002, and notified the employer September 9, 2002, that the claim was filed. Nothing in the record indicated if or when Montana State Fund was notified of the accident or the claim prior to September 23, 2002. Nevertheless, the employer demanded that State Fund defend the employer in the Oklahoma case. State Fund did not respond, and the employer filed suit against State Fund in January 2006, seeking relief for breach of contract and common-law bad faith. The Montana District Court granted summary judgment to State Fund, and the employer appealed. The Supreme Court affirmed. The employer's policy with State Fund insured the employer for liability only for claims filed within 12 months of an accident. Reynolds claimed that the injury occurred on January 16, 2001, but the claim was not filed until more than 5 months after the January 16, 2002, deadline, so the claim fell outside the policy and State Fund had no duty to resolve any factual issues or to defend the claim. Hogenson Constr. of N. Dak. v. Mont. St. Fund, 2007 MT 267, 339 M 389, 170 P3d 471 (2007).

Failure to Inform Employer of Injury Within Statutory Time Limit — Claim Barred: Grenz did not file a claim for benefits within the 12-month statute of limitations unequivocally required by this section, nor did he satisfy the requirement that the claim be filed in writing or assist the employer in completing a report of a new and separate microtrauma injury unrelated to the initial elbow injury. The fact that the insurer accepted liability for Grenz's initial injury did not equitably estop the insurer from denying liability for the subsequent unreported microtrauma injury, nor did the insurer have any duty to inform Grenz of his duty to assert a separate claim. Grenz v. Fire & Cas. of Conn., 260 M 60, 857 P2d 730, 50 St. Rep. 942 (1993), following Wassberg v. Anaconda Copper Co., 215 M 309, 697 P2d 909 (1985), and distinguishing Scott v. Util. Line Contractors, 266 M 154, 734 P2d 206 (1987), and Weigland v. Anderson-Mayer Drilling Co., 232 M 390, 758 P2d 260 (1988).

Medical Bill and Employer's First Report Sent to Division (Now State Fund) — Requirement for Statutory Filing Met: Claimant failed to submit a Form 54 claim, the usual form filed by claimants to present their claims, but did meet the 1-year notice provision by presenting a medical bill and assisting the employer in completing an Employer's First Report form, both of which were timely submitted to the Workers' Compensation Division (now State Fund). Scott v.

Util. Line Contractors, 226 M 154, 734 P2d 206, 44 St. Rep. 547 (1987), followed in Weigand v. Anderson-Meyer Drilling Co., 232 M 390, 758 P2d 260, 45 St. Rep. 1138 (1988).

Notice of Subsequent Disability From Prior Accident Not Required — Liberal Construction of Notice Requirement: Where the employee was injured in an industrial accident in 1978 and gave notice to his employer of an injury to his right knee and leg, the Workers' Compensation Court did not err in holding the employer's insurance company liable for back injuries from the same accident that were not manifested until 1980. Under the rationale of Wight v. Hughes Livestock Co., 194 M 109, 634 P2d 1189, 38 St. Rep. 1632 (1981), the notice requirement is to be liberally construed as not requiring a separate notice for every ache, pain, or discomfort an employee experiences as a result of a compensable accident. The purpose of the notice statute is to allow an employer to promptly investigate the claim and treat the injured worker; that purpose was fulfilled by the notice given in this case. Wilson v. Glacier Gen. Assurance Co., 206 M 63, 670 P2d 931, 40 St. Rep. 1509 (1983).

Form of Claim: A letter to the Workers' Compensation Division (now State Fund) informing it that the writer missed 4 days of work due to an accident and requesting a form is not a "claim" within the meaning of this section. Klein v. Independent Wholesale Assoc. Grocers, 167 M 341, 538 P2d 1358 (1975), overruled in Weigand v. Anderson-Meyer Drilling Co., 232 M 390, 758 P2d 260, 45 St. Rep. 1138 (1988), with respect to a case where there was presented to employer, and through employer to insurer, with claimant's assistance, written information providing details that could have been provided by a further form filled out and presented by claimant.

Multiple Claims: Claimant who filed a claim for compensation on January 16, 1969, covering an injury on August 26, 1968, was not barred from asserting claim to compensation arising from injury on July 12, 1968, where the two injuries were closely related and where the employer and his insurer had actual knowledge of the claim long before 1 year had elapsed following the alleged injury. Love v. Ralph's Food Store, Inc., 163 M 234, 516 P2d 598 (1973).

Doctor Filing Claim: Where doctor filed a claim for services in treating eye of injured employee with the Industrial Accident Board (now State Fund) within 12 months from the date of the accident, and the employee who lost no wages by his injury filed no claim but acquiesced in the filing of the claim by the doctor when informed, the employee ratified the act of the doctor and the filing of the claim gave the Board (now State Fund) jurisdiction to award compensation for the loss of an eye when it later developed that the employee had become totally blind in one eye. (See 2009 amendment.) Gugler v. Indus. Accident Bd., 117 M 38, 157 P2d 89 (1945).

KNOWLEDGE OF DISABILITY

Claimant's Lack of Knowledge of Disability — Time for Filing Claim to Run From Time of Knowledge of Disability: Tinker suffered a hip injury at work sometime in 2005, but the pain seemed to come and go, so Tinker reported the injury but continued to work. In 2007, the pain escalated to the point where Tinker had trouble getting in and out of a vehicle and performing his job. A visit to the doctor revealed a degenerative condition in the hip, and Tinker decided to file a workers' compensation claim. The State Fund denied the claim as untimely because it was not filed within 12 months of the injury as required by 39-71-601. Tinker contended that the claim should be compensable as an occupational disease or that the filing time should be waived. The Workers' Compensation Court concluded that the injury was not an occupational disease but held that Tinker lacked knowledge of the disability until he sought treatment in 2007, so Tinker's claim qualified for the waiver of the filing limitation and was thus compensable. The State Fund appealed, but the Supreme Court affirmed. The plain meaning of the Workers' Compensation Act clearly demonstrates that the term "disability" is tied to a wage loss or an impairment in the ability to earn wages through employment. Therefore, until a claimant knows that he or she is suffering some form of wage loss as a result of an injury, condition, or impairment, the claimant lacks knowledge of a disability. In this case, Tinker lacked knowledge of his disability until 2007 when he first sought medical treatment because his injury was preventing him from performing his job, so the Workers' Compensation Court did not err in waiving the filing requirement and compensating Tinker for the injury. Tinker v. Mont. St. Fund, 2009 MT 218, 351 M 305, 211 P3d 194 (2009). See also Dvorak v. Mont. St. Fund, 2013 MT 210, 371 Mont. 175, 305 P.3d 873.

Loss in Ability to Engage in Gainful Employment as Disability — Extension Allowed Absent Knowledge of Disability: Under the 1985 interpretation of this section, a disability occurs only when the claimant suffers a loss in the ability to engage in gainful employment. When a claimant was injured but did not file within the 12-month statute of limitations because she was not aware of her disability until her doctor advised her to quit work, she was entitled to the 24-month waiver on presentment of her claim. Conn v. St. Comp. Ins. Fund, 242 M 190, 789 P2d 1213, 47 St. Rep. 425 (1990).

Knowledge of Injury — No Extension of Filing Time: When the claimant felt a sharp pain in his back at the time of an incident in July 1984, continued to have back problems through the next year, purchased a back brace in August 1984, and had leg pains in October and November 1984, there was no credible evidence that he lacked knowledge of the nature, seriousness, and probable compensable character of a latent injury. The District Court did not abuse its discretion by denying benefits to the claimant because he failed to timely file notice of the accident claimed to have caused the injury. Schmidt v. Home Ins. Co., 227 M 171, 741 P2d 382, 44 St. Rep. 986 (1987).

Latent Injury — Section Interpreted to Toll Time Period Until Discovery: The workers' compensation statute provides that all claims are forever barred unless presented within 12 months of "the date of the happening of the accident". In 3 Larson, Workmen's Compensation Law, section 78.40 (1983), the author states that "It is odd indeed to find, in a supposedly beneficent piece of legislation, the survival of this fragment of irrational cruelty surpassing the most technical forfeitures of legal statutes of limitation." The logic of Larson's position that latent injuries should not be barred until the statutory period has run from the time of discovery is unassailable and appeals to this court, whose duty it is to liberally interpret the Workers' Compensation Act. Therefore, this section is interpreted, in cases of latent injury, so that the time period does not begin to run until the claimant, as a reasonable man, should have recognized the nature, seriousness, and probable compensable character of his latent injury. Bowerman v. Employment Sec. Comm'n, 207 M 314, 673 P2d 476, 40 St. Rep. 2062 (1983), followed in Dodd v. Champion Int'l Corp., 239 M 236, 779 P2d 901, 46 St. Rep. 1649 (1989), and distinguished in Reil v. St. Comp. Ins. Fund, 229 M 305, 746 P2d 617, 44 St. Rep. 1985 (1987), and Siebken v. Liberty Mutual Ins. Co., 2008 MT 353, 346 M 330, 195 P3d 803 (2008).

Lack of Knowledge of Disability: There is substantial credible evidence in the record to support both the decision of the administrator and the decision of the Workers' Compensation Court that "there has been a reasonable showing by the claimant of lack of knowledge of disability" when the claimant treated an injury himself believing the injury would go away but was finally compelled to seek medical treatment resulting in knowledge of disability. Pinion v. H. C. Smith Constr. Co., 190 M 103, 619 P2d 167, 37 St. Rep. 1355 (1980). See also Dvorak v. Mont. St. Fund, 2013 MT 210, 371 Mont. 175, 305 P.3d 873.

Requirement to File a Claim Where Symptoms Present: A claimant who was "gassed" by diesel fumes from equipment and burning trash and who was plagued from the time of the gassing to the date of hearing by shortness of breath, weakness, coughing, and other symptoms of chronic disease did not have a latent injury and was required to file a claim for compensation within 1 year of the "gassing". Miller v. Billings, 171 M 91, 555 P2d 747 (1976).

TOLLING OF STATUTE

Failure to Inform Employer of Injury Within Statutory Time Limit — Claim Barred: Grenz did not file a claim for benefits within the 12-month statute of limitations unequivocally required by this section, nor did he satisfy the requirement that the claim be filed in writing or assist the employer in completing a report of a new and separate microtrauma injury unrelated to the initial elbow injury. The fact that the insurer accepted liability for Grenz's initial injury did not equitably estop the insurer from denying liability for the subsequent unreported microtrauma injury, nor did the insurer have any duty to inform Grenz of his duty to assert a separate claim. Grenz v. Fire & Cas. of Conn., 260 M 60, 857 P2d 730, 50 St. Rep. 942 (1993), following Wassberg v. Anaconda Copper Co., 215 M 309, 697 P2d 909 (1985), and distinguishing Scott v. Util. Line Contractors, 266 M 154, 734 P2d 206 (1987), and Weigland v. Anderson-Mayer Drilling Co., 232 M 390, 758 P2d 260 (1988).

Statute Not Tolled — Payments Not in Lieu of Compensation: The claimant argued that the statute of limitations should have been tolled on his filing a claim because the payments he had received in 1981 were in lieu of compensation. The Supreme Court found that he had received payments based upon wages he was receiving in 1978 when he first injured his shoulder, and therefore he knew that the payments were disability payments and not payments in lieu of compensation. Sharkey v. Atl. Richfield Co., 238 M 159, 777 P2d 870, 46 St. Rep. 1169 (1989).

Payment of Full Salary After Injury — Statute Tolled: Jaeger injured his back in 1977 while employed by Stauffer Chemical but failed to file a workers' compensation claim until 1979. Jaeger argued that because he received full salary after the injury, he did not have knowledge of his injury and the Workers' Compensation Court should grant an extension to the 12-month Statute of

Limitations. On appeal the Supreme Court held that the Workers' Compensation Court properly found that Jaeger knew or should have known that his earning capacity had been diminished because he was unable to perform his former duties even though Stauffer continued to pay him. However, Stauffer's payment of full salary during the period of his inability to perform his duties amounted to payment of compensation and tolled the Statute of Limitations. Jaeger v. Traveler's Ins. Co., 198 M 263, 645 P2d 942, 39 St. Rep. 919 (1982), distinguished in Turjan v. Valley View Estates, 272 M 386, 901 P2d 76, 52 St. Rep. 740 (1995).

Tolling Statute of Limitations — Knowledge of Accident Imputed to Employer: One of the requirements to toll the Statute of Limitations for the filing of workers' compensation benefits is that the employer has knowledge he is paying compensation to an employee because of an industrial accident. Where the foreman of a claimant had knowledge that the claimant's injuries were work-related, such knowledge could be imputed to the employer. Frost v. Anaconda Co., 198 M 216, 645 P2d 419, 39 St. Rep. 879 (1982), followed in Varela v. Petroleum Cas. Co., 237 M 300, 773 P2d 299, 46 St. Rep. 819 (1989).

Voluntary Noninsurance Benefits Paid by Employer — Statute Tolled: After a work-related accident that prevented the claimant from returning to work, the employer voluntarily provided him with benefits larger than workers' compensation benefits. The claimant was not prevented from filing for workers' compensation benefits 4½ years later because the Statute of Limitations had been tolled. The Statute of Limitations for filing a workers' compensation claim is tolled if: (1) the claimant receives compensation from the employer that is substantially comparable to that available under the Workers' Compensation Act; and (2) the employer has knowledge it is paying compensation because of an industrial accident. Frost v. Anaconda Co., 198 M 216, 645 P2d 419, 39 St. Rep. 879 (1982), distinguished in Turjan v. Valley View Estates, 272 M 386, 901 P2d 76, 52 St. Rep. 740 (1995).

WAIVER, ESTOPPEL, AND LACHES

Failure to Pay Any Benefit Because of Insufficient Funds: A worker was injured in September of 1984, filed an uninsured employers' fund claim in October of 1984, and was told that the fund was not paying claims because the fund was insolvent. The law required proportionate reductions in benefits payments if the fund could not pay all claims in full. In 1992, the worker again filed a claim with the fund, and it was denied for failure to file within the statutorily required 1 year after the injury. She claimed that the fund should be equitably estopped from raising the 1 year statute of limitations to deny the claim because the fund was not insolvent and should have paid claims on a proportionately reduced basis rather than not paying anything on any claim. She claimed that the fund misrepresented a material fact, the first element in establishing equitable estoppel. According to the fund's interpretation of the law requiring it to maintain surpluses and reserves and according to its accounting practices, the fund was insolvent. There was no misrepresentation of a material fact, and the claim was time-barred. Lako v. Employment Relations Div., 2004 MT 290, 323 M 334, 100 P3d 142 (2004).

Elements of Estoppel Properly Applied — Lindblom Standard: State Fund was estopped from taking credit for permanent partial disability payments after the Workers' Compensation Court held that the benefits were actually temporary total. The following facts were sufficient to satisfy the elements of estoppel as set out in Lindblom v. Employers' Liab. Assurance Corp., 88 M 488, 295 P 1007 (1930): (1) claimant was informed by State Fund that the benefits he received were for temporary total disability; (2) claimant was never advised that the benefits were anything but temporary total and had no reason to know because the dollar amount of temporary total and permanent partial was the same; (3) claimant never tried to hide the fact that he was receiving a salary, which was reported to State Fund; (4) the corporation bookkeeper requested guidance from State Fund as to the correct reporting of claimant's earnings and simultaneous receipt of temporary total benefits but received no assistance; and (5) claimant would be harmed if his temporary total benefits were reclassified as permanent partial because of the subsequent loss of unlimited benefits. Ryles v. Springhill Ranch Eggs, 247 M 276, 806 P2d 525, 48 St. Rep. 196 (1991).

No Estoppel When Claimant Aware Benefits Not at Rate He Alleged Due Him: The claimant had been injured in 1978. He alleged he received a new injury in 1981 but was paid benefits based on the 1978 rate by the insurer on the basis that the injury was a reoccurrence of the prior accident. The claimant's knowledge of the lower payments prevented him from asserting that the statute of limitations should have been tolled on the theory of equitable estoppel. Sharkey v. Atl. Richfield Co., 238 M 159, 777 P2d 870, 46 St. Rep. 1169 (1989).

Estoppel Allowed — Prior Policy and Actions of Employer: Since employer had repeatedly informed employee that it would file his claim and had on several prior occasions filed the necessary paperwork for the employee, the employee was entitled to compensation even though his claim was not filed in the 12-month period. Schaub v. St. Comp. Ins. Fund, 236 M 389, 770 P2d 522, 46 St. Rep. 450 (1989).

Employer Silent on Necessity of Claim Filing — No Estoppel: The exception to the Statute of Limitations set forth in subsection (1) of this section is that the 1-year limitation may be waived by the employer by acts or representations giving rise to an equitable estoppel. Lindblom v. Employers' Liab. Assur. Corp., 88 M 488, 295 P 1007 (1930), set forth the six elements necessary to find an estoppel. The first of these, that there must be conduct—acts, language, or silence—amounting to misrepresentation of a material fact, was not satisfied by the employer's failure to inform the claimant of the need to file a claim. Claimant's erroneous "understanding" that filing his accident report satisfied the requirements imposed on him by the Workers' Compensation Act was not attributable to any assertions of the employer or his agents. Further, one instance of employer's silence occurred 1 year after the Statute of Limitations had already run. Finally, the employer does not have a duty to pursue the employee's claim; claimant had a duty to act first. Wassberg v. Anaconda Copper Co., 215 M 309, 697 P2d 909, 42 St. Rep. 388 (1985).

Late Claim Caused by Misstatement of Employer or Insurer — Equitable Estoppel Allows Claim: When an employer or insurer has taken some positive action that prevents a workers' compensation claimant from filing a timely claim or leads claimant to reasonably believe he need not file a claim or a claim is not filed because an employer or insurer foists onto the claimant a misinterpretation of the law, the doctrine of equitable estoppel applies. Employer told claimant wife that because her husband died at home, employer had no responsibility. Husband passed out while chopping a hole in some ice, and his employer suggested he go home and see a doctor. He visited friends, got home at about 9:30 p.m., and died of a heart attack. Wife did not know the representation of employer was not true and relied on it, failing to file a claim within the statutorily mandated 12 months. Employer and insurer were barred by equitable estoppel from using the Statute of Limitations to bar wife's claim. Davis v. Jones, 203 M 464, 661 P2d 859, 40 St. Rep. 570 (1983), followed in Mellem v. St. Comp. Ins. Fund, 237 M 439, 774 P2d 390, 46 St. Rep. 932 (1989), and in Shelley v. USF&G, 252 M 106, 827 P2d 1288, 49 St. Rep. 277 (1992).

Estoppel Inapplicable — No Duty of Employer to Solicit Claim: Where the claimant, after injuring herself at work in 1975, informed her supervisor that she did not wish to file a workers' compensation claim but subsequently did file a claim in 1981, the Workers' Compensation Court did not err in its findings that the claim was barred by the 12-month Statute of Limitations and that there were no grounds upon which to hold that the employer and its insurer should be estopped from raising the Statute of Limitations. The claimant decided, although out of ignorance, not to file a claim for her known injury, and the employer had no duty to solicit or file the claim for her. Devlin v. Galusha, Higgins & Galusha, 201 M 134, 655 P2d 979, 39 St. Rep. 2378 (1982).

Equitable Estoppel Denied — Employee Fault: Record was devoid of evidence to support a charge of equitable estoppel in filing a claim where claimant admitted she was not prevented or discouraged from filing a claim and was never misled into believing that the matter regarding a claim filing would be taken care of. Bagley v. Hotel Florence Co., 165 M 145, 526 P2d 1372 (1974).

Equitable Estoppel — Action by Insurer or Employer a Prerequisite: The doctrine of equitable estoppel provides an exception to the Statute of Limitations provided for in this section and applies where an insurer has taken some positive action which either prevents the claimant from making a claim or leads a claimant to reasonably believe a claim need not be filed, and in this case there was no misleading by the insurer because it was established that there was never any communication between the claimant and anyone representing the insurer. Ricks v. Teslow Consol., 162 M 469, 512 P2d 1304 (1973).

Payment of Medical Bills: Medical benefits are separate from compensation and no claim for medical benefits need be made. The payment of medical bills does not dispense with the necessity of a claim for compensation by an injured worker. Ricks v. Teslow Consol., 162 M 469, 512 P2d 1304 (1973); Vetsch v. Helena Transfer & Storage Co., 154 M 106, 460 P2d 757 (1969).

Estoppel Allowed — Employer Statement That Claim Not Covered: Equitable estoppel was involved where injured worker was told by a company lawyer and the company personnel manager that his claim was not covered by workers' compensation. Levo v. General-Shea-Morrison, 128 M 570, 280 P2d 1086 (1955).

Estoppel Allowed — Employer Statement Employee Not Injured: Where injured worker was told by the company doctor that he had not been injured, the employee was entitled to compensation even though he had not submitted claim within 12-month period. McCoy v. Mike Horse Min. & Milling Co., 126 M 435, 252 P2d 1036 (1953).

Waiver of Defense: Where claimant for compensation did not file his claim within the time required by this section, defendant employer was not required to file an answer or state a defense orally before the Industrial Accident Board (now State Fund), and claimant's assertion that by such failure the employer waived its right to make defense was without merit. Williams v. Anaconda Copper Min. Co., 96 M 204, 29 P2d 649 (1934).

Estoppel Allowed — Insurance Agent Delays: Doctrine applied where agent of insurance company led worker to believe his claim would be taken care of and settled. Lindblom v. Employers' Liab. Assurance Corp., 88 M 488, 295 P 1007 (1930), followed in Wassberg v. Anaconda Copper Co., 215 M 309, 697 P2d 909, 42 St. Rep. 388 (1985).

39-71-602. Statute of limitation not to apply during minority or mental incompetency unless guardian appointed.

Case Notes

Injured Employee Rendered Mentally Incompetent — Statute of Limitations Properly Tolled During Period in Which Employee Lacked Appointed Guardian. Breyer v. Accident Fund Gen. Ins. Co., 2023 MT 104, 412 Mont. 347, 530 P.3d 801.

1939 Amendment Unconstitutional: Chapter 79, L. 1939, is unconstitutional as being a special act in the nature of class legislation in contravention of Art. V, sec. 26, 1889 Mont. Const. Kerruish v. Indus. Accident Bd., 112 M 556, 118 P2d 1049 (1941).

Mental Incompetency: The statutory period within which an injured worker must file his claim for compensation does not apply where the claimant was mentally incompetent for some time thereafter. Under such conditions the statute does not begin to run until he regains his competency. Maki v. Anaconda Copper Min. Co., 87 M 314, 287 P 170 (1930).

39-71-603. Notice of injuries other than death to be submitted within 30 days — exception.

Compiler's Comments

2005 Amendment: Chapter 416 inserted (3) making section inapplicable to occupational diseases. Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

1995 Amendment: Chapter 243 inserted (2) requiring certain persons other than employees to notify the insurer of an accident and injury; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

1987 Amendment: In first sentence reduced notice period from 60 to 30 days. Applicable to injuries occurring on or after October 1, 1987.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Failure to Notify Employer of Injury Within Statutory Time Period — Claim Precluded — Occupational Disease Act (Now Repealed and Merged With Workers' Compensation Act) Inapplicable to Single Incident: Hanks suffered a back injury while working as a home-care aide, but did not report the incident to the employer until more than 5 years later, when Hanks sought workers' compensation benefits. Those benefits were denied because Hanks did not report the incident within 30 days as required by this section. Hanks was then granted an emergency trial, and she claimed that the Workers' Compensation Act did not apply because the incident was not caused by an injury, but rather by an occupational disease. That claim was also dismissed with prejudice because Hanks did not comply with the notice requirement, and Hanks appealed. The Supreme Court affirmed. Hanks' problem was properly characterized as an injury rather than an occupational disease because the incident was a single identifiable incident occurring in a single work shift. Hanks was not entitled to bring an occupational disease claim because the injury did not occur on more than a single day, so the occupational disease claim was properly dismissed with prejudice. Because Hanks failed to notify the employer of the injury within 30 days, the workers' compensation claim was also dismissed as untimely. Hanks v. Liberty NW. Ins. Corp., 2002 MT 334, 313 M 263, 62 P3d 710 (2002).

Employer Estopped From Claiming Employee's Notice Not Given Within Thirty Days: Spring Creek argued that Kuzara had not filed a claim with the State Fund within the required 30-day notice period. The Supreme Court held that the evidence indicated that Spring Creek had acted in a manner that caused Kuzara to rely on the company's representations to her detriment and that she had not filed in time because of her reliance on those representations. Therefore, the company was estopped from claiming that she had given insufficient notice. However, the Supreme Court remanded the case to give Spring Creek the opportunity to present evidence to rebut the issue of estoppel. Kuzara v. St. Comp. Ins. Fund, 279 M 223, 928 P2d 136, 53 St. Rep. 1125 (1996).

Informing Supervisor That Another Employee Has Knowledge of Accident — Sufficient Notice of Injury: Kuzara called her supervisor and informed him that she had to have back surgery due to a job-related injury. She also told the supervisor that she was ill and could not continue talking but that he could get the details of the accident from another employee with whom she had discussed the incident. The Supreme Court concluded that during the hearing, Kuzara had presented sufficient evidence that her supervisor could have learned the details of her injury by contacting the other employee and therefore the Workers' Compensation Court erred in dismissing the claim on the basis that Kuzara had given her employer insufficient notice. The Supreme Court remanded the issue to the Workers' Compensation Court to give the employer an opportunity to rebut Kuzara's claim that she gave it sufficient notice of her injury. Kuzara v. St. Comp. Ins. Fund, 279 M 223, 928 P2d 136, 53 St. Rep. 1125 (1996).

Employee's Knowledge of Claims Process — Filing After Thirty Days as Bar to Recovery: Larson did not comply with the mandatory 30-day notice requirement of this section. Based on past experience, Larson understood how and when to notify the employer of injury and the procedure for filing a workers' compensation claim. Larson was aware that he had suffered an injury and sought medical treatment shortly after the accident. These facts constituted sufficient evidence to support the Workers' Compensation Court's decision that Larson was not entitled to benefits. Larson v. Barry Smith Logging, Inc., 267 M 444, 884 P2d 786, 51 St. Rep. 1114 (1994), followed in Siebken v. Liberty Mutual Ins. Co., 2008 MT 353, 346 M 330, 195 P3d 803 (2008).

Failure to Report Injury Within Thirty Days as Rendering Claim Noncompensable: Because Buckentin did not follow the proper 30-day notification requirements mandated by this section, even though he knew the necessary procedure from prior experience, his injury claim was not compensable. There was no evidence that his employer prevented him from reporting the injury or that he was misinformed by medical personnel as to his condition. Buckentin v. St. Comp. Ins. Fund, 265 M 518, 878 P2d 262, 51 St. Rep. 656 (1994), distinguishing Bodily v. John Jump Trucking, Inc., 250 M 274, 819 P2d 1262 (1991), with regard to a slowly developing injury, and followed in Strickland v. St. Comp. Mut. Ins. Fund, 273 M 254, 901 P2d 1391, 52 St. Rep. 962 (1995).

Substantial Credible Evidence of Insufficient Notice of Injury: The following information in the record supported the contention that Rose did not give notice within the 30-day time limit established in this section: (1) Rose contended that he was injured at work on July 24, 1992; (2) State Fund received the physician's initial report of the injury on October 16, 1992; (3) Rose's compensation claim was received October 20, 1992; and (4) the employer's first report was received October 29, 1992. Rose v. Burdick's Locksmith, 265 M 178, 875 P2d 337, 51 St. Rep. 447 (1994).

Failure to Make Knowledge of Injury Available to Employer — Denial of Claim Proper: The Workers' Compensation Court properly denied Bogle's request for benefits because Bogle did not make knowledge of the claimed industrial accident available to the employer, the employer's managing agent, or superintendent within 30 days of the claimed injury, as required by this section. Bogle v. Ownerrent Rent to Own, 264 M 515, 872 P2d 800, 51 St. Rep. 380 (1994), distinguishing Killebrew v. Larson Cattle Co., 254 M 513, 839 P2d 1260 (1992).

Worker Reporting Accident Within Thirty Days but Not Aware of Injury Until Later Not Barred From Recovery: Killebrew reported to his employer an accident that occurred while he was operating a tractor. At the time, he did not believe that he had been injured. After the expiration of the 30-day reporting period required by statute, Killebrew learned that he had suffered an injury described as a rotator cuff tear. The Supreme Court held that he had reported the accident within the 30-day period and would not be barred from recovery because he had a good faith belief at the time of the accident that he had not been injured. Killebrew v. Uninsured Employers Fund, 254 M 513, 839 P2d 1260, 49 St. Rep. 783 (1992).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Claimant Liable for Restitution for Benefits Paid Under Order Reversed on Appeal: Reil was granted about $13,750 in benefits by the Workers' Compensation Court, of which $3,000 was retained by Reil's counsel for costs and fees. On appeal, the Supreme Court in Reil v. Billings

Processors, Inc., 229 M 305, 746 P2d 617 (1987), reversed the award after finding that Reil failed to provide his employer with timely notice of his injury. In a subsequent declaratory action, the Workers' Compensation Court ruled that restitution was proper, denied Reil's joinder of counsel as a third-party defendant, and ordered Reil to reimburse State Fund for all compensation benefits and medical expenses received. Although there is nothing in the Workers' Compensation Act that specifically refers to restitution, neither do the exclusivity provisions of the Act preclude restitution. Therefore, Reil was properly ordered to reimburse State Fund for compensation and benefits paid pursuant to the lower court judgment that was subsequently reversed on appeal. Reil v. St. Comp. Mut. Ins. Fund, 254 M 274, 837 P2d 1334, 49 St. Rep. 734 (1992).

Actual Knowledge:

The Supreme Court distinguished Reil v. St. Comp. Ins. Fund, 229 M 305, 746 P2d 617 (1987), because in this case, there was a slowly developing injury that did not lend itself to precise notification and the employee provided his employer with all the information he had regarding the nature of his injury and its relationship to his employment. The notice requirement of this section was satisfied by giving the employer sufficient information to lead a reasonably conscientious person to conclude that there may be a connection between the worker's condition and his job. Bodily v. John Jump Trucking, Inc., 250 M 274, 819 P2d 1262, 48 St. Rep. 929 (1991).

Where employer knew that claimant suffered pain from congenital problems but was not informed by claimant that the pain resulted from claimant's work, the Supreme Court held that constructive knowledge imputed to the employer on the basis of facts taken cumulatively is insufficient to meet requirement of actual knowledge of injury under this section. Reil v. St. Comp. Ins. Fund, 229 M 305, 746 P2d 617, 44 St. Rep. 1985 (1987), followed in Lee v. St. Comp. Ins. Fund, 234 M 197, 761 P2d 835, 45 St. Rep. 1839 (1988).

In order for the "actual knowledge" test to be met, there need not be an actual witnessing of the accident; a conveyance of the information to the agents specified in the statute is adequate. Hartl v. Commercial Union Assurance Co., 176 M 540, 579 P2d 1239 (1978).

Mere knowledge on the part of the employer that an employee became sick while at work will not, in the absence of some knowledge on the part of the employer that some accidental injury was sustained by the employee, amount to actual knowledge of an injury under this section. Dean v. The Anaconda Co., 135 M 13, 335 P2d 854 (1959); State ex rel. Magelo v. Indus. Accident Bd., 102 M 455, 59 P2d 785 (1936).

Provision Mandatory: The provisions of this section are mandatory and compliance with its requirements is indispensable to maintain a claim for compensation. Reil v. St. Comp. Ins. Fund, 229 M 305, 746 P2d 617, 44 St. Rep. 1985 (1987); Masters v. Davis Logging, 228 M 441, 743 P2d 104, 44 St. Rep. 1664 (1987); Bender v. Roundup Min. Co., 138 M 306, 356 P2d 469 (1960); Dean v. The Anaconda Co., 135 M 13, 335 P2d 854 (1959); State ex rel. Magelo v. Indus. Accident Bd., 102 M 455, 59 P2d 785 (1936); Maki v. Anaconda Copper Min. Co., 87 M 314, 287 P2d 170 (1930). See also Turjan v. Valley View Estates, 272 M 386, 901 P2d 76, 52 St. Rep. 740 (1995).

Injury Not Timely Reported to Employer or Physicians — Claim Denied: The Workers' Compensation Court properly denied coverage of claimant when he did not give notice of the time and place of injury to his employer until over 1 year after the alleged injury and when he failed to mention to any of his three physicians that his injury might be job-related. Although claimant contended the claim period did not begin to run until he had reason to recognize the serious nature of his problem, the Supreme Court found that he had ample opportunity to notify his employer and his physicians and that his alleged injury appeared to be the product of inspiration, not recognition. Nelson v. Asarco, Inc., 227 M 272, 739 P2d 943, 44 St. Rep. 1074 (1987).

Sufficient Notice — Notice to Company Nurse: Claimant injured his back at work. He reported to the company nurse who referred him to a doctor. The doctor's report turned out to be a misdiagnosis. Because the reported condition was not work-related, the nurse did not process a compensation form. Claimant went to another doctor, and a back injury was diagnosed. The nurse then prepared and processed the claim. The employer contested liability on the ground that it had not been notified within 60 days of the accident. The trial court found that claimant had notified the nurse but that she was not an authorized agent. The trial court held that the employer had not received actual knowledge within the time requirement. On appeal, the Supreme Court held that notice to the nurse was proper. The court stated that there is no more important area to apply liberal construction than whether sufficient notice was given of such an accident. The court concluded that the nurse was in effect the managing agent insofar as the receipt of notice of injuries is concerned. Ackerman v. Intermountain Ins. Co., 206 M 508, 672 P2d 267, 40 St. Rep. 1813 (1983).

Notice of Every Subsequent Disability From Prior Accident Not Required — Liberal Construction of Notice Requirement: Where the employee was injured in an industrial accident in 1978 and gave notice to his employer of an injury to his right knee and leg, the Workers' Compensation Court did not err in holding the employer's insurance company liable for back injuries from the same accident that were not manifested until 1980. Under the rationale of Wight v. Hughes Livestock Co., 194 M 109, 634 P2d 1189, 38 St. Rep. 1632 (1981), the notice requirement is to be liberally construed as not requiring a separate notice for every ache, pain, or discomfort an employee experiences as a result of a compensable accident. The purpose of the notice statute is to allow an employer to promptly investigate the claim and treat the injured worker; that purpose was fulfilled by the notice given in this case. Wilson v. Glacier Gen. Assurance Co., 206 M 63, 670 P2d 931, 40 St. Rep. 1509 (1983).

Immediate Notice Not Required: An employee had severe back pain at work and went home at the end of his shift. He later called his supervisor and stated he had hurt his back and was going to see a doctor and would not be at work for his next shift. Evidence that he failed to notify his employer at that time that he had been injured in an accident on the job was evidence that employee may not have believed he had suffered an on-the-job injury but was not evidence that employee did not suffer an on-the-job injury. Employee had 60 days to give employer notice of an on-the-job injury; that requirement was met by employee's written notice less than 3 weeks after the alleged injury, and there was no requirement that he notify employer of an accident or injury within hours or days of its occurrence. Jones v. St. Regis Paper Co., 196 M 138, 639 P2d 1140, 38 St. Rep. 2201 (1981).

Notice of Each Separate Injury Not Required: This section's requirement that an injured employee give, within 60 days after the occurrence of an accident which is claimed to have caused injury, notice of the time and place where the accident occurred and the "nature of the injury" was complied with as to a back injury where the employee only indicated injuries to ribs and chest. There was no requirement that employee give notice of each separate injury, particularly where employee was functionally illiterate, having completed school only through the third grade. The employee complied with this section when he notified the insurer of the accident and the fact that he had been injured. Wight v. Hughes Livestock Co., Inc., 194 M 109, 634 P2d 1189, 38 St. Rep. 1632 (1981).

Purpose: The purpose of this section's notice requirement is to enable the employer to protect himself by prompt investigation of the claimed accident and prompt treatment of the injury involved with a view toward minimizing the effects of the injury by proper medical care. Wight v. Hughes Livestock Co., Inc., 194 M 109, 634 P2d 1189, 38 St. Rep. 1632 (1981); Reil v. St. Comp. Ins. Fund, 229 M 305, 746 P2d 617, 44 St. Rep. 1985 (1987).

Injury of Managing Agent — Actual Knowledge of Self-Injury Held Insufficient: Where the claimant, a local manager of a paint store, alleged on-the-job injuries but failed to give written or oral notice to his employer or its insurance carrier until 11 months after the injuries, the trial court did not err in holding that the claimant failed to give the required notice of his injuries. The claimant's argument that his own knowledge of his injuries should be held sufficient under this section because he was the store's managing agent ignores the purpose of the notice requirements of the statute. As neither the claimant's employing company nor its insurer had knowledge of the injuries, they could not protect themselves by prompt investigation. The claimant's own knowledge is therefore insufficient knowledge by a managing agent and insufficient notice under the statute. Hunt v. Sherwin-Williams Co., 191 M 348, 624 P2d 489, 38 St. Rep. 358 (1981).

Notice of On-Job Injury Through Employer's Agent, a Physician: Employer, a hospital, in a suit to recover workers' compensation benefits may be considered to have actual notice within the meaning of this section when claimant, a nurse in the hospital, sought and was given treatment by a physician in the emergency room. The physician is an agent under 28-10-103, and the hospital may be considered to have notice under 28-10-604. The purpose of the notice requirement is to enable the employer to protect himself by prompt investigation of the claimed accident and prompt treatment of the injury involved with a view toward minimizing its effects by proper medical care. Where, as here, within 2 hours of the accident, the employer had notice and a diagnosis and had prescribed treatment for the injury, the purpose of this section is fulfilled. Harmon v. Deaconess Hosp., 191 M 285, 623 P2d 1372, 38 St. Rep. 65 (1981).

Mental Incompetency: The provisions of 39-71-602 relating to excepting certain time requirements for mental incompetents and minors under 18 apply to this section. Maki v. Anaconda Copper Min. Co., 87 M 314, 287 P2d 170 (1930).

39-71-604. Application for compensation — disclosure and communication without prior notice of health care information.

Compiler's Comments

2003 Amendment: Chapter 464 inserted (2) providing for disclosure and communication of health care information; inserted (3) providing for disclosure without prior notice to injured employee; and made minor changes in style. Amendment effective April 21, 2003.

Applicability: Section 6(4), Ch. 464, L. 2003, provided that this section applies retroactively, within the meaning of 1-2-109, to injuries occurring before April 21, 2003.

1991 Amendment: In first sentence of (1) and in (2), after "with the insurer", deleted "or the department". Amendment effective July 1, 1991.

Applicability: Section 15, Ch. 558, L. 1991, provided: "[This act] applies to injuries that occur on or after [the effective date of this act]." Effective July 1, 1991.

1989 Amendment: In four places changed "division" to "department"; deleted former (3) that provided Division goal to process all claims within 14 days of initial acceptance; and made minor changes in phraseology. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

1987 Amendment: Inserted (3) establishing claims processing goal of 14 days.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Constitutional Right to Privacy Infringed by Statutorily Authorized Ex Parte Communication Between Insurer's Agent and Claimant's Health Care Providers Without Prior Notice to Claimant: The claimant filed a workers' compensation claim after being injured as a manager of a restaurant. The defendant insurer terminated the claimant's benefits after the claimant withdrew her consent to allow the defendant insurer and its agents to have ex parte communication with the claimant's medical care providers. The defendant insurer claimed that the claimant's withdrawal of consent violated 39-71-604. The claimant sued to have the Workers' Compensation Court reinstate the claimant's benefits. The Workers' Compensation Court held that 39-71-604(3), as applied, violated the claimant's constitutional right of privacy and directed the defendant insurer to reinstate the benefits and further held that the defendant insurer could not have ex parte communications with the claimant's medical team without the claimant's knowledge and opportunity to participate. On appeal, the Supreme Court affirmed, reiterating that an individual's medical records are constitutionally protected private information and that the constitutional right to privacy includes the right to control circulation of private information. The Supreme Court held that the unconstitutionality of 39-71-604(3) has been established beyond a reasonable doubt and that the statute is facially unconstitutional because it would impose the same violation of privacy interests on every injured worker to whom it was applied. The Supreme Court also held that the Workers' Compensation Court did not err in concluding that a narrowly crafted release authorizing insurers to have ex parte contact with health care providers solely for administrative purposes would not violate a claimant's right of privacy. Malcomson v. Liberty Northwest, 2014 MT 242, 376 Mont. 306, 339 P.3d 1235.

Workers' Compensation Court Authorized to Issue Only Limited Declaratory Judgments: Several workers filed claims in the Workers' Compensation Court seeking benefits. In a separate action, the workers filed a petition for a declaratory judgment in the Workers' Compensation Court seeking a declaration that the claimant disclosure waiver procedures in 50-16-527(5) and subsection (3) of this section violated the workers' right to privacy and deprived them of property without due process. The Workers' Compensation Court granted summary judgment for the workers and declared the statutory provisions unconstitutional. On appeal, the Supreme Court reversed. The Workers' Compensation Court erred in concluding that it had jurisdiction to enter a declaratory judgment in the context of this case. As a court of limited jurisdiction, the Workers' Compensation Court is statutorily authorized to issue declaratory rulings only in the context of a dispute concerning benefits under the Workers' Compensation Act and only as to the applicability of any statutory provision, rule, or order of an agency to that dispute. Benefits were not at issue in this case, so the Workers' Compensation Court did not have jurisdiction to issue a declaratory judgment concerning the constitutionality of 50-16-527(5) and subsection (3) of this section, nor is the Workers' Compensation Court a court of record because it does not appear in the list in 3-1-102. (Note that the Legislature added the Workers' Compensation Court to the list of courts of record effective October 1, 2007.) Thompson v. St., 2007 MT 185, 338 M 511, 167 P3d 867 (2007). See also Allum v. Mont. St. Fund, 2023 MT 121, 412 Mont. 546, 531 P.3d 560.

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Doctor-Patient Privilege as Precluding Physician Private Interviews in Workers' Compensation Case: The doctor-patient privilege set out in 26-1-805 prevents the defendant from conducting private interviews with a claimant's physician. Linton v. St. Comp. Ins. Fund, 230 M 122, 749 P2d 55, 45 St. Rep. 68 (1988), citing Japp v. District Court, 191 M 319, 623 P2d 1389, 38 St. Rep. 280 (1981).

Claimant's Duty to File Information Needed to Determine Compensability: Under this section, a claimant has a duty to file with the insurer and with the Workers' Compensation Court all reasonable information needed by the insurer and the court to determine compensability. Claimant has a duty therefore, through the use of depositions or medical reports obtained from health care providers, to carry his burden of compensability. Examination reports relating to compensability as are in claimant's or his attorney's possession are to be freely exchanged with the insurer and his counsel under Rule 2.52.317 of the Procedural Rules of the Workers' Compensation Court. Bowen v. Liberty Mut. Ins. Co., 229 M 84, 745 P2d 330, 44 St. Rep. 1799 (1987).

Waiver of Physician-Patient Privilege by Workers' Compensation Claimant — Discovery: Although there is no direct statement in the Workers' Compensation Act or in the Procedural Rules of the Workers' Compensation Court regarding waiver of the physician-patient privilege, this section and 39-71-605 imply that an injured employee, to sustain a right to workers' compensation benefits, must waive any privilege or claim of confidentiality as to medical information relating to compensability of his claim. If a claimant exercises his right under 26-1-805 or 50-16-525 to prevent any medical witness from disclosing confidential health information, and subsequently application is made by the adverse party to the Workers' Compensation Court for an order authorizing discovery, the court should authorize such discovery as is relevant to the subject involved in the pending action. The information obtained must be reasonably necessary to determine compensability. Bowen v. Liberty Mut. Ins. Co., 229 M 84, 745 P2d 330, 44 St. Rep. 1799 (1987).

1945 Amendment Unconstitutional: Chapter 213, L. 1945, is unconstitutional since the Legislature failed to follow the constitutional mandate of having the bill printed for use of the members and that fact shows affirmatively on the journals. O'Bannon v. Gustafson, 130 M 402, 303 P2d 938 (1956).

39-71-605. Examination of employee by physician — effect of refusal to submit to examination — report and testimony of physician — cost.

Compiler's Comments

2005 Amendment: Chapter 141 deleted former (5) that read: "(5) This section does not apply to impairment evaluations provided for in 39-71-711." Amendment effective March 30, 2005.

Effective Date — Applicability: Section 3, Ch. 141, L. 2005, provided: "[This act] is effective on passage and approval and applies to impairment evaluations completed on or after [the effective date of this act]." Effective March 30, 2005.

1999 Amendments — Composite Section: Chapter 218 in (4) inserted reference to occupational therapist. Amendment effective March 30, 1999.

Severability: Section 24, Ch. 377, L. 1999, was a severability clause.

Chapter 377 in (3) inserted "practitioner having substantial experience in the field of medicine concerned with the matters presented by the dispute and whose licensure would qualify the practitioner to act as a". Amendment effective July 1, 1999.

1997 Amendment: Chapter 276 throughout section, after "physician", inserted "psychologist"; in two places in (1) and three places in (2), after "panel", deleted "of physicians"; at end of (1)(a) inserted "or as ordered by the workers' compensation judge"; in (1)(b) inserted second sentence authorizing an examination conducted by a physician, psychologist, or panel licensed in another state; in first sentence in (2), after "department", inserted "or the workers' compensation judge"; inserted (3) providing that a panel includes a treating physician and may include a psychologist; inserted (4) requiring claimant upon request to submit to evaluation conducted by licensed physical therapist; and made minor changes in style. Amendment effective April 16, 1997.

Preamble: The preamble attached to Ch. 276, L. 1997, provided: "WHEREAS, it is the intent of the state compensation insurance fund to assist all Montanans by reducing the unfunded liability of the old fund, terminating the old fund liability tax when the old fund is adequately funded, which is currently estimated to occur as early as June 30, 1999, providing for the payment of dividends to policyholders, and maintaining a viable state compensation insurance fund; and

WHEREAS, there was an unfunded liability of $355 million as of June 30, 1996, for claims for workers' compensation injuries occurring before July 1, 1990, in the old fund, which included $129 million in outstanding bond debt; and

WHEREAS, the old fund is funded with the old fund liability tax paid by employers, employees, and self-employed persons, generating as much as $50 million each year; and

WHEREAS, the surplus of $231 [sic] in the new fund as of June 30, 1996, allowed the Board of Directors of the State Fund to declare a dividend of up to $109 million to retire the outstanding bond debt in the old fund; and

WHEREAS, the unfunded liability in the old fund will be an estimated $200 million deficit by June 30, 1997, and the surplus or the excess of assets above the reserves that are set aside to meet the claim liability in the new fund will be an estimated $127 million by June 30, 1997; and

WHEREAS, current state law requires the State Fund to use dividends to be applied first to old fund outstanding liability rather than paying dividends directly to policyholders, the State Fund shall, no later than June 30, 1998, transfer $63.8 million to the old fund account to pay old fund claims to allow direct payment of dividends to policyholders; and

WHEREAS, the $20 million appropriation received by the State Fund from the general fund during the June 1989 Special Session partially addressed the unfunded liability issue existing at that time in the old fund and canceled a planned 22% rate increase; and

WHEREAS, the State Fund now agrees to repay the $20 million appropriation to the general fund by June 30, 1999, in lieu of transferring additional funds to the old fund account to provide the general fund with additional revenue and to remove any perception that the State Fund remains a burden on the general fund; and

WHEREAS, because decreases in premium rates totaled 35% in fiscal years 1996 and 1997 and legislative changes in benefit levels have resulted in the return of private carriers, the 15% limitation on administration expenses as a percent of the prior year's premium will significantly impact the State Fund's ability to provide service to policyholders and their injured workers; and

WHEREAS, the State Fund seeks to improve the level of services provided to customers without increasing existing State Fund staffing levels by working with private sector-licensed insurance producers; and

WHEREAS, in response to Haag v. Montana Schools Group Insurance Authority, 274 M 109, 906 P.2d 693 (1995), in which the Montana Supreme Court ruled that an insurer's failure to comply with the time limitations for accepting or denying a workers' compensation claim constituted acceptance of the claim, current law needs to be clarified to provide that the failure to comply with the time limitations does not constitute acceptance of the claim."

Severability: Section 32, Ch. 276, L. 1997, was a severability clause.

Retroactive Applicability: Section 33(1), Ch. 276, L. 1997, provided: "[Sections 6(35)(f) and 10 [39-71-605]] apply retroactively, within the meaning of 1-2-109, to claims for injuries occurring prior to [the effective date of sections 6(35)(f) and 10]." Effective April 16, 1997.

1993 Amendment: Chapter 619 in (1)(b), at end of third sentence after "suspended", inserted "and is subject to the provisions of 39-71-607"; and made minor changes in style. Amendment effective July 1, 1993.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

1991 Amendment: In (1)(b), at end of first sentence, provided that place of examination be "as close to the employee's residence as is practical"; in (2), in second to last sentence, substituted "claimant and insurer" for "department" and in last sentence, at beginning, substituted "requesting party" for "department" and at end deleted "and shall be reimbursed by the party who requested it"; and made minor changes in style. Amendment effective July 1, 1991.

Applicability: Section 15, Ch. 558, L. 1991, provided: "[This act] applies to injuries that occur on or after [the effective date of this act]." Effective July 1, 1991.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1987 Amendment: In four places in (1) and (2), before "insurer", deleted references to employer; at end of (1) deleted "or any member or examiner or referee thereof"; inserted (3) providing that the section does not apply to impairment evaluations under 39-71-711; and made minor changes in phraseology.

1985 Amendment: In six places, after "physician", inserted reference to panel of physicians, the first such reference in (2) being accomplished by substituting "physician or panel of physicians" for "physician or physicians"; and in (1)(b) in second sentence, after "physician", deleted "provided and paid for by himself".

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Psychiatric Complaints Required to Be Related to Claim for Compulsory Exam or Coverage: An insurer denied to the petitioner, an injured worker, psychiatric coverage that was recommended by a treatment provider, who did not connect the psychiatric complaint to the claim for workers' compensation filed by the injured worker. The insurer sought instead a psychiatric evaluation, which the injured worker refused. The Workers' Compensation Court ordered that the insurer authorize the injured worker to see a psychiatrist who could evaluate the injured worker and provide treatment if needed. On appeal, the Supreme Court ruled that because the psychiatric complaint was not connected to the workers' compensation claim, the insurer did not need to authorize treatment and could not compel an exam. Neisinger v. New Hampshire Ins. Co., 2019 MT 275, 398 Mont. 1, 452 P.3d 909.

Insurer's Obtaining of Second Independent Medical Examination Proper: An employee covered under the state workers' compensation program suffered a heat stroke-related injury in 1996, and the State Fund accepted liability and began paying expenses related to care and treatment. In 2002, the State Fund referred the employee for an independent medical examination (IME) to determine the effectiveness of treatment and to identify any permanent restrictions caused by the injury. In 2003, a claims examiner for the State Fund noticed that the employee was taking medicine that was inconsistent with the injury and that the employee's providing physicians had not provided treatment plans. The claims examiner then requested a panel IME, and the State Fund eventually suspended payment for further psychiatric treatment of the employee for 1 month before resuming payments. The employee filed suit, claiming that by obtaining a second IME without showing good cause, the State Fund had violated her constitutional rights to privacy, substantive due process, and freedom from unreasonable searches. The District Court dismissed the claim. On appeal, the Supreme Court affirmed, finding that the IME process is sufficiently narrowly tailored to protect the state's compelling interest in the orderly administration of the workers' compensation process, that the IME process is reasonably related to the legitimate government objective of promoting efficiency and self-reliance in the workers' compensation process, and that an appropriately ordered IME is not a "search" for constitutional purposes. Robinson v. St. Comp. Mut. Ins. Fund, 2018 MT 259, 393 Mont. 178, 430 P.3d 69.

Benefits Due for Cognitive Impairment From Carbon Monoxide Exposure: Russell alleged that he was exposed to carbon monoxide while working for defendant employer, resulting in a variety of physical problems. The Workers' Compensation Court granted Russell's claim but did not specify the time period for which indemnity benefits were awarded. The employer appealed, but the Supreme Court found that the employer failed to demonstrate that the Workers' Compensation Court's findings were not supported by substantial credible evidence or that its conclusions of law were erroneous, so the Workers' Compensation Court's finding that Russell was entitled to medical and indemnity benefits for the occupational disease claim for cognitive impairment caused by carbon monoxide exposure was affirmed. However, the case was remanded for the Workers' Compensation Court to determine the appropriate period for which indemnity benefits were due. Russell v. Watkins & Shepard Trucking Co., 2009 MT 217, 351 M 297, 211 P3d 864 (2009).

No Equal Protection Violation Under Workers' Compensation Act and Occupational Disease Act (Now Repealed and Merged With Workers' Compensation Act) Requirements for Medical Examination: Grooms filed a workers' compensation claim with her insurer, the State Fund, alleging that she suffered from a skin allergy condition. The State Fund denied liability and requested that the Department of Labor and Industry process her claim under the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) by scheduling a medical examination for her by a member of a panel of physicians. Grooms argued before the Supreme Court that her rights to equal protection were infringed by the requirement that if she requested a second medical examination, she would have to pay for it, whereas if her claim had been processed under the Workers' Compensation Act, then this section requires the insurer or the Department to pay for the cost of the examination. The Supreme Court held that Grooms misinterpreted the statutes because this section does not allow a workers' compensation claimant to request and obtain an examination at the insurer's expense but, rather, provides that an insurer or the Department may require the claimant to submit to physical examinations from time to time and provides that the entity requesting the examination must pay for it. As a result, the Supreme Court held that there was no disparate treatment between the two Acts. In response to Grooms' argument that the Occupational Disease Act (now repealed and merged with Workers' Compensation Act) violates the state constitutional equal protection clause by requiring a mandatory physical examination without providing for a waiver of the costs of the examination for an indigent claimant, the Supreme Court again held that Grooms misapprehended the statutes because 39-72-602 and 39-72-608 (both now repealed) do not mandate an examination at the claimant's expense but provide that it is mandatory for a claimant to submit to a medical examination and require the claimant to pay for an examination only if the claimant is dissatisfied with the results of the first examination and requests a second examination. Because a second examination is not mandatory but optional at the choice of the claimant, the Supreme Court held that Grooms' right of equal protection was not violated. Grooms v. Ponderosa Inn, 283 M 459, 942 P2d 699, 54 St. Rep. 725 (1997).

Independent Medical Examination — Qualifications of Examining Physician — Determination of Applicable Law: In 1989, Blythe was stuck by a needle that had previously been used on an AIDS patient, and after that time, Blythe alleged that he was suffering from depression and hallucinations that prevented him from working. The Workers' Compensation Court determined that Blythe was malingering. The insurer required an independent medical examination (IME), and the Workers' Compensation Court allowed testimony on the issue of malingering from two Ph.D. clinical psychologists, one of whom conducted the IME by the order of the Workers' Compensation Court. Citing St. Comp. Ins. Fund v. Sky Country, Inc., 239 M 376, 780 P2d 1135 (1989), the Supreme Court held that the applicable substantive law is the law as it was at the time of injury and that the applicable law for procedural purposes is the law at the time of trial. The issue of who is qualified to conduct an IME is procedural rather than substantive, so the applicable law is the 1993 version of this section. The Supreme Court also held that the Workers' Compensation Court erred when it treated the listing of types of treating physicians in 39-71-116 to be exemplary rather than exclusive. The Supreme Court noted that even if the list of types of physicians included a clinical psychologist, which it did not, the law also required that the physicians be licensed in Montana. The psychologist who conducted the IME was not licensed as a physician. The testimony of one of the psychologists was therefore inadmissible, but because the Supreme Court could not determine whether the outcome of the trial would have been different without the inadmissible testimony, it remanded the case to the Workers' Compensation Court for that determination. EBI/Orion Group v. Blythe, 281 M 50, 931 P2d 38, 54 St. Rep. 54 (1997), followed in Murphy v. WestRock Co., 2018 MT 54, 390 Mont. 394, 414 P.3d 276.

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Physician's Standard of Care Toward Examinee Sent to Physician by Examinee's Employer or Insurer or by Some Other Third Party: At the request of the workers' compensation insurer of an injured worker's employer, a physician examined the worker. He reported his findings to, and his fee was paid by, the insurer. He wrote the worker a letter telling her that she had a back sprain, that no treatment was needed, and that she had an impairment rating of 2% of the whole person. She went back to work, suffered a severely herniated disc in her back, and has significant physical limitations as a result. She sued the doctor for negligence. He claimed that he did not have a physician-patient relationship with her and therefore had no duty of care toward her. The Supreme Court held that based on 27-1-701, a physician who performs an examination of an employee, insured, or other person at the request of a third party has a duty to exercise the level of care required by the physician's professional training and experience and the duty to exercise ordinary care to: (1) discover those conditions that pose imminent danger to the examinee's physical and mental well-being; (2) take reasonable steps to communicate any such condition to the examinee; and (3) ensure that when the physician advises an examinee about a condition, the advice comports with the standard of care for the profession. The court stated that it was not thereby concluding that the physician has the same duty of care as toward a patient. Webb v. T.D., 287 M 68, 951 P2d 1008, 54 St. Rep. 1502 (1997).

Insurer's Right to Choose Physician or Panel: Claimant contended that she had the right to refuse to submit to an examination by an independent medical panel because her attorney was suing the panel chairman and the clinic for malpractice. However, under this section, the insurer clearly has the right to employ a physician or panel of its own choosing to perform a medical evaluation and bears responsibility for paying for the panel. A claimant's safeguards against bias or unfairness in the examination include the right to have a physician present at the examination and the right to cross-examine the panel doctors at trial. Young v. St. Comp. Ins. Fund, 248 M 46, 807 P2d 1369, 48 St. Rep. 316 (1991).

Waiver of Physician-Patient Privilege by Workers' Compensation Claimant — Discovery: Although there is no direct statement in the Workers' Compensation Act or in the Procedural Rules of the Workers' Compensation Court regarding waiver of the physician-patient privilege, 39-71-604 and this section imply that an injured employee, to sustain a right to workers' compensation benefits, must waive any privilege or claim of confidentiality as to medical information relating to compensability of his claim. If a claimant exercises his right under 26-1-805 or 50-16-525 to prevent any medical witness from disclosing confidential health information, and subsequently application is made by the adverse party to the Workers' Compensation Court for an order authorizing discovery, the court should authorize such discovery as is relevant to the subject involved in the pending action. The information obtained must be reasonably necessary to determine compensability. Bowen v. Liberty Mut. Ins. Co., 229 M 84, 745 P2d 330, 44 St. Rep. 1799 (1987).

Temporary Total Disability Awarded During Period of Medical Testing: Where the Workers' Compensation Court ordered the claimant to undergo spinal nerve tests on the strength of medical testimony that the tests were needed in order to restore the claimant to his best physical condition, the court did not err in awarding the claimant temporary total disability payments during the period of testing. While he undergoes treatment, the claimant will of necessity experience a total loss of wages. Therefore the requirements of the statutory definition of "total temporary disability" were met and the award was proper. Wilson v. Glacier Gen. Assurance Co., 206 M 63, 670 P2d 931, 40 St. Rep. 1509 (1983).

Pain Insufficient to Establish Percentage Disability Rating: Plaintiff suffered a compensable work-related injury, which was later aggravated in a fight at work. Conflicting medical testimony was presented as to the amount of disability before and after the fight. The hearings examiner decided that a percentage of disability could only be arrived at by conjecture based on pain. The judge approved the finding of a 25% disability to the whole man. The Supreme Court held that evidence of pain was insufficient in and of itself to establish a percentage disability rating and remanded the case for determination of that issue. Penny v. The Anaconda Co., 194 M 409, 632 P2d 1114, 38 St. Rep. 1429 (1981).

Inapplicable to Workers' Compensation Court: This section is limited to the Division (now Department of Labor and Industry) itself and cannot be construed to allow the use of written medical reports in Workers' Compensation Court in violation of the right to cross-examination. Hert v. Lumberman Mut. Cas. Co., 179 M 160, 587 P2d 11, 35 St. Rep. 1345 (1978), clarifying and denying rehearing of Hert v. Lumberman Mut. Cas. Co., 178 M 355, 584 P2d 656 (1978). Hert was held to no longer be authority for admissibility of medical records, in light of the 1990 adoption of ARM 24.5.317, in Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

Admissibility of Medical Reports: It is well settled that it is not an abuse of discretion for the Workers' Compensation Court to consider the contents of medical reports contained in the case file before the court in spite of their alleged hearsay nature when counsel for defendant fails to object. Hayes v. Aetna Ins. Co., 176 M 513, 579 P2d 1225 (1978).

Medical Reports Considered: The Workers' Compensation Court properly considered unsworn written medical reports without violating Montana Rules of Evidence regarding hearsay, since the court is not bound by common law and statutory rules of evidence, and without violating claimant's right to cross-examination because she had the opportunity at the hearing to present rebutting medical evidence. Stevens v. Glacier Gen. Assurance Co., 176 M 61, 575 P2d 1326, 35 St. Rep. 278 (1978).

Absent Witness: It was improper for workers' compensation hearing examiner, when confronted with conflicting medical testimony, to seek the opinion of an independent physician who was not a witness at the hearing without granting claimant an opportunity to cross-examine and rebut his findings. Rumsey v. Cardinal Petroleum, 166 M 17, 530 P2d 433 (1975).

Penalties Not Self-Executing: The statute is mandatory, but it is not self-executing, and the mere assertion by the insurer that an injured worker had refused to submit to an examination would not automatically invoke the penalties provided for use only in case of a refusal; the administrative agency or a court must decide if there has been a refusal. Burns v. Aetna Life Ins., Co., 95 M 186, 26 P2d 175 (1933).

Unreasonable Demand: The demand regarding the type of physical examination must be reasonable, and a claimant who had submitted to previous physical examinations but who refused to enter the hospital for 4 to 6 days for extended tests on her injured hand was within her rights to refuse such an examination procedure. Burns v. Aetna Life Ins., Co., 95 M 186, 26 P2d 175 (1933).

39-71-606. Insurer to accept or deny claim within 30 days of receipt — notice of benefits and entitlements to claimants — notice of denial — notice of reopening — notice to employer — employer's right to loss information.

Compiler's Comments

2021 Amendment: Chapter 79 inserted (2)(b) concerning providing information to injured workers regarding nonstatutory programs or benefits offered by nonprofit organizations; and made minor changes in style. Amendment effective July 1, 2021.

2015 Amendment: Chapter 267 in (4) substituted current text for former text that read: "Upon the request of an employer that it insures, an insurer shall notify the employer of all compensation benefits that are ongoing and are being charged against that employer's account"; in (5) in two places substituted "subsections (1) and (3)" for "this section"; and made minor changes in style. Amendment effective April 23, 2015.

1997 Amendment: Chapter 276 in (1), after "for compensation", inserted "signed by the claimant or the claimant's representative"; inserted (5) providing that failure by insurer to comply with time limitations is not acceptance of claim and authorizing assessment of a penalty for compensable claim; and made minor changes in style. Amendment effective April 16, 1997.

Preamble: The preamble attached to Ch. 276, L. 1997, provided: "WHEREAS, it is the intent of the state compensation insurance fund to assist all Montanans by reducing the unfunded liability of the old fund, terminating the old fund liability tax when the old fund is adequately funded, which is currently estimated to occur as early as June 30, 1999, providing for the payment of dividends to policyholders, and maintaining a viable state compensation insurance fund; and

WHEREAS, there was an unfunded liability of $355 million as of June 30, 1996, for claims for workers' compensation injuries occurring before July 1, 1990, in the old fund, which included $129 million in outstanding bond debt; and

WHEREAS, the old fund is funded with the old fund liability tax paid by employers, employees, and self-employed persons, generating as much as $50 million each year; and

WHEREAS, the surplus of $231 [sic] in the new fund as of June 30, 1996, allowed the Board of Directors of the State Fund to declare a dividend of up to $109 million to retire the outstanding bond debt in the old fund; and

WHEREAS, the unfunded liability in the old fund will be an estimated $200 million deficit by June 30, 1997, and the surplus or the excess of assets above the reserves that are set aside to meet the claim liability in the new fund will be an estimated $127 million by June 30, 1997; and

WHEREAS, current state law requires the State Fund to use dividends to be applied first to old fund outstanding liability rather than paying dividends directly to policyholders, the State Fund shall, no later than June 30, 1998, transfer $63.8 million to the old fund account to pay old fund claims to allow direct payment of dividends to policyholders; and

WHEREAS, the $20 million appropriation received by the State Fund from the general fund during the June 1989 Special Session partially addressed the unfunded liability issue existing at that time in the old fund and canceled a planned 22% rate increase; and

WHEREAS, the State Fund now agrees to repay the $20 million appropriation to the general fund by June 30, 1999, in lieu of transferring additional funds to the old fund account to provide the general fund with additional revenue and to remove any perception that the State Fund remains a burden on the general fund; and

WHEREAS, because decreases in premium rates totaled 35% in fiscal years 1996 and 1997 and legislative changes in benefit levels have resulted in the return of private carriers, the 15% limitation on administration expenses as a percent of the prior year's premium will significantly impact the State Fund's ability to provide service to policyholders and their injured workers; and

WHEREAS, the State Fund seeks to improve the level of services provided to customers without increasing existing State Fund staffing levels by working with private sector-licensed insurance producers; and

WHEREAS, in response to Haag v. Montana Schools Group Insurance Authority, 274 M 109, 906 P.2d 693 (1995), in which the Montana Supreme Court ruled that an insurer's failure to comply with the time limitations for accepting or denying a workers' compensation claim constituted acceptance of the claim, current law needs to be clarified to provide that the failure to comply with the time limitations does not constitute acceptance of the claim."

Severability: Section 32, Ch. 276, L. 1997, was a severability clause.

Retroactive Applicability: Section 33(2), Ch. 276, L. 1997, provided: "[Section 11] [39-71-606] applies retroactively, within the meaning of 1-2-109, to claims filed on or after March 27, 1973."

1993 Amendments — Composite Section: Chapter 619 inserted (2) requiring distribution of a document describing current benefits and entitlements; and inserted (3) requiring plan No. 2 and plan No. 3 insurers to notify employer of claim reopening. Amendment effective July 1, 1993.

Chapter 630 inserted (2) requiring distribution of a document describing current benefits and entitlements. Amendment effective July 1, 1993.

Subsection (2) was identical in the two chapters with a slight change in style. The codifier chose the more appropriate of the two.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

Section 15, Ch. 630, L. 1993, was a severability clause.

Saving Clause: Section 16, Ch. 630, L. 1993, was a saving clause.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1981 Amendment: Added (2) requiring notice to employer of ongoing claims against his account if he requests.

Case Notes

Limitation of Action — Workers' Compensation Third Party and Bad Faith Claims: A third-party claimant may not bring an action pursuant to Title 33, ch. 18, commonly known as the Unfair Trade Practices Act, until the underlying claim has been settled or a judgment entered in favor of the claimant on the underlying claim. The statute of limitations on such a claim is 1 year from the date of settlement or entry of judgment on the underlying claim, even though the Act does not define what constitutes an underlying claim. A common-law bad faith claim accrues when: (1) all of the elements of the claim or cause exist or have occurred; (2) the right to maintain an action on the claim or cause is complete; or (3) a court or other agency is authorized to accept jurisdiction of the action. The statute of limitations for a common-law bad faith claim is 3 years and begins to run when the claim or action accrues. The accrual date of a bad faith claim arising out of a separate and independent disputed issue is established by determining whether that particular issue has been ultimately resolved, regardless of the existence or absence of a resolution of other issues within the workers' compensation case. Therefore, for statute of limitations purposes, statutory and common-law bad faith claims against an insurer that are predicated on actions taken in adjusting a workers' compensation claim accrue when the Workers' Compensation Court enters a judgment ordering the insurer to pay for a previously denied benefit but leaves unresolved the ultimate determinations of the extent and duration of the worker's disability. O'Connor v. Nat'l Union Fire Ins. Co., 2004 MT 65, 320 M 301, 87 P3d 454 (2004), following Grenz v. Orion Group, Inc., 243 M 486, 795 P2d 444 (1990), Poteat v. St. Paul Mercury Ins. Co., 277 M 117, 918 P2d 677 (1996), and Brewington v. Employers Fire Ins. Co., 1999 MT 312, 297 M 243, 992 P2d 237 (1999), and distinguishing Fode v. Farmers Ins. Exch., 221 M 282, 719 P2d 414 (1986).

Automatic Acceptance of Claim — Error to Deny Benefits With No Finding of Maximum Healing or Intervening Event: Chaney claimed that he was injured in 1983 when he slipped and fell at his employing sawmill, which was then insured by USF&G. Chaney also consulted several physicians between 1989 and 1992 concerning numbness in his hands. In 1992, Chaney had surgery to correct carpal tunnel syndrome. State Fund paid benefits while reserving its rights against Chaney and USF&G, but the Workers' Compensation Court held that Chaney was not entitled to benefits. The Supreme Court held that USF&G automatically accepted the claim when it failed to deny it (see 1997 amendment) and that by accepting the claim in this fashion, Chaney had satisfied his initial burden to prove that he sustained a compensable injury and that there was a causal connection between his injury and his current condition. Citing Walker v. United Parcel Serv., 262 M 450, 865 P2d 1113 (1993), and Haag v. Mont. School Group Ins. Authority, 274 M 109, 906 P2d 693 (1995), the Supreme Court held that without any proof of maximum healing or an intervening event, it was error for the Workers' Compensation Court to deny benefits. Chaney v. U.S. Fidelity & Guar., 276 M 513, 917 P2d 912, 53 St. Rep. 499 (1996).

Failure to Accept or Deny Claim Within Thirty Days Is Acceptance as Matter of Law — Solheim Reversed — Options for Insurer: After Haag injured his shoulder while working for a school district, he filed a timely claim with the district's workers' compensation insurer. More than 2 months later, the claims adjuster for the district's insurer denied the claim. The Workers' Compensation Court, relying upon Solheim v. Ranch, 208 M 265, 677 P2d 1034 (1984), held that the insurer's failure to respond within the 30-day time period provided in subsection (1) of this section was not an automatic acceptance of the claim. The Supreme Court reversed, overruling Solheim. The Supreme Court held that in deciding Solheim, it had exceeded its proper role as a court, that 39-71-608 provides an insurer with an alternative to admitting liability, and that 39-71-609 and 39-71-610 provide an insurer with a means to subsequently deny liability after accepting liability under this section or beginning payments with a reservation of rights under 39-71-608. (See 1997 amendment.) The Supreme Court also noted that in this case, the insurer could not later contest the claim on the basis of fraud because the issue of fraud was not properly before the Workers' Compensation Court. Haag v. Mont. Schools Group Ins. Authority, 274 M 109, 906 P2d 693, 52 St. Rep. 1146 (1995).

Liability for Failure to Notify of Claim Denial Subject to Existence of Employer/Employee Relationship: The plaintiff owner of a semitrailer truck who was injured while unloading the defendant's hay brought an action in the Workers' Compensation Court for payment for his injuries. On appeal of that court's judgment, the Supreme Court affirmed, holding that the plaintiff's argument that the insurer was liable for benefits because of its failure to deny benefits within 30 days ignored the fact that there was no employer/employee relationship between the parties. The 20% penalty provided in 39-71-2907 for paying unreasonably delayed claims applies to delays in denial longer than the 30 days specified in 39-71-606 and provides sufficient protection for persons in the position of the plaintiff. That section is therefore inapplicable in the absence of the requisite employee relationship. Solheim v. Tom Davis Ranch, 208 M 265, 677 P2d 1034, 41 St. Rep. 326 (1984), overruled in Haag v. Mont. Schools Group Ins. Authority, 274 M 109, 906 P2d 693, 52 St. Rep. 1146 (1995).

Failure to Give Notice: Failure of an employer to give an employee written notice of denial of his claim does not remove the employer from coverage under this chapter or subject him to a common-law tort action. Jacques v. Nelson, 180 M 415, 591 P2d 181, 36 St. Rep. 287 (1979).

Law Review Articles

Hensley v. Montana State Fund: A Shift in the Grand Bargain of Workers' Compensation, Hagan, 83 Mont. L. Rev. 159 (2022).

39-71-607. Suspension of payments by insurer pending receipt of medical information.

Compiler's Comments

1993 Amendment: Chapter 619 near beginning of first sentence, after "department", deleted "and in the discretion of the department", after "payments" deleted "for not more than 30 days", and after "information" inserted "when an injured worker unreasonably fails to keep scheduled medical appointments" and inserted second sentence relating to forfeiture of suspended benefits. Amendment effective July 1, 1993.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Administrative Rules

ARM 24.29.1408 Suspension allowed.

Case Notes

Unilateral Termination — Ineffective: An employee or his insurer may not unilaterally terminate workers' compensation benefits. Attempted termination is ineffective, and the employer remains liable until termination is properly accomplished. Clark v. Hensel Phelps Constr. Co., 172 M 8, 560 P2d 515 (1977).

Insurer: The term "insurer" used in this section refers to every insurer under any one of the three plans for payment of benefits, and includes employers who are their own insurers under plan I. McMillen v. Arthur G. McKee & Co., 166 M 400, 533 P2d 1095 (1975).

39-71-608. Payments within 30 days by insurer without admission of liability or waiver of defense authorized — notice — limitations on payments over 90 days.

Compiler's Comments

2005 Amendment: Chapter 103 inserted (2) limiting time of payment without consent or approval; and made minor changes in style. Amendment effective July 1, 2005.

Effective Date — Applicability: Section 13, Ch. 103, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005."

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Case Notes

Failure to Accept or Deny Claim Within Thirty Days Is Acceptance as Matter of Law — Solheim Reversed — Options for Insurer: After Haag injured his shoulder while working for a school district, he filed a timely claim with the district's workers' compensation insurer. More than 2 months later, the claims adjuster for the district's insurer denied the claim. The Workers' Compensation Court, relying upon Solheim v. Ranch, 208 M 265, 677 P2d 1034 (1984), held that the insurer's failure to respond within the 30-day time period provided in 39-71-606(1) (see 1997 amendment) was not an automatic acceptance of the claim. The Supreme Court reversed, overruling Solheim. The Supreme Court held that in deciding Solheim, it had exceeded its proper role as a court, that this section provides an insurer with an alternative to admitting liability, and that 39-71-609 and 39-71-610 provide an insurer with a means to subsequently deny liability after accepting liability under 39-71-606 or beginning payments with a reservation of rights under this section. The Supreme Court also noted that in this case, the insurer could not later contest the claim on the basis of fraud because the issue of fraud was not properly before the Workers' Compensation Court. Haag v. Mont. Schools Group Ins. Authority, 274 M 109, 906 P2d 693, 52 St. Rep. 1146 (1995).

Payment of Benefits for Five Years Not Waiver of Right to Deny Benefits: Five years after injuring his elbow, Grenz submitted a claim for his hospitalization for depression and psychotherapy. The insurer refused to pay on the grounds that the treatment was not related to the elbow injury. Grenz argued that the insurer had waived its right to deny benefits because it had paid benefits for 5 years. The Supreme Court held that the insurer, by making payments, did not waive its right to subsequently assert nonliability for the claimant's condition insofar as it was not causally related to the elbow injury. Grenz v. Fire & Cas. of Conn., 250 M 373, 820 P2d 742, 48 St. Rep. 967 (1991).

No Waiver of Defenses: An insurer did not waive all defenses regarding the reopening of a claim when it accepted liability and made payments of benefits for the original industrial accident. Stangler v. Home Ins. Co., 229 M 251, 746 P2d 99, 44 St. Rep. 1944 (1987).

Violations Technical — No Bad Faith: The insurer's violation of this section was technical in nature and does not constitute bad faith. Much of the claimed delay in paying claimant's claim was due to her own calculated and fraudulent conduct. Summary judgment in favor of the insurer was proper because claimant failed to show any disputed material fact. Spadaro v. Midland Claims Serv., Inc., 227 M 445, 740 P2d 1105, 44 St. Rep. 1221 (1987).

39-71-609. Denial of claim after payments made or termination of all benefits or reduction to partial benefits by insurer — 14-day notice required — criteria for conversion of benefits.

Compiler's Comments

2001 Amendment: Chapter 174 inserted second sentence in (2); and inserted (2)(a) through (2)(d) outlining criteria insurer is required to determine prior to converting temporary total or temporary partial disability benefits to permanent partial disability benefits; and made minor changes in style. Amendment effective March 30, 2001.

1995 Amendment: Chapter 243 at beginning of (1) inserted exception clause; and inserted (2) allowing termination of benefits. Amendment effective July 1, 1995.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

1989 Amendment: Chapter 333 in middle of first sentence, before "biweekly compensation benefits", inserted "all"; and inserted second sentence providing that for injuries occurring prior to July 1, 1987, insurer must give 14 days' written notice to claimant before reducing benefits from total to partial. Amendment effective July 1, 1989.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Case Notes

Workers' Compensation Benefits — Deception: Sufficient evidence was presented by the state to prove the defendant received workers' compensation benefits by deception beyond a reasonable doubt. The defendant was charged with felony theft by common scheme for misrepresenting the severity of his injuries to medical providers who treated the defendant for a work-related injury. The District Court did not abuse its discretion in instructing the jury by rejecting the defendant's proposed jury instruction on the termination of workers' compensation. St. v. Sheehan, 2017 MT 185, 388 Mont. 220, 399 P.3d 314.

Fourteen-Day Notice Requirement Inapplicable to Reduction in Benefits: Wallace, injured while delivering a grain bin, appealed a Workers' Compensation Court decision denying retroactive reinstatement of total disability benefits, alleging that state law required State Fund to give him 14 days' notice before reducing benefits from total to partial. In affirming the Workers' Compensation Court decision, the Supreme Court held that the 14-day notice requirement does not apply to the reduction of benefits because Wallace's benefits were reduced after he realized income from subsequent employment as a real estate agent. Wallace v. Professional Farm Sys., 2000 MT 310, 302 M 442, 14 P3d 1234, 57 St. Rep. 1315 (2000).

No Duty of Employer to Renotify Claimant of Intent to Reduce Benefits Once Coles Test Fulfilled: The test set out in Coles v. Seven Eleven Stores, 217 M 343, 704 P2d 1048, 42 St. Rep. 1238 (1985), ensures that an insurer provide a claimant with the minimum information necessary to discharge its duty to investigate the extent of a claimant's disability before a benefit reduction or termination may occur and includes a requirement of notice to the claimant of receipt of the report attached to a copy of the report. Until the physician's report is made and the claimant notified of it, benefits may not be reduced. In addition, the insurer is required by this section to provide the claimant with at least 14 days' notice of its intent to terminate benefits. This section contains no expiration provision that would render the notice ineffective by passage of time. There is nothing in law that prohibits the statutory notice from being given until after the Coles test is completed or that, once properly given, causes the notice to somehow expire. In the present case, the employer had no duty to renotify claimant of its intention to reduce benefits once the Coles test was fulfilled. Ness v. Anaconda Minerals Co., 279 M 472, 929 P2d 205, 53 St. Rep. 1241 (1996).

"Coles" Criteria Inapplicable When Employee Returns to Work: Larson, a parts manager for a truck dealership, suffered a nonwork-related heart attack in 1980 but returned to work full-time in 1981. Then, in July 1981, Larson suffered a left inguinal hernia after lifting a heavy truck spring at his job. The Workers' Compensation Court refused to require Larson's insurer to comply with criteria used to determine the nature and extent of Larson's injuries, as those criteria were set forth in Coles v. Seven Eleven Stores, 217 M 343, 704 P2d 1048 (1985), and as were further applied in Wood v. Consol. Freightways, 248 M 26, 808 P2d 502 (1991). The Supreme Court held that when an employee returns to work, the employee is no longer experiencing a wage loss and that the employer can therefore rightfully terminate temporary total disability benefits without proceeding with an investigation under this section because if the duty to investigate was statutorily discharged, the Coles criteria no longer apply. Larson v. Cigna Ins. Co., 276 M 283, 915 P2d 863, 53 St. Rep. 394 (1996), followed in Wallace v. Professional Farm Sys., 2000 MT 310, 302 M 442, 14 P3d 1234, 57 St. Rep. 1315 (2000).

Failure to Accept or Deny Claim Within Thirty Days Is Acceptance as Matter of Law — Solheim Reversed — Options for Insurer: After Haag injured his shoulder while working for a school district, he filed a timely claim with the district's workers' compensation insurer. More than 2 months later, the claims adjuster for the district's insurer denied the claim. The Workers' Compensation Court, relying upon Solheim v. Ranch, 208 M 265, 677 P2d 1034 (1984), held that the insurer's failure to respond within the 30-day time period provided in 39-71-606(1) was not an automatic acceptance of the claim. The Supreme Court reversed, overruling Solheim. The Supreme Court held that in deciding Solheim, it had exceeded its proper role as a court, that 39-71-608 provides an insurer with an alternative to admitting liability, and that 39-71-610 and this section provide an insurer with a means to subsequently deny liability after accepting liability under 39-71-606 or beginning payments with a reservation of rights under 39-71-608. The Supreme Court also noted that in this case, the insurer could not later contest the claim on the basis of fraud because the issue of fraud was not properly before the Workers' Compensation Court. Haag v. Mont. Schools Group Ins. Authority, 274 M 109, 906 P2d 693, 52 St. Rep. 1146 (1995).

Failure to Show Suitable Work Available: The claimant was injured resulting from his work in the logging industry. The insurer terminated payments to him upon receiving a report from his doctor stating that the claimant was physically able to perform janitorial duties. The Workers' Compensation Court applied the four-part test established in Coles v. Seven Eleven Stores, 217 M 343, 704 P2d 1048 (1985), and affirmed the insurer's decision to terminate benefits. The Supreme Court reversed, holding that the doctor's report stated only that the claimant could physically perform janitorial duties and did not show that he possessed the necessary experience to obtain work as a janitor. Wilhelm v. Owens Enterprises, Inc., 242 M 285, 790 P2d 467, 47 St. Rep. 699 (1990).

Violations Technical — No Bad Faith: The insurer's violation of 39-71-608 was technical in nature and does not constitute bad faith. Much of the claimed delay in paying claimant's claim was due to her own calculated and fraudulent conduct. Summary judgment in favor of the insurer was proper because claimant failed to show any disputed material fact. Spadaro v. Midland Claims Serv., Inc., 227 M 445, 740 P2d 1105, 44 St. Rep. 1221 (1987).

Liability for Benefits Following Unilateral Termination: If the employer unilaterally terminates workers' compensation benefits, such attempted termination is ineffective, following Clark v. Hensel Phelps Constr. Co., 172 M 8, 560 P2d 515 (1977). Once it has been determined that this section and Clark have been violated, the carrier remains liable for the payment of benefits until the termination is accomplished by following the statutory notice provision. Catteyson v. Glacier Gen. Assurance Co., 183 M 284, 599 P2d 341, 36 St. Rep. 1443 (1979).

Statutory Requirement: An insurer remains liable for the payment of benefits until the termination is accomplished by following the statutory provisions. Clark v. Hensel Phelps Constr. Co., 172 M 8, 560 P2d 515 (1977).

Liberal Construction Statute Applied: When no effort was made by claimant to comply with the statute, the claimant cannot turn to the liberal construction statute for relief. Klein v. Independent Wholesale Assoc. Grocers, 167 M 341, 538 P2d 1358 (1975).

39-71-610. Termination of benefits by insurer — department order to pay disputed benefits prior to hearing or mediation — limitation on order — right of reimbursement.

Compiler's Comments

2001 Amendment: Chapter 214 inserted third sentence providing that proceeding in workers' compensation court is new proceeding not subject to mediation; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 25, Ch. 214, L. 2001, was a severability clause.

1999 Amendments — Composite Section: Chapter 377 in first sentence in two places after "hearing" inserted "or mediation" (first occurrence rendered void by Ch. 442 amendment) and near beginning of third sentence after "hearing" inserted "before the workers' compensation court"; and made minor changes in style. Amendment effective July 1, 1999.

Chapter 442 in first sentence after the first "hearing" inserted "before the workers' compensation court or prior to mediation" and at end inserted "or mediation"; inserted second sentence concerning appeal to workers' compensation court; in third sentence after "hearing" inserted "before the workers' compensation court"; and made minor changes in style. Amendment effective April 23, 1999.

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 24, Ch. 377, L. 1999, was a severability clause.

Section 28, Ch. 442, L. 1999, was a severability clause.

Retroactive Applicability: Section 31(1), Ch. 442, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to claims for injuries occurring before April 23, 1999, unless a party elects, after notification by the department of labor and industry, to remain in the contested case process.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Case Notes

Failure to Accept or Deny Claim Within Thirty Days Is Acceptance as Matter of Law — Solheim Reversed — Options for Insurer: After Haag injured his shoulder while working for a school district, he filed a timely claim with the district's workers' compensation insurer. More than 2 months later, the claims adjuster for the district's insurer denied the claim. The Workers' Compensation Court, relying upon Solheim v. Ranch, 208 M 265, 677 P2d 1034 (1984), held that the insurer's failure to respond within the 30-day time period provided in 39-71-606(1) was not an automatic acceptance of the claim. The Supreme Court reversed, overruling Solheim. The Supreme Court held that in deciding Solheim, it had exceeded its proper role as a court, that 39-71-608 provides an insurer with an alternative to admitting liability, and that 39-71-609 and this section provide an insurer with a means to subsequently deny liability after accepting liability under 39-71-606 or beginning payments with a reservation of rights under 39-71-608. The Supreme Court also noted that in this case, the insurer could not later contest the claim on the basis of fraud because the issue of fraud was not properly before the Workers' Compensation Court. Haag v. Mont. Schools Group Ins. Authority, 274 M 109, 906 P2d 693, 52 St. Rep. 1146 (1995).

Liability for Benefits Following Unilateral Termination: If the employer unilaterally terminates workers' compensation benefits, such attempted termination is ineffective, following Clark v. Hensel Phelps Constr. Co., 172 M 8, 560 P2d 515 (1977). Once it has been determined that 39-71-609 and Clark have been violated, the carrier remains liable for the payment of benefits until the termination is accomplished by following the statutory notice provision. Catteyson v. Glacier Gen. Assurance Co., 183 M 284, 599 P2d 341, 36 St. Rep. 1443 (1979).

39-71-611. Costs and attorney fees payable on denial of claim or termination of benefits later found compensable — barring of attorney fees under common fund and other doctrines.

Compiler's Comments

2003 Amendment: Chapter 464 inserted (3) barring attorney fees under common fund and other doctrines; and made minor changes in style. Amendment effective April 21, 2003.

Applicability: Section 6(2), Ch. 464, L. 2003, provided that this section applies to injuries that occur on or after April 21, 2003.

1987 Amendment: Substituted section (see 1987 Session Law for text) for former section that read: "In the event an insurer denies liability for a claim for compensation or terminates compensation benefits and the claim is later adjudged compensable by the workers' compensation judge or on appeal, the insurer shall pay reasonable costs and attorneys' fees as established by the workers' compensation judge."

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

No Attorney Fees or Penalty When Claimant Fails to Prevail: A claim must be adjudged compensable in order for a claimant to be entitled to attorney fees under 39-71-611 or the 20% penalty under 39-71-2907. Ford v. Sentry Cas. Co., 2012 MT 156, 365 Mont. 405, 282 P.3d 687.

Aggravation of Unknown Preexisting Condition by Industrial Accident — Burden of Proof of Causality Satisfied — Attorney Fees, Costs, and Statutory Penalty Affirmed: Narum injured his hip in an industrial accident and filed a workers' compensation claim. Defendant insurer accepted liability and began paying benefits. Although Narum had never experienced hip pain prior to the accident, medical examination revealed the existence of a degenerative joint disease in the hip. The insurer's examining physician opined that the degenerative condition was aggravated by the accident and that the injury was not connected to the workers' compensation claim because it was more than likely a preexisting condition that was exacerbated by work. The insurer continued making payments until Narum was determined to have reached maximum medical improvement based on an 8% impairment. The parties then negotiated a settlement, which provided $25,000 and allowed Narum to reserve medical benefits because possible hip surgery was anticipated. Narum later underwent hip surgery, but the insurer refused any subsequent payments, so Narum filed a workers' compensation claim seeking medical and hospital benefits, attorney fees and costs, and a statutory penalty based on the insurer's refusal to pay benefits. The Workers' Compensation Court found that the insurer was bound by the settlement to pay medical and hospital costs and that Narum was entitled to attorney fees and costs and a statutory penalty award based on the insurer's unreasonable refusal to pay benefits. The insurer appealed, but the Supreme Court affirmed on all issues. Narum met the burden of proof in this case by showing that the injury was established by objective medical findings and that it was more probable than not that the claimed injury aggravated a preexisting condition, causing the need for the hip surgery and for other treatment before and after the surgery. An award of attorney fees and costs was affirmed because the insurer denied liability for a claim that was later judged compensable, and the insurer's actions in denying liability were unreasonable in that the insurer originally agreed to pay for the hip surgery in the settlement and then denied liability and suddenly stopped paying benefits for treatment, without notice, after initially accepting liability for Narum's condition. Lastly, a statutory penalty was warranted based on the substantial credible evidence of unreasonableness. Narum v. Liberty NW. Ins. Corp., 2009 MT 127, 350 M 252, 206 P3d 964 (2009), distinguished in Stewart v. Liberty NW. Ins. Corp., 2013 MT 107, 370 Mont. 19, 299 P.3d 820. See also Best v. St. Comp. Ins. Fund, 276 M 302, 916 P2d 108 (1996).

No Authority of Workers' Compensation Court to Grant Attorney Fees and Costs Pursuant to Improper Declaratory Judgment: When the Workers' Compensation Court improperly issued a declaratory judgment in a case that did not involve a dispute concerning benefits, the court did not have authority to then award attorney fees and costs pursuant to 27-8-311. Thompson v. St., 2007 MT 185, 338 M 511, 167 P3d 867 (2007).

Costs and Fees on Denied Claim Later Held Compensable: Attorney fees and costs are payable only on denial of a claim or termination of benefits later found to be compensable. Simms v. St. Comp. Ins. Fund, 2005 MT 175, 327 M 511, 116 P3d 773 (2005).

Award of Attorney Fees at Variance With Contingency Agreement Permissible—Constitutionality of Workers' Compensation Hourly Attorney Fee Rule: Bustell entered a contingency fee agreement with the attorney handling her workers' compensation claim. Bustell's claim was found to be compensable, and the Workers' Compensation Court held that Bustell was entitled to attorney fees. However, the court awarded fees based on the hourly attorney fee provisions in 39-71-614 rather than on the contingent fee agreement. On appeal, Bustell contended that the hourly fee rule violated due process by failing to protect a claimant's net benefits, particularly claimants who enter a contingency fee agreement, and by shifting the burden of paying attorney fees from the insurer to the claimant. Bustell also asserted that the rule violated equal protection by preventing her from seeking reasonable attorney fees as compared to other similarly situated claimants. Section 39-71-614 was enacted in response to the holding in Wight v. Hughes Livestock, Inc., 204 M 98, 664 P2d 303 (1983), which created a strong presumption in favor of the reasonableness of a contingent fee contract, and the section was intended to eliminate any question that the basis for determining attorney fees would be an hourly fee to be determined in the judge's discretion. Bustell failed to overcome the presumption of constitutionality, and the Workers' Compensation Court correctly found no due process violation. Bustell's equal protection claim also failed. There are not two legitimate classes for an equal protection challenge because every claimant is treated equally under the statutes. The amount of fees awarded is not relevant to any discriminatory treatment of the claimants themselves. Bustell v. AIG Claims Serv., Inc., 2004 MT 362, 324 M 478, 105 P3d 286 (2004).

Increase in Attorney Fee Based on Administrative Factors Proper: The Workers' Compensation Court held that an attorney fee should be based on the hourly rate in 39-71-614 rather than on a contingent fee contract with the claimant. The statute requires payment either at the attorney's usual and customary rate or at $75 an hour. The attorney conducted all business on a contingency basis and thus did not have a customary rate, but submitted that the hourly award should be $225. The court found that good cause existed under ARM 24.29.3802 to increase the fee to $140 an hour. The Supreme Court held that because the attorney's work met the administrative factors, the $140 an hour fee was reasonable under the statutory scheme and affirmed the award. Bustell v. AIG Claims Serv., Inc., 2004 MT 362, 324 M 478, 105 P3d 286 (2004).

Denial of Attorney Fees and Penalty Proper: Correspondence from a doctor created an issue with regard to petitioner's physical complaints. Therefore, it was not unreasonable for the insurer to rely on that information as a basis for termination of benefits. The Workers' Compensation Court did not err in its denial of attorney fees and a 20% penalty. Satterlee v. Lumbermen's Mut. Cas. Co., 280 M 85, 929 P2d 212, 53 St. Rep. 1310 (1996).

Employer Investigation of Injury — No Duty to Ignore Statements Employee Made While in Pain: A self-insured employer's duty to reasonably investigate and evaluate a claim would not be expanded by the court to require the employer to ignore the employee's initial statements to his supervisors and to doctors or to ignore the doctors' reports, on the basis that at the time of the employee's statements to the supervisors and doctors, he was, allegedly, in agonizing pain. Marcott v. La. Pac. Corp., 275 M 197, 911 P2d 1129, 53 St. Rep. 106 (1996).

Employer Investigation of Injury — No Duty to Try to Uncover Facts Conflicting With Initial Statements of Employee: A self-insured employer's duty to reasonably investigate and evaluate a claim would not be expanded by the court to require the employer to ask the employee followup questions to attempt to uncover any facts additional to or different from those that the employee initially provided. Marcott v. La. Pac. Corp., 275 M 197, 911 P2d 1129, 53 St. Rep. 106 (1996).

Leg Injury Occurring While Walking — Reasonableness of Denial of Claim: At the time that a torn leg muscle injury occurred, the employee told several supervisors and several examining doctors that it occurred while he was merely walking. The employer denied compensation on this basis and after obtaining legal advice. More than a month later, a letter from the employee's attorney, stating that the injury occurred when the employee turned sharply while walking quickly, caused the employer to reevaluate its denial. The employer again denied compensation, saying that a factual dispute requiring resolution by the Workers' Compensation Court had arisen as to the circumstances surrounding the injury and as to the employee's credibility. Substantial evidence supported that court's determination that the employer's denial of compensation based on the existence of a factual dispute was reasonable. That court's further decision, that the employer was not unreasonable in the employer's interpretation of the law as allowing the employer to claim that the injury was not compensable, was supported by the case law, a reading of which did not clearly show that there was no genuine doubt of compensability from a legal standpoint. Marcott v. La. Pac. Corp., 275 M 197, 911 P2d 1129, 53 St. Rep. 106 (1996).

No Duty to Accept Claim Merely Because One Doctor for Employee Says Injury Is Work-Related When Substantial Prior Evidence Shows It Is Not: The employer did not have a legal duty to accept a claim and pay compensation as of the time that the employer received from one of the employee's doctors an indication that the injury was work-related. Prior to that, the employer had received numerous indications from the employee and his doctors that the injury was not compensable, raising a genuine doubt over liability. Marcott v. La. Pac. Corp., 275 M 197, 911 P2d 1129, 53 St. Rep. 106 (1996).

Award of Costs and Attorney Fees Proper: When the Workers' Compensation Court did not err in finding that the employee was entitled to benefits, substantial credible evidence supported the conclusion that denial of benefits was unreasonable and that the employee was entitled to costs and attorney fees. Ingbretson v. Louisiana-Pacific Corp., 272 M 294, 900 P2d 912, 52 St. Rep. 764 (1995).

Section Not Applicable to Uninsured Employer: Plaintiff filed a claim for on-the-job injuries, and defendant was determined to be an uninsured employer. Plaintiff's claim benefits were paid by the uninsured employers' fund, and defendant was assessed a penalty. The court denied plaintiff's claim for attorney fees, and plaintiff appealed. The Supreme Court held that this section applies only to insurers, and plaintiff was not entitled to attorney fees under this statute. Clarke v. Massey, 271 M 412, 897 P2d 1085, 52 St. Rep. 538 (1995).

Lack of Minimal Review and Evaluation of Validity of Claim as Unreasonable Conduct — Award of Fees Warranted: The Workers' Compensation Court held that a claimant's benefits were improperly terminated, but declined to award penalty fees and attorney fees to claimant. Issues of penalty and attorney fees must be decided based upon a determination of whether the insurer was unreasonable in terminating benefits. An insurer has a duty to make at least a minimal investigation of a claim's validity. Absent an investigation, denial of a claim for benefits is unreasonable. The failure to provide even a minimal review and evaluation once investigations are completed rises to the level of unreasonable conduct by State Fund, and the award of penalty fees and attorney fees is warranted. Stevens v. St. Comp. Mut. Ins. Fund, 268 M 460, 886 P2d 962, 51 St. Rep. 1396 (1994). See also Gaumer v. Dept. of Highways, 243 M 414, 795 P2d 77

(1990), Lovell v. St. Comp. Mut. Ins. Fund, 260 M 279, 860 P2d 95 (1993), and Stordalen v. Ricci's Food Farm, 261 M 256, 862 P2d 393 (1993).

Finding of Not Unreasonable Not Amounting to Finding of Reasonable: Workers' compensation claimant who was successful in the Workers' Compensation Court and on appeal requested costs and attorney fees, claiming that State Fund was unreasonable in delaying and in the manner of handling the claim and benefits. The Supreme Court agreed with the lower court's finding that State Fund was not unreasonable but also stated that the finding was not the equivalent to a finding of reasonable conduct, quoting the Workers' Compensation Court's conclusion that "the Court has been hindered throughout this case by the convenient forgetfulness of the parties, disappearance of key bits of evidence and the self-serving testimony by the parties. The Court reaches the conclusion that neither party is credible and both parties have been less than candid with the Court. The present case epitomizes Webster's definition of a dog-and-pony show". Simons v. St. Comp. Mut. Ins. Fund, 262 M 438, 865 P2d 1118, 50 St. Rep. 1628 (1993).

Reasonableness to Include Delay or Refusal of Payment and Manner of Conducting Defense, but Not Difference Between Requested and Granted Amounts: A State Fund defense to a claim is not reasonable merely because State Fund believes it is necessary to defend the claim. Reasonableness also refers to the manner in which the defense is conducted and delay in or refusal to make payments. In addition, reasonableness had nothing to do with the amount of benefits claimant requested, the amount awarded by the Workers' Compensation Court, or whether claimant requested more than was awarded. Simons v. St. Comp. Mut. Ins. Fund, 262 M 438, 865 P2d 1118, 50 St. Rep. 1628 (1993).

Case Remanded for Consideration Pursuant to Statute and for Clarification: The Workers' Compensation Court concluded that Lovell had been incorrectly denied benefits and awarded him attorney fees and costs for that reason. The Supreme Court found that the Workers' Compensation Court had not analyzed the question of attorney fees under this section and applicable case law. The Supreme Court also found that the record was unclear as to whether Lovell had been reimbursed by the State Fund for amounts improperly withheld. Because the case was to be remanded to the Workers' Compensation Court on another issue, the Supreme Court directed the Workers' Compensation Court to readdress the issue of attorney fees. Lovell v. St. Comp. Mut. Ins. Fund, 260 M 279, 860 P2d 95, 50 St. Rep. 1043 (1993).

Insurer Not Unreasonable in Denying Benefits to Widow of Tavern Operator: Loos was killed during the robbery of a bar that he was operating. The insurer argued that Loos was the owner of the bar and because he was a sole proprietor and not an employee, his widow was not entitled to workers' compensation benefits. The Supreme Court affirmed the lower court's finding that although Loos ran the bar, a sale of the bar had never been completed and that because the liquor license was still in Waldo's name, that constituted sufficient control by Waldo over Loos to make Loos an employee and not a sole proprietor. The Supreme Court also held that the insurer had not acted unreasonably in denying benefits because a workers' compensation mediator and a hearings examiner had determined that Loos was not an employee. Loos v. Waldo, 257 M 266, 849 P2d 166, 50 St. Rep. 262 (1993).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Attorney Fees Owing Based on Difference Between Amount of Settlement and Amount of Compensable Benefits Previously Paid: Galetti suffered a compensable back injury in 1983 while employed by Montana Power Company (MPC), and MPC accepted liability for the injury. Following a snowmobile outing in 1994, Galetti suffered a flareup of the back injury. Galetti's medical costs were paid by his health insurance, and Galetti then sought recovery of expenses, including attorney fees, through workers' compensation. MPC offered Galetti a cash amount to settle without accepting liability, but Galetti declined and later filed this action. At a Workers' Compensation Court hearing, MPC accepted liability. The court denied Galetti's request for fees pursuant to this section (1983) because liability was conceded at the commencement of the hearing, so adjudication of the claim was unnecessary. Galetti appealed, asserting error in denial of attorney fees. Pursuant to Allen v. Employers Commercial Union, 246 M 105, 803 P2d 644 (1990), MPC's refusal to pay benefits on grounds that a subsequent injury relieved it of further liability for Galetti's back condition was tantamount to a termination of compensation benefits, so the court correctly concluded that MPC was not liable for attorney fees under this section because the concession of liability at the commencement of the hearing did not amount to an adjudication of compensability. However, that conclusion did not preclude MPC's liability for attorney fees under 39-71-612 (1983). That statute had three elements: (1) an employer or insurer must pay or tender payment of compensation under ch. 71 or 72 of Title 39; (2) there must be a controversy that relates to the amount of compensation due; and (3) the settlement or award must be greater than the amount paid or tendered by the employer or insurer. All three elements were met in this case; thus, the court erred by concluding that Galetti was not entitled to attorney fees. The Supreme Court held that Galetti was entitled to attorney fees based on the difference between the settlement amount and the amount of compensable benefits arising from his back injury that MPC had previously paid, which was equal to the amount of compensable benefits for which MPC conceded liability at the beginning of the workers' compensation hearing. Galetti v. Mont. Power Co., 2000 MT 234, 301 M 314, 8 P3d 812, 57 St. Rep. 971 (2000).

Causation Disputable at Time of Trial — Case Remanded to Workers' Compensation Court for Determination of Statutory Penalty — Fees and Costs Awarded: Briney injured his back in 1981 in a work-related accident but was allowed by his physician to return to work the same year. In the years following the injury, Briney had good days and bad days, was treated by several physicians, and sometimes missed work. In 1993, he underwent unrelated surgery and, because he was inactive for a period of time following surgery, was not able to continue his exercise regimen to strengthen his back. Consequently, his back condition deteriorated and he was unable to return to work after the surgery. After his employer's workers' compensation insurer agreed to pay temporary total disability, Briney sought compensation for a permanent partial disability, but the Workers' Compensation Court Judge denied the claim, holding that Briney's current condition was not caused by the 1981 work-related injury but was caused by multiple injuries or aggravations over the years since 1981. The Supreme Court reversed, pointing to testimony linking Briney's current physical condition to his 1981 injury and relying upon its holding in Walker v. United Parcel Serv., 262 M 450, 865 P2d 1113 (1993), in which the Supreme Court held that once a worker has proved a work-related injury and produces evidence that the injury is the cause of the worker's present condition, the burden shifts to the insurer to prove that the worker's present condition is due to other injuries. Because the Supreme Court found that no such evidence had been presented by the insurer, it held that the Workers' Compensation Court erred in denying benefits. However, the Supreme Court refused to hold that, as a matter of law, causation was indisputable at the time that the trial before the Workers' Compensation Court began and that a penalty should therefore be awarded pursuant to Holton v. F.H. Stoltze Land & Lumber Co., 195 M 263, 637 P2d 10 (1981). The Supreme Court therefore remanded the case to the Workers' Compensation Court to determine whether Briney was entitled to the statutory penalty. However, the Supreme Court did award costs and attorney fees because the insurer denied that Briney's disability was related to his 1981 injury. Briney v. Pac. Employers Ins. Co., 283 M 346, 942 P2d 81, 54 St. Rep. 608 (1997).

Insurer Liable for Fees and Costs When Claim Accepted by Virtue of Statute: Chaney claimed that he was injured in 1983 when he slipped and fell at his employing sawmill, which was then insured by USF&G. Chaney also consulted several physicians between 1989 and 1992 concerning numbness in his hands. In 1992, Chaney had surgery to correct carpal tunnel syndrome. State Fund paid benefits while reserving its rights against Chaney and USF&G, but the Workers' Compensation Court held that Chaney was not entitled to benefits. The Supreme Court reversed and held that Chaney was entitled to benefits because USF&G had not denied the claim within 30 days and had not met its burden of proving maximum healing of the old injury and subsequent reinjury while working for a different employer. The Supreme Court also held that Chaney was entitled to costs and fees under this section because benefits were previously denied but had now been granted on appeal. Chaney v. U.S. Fidelity & Guaranty, 276 M 513, 917 P2d 912, 53 St. Rep. 499 (1996).

Proper Termination of Benefits — Plaintiff Not Entitled to Attorney Fees, Costs, or Penalty: After Beery was injured in a fall from an oil rig in 1984, he was evaluated by a medical panel that concluded that he did not need domiciliary care. CNA Insurance Company, Beery's workers' compensation insurer, reviewed the findings of the panel and terminated coverage for domiciliary care in August of 1991. The Supreme Court found that because CNA had properly terminated domiciliary care benefits, Beery was not entitled to attorney fees, costs, or a penalty. Beery v. Grace Drilling, 260 M 157, 859 P2d 429, 50 St. Rep. 980 (1993).

Medical Benefits Found Payable — Fees and Costs for Medical Benefits Payable: Claimant's medical benefits were found payable, but she was found not to be entitled to disability benefits; therefore, attorney fees and costs associated with litigating the issue of medical benefits, but not the issue of disability benefits, were payable. Weaver v. Buttrey Food & Drug, 255 M 90, 841 P2d 476, 49 St. Rep. 897 (1992).

Claimant Unsuccessful on Appeal — Not Entitled to Costs and Fees: A claimant who is unsuccessful in claims before the Workers' Compensation Court and on appeal before the

Supreme Court is not entitled to costs and attorney fees. Kelly v. St. Comp. Mut. Ins. Fund, 254 M 200, 835 P2d 774, 49 St. Rep. 699 (1992).

Reopening of Claim and Receipt of Further Benefits — Attorney Fees Allowed: A Supreme Court finding that claimant was entitled to reopen his claim and receive further benefits after a final settlement agreement was signed by mutual mistake also entitled claimant to an award of reasonable costs and attorney fees. Wolfe v. Webb, 251 M 217, 824 P2d 240, 49 St. Rep. 1 (1992).

Insurers Not Entitled to Costs and Attorney Fees: The insurer sought reimbursement for costs and attorney fees incurred at a hearing on the basis that the claimant had offered to pay them. The Supreme Court held that insurers are not entitled to costs and attorney fees under the Workers' Compensation Act. Jaenish v. EBI/Orion Group, 248 M 383, 812 P2d 1241, 48 St. Rep. 474 (1991).

Refusal of Employer to Pay Benefits After Date of Second Injury Tantamount to Termination of Benefits: Employer maintained it did not deny the claim for benefits or terminate compensation benefits but merely contested the extent of its obligation to claimant following his second injury. However, the employer paid medical costs and disability benefits up until the date of the second injury, refusing to pay any benefits due after that date, which was tantamount to a termination of compensation benefits sufficient to trigger the award of attorney fees and costs under this section as it read in 1974 when claimant was initially injured. Allen v. Employers Commercial Union, 246 M 105, 803 P2d 644, 47 St. Rep. 2280 (1990).

Attorney Fees Due Claimant When Insurer Withdraws Settlement Offer Prior to Hearing and Argues That Claimant Should Receive Nothing: Prior to the hearing, the insurer offered the claimant approximately $30,000 to settle his claim. The insurer withdrew the offer when the claimant did not accept it within 15 days. At the hearing, the insurer argued that the claimant was entitled to no recovery. The claimant was awarded less than $30,000, and the insurer contended that the claimant was therefore entitled to no attorney fees. The Supreme Court disagreed, stating that when the insurer refuses to acknowledge that the claimant is entitled to anything at the trial, it is irrelevant if the award is less than the original settlement offer and the claimant is entitled to receive attorney fees if he is successful in obtaining a recovery. Carroll v. CNA Ins. Co., 240 M 151, 783 P2d 387, 46 St. Rep. 2014 (1989).

Return of Contingent Attorney Fees Based on Overpayment — Failure of Claimant to Comply With Terms of Award: When an attorney's fees were based solely on a percentage of benefits paid to his client and an order granting benefits specifically stated that the insurer would be credited any overpayment if claimant failed to comply with the order, the Workers' Compensation Court did not err in ordering repayment of attorney fees upon claimant's failure to meet the conditions of the benefits award. Champion Int'l Corp. v. McChesney, 239 M 287, 779 P2d 527, 46 St. Rep. 1689 (1989). See also Reil v. St. Comp. Mut. Ins. Fund, 254 M 274, 837 P2d 1334, 49 St. Rep. 734 (1992).

Failure to Request Evidentiary Hearing or Raise Timely Objection — Issue of Attorney Fees Not Preserved for Appeal: The Supreme Court was precluded from reviewing the correctness of the computation of an award of attorney fees in a workers' compensation case because the defendant failed to either timely object or request an evidentiary hearing contesting the proposed order granting the fees. Defendant contended that there was no bar on appeal because: (1) the lower court abused its discretion; and (2) the plain error doctrine applied. However, the abuse of discretion standard is applied only when the usual requirements of preserving the issue at trial are met. Furthermore, the plain error exception will not be applied when failure or refusal to raise an issue in trial court is conscious and intentional on the part of trial counsel. Martinez v. Mont. Power Co., 239 M 281, 779 P2d 917, 46 St. Rep. 1684 (1989).

Attorney Fees Based on Award in Excess of Those Offered: The claimant argued that he should have received attorney fees based on a finding that benefits had been denied him. The Supreme Court stated that the claimant had asked for permanent disability payments for an alleged new injury and was awarded instead continued partial disability payments for a prior injury. Since he had been receiving some benefits, the attorney fees and costs were properly awarded pursuant to 39-71-612. Sharkey v. Atl. Richfield Co., 238 M 159, 777 P2d 870, 46 St. Rep. 1169 (1989).

Claimant to Be Compensable — Success Not Issue: A claimant need only be adjudged compensable by the Workers' Compensation Judge or on appeal in order to recover reasonable costs and attorney fees. Counsel for the insurance company was in error with the novel argument that because the claimant was not compensated the $73,250 he requested but was only awarded $36,625, he ended up receiving an amount that was mathematically closer to the $5,000 made as a settlement offer by the insurer than the $73,250 originally requested, and therefore he was not successful and was not entitled to attorney fees. Hartman v. Nat'l Union Fire Ins., 236 M 141, 768 P2d 1380, 46 St. Rep. 248 (1989), followed in Ness v. Anaconda Minerals Co., 257 M 335, 849 P2d 1021, 50 St. Rep. 296 (1993).

Fees Not Granted to Insurance Companies: Liberty Mutual Insurance Company (Liberty) and the State Compensation Insurance Fund (State Fund) were named as defendants in an action involving an injured worker. State Fund was found to be liable for benefits to the worker, and Liberty moved for payment of its attorney fees by State Fund, alleging that its costs went to defending allegations by State Fund that Liberty was the insurer at risk. Although this section has undergone numerous revisions since passage in 1973, the purpose of the section remains intact. Attorney fees were meant to be provided to the claimant only (to ensure that the worker receives the full amount of available benefits), not to the defending insurance companies. Liberty Mut. Ins. Co. v. Evans Transfer & Storage, 234 M 209, 766 P2d 220, 45 St. Rep. 1848 (1988), distinguishing Belton v. Carlson Transp., 202 M 384, 658 P2d 405 (1983), and overruling Guild v. Rockwood Ins. Co., 229 M 466, 747 P2d 217, 44 St. Rep. 2139 (1987), with respect to payment of attorney fees to a losing insurance company in a dispute between insurers.

Award of Attorney Fees on Subsequent Disability Hearing When Claimant Prevails: Claimant was awarded temporary total disability benefits plus attorney fees pursuant to this section. He later went to hearing again to determine his entitlement to increased partial disability payments and domiciliary care payments, both of which were disputed by the insurer. Claimant was found to be entitled to both payments, but an amount could not be determined. He later settled for an increase based on a court-suggested formula, and sought attorney fees. The new round of litigation did not fall under this section because the insurer did not deny liability but rather disputed the amount owed; therefore, 39-71-612 applied. Employer settled for more than the amount being paid prior to the hearing, so attorney fees were proper. Lamb v. Universal Ins. Co., 230 M 183, 748 P2d 965, 45 St. Rep 127 (1988).

Claim Adjudged Compensable — Attorney Fees Proper: The state fund denied a claim for benefits that was later adjudged compensable by the Workers' Compensation Court and the Supreme Court. This fit the statutory prerequisite providing for reasonable attorney fees. Milender v. Carpenter, 230 M 1, 748 P2d 932, 44 St. Rep. 2204 (1987).

Discounting Costs Unrelated to Issues of Insurer's Liability: Claimant hired an economist to discount attorney fees to present value. However, the Workers' Compensation Court decided to deny a lump-sum request, negating the need for the present value calculations, and the discounted fee was neither presented nor considered. Thus, in assessing insurer's liability, the court properly concluded that the discounting costs were unrelated to the issues. Davis v. Jones, 229 M 158, 745 P2d 362, 44 St. Rep. 1859 (1987).

Refusal of Award of Lump-Sum Attorney Fees Based on Projected Benefits — No Abuse of Discretion: The lower court did not abuse its discretion in refusing to award lump-sum attorney fees where claimant's counsel sought immediate contingent fees for benefits that would possibly be paid for 44 years since benefits would cease if claimant died or remarried and since a contingency fee agreement limited attorney fees to 33% of benefits received, benefits being paid on a biweekly rather than lump-sum basis. Swan v. Sletten Constr. Co., 223 M 477, 726 P2d 1170, 43 St. Rep. 1926 (1986), followed in Davis v. Jones, 229 M 158, 745 P2d 362, 44 St. Rep. 1859 (1987). See also Wood v. St. Comp. Ins. Fund, 236 M 353, 769 P2d 1264, 46 St. Rep. 419 (1989).

Insurer Denial of Liability or Benefit Termination Required: A claimant is not entitled to attorney fees and costs under this section unless the insurer has denied liability for a claim or terminated benefits. Lasar v. St. Comp. Ins. Fund, 222 M 251, 721 P2d 352, 43 St. Rep. 1239 (1986), followed in Leikam v. Edson Express, 228 M 66, 740 P2d 1130, 44 St. Rep. 1347 (1987).

When Attorney Fees Denied: Attorney fees in workers' compensation cases are recoverable under this section when an insurer denies liability for a claim for compensation or terminates compensation benefits and the claimant is later adjudged compensable by the Workers' Compensation Judge or on appeal. In this case, the employer accepted liability for the claim, and the claimant was paid $41,269 temporary disability, $198 a week permanent disability, and $4,639 medical. Since liability was not denied, compensation benefits were not terminated, and attorney fees incurred in the claim against the third-party insurer were included in the computations in that judgment, the denial of attorney fees in this appeal was proper. Elwell v. Am. Smelting & Ref., Inc., 219 M 248, 711 P2d 819, 42 St. Rep. 1992 (1985).

Reasonable Attorney Fees — Sufficient Evidence to Support Award: Workers' Compensation Court did not err in awarding lump-sum attorney fees when claimant received periodic disability payments. The Workers' Compensation Court's authority to set a "reasonable" fee includes the power to set the kind of fee awarded. The Workers' Compensation Court did not err in relying on claimant's expert's calculations of the present value of the award even though the calculations lacked a proper foundation under strict evidence law. Conway v. Blackfeet Indian Dev., Inc., 217 M 54, 702 P2d 970, 42 St. Rep. 1020 (1985).

Hearing on Request for Attorney Fees: The Workers' Compensation Court determined claimant's award and ordered his counsel to submit a request for costs and attorney fees. After the submission, the employer objected to any attorney fee award in excess of the contingent fee agreement, and the objection was successful. It was not reversible error to enter the attorney fee order without giving claimant at least 5 days to respond to the objection. There was no rule requirement on the matter, and under Sorenson v. Drilcon, Inc., 204 M 258, 664 P2d 320, 40 St. Rep. 829 (1983), claimant could have requested an evidentiary hearing on the matter, even after the order granting the attorney fee. However, the case was remanded for a hearing on what the fee should be, taking into account the factors in Wight v. Hughes Livestock, Inc., 204 M 98, 664 P2d 303, 40 St. Rep. 696 (1983), with claimant having the primary obligation to present evidence from which the court could set the fee. McDanold v. B.N. Transp., Inc., 216 M 447, 701 P2d 1001, 42 St. Rep. 940 (1985).

Refusal to Hold Hearing on Attorney Fees as Abuse of Discretion — Questions of Fact Presented: Where the claimant brought a successful claim for compensation, requesting $3,491.52 in costs and $11,372 in attorney fees, and the Workers' Compensation Court awarded $2,951.53 in costs and $5,750 for attorney fees without holding a hearing and denied a hearing on or reconsideration of the order, the Supreme Court held that the Workers' Compensation Court abused its discretion to deny a hearing on the issue of costs and attorney fees. The record showed that a factual dispute existed as to whether opposing counsel had agreed to the fees sought by the claimant. While the court has discretion under Cont. Ins. Co. v. Horton, 188 M 341, 613 P2d 1011 (1980), to deny a hearing, the factual issues presented by this case could be resolved only by an evidentiary hearing. Thus, the hearing should not have been denied. Sorenson v. Drilcon, Inc., 204 M 258, 664 P2d 320, 40 St. Rep. 829 (1983).

Basis for Reasonable Attorney Fees — Factors: Plaintiff entered into a 25% contingent fee arrangement with his attorney in a workers' compensation case. After successful appeal to the Supreme Court, the plaintiff and attorney entered a 40% contingent fee agreement. On remand to consider proper fees, the Workers' Compensation Judge asked for a detailed statement and number of hours from the attorney. The attorney said he did not keep such records in contingent fee cases. The judge awarded a much lower percentage fee, and the case was appealed to the Supreme Court. The court restated its "net recovery" rule from Myers v. 4-B's Restaurant, Inc., 172 M 159, 561 P2d 1331 (1977), saying attorney fees are to be above and beyond the compensation awarded to a successful claimant. The court noted that the Workers' Compensation Judge may set reasonable attorney fees and that administrative rules adopted specifically approve such arrangements. A reason for this is the "risk factor" that attorneys face whereby they may not receive any compensation. The factors to be considered are: (1) anticipated time and labor; (2) novelty and difficulty of the issues; (3) fee customarily charged; (4) possible total recovery; (5) time limitations; (6) nature and length of attorney-client relationship; (7) experience, skill, and reputation of the attorney; (8) client's ability to pay; and (9) market value of the lawyer's services. The court remanded for consideration of those factors. Wight v. Hughes Livestock Co., Inc., 204 M 98, 664 P2d 303, 40 St. Rep. 696 (1983), partially overruling Cont. Ins. Co. v. Horton, 188 M 341, 613 P2d 1011, 37 St. Rep. 1244 (1980), followed, as to the factors to be considered in determining the fee, in McDanold v. B.N. Transp., Inc., 216 M 447, 701 P2d 1001, 42 St. Rep. 940 (1985), Davis v. Jones, 229 M 158, 745 P2d 362, 44 St. Rep. 1859 (1987), and in Worts v. Hardy Constr. Co., 249 M 477, 817 P2d 231, 48 St. Rep. 800 (1991).

Proper Section Where Claim Denied in Part: Where insurer did not dispute a claim for compensation but did dispute amount of compensation due, arguing initially that claimant's condition was temporary rather than permanent, attorney's fees and costs to the successful claimant are properly awarded under 39-71-612 rather than this section. Krause v. Sears Roebuck & Co., 197 M 102, 641 P2d 458, 39 St. Rep. 394 (1982), distinguished in Komeotis v. St. Comp. Ins. Fund, 232 M 340, 756 P2d 1153, 45 St. Rep. 1098 (1988).

Benefits Improperly Terminated — Penalty and Fees Awarded: Plaintiff was injured when a refrigerator he was lifting fell and smashed his hand and wrist. Plaintiff received temporary total benefits from December 7, 1976, until terminated on May 2, 1979. Plaintiff had heart surgery in 1977. In 1979 defendant terminated plaintiff's benefits claiming that he had no permanent disability from the accident and that his medical problems were nonindustrially related. The Workers' Compensation Court found that plaintiff's benefits were improperly terminated. The letter to plaintiff terminating his benefits was not supported by medical evidence. The Workers' Compensation Court properly awarded plaintiff a penalty amount of 20% and attorney fees because his benefits were improperly terminated. Novak v. Montgomery Ward & Co., Inc., 195 M 219, 638 P2d 390, 38 St. Rep. 1803 (1981).

Denial of Subsequent Claim After Grant of Initial Claim: Where an injured employee claimed benefits and the insurer paid them, stopping the benefits when employee returned to work, and some 2 years later the employee claimed he had been totally and permanently disabled as a result of the accident, and the insurer disputed the claim, refused to pay benefits, and went to hearing on the matter and lost, the insurer had denied liability for a claim later adjudged compensable, within the meaning of this section, and the award of attorney fees to claimant was proper. Wight v. Hughes Livestock Co., Inc., 194 M 109, 634 P2d 1189, 38 St. Rep. 1632 (1981).

Attorneys' Fees a Matter of Discretion: The failure of a Workers' Compensation Judge to provide a hearing on a determination of attorneys' fees pursuant to this section is not per se an abuse of discretion. This section, as amended, does not require an evidentiary hearing to determine attorneys' fees in workers' compensation cases. Rather, the method used to fix attorneys' fees is discretionary with the Workers' Compensation Judge, and the matter of allowing a hearing concerning attorneys' fees is also discretionary. Cont. Ins. Co. v. Horton, 188 M 341, 613 P2d 1011, 37 St. Rep. 1244 (1980).

Suspension of Compensation — Attorney Fees: An award of attorney fees pursuant to this section was proper since appellant was not justified in suspending compensation to obtain medical testimony, such suspension being applicable only when the insurer is having difficulty receiving medical information and after following procedural prerequisites. Furthermore, it is unnecessary to introduce evidence per se of attorney fees in a workers' compensation case, as the procedure entails submission of a verified petition to the Division (now Department of Labor and Industry), setting forth the number of hours spent and services performed. Smith v. Pac. Ins. Co., 177 M 267, 581 P2d 834 (1978).

Penalty: This section is meant to penalize an insurer which cavalierly terminates a claimant's benefits without prior approval of the Workers' Compensation Court. However, an insurer is entitled to rely on the opinion of the Workers' Compensation Court, and need not bear the costs of an appeal when the court found the claimant was no longer entitled to benefits and the finding was reversed on appeal. Schumacher v. Employers Mut. Liab. Ins. Co., 175 M 411, 574 P2d 987 (1977).

When Adjudged Total Rather Than Partial Disability: When the Workers' Compensation Court adjudges that total disability benefits are due rather than the partial benefits being paid by the insurer, this section authorizes an award of attorney fees against the insurer. Myers v. 4 B's Restaurants, Inc., 172 M 159, 561 P2d 1331 (1977).

Adjudication Required: Under this section there must be an adjudication of the claim as compensable before attorney fees will be assessed against the insurer. Cosgrove v. Indus. Indem. Co., 170 M 249, 552 P2d 622 (1976), followed in McNeel v. Holy Rosary Hosp., 228 M 424, 742 P2d 1020, 44 St. Rep. 1649 (1987), and in Leikam v. Edson Express, 228 M 66, 740 P2d 1130, 44 St. Rep. 1347 (1987), where the parties settled their compensation dispute before the trial date, vacating the trial. This is true even though the insurer would not have accepted liability but for the efforts of the worker's attorney, and liability was not accepted until the commencement of the trial. This section is clear on its face, and the equitable arguments in the worker's favor must be presented to the Legislature. Yearout v. St. Comp. Ins. Fund, 222 M 65, 719 P2d 1258, 43 St. Rep. 1063 (1986).

Constitutionality: This section does not violate the Equal Protection Clause of the United States and Montana Constitutions by allowing costs and attorneys' fees to successful claimants but not to successful insurers because the classification adopted by the Legislature is reasonable. McMillen v. Arthur G. McKee & Co., 166 M 400, 533 P2d 1095 (1975).

Insurer: The term "insurer" used in this section refers to every insurer under any one of the three plans for payment of benefits, and includes employers who are their own insurers under plan I. McMillen v. Arthur G. McKee & Co., 166 M 400, 533 P2d 1095 (1975).

39-71-612. Costs and attorney fees that may be assessed against insurer by workers' compensation judge — barring of attorney fees under common fund or other doctrines.

Compiler's Comments

2005 Amendment: Chapter 416 in (1) near beginning after "compensation under" substituted "this chapter" for "chapter 71 or 72 of this title". Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

2003 Amendment: Chapter 464 inserted (4) barring attorney fees under common fund and other doctrines; and made minor changes in style. Amendment effective April 21, 2003.

Applicability: Section 6(2), Ch. 464, L. 2003, provided that this section applies to injuries that occur on or after April 21, 2003.

1987 Amendment: In (1), in two places before "insurer", deleted references to employer, near beginning substituted "submits a written offer of" for "tenders", near middle substituted "offered" for "tendered", and after "attorney's fee" inserted "and costs"; deleted former (2) that read: "(2) When an attorney's fee is awarded against an employer or insurer under this section there may be further assessed against the employer or insurer reasonable costs, fees, and mileage for necessary witnesses attending a hearing on the claimant's behalf. Both the necessity for the witness and the reasonableness of the fees must be approved by the workers' compensation judge"; inserted (2) allowing attorneys' fees only if insurer's actions were unreasonable and providing that written payment offer made 30 days or more before hearing is considered a valid offer; and inserted (3) providing that a finding of unreasonableness does not constitute bad faith or violation of unfair trade practices provisions.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Denial of Payment for Medicine for Stress Based on Doctor's Statement That Stress Was Caused by Injury and by Proceedings in Case: A State Fund claims examiner's investigation into a doctor's prescription of medicine for exacerbated gastroesophageal reflux consisted solely of her reading of the doctor's notes, which stated that the exacerbation was caused by stress connected to her injury, subsequent problems, trial of the case, rehabilitation, and other matters connected to the case. She then denied payment for the medication. At least a minimal investigation of a claim's validity is necessary for denial to be reasonable. The payment was properly denied because there was evidence in the doctor's notes to support a reasonably debatable argument that the need for the medicine arose from the trial and matters associated with it, not from the injury itself. Therefore, the worker was not entitled to penalties or attorney fees for denial of the payment. S.L.H. v. St. Comp. Mut. Ins. Fund, 2000 MT 362, 303 M 364, 15 P3d 948, 57 St. Rep. 1543 (2000).

Insurer That Settles on Courthouse Steps Need Not Pay Worker's Attorney Fees: Because the Legislature amended this section in 1987 by deleting language that allowed an award for attorney fees when an insurer settles "on the courthouse steps", the court declined to rule, that as a matter of policy, an insurer who settles on the courthouse steps can be ordered to pay a worker's attorney fees. S.L.H. v. St. Comp. Mut. Ins. Fund, 2000 MT 362, 303 M 364, 15 P3d 948, 57 St. Rep. 1543 (2000).

Penalty, Award of Attorney Fees, or Sanction for Settling on Courthouse Steps: State Fund, without investigating and with no factual or legal basis, claimed a $50,000 subrogation right during a 6-month period, taking the position that it was the worker's burden to prove that there was no subrogation right. A week before trial, State Fund conceded the issue. The lower court's holding that a claim for subrogation as to benefits already paid does not constitute benefits due and cannot give rise to penalties or attorney fees under 39-71-2907 or this section was proper. "Benefits" and "compensation" do not include subrogation, and a judge awards no benefits or compensation in deciding a subrogation claim. The Supreme Court agreed with the lower court's opinion that State Fund's actions were worthy of sanctions. Section 39-71-2914 allows imposition of a sanction in a case such as this, and although the worker did not request a sanction, the lower court should have imposed one on its own initiative. However, because the worker did not raise the issue on appeal, the Supreme Court did not remand for imposition of a sanction. S.L.H. v. St. Comp. Mut. Ins. Fund, 2000 MT 362, 303 M 364, 15 P3d 948, 57 St. Rep. 1543 (2000).

Statute Not Applicable to Workers' Compensation Cases: Kloepfer appealed the Workers' Compensation Court's denial of her claim for $750 as cost for an expert medical witness. The Supreme Court held that 25-10-201 does not apply to workers' compensation cases and that Kloepfer was entitled to recover her costs. Kloepfer v. Lumbermens Mut. Cas. Co., 272 M 78, 899 P2d 1081, 52 St. Rep. 663 (1995), overruling, as to the applicability of 25-10-201 to workers' compensation cases, Baeta v. Don Tripp Trucking, 254 M 487, 839 P2d 566 (1992), and Stevens v. St. Fund, 268 M 460, 886 P2d 962 (1994).

Loss of Part of Toe, Fracture of Another, and Resultant Sensitivity to Cold as Permanent Partial Disability — Justifiable Dispute as to Benefits: The insurer did not act unreasonably in denying permanent partial disability benefits. Therefore, the court properly denied claimant legal fees and a 20% penalty. There was a valid factual dispute and a valid question of legal interpretation of the pertinent statute. Claimant lost part of his fifth toe and had a fracture of his largest toe. Cold temperatures caused the foot and toes to ache. He was given an impairment rating of 1% of the whole man. The treating doctor's treatment notes did not indicate impairment of work, and the doctor's deposition was not clear on the issue. Claimant and the insurer disagreed on whether there was work impairment, and the Workers' Compensation Court found impairment. The pertinent statute had been amended in 1991 to provide that a claimant was not entitled to permanent partial disability benefits unless the medically determined physical restriction impaired the claimant's ability to work. Claimant's interpretation of the statute was justifiably disputed by the insurer, and there was no case law to aid in interpretation. Williams v. Plum Creek Timber Co., 270 M 209, 891 P2d 502, 52 St. Rep. 148 (1995).

Court Agreement With Amount Awarded by State Fund — Attorney Fees Improper: When the Workers' Compensation Court agrees with the award calculated by State Fund, an award of attorney fees is inappropriate. David v. St. Comp. Mut. Ins. Fund, 267 M 435, 884 P2d 778, 51 St. Rep. 1105 (1994).

Finding of Not Unreasonable Not Amounting to Finding of Reasonable: Workers' compensation claimant who was successful in the Workers' Compensation Court and on appeal requested costs and attorney fees, claiming that State Fund was unreasonable in delaying and in the manner of handling the claim and benefits. The Supreme Court agreed with the lower court's finding that State Fund was not unreasonable but also stated that the finding was not the equivalent to a finding of reasonable conduct, quoting the Workers' Compensation Court's conclusion that "the Court has been hindered throughout this case by the convenient forgetfulness of the parties, disappearance of key bits of evidence and the self-serving testimony by the parties. The Court reaches the conclusion that neither party is credible and both parties have been less than candid with the Court. The present case epitomizes Webster's definition of a dog-and-pony show". Simons v. St. Comp. Mut. Ins. Fund, 262 M 438, 865 P2d 1118, 50 St. Rep. 1628 (1993).

Reasonableness to Include Delay or Refusal of Payment and Manner of Conducting Defense, but Not Difference Between Requested and Granted Amounts: A State Fund defense to a claim is not reasonable merely because State Fund believes it is necessary to defend the claim. Reasonableness also refers to the manner in which the defense is conducted and delay in or refusal to make payments. In addition, reasonableness had nothing to do with the amount of benefits claimant requested, the amount awarded by the Workers' Compensation Court, or whether claimant requested more than was awarded. Simons v. St. Comp. Mut. Ins. Fund, 262 M 438, 865 P2d 1118, 50 St. Rep. 1628 (1993).

Attorney Fees and Penalty to Be Imposed if State Fund Acted Unreasonably: The Workers' Compensation Court found that the State Fund acted unreasonably in denying Stordalen's request for a consultive examination but determined that Stordalen was not entitled to receive a penalty or attorney fees. The Supreme Court held that the Workers' Compensation Court should make an award when it determines that the State Fund acted unreasonably. Stordalen v. St. Comp. Mut. Ins. Fund, 261 M 256, 862 P2d 393, 50 St. Rep. 1311 (1993), followed in Robertson v. Aero Power-Vac, Inc., 272 M 85, 899 P2d 1078, 52 St. Rep. 673 (1995).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Attorney Fees Owing Based on Difference Between Amount of Settlement and Amount of Compensable Benefits Previously Paid: Galetti suffered a compensable back injury in 1983 while employed by Montana Power Company (MPC), and MPC accepted liability for the injury. Following a snowmobile outing in 1994, Galetti suffered a flareup of the back injury. Galetti's medical costs were paid by his health insurance, and Galetti then sought recovery of expenses, including attorney fees, through workers' compensation. MPC offered Galetti a cash amount to settle without accepting liability, but Galetti declined and later filed this action. At a Workers' Compensation Court hearing, MPC accepted liability. The court denied Galetti's request for fees pursuant to 39-71-611 (1983) because liability was conceded at the commencement of the hearing, so adjudication of the claim was unnecessary. Galetti appealed, asserting error in denial of attorney fees. Pursuant to Allen v. Employers Commercial Union, 246 M 105, 803 P2d 644 (1990), MPC's refusal to pay benefits on grounds that a subsequent injury relieved it of further liability for Galetti's back condition was tantamount to a termination of compensation benefits, so the court correctly concluded that MPC was not liable for attorney fees under 39-71-611 because the concession of liability at the commencement of the hearing did not amount to an adjudication of compensability. However, that conclusion did not preclude MPC's liability for attorney fees under this section (1983). That statute had three elements: (1) an employer or insurer must pay or tender payment of compensation under ch. 71 or 72 (now repealed) of Title 39; (2) there must be a controversy that relates to the amount of compensation due; and (3) the settlement or award must be greater than the amount paid or tendered by the employer or insurer. All three elements were met in this case; thus, the court erred by concluding that Galetti was not entitled to attorney fees. The Supreme Court held that Galetti was entitled to attorney fees based on the difference between the settlement amount and the amount of compensable benefits arising from his back injury that MPC had previously paid, which was equal to the amount of compensable benefits for which MPC conceded liability at the beginning of the workers' compensation hearing. Galetti v. Mont. Power Co., 2000 MT 234, 301 M 314, 8 P3d 812, 57 St. Rep. 971 (2000).

Entitlement to Attorney Fees After Settlement — Field, Komeotis, and Lasar Overruled — Existence of "Controversy" — Mandatory Payment of Fees: Madill was injured when he slipped at a construction site in 1979. Madill sought benefits from the State Fund for a permanent total disability, which Madill eventually received, and payment of his costs and attorney fees. Applying the statute in effect on the date of Madill's injury, the Supreme Court overruled Lasar v. E.H. Oftedal & Sons, 222 M 251, 721 P2d 352 (1986), Komeotis v. Williamson Fencing, 232 M 340, 756 P2d 1153 (1988), and Field v. Sears, Roebuck & Co., 257 M 81, 847 P2d 306 (1993), and held that the plain language of the 1979 version of the statute required that if the "settlement" of claims by the injured worker is greater than the amount paid or tendered by the employer's insurer, the claimant is entitled to costs and fees and that the award of costs and fees is mandatory in that situation. The Supreme Court also held that the Workers' Compensation Court erred when it held, as a prerequisite for the award of costs and fees under the 1979 statute, that there was no "controversy" over the amount to be paid because the State Fund had insufficient information to make the determination. The Supreme Court noted that the parties resolved three separate controversies over the amount of benefits due Madill: the nature and duration of Madill's total disability, whether Madill was entitled to a lump-sum advance, and whether the benefits could be converted to a lump-sum discounted to present value. The Supreme Court also noted that the State Fund had no more information once it did award benefits for permanent total disability than when it claimed it had insufficient information. Further, the Supreme Court overruled the Workers' Compensation Court when that court concluded that Madill was not entitled to costs and fees because he eventually settled for less than his original demand. The Supreme Court noted that it had previously held in McKinley v. Am. Dental Mfg. Co., 232 M 92, 754 P2d 831 (1988), that under the statute, payment of fees is not conditioned upon the amount demanded by the claimant but upon recovery of an amount by settlement greater than an amount originally paid or tendered by the insurer. Madill v. St. Comp. Ins. Fund, 280 M 450, 930 P2d 665, 54 St. Rep. 4 (1997).

Attorney Fees for Litigating Fees Issue Not Governed by This Section: Baeta injured his shoulder and was eventually compensated $46,825 from the State Fund. His attorney, Palmer, claimed fees in the amount of $20,566 (205.66 hours at $100 per hour) and $4033.23 for costs. The State Fund offered to settle the matter of fees and costs for $16,500, which Baeta refused. The Workers' Compensation Court awarded fees in the amount of $12,500 and $3,805.59, respectively. The Supreme Court held that the award of fees for litigating the fees and costs issue was not governed by the terms "tender" and "offer", as discussed in Hilbig v. Cent. Glass Co., 249 M 396, 816 P2d 1037 (1991), because that language applies to the tender of compensation due and not to fees. The award of fees and costs incurred in litigating the fees and costs issue is determined by whether the claimant prevailed, as discussed in Worts v. Hardy Constr. Co., 249 M 477, 817 P2d 231 (1991). In this case, Palmer did not prevail on the issue of fees because he was eventually awarded by the court less in fees than was originally offered by the State Fund. Baeta v. St. Comp. Mut. Ins. Fund, 254 M 487, 839 P2d 566, 49 St. Rep. 824 (1992).

Specific Costs to Be Awarded Determined by Other Statute: The Supreme Court held that only those costs allowed by 25-10-201 may be charged to an opposing party, unless other costs are allowed by another "express provision of law". The Supreme Court said that this section is not such an "express provision of law" because it grants the Workers' Compensation Judge discretion only to award the claimant fees and costs. It does not address the issue of what those costs are. The Supreme Court also held that the "net recovery" theory addressed in Wight v. Hughes Livestock Co., Inc., 204 M 98, 664 P2d 303 (1983), did not alter its view that recovery of costs is governed by 25-10-201. Baeta v. St. Comp. Mut. Ins. Fund, 254 M 487, 839 P2d 566, 49 St. Rep. 824 (1992), overruled, as to the applicability of 25-10-201 to workers' compensation cases, by Kloepfer v. Lumbermens Mut. Cas. Co., 272 M 78, 899 P2d 1081, 52 St. Rep. 663 (1995).

Claimant Unsuccessful on Appeal — Not Entitled to Costs and Fees: A claimant who is unsuccessful in claims before the Workers' Compensation Court and on appeal before the

Supreme Court is not entitled to costs and attorney fees. Kelly v. St. Comp. Mut. Ins. Fund, 254 M 200, 835 P2d 774, 49 St. Rep. 699 (1992).

Firm Offer Required: A proposal offering "the sum of $47,000 over a period of time" leaves open the possibility of a lump-sum settlement of an undetermined amount and is not a firm offer. In order to be an offer contemplated by the statute, nothing must be left to negotiate. A grant of attorney fees on the full amount of the final award was affirmed. J&L Tire & Alignment Center v. Peak, 247 M 169, 805 P2d 571, 48 St. Rep. 148 (1991).

Credit for Alleged Permanent Partial Benefits Improper — Attorney Fees Granted: The Workers' Compensation Court denied claimant's attorney fees after deciding State Fund could take credit for disputed permanent partial benefits. The Supreme Court subsequently decided that the benefits were to be characterized as temporary total for which no credit was allowed and that as such, claimant was entitled to attorney fees and costs under the 1983 version of this section. Ryles v. Springhill Ranch Eggs, 247 M 276, 806 P2d 525, 48 St. Rep. 196 (1991).

Grant of Attorney Fees Following Waiver — Remand: The Supreme Court remanded for further consideration the award of limited attorney fees to a claimant after the trial court had previously noted that the claimant had elected to waive any claim to attorney fees and costs. Winchell v. G&B Motors, Inc., 246 M 320, 805 P2d 1323, 47 St. Rep. 2070 (1990).

Attorney Fees Due Claimant When Insurer Withdraws Settlement Offer Prior to Hearing and Argues That Claimant Should Receive Nothing: Prior to the hearing, the insurer offered the claimant approximately $30,000 to settle his claim. The insurer withdrew the offer when the claimant did not accept it within 15 days. At the hearing, the insurer argued that the claimant was entitled to no recovery. The claimant was awarded less than $30,000, and the insurer contended that the claimant was therefore entitled to no attorney fees. The Supreme Court disagreed, stating that when the insurer refuses to acknowledge that the claimant is entitled to anything at the trial, it is irrelevant if the award is less than the original settlement offer and the claimant is entitled to receive attorney fees if he is successful in obtaining a recovery. Carroll v. CNA Ins. Co., 240 M 151, 783 P2d 387, 46 St. Rep. 2014 (1989).

Evidentiary Hearing Not Always Necessary to Determine Attorney Fees and Costs: The claimant's attorney represented her on a contingent fee basis. The Supreme Court held that in view of the particular facts of the case before it, the lower court had not erred in awarding fees and costs without holding an evidentiary hearing. Beck v. Flathead County, 240 M 128, 783 P2d 383, 46 St. Rep. 1996 (1989).

Attorney Fees Awarded Based on Contingency Agreement: After considering evidence on the issue, the Workers' Compensation Court properly awarded attorney fees based on the contingency fee agreement, stating that claimant had not convinced the court that any greater fee should be awarded. This case may be distinguished from the holding in Honey v. Stoltze Land & Lumber Co., 236 M 86, 769 P2d 42, 46 St. Rep. 202 (1989), in which the Supreme Court concluded that the claimant's attorney was not required to request an evidentiary hearing before the court could consider the evidence under the guidelines in Wight v. Hughes Livestock Co., 204 M 98, 664 P2d 303, 46 St. Rep. 1275 (1983). Hedegaard v. St. Comp. Ins. Fund, 238 M 290, 776 P2d 1225, 46 St. Rep. 1275 (1989), followed in Worts v. Hardy Constr. Co., 249 M 477, 817 P2d 231, 48 St. Rep. 800 (1991).

No Error in Denying Lump-Sum Award of Attorney Fees for Future Benefits: The claimant was awarded disability benefits for a period of 4 years during which time he was to be enrolled in a computer science course. The Supreme Court upheld the Workers' Compensation Court refusal to award a lump-sum award of attorney fees for the 4-year period because the judge felt there was a good chance that the claimant would not complete the course work. Sciuchetti v. Hurt Constr., 238 M 170, 777 P2d 308, 46 St. Rep. 1177 (1989).

Attorney Fees Based on Award in Excess of Those Offered: The claimant argued that he should have received attorney fees based on a finding that benefits had been denied him. The Supreme Court stated that the claimant had asked for permanent disability payments for an alleged new injury and was awarded instead continued partial disability payments for a prior injury. Since he had been receiving some benefits, the attorney fees and costs were properly awarded pursuant to this section. Sharkey v. Atl. Richfield Co., 238 M 159, 777 P2d 870, 46 St. Rep. 1169 (1989).

Fees Allowable on Prevailing Issues: The Workers' Compensation Court did not err in finding that a claimant's attorney should not receive attorney fees for issues upon which he did not prevail. A claimant is entitled to attorney fees and costs in relation only to his proof on prevailing issues. Buckman v. St. Comp. Ins. Fund, 238 M 516, 776 P2d 1210, 46 St. Rep. 1036 (1989), followed in Worts v. Hardy Constr. Co., 249 M 477, 817 P2d 231, 48 St. Rep. 800 (1991).

Attorney Fees on Appeal: The claimant prevailed in the Workers' Compensation Court, receiving an amount greater than the insurer had paid, and was awarded attorney fees. On appeal, the claimant successfully defended the rate of compensation and was awarded reasonable costs and attorney fees for the appeal in order to preserve intact his disability benefit. Stuber v. John Deere Ins. Co., 236 M 189, 769 P2d 1205, 46 St. Rep. 287 (1989).

Evidentiary Hearing to Consider Factors in Determining Fee: It was error for the Workers' Compensation Court to limit a claimant's attorney fees to the contingent fee agreement without considering the time records and affidavit of this counsel. The facts demonstrate a need for an evidentiary hearing on the factors necessary to determine reasonable attorney fees. Honey v. Stoltze Land & Lumber Co., 236 M 86, 769 P2d 42, 46 St. Rep. 202 (1989).

Attorney Fees Based on Amount Awarded and Amount Offered: The Workers' Compensation Court, applying this section as it read in 1983, properly computed "a reasonable attorney fee" using the difference between the amount awarded and the amount offered preceding the filing of the petition. (Language allowing this form of computation was eliminated from the statute in 1985.) McKinley v. St. Comp. Ins. Fund, 232 M 92, 754 P2d 831, 45 St. Rep. 892 (1988), followed in Hilbig v. St. Comp. Ins. Fund, 249 M 396, 816 P2d 1037, 48 St. Rep. 703 (1991).

Award Predicated on Success in Obtaining Greater Benefits Than Previously Paid: An award of attorney fees from the insurer is predicated on the plaintiff being successful in obtaining benefits greater than the amount previously paid or tendered by the insurer or employer. Phelps v. Hillhaven Corp., 231 M 245, 752 P2d 737, 45 St. Rep. 582 (1988).

Award of Attorney Fees on Subsequent Disability Hearing When Claimant Prevails: Claimant was awarded temporary total disability benefits plus attorney fees pursuant to 39-71-611. He later went to hearing again to determine his entitlement to increased partial disability payments and domiciliary care payments, both of which were disputed by the insurer. Claimant was found to be entitled to both payments, but an amount could not be determined. He later settled for an increase based on a court-suggested formula, and sought attorney fees. The new round of litigation did not fall under 39-71-611 because the insurer did not deny liability but rather disputed the amount owed; therefore, this section applied. Employer settled for more than the amount being paid prior to the hearing, so attorney fees were proper. Lamb v. Universal Ins. Co., 230 M 183, 748 P2d 965, 45 St. Rep 127 (1988), followed in Chagnon v. Tilleman Motor Co., 259 M 21, 855 P2d 1002, 50 St. Rep. 198 (1993).

Authority for Determination of Attorney Fees: A contingent fee agreement provided for 40% of benefits as attorney fees, but following a first appeal, claimant sought to increase the percentage for good cause under ARM 24.29.3801 (now 24.29.3802). The Workers' Compensation Court (WCC) refused to vary from the original 40% figure, citing the holding in Wight v. Hughes Livestock, Inc., 204 M 98, 664 P2d 303, 40 St. Rep. 696 (1983), but claimant contended Wight did not apply where an administrative good cause variance was requested. The Supreme Court cited Bowen v. Liberty Mut. Ins. Co., 229 M 84, 745 P2d 330, 44 St. Rep. 1799 (1987), holding that the rules adopted by the Department, in this case the Division (now Department of Labor and Industry), had no application to proceedings before the WCC. Thus, the WCC properly analyzed the issue under Wight. Davis v. Jones, 229 M 158, 745 P2d 362, 44 St. Rep. 1859 (1987).

Controversy Over Lump Sum: Attorney fees may be awarded under this section if a dispute over a lump-sum advance is resolved in the claimant's favor. Johnson v. Fidelity & Cas. Co. of New York, 227 M 464, 740 P2d 665, 44 St. Rep. 1236 (1987).

Size of Attorney Fee — Date of Injury: The size of an attorney fee award in a workers' compensation case is determined by the statute in effect on the date of injury. Cuellar v. Royal Ins. Co., 226 M 428, 736 P2d 130, 44 St. Rep. 778 (1987).

Workers' Compensation Denied — Claimant Receiving Unemployment Benefits: The judgment of the Workers' Compensation Court denying claimant disability benefits will not be disturbed on appeal as it is supported by substantial credible evidence. Claimant was receiving unemployment benefits during the period he claims he was disabled, asserting on his application for unemployment benefits that he was able and available to work and had no medical condition that prevented him from accepting immediate employment in his field. Eveleigh v. Nat'l Union Fire Ins. Co. of Pittsburgh, 225 M 53, 730 P2d 1176, 44 St. Rep. 36 (1987).

Award No Greater Than Benefits Paid Prior to Hearing — No Attorney Fees Awarded: When the award granted by the Workers' Compensation Judge was no greater than the weekly benefits paid to the claimant by the employer's insurer prior to the hearing, there was no basis for an award of attorney fees to claimant under this section. Burkland v. COP Constr., 224 M 173, 728 P2d 806, 43 St. Rep. 2109 (1986).

Attorney Fees and Costs Denied — No Compensation Controversy at Time of Hearing: An insurer conceded the claimant was permanently totally disabled shortly after claimant petitioned therefor, 3 weeks prior to a hearing. The Workers' Compensation Court was correct in not awarding him attorney fees and costs under this section. Such an award may be made only if, first, the amount of compensation is in controversy, and second, the amount awarded exceeds that paid or tendered. Neither condition was satisfied in this claim. Lasar v. St. Comp. Ins. Fund, 222 M 251, 721 P2d 352, 43 St. Rep. 1239 (1986), cited in McKinley v. St. Comp. Ins. Fund, 232 M 92, 754 P2d 831, 45 St. Rep. 892 (1988), and followed in Komeotis v. St. Comp. Ins. Fund, 232 M 340, 756 P2d 1153, 45 St. Rep. 1098 (1988). See also Field v. Sears, Roebuck & Co., 257 M 81, 847 P2d 306, 50 St. Rep. 166 (1993). Lasar, Komeotis, and Field were overruled, to the extent limited in the opinion, by Madill v. St. Comp. Ins. Fund, 280 M 450, 930 P2d 665, 54 St. Rep. 4 (1997).

Hearing on Request for Attorney Fees: The Workers' Compensation Court determined claimant's award and ordered his counsel to submit a request for costs and attorney fees. After the submission, the employer objected to any attorney fee award in excess of the contingent fee agreement, and the objection was successful. It was not reversible error to enter the attorney fee order without giving claimant at least 5 days to respond to the objection. There was no rule requirement on the matter, and under Sorenson v. Drilcon, Inc., 204 M 258, 664 P2d 320, 40 St. Rep. 829 (1983), claimant could have requested an evidentiary hearing on the matter, even after the order granting the attorney fee. However, the case was remanded for a hearing on what the fee should be, taking into account the factors in Wight v. Hughes Livestock, Inc., 204 M 98, 664 P2d 303, 40 St. Rep. 696 (1983), with claimant having the primary obligation to present evidence from which the court could set the fee. McDanold v. B.N. Transp., Inc., 216 M 447, 701 P2d 1001, 42 St. Rep. 940 (1985).

Basis for Reasonable Attorney Fees — Factors: Plaintiff entered into a 25% contingent fee arrangement with his attorney in a workers' compensation case. After successful appeal to the Supreme Court, the plaintiff and attorney entered a 40% contingent fee agreement. On remand to consider proper fees, the Workers' Compensation Judge asked for a detailed statement and number of hours from the attorney. The attorney said he did not keep such records in contingent fee cases. The judge awarded a much lower percentage fee, and the case was appealed to the Supreme Court. The court restated its "net recovery" rule from Myers v. 4-B's Restaurant, Inc., 172 M 159, 561 P2d 1331 (1977), saying attorney fees are to be above and beyond the compensation awarded to a successful claimant. The court noted that the Workers' Compensation Judge may set reasonable attorney fees and that administrative rules adopted specifically approve such arrangements. A reason for this is the "risk factor" that attorneys face whereby they may not receive any compensation. The factors to be considered are: (1) anticipated time and labor; (2) novelty and difficulty of the issues; (3) fee customarily charged; (4) possible total recovery; (5) time limitations; (6) nature and length of attorney-client relationship; (7) experience, skill, and reputation of the attorney; (8) client's ability to pay; and (9) market value of the lawyer's services. The court remanded for consideration of those factors. Wight v. Hughes Livestock Co., Inc., 204 M 98, 664 P2d 303, 40 St. Rep. 696 (1983), partially overruling Cont. Ins. Co. v. Horton, 188 M 341, 613 P2d 1011, 37 St. Rep. 1244 (1980), followed, as to the factors to be considered in determining the fee, in McDanold v. B.N. Transp., Inc., 216 M 447, 701 P2d 1001, 42 St. Rep. 940 (1985), Davis v. Jones, 229 M 158, 745 P2d 362, 44 St. Rep. 1859 (1987), Miller v. W. Guar. Fund Serv., 248 M 132, 809 P2d 1257, 48 St. Rep. 348 (1991), and in Plooster v. Pierce Packing Co., 256 M 287, 846 P2d 287, 50 St. Rep. 59 (1993).

Proper Section Where Claim Denied in Part: Where insurer did not dispute a claim for compensation but did dispute amount of compensation due, arguing initially that claimant's condition was temporary rather than permanent, attorney's fees and costs to the successful claimant are properly awarded under this section rather than 39-71-611. Krause v. Sears Roebuck & Co., 197 M 102, 641 P2d 458, 39 St. Rep. 394 (1982), distinguished in Lasar v. St. Comp. Ins. Fund, 222 M 251, 721 P2d 352, 43 St. Rep. 1239 (1986), and in Komeotis v. St. Comp. Ins. Fund, 232 M 340, 756 P2d 1153, 45 St. Rep. 1098 (1988).

Successful Claimant Not to Pay Attorney Fees From His Award: Claimant was awarded a 40% disability to the whole man. The Workers' Compensation Judge directed claimant to pay his attorney fees from his lump-sum award. The Supreme Court held that, while the Workers' Compensation Judge may determine which attorney fees are reasonable, the clear meaning of this section is to provide attorney fees above and beyond the compensation awarded to a successful claimant. Assessing a successful claimant for attorney fees clearly reduces his net compensation and thus cannot be allowed. Holton v. F. H. Stoltze Land & Lumber Co., 195 M 263, 637 P2d 10, 38 St. Rep. 1835 (1981).

Effect of Compliance or Noncompliance With Chapter: Insurance carrier's compliance or noncompliance with this chapter was not relevant to the issue of whether claimant, who prevailed on petition for a lump-sum settlement in lieu of future periodic payments, was entitled to attorney fees and costs. Award of attorney fees and costs was governed by this section, and where claimant prevailed in a hearing wherein the sole controversy was the difference between amount tendered and amount awarded, he was entitled to attorney fees and costs. Polich v. Whalen's O.K. Tire Warehouse, 194 M 167, 634 P2d 1162, 38 St. Rep. 1572 (1981).

Forum for Determination of Awards: It is a function of the Workers' Compensation Court to determine the amount of awards, attorney fees, and costs. Where petitioner for a lump-sum settlement in lieu of future periodic payments prevailed in that court and on appeal, was found on appeal to be entitled to attorney fees and costs, and the court below had not determined the amounts of the settlement, attorney fees, and costs, the Supreme Court remanded for such determination (but see 1985 amendment note). Polich v. Whalen's O.K. Tire Warehouse, 194 M 167, 634 P2d 1162, 38 St. Rep. 1572 (1981).

Triggering of Attorney's Fee: The finding that a claimant is entitled to benefits under 39-71-703 triggers this section, entitling a claimant to a reasonable attorney's fee as established by the Division (now Department of Labor and Industry) or Workers' Compensation Judge (but see 1985 amendment note). Catteyson v. Glacier Gen. Assurance Co., 183 M 284, 599 P2d 341, 36 St. Rep. 1443 (1979), following Walker v. H. F. Johnson, Inc., 180 M 405, 591 P2d 181 (1978).

39-71-613. Regulation of attorney fees — forfeiture of fee for noncompliance — return of fee when claimant received benefits through fraud or deception.

Compiler's Comments

2009 Amendment: Chapter 112 inserted (5)(b) allowing voluntary nonbinding mediation of disputes concerning certain attorney fees; and made minor changes in style. Amendment effective April 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

1999 Amendment: Chapter 442 inserted (5) concerning original jurisdiction of attorney fees dispute; and made minor changes in style. Amendment effective April 23, 1999.

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 28, Ch. 442, L. 1999, was a severability clause.

Retroactive Applicability: Section 31(1), Ch. 442, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to claims for injuries occurring before April 23, 1999, unless a party elects, after notification by the department of labor and industry, to remain in the contested case process.

1995 Amendment: Chapter 235 inserted (4) requiring return of fees and costs paid by insurer for fraudulent claim; and made minor changes in style. Amendment effective July 1, 1995.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Section 64, Ch. 613, L. 1989, provided that in this section the Code Commissioner is directed to change the term "administrator" or "his" to "department", meaning the Department of Labor and Industry.

1987 Amendment: In (1), near end, inserted "on a form provided by the division"; inserted (2)(a) requiring administrator to consider the benefits to claimant from attorney's efforts; and made minor change in grammar.

Administrative Rules

ARM 24.29.3802 Attorney fee regulation.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

No Authority for Departmental Resolution of Workers' Compensation Attorney Fee Disputes — Administrative Rule Ineffective: Plaintiff had a dispute over attorney fees payable pursuant to a workers' compensation claim. Plaintiff argued that the Workers' Compensation Court lacked authority to resolve the dispute because A.R.M. 24.29.3802 required the court to transfer the dispute to the Department of Labor and Industry for resolution. The Supreme Court disagreed. An administrative agency does not have the power to create or divest a court of subject matter jurisdiction. Thus, to the extent that the administrative provision attempted to divest the Workers' Compensation Court of jurisdiction over the attorney fee dispute, the provision was ineffective. Pinnow v. Mont. St. Fund, 2007 MT 332, 340 M 217, 172 P3d 1273 (2007), following Kelleher Law Office v. St. Comp. Ins. Fund, 213 M 412, 691 P2d 823 (1984).

Constitutionality of Statute Regulating Fees of Workers' Compensation Attorneys — No Due Process Violation: An attorney whose fee arrangements were disallowed by the Employment Relations Division claimed that this section, which allows regulation of fees of workers' compensation attorneys, was a violation of constitutional due process. However, he was given a hearing on the subject by the Department of Labor and Industry, the Workers' Compensation Court, and finally the Supreme Court, so his due process argument could not stand. He further contended that this section violated his equal protection rights because the Department regulates the fees of only claimants' attorneys and not defense attorneys, which impaired his right to contract. However, there is neither a suspect class nor a fundamental right involved. The Department's application of the statute to a claimant's attorney fee is rationally related to the government's legitimate interest in protecting the claimant's net benefits in workers' compensation cases, and protection from impaired fee agreements is rationally related to that interest and is therefore not a constitutional violation. Burris v. Employment Relations Div., 252 M 376, 829 P2d 639, 49 St. Rep. 326 (1992).

Constitutionality of Statute Regulating Fees of Workers' Compensation Attorneys — No Equal Protection Violation: An attorney whose fee arrangements were disallowed by the Employment Relations Division claimed that this section, which allows regulation of fees of workers' compensation attorneys, violated his equal protection rights because the Department regulates the fees of only claimants' attorneys and not defense attorneys. However, there is neither a suspect class nor a fundamental right involved. The Department's application of the statute to a claimant's attorney fee is rationally related to the government's legitimate interest in protecting the claimant's net benefits in workers' compensation cases, and protection from impaired fee agreements is rationally related to that interest and is therefore not a constitutional violation. Burris v. Employment Relations Div., 252 M 376, 829 P2d 639, 49 St. Rep. 326 (1992).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Violation of Statute Requires Total Forfeiture of Fees: Attorney, who attempted to overcharge claimant by charging for benefit advances she received prior to retaining him and charging her twice for other amounts she received, violated the rule limiting attorney fees and therefore, under this statute, must totally forfeit all attorney fees. Hartford v. Young, 239 M 527, 782 P2d 365, 46 St. Rep. 1886 (1989), distinguished in Miller v. W. Guar. Fund Serv., 248 M 132, 809 P2d 1257, 48 St. Rep. 348 (1991), in which a total forfeiture was unwarranted because attorney was not attempting to charge the claimant for recovery received pursuant to the claimant's own efforts.

Authority for Determination of Attorney Fees: A contingent fee agreement provided for 40% of benefits as attorney fees, but following a first appeal, claimant sought to increase the percentage for good cause under ARM 24.29.3801 (now 24.29.3802). The Workers' Compensation Court (WCC) refused to vary from the original 40% figure, citing the holding in Wight v. Hughes Livestock, Inc., 204 M 98, 664 P2d 303, 40 St. Rep. 696 (1983), but claimant contended Wight did not apply where an administrative good cause variance was requested. The Supreme Court cited Bowen v. Liberty Mut. Ins. Co., 229 M 84, 745 P2d 330, 44 St. Rep. 1799 (1987), holding that the rules adopted by the Department, in this case the Division (now Department of Labor and Industry), had no application to proceedings before the WCC. Thus, the WCC properly analyzed the issue under Wight. Davis v. Jones, 229 M 158, 745 P2d 362, 44 St. Rep. 1859 (1987).

Failure to Adopt Claimant's Theory of Law — Jurisdiction Not Exceeded: The Workers' Compensation Court failed to base its decision on claimant's allegation that there was good cause to vary from the maximum fee schedule as allowed under ARM 24.29.3801 (now 24.29.3802), holding instead that "the Division [now Department of Labor and Industry] rules governing attorney fees on cases before this Court and the Supreme Court are a nullity". The fact that the lower court refused to apply the law as presented by claimant did not mean it exceeded its jurisdiction. Davis v. Jones, 229 M 158, 745 P2d 362, 44 St. Rep. 1859 (1987).

Hearing on Request for Attorney Fees: The Workers' Compensation Court determined claimant's award and ordered his counsel to submit a request for costs and attorney fees. After the submission, the employer objected to any attorney fee award in excess of the contingent fee agreement, and the objection was successful. It was not reversible error to enter the attorney fee order without giving claimant at least 5 days to respond to the objection. There was no rule requirement on the matter, and under Sorenson v. Drilcon, Inc., 204 M 258, 664 P2d 320, 40 St. Rep. 829 (1983), claimant could have requested an evidentiary hearing on the matter, even after the order granting the attorney fee. However, the case was remanded for a hearing on what the fee should be, taking into account the factors in Wight v. Hughes Livestock, Inc., 204 M 98, 664 P2d 303, 40 St. Rep. 696 (1983), with claimant having the primary obligation to present evidence from which the court could set the fee. McDanold v. B.N. Transp., Inc., 216 M 447, 701 P2d 1001, 42 St. Rep. 940 (1985).

Basis for Reasonable Attorney Fees: Plaintiff entered into a 25% contingent fee arrangement with his attorney in a workers' compensation case. After successful appeal to the Supreme Court, the plaintiff and attorney entered a 40% contingent fee agreement. On remand to consider proper fees, the Workers' Compensation Judge asked for a detailed statement and number of hours from the attorney. The attorney said he did not keep such records in contingent fee cases. The judge awarded a much lower percentage fee, and the case was appealed to the Supreme Court. The court restated its "net recovery" rule from Myers v. 4-B's Restaurant, Inc., 172 M 159, 561 P2d 1331 (1977), saying attorney fees are to be above and beyond the compensation awarded to a successful claimant. The court noted that the Workers' Compensation Judge may set reasonable attorney fees and that administrative rules adopted specifically approve such arrangements. A reason for this is the "risk factor" that attorneys face whereby they may not receive any compensation. The factors to be considered are: (1) anticipated time and labor; (2) novelty and difficulty of the issues; (3) fee customarily charged; (4) possible total recovery; (5) time limitations; (6) nature and length of attorney-client relationship; (7) experience, skill, and reputation of the attorney; (8) client's ability to pay; and (9) market value of the lawyer's services. The court remanded for consideration of those factors. Wight v. Hughes Livestock Co. Inc., 204 M 98, 664 P2d 303, 40 St. Rep. 696 (1983), partially overruling Cont. Ins. Co. v. Horton, 188 M 341, 613 P2d 1011, 37 St. Rep. 1244 (1980), followed, as to the factors to be considered in determining the fee, in McDanold v. B.N. Transp., Inc., 216 M 447, 701 P2d 1001, 42 St. Rep. 940 (1985), and followed, as to Department of Labor and Industry's authority to regulate attorney fees, in Burris v. Employment Relations Div., 252 M 376, 829 P2d 639, 49 St. Rep. 326 (1992).

Fees Disallowed on Good Faith Appeal: Where the State Compensation Insurance Fund, in good faith, raised significant issues on appeal of a decision of the Workers' Compensation Court, attorney fees for the appellate proceedings would not be awarded to the claimant, who prevailed. Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981).

Filing of Fee Agreement: Failure of attorney for workers' compensation lump-sum advance payment petitioner to file attorney-petitioner fee agreement prior to the hearing in Workers' Compensation Court did not work a forefeiture of claim for attorney's fees. Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981).

Disease Covered by Other Act: When it is found that claimant suffered some disease under the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act), he is not entitled to attorney fees under this section. Greger v. St. Ins. Fund, 180 M 348, 590 P2d 1121, 36 St. Rep. 268 (1979).

Public Censure for Charging Excessive Fees: Attorney who charged fees in excess of amount ordered by Industrial Accident Board (now Department of Labor and Industry) pursuant to this section was properly subject to discipline by public censure. In re Porter, 156 M 190, 478 P2d 866 (1970).

39-71-614. Calculation of attorney fees — limitation.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1987 Amendment: In (1), in first sentence, and (3), in second sentence, before "insurer", deleted reference to employer; in (1), at end of first sentence, substituted "brought to hearing" for "brought before the workers' compensation judge" and in second sentence, after "time spent", substituted "but the judge is not bound by the documentation submitted" for "and give the documentation to the judge"; and in (2) deleted former second sentence that read: "He is not bound by the documentation submitted to him" and substituted remainder of subsection (see 1987 Session Law for text) for "The hourly fee the judge applies to the time spent must be based on the attorney's customary and current hourly fee for legal work performed in this state."

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Award of Attorney Fees at Variance With Contingency Agreement Permissible — Constitutionality of Workers' Compensation Hourly Attorney Fee Rule: Bustell entered a contingency fee agreement with the attorney handling her workers' compensation claim. Bustell's claim was found to be compensable, and the Workers' Compensation Court held that Bustell was entitled to attorney fees. However, the court awarded fees based on the hourly attorney fee provisions in this section rather than on the contingent fee agreement. On appeal, Bustell contended that the hourly fee rule violated due process by failing to protect a claimant's net benefits, particularly claimants who enter a contingency fee agreement, and by shifting the burden of paying attorney fees from the insurer to the claimant. Bustell also asserted that the rule violated equal protection by preventing her from seeking reasonable attorney fees as compared to other similarly situated claimants. This section was enacted in response to the holding in Wight v. Hughes Livestock, Inc., 204 M 98, 664 P2d 303 (1983), which created a strong presumption in favor of the reasonableness of a contingent fee contract, and the section was intended to eliminate any question that the basis for determining attorney fees would be an hourly fee to be determined in the judge's discretion. Bustell failed to overcome the presumption of constitutionality, and the Workers' Compensation Court correctly found no due process violation. Bustell's equal protection claim also failed. There are not two legitimate classes for an equal protection challenge because every claimant is treated equally under the statutes. The amount of fees awarded is not relevant to any discriminatory treatment of the claimants themselves. Bustell v. AIG Claims Serv., Inc., 2004 MT 362, 324 M 478, 105 P3d 286 (2004).

Increase in Attorney Fee Based on Administrative Factors Proper: The Workers' Compensation Court held that an attorney fee should be based on the hourly rate in this section rather than on a contingent fee contract with the claimant. The statute requires payment either at the attorney's usual and customary rate or at $75 an hour. The attorney conducted all business on a contingency basis and thus did not have a customary rate, but submitted that the hourly award should be $225. The court found that good cause existed under ARM 24.29.3802 to increase the fee to $140 an hour. The Supreme Court held that because the attorney's work met the administrative factors, the $140 an hour fee was reasonable under the statutory scheme and affirmed the award. Bustell v. AIG Claims Serv., Inc., 2004 MT 362, 324 M 478, 105 P3d 286 (2004).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Duty of Court in Determining Fees Not Simple Mathematical Calculation: Baeta injured his shoulder and was eventually compensated $46,825 from the State Fund. His attorney, Palmer, claimed fees in the amount of $20,566 (205.66 hours at $100 per hour) and $4,033.23 for costs. Following an evidentiary hearing, the Workers' Compensation Court awarded Palmer $12,500 in fees (125 hours at $100 per hour) and $3,805.59 in costs. Palmer contended on appeal that the only duty of the Workers' Compensation Court was to multiply the attorney's hourly rate times the hours spent. The Supreme Court held that the court's duty under the statute was to determine a reasonable fee in light of the facts. Here, the evidentiary hearing showed that there were no extraordinary issues or work involved. The Supreme Court held that under these circumstances, the Workers' Compensation Court did not abuse its discretion. Baeta v. St. Comp. Mut. Ins. Fund, 254 M 487, 839 P2d 566, 49 St. Rep. 824 (1992).

Fees Allowable on Prevailing Issues: The Workers' Compensation Court did not err in finding that a claimant's attorney should not receive attorney fees for issues upon which he did not prevail. A claimant is entitled to attorney fees and costs in relation only to his proof on prevailing issues. Buckman v. St. Comp. Ins. Fund, 238 M 516, 776 P2d 1210, 46 St. Rep. 1036 (1989).

Reduction in Attorney Fees Absent Evidence of Customary Hourly Fee: An attorney who sought to recover fees in a workers' compensation case and who normally worked on a contingent fee basis rather than an hourly basis presented a claim for $225 an hour as a rate that would be necessary to support the cost of business if he charged an hourly rate. Without a customary and current hourly fee, the judge could not wholly rely on the attorney's testimony as to what the fee should be. Rather, he looked to evidence submitted by both parties to determine a reasonable rate. An attorney who charges an hourly fee does not take the same risk or expect the same high compensation as in a contingent fee arrangement. The court took this into consideration and did not abuse its broad discretion in reducing the fee to $80 an hour. Buckman v. St. Comp. Ins. Fund, 238 M 516, 776 P2d 1210, 46 St. Rep. 1036 (1989).

Authority for Determination of Attorney Fees: A contingent fee agreement provided for 40% of benefits as attorney fees, but following a first appeal, claimant sought to increase the percentage for good cause under ARM 24.29.3801 (now ARM 24.29.3802). The Workers' Compensation Court (WCC) refused to vary from the original 40% figure, citing the holding in Wight v. Hughes Livestock, Inc., 204 M 98, 664 P2d 303, 40 St. Rep. 696 (1983), but claimant contended Wight did not apply where an administrative good cause variance was requested. The Supreme Court cited Bowen v. Liberty Mut. Ins. Co., 229 M 84, 745 P2d 330, 44 St. Rep. 1799 (1987), holding that the rules adopted by the Department, in this case the Division (now Department of Labor and Industry), had no application to proceedings before the WCC. Thus, the WCC properly analyzed the issue under Wight. Davis v. Jones, 229 M 158, 745 P2d 362, 44 St. Rep. 1859 (1987).

Fees — Section Applicability — Retroactivity: A statute should not be retroactively applied unless the Legislature clearly expressed an intention to so apply it. There was no indication the Legislature intended this section, changing the method of determining attorney fees in workers' compensation cases, to apply retroactively, and the court would not make the section retroactive. The section, effective April 19, 1985, does not apply to cases in which the injury occurred prior to that date. The law in effect on the date of the injury applies in determining the attorney fees. Cadwell v. Bechtel Power Corp., 225 M 423, 732 P2d 1352, 44 St. Rep. 370 (1987).

Size of Attorney Fee — Date of Injury: The size of an attorney fee award in a workers' compensation case is determined by the statute in effect on the date of injury. Cuellar v. Royal Ins. Co., 226 M 428, 736 P2d 130, 44 St. Rep. 778 (1987).

Basis for Calculation of Fees — Customary Hourly Rate: Appellant insurance division filed a motion opposing the proposed calculation of attorney fees under this section, contending that the calculation of 150.8 hours was unreasonably high for the nature of the case, that $125 an hour was an unreasonably high hourly fee, and that the calculation was engineered to garner an award roughly equal to what counsel would have received if the court could have awarded fees based on the contingency contract. The Supreme Court, in affirming the award, noted that the time spent was documented and on file and that the fee should be based on the rate the attorney commands in the open market rather than the average rate of Montana attorneys. Gullett v. Aetna Commercial Ins. Div., 222 M 365, 722 P2d 619, 43 St. Rep. 1335 (1986). See also Paulsen v. Bonanza Steak House, 225 M 191, 733 P2d 335, 44 St. Rep. 159 (1987).

Basis for Reasonable Attorney Fees — Factors: Plaintiff entered into a 25% contingent fee arrangement with his attorney in a workers' compensation case. After successful appeal to the Supreme Court, the plaintiff and attorney entered a 40% contingent fee agreement. On remand to consider proper fees, the Workers' Compensation Judge asked for a detailed statement and number of hours from the attorney. The attorney said he did not keep such records in contingent fee cases. The judge awarded a much lower percentage fee, and the case was appealed to the Supreme Court. The court (in a pre-1985 amendment case) restated its "net recovery" rule from Myers v. 4-B's Restaurant, Inc., 172 M 159, 561 P2d 1331 (1977), saying attorney fees are to be above and beyond the compensation awarded to a successful claimant. The court noted that the Workers' Compensation Judge may set reasonable attorney fees and that administrative rules adopted specifically approve such arrangements. A reason for this is the "risk factor" that attorneys face whereby they may not receive any compensation. The factors to be considered are: (1) anticipated time and labor; (2) novelty and difficulty of the issues; (3) fee customarily charged; (4) possible total recovery; (5) time limitations; (6) nature and length of attorney-client relationship; (7) experience, skill, and reputation of the attorney; (8) client's ability to pay; and (9) market value of the lawyer's services. The court remanded for consideration of those factors. Wight v. Hughes Livestock Co., Inc., 204 M 98, 664 P2d 303, 40 St. Rep. 696 (1983), partially overruling Cont. Ins. Co. v. Horton, 188 M 341, 613 P2d 1011, 37 St. Rep. 1244 (1980), followed, as to the factors to be considered in determining the fee, in McDanold v. B.N. Transp., Inc., 216 M 447, 701 P2d 1001, 42 St. Rep. 940 (1985).

39-71-615. Payment of medical claims without acceptance of liability.

Compiler's Comments

Effective Date: Section 29, Ch. 243, L. 1995, provided that this section is effective July 1, 1995.

Part 7
Compensation and Benefits Generally

Part Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Opinion of Treating Physician Generally Accorded Greater Weight — Causation Not Proved: The claimant contended that an industrial accident caused his spinal condition and that the Workers' Compensation Court (WCC) erred by concluding that he failed to prove a causal connection between the accident and the condition. The Supreme Court evaluated medical opinions of treating physicians, a psychological evaluation, and two independent medical examinations in determining that no grounds existed for weighing the opinion of an independent medical examiner more heavily than the opinions of the claimant's treating physicians. The Supreme Court affirmed the judgment of the WCC, holding that while not conclusive, the opinions of treating physicians are entitled to greater weight than the opinions of other expert witnesses. Ford v. Sentry Cas. Co., 2012 MT 156, 365 Mont. 405, 282 P.3d 687, citing EBI/Orion Group v. Blythe, 1998 MT 90, 288 Mont. 356, 957 P.2d 1134.

Aggravated Preexisting Condition Compensable — Test for Compensability: Lanes injured his left knee and was unable to perform his job, so he took a second more sedentary job that did not require the same duties. However, he overloaded the right knee because of the previous injury to the left knee, and was eventually unable to perform the second job, so he filed for workers' compensation benefits. Even though the activities of the second job were simply the activities of daily living, the Workers' Compensation Court concluded that the right knee injury was attributable to the original occupational injury. The State Fund appealed on grounds that a temporary aggravation of the preexisting knee condition did not result in an injurious exposure pursuant to former 39-72-303 (repealed 2005), but the Supreme Court affirmed. An aggravation of a preexisting condition may give rise to a compensable occupational disease. To determine whether an aggravation of a preexisting condition is compensable, the test is whether occupational factors significantly aggravated a preexisting condition, not whether occupational factors played the major or most significant role in causing the resulting disease. In this case, there was no evidence that the activities of the second job significantly aggravated the preexisting condition, so the Workers' Compensation Court did not err in concluding that the temporary aggravation did not constitute the last injurious exposure. Lanes v. Mont. St. Fund, 2008 MT 306, 346 M 10, 192 P3d 1145 (2008), following Burglund v. Liberty Mut. Fire Ins. Co., 286 M 134, 950 P2d 1371 (1997). See also Polk v. Planet Ins. Co., 287 M 79, 951 P2d 1015 (1997), and Romero v. Liberty Mut. Fire Ins. Co., 2001 MT 303N, 308 M 394, 43 P3d 983 (2001).

Finding of Malingering Affirmed Notwithstanding Expert Testimony: Blythe was accidentally stuck with an AIDS-contaminated needle while working in 1989. Evidence was uncontroverted that if Blythe had been infected with the virus, he would have tested positive within 3 to 6 months after the needle stick. However, Blythe has consistently tested negative. Nevertheless, Blythe contended that he suffered anxiety attacks and depression, that his educational efforts were adversely affected, and that his mental condition had deteriorated. Despite conflicting expert testimony as to the extent of Blythe's injuries, sufficient findings existed to affirm the Workers' Compensation Court's decision that Blythe was malingering, that he was not disabled, and that he was not entitled to compensation or benefits for the accident. EBI/Orion Group v. Blythe, 1998 MT 90, 288 M 356, 957 P2d 1134, 55 St. Rep. 359 (1998).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Limited Knowledge of Claimant's Disability Status Not Grounds to Have Payment Agreement Modified on Basis of Mutual Mistake: State Fund argued that it was entitled to off set against temporary disability benefits lump-sum payments made to the claimant rather than against future permanent disability benefits. State Fund based its arguments on the theory that the petitions for lump-sum payments submitted by the claimant and approved by State Fund were ambiguous, resulting in no meeting of the minds, and that the parties committed a mutual mistake because they entered into the agreement believing that the claimant was then permanently disabled. The Supreme Court held that the petitions submitted by the claimant and approved by State Fund were clear on their face and indicated that the claimant was requesting that any offset against the lump-sum payments be made against future permanent disability benefits. The Supreme Court stated that since the agreement was unambiguous, no extrinsic evidence could be submitted to show that there had not been a meeting of the minds between the parties. The Supreme Court also held that State Fund could not seek modification based on mistake because it bore the risk of mistake in this case. State Fund knew that it had limited knowledge of the claimant's disability status at the time that it approved the lump-sum advances. Wray v. St. Comp. Ins. Fund, 266 M 219, 879 P2d 725, 51 St. Rep. 735 (1994).

Withdrawal of Election After Court Award of Benefits: Section 39-71-709 (as it read in 1986, the time of the injury, but now repealed), allowing a worker to elect either permanent partial disability benefits under 39-71-703 or indemnity benefits under 39-71-705 through 39-71-708 and allowing a worker to withdraw an election pursuant to 39-71-703 "at any time" and to instead receive indemnity benefits under 39-71-705 through 39-71-708, allowed a worker to withdraw an election under 39-71-703 after a Workers' Compensation Court award of those benefits and to elect benefits under 39-71-705 through 39-71-708. State Fund's claim that a withdrawal is subject to time limits based either on the procedural status of the case or on the extent to which originally elected benefits have been received and its further claim that res judicata or collateral estoppel applies are unwarranted in view of the clear wording of the statutory right. In addition, 39-71-709 (now repealed) does not, as claimed by State Fund, prohibit the worker from receiving a greater benefit as a result of the withdrawal and change. It provides that the sum of the benefits received under 39-71-703 before the withdrawal and under 39-71-705 through 39-71-708 after the withdrawal cannot exceed what the worker would have received had the worker originally claimed benefits under 39-71-705 through 39-71-708. Lund v. St. Comp. Mut. Ins. Fund, 263 M 346, 868 P2d 611, 51 St. Rep. 83 (1994). followed in Stewart v. Liberty NW. Ins. Corp., 2013 MT 107, 370 Mont. 19, 299 P.3d 820.

Whole Person Injury — Maximum Benefits Payable: Although claimant was eligible for 280 weeks of benefits for loss of use of one arm at or near the shoulder, it was not error to award 500 weeks of permanent partial disability benefits because substantial credible evidence supported the finding that the injury was not limited to the arm and shoulder area, but affected the whole person. Symptoms included chronic pain and weakness, permanent soft tissue injuries, bicipital tendinitis, rotator cuff tendinitis, subacromial bursitis, and atrophy in the infraspinatus, teres minor, upper trapezius, and pectoralis. Anderson v. Hammer, 252 M 73, 826 P2d 931, 49 St. Rep. 165 (1992), distinguishing Obie v. Obie Signs, Inc., 143 M 1, 386 P2d 68 (1963).

Partially Permanently Disabled — Substantial Credible Evidence to Support Findings: The Supreme Court will not overturn the findings of fact of the Workers' Compensation Court if there is substantial credible evidence to support them in the record. Stuker v. Stuker Ranch, 251 M 96, 822 P2d 105, 48 St. Rep. 1071 (1991), followed in Burglund v. Liberty Mut. Fire Ins. Co., 279 M 298, 927 P2d 1006, 53 St. Rep. 1158 (1996), awarding benefits for possible loss of future earnings.

Temporary Total Disability for Paralysis and Head Injury: The Workers' Compensation Court erred in finding that a hotel manager was permanently partially disabled from spinal and head injuries that resulted in total lower body paralysis and diminished intellectual capacity. In reversing the decision, the Supreme Court held that the defendant had failed to present conclusive proof, required under 39-71-705 (now repealed), that the hotel manager was ready or able to work in other occupations at the time of trial. The Supreme Court directed the Workers'

Compensation Court to enter a finding holding the manager to be permanently totally disabled. Parker v. Glacier Park, Inc., 249 M 225, 815 P2d 583 48 St. Rep. 687 (1991).

Thirty Percent Impairment Rating Affirmed — Mathematical Uncertainty: At the time of injury, claimant's reported earnings were similar to the amount reflected in his business tax returns. Recognizing that mathematical certainty was virtually impossible to find, the award of benefits based on a 30% impairment was appropriate. Ryles v. Springhill Ranch Eggs, 247 M 276, 806 P2d 525, 48 St. Rep. 196 (1991).

Workers' Compensation Court — Proper Following of Instructions on Remand: The defendant insurance company argued that the Workers' Compensation Court had exceeded its jurisdiction when on remand it increased the claimant's 35% permanent partial disability award to 60%. The insurance company alleged that the lower court was instructed to specify the grounds of its original award of 35% and that it was error for it to increase the award to 60%. The Supreme Court held that it had clearly stated when remanding the case that the Workers' Compensation Court was to redetermine the disability award, that the lower court had properly done so, and that the increase was supported by the evidence. Carroll v. CNA Ins. Co., 245 M 495, 802 P2d 618, 47 St. Rep. 2218 (1990).

Likelihood of Eventual Fifty Percent Decrease in Earning Capacity — Sufficient Evidence: The workers' compensation claimant was a sales representative who drove over 750 miles a week. He earned $68,000 in 1987, 2 years after a traffic accident that exacerbated an existing neck injury from which he continued to suffer pain and increasing deterioration without responding to treatment. The Supreme Court held that there was sufficient evidence to award the claimant 250 weeks of permanent partial disability benefits because the deterioration would likely require a change in employment that would result in a 50% decrease in his earning capacity. Hartman v. Nat'l Union Fire Ins., 236 M 141, 768 P2d 1380, 46 St. Rep. 248 (1989).

Award for Occupational Deafness Properly Computed: The Workers' Compensation Court properly calculated monaural and binaural hearing impairments of an employee suffering from occupational deafness and properly exercised its discretion in awarding the claimant the larger sum to which he was statutorily entitled. Beach v. St. Comp. Ins. Fund, 231 M 310, 752 P2d 200, 45 St. Rep. 635 (1988).

Discretionary Award Not Granted: Under section 92-702, R.C.M. 1947 (since repealed), a claimant was eligible, in the former Industrial Accident Board's discretion, to compensation beyond the 500-week maximum in cases of hardship due to permanent loss of or loss of use of both hands, arms, feet, legs, or eyes. Absent those circumstances, the lower court properly denied the discretionary award. Larson v. Crissmore, 228 M 9, 741 P2d 401, 44 St. Rep. 1299 (1987).

Total Benefits Available — Temporary and Permanent Disability: Where a claimant was entitled to some temporary and some permanent disability benefits but the actual duration of the healing period was not determined, the Supreme Court reconciled several inconsistent statutes in the 1971 workers' compensation law to determine that claimant was entitled to a maximum of 300 weeks of temporary total disability benefits and, totaling temporary total disability benefits and permanent partial or permanent total benefits, 500 weeks of total compensation benefits. Larson v. Crissmore, 228 M 9, 741 P2d 401, 44 St. Rep. 1299 (1987), distinguishing McDanold v. B.N. Transport, Inc., 194 M 300, 634 P2d 175, 38 St. Rep. 1466 (1981).

Tip Income Not Included in Original Calculation of Benefit Rate — Remand: Ten years after his injury, claimant contended that money he received in tips but never reported should have been included in his wage base. The Supreme Court found that the passage of more than 10 years, combined with the inability of claimant or his employer to submit proof of the alleged tips, indicated that the doctrine of equitable estoppel applied. The court remanded to the Workers' Compensation Court for reconsideration of the tip income issue in light of the elements constituting equitable estoppel described in Sweet v. Colborn School Supply, 196 M 367, 639 P2d 521 (1982). Sampson v. Broadway Yellow Cab Co., 226 M 273, 735 P2d 298, 44 St. Rep. 649 (1987), distinguished in Miller v. W. Guar. Fund Serv., 248 M 132, 809 P2d 1257, 48 St. Rep. 348 (1991), in which neither equitable estoppel nor laches applied because: (1) claimant was induced by the employer as to how tips should be reported; (2) the claim for benefits specifically stated that tips were not included in wages listed; and (3) there was only a 2-year delay in asserting the claim for increased wages, during which time the insurer had constant access to claimant's employment records.

Law at Time of Injury to Govern: Benefits payable for injury sustained on January 8, 1974, are governed by section 92-704.2, R.C.M. 1947. The Workers' Compensation Court did not err in finding the Division of Workers' Compensation (now State Fund) liable for benefits when the injury occurred within the time frame of that section although the resulting death occurred outside the time frame. The statutes in effect on the date of the injury are controlling. There is no merit to the Division's (now State Fund's) argument that it was denied due process as to the effect of section 92-704.2, R.C.M. 1947. Young Motor Co. v. Div. of Workers' Comp., 219 M 1, 710 P2d 58, 42 St. Rep. 1796 (1985).

Successive Injuries to Same Knee — No Deduction of First Settlement From Second: Worker's left knee was injured when a cow butted the knee. He was paid temporary total disability benefits until a full and final compromise settlement was made. A portion of the settlement was for permanent partial disability benefits. One and a half years later, the left knee was injured when worker was working for a logging company and fell off a log. Temporary total disability benefits were commenced. Worker then requested a lump-sum advance of his future permanent partial disability benefits. The Workers' Compensation Court held that worker was entitled to the advance without a deduction equal to that portion of the settlement for the prior injury that was for permanent partial disability benefits. The court said that each new compensable injury begins a new benefit consideration beginning at zero, and the Supreme Court agreed. The Supreme Court held that Pietz v. Indus. Accident Bd., 127 M 316, 264 P2d 709 (1953), is controlling in the application of 39-71-738 (now repealed) and is the enlightened approach. In order to give effect both to the rule of liberal construction of this act and the rule that an employer takes an employee subject to the employee's physical condition at the time of employment, 39-71-738 (now repealed) can only apply to a particular injury from a particular accident and not to separate injuries in separate accidents. Tiedeman v. Cooper Logging, Inc., 218 M 312, 708 P2d 255, 42 St. Rep. 1610 (1985).

Concurrent Payment of Disability and Rehabilitation Benefits Allowed: Plaintiff injured his back during the scope and course of his employment. Defendant accepted liability and began paying total disability benefits. Plaintiff entered a rehabilitation program, for which he began receiving rehabilitation benefits under Title 39, ch. 71, part 10. During his training, defendant wrote plaintiff that since his condition had stabilized, his benefits would be reduced to permanent partial benefits based on his impairment rate. Plaintiff appealed to the Workers' Compensation Court, which ruled claimant was entitled to receive benefits based on his impairment rating while concurrently receiving permanent total disability benefits during his retraining. On appeal, the Supreme Court held that the term "classes" of disability referred to in 39-71-737 refers to all of the various benefits provided by the Workers' Compensation Act that are not otherwise specifically excepted. The rehabilitation benefits are distinguishable from all other benefits pursuant to 39-71-1003 (now repealed). The court held that the concurrent payment of two classes of benefits provided under Title 39, ch. 71, part 7, is prohibited (but see 1985 amendment notes under 39-71-737) and that the benefits provided by part 10 are not affected. Plaintiff was entitled to total disability benefits and rehabilitation benefits during his rehabilitation program. Rehabilitation benefits are totally separate from and not counted against benefits provided in Title 39, ch. 71, part 7. When plaintiff has completed his rehabilitation program, he will be entitled to his partial disability benefits. Grimshaw v. L. Peter Larson Co., 213 M 290, 691 P2d 805, 41 St. Rep. 2123 (1984).

Workers' Compensation Benefits as Marital Assets — Error to Preclude as Matter of Law: The District Court found as a matter of law that workers' compensation benefits of the husband were not marital assets. The Supreme Court vacated the judgment, ordering an evidentiary hearing because it was unable to make an informed opinion from the record. At the hearing, findings should address the terms and purpose of the workers' compensation award. Blankenship v. Blankenship, 210 M 31, 682 P2d 1354, 41 St. Rep. 901 (1984).

Offset of Overpayment and Social Security Benefits Required: Where the claimant in a workers' compensation proceeding conceded that he was overpaid by a lump sum of $1,500 and also conceded that he had received social security benefits in the amount of $4,704.97, the Supreme Court held that these amounts must be offset against any award to the claimant. The Supreme Court ordered that the adjustment in any award be made by the Workers' Compensation Court, which had maintained jurisdiction over the case. Wilson v. Glacier Gen. Assurance Co., 206 M 63, 670 P2d 931, 40 St. Rep. 1509 (1983).

Determination of Indemnity Award Arbitrary: After suffering an industrial accident the claimant returned to school to complete his engineering degree. The court, finding that residual effects of claimant's injury limited his employment as an engineer, made an "indemnity award" of 100 weeks' partial disability. Because the court made no finding of percent of disability of the whole man, did not specify the statutory basis for the award, and did not specify its basis for a 100-week award, the determination was arbitrary. Van Daveer v. Stauffer Chem. Co., 200 M 218, 657 P2d 1142, 39 St. Rep. 1698 (1982).

Diminished Earning Capacity Benefits Applicable to Lost Ability to Compete — Limiting Factors Inapplicable: Claimant fractured his elbow in an industrial accident. As a result of the injury it was necessary for a surgeon to implant a prosthesis in the elbow. Claimant brought an action under 39-71-703 seeking workers' compensation benefits for lost earning capacity in lieu of indemnity benefits under 39-71-705 through 39-71-708 (39-71-705 through 39-71-707 now repealed). The Workers' Compensation Court found that although claimant was earning more at the time he filed his claim than at the time of his injury, he could proceed under 39-71-703 because his ability to compete in the open labor market was impaired. The court then applied the limiting factors of 39-71-705 through 39-71-708 (39-71-705 through 39-71-707 now repealed) to its award. Claimant appealed, contending the limiting factors were inapplicable. The Supreme Court held that claimant had established sufficient factual basis to elect compensation under 39-71-703 for loss of earning capacity even though he was performing the same job and earning more. The Supreme Court also held that under 39-71-709 (now repealed), the limiting factors of 39-71-705 through 39-71-708 (39-71-705 through 39-71-707 now repealed) should be applied only if a claimant has withdrawn his election to proceed under 39-71-703 and claims indemnity benefits. The case was remanded for proper computation of compensation. Hafer v. Anaconda Aluminum Co., 198 M 105, 643 P2d 1192, 39 St. Rep. 796 (1982).

Computation of Award Based on Concurrent Employment: Earnings from concurrent employments may be combined in computing workers' compensation award if the employments are sufficiently similar so that a disabling injury at one employment would necessarily disable the employee in respect to the other employment. However, where appellant had terminated the concurrent employment prior to his injury and was merely receiving a 2-month continuation of salary because of length of service in the concurrent employment, such earnings from that former employment should not be included in computing temporary total disability award. Gee v. St. Compensation Ins. Fund, 197 M 335, 642 P2d 1070, 39 St. Rep. 597 (1982), followed in Milender v. Carpenter, 230 M 1, 748 P2d 932, 44 St. Rep. 2204 (1987).

Permanent Pain as Factor in Disability Award: Plaintiff, employed as a boilerman, severely injured his left arm in a fall onto a catwalk in 1977. He suffers from recurrent pain, and any prolonged activity causes him severe, debilitating pain in his left arm. The insurance carrier contended that although the disability is permanent, plaintiff was not entitled to 100% disability in the arm because he had some use of it. The Supreme Court upheld the decision of the Workers' Compensation Court that the fact that the claimant can perform a few odd jobs for short periods of time does not preclude a finding that claimant is totally and permanently disabled in the arm. This is especially true where, as here, the evidence shows the claimant must work with a substantial degree of pain. Cleveland v. Cyprus Indus. Minerals, 196 M 15, 636 P2d 1386, 38 St. Rep. 2086 (1981).

Death Arising Out of and in Course of Lull in Work Period: Department store manager's death arose out of and in the course of his employment where he reported for work, mentioning that the motorcycle he rode to work was not running properly and might be "carboned up", rode the motorcycle to a shop where he left a department store shoe to be repaired, left the store, giving the impression that he would be back in the 15 to 20 minutes he had been told it would take to repair the shoe, rode the motorcycle onto a highway, and lost control of the motorcycle while traveling more than 70 miles per hour and was killed, and where his district manager knew he used his motorcycle in the course of his work and it was reasonable to conclude that he was cleaning the carbon out of the motorcycle at the time of his death, an activity that would be to the benefit of his employer as well as himself as he used the motorcycle in the course of his work and it would run better without the carbon. Green v. C. R. Anthony Co., 194 M 102, 634 P2d 629, 38 St. Rep. 1638 (1981).

Finding of Aggravation of Preexisting Disease Sustained: Where the Workers' Compensation Court finding that preexisting spinal disease was aggravated or accelerated by the accident was based on conflicting evidence, the Supreme Court's function on review was confined to determining whether there was substantial evidence on the whole record supporting the finding. The finding was supported and was upheld where the evidence consisted of claimant's testimony that he received a back injury and production of shirt showing holes where tines of a front-end loader pinned him between the loader and the steering wheel of tractor he was operating, nurse's notes and charts indicating claimant had complained about his back following the accident, and the depositions of the attending physician and another physician stating they found no aggravation by the accident of the preexisting spinal disease. Wight v. Hughes Livestock Co., Inc., 194 M 109, 634 P2d 1189, 38 St. Rep. 1632 (1981).

Periodic Payments Preferred — Purpose: The purpose behind usually paying workers' compensation in periodic rather than lump-sum payments is to preclude an employee or his dependent from imprudently wasting his means of support and thereby becoming a burden upon society. Polich v. Whalen's O.K. Tire Warehouse, 194 M 167, 634 P2d 1162, 38 St. Rep. 1572 (1981).

Recovery Limited to Specific Injury Statute: Workers' Compensation Court decided that the claimant was not entitled to permanent total disability benefits and limited his recovery to benefits under 39-71-707 (now repealed) and to such temporary total disability compensation benefits as he had received while convalescing. The decision was upheld since credible and substantial evidence appeared in the record in support of the Workers' Compensation Court. McGee v. Bechtel Corp., 182 M 149, 595 P2d 1156, 36 St. Rep. 220 (1979).

Calculation of Award for Whole Body Injury: A claimant who suffered a back injury and could not find steady employment was given medical impairment ratings of 15%, 15%, and 33% by three physicians, was given a 25% disability award (125 weeks) by the Workers' Compensation Court, received a proper award supported by the evidence, and was not entitled to 500 weeks of wage loss permanent partial disability in that the Legislature intended that for lesser degrees of partial disability shorter periods of compensation should be awarded. Head v. Missoula Serv. Co., 181 M 129, 592 P2d 507 (1979).

Election of Remedies: An election exists between the awards provided in 39-71-703 and 39-71-705 through 39-71-708 (39-71-705 through 39-71-707 now repealed) even though an injury falls within a specific provision of 39-71-705 through 39-71-708 (39-71-705 through 39-71-707 now repealed). Walker v. Truck Ins. Exch., 180 M 405, 591 P2d 181, 35 St. Rep. 1667 (1978).

Permanent Total Disability for Extremity Injuries: A claimant who suffers an injury to an extremity is not limited to the benefits set forth in 39-71-705 (now repealed), if it is determined the claimant is permanently totally disabled from the injury. Jensen v. Argonaut Ins. Co., 178 M 59, 582 P2d 1191 (1978).

Determination of Indemnity Award — Impairment Ratings: Many factors in addition to medical impairment rating may be properly considered in determining a claimant's disability, and such ratings do not limit compensation awards in all cases. Impairment ratings by physicians are but one item of evidence, and the Workers' Compensation Court had sufficient evidence to justify an award of 90% permanent partial disability of the hand even though the medical impairment ratings were 55% and 66%. Ramsey v. Argonaut NW. Ins. Co., 174 M 438, 571 P2d 384 (1977).

Sufficiency of Evidence to Support Rating: Testimony by a physician indicating "perhaps a slight permanent partial impairment of function" does not support a fixed percentage rating at any figure, and it was error to convert such testimony into a percentage disability rating. Crittendon v. Butte, 171 M 470, 559 P2d 816 (1977).

Partial Loss or Loss of Use:

The District Court clearly erred in allowing a claimant 500 weeks of compensation for an injury to one eye since compensation had to be limited to 140 weeks as prescribed in 39-71-705 (now repealed) for the total loss of an eye or some proportionate amount less. Johnson v. Indus. Accident Bd., 157 M 221, 483 P2d 918 (1971).

For permanent partial loss or loss of use of member a claimant may be granted as compensation the full amount allowable under 39-71-705 (now repealed) that would result if the member was permanently lost or a proportionately less amount, but in no event may a claimant be granted a greater amount of compensation than that allowed for the loss of the entire member. Obie v. Obie Signs, Inc., 143 M 1, 386 P2d 68 (1963).

Indemnity Benefits: The words "indemnity benefits" coupled with "proportionate loss" anticipate estimated loss of future earning capacity irrespective of loss of wages and economic deprivation suffered by claimant. Jones v. Glacier Gen. Assurance Co., 145 M 326, 400 P2d 888 (1965).

Proof of Additional Injuries:

Section 39-71-705 (now repealed) does not limit recovery where there is evidence of subsequent accident resulting in additional injuries. Newman v. Kamp, 140 M 487, 374 P2d 100 (1962).

Where claimant had been granted compensation under 39-71-705 (now repealed) for the loss of his entire hand at the wrist and claimant attempted to prove additional injury through his own testimony to the effect that, since his hand had healed, he had suffered from pains in his arm and shoulder, such testimony did not constitute a preponderance which would overturn the findings of the Board and the District Court based on objective credible evidence and there was no abuse of discretion in denying compensation for other injuries in addition to those resulting from the amputation. Becktold v. Indus. Accident Bd., 137 M 119, 350 P2d 383 (1960).

Liability for First Injury: Section 39-71-738, now repealed, does not affect the liability of an insurer which is liable to a claimant for compensation due him under a first accident but not for compensation due as a result of a second accident. Infelt v. Horen, 136 M 217, 346 P2d 556 (1959).

Construction: The fact that a man has once received compensation, as for example where he has previously received 250 weeks or half the statutory amount, does not mean that forever after he is in the eyes of the compensation laws but half a man, so that he can never again receive a compensation award going beyond the other 50% of total. After having received his prior payments, he may in future years be physically able to and does resume full gainful employment for several years, and if he does there is no reason or logic why a disability from an unscheduled industrial accidental injury, which would bring anyone else total permanent disability benefits, should yield him only half as much. Peitz v. Indus. Accident Bd., 127 M 316, 264 P2d 709 (1953).

39-71-701. Compensation for temporary total disability — exception.

Compiler's Comments

2001 Amendment: Chapter 121 near end of (3) inserted "except for the worker's incarceration as provided for in 39-71-744, resignation, or termination for disciplinary reasons caused by a violation of the employer's policies that provide for termination of employment"; and made minor changes in style. Amendment effective March 22, 2001.

1995 Amendment: Chapter 243 inserted (1)(b) concerning release to employment; in (2) substituted "objective medical findings" for "medical evidence"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

1993 Amendments — Composite Section: Chapter 296 inserted (7) establishing a penalty for receipt of both wages and temporary total disability benefits; and made minor changes in style. Amendment effective July 1, 1993.

Chapter 619 deleted former (6) that read: "(6) Notwithstanding subsection (3), beginning July 1, 1987, through June 30, 1991, weekly compensation benefits for temporary total disability may not exceed the state's average weekly wage of $299 established July 1, 1986"; inserted (6) authorizing insurer to suspend biweekly compensation benefits for claimant awarded Social Security benefits and providing that suspension does not prevent repayment plan; and made minor changes in style. Amendment effective July 1, 1993.

A style change in (4) was slightly different in the two chapters. The codifier chose the more appropriate of the two.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

1991 Amendment: In introductory clause of (1) inserted reference to subsection (4); and inserted (4) denying benefits to a worker who is released to return to an equivalent position and wage with the same employer prior to maximum healing and providing a system for requalification for benefits. Amendment effective July 1, 1991.

Applicability: Section 2, Ch. 52, L. 1991, provided: "[This act] applies to claims for injuries that occur after [the effective date of this act]." Effective July 1, 1991.

1989 Special Session Amendment: In (5) reimposed benefit freeze that ended June 30, 1989, to continue through June 30, 1991; and made minor changes in phraseology. Amendment effective July 17, 1989.

Severability: Section 13, Ch. 9, Sp. L. June 1989, was a severability clause.

1987 Amendment: Inserted (1) allowing temporary total benefits when a worker suffers a total wage loss until he reaches maximum healing; inserted (2) requiring a finding of temporary total disability to be supported by a preponderance of medical evidence; in (3), in second sentence, substituted "the state's average weekly wage at the time of the injury" for "$110 beginning July 1, 1973. Beginning July 1, 1974, the maximum weekly compensation benefits shall not exceed the state's average weekly wage" and inserted fourth sentence concerning no cost-of-living adjustments; inserted (5) setting a cap on benefits for 1987 biennium; and made minor changes in phraseology.

1981 Amendment: Inserted "disability" before "benefits" near beginning of (2) and at end added phrase providing for calculation from date of disability entitlement.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Failure to Prove Condition Caused by Accident — Failure to Prove Entitlement to Disability Benefits by Preponderance of Objective Medical Findings: Approximately 8 months after a workplace injury, a treating physician released the claimant to perform regular and unrestricted work duties. The claimant disagreed with the assessment and contended that the Workers' Compensation Court (WCC) erred by concluding that he was not entitled to ongoing temporary total disability benefits. The Supreme Court upheld the finding of the WCC and concluded that the claimant failed to prove that he was entitled to temporary total disability benefits by a preponderance of objective medical findings. Ford v. Sentry Cas. Co., 2012 MT 156, 365 Mont. 405, 282 P.3d 687.

No Total Loss of Wages — Temporary Total Disability Not Payable: Aldrich suffered an occupational disease in 1994, and it was anticipated that additional surgery might be necessary. Aldrich began receiving Social Security disability benefits in 1994 and state permanent total disability benefits in 2001. Aldrich did not reach maximum medical improvement until 2003. In late 2003, the Social Security disability benefits were converted to full Social Security retirement benefits, at which time the permanent total disability benefits terminated. Aldrich had the anticipated additional surgery in 2005 and requested state temporary total disability benefits at that time. The Workers' Compensation Court correctly concluded that Aldrich's receipt of Social Security retirement benefits did not preclude the receipt of temporary total disability benefits, as long as the criteria of 39-71-710 were satisfied. The court found that Aldrich did not suffer a total loss of wages, so temporary total disability benefits were not payable. Aldrich appealed, but the Supreme Court affirmed. Aldrich was not earning a wage at the time of the 2005 surgery and treatment, nor were the Social Security benefits interrupted, and Aldrich was not seeking gainful employment and had no viable job prospects or other prospective source of wages that the surgery prevented him from receiving, so a total loss of wages did not occur and Aldrich was not entitled to temporary total disability benefits. Aldrich v. Mont. St. Fund, 2009 MT 40, 349 M 251, 203 P3d 783 (2009), distinguishing Wilson v. Sun River Cattle Co., 206 M 63, 670 P2d 931 (1983).

Disparate Awards for Permanent Partial Disability and Permanent Total Disability Not Violative of Equal Protection: The statutory framework of the Workers' Compensation Act reveals distinctly different purposes served by permanent partial disability and permanent total disability benefits. Permanent partial disability benefits compensate a worker for sustaining a partial disability by a smaller impairment award and by supplementing wages earned when the claimant returns to work. Permanent total disability benefits do not contemplate a return to work and so provide a higher continuous benefit that is paid over the work life of the claimant. Because claimants in these classes are not similarly situated, denial of an impairment award to permanent partial disability claimants does not violate equal protection guarantees. Rausch v. St. Comp. Ins. Fund, 2005 MT 140, 327 M 272, 114 P3d 192 (2005).

Reduction of Workers' Compensation Benefits to Recover Overpaid Benefits From Retroactive Social Security Disability Award: Prior to 1993, the Workers' Compensation Act authorized insurers to offset benefit distributions on account of a Social Security disability award, but failed to address the recovery of prior payments that became duplicate by virtue of a subsequent retroactive Social Security disability award. The fact that a Social Security disability award is delayed should not preclude offset for the same amount. In this case, the State Fund acted reasonably in reducing Flynn's state benefit disbursements in order to recover overpaid benefits from Flynn's retroactive Social Security disability award. Flynn v. St. Comp. Ins. Fund, 2002 MT 279, 312 M 410, 60 P3d 397 (2002).

State Fund Required to Bear Proportion of Attorney Fees of Claimant Who Recovers Social Security Disability Benefits — Applicability of Common Fund Doctrine: Flynn was diagnosed with an occupational disease, and the State Fund accepted liability and tendered medical and disability benefits. Flynn also sought Social Security disability benefits, but the claim was initially denied. The claim was later accepted, and Flynn was awarded retroactive Social Security benefits, at which point the State Fund notified Flynn that his biweekly benefits would be reduced and that it intended to recoup overpaid benefits by an additional offset against Flynn's state benefits. Flynn filed a petition requesting that the State Fund pay a proportionate share of the attorney fees incurred in recovering the Social Security benefits, but the Workers' Compensation Court denied the petition. On appeal, the Supreme Court found no statutory preemption on the issue of attorney fee apportionment following benefit recoupment and thus applied the common fund doctrine, which authorizes the assignment of responsibility for fees among those individuals who benefit from litigation that created the common fund. With the aid of counsel but without the assistance of the State Fund, Flynn recovered Social Security benefits that resulted in a reduction of Flynn's state benefits to the substantial benefit of the State Fund. Therefore, pursuant to the common fund doctrine, the State Fund was required to contribute to the cost of Flynn's litigation, including reasonable attorney fees, in proportion to the benefits that it actually received. The Workers' Compensation Court committed reversible error when it denied Flynn's request for reasonable apportionment of attorney fees. Flynn v. St. Comp. Ins. Fund, 2002 MT 279, 312 M 410, 60 P3d 397 (2002).

Permanent Total Disability and Regular Employment Construed — Part-Time Work Not Substantial and Significant: After McFerran was injured at his job, his employer, Consolidated Freightways, hired Addy, a vocational consultant, to assess McFerran's employability. Addy found five job possibilities for McFerran. The Workers' Compensation Court found that one of those five, a job as a pharmacy delivery driver, constituted "regular employment" for the purposes of determining whether McFerran suffered from a permanent total disability. The Supreme Court, although agreeing with the analysis used by the Workers' Compensation Court to determine whether a worker is permanently and totally disabled, disagreed that the work as a pharmacy delivery driver was substantial and significant and that the work constituted regular employment. The Supreme Court pointed out that Addy's written report found that the period of work could vary between 1 to 4 hours a day, 6 days a week. The Supreme Court held that a job offering no assurance of more than 1 hour of work each day was not "substantial and significant" enough to be considered regular employment. The court therefore held that the Workers' Compensation Court erred when it concluded that McFerran was not totally and permanently disabled. McFerran v. Consol. Freightways, 2000 MT 365, 303 M 393, 15 P3d 935, 57 St. Rep. 1558 (2000).

Substantial Credible Evidence of Maximum Healing Prior to Nonwork-Related Injury — Claim Denied: Paterson sought temporary total disability benefits, claiming that a nonwork-related injury had exacerbated a prior work-related injury and was thus compensable. To determine whether maximum healing of the work-related injury had occurred, the insurer presented a hypothetical scenario to Paterson's physician, consisting of three components that the insurer intended to establish through its witnesses in subsequent testimony. Based on the hypothetical, the doctor agreed that Paterson did reach maximum healing prior to the nonwork-related injury. Paterson then paraphrased his version of events based on his witnesses' testimony, and the doctor opined that Paterson had not reached maximum healing. The Workers' Compensation Court found more credible the evidence presented in proving the hypothetical, including findings regarding Paterson's work history and back symptomology, his lack of fear of losing current employment or not obtaining future employment, and the affordability and availability of medical care. The court did not err in holding that Paterson had reached maximum healing prior to the nonwork-related injury. Paterson v. Mont. Contractor Comp. Fund, 1999 MT 158, 295 M 120, 983 P2d 300, 56 St. Rep. 623 (1999).

Job "No Longer Available": When the employer worked the employee beyond the employee's medical restrictions and caused the episode that triggered the employee's discharge, the Workers' Compensation Court did not err in determining that the employee's job was "no longer available" and therefore did not err in ruling that the employee was entitled to temporary total disability benefits. Ingbretson v. Louisiana-Pacific Corp., 272 M 294, 900 P2d 912, 52 St. Rep. 764 (1995).

Jurisdiction of Court — Wrongful Discharge From Employment Act Not Applicable: When the claimant was discharged for sleeping on the job, the Workers' Compensation Court found that the claimant's discharge was a pretext by the employer to rid itself of a disabled employee. The court did not exceed its jurisdiction in reaching its decision and was not required to apply the provisions of the Wrongful Discharge From Employment Act. Ingbretson v. Louisiana-Pacific Corp., 272 M 294, 900 P2d 912, 52 St. Rep. 764 (1995).

Cap on Benefits Payments as Temporary — Statutory Rate at Time of Injury Following Termination of Cap: The 1987 Legislature placed an arbitrary cap on the benefits payable to injured workers, as an exception to the regular benefit rate provided in subsection (3) of this section (1987). The Supreme Court construed the cap according to standard rules of statutory construction and held that according to the plain meaning of the words used, this section was clear and unambiguous in establishing a temporary rather than permanent cap on benefit payments. Following expiration of the benefit cap on June 30, 1991, the maximum benefit rate for workers is set at the state's average weekly wage at the time of the injury. Murer v. St. Comp. Mut. Ins. Fund, 267 M 516, 885 P2d 428, 51 St. Rep. 1145 (1994) (Murer II), clarified in Murer v. St. Comp. Mut. Ins. Fund, 283 M 210, 942 P2d 69, 54 St. Rep. 566 (1997) (Murer III), that the 1987 temporary cap applies to injuries that occurred between July 1, 1987, and June 30, 1989, and expired on June 30, 1989; that the 1989 temporary cap applies to injuries that occurred between July 17, 1989, and June 30, 1991, and expired on June 30, 1991; and that the 1989 temporary cap cannot be applied retroactively to injuries that occurred prior to July 17, 1989.

Higher Hourly Wage at Time of Injury Overrides Wage Earned in Four Previous Pay Periods: Although the claimant was earning $7.25 an hour at the time of injury, the Workers' Compensation

Court awarded an amount of total temporary disability compensation based on the $6-an-hour salary that the claimant had earned in the four pay periods preceding the injury. On appeal, the Supreme Court reversed, ruling that because 39-71-123(3)(b) (1991) allows use of additional pay periods if a claimant can show good cause why use of the four pay periods does not accurately reflect the claimant's employment history, the Workers' Compensation Court should have used the $7.25-an-hour pay period because it bore a more reasonable relationship to actual wages lost due to injury than did the $6-an-hour rate. Deshner v. Town & Country Foods, Inc., 266 M 352, 880 P2d 1300, 51 St. Rep. 787 (1994).

Duty of State Fund to Investigate Receipt of Collateral Benefits — Penalty for Unreasonable Termination of Benefits: Lovell, who was a painter, roofer, and lawn mower, stopped by the Oak Room Bar for a drink after work and was asked by the owner to help unload a truck. In the process, Lovell injured his knee and was found by the State Fund to be temporarily totally disabled. The State Fund paid disability benefits of $8.26 per week based upon the bar owner's testimony that he intended to pay Lovell $4.75 per hour for a 2-hour job. After receiving a computer printout showing that Lovell was receiving social security payments, the State Fund computed an offset against Lovell's benefits, reduced his payments to zero, and also erroneously reduced mileage payments to Lovell. The Workers' Compensation Court imposed a 20% penalty against the State Fund for these calculations and reductions. The Supreme Court found that the State Fund had a duty under this section to investigate the reason for the social security payments and that had it done so, the State Fund would have discovered the payments were for alcoholism and not the knee injury. Thus, the action of the State Fund in miscalculating Lovell's benefits was unreasonable and the penalty applied was proper. Action by the State Fund to settle the disputed amounts "on the courthouse steps" does not negate liability for the penalty. Lovell v. St. Comp. Mut. Ins. Fund, 260 M 279, 860 P2d 95, 50 St. Rep. 1043 (1993), followed in Mintyala v. St. Comp. Ins. Fund, 276 M 521, 917 P2d 442, 53 St. Rep. 503 (1996).

Benefit Calculation — Sporadic, Seasonal Job: Claimant worked at a seasonal, sporadic job during 31 of a total of 59 weeks, for a total of 967 hours. It was proper under the provisions of 39-71-123(3)(b) for the Workers' Compensation Court to consider additional pay periods and to exclude 18 weeks of idleness forced by weather, then divide the total number of actual hours by the actual number of weeks worked to arrive at a fair approximation of claimant's average weekly salary rather than to strictly consider only the four pay periods immediately preceding the injury, which would have provided an average monthly amount higher than the total amount earned in any of the 4 preceding months except 1. It was not error for the court to take into account the seasonal nature of the employment by including time off in its calculations. Gregory v. Michael Bailey & Sons Logging, 255 M 190, 841 P2d 525, 49 St. Rep. 966 (1992).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Cost-of-Living Increases Included in Initial Award of Social Security Benefits Excluded in Determining Workers' Compensation Offset: Broeker was injured in the course of his employment when a soft drink machine fell on him. In determining Social Security benefits to be offset against Broeker's workers' compensation benefits, the Workers' Compensation Court excluded cost-of-living increases that had been given to Social Security recipients between the time that Broeker became eligible for Social Security benefits and when he received them over 4 years later. Citing Colorado case law, the Supreme Court affirmed, noting that at the time of Broeker's injury, the Montana workers' compensation statutes did not include a cost-of-living provision and that Broeker was therefore not receiving an increased benefit or a double award. Broeker v. Great Falls Coca-Cola Bottling Co., 275 M 502, 914 P2d 967, 53 St. Rep. 235 (1996).

Social Security Benefits Offset Indexed to Date of Eligibility — Statute Not Ambiguous — Rule of Liberal Construction Inapplicable: Broeker was injured in the course of his employment when a soft drink machine fell on him. In determining Social Security benefits to be offset against Broeker's workers' compensation benefits, the Workers' Compensation Court held that the state payments were to be indexed to the date on which Broeker became eligible for those payments. The Supreme Court held that Broeker was incorrect when he argued that the words "for such week" in statute were ambiguous. The Supreme Court held that the language clearly referred to the week in which benefits are paid and that a rule of liberal construction in effect at the time of Broeker's injury was inapplicable because statute was unambiguous. For these reasons, the Supreme Court held that indexing the offset to the date on which Broeker became eligible for benefits was correct. Broeker v. Great Falls Coca-Cola Bottling Co., 275 M 502, 914 P2d 967, 53 St. Rep. 235 (1996).

Ability to Perform Odd Jobs but Not Regular Employment — Availability of Temporary Total Benefits: Consistent with the holding in Jensen v. Zook Bros. Constr. Co., 178 M 59, 582 P2d 1191 (1978), claimant's ability to perform intermittent odd jobs does not preclude a finding that a temporary total injury exists, especially when the work is performed with a substantial degree of pain. Wolfe v. Webb, 251 M 217, 824 P2d 240, 49 St. Rep. 1 (1992).

Claimant's Work Performed by Wife but Wages Paid to Claimant — Benefits Not Payable: As a result of an arrangement among McIntyre, his wife, and the employer, McIntyre continued to receive his regular wage during the 3-month period following his industrial accident, although his wife performed the work under his supervision. McIntyre contended that because his wife performed the work, it was she who was paid and not him, and therefore a claim for temporary total disability benefits was payable. However, while the arrangement was questionable, McIntyre's condition did not precipitate a total loss of wages because wages were nevertheless paid to him; therefore, benefits were properly denied. McIntyre v. St. Comp. Ins. Fund, 249 M 63, 813 P2d 451, 48 St. Rep. 579 (1991).

Offset of Auxiliary Social Security Benefits Payable Directly to Minor Child: This section does not distinguish between primary and auxiliary benefits for purposes of establishing an offset, but rather it applies to all benefits payable because of the injury. Therefore, State Fund is entitled to offset auxiliary social security benefits paid to a claimant's minor child even when the benefits are paid directly to the minor's mother who resides at a different address. Stahl v. State Comp. Mut. Ins. Fund, 246 M 271, 811 P2d 546, 48 St. Rep. 429 (1991).

Offset of Retroactive Social Security Benefits Paid to Attorney: Absent statutory or contractual authority to the contrary, State Fund is entitled to offset a portion of retroactive social security benefits paid directly to claimant's attorney as an authorized fee for legal services rendered in obtaining those benefits. While arguably unfair to claimant, State Fund is not required to bear an equal share of costs and attorney fees despite the fact that State Fund was benefited by the right to offset, resulting in claimant bearing the entire burden of costs and attorney fees for the social security claim. Stahl v. St. Comp. Mut. Ins. Fund, 248 M 271, 811 P2d 546, 48 St. Rep. 429 (1991).

No Physician Approval of Job Options — Temporary Total Benefits Improperly Terminated: Absent a physician's determination that claimant could return to work in one of the jobs listed by a vocational rehabilitation counselor, there was no substantial credible evidence to support the Workers' Compensation Court's finding that claimant could return to work in one of those jobs. Because the employer failed to meet the burden under Coles v. Seven Eleven Stores, 217 M 343, 704 P2d 1048 (1985), that claimant could return to work at his former or an equivalent job, as determined by a physician based on knowledge of claimant's former employment duties, termination of temporary total benefits was improper. Wood v. Consol. Freightways, Inc., 248 M 26, 808 P2d 502, 48 St. Rep. 306 (1991), distinguished in Garcia v. St. Comp. Mut. Ins. Fund, 253 M 196, 832 P2d 770, 49 St. Rep. 440 (1992), and followed in Ness v. Anaconda Minerals Co., 257 M 335, 849 P2d 1021, 50 St. Rep. 296 (1993), and Larson v. Cigna Ins. Co., 276 M 283, 915 P2d 863, 53 St. Rep. 394 (1996).

Permanent Partial Disability and Loss of Earning Capacity Properly Determined — Conflicting Conclusions Regarding Temporary Total Disability — Remand: Applying 1979 workers' compensation provisions, the trial court properly found that claimant suffered a loss of earning capacity and was eligible for permanent partial disability benefits based on the following medical and other evidence: (1) claimant's accident and injury were undisputedly employment-related; (2) prior to the accident, claimant was a strong person with no history of back problems; (3) after the accident, numerous physicians diagnosed soft tissue injury; (4) claimant had a number of vocational alternatives and could minimize pain by following a pain clinic's recommendations; and (5) claimant could return to work and earn essentially the same wage. However, after applying the factors set out in Beck v. St. Comp. Ins. Fund, 230 M 294, 749 P2d 527 (1988), claimant had a 78% reduction in job market as a result of her 10% impairment rating, taking into account her chronic pain and inability to work long hours standing or in one position. Nevertheless, the case was remanded because of inconsistent and conflicting conclusions regarding whether claimant was eligible for temporary total disability benefits between the time employment ended and permanent partial disability was established. Winchell v. G&B Motors, Inc., 246 M 320, 805 P2d 1323, 47 St. Rep. 2070 (1990).

Determining Benefits When Disablement Occurs After Time of Injury: Claimant continued to work for 2½ months after his injury. The insurance carrier argued that other jurisdictions have held that it is more appropriate to compute wages as of the time of the disablement rather than the time of the accident. The Supreme Court stated that the cases cited by the insurer were not pertinent because those cases referred to instances where the disablement occurred years after the accident rather than 2½ months later, as in the case before the court. Stuber v. John Deere Ins. Co., 236 M 189, 769 P2d 1205, 46 St. Rep. 287 (1989).

Social Security Disability Setoff Computation — Difference Between Disability Payment and Lower Early Retirement Payment Not Basis for Deduction Computation: Worker receiving workers' compensation applied for and received early retirement (at age 62) social security benefits. About 6 months later, he elected to exercise his option to receive social security disability benefits instead. Section 39-71-702 provides for an offset against the workers' compensation payment of half of the social security disability payment "payable because of the injury". The words "payable because of the injury" do not refer to the difference between the early retirement benefit amount and the (higher) disability benefit amount. The statute is clear and unambiguous in its plain language. Half the disability payment is to be deducted, not just half of the amount by which that payment exceeds what the early retirement payment would be. This interpretation does not violate the supremacy clause of the federal constitution. Watson v. Seekins, 234 M 309, 763 P2d 328, 45 St. Rep. 1931 (1988).

Rating of Impairments Restricted to Licensed Physicians: Under 39-71-122 (repealed 1987) and 39-71-701 through 39-71-703, the legislative intent was that the making of impairment ratings be restricted to licensed medical physicians. Therefore, the Workers' Compensation Division (now Department of Labor and Industry) properly exercised its rulemaking authority by promulgating ARM 24.29.806 (now repealed), which imposes the restriction. Weis v. Div. of Workers' Comp., 232 M 218, 755 P2d 1385, 45 St. Rep. 1004 (1988).

Total Benefits Available — Temporary and Permanent Disability: Where a claimant was entitled to some temporary and some permanent disability benefits but the actual duration of the healing period was not determined, the Supreme Court reconciled several inconsistent statutes in the 1971 workers' compensation law to determine that claimant was entitled to a maximum of 300 weeks of temporary total disability benefits and, totaling temporary total disability benefits and permanent partial or permanent total benefits, 500 weeks of total compensation benefits. Larson v. Crissmore, 228 M 9, 741 P2d 401, 44 St. Rep. 1299 (1987), distinguishing McDanold v. B.N. Transport, Inc., 194 M 300, 634 P2d 175, 38 St. Rep. 1466 (1981).

Workers' Compensation Denied — Claimant Receiving Unemployment Benefits: The judgment of the Workers' Compensation Court denying claimant disability benefits will not be disturbed on appeal as it is supported by substantial credible evidence. Claimant was receiving unemployment benefits during the period he claims he was disabled, asserting on his application for unemployment benefits that he was able and available to work and had no medical condition that prevented him from accepting immediate employment in his field. Eveleigh v. Nat'l Union Fire Ins. Co. of Pittsburgh, 225 M 53, 730 P2d 1176, 44 St. Rep. 36 (1987).

Future Earning Capacity as Based on Estimated Payroll: Claimants established a partnership to buy and sell used furniture and purchased workers' compensation insurance through Rockwood Company (Rockwood). On their fourth day of business, both claimants were injured. Rockwood accepted liability and set the rates for temporary total disability benefits on the basis of annual wages of $12,000 per claimant, but claimants requested that the Workers' Compensation Court increase their benefits. Due to the brevity of employment, no evidence of actual earnings was available. The only documentary evidence presented was the business' application for insurance, which indicated the expectation of a total annual payroll of $30,000. The court increased the benefits based on the estimated annual income for each claimant of $15,000, or half the expected payroll shown on the application. In affirming the award, the Supreme Court concluded that, in the absence of better evidence, the Workers' Compensation Court arrived at a fair estimate of claimants' future earning capacity based on the estimated business payroll divided by the actual number of employees. Wilkerson v. Rockwood Co., 221 M 250, 718 P2d 338, 43 St. Rep. 787 (1986).

Temporary Total Disability Compensation — Based on Wages, Not Income: Appellant, Harmon, was injured while employed by his father as a ranch hand. He concurrently operated his own farm. The State Compensation Insurance Fund determined Harmon's temporary total disability rate based only on his salary as a ranch hand. Harmon maintained that earnings from his separate but identical self-employment on his own farm should have been combined with his earnings as a ranch hand to properly determine his disability rate. The Workers' Compensation Court found that Harmon failed to prove that he had additional wages beyond his monthly salary as a ranch hand which could be aggregated to increase his rate. Essentially, Harmon suggested on appeal that the gross income from his farm should be treated as wages; however, the Supreme Court found that under 39-71-116, the term "wages" is predicated on an employment relationship which generates income from employer to employee. The record was clear that no such relationship existed in Harmon's position as a self-employed farmer. As stated in Gee v. St. Comp. Ins. Fund, 197 M 335, 642 P2d 1070 (1982), in providing compensation for a temporary total disability, the Legislature chose to restrict the compensation to that based on loss of wages rather than loss of earnings. Although Harmon clearly suffered a loss of earnings on his farm from his disability, this loss of earnings was held to be noncompensable for purposes of his temporary total disability. Harmon v. St. Comp. Ins. Fund, 220 M 445, 716 P2d 605, 43 St. Rep. 514 (1986).

Social Security Offset: Montana law allows an offset against compensation when an injured worker is also receiving social security disability benefits. Belton v. Carlson Transp., 220 M 194, 714 P2d 148, 43 St. Rep. 286 (1986).

Benefits Based on Forty Hours a Week Despite Intermittent Nature of Job: Claimant worked in a roofing business typified by 40-hour workweeks unless interrupted by inclement weather. The Workers' Compensation Court, in awarding temporary total disability benefits, found that claimant was hired on a full-time basis and that claimant's usual hours of employment were 40 hours a week. Defendants contended on appeal that the court should use an averaging formula to establish claimant's base workweek. The court rejected the contention and appellants' citation to 39-71-116(20) and 39-71-701 as authority, finding that the Workers' Compensation Court decision was based on substantial evidence. Denend v. Bradford Roofing & Insulation, 218 M 505, 710 P2d 61, 42 St. Rep. 1778 (1985).

Average Gross Earnings: Claimant's average gross earnings under this section's definition of "wages" are the amount he was earning at the time of his injury in October 1981, not the amount he was earning from a different employer at the time of an earlier injury in January 1981, even though he had not worked between January and October and the October employment was temporary. Where he was receiving compensation benefits as a result of the injury in January 1981, he was not entitled to include the amount of those benefits in the computation of his average gross earnings for the purpose of determining benefits due him for the second injury. Putnam v. Castle Mtn. Corp., 216 M 306, 702 P2d 333, 42 St. Rep. 833 (1985).

Claimant Need Not Undergo Surgery to Prove Permanent Disability: The Workers' Compensation Court found that the claimant was totally disabled, but that his disability was temporary because back surgery may improve his condition. On appeal, the Supreme Court ruled that there is sufficient evidence to establish that the claimant is permanently disabled; he is not required to undergo surgery to determine whether his condition would change. The matter was remanded for a determination of how the claimant's permanent disability may have affected his ability to function in the normal labor market. Moilanen v. St. Comp. Ins. Fund, 214 M 367, 694 P2d 485, 42 St. Rep. 25 (1985).

Total Disability — Ends When Restoration Ends:

A worker is temporarily totally disabled until such time as the worker is as far restored as the permanent character of his injuries will permit. When the claimant has reached this stage in his healing process, temporary total disability ceases and partial disability begins. In making this determination, the compensation court should not rely exclusively on medical opinion of restoration when other credible evidence clearly demonstrates the healing process is not yet complete. McDanold v. B.N. Transp., Inc., 208 M 470, 679 P2d 1188, 41 St. Rep. 472 (1984).

There was sufficient evidence upon which to base the finding that claimant had not yet been "restored as far as the permanent character of his injuries will permit", thus supporting the conclusion that claimant continued to suffer temporary total disability. Smith v. Pac. Ins. Co., 177 M 267, 581 P2d 834 (1978).

Temporary Total Disability Awarded During Period of Medical Testing: Where the Workers' Compensation Court ordered the claimant to undergo spinal nerve tests on the strength of medical testimony that the tests were needed in order to restore the claimant to his best physical condition, the court did not err in awarding the claimant temporary total disability payments during the period of testing. While he undergoes treatment, the claimant will of necessity experience a total loss of wages. Therefore the requirements of the statutory definition of "total temporary disability" were met and the award was proper. Wilson v. Glacier Gen. Assurance Co., 206 M 63, 670 P2d 931, 40 St. Rep. 1509 (1983).

Temporary Total Disability Where Claimant Returns to School: The claimant underwent surgery and hospitalization after a September 1978 industrial accident. Claimant's doctor, knowing that claimant intended to return to school and not to his job, released him to resume "full, normal activities and duties" in January of 1979. In March of 1979 claimant's surgical incision herniated, thereby necessitating corrective surgery. Claimant's doctor again released him for full activity in May of 1979. Claimant received his degree in August of 1979. The court's determination of temporary total disability from the date of the accident until August of 1979 was supported by substantial evidence. Van Daveer v. Stauffer Chem. Co., 200 M 218, 657 P2d 1142, 39 St. Rep. 1698 (1982).

Computation of Temporary Total Disability Award Based on Concurrent Employment: Earnings from concurrent employments may be combined in computing workers' compensation award if the employments are sufficiently similar so that a disabling injury at one employment would necessarily disable the employee in respect to the other employment. However, where appellant had terminated the concurrent employment prior to his injury and was merely receiving a 2-month continuation of salary because of length of service in the concurrent employment, such earnings from that former employment were not properly included in computing temporary total disability award. Gee v. St. Compensation Ins. Fund, 197 M 335, 642 P2d 1070, 39 St. Rep. 597 (1982), followed in Milender v. Carpenter, 230 M 1, 748 P2d 932, 44 St. Rep. 2204 (1987).

Aggregate Earnings: The Workers' Compensation Court can aggregate earnings from two separate and unrelated employments for the purpose of determining benefits payable. Catteyson v. Glacier Gen. Assurance Co., 183 M 284, 599 P2d 341, 36 St. Rep. 1443 (1979), following Walker v. H. F. Johnson, Inc., 180 M 405, 591 P2d 181 (1978).

Computing Average Daily Wage: Under section 92-703, R.C.M. 1947 (now repealed), as amended by sec. 3, Ch. 207, L. 1967, the first step in the formula for computing compensation is to determine the average daily wage. Average daily wage is computed by dividing a person's earnings over a reasonable period of time by the total number of days he worked, excluding overtime. What is a reasonable period of time depends on the circumstances of each case. The period must be sufficiently long to take into account seasonal fluctuations for hours, wage rates, vacations, and any other factors that may materially affect the average daily wage. Walter v. Nat'l Auto. & Cas. Ins. Co., 181 M 109, 592 P2d 497, 36 St. Rep. 553 (1979).

Intent of Former Section: The intent of section 92-703, R.C.M. 1947 (now repealed), with respect to partial disability, was to compensate the injured employee by a percentage of the difference between the wages received at the time of the injury and the wages that such injured employee is able to earn thereafter. Walter v. Nat'l Auto. & Cas. Ins. Co., 181 M 109, 592 P2d 497, 36 St. Rep. 553 (1979).

Computing Temporary Total Disability: In determining the amount of temporary total disability under former law, weekly wages (average wages earned for the usual hours of employment in a day multiplied by 5 working days) must first be determined. Once that is done the wage figure is applied to the factor contained in section 92-701, R.C.M. 1947 (now repealed), to arrive at the actual amount of weekly compensation to which one is entitled. Hutchison v. Liberty Mut. Ins. Co., 178 M 81, 582 P2d 1203, 35 St. Rep. 1126 (1978).

Evidence Must Sustain Classification: Workers' Compensation Court finding of "temporary total disability" was overruled, and reclassification was mandated as "permanent". Skrukrud v. Gallatin Laundry Co., Inc. & Employees Commercial Union Ins. Co., 171 M 217, 557 P2d 278, 33 St. Rep. 1191 (1976).

Retirement Age Does Not Stop Benefits: No statutory provision is made for early cessation of benefits due to claimant reaching retirement age. Skrukrud v. Gallatin Laundry Co., Inc. & Employees Commercial Union Ins. Co., 171 M 217, 557 P2d 278, 33 St. Rep. 1191 (1976).

Attorney General's Opinions

Supplementation of Workers' Compensation Benefits With Annual Leave Not Allowed: This section provides that a worker is eligible for temporary total disability benefits after suffering a total loss of wages. The term "wages" is defined in 39-71-123 to include remuneration at the regular hourly rate for vacations and sickness periods. If annual leave benefits are paid, then the employee is not suffering a total loss of wages and is not eligible for workers' compensation benefits. Therefore, a state agency may not supplement workers' compensation wage loss benefits with annual leave upon the request of an employee. 44 A.G. Op. 33 (1992).

Change in State's Average Weekly Wage — No Effect on Existing Benefits: The amount of an existing benefit award under 39-71-701, 39-71-702, or 39-71-703 is unaffected by increase in the state's average weekly wage. 40 A.G. Op. 38 (1984).

Salary Payments to Municipal Policemen After Disabling Injury: Section 7-32-4132 requires a municipality to pay an injured policeman's full salary during the period of disability or 1 year, whichever ends first. The Workers' Compensation Fund is not liable for any wage loss benefits during that period because the municipality pays the policeman in full and he has suffered no wage loss. 37 A.G. Op. 156 (1978).

39-71-702. Compensation for permanent total disability.

Compiler's Comments

2003 Amendment: Chapter 138 in (5) deleted former second sentence that read: "A worker may not receive more than 10 adjustments" and at end of second sentence after "previous year" deleted "or 3%, whichever is less". Amendment effective March 26, 2003.

Effective Date — Applicability: Section 2, Ch. 138, L. 2003, provided: "[This act] is effective on passage and approval and applies to injuries that occur on or after [the effective date of this act]." Effective March 26, 2003.

1995 Amendment: Chapter 243 in (2), at end, substituted "objective medical findings" for "medical evidence"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

1993 Amendments: Chapter 296 substituted (6) establishing a penalty for receipt of both wages and permanent total disability benefits for former language that read: "Notwithstanding subsection (3), beginning July 1, 1987, through June 30, 1991, the maximum weekly compensation benefits for permanent total disability may not exceed the state's average weekly wage of $299 established July 1, 1986"; and made minor changes in style. Amendment effective July 1, 1993.

Chapter 619 substituted (7) authorizing insurer to suspend biweekly compensation benefits for claimant awarded Social Security benefits and providing that suspension does not prevent repayment plan for former language that read: "Notwithstanding subsection (3), beginning July 1, 1987, through June 30, 1991, the maximum weekly compensation benefits for permanent total disability may not exceed the state's average weekly wage of $299 established July 1, 1986"; and made minor changes in style. Amendment effective July 1, 1993.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

1991 Amendment: In (1), near beginning after "disabled and is", substituted "permanently totally disabled, as defined in 39-71-116" for "unable to return to work due to injury", deleted former second sentence that read: "At an insurer's request, an evaluation of all options under 39-71-1012 must be made before permanent total disability status is determined", and at end of last sentence deleted "and 39-71-1026". Amendment effective July 1, 1991.

Severability: Section 15, Ch. 574, L. 1991, was a severability section.

1989 Special Session Amendment: In (6) reimposed benefit freeze that ended June 30, 1989, to continue through June 30, 1991. Amendment effective July 17, 1989.

Severability: Section 13, Ch. 9, Sp. L. June 1989, was a severability clause.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1987 Amendment: Inserted (1) stating requirements for permanent total disability benefits; inserted (2) requiring a finding of permanent total disability to be supported by a preponderance of medical evidence; in (3), near beginning of first sentence, substituted "an injury resulting in permanent total disability" for "injury producing total permanent disability", at end of second sentence inserted "at the time of injury", and deleted former third sentence that read: "Total permanent disability benefits shall be paid for the duration of the worker's total permanent disability"; inserted (5) concerning cost-of-living adjustments; and inserted (6) setting a cap on benefits for 1987 biennium.

1981 Amendment: Inserted "disability" before "benefits" near beginning of (2) and at end added phrase providing for calculation from date of disability entitlement.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Offset of Social Security Provisions Constitutional: Citing McClanathan v. Smith, 186 M 56, 606 P2d 507 (1980), the Ninth Circuit Court of Appeals affirmed the constitutionality of the offset against Social Security benefits authorized by this section. Siaperas v. Mont. St. Comp. Ins. Fund, 480 F3d 1001 (9th Cir. 2007).

Disparate Awards for Permanent Partial Disability and Permanent Total Disability Not Violative of Equal Protection: The statutory framework of the Workers' Compensation Act reveals distinctly different purposes served by permanent partial disability and permanent total disability benefits. Permanent partial disability benefits compensate a worker for sustaining a partial disability by a smaller impairment award and by supplementing wages earned when the claimant returns to work. Permanent total disability benefits do not contemplate a return to work and so provide a higher continuous benefit that is paid over the work life of the claimant. Because claimants in these classes are not similarly situated, denial of an impairment award to permanent partial disability claimants does not violate equal protection guarantees. Rausch v. St. Comp. Ins. Fund, 2005 MT 140, 327 M 272, 114 P3d 192 (2005).

Improper Apportionment of Total Disability Benefits for Total Wage Loss as Result of Occupational Disease — Schmill Applied: In its order of determination, the Department determined that Hand was entitled to 25% of total disability payments if Hand suffered a total wage loss as the result of an occupational disease. However, Hand's case was still pending when the Supreme Court decided Schmill v. Liberty NW. Ins. Corp., 2003 MT 80, 315 M 51, 67 P3d 290 (2003), which held that the apportionment of benefits for a work-related injury was statutorily prohibited and violated the equal protection clause of the Montana Constitution. Thus, the Supreme Court remanded Hand's case and ordered that Hand be awarded 100% of his total disability payments if he suffered a total wage loss as the result of an occupational disease. Hand v. Uninsured Employers' Fund, 2004 MT 336, 324 M 196, 103 P3d 994 (2004).

Reduction of Workers' Compensation Benefits to Recover Overpaid Benefits From Retroactive Social Security Disability Award: Prior to 1993, the Workers' Compensation Act authorized insurers to offset benefit distributions on account of a Social Security disability award, but failed to address the recovery of prior payments that became duplicate by virtue of a subsequent retroactive Social Security disability award. The fact that a Social Security disability award is delayed should not preclude offset for the same amount. In this case, the State Fund acted reasonably in reducing Flynn's state benefit disbursements in order to recover overpaid benefits from Flynn's retroactive Social Security disability award. Flynn v. St. Comp. Ins. Fund, 2002 MT 279, 312 M 410, 60 P3d 397 (2002).

Impairment Award Payable Upon Receipt of Undisputed Impairment Rating: Several injured workers filed petitions claiming entitlement to immediate payment of impairment awards based on their respective impairment ratings. The State Fund denied immediate payment on grounds that impairment awards for permanently totally disabled claimants were not due until the claimants received or were entitled to receive Social Security benefits. The Workers' Compensation Court consolidated the cases and concluded that impairment awards for permanently disabled claimants were not authorized at all, so the court never reached the question of when impairment awards were payable. The Supreme Court reversed, holding that impairment awards were authorized for permanently totally disabled claimants, and then went on to address when impairment awards are payable. The court found that requiring the delay of an impairment award until retirement would create an absurd result that was not intended by the Legislature. Rather, an impairment award is due a permanently totally disabled claimant upon the claimant's receipt of an undisputed impairment rating. Rausch v. St. Comp. Ins. Fund, 2002 MT 203, 311 M 210, 54 P3d 25 (2002). However, see Rausch v. St. Comp. Ins. Fund, 2005 MT 140, 327 M 272, 114 P3d 192 (2005), in which it was held that permanent total disability claimants are not entitled to an impairment award under the 1987 and 1989 versions of the Workers' Compensation Act.

Impairment Award to Permanently Totally Disabled Claimant Considered Permanent Total Disability Benefit: On the question of how an impairment award to a permanently totally disabled claimant should be characterized, the Supreme Court held that the most logical approach was to characterize the impairment award consistently with the claimant's disability status, considering that the impairment is a result of the claimant's injury and a substantial factor in the disability. Therefore, in the case of a claimant who was permanently and totally disabled, the impairment award was characterized as a permanent total disability benefit. Rausch v. St. Comp. Ins. Fund, 2002 MT 203, 311 M 210, 54 P3d 25 (2002). However, see Rausch v. St. Comp. Ins. Fund, 2005 MT 140, 327 M 272, 114 P3d 192 (2005), in which it was held that permanent total disability claimants are not entitled to an impairment award under the 1987 and 1989 versions of the Workers' Compensation Act.

Attorney Fee Lien Applicable to Medical Benefits Received in Workers' Compensation Settlement: Lockhart moved for an order directing the insurer to pay attorney fees out of the medical benefits owing to Lockhart under his successful workers' compensation claim. The Workers' Compensation Court denied the attorney fees on grounds that medical benefits are not benefits, but rather an imposition of liability imposed on the insurer, and that because an award of medical benefits does not entitle a claimant to receipt of money, there is no property against which an attorney fee lien can attach. The court held that when a claim has been denied and later found compensable by the court without a separate award of attorney fees, a contingent attorney fee may be computed based on medical benefits, but the amount may not be deducted from the compensation payable to the medical providers. The Supreme Court disagreed. Medical benefits are not the property of the medical providers simply because the medical providers are the actual recipients of the money, nor are medical benefits simply an obligation of the insurer. Instead, medical benefits are the property of the individual claimant, and, as such, the claimant should be allowed to pay attorney fees out of medical benefits. In the context of workers' compensation cases, attorney fee liens attach as a matter of law to all compensation, including medical benefits, upon the filing of an attorney retainer agreement with the Department of Labor and Industry. To require a claimant to pay a disproportionate amount of attorney fees from the claimant's personal resources would be unfair and contrary to the fundamental purpose of workers' compensation laws. Lockhart v. N.H. Ins. Co., 1999 MT 205, 295 M 467, 984 P2d 744, 56 St. Rep. 800 (1999), following Carlson v. Cain, 216 M 129, 700 P2d 607, 42 St. Rep. 695 (1985), and followed in Dildine v. Liberty NW. Ins. Corp., 2009 MT 87, 350 M 1, 204 P3d 729 (2009).

Emotional and Physical Condition Preexisting Work-Related Injury — Employer Liable for Disability — No Substantial Evidence to Support Workers' Compensation Court's Findings to Contrary: In May 1990, petitioner's son was killed in an accident. As a result of that event, petitioner suffered severe depression and was diagnosed with posttraumatic stress disorder. In 1992, petitioner suffered an injury on the job that aggravated an underlying condition of degenerative arthritis or disc disease. Because of the injury, petitioner was unable to continue working. In 1993, petitioner's daughter died, her foster daughter and her children were killed in a house fire, and her sister was diagnosed with a terminal brain tumor. Lumbermen's contended that petitioner's physical disability was temporary, that the primary factor in petitioner's disability was the emotional disorder that developed subsequent to the work-related injury, and that Lumbermen's was not responsible for any disability caused by that disorder. The Workers' Compensation Court found that petitioner's emotional condition was caused by events that occurred subsequent to the work-related injury and that Lumbermen's was not liable. The Supreme Court held that there was no substantial evidence to support that finding. An employer takes its employees as it finds them. The evidence showed that the emotional condition arose from the son's death, which preceded the work-related injury, and that the work-related injury aggravated a preexisting physical condition. An employee who suffers from a preexisting condition is entitled to compensation if the condition was aggravated by an industrial injury. Satterlee v. Lumbermen's Mut. Cas. Co., 280 M 85, 929 P2d 212, 53 St. Rep. 1310 (1996).

Cap on Benefits Payments as Temporary — Statutory Rate at Time of Injury Following Termination of Cap: The 1987 Legislature placed an arbitrary cap on the benefits payable to injured workers, as an exception to the regular benefit rate provided in 39-71-701(3)(1987). The Supreme Court construed the cap according to standard rules of statutory construction and held that according to the plain meaning of the words used, 39-71-701 was clear and unambiguous in establishing a temporary rather than permanent cap on benefit payments. Following expiration of the benefit cap on June 30, 1991, the maximum benefit rate for workers is set at the state's average weekly wage at the time of the injury. Murer v. St. Comp. Mut. Ins. Fund, 267 M 516, 885 P2d 428, 51 St. Rep. 1145 (1994) (Murer II), clarified in Murer v. St. Comp. Mut. Ins. Fund, 283 M 210, 942 P2d 69, 54 St. Rep. 566 (1997) (Murer III), that the 1987 temporary cap applies to injuries that occurred between July 1, 1987, and June 30, 1989, and expired on June 30, 1989; that the 1989 temporary cap applies to injuries that occurred between July 17, 1989, and June 30, 1991, and expired on June 30, 1991; and that the 1989 temporary cap cannot be applied retroactively to injuries that occurred prior to July 17, 1989.

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Cost-of-Living Increases Included in Initial Award of Social Security Benefits Excluded in Determining Workers' Compensation Offset: Broeker was injured in the course of his employment when a soft drink machine fell on him. In determining Social Security benefits to be offset against Broeker's workers' compensation benefits, the Workers' Compensation Court excluded cost-of-living increases that had been given to Social Security recipients between the time that Broeker became eligible for Social Security benefits and when he received them over 4 years later. Citing Colorado case law, the Supreme Court affirmed, noting that at the time of Broeker's injury, the Montana workers' compensation statutes did not include a cost-of-living provision and that Broeker was therefore not receiving an increased benefit or a double award. Broeker v. Great Falls Coca-Cola Bottling Co., 275 M 502, 914 P2d 967, 53 St. Rep. 235 (1996).

Social Security Benefits Offset Indexed to Date of Eligibility — Statute Not Ambiguous — Rule of Liberal Construction Inapplicable: Broeker was injured in the course of his employment when a soft drink machine fell on him. In determining Social Security benefits to be offset against

Broeker's workers' compensation benefits, the Workers' Compensation Court held that the state payments were to be indexed to the date on which Broeker became eligible for those payments. The Supreme Court held that Broeker was incorrect when he argued that the words "for such week" in statute were ambiguous. The Supreme Court held that the language clearly referred to the week in which benefits are paid and that a rule of liberal construction in effect at the time of Broeker's injury was inapplicable because statute was unambiguous. For these reasons, the Supreme Court held that indexing the offset to the date on which Broeker became eligible for benefits was correct. Broeker v. Great Falls Coca-Cola Bottling Co., 275 M 502, 914 P2d 967, 53 St. Rep. 235 (1996).

Independent Disabling Conditions — One Work-Related, Another Not: The Workers' Compensation Court held that Larson was ineligible to receive permanent total disability benefits for a work-related hernia because he first became totally disabled by a preexisting, nonwork-related and independent heart condition. In a case of first impression, the Supreme Court, noting that the liberal construction provision in 39-71-104 (now repealed) favored the injured worker, relied on Bond v. St. Regis Paper Co., 174 M 417, 571 P2d 372 (1977), for the proposition that an employer takes an employee subject to the employee's physical condition at the time of employment and on Shea v. Dept. of Labor and Industry, 529 P2d 1131 (Wash. Ct. App. 1974), and Estate of Ensley v. Anglo Alaska Constr., 773 P2d 955 (Alaska 1989), in holding that if evidence showed that Larson's hernia produced a permanent total disability, total disability benefits were payable regardless of the fact that the preexisting, nonwork-related heart condition also could be considered a cause of the permanent total disability. Larson v. Cigna Ins. Co., 271 M 98, 894 P2d 327, 52 St. Rep. 369 (1995).

Evidence Supports Permanent Disability Caused by Previous Accident: The Workers' Compensation Court found that the claimant's current condition was not the result of a 1979 shoulder injury, but rather was aggravated by a 1984 accident. On appeal, the Supreme Court ruled that there was sufficient evidence to establish that the claimant's shoulder condition was caused by the 1979 accident and that the claimant had become permanently disabled because of the arthritic condition of his shoulder. The Supreme Court remanded for a determination of whether the claimant's permanent disability is partial or total. Harmon v. Harmon, 249 M 387, 816 P2d 1032, 48 St. Rep. 698 (1991).

Claimant Unable to Perform Work in Normal Labor Market: The District Court erred in holding that there was no evidence by which it could establish the claimant's disability and compensation rate for his second injury. The record established that he had only a high school education and that his employment experience was limited to physical labor jobs that he is no longer able to perform. The burden now shifts to his employer to show that claimant has reasonable prospects for employment. Varela v. Petroleum Cas. Co., 237 M 300, 773 P2d 299, 46 St. Rep. 819 (1989).

Social Security Disability Setoff Computation — Difference Between Disability Payment and Lower Early Retirement Payment Not Basis for Deduction Computation: Worker receiving workers' compensation applied for and received early retirement (at age 62) social security benefits. About 6 months later, he elected to exercise his option to receive social security disability benefits instead. This section provides for an offset against the workers' compensation payment of half of the social security disability payment "payable because of the injury". The words "payable because of the injury" do not refer to the difference between the early retirement benefit amount and the (higher) disability benefit amount. The statute is clear and unambiguous in its plain language. Half the disability payment is to be deducted, not just half of the amount by which that payment exceeds what the early retirement payment would be. This interpretation does not violate the supremacy clause of the federal constitution. Watson v. Seekins, 234 M 309, 763 P2d 328, 45 St. Rep. 1931 (1988).

Rating of Impairments Restricted to Licensed Physicians: Under 39-71-122 (repealed 1987) and 39-71-701 through 39-71-703, the legislative intent was that the making of impairment ratings be restricted to licensed medical physicians. Therefore, the Workers' Compensation Division (now Department of Labor and Industry) properly exercised its rulemaking authority by promulgating ARM 24.29.806 (now repealed), which imposes the restriction. Weis v. Div. of Workers' Comp., 232 M 218, 755 P2d 1385, 45 St. Rep. 1004 (1988).

Tip Income Not Included in Original Calculation of Benefit Rate — Remand: Ten years after his injury, claimant contended that money he received in tips but never reported should have been included in his wage base. The Supreme Court found that the passage of more than 10 years, combined with the inability of claimant or his employer to submit proof of the alleged tips, indicated that the doctrine of equitable estoppel applied. The court remanded to the Workers' Compensation Court for reconsideration of the tip income issue in light of the elements constituting equitable estoppel described in Sweet v. Colborn School Supply, 196 M 367, 639 P2d 521 (1982). Sampson v. Broadway Yellow Cab Co., 226 M 273, 735 P2d 298, 44 St. Rep. 649 (1987), distinguished in Miller v. W. Guar. Fund Serv., 248 M 132, 809 P2d 1257, 48 St. Rep. 348 (1991), in which neither equitable estoppel nor laches applied because: (1) claimant was induced by the employer as to how tips should be reported; (2) the claim for benefits specifically stated that tips were not included in wages listed; and (3) there was only a 2-year delay in asserting the claim for increased wages, during which time the insurer had constant access to claimant's employment records.

Social Security Offset: Montana law allows an offset against compensation when an injured worker is also receiving social security disability benefits. Belton v. Carlson Transp., 220 M 194, 714 P2d 148, 43 St. Rep. 286 (1986).

Permanent Total Disability Benefits — Not Based on Earning Capability: Claimant LaVe contended that the lower court erred in basing her permanent total disability benefits on her usual hours of employment rather than on her earning capability. At the time of injury, she was working 10 hours a week, but she asserted that since she had intended to get a job working 40 hours a week, her benefits should be based on her capability to work 40 hours a week. Notwithstanding the fact that 39-71-116 mentions earning capability in the definition of permanent total disability, under 39-71-702 benefits for such a disability are "66⅔% of the wages received at the time of the injury". Section 39-71-116 defines wages as "the average gross earnings received by the employee at the time of the injury for the usual hours of employment in a week". Therefore, the Supreme Court affirmed the lower court's computation of benefits based on 10 hours a week actual employment rather than on an earning capability based on 40 hours a week. LaVe v. School District, 220 M 52, 713 P2d 546, 43 St. Rep. 165 (1986).

Claimant Need Not Undergo Surgery to Prove Permanent Disability: The Workers' Compensation Court found that the claimant was totally disabled, but that his disability was temporary because back surgery may improve his condition. On appeal, the Supreme Court ruled that there is sufficient evidence to establish that the claimant is permanently disabled; he is not required to undergo surgery to determine whether his condition would change. The matter was remanded for a determination of how the claimant's permanent disability may have affected his ability to function in the normal labor market. Moilanen v. St. Comp. Ins. Fund, 214 M 367, 694 P2d 485, 42 St. Rep. 25 (1985).

No Offset Against Claimant of Social Security Benefits: At the time that claimant suffered the injury which rendered him totally permanently disabled, in May 1974, Montana law provided for a 100% offset of social security disability benefits. Shortly afterward, the Legislature reduced the offset to 50%. In 1980, in McClanathan v. Smith, 186 M 56, 606 P2d 507, the Supreme Court ruled that the 100% offset statute was constitutionally unenforceable. Therefore, application of a 50% offset to claimant was error. The statutes in effect at the time of injury set the standards by which the benefits for the claimant are computed, and since the offset statute in effect at the time of claimant's injury was void under the McClanathan decision, no offset can be made of claimant's benefits. Neither can the 50% offset statute be applied retroactively to claimant because this would be an impairment of his vested rights. Trusty v. Consol. Freightways, 210 M 148, 681 P2d 1085, 41 St. Rep. 973 (1984).

Social Security Auxiliary Benefits Includable in Offset Formula: Social security benefits received by auxiliaries of the disabled person are properly included in the formula for offsets against workers' compensation benefits under this section. Trusty v. Consol. Freightways, 210 M 148, 681 P2d 1085, 41 St. Rep. 973 (1984).

Refusal to Submit to Low-Risk Surgery With High Probability of Success — Effect on Disability: The Workers' Compensation Court found that claimant was permanently totally disabled despite the fact that claimant refused low-risk surgery with a 92% chance of restoring working ability. The claimant had a manic-depressive disorder that distorted his powers of perception, comprehension, and judgment and constricted his mind with the possibility of failure, reinjury, and pain. His mental disorder prevented him from evaluating rationally the benefits of the proposed surgery. From this perspective, the claimant's refusal to submit to knee surgery was not unreasonable. In so holding, the Supreme Court overruled Dosen v. E. Butte Copper Min. Co., 78 M 579, 254 P 880 (1927). Small v. Transp. Ins. Co., 209 M 387, 681 P2d 1081, 41 St. Rep. 776 (1984).

Offset Claim Motivated by Good Faith: At the time that defendants claimed offset against claimant's workers' compensation benefits, defendants' conduct was lawful and motivated by good faith, since the offset provision had not, at that time, been declared unconstitutional. Vigue v. Evans Prod. Co., 187 M 1, 608 P2d 488, 37 St. Rep. 474 (1980).

Offset Statute — Constitutionality Under Discrimination by "Social Condition": Appellant attacks the Offset Statute on the grounds that it discriminates against him on the basis of social condition, namely as a parent and totally disabled person. The words "social condition" were intended to include and refer to "discriminations based on status of income and standard of living". "Social condition" relates to one's economic status or rank in society, and the type of discrimination which is sought to be prohibited is, for example, that type of discrimination which results solely because one is poor. As such, appellant's status here does not fall within the protections of the provision. McClanathan v. St. Comp. Ins. Fund, 186 M 56, 606 P2d 507, 37 St. Rep. 113 (1980), followed in Siaperas v. Mont. St. Comp. Ins. Fund, 480 F3d 1001 (9th Cir. 2007).

Offset Statute — Constitutionality Under Equal Protection: Appellant attacked Montana's Offset Statute as being unconstitutional under the Equal Protection Clause of the United States Constitution in that it provides for different reductions in benefits for claimants with dependents. In applying the Equal Protection Clause to social and economic legislation, great latitude is given to state Legislatures in making classifications. Perfection in making classifications is neither possible nor necessary, neither is mathematical nicety or perfect quality. Rather, where the goals of a classification are legitimate and the classification is rationally related to the achievement of those goals, the Statute should be constitutionally upheld. Here, the avoidance of duplication or overlapping benefits is a reasonable and permissive legislative objective. Though there are results in inequality to some, the Statute is rationally related to the accomplishment of that objective. The Statute is applied to individuals uniformly and equally, the difference in treatment relating only to differences in factual situations between individuals. McClanathan v. St. Comp. Ins. Fund, 186 M 56, 606 P2d 507, 37 St. Rep. 113 (1980), followed in Siaperas v. Mont. St. Comp. Ins. Fund, 480 F3d 1001 (9th Cir. 2007).

Offset Statute Includes All of Social Security Provisions: In construing the Offset Statute of the Workers' Compensation Act, the court found that it was the intention of the Legislature to incorporate all of the relevant subchapters of the Social Security Act into the Statute and not merely section 301 (since repealed), which was the beginning subchapter of the Social Security Act. Limiting the Statute to just section 301 would defeat the Statute's meaning and purpose and would lead to an absurd result whereas a reasonable construction avoids it. The court therefore held that the Offset Statute is effective and that despite the repeal of section 301, federal disability insurance benefits are covered under the Statute. McClanathan v. St. Comp. Ins. Fund, 186 M 56, 606 P2d 507, 37 St. Rep. 113 (1980).

Offset Statute Not Applicable to Cost-of-Living Increases: The State Offset Statute may not be used to reduce the benefits accruing to an individual under the cost-of-living increases provided in 42 U.S.C. § 415, but his benefits may be reduced under 42 U.S.C. § 424, relating to disability benefits under the Social Security program, and payments for such disability under the workers' compensation program. McClanathan v. St. Comp. Ins. Fund, 186 M 56, 606 P2d 507, 37 St. Rep. 113 (1980), followed in Broeker v. Great Falls Coca-Cola Bottling Co., 275 M 502, 914 P2d 967, 53 St. Rep. 235 (1996).

Permanent Disability Award May Be Reviewed: The Workers' Compensation Court has continuing jurisdiction to review an award of permanent disability. Hert v. Lumberman Mut. Cas. Co., 179 M 160, 587 P2d 11 (1978), clarifying and denying rehearing of Hert v. Lumberman Mut. Cas. Co., 178 M 355, 584 P2d 656 (1978). Hert was held to no longer be authority for admissibility of medical records, in light of the 1990 adoption of ARM 24.5.317, in Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

Extremity Injury: Claimant who suffered a crushing injury to the left hand, and was left-handed, testified that he could not endure the pain in his hand, and had only worked on a ranch or construction and could no longer do this type of work, could be considered permanently totally disabled even though he could do various odd jobs. Claimant was not limited to the specific injury statute. Jensen v. Argonaut Ins. Co., 178 M 59, 582 P2d 1191 (1978).

Permanent Versus Partial Disability: The limitations on recovery under the specific injury statutes 39-71-705 through 39-71-708 (39-71-705 through 39-71-707 now repealed) apply only to permanent partial disability and do not apply to or limit the amount of recovery for permanent total disability under this section. Jensen v. Argonaut Ins. Co., 178 M 59, 582 P2d 1191, 35 St. Rep. 1066 (1978).

Total Permanent Disability Determination: Evidence showing an aggravation from an industrial injury of a preexisting condition, and that claimant could not work because he could not take the pain, substantiated a finding that the claimant was permanently totally disabled. Robins v. Anaconda Aluminum Co., 175 M 514, 575 P2d 67 (1978), followed in Larson v. Cigna

Ins. Co., 276 M 283, 915 P2d 863, 53 St. Rep. 394 (1996), and Killoy v. Reliance Nat'l Indem., 278 M 88, 923 P2d 531, 53 St. Rep. 838 (1996).

Evidence Must Sustain Classification: Workers' Compensation Court finding of "temporary total disability" was overruled, and reclassification was mandated as "permanent". Skrukrud v. Gallatin Laundry Co., Inc. & Employees Commercial Union Ins. Co., 171 M 217, 557 P2d 278, 33 St. Rep. 1191 (1976).

Retirement Age: Permanent total workers' compensation disability benefits are not tied to the conversion of federal social security disability benefits to retirement benefits and are not governed by retirement age. Skrukrud v. Gallatin Laundry Co., Inc. & Employees Commercial Union Ins. Co., 171 M 217, 557 P2d 278 (1976).

Attorney General's Opinions

OPINIONS PRIOR TO 1987 GENERAL REVISION

Change in State's Average Weekly Wage — No Effect on Existing Benefits: The amount of an existing benefit award under 39-71-701, 39-71-702, or 39-71-703 is unaffected by increase in the state's average weekly wage. 40 A.G. Op. 38 (1984).

Salary Payments to Municipal Policemen After Disabling Injury: Section 7-32-4132 requires a municipality to pay an injured policeman's full salary during the period of disability or 1 year, whichever ends first. The Workers' Compensation Fund is not liable for any wage loss benefits during that period because the municipality pays the policeman in full and he has suffered no wage loss. 37 A.G. Op. 156 (1978).

39-71-703. Compensation for permanent partial disability.

Compiler's Comments

2015 Amendment: Chapter 55 in (5)(b) near end substituted "high school equivalency diploma" for "graduate equivalency diploma". Amendment effective October 1, 2015.

2011 Amendments — Composite Section: Chapter 36 in (7) at end substituted "39-71-741(5)" for "39-71-741(3)". Amendment effective March 23, 2011.

Chapter 167 in (1)(b) in lead-in inserted "as determined by the sixth edition of the American medical association Guides to the Evaluation of Permanent Impairment for the ratable condition. The ratable condition must be a direct result of the compensable injury or occupational disease"; in (1)(b)(iii) at end deleted "as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment"; in (2) substituted current language for "When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only"; in (3) at end substituted "400 weeks" for "375 weeks"; in (5) in lead-in near end inserted "whole person"; in (7) near middle substituted "payments" for "conversions" and at end substituted "39-71-741(5)" for "39-71-741(3)"; and made minor changes in style. Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability—Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

2005 Amendment: Chapter 103 inserted (7) concerning payment of undisputed impairment award; and made minor changes in style. Amendment effective July 1, 2005.

Effective Date — Applicability: Section 13, Ch. 103, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005."

2003 Amendment: Chapter 464 inserted (1)(b)(i) excluding ratings based exclusively on complaints of pain; in (3) at beginning inserted reference to July 1, 2003, and at end increased weeks in formula from 350 to 375; in (5) substituted "subsection (4)" for "subsection (3)"; and made minor changes in style. Amendment effective April 21, 2003.

Applicability: Section 6, Ch. 464, L. 2003, provided that the amendments to this section, except amendments to subsection (3), apply to injuries that occur on or after April 21, 2003, and that amendments to subsection (3) apply to claims for injuries occurring on or after July 1, 2003.

1997 Amendments: Chapter 42 in (3) substituted "subsection (5)" for "subsection (4)". Amendment effective March 12, 1997.

Chapter 276 in (9)(c), defining light labor activity, substituted "20 pounds" for "25 pounds". Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 276, L. 1997, provided: "WHEREAS, it is the intent of the state compensation insurance fund to assist all Montanans by reducing the unfunded liability of the old fund, terminating the old fund liability tax when the old fund is adequately funded, which is currently estimated to occur as early as June 30, 1999, providing for the payment of dividends to policyholders, and maintaining a viable state compensation insurance fund; and

WHEREAS, there was an unfunded liability of $355 million as of June 30, 1996, for claims for workers' compensation injuries occurring before July 1, 1990, in the old fund, which included $129 million in outstanding bond debt; and

WHEREAS, the old fund is funded with the old fund liability tax paid by employers, employees, and self-employed persons, generating as much as $50 million each year; and

WHEREAS, the surplus of $231 [sic] in the new fund as of June 30, 1996, allowed the Board of Directors of the State Fund to declare a dividend of up to $109 million to retire the outstanding bond debt in the old fund; and

WHEREAS, the unfunded liability in the old fund will be an estimated $200 million deficit by June 30, 1997, and the surplus or the excess of assets above the reserves that are set aside to meet the claim liability in the new fund will be an estimated $127 million by June 30, 1997; and

WHEREAS, current state law requires the State Fund to use dividends to be applied first to old fund outstanding liability rather than paying dividends directly to policyholders, the State Fund shall, no later than June 30, 1998, transfer $63.8 million to the old fund account to pay old fund claims to allow direct payment of dividends to policyholders; and

WHEREAS, the $20 million appropriation received by the State Fund from the general fund during the June 1989 Special Session partially addressed the unfunded liability issue existing at that time in the old fund and canceled a planned 22% rate increase; and

WHEREAS, the State Fund now agrees to repay the $20 million appropriation to the general fund by June 30, 1999, in lieu of transferring additional funds to the old fund account to provide the general fund with additional revenue and to remove any perception that the State Fund remains a burden on the general fund; and

WHEREAS, because decreases in premium rates totaled 35% in fiscal years 1996 and 1997 and legislative changes in benefit levels have resulted in the return of private carriers, the 15% limitation on administration expenses as a percent of the prior year's premium will significantly impact the State Fund's ability to provide service to policyholders and their injured workers; and

WHEREAS, the State Fund seeks to improve the level of services provided to customers without increasing existing State Fund staffing levels by working with private sector-licensed insurance producers; and

WHEREAS, in response to Haag v. Montana Schools Group Insurance Authority, 274 M 109, 906 P.2d 693 (1995), in which the Montana Supreme Court ruled that an insurer's failure to comply with the time limitations for accepting or denying a workers' compensation claim constituted acceptance of the claim, current law needs to be clarified to provide that the failure to comply with the time limitations does not constitute acceptance of the claim."

Severability: Section 32, Ch. 276, L. 1997, was a severability clause.

Effective Date — Applicability: Section 34(2), Ch. 276, L. 1997, provided: "[Sections 7, 12 [39-71-703] through 14 and 29] are effective July 1, 1997, and apply to claims for injuries occurring on or after [the effective dates of sections 7, 12 through 14 and 29]."

1995 Amendment: Chapter 243 in (1), at end, inserted "if that worker"; inserted (1)(a) and (1)(b) requiring a wage loss and an impairment rating; inserted (2) stating conditions for an impairment award only; at beginning of (4) inserted "A permanent partial disability" and deleted second sentence that read: "The criteria for the rating of disability must be calculated using the medical impairment rating as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment"; in (5), after "adding", inserted "all of"; in two places in (5)(a) increased age from 30 years to 40 years, after second "years of age" deleted "but under 56 years of age", reduced award from 2% to 1%, and after "1%" deleted "and if the claimant is 56 years of age or older at the time of injury, 3%"; in (5)(b) increased education factor from "9 years" to "12 years", reduced award from 3% to 1%, substituted "12 years or more of education" for "9 through 12 years of education", reduced award from 2% to 0%, and after "0%" deleted "for a worker who has completed more than 12 years of education, 0%"; in (5)(c), near beginning before "wage loss", inserted "actual" and inserted second sentence concerning calculation of wage loss benefits; in (5)(d) reduced awards from 20% to 5%, 15% to 3%, and 10% to 2%; inserted (8) concerning calculation of permanent partial disability benefits under rehabilitation plan; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

1991 Amendment: Substituted present language regarding compensation for permanent partial disability (see 1991 Session Law for text) for former language that read: "(1) The benefits available for permanent partial disability are impairment awards and wage supplements. A worker who has reached maximum healing and is not eligible for permanent total disability benefits but who has a medically determined physical restriction as a result of a work-related injury may be eligible for an impairment award and wage supplement benefits as follows:

(a) The following procedure must be followed for an impairment award:

(i) Each percentage point of impairment is compensated in an amount equal to 5 weeks times 66⅔% of the wages received at the time of the injury, subject to a maximum compensation rate of one-half of the state's average weekly wage at the time of injury.

(ii) When a worker reaches maximum healing, an impairment rating is rendered by one or more physicians as provided for in 39-71-711. Impairment benefits are payable beginning the date of maximum healing.

(iii) An impairment award may be paid biweekly or in a lump sum, at the discretion of the worker. Lump sums paid for impairments are not subject to the requirements set forth in 39-71-741, except that lump-sum conversions for benefits not accrued may be reduced to present value at the rate set forth by the department in 39-71-741(5).

(iv) If a worker becomes eligible for permanent total disability benefits, the insurer may recover any lump-sum advance paid to a claimant for impairment, as set forth in 39-71-741(5). Such right of recovery does not apply to lump-sum benefits paid for the period prior to claimant's eligibility for permanent total disability benefits.

(v) If a worker suffers additional injury, an impairment award payable for the additional injury must be reduced by the amount of a previous award paid for impairment to the same site on the body.

(b) The following procedure must be followed for a wage supplement:

(i) A worker must be compensated in weekly benefits equal to 66⅔% of the difference between the worker's actual wages received at the time of the injury and the wages the worker is qualified to earn in the worker's job pool, subject to a maximum compensation rate of one-half the state's average weekly wage at the time of injury.

(ii) Eligibility for wage supplement benefits begins at maximum healing and terminates at the expiration of 500 weeks minus the number of weeks for which a worker's impairment award is payable, subject to 39-71-710. A worker's failure to sustain a wage loss compensable under subsection (1)(b)(i) does not extend the period of eligibility. However, if a worker becomes eligible for temporary total disability, permanent total disability, or total rehabilitation benefits after reaching maximum healing, the eligibility period for wage supplement benefits is extended by any period for which a worker is compensated by those benefits after reaching maximum healing.

(2) The determination of permanent partial disability must be supported by a preponderance of medical evidence.

(3) Notwithstanding subsection (1), beginning July 1, 1987, through June 30, 1991, the maximum weekly compensation benefits for permanent partial disability may not exceed $149.50, which is one-half the state's average weekly wage established July 1, 1986". Amendment effective July 1, 1991.

Severability: Section 15, Ch. 574, L. 1991, was a severability section.

1989 Special Session Amendment: In (3) reimposed benefit freeze that ended June 30, 1989, to continue through June 30, 1991. Amendment effective July 17, 1989.

Severability: Section 13, Ch. 9, Sp. L. June 1989, was a severability clause.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1987 Amendment: Substituted section (see 1987 Session Law for text) for former section that read: "(1) Weekly compensation benefits for injury producing partial disability shall be 66⅔% of the actual diminution in the worker's earning capacity measured in dollars, subject to a maximum weekly compensation of one-half the state's average weekly wage.

(2) The compensation shall be paid during the period of disability, not exceeding, however, 500 weeks in cases of partial disability. However, compensation for partial disability resulting from the loss of or injury to any member shall not be payable for a greater number of weeks than is specified in 39-71-705 for the loss of the member."

One-Half the State's Average Weekly Wage: Maximum benefit under 39-71-703 for injuries occurring on July 1, 1975, through June 30, 1976, is $73.50 per week; for injuries occurring on July 1, 1976, through June 30, 1977, is $81 per week; for injuries occurring on July 1, 1977, through June 30, 1978, $87 per week; for injuries occurring on July 1, 1978, through June 30, 1979, is $94 per week; for injuries occurring on July 1, 1979, through June 30, 1980, is $99 per week; July 1, 1980, through June 30, 1981, is $109 per week; July 1, 1981, through June 30, 1982, is $120.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Actual Wage Loss at Maximum Medical Healing Used to Determine Permanent Partial Disability Benefit Rate — Workers' Compensation Court Erred in Ruling Permanent Partial Disability Benefit Rate Is Aggregated From Both Time-of-Injury Concurrent Employments When Disability Precluded Only One Job — Public Policy of Wage Loss Benefit Relating to Actual Wages Lost. Barnhart v. Mont. St. Fund, 2022 MT 250, 411 Mont. 138, 522 P.3d 418.

Aggravated Preexisting Condition Compensable — Test for Compensability: Lanes injured his left knee and was unable to perform his job, so he took a second more sedentary job that did not require the same duties. However, he overloaded the right knee because of the previous injury to the left knee, and was eventually unable to perform the second job, so he filed for workers' compensation benefits. Even though the activities of the second job were simply the activities of daily living, the Workers' Compensation Court concluded that the right knee injury was attributable to the original occupational injury. The State Fund appealed on grounds that a temporary aggravation of the preexisting knee condition did not result in an injurious exposure pursuant to former 39-72-303 (repealed 2005), but the Supreme Court affirmed. An aggravation of a preexisting condition may give rise to a compensable occupational disease. To determine whether an aggravation of a preexisting condition is compensable, the test is whether occupational factors significantly aggravated a preexisting condition, not whether occupational factors played the major or most significant role in causing the resulting disease. In this case, there was no evidence that the activities of the second job significantly aggravated the preexisting condition, so the Workers' Compensation Court did not err in concluding that the temporary aggravation did not constitute the last injurious exposure. Lanes v. Mont. St. Fund, 2008 MT 306, 346 M 10, 192 P3d 1145 (2008), following Burglund v. Liberty Mut. Fire Ins. Co., 286 M 134, 950 P2d 1371 (1997). See also Polk v. Planet Ins. Co., 287 M 79, 951 P2d 1015 (1997), and Romero v. Liberty Mut. Fire Ins. Co., 2001 MT 303N, 308 M 394, 43 P3d 983 (2001).

Sole Use of Actual Wage Loss in Determining Permanent Partial Disability Benefits Not Violative of Equal Protection: Wilkes asserted that 39-71-703 violated equal protection guarantees by basing permanent partial disability benefits solely on actual wage loss, resulting in treatment of similarly situated classes of workers unequally by creating two classes of workers—one class with actual wage loss who suffer reduced earning capacity, and one class without actual wage loss who suffered reduced earning capacity. Wilkes contended that denying permanent partial disability benefits to workers who suffer reduced earning capacity without suffering actual wage loss impermissibly compensated similarly situated workers differently, in violation of equal protection. The Supreme Court disagreed. The Legislature's express public policy, as stated in 39-71-105, is that the wage-loss benefit should bear a reasonable relationship to actual wages lost as a result of a work-related injury or disease, so the distinguishing factor of actual wage loss between the two classes plainly relates to the underlying justification of 39-71-703 and sufficiently distinguishes the two putative classes. Because the classes are not similarly situated, the equal protection claim failed. Wilkes v. Mont. St. Fund, 2008 MT 29, 341 M 292, 177 P3d 483 (2008), following Powell v. St. Comp. Ins. Fund, 2000 MT 321, 302 M 518, 15 P3d 877 (2000), and distinguishing Reesor v. Mont. St. Fund, 2004 MT 370, 325 M 1, 103 P3d 1019 (2004), and Snetsinger v. Mont. Univ. Sys., 2004 MT 390, 325 M 148, 104 P3d 445 (2004).

Retroactive Application of Stavenjord-Type Claims: On remand to the Workers' Compensation Court of Stavenjord v. Mont. St. Fund, 2003 MT 67, 314 M 466, 67 P3d 229 (2003) (Stavenjord I), the State Fund paid Stavenjord's additional benefits, and Stavenjord then sought to retroactively apply Stavenjord I. The Workers' Compensation Court cited Chevron Oil Co. v. Huson, 404 US 97 (1971), and applied partial retroactive application of Stavenjord I and ordered common fund attorney fees for claims arising within the period of retroactivity. Stavenjord appealed. The Supreme Court noted the strong presumption in favor of retroactive application of new rules of law, but also noted that an exception to retroactivity would be recognized only when a party arguing for the purely retroactive application of new rules of law meets all three Chevron factors: (1) the decision must establish a new principle of law; (2) the history of the rule must be weighed; and (3) the inequity imposed by retroactive application must be weighed. In this case, the second factor was not met, and the Workers' Compensation Court erred in ordering only partial retroactivity, which Chevron does not allow. Therefore, Stavenjord I applied retroactively to all claims that remained open. Stavenjord's occupational disease-related claims for permanent partial disability benefits previously finalized and closed by court order or settlement and release were not subject to being reopened. Stavenjord v. Mont. St. Fund, 2006 MT 257, 334 M 117, 146 P3d 724 (2006).

Disparate Awards for Permanent Partial Disability and Permanent Total Disability Not Violative of Equal Protection: The statutory framework of the Workers' Compensation Act reveals distinctly different purposes served by permanent partial disability and permanent total disability benefits. Permanent partial disability benefits compensate a worker for sustaining a partial disability by a smaller impairment award and by supplementing wages earned when the claimant returns to work. Permanent total disability benefits do not contemplate a return to work and so provide a higher continuous benefit that is paid over the work life of the claimant. Because claimants in these classes are not similarly situated, denial of an impairment award to permanent partial disability claimants does not violate equal protection guarantees. Rausch v. St. Comp. Ins. Fund, 2005 MT 140, 327 M 272, 114 P3d 192 (2005).

Statute Unconstitutional Based on Equal Protection Analysis — No Rational Basis for Disparate Treatment Based on Age: Reesor was injured on the job when he was 65 years old and had been receiving Social Security retirement benefits for 9 months. Because of his age and pursuant to 39-71-710, he received no permanent partial disability benefits other than an impairment award. The Workers' Compensation Court upheld the award and found 39-71-710 constitutional. On appeal, the Supreme Court held that the disparate treatment of partially disabled claimants based upon their age, because they are receiving or are eligible to receive Social Security retirement benefits, is not rationally related to a legitimate governmental interest, that there is no rational basis to deny a class of injured workers a category of benefits based on their age, and that 39-71-710 is unconstitutional. Reesor v. Mont. St. Fund, 2004 MT 370, 325 M 1, 103 P3d 1019 (2004).

Erroneous Finding of No Permanent Partial Disability — Reversal Based on Medical Depositions: Nielson filed a workers' compensation petition, alleging that he suffered an occupational disease in his left arm and a work-related injury to his right arm and was permanently totally disabled. The Workers' Compensation Court found that the conflicting medical opinions accompanying the petition ultimately depended on Nielson's subjective complaints of pain, and because Nielson was not credible, the court was not persuaded that Nielson was incapable of holding at least light duty jobs and dismissed the petition. Nielson then filed a second petition, alleging the same background facts and claiming that he was at least entitled to permanent partial disability benefits. The second time the court added to its previous findings that there was a lack of persuasive medical evidence verifying Nielson's physical restrictions or that Nielson's ability to work was impaired and, based on the testimony of one member of a three-physician panel who examined Nielson, concluded that a permanent partial disability did not exist and dismissed the petition. Nielson appealed. The Supreme Court noted that it may not substitute its judgment for that of the trial court when the issue relates to the weight given to certain evidence or to the credibility of witnesses, but that when evidence is produced by medical deposition, the appellate court is in as good a position as the trial court to judge the weight given that testimony. The court also noted that the general rule is that the testimony of a treating physician is entitled to greater evidentiary weight than that of other doctors. The court found that Nielson had been examined by 10 physicians, an exercise physiologist, and a physical therapist, and with the exception of the physician upon whose testimony the Workers' Compensation Court relied, some form of injury was diagnosed by every doctor who saw Nielson, including Nielson's treating physician. Thus, without meaning to infer that objective evidence is always necessary or even available for diagnosis of an injury, the Supreme Court concluded that, based on the substantial evidence offered at trial, Nielson suffered a work-related permanent partial disability, and the court reversed for a determination of Nielson's permanent partial disability benefits. Nielson v. St. Comp. Ins. Fund, 2003 MT 95, 315 M 194, 69 P3d 1136 (2003).

Similarly Situated Classes of Workers Treated Differently Under Workers' Compensation Act and Occupational Disease Act (Now Repealed And Merged With Workers' Compensation Act) — Occupational Disease Permanent Impairment Award Violative of Equal Protection: Schmill suffered an occupational disease arising from employment, resulting in a 3% physical impairment rating. In spite of the limitations, Schmill did not suffer an actual wage loss as a result of the occupational disease, so Schmill requested an impairment award pursuant to the Workers' Compensation Act because the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) does not provide partial disability or impairment benefits. Schmill's petition alleged that plaintiff was entitled to the same impairment award available under the Workers' Compensation Act. Subsequently, the Workers' Compensation Court issued a decision (affirmed in Stavenjord v. Mont. St. Fund, 2003 MT 67, 314 M 466, 67 P3d 229 (2003)) requiring that permanent partial disability benefits be paid to occupational disease claimants pursuant to the Workers' Compensation Act. Based on that decision, the insurer agreed to pay Schmill's impairment award, but deducted 20% from the award for nonoccupational factors that contributed to the disability, pursuant to 39-72-706 (now repealed). Schmill claimed entitlement to full payment pursuant to the Workers' Compensation Act, and the Workers' Compensation Court agreed, concluding that full payment was warranted because 39-72-706 (now repealed) violated equal protection guarantees by providing disparate treatment to workers injured and workers with occupational diseases. The insurer appealed, but the Supreme Court affirmed. Apportioning a permanent impairment award under the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) while providing a full award for a permanent impairment under the Workers' Compensation Act is not rationally related to a legitimate government interest, and by treating similarly situated classes of workers differently, 39-72-706 (now repealed) is violative of the constitutional guarantee of equal protection. Schmill v. Liberty NW. Ins. Corp., 2003 MT 80, 315 M 51, 67 P3d 290 (2003). On remand, the Workers' Compensation Court held that the 2003 Schmill rule applied retroactively, and on appeal, the Supreme Court affirmed. A retroactive application of the rule that the former Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) cannot allow for apportionment deductions for nonoccupational factors if the Workers' Compensation Act does not allow apportionment deductions places workers whose occupational disease arose before the decision on equal footing with those whose occupational disease arose subsequently. A retroactive application of the Schmill rule does not retard the rule's operation, and future claimants will not find it more difficult to receive nonapportioned awards, so the 2003 Schmill decision applies retroactively to all cases not final or settled at the time of its issuance. Schmill v. Liberty NW. Ins. Corp., 2005 MT 144, 327 M 293, 114 P3d 204 (2005), following Dempsey v. Allstate Ins. Co., 2004 MT 391, 325 M 207, 104 P3d 483 (2004).

Following the 2005 Schmill decision, the Workers' Compensation Court issued summonses to over 500 insurers regarding their obligation to identify and pay past Schmill-type claims. Numerous insurers appealed on grounds that enforcement of the Schmill decisions violated the insurers' due process rights inasmuch as the summonses failed to satisfy notice requirements because the insurers were not parties to the Schmill cases. Nevertheless, the Supreme Court affirmed. Once all potential beneficiaries were granted a vested right pursuant to the Schmill decisions, a corresponding duty to pay on the part of all insurers arose as a matter of law. Schmill v. Liberty NW. Ins. Corp., 2009 MT 430, 354 M 88, 223 P3d 842 (2009), following Murer v. St. Comp. Mut. Ins. Fund, 283 M 210, 942 P2d 69 (1997), and Ruhd v. Liberty NW. Ins. Corp., 2004 MT 236, 322 M 478, 97 P3d 561 (2004).

Disparate Partial Disability Benefits Under Workers' Compensation Act and Occupational Disease Act (Now Repealed And Merged With Workers' Compensation Act) Violative of Equal Protection: Plaintiff contracted an occupational disease. Because of the extent of the impairment, plaintiff would have been entitled to a partial disability benefit of $27,027 if the entitlement was calculated under this section of the Workers' Compensation Act, but the maximum that could be recovered under 39-72-405 (now repealed) was $10,000. Plaintiff argued that 39-72-405 (now repealed) violated the right to equal protection by limiting compensation to less than would have been available for the same disability under this section. The Supreme Court agreed. Providing partial disability benefits to a person in plaintiff's situation in the amount of $27,027 under the Workers' Compensation Act but limiting plaintiff's wage supplement to $10,000 under the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) violated the constitutional guarantee of equal protection under the law. Stavenjord v. Mont. St. Fund, 2003 MT 67, 314 M 466, 67 P3d 229 (2003), following Henry v. St. Comp. Ins. Fund, 1999 MT 126, 294 M 449, 982 P2d 456 (1999).

Refusal of Workers' Compensation Court to Reopen Case for Introduction of Further Evidence of Historical and Anatomical Differences Between Injuries and Occupational Diseases Not Abuse of Discretion: After an occupational disease case was submitted to the Workers' Compensation Court, the state sought to reopen the case for the introduction of further evidence of the historical and anatomical differences between injuries and occupational diseases. The court declined to reopen the record, and the state appealed. The Supreme Court affirmed, noting that the state could have offered the evidence prior to the close of evidence. Further, the state did not demonstrate the materiality of the evidence in support of the motion to reopen the case. The Workers' Compensation Court did not abuse its discretion in declining to reopen the case for additional evidence. Stavenjord v. Mont. St. Fund, 2003 MT 67, 314 M 466, 67 P3d 229 (2003). See also Cole v. Helena Light & Ry., 49 M 443, 143 P 974 (1914).

Permanently Totally Disabled Workers Entitled to Impairment Awards: Several injured workers filed petitions claiming entitlement to immediate payment of impairment awards based on their respective impairment ratings. The Workers' Compensation Court consolidated the cases and concluded that the only statute that expressly provides for impairment awards is this section, which pertains to compensation for permanently partially disabled claimants, but held that there was no statutory basis for an impairment award to permanently totally disabled claimants at all. The claimants appealed, and the Supreme Court reversed. Montana recognizes four distinct classes of disability benefits: (1) temporary total; (2) temporary partial; (3) permanent partial; and (4) permanent total. Impairment awards are not explicitly authorized in statute, but are impliedly authorized to injured workers in any of the four classes in 39-71-710 and 39-71-737. The Supreme Court found nothing in this section that authorizes a limit on impairment awards only to partially disabled claimants. To provide an impairment award to permanently partially disabled claimants and deny impairment awards to permanently totally disabled claimants would lead to an absurd result and contravene the intent of the Workers' Compensation Act. Therefore, a permanently totally disabled claimant is legally entitled to an impairment award for the loss of physical function occasioned by a work-related injury pursuant to 39-71-710 and 39-71-737. Rausch v. St. Comp. Ins. Fund, 2002 MT 203, 311 M 210, 54 P3d 25 (2002). However, see Rausch v. St. Comp. Ins. Fund, 2005 MT 140, 327 M 272, 114 P3d 192 (2005), in which it was held that permanent total disability claimants are not entitled to an impairment award under the 1987 and 1989 versions of the Workers' Compensation Act.

Medium Duty Female Bartending Job: The judge's finding that a female bartending job was medium duty was supported by the vocational consultant's testimony, based partly on the job description that the employer gave the consultant. The job description stated that S.L.H. occasionally stocked cases of beer that weighed 31 pounds, moved a keg of beer into a cooler about once a week, which required 35 to 37 pounds of exertion, and once in a while removed garbage that weighed 25 to 30 pounds. S.L.H. v. St. Comp. Mut. Ins. Fund, 2000 MT 362, 303 M 364, 15 P3d 948, 57 St. Rep. 1543 (2000).

Loss of Part of Toe, Fracture of Another, and Resultant Sensitivity to Cold as Permanent Partial Disability — Justifiable Dispute as to Benefits: The insurer did not act unreasonably in denying permanent partial disability benefits. Therefore, the court properly denied claimant legal fees and a 20% penalty. There was a valid factual dispute and a valid question of legal interpretation of the pertinent statute. Claimant lost part of his fifth toe and had a fracture of his largest toe. Cold temperatures caused the foot and toes to ache. He was given an impairment rating of 1% of the whole man. The treating doctor's treatment notes did not indicate impairment of work, and the doctor's deposition was not clear on the issue. Claimant and the insurer disagreed on whether there was work impairment, and the Workers' Compensation Court found impairment. The pertinent statute had been amended in 1991 to provide that a claimant was not entitled to permanent partial disability benefits unless the medically determined physical restriction impaired the claimant's ability to work. Claimant's interpretation of the statute was justifiably disputed by the insurer, and there was no case law to aid in interpretation. Williams v. Plum Creek Timber Co., 270 M 209, 891 P2d 502, 52 St. Rep. 148 (1995).

Wage Supplement Claim — Use of Pay Period Average for Calculating Preinjury Wages: A wage supplement claim, like any other workers' compensation claim, is a claim for a type of compensation benefits. Therefore, 39-71-123 mandates the use of the four-pay period average for calculating preinjury wages unless one of the enumerated exceptions is met. Multiplying a worker's hourly rate by the number of scheduled working hours is permitted only when a worker has been employed at a job for less than four pay periods. Also, additional pay periods may be used if the four-pay period method does not accurately reflect the claimant's employment history. Further, under this section, the wages that a worker is qualified to earn, not what are actually earned, are used in calculating wage supplement benefits. In the case at hand, the Workers' Compensation Court found that because Perryman was capable of earning as much if not more than he was earning at the time of injury, he was not entitled to wage supplement benefits under this section. Perryman v. St. Comp. Mut. Ins. Fund, 269 M 140, 887 P2d 254, 51 St. Rep. 1523 (1994).

Cap on Benefits Payments as Temporary — Statutory Rate at Time of Injury Following Termination of Cap: The 1987 Legislature placed an arbitrary cap on the benefits payable to injured workers, as an exception to the regular benefit rate provided in 39-71-701(3)(1987). The Supreme Court construed the cap according to standard rules of statutory construction and held that according to the plain meaning of the words used, 39-71-701 was clear and unambiguous in establishing a temporary rather than permanent cap on benefit payments. Following expiration of the benefit cap on June 30, 1991, the maximum benefit rate for workers is set at the state's average weekly wage at the time of the injury. Murer v. St. Comp. Mut. Ins. Fund, 267 M 516, 885 P2d 428, 51 St. Rep. 1145 (1994) (Murer II), clarified in Murer v. St. Comp. Mut. Ins. Fund, 283 M 210, 942 P2d 69, 54 St. Rep. 566 (1997) (Murer III), that the 1987 temporary cap applies to injuries that occurred between July 1, 1987, and June 30, 1989, and expired on June 30, 1989; that the 1989 temporary cap applies to injuries that occurred between July 17, 1989, and June 30, 1991, and expired on June 30, 1991; and that the 1989 temporary cap cannot be applied retroactively to injuries that occurred prior to July 17, 1989.

Workers' Compensation Court Error in Amending Termination of Benefits Statute That Legislature Had Not Amended: The Workers' Compensation Court concluded that the Legislature's failure to amend 39-71-710 to disallow retired claimants from receiving partial disability benefits, in light of the subsequent amendment of this section, was an obvious oversight. The court concluded, without any reference to legislative history, that it was not the Legislature's intent to allow such benefits. However, by its decision, the court amended the termination of benefits statute that the Legislature either failed or declined to amend and, in the process, erred by inserting into the statute what had been omitted. The Supreme Court strictly construed the statutory language, concluding that 39-71-710 (1987) did not provide for termination of benefits that were awarded pursuant to this section (1991) when claimant retired. The case was remanded for a determination of the duration over which claimant was entitled to permanent partial disability benefits. Russette v. Chippewa Cree Housing Authority, 265 M 90, 874 P2d 1217, 51 St. Rep. 414 (1994).

Appropriate Rehabilitation Option for Permanent Partial Disability: In order to qualify as permanently totally disabled, claimant was required to show that after exhausting all rehabilitation options in 39-71-1012 (now repealed), he remained unable to return to work in his job pool. Absent such a showing, claimant's classification as permanently partially disabled was proper, and his return to a related occupation suited to his education and marketable skills was the appropriate rehabilitation option. Kelly v. St. Comp. Mut. Ins. Fund, 254 M 200, 835 P2d 770, 49 St. Rep. 699 (1992).

Earning Capacity Improperly Including Modified Position Not in Job Pool: After claimant suffered a back injury working as a grocery clerk, she received disability benefits until she returned to work in a camera bar clerk position, which had been modified by the defendant to allow claimant to avoid lifting requirements normally required for the position, at a higher wage than normally paid to a camera bar clerk. In calculating claimant's postinjury earning capacity, the Workers' Compensation Court included the modified camera bar clerk's position in claimant's job pool and concluded that she was not entitled to wage supplement benefits. On appeal, the Supreme Court reversed, holding that because of the modification of the camera bar clerk position and the inflated wage paid, the position should not have been included in the claimant's job pool. Dilling v. Buttrey Foods, 251 M 286, 825 P2d 1193, 48 St. Rep. 1057 (1991).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

No Increase in Disability Over That Which Existed Prior to Injury — Benefits for Permanent Partial Disability Denied: Kuntz was injured numerous times during his employment history. In this proceeding, Kuntz asserted that his 1987 back injury was an aggravation of a previous injury and thus compensable. After hearing testimony from the examining physicians and failing to find wholly credible Kuntz's testimony concerning the nature and extent of his pain and disability, the Workers' Compensation Court properly found that the 1987 injury was not material or significant on a permanent basis and did not increase Kuntz's disability over that which existed prior to the injury. Because Kuntz failed to prove by a preponderance of the evidence that the 1987 injury caused his current disability, the burden did not shift to the employer. Denial of permanent partial benefits was affirmed. Kuntz v. Nationwide Mut. Fire Ins. Co., 1998 MT 5, 287 M 142, 952 P2d 422, 55 St. Rep. 12 (1998), following Kloepfer v. Lumbermen's Mut. Cas. Co., 276 M 495, 916 P2d 1310 (1996).

Work-Related Injury — Insurer Alleged Current Disability Caused by Intervening Events — Shifted Burden of Proof — Workers' Compensation Court Findings Reversed: Briney injured his back in 1981 in a work-related accident but was allowed by his physician to return to work the same year. In the years following the injury, Briney had good days and bad days, was treated by several physicians, and sometimes missed work. In 1993, he underwent unrelated surgery and, because he was inactive for a period of time following surgery, was not able to continue his exercise regimen to strengthen his back. Consequently, his back condition deteriorated and he was unable to return to work after the surgery. After his employer's workers' compensation insurer agreed to pay temporary total disability, Briney sought compensation for a permanent partial disability, but the Workers' Compensation Court Judge denied the claim, holding that Briney's current condition was not caused by the 1981 work-related injury but was caused by multiple injuries or aggravations over the years since 1981. The Supreme Court reversed, pointing to testimony linking Briney's current physical condition to his 1981 injury and relying upon its holding in Walker v. United Parcel Serv., 262 M 450, 865 P2d 1113 (1993), in which the Supreme Court held that once a worker has proved a work-related injury and produces evidence that the injury is the cause of the worker's present condition, the burden shifts to the insurer to prove that the worker's present condition is due to other injuries. Because the Supreme Court found that no such evidence had been presented by the insurer, it held that the Workers' Compensation Court erred in denying benefits. Briney v. Pac. Employers Ins. Co., 283 M 346, 942 P2d 81, 54 St. Rep. 608 (1997).

Claimant Not Entitled to Benefits: Burglund argued that the Workers' Compensation Court erred in concluding that he was not entitled to compensation under the 1983 version of this section. The Supreme Court held that there was ample evidence in the record to support the lower court's finding that Burglund did not have the physical restrictions that he claimed. Burglund v. Liberty Mut. Fire Ins. Co., 279 M 298, 927 P2d 1006, 53 St. Rep. 1158 (1996).

Increased Earnings After Injury Not Disqualification to Receive Benefits: Where claimant's earnings after injury were actually greater than before but evidence showed a diminished potential earning capacity because of continuing pain, restrictions on activities, and diminished qualification for jobs in the open labor market as a whole, claimant is not disqualified for permanent partial disability benefits under this section (decided on law prior to 1987 amendment). Reeverts v. Sears, Roebuck & Co., 266 M 509, 881 P2d 620, 51 St. Rep. 894 (1994); Beck v. St. Comp. Ins. Fund, 230 M 294, 749 P2d 527, 45 St. Rep. 215 (1988); Sedlack v. Church Mut. Ins., 230 M 273, 749 P2d 1085, 45 St. Rep. 199 (1988).

Indemnity Benefits for Scheduled Injury Affirmed: The Supreme Court affirmed the award of 140 weeks for total blindness of one eye, as established in the schedule set out in 39-71-705 (now repealed) as that section read at the time of injury, despite claimant's contentions that 500 weeks was more appropriate because the Workers' Compensation Act should be broadly construed in favor of the worker and that an eye should not be considered a "member" under the compensation terms of this section. Raffety v. Kanta Prod., Inc., 250 M 268, 819 P2d 1272, 48 St. Rep. 926 (1991).

Temporary Total Benefits Improperly Characterized as Permanent Partial — Court Estopped From Denying Liability: State Fund characterized benefits as permanent partial disability payments deductible from claimant's eventual permanent disability award because of wages claimant received during the period in question. On appeal, the Supreme Court held that the payments could not have been permanent partial disability payments because: (1) claimant had not reached maximum healing; and (2) as a proprietor or corporate officer, claimant's injury did not result in a total loss of wages. Given these circumstances, State Fund was properly estopped from denying liability for temporary total disability benefits. Ryles v. Springhill Ranch Eggs, 247 M 276, 806 P2d 525, 48 St. Rep. 196 (1991).

Right to Permanent Partial Disability Benefits Following Death of Claimant: Justice Sheehy offered a brief and clearly well-documented explanation of the legal liability for payment of permanent partial disability benefits of a worker now expired. Citing Holton v. F.H. Stoltze Land & Lumber Co., 195 M 263, 637 P2d 10 (1981), and Grimshaw v. L. Peterson Larson Co., 213 M 291, 691 P2d 805 (1984), it was held that a worker's impairment rating is a medical component of a permanent partial disability rating and constitutes an irreducible minimum of payments that the worker is entitled to and that accrued at the time of his maximum healing. Because the date of accrual in this case was before the worker's death, his right to permanent partial disability benefits was properly an asset in his estate. Monroy v. Cenex, 246 M 365, 805 P2d 1343, 47 St. Rep. 2283 (1990).

Permanent Partial Disability and Loss of Earning Capacity Properly Determined — Conflicting Conclusions Regarding Temporary Total Disability — Remand: Applying 1979 workers' compensation provisions, the trial court properly found that claimant suffered a loss of earning capacity and was eligible for permanent partial disability benefits based on the following medical and other evidence: (1) claimant's accident and injury were undisputedly employment-related; (2) prior to the accident, claimant was a strong person with no history of back problems; (3) after the accident, numerous physicians diagnosed soft tissue injury; (4) claimant had a number of vocational alternatives and could minimize pain by following a pain clinic's recommendations; and (5) claimant could return to work and earn essentially the same wage. However, after applying the factors set out in Beck v. St. Comp. Ins. Fund, 230 M 294, 749 P2d 527 (1988), claimant had a 78% reduction in job market as a result of her 10% impairment rating, taking into account her chronic pain and inability to work long hours standing or in one position. Nevertheless, the case was remanded because of inconsistent and conflicting conclusions regarding whether claimant was eligible for temporary total disability benefits between the time employment ended and permanent partial disability was established. Winchell v. G&B Motors, Inc., 246 M 320, 805 P2d 1323, 47 St. Rep. 2070 (1990).

Open Labor Market Defined: The insurer argued that under the statute, the claimant could only be compensated for actual loss, not for possible future loss of earning capacity. The Supreme Court held that the test was whether the claimant had an injury that caused a loss of the ability to earn in the open labor market. The court went on to say that this test could be met if the claimant continued to work for the same employer on a job that paid less or presented less chance for advancement. Taylor v. Nat'l Union Fire Ins., 243 M 464, 795 P2d 433, 47 St. Rep. 1325 (1990).

Difference Between Preinjury and Postinjury Wages — Only One of Factors in Determining Earning Capacity: The claimant was found to be permanently partially disabled. The insurer argued that the lower court erred in determining the loss of earning capacity in light of the range of wages he had earned subsequent to his injury. The Supreme Court affirmed the lower court's award, stating that preinjury and postinjury were only one of the factors to be considered by the court in determining the claimant's earning capacity. Quinn v. EBI/Orion Group, Inc., 240 M 221, 783 P2d 406, 46 St. Rep. 2071 (1989).

No Additional Evidentiary Hearing Required on Remand to Satisfy Defendants' Desire for More Specific Findings: In the first trial, the Workers' Compensation Court applied the wrong standard in determining the elements the claimant had to prove to establish permanent partial disability. The defendants alleged that the lower court had erred on remand by not making any additional findings or conclusions regarding the claimant's preinjury and postinjury earning capacity. The Supreme Court disagreed, stating that the lower court had only been instructed to determine if the claimant had a permanent partial disability and that the lower court was not obliged to conduct an evidentiary hearing to satisfy the defendants' desire for more specific findings and conclusions. Beck v. Flathead County, 240 M 128, 783 P2d 383, 46 St. Rep. 1996 (1989).

Inconsistent Findings — Remand to Determine Percentage of Disability and Number of Weeks Allowed: Throughout its findings of fact and conclusions of law, the lower court referred to claimant's 10% impairment rating of his upper left extremity. However, after considering claimant's age, education, work history, medical evaluations, and postinjury employment and earnings, the court, without explanation, found 20% disability of the upper left extremity. Although this section allows 280 weeks for such an injury, the lower court concluded that claimant was entitled to only 220 weeks. The Supreme Court remanded for further findings and conclusions to determine the percentage of disability and the number of weeks of permanent partial disability allowed. Allee v. St. Comp. Ins. Fund, 239 M 243, 779 P2d 929, 46 St. Rep. 1655 (1989).

Deposition Testimony — Insufficient Evidence to Support Claim: The Supreme Court will not substitute its judgment for that of the Workers' Compensation Court concerning credibility of witnesses or the weight to be given their testimony. However, when the evidence is entered by deposition, the Supreme Court is in as good a position as the Workers' Compensation Court to judge the weight to be given to the testimony. When the medical evidence does not reveal abnormalities that support claimant's complaints, claimant has failed to prove by a preponderance of the evidence that his problems were a result of the 1977 industrial injury. Schrapps v. Home Ins. Co., 238 M 355, 777 P2d 887, 46 St. Rep. 1330 (1989).

Earning Capacity Improperly Based on Short-Term Maximum Wage: Claimant worked at 15 different jobs over a 10-year period. The highest wage he received was $12.44 an hour for a job he held 1 or 2 weeks for an employer he could not name. Under the circumstances, it was error for the Workers' Compensation Court to calculate wage loss benefits based on $12.44 an hour in light of rehabilitation experts' assertions of a $4.50 to $6.00 an hour earning capacity; claimant's previous work history, age, education, remaining work years, and extent of injury; review of deposition evidence; and this section as it read prior to 1987 amendment. Hurley v. St. Comp. Ins. Fund, 233 M 242, 759 P2d 996, 45 St. Rep. 1457 (1988), followed in Combs v. St. Comp. Ins. Fund, 240 M 453, 784 P2d 928, 47 St. Rep. 23 (1990), and in Chagnon v. Tilleman Motor Co., 259 M 21, 855 P2d 1002, 50 St. Rep. 198 (1993).

Rating of Impairments Restricted to Licensed Physicians: Under 39-71-122 (repealed 1987) and 39-71-701 through 39-71-703, the legislative intent was that the making of impairment ratings be restricted to licensed medical physicians. Therefore, the Workers' Compensation Division (now Department of Labor and Industry) properly exercised its rulemaking authority by promulgating ARM 24.29.806 (now repealed), which imposes the restriction. Weis v. Div. of Workers' Comp., 232 M 218, 755 P2d 1385, 45 St. Rep. 1004 (1988).

Failure to Prove Actual Loss of Earning Capacity: In a decision based on this section as it read prior to 1987 amendment, the Supreme Court affirmed a denial of additional permanent partial disability benefits after finding that claimant failed to prove actual loss of earning capacity in the open labor market. Claimant continued to work at his ski patrol job with no income loss, medical restrictions, or job modification; had not lost any carpentry employment because of his injuries; and failed to avail himself of opportunities in the open labor market with regard to his skills as an emergency medical technician or to his extensive college education in photography and English literature. Kuenning v. St. Comp. Ins. Fund, 231 M 1, 750 P2d 1091, 45 St. Rep. 383 (1988), followed in Wunderlich v. Lumbermens Mut. Cas. Co., 270 M 404, 892 P2d 563, 52 St. Rep. 251 (1995). See also Houtchens v. St. Comp. Ins. Fund, 232 M 99, 754 P2d 824, 45 St. Rep. 898 (1988).

Loss of Earning Capacity Sufficient for Award of Benefits: The lower court found that claimant unsuccessfully applied for several positions that would alleviate her physical problems because they involved less desk work; that retail sales positions paid between $3.35 and $3.50 an hour compared to $8.89 an hour that claimant earned at her former position, resulting in an actual loss in earning capacity of $216 a week; and that the rehabilitation counselor who testified for the State Fund was unable to find appropriate employment for which claimant was qualified. The court properly concluded that the State Fund failed to overcome claimant's showing that she could not return to her former or a comparable position and that an award of 500 weeks of permanent partial disability payments was proper. Lauderdale v. St. Comp. Ins. Fund, 229 M 188, 745 P2d 690, 44 St. Rep. 1883 (1987).

Injury to Finger and Back — Only Finger Injury Affecting Earning Capacity: A claimant elected to proceed under this section, which compensates a claimant for actual diminution in earning capacity. Evidence established that loss of earning capacity resulted from his finger injury and the resulting inability to effectively use his hand, but did not establish loss of earning capacity from his back injury. The lower court applied 39-71-705 in determining compensation for loss of or injury to one hand and properly limited benefits to 200 weeks. Sterns v. Dudley, 228 M 45, 741 P2d 407, 44 St. Rep. 1329 (1987).

Workers' Compensation Denied — Claimant Receiving Unemployment Benefits: The judgment of the Workers' Compensation Court denying claimant disability benefits will not be disturbed on appeal as it is supported by substantial credible evidence. Claimant was receiving unemployment benefits during the period he claims he was disabled, asserting on his application for unemployment benefits that he was able and available to work and had no medical condition that prevented him from accepting immediate employment in his field. Eveleigh v. Nat'l Union Fire Ins. Co. of Pittsburgh, 225 M 53, 730 P2d 1176, 44 St. Rep. 36 (1987).

Actual Loss of Earning Capacity — Insufficient Evidence to Support Award: Respondent, a millworker, was awarded permanent partial disability benefits by the Workers' Compensation Court. On appeal, the Supreme Court held that there was not sufficient evidence to support the award when it was based solely on the testimony of a Job Service counselor, was based on a postinjury job list that did not include millworker positions, ignored the testimony of treating doctors and the employer's representative that respondent was capable, after her injury, of handling millwork positions, and ignored the fact that respondent was continuing to handle millwork positions. In determining the actual loss of earning capacity, it was improper for the Workers' Compensation Court to anticipate possible future lost income. Dunn v. Champion Int'l Corp., 222 M 142, 720 P2d 1186, 43 St. Rep. 1124 (1986), distinguished in Sedlack v. Church Mut. Ins., 230 M 273, 749 P2d 1085, 45 St. Rep. 199 (1988), Beck v. St. Comp. Ins. Fund, 230 M 294, 749 P2d 527, 45 St. Rep. 215 (1988), and Hale v. Royal Logging, 1999 MT 302, 297 M 165, 990 P2d 1245, 56 St. Rep. 1217 (1999).

Back Condition and Ulcerative Proctitis Not Causally Related to Compensable Knee Injury: The Workers' Compensation Court found that appellant failed to prove that his ulcerative proctitis and alleged back condition were caused or aggravated by his compensable knee injury. There was substantial evidence in the record to support this finding. The Supreme Court affirmed the Workers' Compensation Court finding that appellant was entitled to 200 weeks permanent partial disability pursuant to 39-71-705 (now repealed) and not 500 weeks under 39-71-703. Byrd v. Ramsey Eng'r, 217 M 18, 701 P2d 1385, 42 St. Rep. 991 (1985).

Test to Determine Compensation — Factors Other Than Earning Capacity Impairment: Factors other than earning capacity impairment are relevant only if the court is unable to determine independently the claimant's income earning ability impairment. Since the primary purpose of workers' compensation is to compensate a worker for reduced earning capabilities resulting from an industrial accident, the award should be based on that percentage reduction and not on the worker's percentage of physical impairment. Hafer v. Anaconda Aluminum Co., 211 M 345, 684 P2d 1114, 41 St. Rep. 1403 (1984), followed in Sedlack v. Church Mut. Ins., 230 M 273, 749 P2d 1085, 45 St. Rep. 199 (1988), and in Beck v. St. Comp. Ins. Fund, 230 M 294, 749 P2d 527, 45 St. Rep. 215 (1988).

Use of Postinjury Earnings: The disability rating is to be determined by comparing earning capacity absent injury with earning capacity given the injury. Postinjury earnings may be unreliable for purposes of comparison because of increases in general wage levels, the claimant's maturity or training, longer hours worked after the accident, and payments of wages disproportionate to capacity out of sympathy to claimant. The objective of the disability test is to determine the wages that would have been paid to claimant as injured, discounting by the various factors listed above, and to compare them to preinjury wages. McDanold v. B.N. Transp., Inc., 208 M 470, 679 P2d 1188, 41 St. Rep. 472 (1984), followed in Sedlack v. Church Mut. Ins., 230 M 273, 749 P2d 1085, 45 St. Rep. 199 (1988), Beck v. St. Comp. Ins. Fund, 230 M 294, 749 P2d 527, 45 St. Rep. 215 (1988), and in Anderson v. Hammer, 252 M 73, 826 P2d 931, 49 St. Rep. 165 (1992).

Incorrect to Give Benefits for That Percentage of 500 Weeks That Equals Percentage of Disability: Disability benefits under 39-71-703 are to be paid for the duration of the disability, not exceeding 500 weeks and subject only to period limitations specifically listed in the indemnity schedule for loss of the member. The procedure used in Head v. Larson & Missoula Serv. Co., 181 M 129, 592 P2d 507 (1979), whereby worker was paid benefits for the same percentage of 500 weeks as the percentage of his disability (25% disability X 500 weeks, resulting in a 125 week award), is incorrect and is expressly overruled. McDanold v. B.N. Transp., Inc., 208 M 470, 679 P2d 1188, 41 St. Rep. 472 (1984).

Diminished Earning Capacity Benefits Applicable to Lost Ability to Compete — Limiting Factors Inapplicable: Claimant fractured his elbow in an industrial accident. As a result of the injury it was necessary for a surgeon to implant a prosthesis in the elbow. Claimant brought an action under 39-71-703 seeking workers' compensation benefits for lost earning capacity in lieu of indemnity benefits under 39-71-705 through 39-71-708 (39-71-705 through 39-71-707 now repealed). The Workers' Compensation Court found that although claimant was earning more at the time he filed his claim than at the time of his injury, he could proceed under 39-71-703 because his ability to compete in the open labor market was impaired. The court then applied the limiting factors of 39-71-705 through 39-71-708 (39-71-705 through 39-71-707 now repealed) to its award. Claimant appealed, contending the limiting factors were inapplicable. The Supreme Court held that claimant had established sufficient factual basis to elect compensation under 39-71-703 for loss of earning capacity even though he was performing the same job and earning more. The Supreme Court also held that under 39-71-709 (now repealed), the limiting factors of 39-71-705 through 39-71-708 (39-71-705 through 39-71-707 now repealed) should be applied only if a claimant has withdrawn his election to proceed under 39-71-703 and claims indemnity benefits. The case was remanded for proper computation of compensation. Hafer v. Anaconda

Aluminum Co., 198 M 105, 643 P2d 1192, 39 St. Rep. 796 (1982), followed in Reeverts v. Sears, Roebuck & Co., 266 M 509, 881 P2d 620, 51 St. Rep. 894 (1994).

Disability Award — Factors Considered — Evidence to Support: Claimant injured his back while "pulling on the green chain" at the Stoltze sawmill on November 8, 1972. Medical testimony indicated that as of 1976 claimant had suffered 15% impairment of the whole body. In a May 7, 1980, decision, the Workers' Compensation Court awarded claimant a 40% disability of the whole man. In determining disability, the court is to consider claimant's age, education, work experience, pain and disability, actual wage loss, and loss of future earning capacity. In this case claimant must avoid strenuous work. His choice of careers was significantly limited by the injury he received at age 25. The injury affected his future earning capacity for which he has not been compensated. The Supreme Court found substantial evidence supporting the finding of 40% disability of the whole man. Holton v. F. H. Stoltze Land & Lumber Co., 195 M 263, 637 P2d 10, 38 St. Rep. 1835 (1981).

Reclassification — Pleading Requirement — Best Interests: Plaintiff was injured when a refrigerator he was lifting fell and smashed his hand and wrist. Plaintiff received temporary total benefits from December 7, 1976, until terminated on May 2, 1979. Plaintiff had heart surgery in 1977. In 1979 defendant terminated plaintiff's benefits claiming that he had no permanent disability from the accident and that his medical problems were nonindustrially related. The Workers' Compensation Court found that plaintiff's benefits were improperly terminated. Defendant alleged that because plaintiff failed to specifically plead for reclassification from temporary total disability to permanent partial disability, the Workers' Compensation Court could not reclassify him and award a lump-sum payment. The Supreme Court held that it was in the best interest of the plaintiff and judicial economy to resolve the entire matter. The Supreme Court declined to second-guess the Workers' Compensation Court's ruling as to the effect to be given to medical impairment ratings. Novak v. Montgomery Ward & Co., Inc., 195 M 219, 638 P2d 390, 38 St. Rep. 1803 (1981). See also Nielsen v. Fireman's Fund Ins. Co., 203 M 339, 661 P2d 47, 40 St. Rep. 489 (1983), and Wolfe v. Webb, 251 M 217, 824 P2d 240, 49 St. Rep. 1 (1992).

Pain Insufficient to Establish Percentage Disability Rating: Plaintiff suffered a compensable work-related injury, which was later aggravated in a fight at work. Conflicting medical testimony was presented as to the amount of disability before and after the fight. The hearings examiner decided that a percentage of disability could only be arrived at by conjecture based on pain. The judge approved the finding of a 25% disability to the whole man. The Supreme Court held that evidence of pain was insufficient in and of itself to establish a percentage disability rating and remanded the case for determination of that issue. Penny v. The Anaconda Co., 194 M 409, 632 P2d 1114, 38 St. Rep. 1429 (1981).

Aggregate Earnings: The Workers' Compensation Court can aggregate earnings from two separate and unrelated employments for the purpose of determining benefits payable. Catteyson v. Glacier Gen. Assurance Co., 183 M 284, 599 P2d 341, 36 St. Rep. 1443 (1979), following Walker v. H. F. Johnson, Inc., 180 M 405, 591 P2d 181 (1978).

Triggering of Attorney's Fee: The finding that a claimant is entitled to benefits under this section triggers 39-71-612, entitling the claimant to a reasonable attorney's fee as established by the Division (now Department of Labor and Industry) or Workers' Compensation Judge. Catteyson v. Glacier Gen. Assurance Co., 183 M 284, 599 P2d 341, 36 St. Rep. 1443 (1979), following Walker v. H. F. Johnson, Inc., 180 M 405, 591 P2d 181 (1978).

Election Doctrine: The Supreme Court has adopted the election doctrine which allows for two distinct types of partial disability benefits that a claimant may seek. A claimant may elect disability benefits under this section, or indemnity benefits under 39-71-705 (now repealed). The distinction between these two benefits is that this section bases the benefits upon actual loss of earning capacity resulting from the injury, whereas 39-71-705 (now repealed) awards compensation regardless of earnings, to compensate for possible loss of earning capacity in the future. An injured worker suffering partial disability may elect either type of benefit, but an election under either section limits the total number of partial disability weeks a worker may receive in accordance with the schedule set forth in 39-71-705 (now repealed). Therefore, a worker who suffers a fracture to the lower leg which results in a continuing loss of actual earning capacity is eligible for benefits up to the 200-week period specified in 39-71-705 (now repealed) even though he has not actually lost the leg. The duration of his partial benefits could not exceed 200 weeks. For injuries occurring to a nonspecified member of the body, 39-71-706 (now repealed) provides a means to calculate the duration of benefits for less than total nonenumerated injuries, on a proportionate basis depending on the severity of the nonenumerated injury. Thus, a worker suffering a nonenumerated back injury resulting in a 15% disability would be eligible for indemnity benefits for a maximum period of 75 weeks (15% times 500 weeks maximum). Walker v. Truck Ins. Exch., 180 M 405, 591 P2d 181 (1978).

Claimant Earning More After Injury: Claimant was awarded a body of the whole injury award for an extremity injury under this section, and the award was affirmed even though claimant was earning more money after the injury. There was evidence of loss of capacity to perform as well after the injury and to compete and earn in the open market. Fermo v. Aetna Cas. & Sur. Co., 175 M 345, 574 P2d 251 (1978), followed in Hale v. Royal Logging, 1999 MT 302, 297 M 165, 990 P2d 1245, 56 St. Rep. 1217 (1999), distinguishing Dunn v. Champion Int'l Corp., 222 M 142, 720 P2d 1186, 43 St. Rep. 1124 (1986).

Use of Physician's Impairment Rating: The Workers' Compensation Court was correct in basing claimant's award on a physician's impairment rating when it was shown claimant worked at least as many hours after the injury as before, and claimant was a part-time employee both before and after the injury. Flake v. Aetna Life & Cas. Co., 175 M 127, 572 P2d 907 (1977).

Election of Awards: A claimant may elect, depending upon the record established before the Workers' Compensation Court, a disability benefit paying the actual loss of earning capacity or an indemnity benefit paying all possible future economic loss. The court may, however, base its award upon the evidence when the claimant makes an incorrect election. McAlear v. McKee, 171 M 462, 558 P2d 1134 (1976).

Loss of Earnings: Employee who was able to return to his former employment only with the assistance and indulgence of his employer and fellow employees was not entitled to present compensation for loss of earning ability, but was protected by order of Division of Workers' Compensation (now Department of Labor and Industry) retaining jurisdiction if there should be a subsequent loss of earning capacity. Ronshaugen v. Ramsey Eng'r Co., 166 M 214, 531 P2d 1348 (1975).

Attorney General's Opinions

OPINIONS PRIOR TO 1987 GENERAL REVISION

Change in State's Average Weekly Wage — No Effect on Existing Benefits: The amount of an existing benefit award under 39-71-701, 39-71-702, or 39-71-703 is unaffected by increase in the state's average weekly wage. 40 A.G. Op. 38 (1984).

Salary Payments to Municipal Policemen After Disabling Injury: Section 7-32-4132 requires a municipality to pay an injured policeman's full salary during the period of disability or 1 year, whichever ends first. The Workers' Compensation Fund is not liable for any wage loss benefits during that period because the municipality pays the policeman in full and he has suffered no wage loss. 37 A.G. Op. 156 (1978).

Law Review Articles

Hafer v. Anaconda: "Lost Earning Capacity" Refines "Permanent Partial Disability", Wilson, 47 Mont. L. Rev. 207 (1986).

39-71-704. Payment of medical, hospital, and related services — fee schedules and hospital rates — fee limitation.

Compiler's Comments

2017 Amendment: Chapter 433 inserted (3)(b) regarding adoption of drug formulary for utilization and treatment guidelines, automatic updates of a commercial drug formulary, transition of treatment, and a dispute resolution process; and made minor changes in style. Amendment effective July 1, 2017.

2015 Amendment: Chapter 123 deleted former (2)(c) that read: "(c) From July 1, 2011, through June 30, 2013, the fee schedules established in subsection (2)(b) must be based on the following standards as adopted by the centers for medicare and medicaid services and as adopted by the department on December 31, 2010, regardless of where services are provided:

(i) the American medical association current procedural terminology codes;
(ii) the healthcare common procedure coding system;
(iii) the medicare severity diagnosis-related groups;
(iv) the ambulatory payment classifications;
(v) the ratio of costs to charges for each hospital;
(vi) the national correct coding initiative edits; and
(vii) the relative value units as adjusted annually using the most recently published resource-based relative value scale"; in (2)(c) at beginning deleted "On or after July 1, 2013" and after "subsection (2)(b)" inserted "when adopted"; in (2)(c)(i), (2)(c)(ii), (2)(c)(iv), (2)(c)(vi), and (2)(c)(vii) substituted "January 1" for "March 31"; in (2)(c)(iii) and (2)(c)(v) substituted "January

1" for "October 1"; deleted former (2)(f) that read: "(f) The rates in effect through June 30, 2013, may not be less than the rates for medical services in effect as of December 31, 2010"; and made minor changes in style. Amendment effective July 1, 2015.

2011 Amendment: Chapter 167 in (1)(a) in two places inserted "or occupational disease", inserted "including prescription drugs", before "injury" inserted "compensable", and substituted "specified in this section" for "as the nature of the injury or the process of recovery requires"; in (1)(b) at beginning inserted "Subject to the limitations in this chapter"; in (1)(d)(i), (1)(d)(ii)(B), and (6) substituted "health care provider" for "medical provider"; in (1)(f)(i) at beginning deleted "Except for the repair or replacement of a prosthesis furnished as a result of an industrial injury" and substituted "60 months from the date of injury or diagnosis of an occupational disease" for "when they are not used for a period of 60 consecutive months" and inserted second sentence regarding reopening of benefits; inserted (1)(f)(ii) relating to inapplicability to a permanently totally disabled worker; in (2)(a) inserted second sentence relating to rate schedule for date service is provided; inserted (2)(c) relating to schedules for July 2011 through June 2013; in (2)(d) in lead-in at beginning inserted "On or after July 1, 2013" and after "medicaid services" deleted "in effect at the time the services are provided"; at end of (2)(d)(i), (2)(d)(vi), and (2)(d)(vii) inserted "as those codes exist on March 31 of each year"; in (2)(d)(ii) and (2)(d)(iv) at end inserted "as those codes and their relative weights exist on March 31 of each year"; in (2)(d)(iii) at end inserted "as those codes and their relative weights exist on October 1 of each year"; in (2)(d)(v) at end inserted "as those codes exist on October 1 of each year"; in (2)(d)(vii) substituted "in the" for "as adjusted annually using the most recently"; in (2)(e) after "additional" inserted "codes and"; inserted (2)(f) relating to rates through June 30, 2013; in (3)(a) near beginning substituted "shall" for "may", in second sentence before "utilization" inserted "adopted", and at end substituted "establish compensable medical treatment for an injured worker" for "established by the department are correct medical treatment for the injured worker"; in (3)(c) inserted first sentence concerning hiring medical director; inserted (3)(d) relating to annual review; in (9) substituted "health care provider" for "medical service provider"; and made minor changes in style. Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

2009 Amendment: Chapter 112 in (2)(a) at end deleted "Until the department adopts a fee schedule applicable to medical services provided by a hospital, insurers shall pay at the rate payable on June 30, 2007, for those services provided by a hospital. The rate must be adjusted by the annual percentage increase in the state's average weekly wage, as defined in 39-71-116, factoring in changes in the hospital's medical service charges"; in (2)(b)(i) in first sentence near middle inserted "up to", substituted "group health insurance coverage" for "disability insurance", and inserted second sentence relating to 1% of market share; in (2)(b)(ii) before "insurers" deleted "top five" and inserted reference to subsection (2)(b)(i); in (2)(c) after "subsection (2)(b)" deleted "apply to medical services covered by the American medical association current procedural terminology codes in effect at the time the services are provided regardless of where the services are provided", inserted language referring to following standards, and inserted subsections (2)(c)(i) through (2)(c)(vii) listing standards; in (2)(d) near middle inserted "additional"; in (4) at end after "outside Montana" substituted language referring to out-of-state schedules for "rates that are greater than those allowed for services delivered in Montana"; inserted (5) relating to payment within 30 days and interest on unpaid balances; inserted (6) relating to reimbursement amount and interest; in (7) near beginning deleted "medical assistance facility or a"; in (9) substituted "an unresolved dispute" for "disputes" and at end substituted "may be brought before the workers' compensation court" for "must be resolved by a hearing before the department upon written application of a party to the dispute"; and made minor changes in style. Amendment effective April 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2007 Amendment — Coordination: Section 3, Ch. 330, L. 2007, a coordination section, provided that if Senate Bill No. 108 and Ch. 330 were both passed and approved, then 39-71-704 was amended as provided in the coordination section. Senate Bill No. 108 was approved as Ch. 117, L. 2007. Chapter 330 in (2)(a) in first sentence near middle after "services" deleted "not provided at a hospital" and inserted fourth and fifth sentences concerning adoption of fee schedule and adjustment to reflect average wage; inserted (2)(b) concerning setting rate to reflect conversion factors used by top five insurers; inserted (2)(c) concerning applicability of fee schedule rates to medical services; inserted (2)(d) concerning coding standards; substituted (3) concerning utilization and treatment guidelines for former (3) that read: "(3) (a) The department shall establish rates for hospital services necessary for the treatment of injured workers.

(b) Except as provided in subsection (3)(g), rates for services provided at a hospital must be the greater of:

(i) 69% of the hospital's January 1, 1997, usual and customary charges; or

(ii) the discount factor established by the department that was in effect on June 30, 1997, for the hospital. The discount factor for a hospital formed by the merger of two or more existing hospitals is computed by using the weighted average of the discount factors in effect at the time of the merger.

(c) Except as provided in subsection (3)(g), the department shall adjust hospital discount factors so that the rate of payment does not exceed the annual percentage increase in the state's average weekly wage, as defined in 39-71-116.

(d) The department may establish a fee schedule for hospital outpatient services rendered. The fee schedule must, in the aggregate, provide for fees that are equal to the statewide average discount factors paid to hospitals to provide the same or equivalent procedure to workers' compensation hospital outpatients.

(e) The discount factors established by the department pursuant to this subsection (3) may not be less than medicaid reimbursement rates"; in (5) deleted former second sentence that read: "Fees paid to a licensed medical assistance facility or critical access hospital are not subject to the limitation provided in subsection (4)"; deleted former (4) that read: "(4) The percentage increase in medical costs payable under this chapter may not exceed the annual percentage increase in the state's average weekly wage, as defined in 39-71-116"; in (7) at beginning inserted "After mediation pursuant to department rules"; and made minor changes in style. Amendment effective July 1, 2007.

The amendments made to this section by sec. 6, Ch. 117, L. 2007, and by sec. 1, Ch. 330, L. 2007, were rendered void by sec. 3, Ch. 330, L. 2007, a coordination section.

Applicability: Section 5, Ch. 330, L. 2007, provided: "(1) [Section 3(3)(a) through (3)(c)] [39-71-704(3)(a) through (3)(c)] applies to injuries or occupational diseases occurring on or after July 1, 2007.

(2) [Section 3(2)(b) through (2)(d)] [39-71-704(2)(b) through (2)(d)] applies to medical treatment or services furnished on or after January 1, 2008."

2005 Amendments — Composite Section: Chapter 69 in (3)(g) at beginning of first sentence after "For a" deleted "hospital licensed as a", near middle after "hospital" inserted "licensed", and near end before "usual" deleted "hospital's" and in second sentence at beginning after "paid to a" substituted "licensed" for "hospital licensed as a" and near middle after "facility" inserted "or critical access hospital". Amendment effective July 1, 2005.

Chapter 345 inserted (1)(e) concerning travel reimbursement for catastrophically injured worker's family or designated person; and made minor changes in style. Amendment effective July 1, 2005.

Effective Date — Applicability: Section 8, Ch. 345, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to catastrophic injuries or occupational diseases occurring on or after July 1, 2005."

2003 Amendment: Chapter 377 deleted former (7)(a) that read: "(a) After the initial visit, the worker is responsible for 20%, but not to exceed $10, of the cost of each subsequent visit to a medical service provider for treatment relating to a compensable injury or occupational disease, unless the visit is to a medical service provider in a managed care organization as requested by the insurer or is a visit to a preferred provider as requested by the insurer"; in (7)(b) after "in" substituted "this subsection (7)" for "subsections (7)(a) and (7)(b)"; at end of (7)(c) substituted "is for treatment requested by an insurer" for "is an examination requested by an insurer pursuant to 39-71-605"; and made minor changes in style. Amendment effective April 17, 2003.

Effective Date — Applicability: Section 2, Ch. 377, L. 2003, provided: "[This act] is effective on passage and approval [approved April 17, 2003] and applies to claims for treatment filed on or after [the effective date of this act]."

2001 Amendments — Composite Section: Chapter 138 in (1)(d)(i) in first sentence after "for reasonable travel" inserted "lodging, meals, and miscellaneous" and at end substituted "pursuant to rules adopted by the department" for "only if the travel is incurred at the request of the insurer" and in second sentence near end substituted "reimbursement for state employees" for "reimbursement of travel by state employees"; inserted (1)(d)(ii) regarding rules governing reimbursement; inserted (1)(d)(iii) regarding insurer's liability for certain injuries or conditions; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 192 in (3)(g) near beginning after "medical assistance facility" inserted "or a critical access hospital". Amendment effective July 1, 2001.

Effective Date — Applicability: Section 2, Ch. 138, L. 2001, provided: "[This act] is effective July 1, 2001, and applies to a claim for benefits for an injury occurring on or after July 1, 2001."

1999 Amendment: Chapter 442 at beginning of first sentence of (1)(f)(iii) substituted "when" for "If", after "that" deleted "palliative or maintenance", and at end deleted "the treating physician shall first request approval from the insurer for the treatment", deleted former second and third sentences that read: "If approval is not granted, the treating physician may request approval from the department for the treatment. The department shall appoint a panel of physicians, including at least one treating physician from the area of specialty in which the injured worker is being treated, pursuant to rules that the department may adopt, to review the proposed treatment and determine its appropriateness", and inserted second sentence concerning jurisdiction of dispute over palliative or maintenance care; in (3)(b) after "(3)(g)" deleted "for the fiscal year beginning July 1, 1997"; and made minor changes in style. Amendment effective April 23, 1999.

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 28, Ch. 442, L. 1999, was a severability clause.

Retroactive Applicability: Section 31(1), Ch. 442, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to claims for injuries occurring before April 23, 1999, unless a party elects, after notification by the department of labor and industry, to remain in the contested case process.

1997 Amendments: Chapter 308 in (3)(a), after first sentence, deleted the method for determining rates that read: "Beginning January 1, 1995, the rates may be based on per diem or diagnostic-related groups. The rates established by the department pursuant to this subsection may not be less than medicaid reimbursement rates. Approved rates must be in effect for a period of 12 months from the date of approval. The department may coordinate this ratesetting function with other public agencies that have similar responsibilities. For services available in Montana, insurers are not required to pay facilities located outside Montana rates that are greater than those allowed for services delivered in Montana"; the substituted method inserted as (3)(b) through (3)(g) provided that for the year beginning July 1, 1997, rates must be the greater of 69% of the hospital's January 1, 1997, usual charge or the discount factor established by the Department that was in effect for the hospital on June 30, 1997, provided that beginning July 1, 1998, the Department shall adjust the hospital discount factors so that the rate does not exceed the annual percentage increase in the state's average weekly wage, allowed the Department to establish a fee schedule for outpatient services rendered after July 1, 1998, provided that discount factors cannot be less than the Medicaid reimbursement rates, provided that for services available in Montana, an insurer need not pay facilities located outside Montana rates that are higher than those allowed for services in Montana, and provided that for a hospital licensed as a medical assistance facility, the rate for services is the hospital's usual rate; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 310 in (2), at end, deleted "The department shall establish utilization and treatment standards for all medical services provided for under this chapter in consultation with the standing medical advisory committees provided for in 39-71-1109." Amendment effective July 1, 1997.

Effective Date — Applicability: Section 2, Ch. 308, L. 1997, provided: "[This act] is effective July 1, 1997, and applies to services provided on or after [the effective date of this act]."

Severability: Section 14, Ch. 310, L. 1997, was a severability clause.

1993 Amendment: Chapter 628 substituted (1)(a) and (1)(b) regarding provision of medical services for compensable injury for former (1)(a) that read: "After the happening of the injury and subject to the provisions of subsection (1)(d), the insurer shall furnish, without limitation as to length of time or dollar amount, reasonable services by a physician or surgeon, reasonable hospital services and medicines when needed, and such other treatment as may be approved by the department for the injuries sustained, subject to the requirements of 39-71-727"; in first sentence of (1)(d), after "injury", substituted "only if the travel is incurred at the request of the insurer" for "pursuant to rules adopted by the department"; inserted (1)(f) regarding provision of palliative or maintenance care after a worker has achieved medical stability; inserted (1)(g) regarding approval of treatment; inserted (1)(h) providing for exclusion from compensability certain medical treatment; inserted second sentence of (2) requiring that charges be usual and customary and inserted fourth sentence requiring establishment of utilization and treatment standards; at beginning of first sentence of (3) deleted "Beginning January 1, 1988", inserted second and third sentences regarding rates, and inserted sixth sentence regarding payment of services to facilities located outside Montana; at beginning of (4) deleted "Notwithstanding subsection (2), beginning January 1, 1988, through December 31, 1991, the maximum fees payable by insurers must be limited to the fee schedule established in January 1987. Notwithstanding subsection (3), beginning January 1, 1988, through December 31, 1991, the hospital rates payable by insurers must be limited to those set in January 1988. After December 31, 1991"; inserted (5) relating to payment pursuant to reimbursement agreements; inserted (6) pertaining to dispute resolution; inserted (7) regarding worker responsibility for costs; and made minor changes in style. Amendment effective July 1, 1993.

Severability: Section 16, Ch. 628, L. 1993, was a severability clause.

1991 Amendments: Chapter 131 in (1), near end of introductory clause after "compensation", inserted "benefits actually provided"; at end of (1)(a) inserted reference to 39-71-727; and made minor change in style. Amendment effective July 1, 1991.

Chapter 558 in (2) substituted provision for annually established fee schedule for medical nonhospital services, with Department having authority to require insurers to submit information to be used in establishing the schedule, for provision requiring an annual relative value fee schedule for medical, chiropractic, and paramedical services, excluding hospital services, with medical fees based on median fees billed to the state in the prior year (see 1989 MCA for text); and in (4), in first sentence before "fee schedule", deleted "relative value" and inserted last sentence relating to percentage increase in medical costs. Amendment effective July 1, 1991.

Chapter 574 in (1)(a) inserted "and subject to the provisions of subsection (1)(d)"; inserted (1)(d) relating to termination of benefits; and in (4) inserted last sentence relating to percentage increase in medical costs. Amendment effective July 1, 1991.

Applicability: Section 15, Ch. 558, L. 1991, provided: "[This act] applies to injuries that occur on or after [the effective date of this act] [July 1, 1991]."

Severability: Section 15, Ch. 574, L. 1991, was a severability section.

1989 Special Session Amendment: In (4) extended through December 31, 1991, freeze on maximum fee schedule for medical, hospital, and related services scheduled to end January 1, 1990. Amendment effective July 17, 1989.

Severability: Section 13, Ch. 9, Sp. L. June 1989, was a severability clause.

1989 Amendments: Chapter 333 inserted (1)(c) requiring insurer to reimburse worker for reasonable travel expenses relating to medical treatment under rules at rate allowed for state employee travel; and made minor changes in phraseology. Amendment effective July 1, 1989.

Chapter 613 in five places changed "division" and "workers' compensation division" to "department"; in (2), in middle of third sentence, changed "state compensation insurance fund" to "state fund" and inserted fourth sentence requiring state fund to report fees billed in form and at times required by Department; and made minor changes in phraseology. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

1987 Amendment: Inserted (3) requiring Division to establish hospital rates; and inserted (4) setting caps on fees and hospital rates for the 2 years beginning January 1988.

1985 Amendment: In (1)(a) and (1)(b) in first sentence, before "insurer", deleted "employer or"; and in (2) substituted text (see 1985 Session Law) for "Fees and charges for medical, chiropractic, and paramedical services provided for in this chapter, excluding hospital services, shall be established by the workers' compensation division based on the 90th percentile of usual and customary charges of the medical specialty involved based upon the most recent 6-months data as determined in January and July of each year."

Statement of Intent: The statement of intent attached to Ch. 422, L. 1985 (section 2 of which inserted the relative fee schedule provisions of this section), provided: "It is the intention of the legislature that the workers' compensation division publish an annual fee schedule which insurers must use to pay for medical, chiropractic, and paramedical services provided for in the Workers' Compensation and Occupational Disease Acts. The fee schedule is to be modeled on the 1974 revision of the 1969 California Relative Value Studies. The rules must establish the relative unit values, groups of specialties, and the payment procedures used in the California study unless the division has information and data that will allow a reliable adaptation of the California study to current Montana practice related to the care of occupationally injured or diseased workers. The rules should also define the method the division will use to annually determine the median of billed fees."

1981 Amendment: Renumbered subsections (1) and (2) as (1)(a) and (1)(b); added (2) (see 1985 amendment note for text).

Administrative Rules

Title 24, chapter 29, subchapter 14, ARM General medical rules and facility service rules.
Title 24, chapter 29, subchapter 16, ARM Utilization and treatment guidelines.
Title 24, chapter 29, subchapter 20, ARM Chiropractic service rules.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Medical Expenses Already Paid — Entity That Paid Did Not Seek Reimbursement — No Recovery Permitted by Employee Estate: The Workers' Compensation Court properly denied the estate of a deceased employee's motion for summary judgment and granted the workers' compensation insurance company's motion for summary judgment. In 2000, the employee's employer established and funded a plan to pay the medical expenses of its employees who were injured by exposure to asbestos. The plan paid $95,846 of the employee's medical expenses. The insurance company accepted liability for the workers' compensation claim and entered a settlement with the widow of the employee who worked for the company from 1963 until 1992. The insurance company agreed to reimburse Medicaid, other providers, and the widow personally for medical expenses each had paid for the employee's care. The insurance company did not reimburse the plan for the $95,846 of the employee's medical bills it had previously paid because the plan refused to accept it. The estate of the employee petitioned the Workers' Compensation Court for the insurance company to pay it the $95,846 that had been paid by the plan. The Workers' Compensation

Court determined that paying an injured worker for medical expenses that were already paid by an entity not seeking reimbursement "is not furnishing medical services" under 39-71-704. The Workers' Compensation Court also concluded that the same issues were presented and decided in Shepard v. Glacier Gen. Assurance Co., 219 Mont. 124, 710 P.2d 1355 (1985). The Supreme Court affirmed the Workers' Compensation Court and the application of Shepard to the facts. Moreau v. Transp. Ins. Co., 2018 MT 1, 390 Mont. 102, 408 P.3d 538, following Shepard v. Glacier Gen. Assurance Co., 219 Mont. 124, 710 P.2d 1355 (1985).

Handicapped Accessible Van Not Considered Primary Medical Service: Simms was permanently totally disabled and unable to return to work and requested that the State Fund provide him with a handicapped accessible van as a necessary medical service. The Workers' Compensation Court held that Simms failed to prove that handicapped accessible transportation was medically necessary and declined the request for a van. On appeal, the Supreme Court affirmed. A van could not be considered a secondary medical service because it would not enable Simms to return to work, nor could a van be considered a primary medical service because it was not a medical appliance necessary for medical treatment. Simms had access to alternative transportation and thus was not entitled to have the State Fund furnish him with a handicapped accessible van. Simms v. St. Comp. Ins. Fund, 2005 MT 175, 327 M 511, 116 P3d 773 (2005).

Failure to Submit Medical Claims Within Sixty-Month Period Precluding Insurer Liability for Recurrence of Prior Injury: Wiard suffered a work-related injury in 1992, settled in 1994 with defendant who was the employer's insurer, including a reservation of future medical and hospital benefits, and returned to work. In 1995, Wiard was treated for additional pain from an injury on a different job, and defendant denied the claim because it was a new injury for which defendant was not the insurer. In 2000, Wiard began experiencing acute pain associated with the 1992 injury. Surgery was required, but defendant denied the claim because Wiard had not submitted a medical claim within 60 months, as required under this section to avoid termination of benefits. The Workers' Compensation Court applied the 60-month limitation and denied benefits, and Wiard appealed, but the Supreme Court affirmed. The governing version of 39-71-741 in effect in 1991 contained no provision for closing medical benefits at the time of settlement of an accepted liability claim, so by law, reasonably necessary medical benefits were reserved and payable under the settlement agreement, except as capped by the 60-month rule. Wiard filed no medical claim within the 60-month period, so benefits were properly denied. Wiard v. Liberty NW. Ins. Corp., 2003 MT 295, 318 M 132, 79 P3d 281 (2003), distinguished in Newlon v. Teck Am., Inc., 2015 MT 317, 381 Mont. 378, 360 P.3d 1134.

No Duty of Insurer to Notify Claimant of Limitation on Workers' Compensation Medical Benefits: Wiard's workers' compensation benefits were terminated because of failure to file a medical claim within the 60-month period required in this section. Wiard contended that the failure of the insurer to notify him of the statutory limit violated Title 33, ch. 18, commonly known as the Unfair Trade Practices Act, and the implied covenant of good faith and fair dealing. The Supreme Court disagreed. The rights and duties of the parties were imposed by the provisions of the Workers' Compensation Act, and nothing in that Act established an affirmative duty on the insurer to inform Wiard of the 60-month limitation on the duration of his medical benefits. Wiard v. Liberty NW. Ins. Corp., 2003 MT 295, 318 M 132, 79 P3d 281 (2003).

No Equitable Estoppel of Defense of Sixty-Month Claim Limit on Workers' Compensation Benefits: Following a work-related injury in 1992, Wiard did not submit a medical claim within 60 months, as required under this section to avoid termination of benefits. Wiard asserted that the insurer should be equitably estopped from asserting the 60-month claim limit as a defense because if he had been advised of the 60-month limit, he would have sought medical care during that period to extend the benefits. However, Wiard had an affirmative duty to exercise his medical benefits if he reasonably needed medical care within the 60-month period, and if Wiard did not need medical care within that period, then the failure to obtain medical care could not be construed as reliance. Therefore, the insurer's defense was properly allowed. Wiard v. Liberty NW. Ins. Corp., 2003 MT 295, 318 M 132, 79 P3d 281 (2003).

When Medical Stability Achieved: The Workers' Compensation Court found that medical stability was synonymous with maximum medical improvement and concluded that Hiett was not entitled to payment for prescription drugs unless the medications enabled Hiett to return to work and to continue working once employed. Based on the definition of medical stability in 39-71-116, the Supreme Court acknowledged that maximum medical improvement is reached when the underlying condition has stabilized to the point that no further medical improvement would be reasonably expected from primary medical treatment. However, the question in this case was how or at what point does one achieve medical stability. Noting that more than one statutory interpretation was possible, the court opted for an interpretation that led to a reasonable result in favor of one that led to an unreasonable or absurd result and to one that gave effect to the legislative intent underlying the Workers' Compensation Act. The court concluded that medical stability is achieved when it can be sustained. Thus, a claimant is entitled to primary medical services that are necessary to permit medical stability to be sustained. Hiett v. Missoula County Pub. Schools, 2003 MT 213, 317 M 95, 75 P3d 341 (2003).

Attorney Fee Lien Applicable to Medical Benefits Received in Workers' Compensation Settlement: Lockhart moved for an order directing the insurer to pay attorney fees out of the medical benefits owing to Lockhart under his successful workers' compensation claim. The Workers' Compensation Court denied the attorney fees on grounds that medical benefits are not benefits, but rather an imposition of liability imposed on the insurer, and that because an award of medical benefits does not entitle a claimant to receipt of money, there is no property against which an attorney fee lien can attach. The court held that when a claim has been denied and later found compensable by the court without a separate award of attorney fees, a contingent attorney fee may be computed based on medical benefits, but the amount may not be deducted from the compensation payable to the medical providers. The Supreme Court disagreed. Medical benefits are not the property of the medical providers simply because the medical providers are the actual recipients of the money, nor are medical benefits simply an obligation of the insurer. Instead, medical benefits are the property of the individual claimant, and, as such, the claimant should be allowed to pay attorney fees out of medical benefits. In the context of workers' compensation cases, attorney fee liens attach as a matter of law to all compensation, including medical benefits, upon the filing of an attorney retainer agreement with the Department of Labor and Industry. To require a claimant to pay a disproportionate amount of attorney fees from the claimant's personal resources would be unfair and contrary to the fundamental purpose of workers' compensation laws. Lockhart v. N.H. Ins. Co., 1999 MT 205, 295 M 467, 984 P2d 744, 56 St. Rep. 800 (1999), following Carlson v. Cain, 216 M 129, 700 P2d 607, 42 St. Rep. 695 (1985), and followed in Dildine v. Liberty NW. Ins. Corp., 2009 MT 87, 350 M 1, 204 P3d 729 (2009).

Rules Including Some Treatments and Excluding Others Not Inherently Arbitrary: Synek argued that State Fund incorrectly determined that her chiropractic treatment was noncompensable maintenance rather than compensable therapeutic treatment. She also argued that in adopting rules that included payment for some treatments and excluded others, State Fund was acting in a capricious and arbitrary manner. The Supreme Court upheld the agency's decision that Synek's treatment constituted maintenance and that under the rules, maintenance was not compensable. The Supreme Court also held that the rules had been adopted pursuant to broad statutory language and were not facially or inherently arbitrary. Synek v. St. Comp. Mut. Ins. Fund, 272 M 246, 900 P2d 884, 52 St. Rep. 651 (1995), distinguishing Weis v. Div. of Workers' Comp., 232 M 218, 755 P2d 1385 (1988).

Insurer's Refusal to Pay for Unsupervised Exercise Reasonable: Plaintiff appealed from a Workers' Compensation Court order denying medical payments for exercise programs at an out-of-state health club and an in-state YMCA. The Supreme Court affirmed, holding that the insurer did not act unreasonably in refusing to pay for unsupervised exercise that did not constitute reasonable physical therapy. Chapman v. Research Cottrell, 259 M 329, 856 P2d 234, 50 St. Rep. 819 (1993).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Medical Expenses Already Paid — Entity That Paid Did Not Seek Reimbursement — No Recovery Permitted by Employee Estate: The Workers' Compensation Court properly denied the estate of a deceased employee's motion for summary judgment and granted the workers' compensation insurance company's motion for summary judgment. In 2000, the employee's employer established and funded a plan to pay the medical expenses of its employees who were injured by exposure to asbestos. The plan paid $95,846 of the employee's medical expenses. The insurance company accepted liability for the workers' compensation claim and entered a settlement with the widow of the employee who worked for the company from 1963 until 1992. The insurance company agreed to reimburse Medicaid, other providers, and the widow personally for medical expenses each had paid for the employee's care. The insurance company did not reimburse the plan for the $95,846 of the employee's medical bills it had previously paid because the plan refused to accept it. The estate of the employee petitioned the Workers' Compensation Court for the insurance company to pay it the $95,846 that had been paid by the plan. The Workers' Compensation Court determined that paying an injured worker for medical expenses that were already paid by an entity not seeking reimbursement "is not furnishing medical services" under 39-71-704. The

Workers' Compensation Court also concluded that the same issues were presented and decided in Shepard v. Glacier Gen. Assurance Co., 219 Mont. 124, 710 P.2d 1355 (1985). The Supreme Court affirmed the Workers' Compensation Court and the application of Shepard to the facts. Moreau v. Transp. Ins. Co., 2018 MT 1, 390 Mont. 102, 408 P.3d 538, following Shepard v. Glacier Gen. Assurance Co., 219 Mont. 124, 710 P.2d 1355 (1985).

Lack of Notice of Need for Domiciliary Care Precluding Retroactive Benefits: Quick suffered a work-related brain injury in 1984 but continued to work for several months until the injury forced him to quit. Quick received numerous treatments and therapies over the years, and his wife Dolly cared for him at home both full-time and part-time over the years. Dolly received a nursing degree and was able to provide more intensive care as necessary. Quick was able to drive long distances and maintain a job as a coach at various times. In 2006, Quick filed a petition for a trial to obtain domiciliary care benefits retroactive to the time of injury. State Fund initially denied domiciliary care benefits, but after Quick's doctor sent a letter in 2007 verifying that Quick needed full-time domiciliary care, State Fund began to pay those benefits. However, the Workers' Compensation Court (WCC) denied retroactive domiciliary care benefits, so Quick appealed. The Supreme Court affirmed. The WCC correctly concluded that Quick's condition from the time of injury was not so readily apparent as to put State Fund on notice that domiciliary care was required and that even though Dolly had provided care for extended periods since the accident, the events were not necessarily indicative of the need for domiciliary care. The WCC also noted that Quick's own attorney asserted in 2005 that Quick had never made a claim that domiciliary care was required. Thus, because State Fund did not receive constructive notice before 2007 that domiciliary care was necessary, Quick was not entitled to receive retroactive domiciliary care benefits before that date. Quick v. Mont. St. Fund, 2009 MT 162, 350 M 455, 208 P3d 415 (2009).

Compensability of Domiciliary Care Costs — Carlson Test: Factors included in the test as to whether in-home domiciliary services are compensable, as set out in Carlson v. Cain, 216 M 129, 700 P2d 607 (1985), are: (1) the employer knows of the employee's need for medical services at home resulting from the industrial accident; (2) the preponderance of credible medical evidence demonstrates that home nursing care is necessary as a result of accident and describes with a reasonable degree of particularity the nature and extent of duties to be performed by family members; (3) services are to be performed under the direction of a physician; (4) services are of a type normally rendered by trained attendants and beyond the scope of normal household duties; and (5) there is a means to determine with reasonable certainty the approximate value of the services performed. In this case, claimant was able to return to work, and even though claimant may have suffered a permanent total disability, that fact did not automatically put the employer on notice that domiciliary care was required. Evidence required to prove permanent total disability is different from that required to justify domiciliary care. Absent evidence that claimant met any of the Carlson test criteria, denial of compensation for domiciliary care was proper. Mennis v. Anderson Steel Supply., 255 M 180, 841 P2d 528, 49 St. Rep. 961 (1992), distinguishing Carlson v. Cain, 216 M 129, 700 P2d 607 (1985), Larson v. Squire Shops, Inc., 228 M 377, 742 P2d 1003 (1987), and Hilbig v. Central Glass Co., 238 M 375, 777 P2d 1296 (1989).

Authorization Required for Change in Treating Physician: Under ARM 24.29.1403 (repealed 1993), claimant was not entitled to medical benefits for diagnostic work done on her back by four specialists because she neither requested nor obtained authorization from the insurer for her visits to the specialists. The rule required authorization from the insurer for changing a worker's treating physician or referring a worker to a medical specialist. Weaver v. Buttrey Food & Drug, 255 M 90, 841 P2d 476, 49 St. Rep. 897 (1992), distinguishing Chapman v. Research Cottrell, 248 M 353, 811 P2d 1283 (1991).

Future Liability to Continue Absent Intervening Injury: Evidence showed that Lapp continued to suffer neck pain after a 1979 industrial accident, and the insurer offered no evidence that Lapp suffered any job-related injury after reaching maximum healing. The fact that a claimant has reached maximum medical healing does not relieve an insurer from future liability for medical and compensatory benefits when there is no new intervening cause. Lapp v. Transp. Ins. Co., 254 M 237, 836 P2d 602, 49 St. Rep. 750 (1992).

Cutoff Date on Domiciliary Care Benefits — Remand for Determination of Further Benefits: When it was not clear why the Workers' Compensation Court placed a cutoff date on benefits payable for domiciliary care, the Supreme Court remanded for additional proceedings necessary to determine the extent of benefits allowed to claimant after the cutoff date. Hilbig v. St. Comp. Ins. Fund, 238 M 375, 777 P2d 1296, 46 St. Rep. 1347 (1989).

Domiciliary Care Benefits Limited to Date of Employer's Knowledge of Need: The Workers' Compensation Court correctly established the date that an employer first knew of the need or demand for domiciliary care as the date that a pretrial conference was held (in which the claimant first requested care) because the record showed that medical reports prior to that date did not recommend home health care. Hilbig v. St. Comp. Ins. Fund, 238 M 375, 777 P2d 1296, 46 St. Rep. 1347 (1989), distinguishing Larson v. Squire Shops, Inc., 228 M 377, 742 P2d 1003, 44 St. Rep. 1612 (1987).

Claimant's Liability for Initial Medical Costs: Claimant argued that because her claim was initially denied, she lacked medical benefits to make affordable the necessary testing to confirm the presence of an injury. However, under this section, the claimant bears the initial liability for medical expenses. Ballard v. St. Comp. Ins. Fund, 235 M 447, 767 P2d 1327, 46 St. Rep. 128 (1989).

Severity of Injury as Constructive Notice of Necessity of Domiciliary Care: An employer may be put on notice of an employee's need for domiciliary medical services because of the severity of the injury. Larson v. Squire Shops, Inc., 228 M 377, 742 P2d 1003, 44 St. Rep. 1612 (1987).

Compensable Subsequent Injury — Benefits Receivable: When medical testimony showed a causal connection between an original injury and surgery performed 3 years later due to a subsequent injury, claimant was entitled to receive benefits payable because of medical treatment necessitated by the original injury, including any medical benefits reserved. Rightnour v. Kare-Mor, Inc., 225 M 187, 732 P2d 829, 44 St. Rep. 141 (1987), order and judgment of the Workers' Compensation Court after final settlement was reopened affirmed in Rightnour v. Intermtn. Ins. Co., 236 M 108, 768 P2d 871, 46 St. Rep. 220 (1989), and followed in Guild v. Rockwood Ins. Co., 229 M 466, 747 P2d 217, 44 St. Rep. 2139 (1987).

Payment for Medical Expenses Not Required: This statute is not authority for ordering workers' compensation insurer to pay claimant for medical expenses already paid by other health care providers. The statute requires the insurer to furnish reasonable services, medicine, and treatment. To order the insurer to pay claimant for medical expenses already paid is not furnishing services, nor is it reasonable. Shepard v. Glacier Gen. Assurance Co., 219 M 124, 710 P2d 1355, 42 St. Rep. 1892 (1985), followed in Moreau v. Transp. Ins. Co., 2018 MT 1, 390 Mont. 102, 408 P.3d 538.

Penalty — Medical Payments Treated as Compensation Benefits: On remand from the Supreme Court to the Workers' Compensation Court for a determination of reasonable costs and attorney fees, the Workers' Compensation Court determined that it could not assess a penalty for unreasonable delay in payment of medical expenses because medical expenses are not "compensation benefits" within the meaning of the penalty statute. The Supreme Court reversed and held that for purposes of assessing a penalty for wrongful refusal or delay in payment, medical payments should be treated as a compensation benefit. It was irrelevant that payments were made directly to the medical providers and not to the claimant herself. Carlson v. Cain, 216 M 129, 700 P2d 607, 42 St. Rep. 695 (1985).

Unnecessary Out-of-Pocket Expenses of Nonclaimant Denied: The Workers' Compensation Court found that out-of-pocket expenses incurred by claimant's mother during claimant's hospital stay were not medically necessary and denied request for reimbursement. The Supreme Court affirmed and held that substantial evidence supported the verdict, and that the Supreme Court may not set aside the findings of the Workers' Compensation Court unless the findings are clearly erroneous. Carlson v. Cain, 216 M 129, 700 P2d 607, 42 St. Rep. 695 (1985).

Domiciliary Care as Medical Expense — Jurisdiction: On remand from the Supreme Court to the Workers' Compensation Court for a determination of reasonable costs and attorney fees, the Workers' Compensation Court determined that domiciliary care provided by claimant's mother was necessary as a medical expense; however, the court ruled that it did not have jurisdiction to set a value on the services because they constituted "other treatment" that must be approved by the Division of Workers' Compensation (now Department of Labor and Industry). The Supreme Court reversed and held that once the Workers' Compensation Court has acquired jurisdiction of a dispute under the Workers' Compensation Act, it has jurisdiction to try and decide all of the issues that arise between the parties, and in this case the Workers' Compensation Court should have fixed a dollar amount on the domiciliary care. Carlson v. Cain, 216 M 129, 700 P2d 607, 42 St. Rep. 695 (1985), affirmed in Larson v. Squire Shops, Inc., 228 M 377, 742 P2d 1003, 44 St. Rep. 1612 (1987).

Prior Authorization to Change Physicians: A rule adopted by the Division of Workers' Compensation (now Department of Labor and Industry), under 39-71-703, requiring prior authorization to change physicians, was a valid rule, and an employer cannot be charged for the services of an unauthorized second doctor. However, the Workers' Compensation Court must consider the medical report and diagnosis of the second doctor. (See 1985 amendment note to this section. The amendment deleted employer's liability for treatment.) Garland v. The Anaconda Co., 177 M 240, 581 P2d 431 (1978). See also Linton v. St. Comp. Ins. Fund, 230 M 122, 749 P2d 55, 45 St. Rep. 68 (1988).

Compensation for Psychological Treatment: An insurer was ordered to pay the bill of a psychiatrist who treated a claimant for a continuing psychological problem aggravated by a compensable injury even though treatment was not approved by the insurer, employer, or the Division (now Department of Labor and Industry), because such services were "reasonable". A lump-sum settlement was also awarded to compensate claimant for his injuries. Schumacher v. Employers Mut. Liab. Ins. Co., 175 M 411, 574 P2d 987, 34 St. Rep. 1112 (1977).

Attorney General's Opinions

OPINIONS PRIOR TO 1987 GENERAL REVISION

Salary Payments to Municipal Policemen After Disabling Injury: Section 7-32-4132 requires a municipality to pay an injured policeman's full salary during the period of disability or 1 year, whichever ends first. The Workers' Compensation Fund is not liable for any wage loss benefits during that period because the municipality pays the policeman in full and he has suffered no wage loss. 37 A.G. Op. 156 (1978).

39-71-708. Compensation for disfigurement.

Compiler's Comments

1993 Amendment: Chapter 555 at beginning of (1) substituted "Injured workers who suffer" for "The department may award proper and equitable benefits for" and near middle, after "disfigurement", inserted "may be entitled to benefits"; and made minor changes in style. Amendment effective July 1, 1993.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1987 Amendment: In (1), in two places before "benefits", deleted reference to "indemnity" and at end deleted "39-71-705, 39-71-706, or 39-71-707" and inserted "39-71-703"; and in (2), after "hospital services", changed "and" to "or".

Case Notes

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

All Statutory Factors Not Discussed in Determining Disability Award: The Workers' Compensation Court discussed only preinjury and postinjury earnings in determining its permanent partial disability award. The Supreme Court ruled that it was error to not specifically discuss all statutory factors and remanded the case for a redetermination of benefits. Carroll v. CNA Ins. Co., 240 M 151, 783 P2d 387, 46 St. Rep. 2014 (1989).

Permanent Versus Partial Disability: The limitations on recovery under the specific injury statutes 39-71-705 through 39-71-708 (39-71-705 through 39-71-707 now repealed) apply only to permanent partial disability and do not apply to or limit the amount of recovery for permanent total disability under 39-71-702. Jensen v. Argonaut Ins. Co., 178 M 59, 582 P2d 1191, 35 St. Rep. 1066 (1978).

Present Earnings Irrelevant — Sufficient Evidence: An indemnity award is to compensate for possible loss of earning capacity in the future without regard to present earnings, and in this case there was sufficient evidence to justify the Workers' Compensation Court's award of 180 weeks of compensation. Ramsey v. Argonaut NW. Ins. Co., 174 M 438, 571 P2d 384 (1977).

Election of Awards: A claimant may elect, depending upon the record established before the Workers' Compensation Court, a disability benefit paying the actual loss of earning capacity or an indemnity benefit paying all possible future economic loss. The court may, however, base its award upon the evidence when the claimant makes an incorrect election. McAlear v. McKee, 171 M 462, 558 P2d 1134 (1976).

39-71-710. Termination of benefits upon retirement.

Compiler's Comments

1995 Amendments: Chapter 243 in (1), near middle of first sentence after "receive", inserted "or is receiving" and after "social security" inserted "retirement benefits or retirement benefits from a system that is an alternative to social security" and in second sentence substituted "payment of permanent partial disability benefits other than the impairment award" for "payment of wage supplement"; in (2), near beginning, inserted reference to eligibility under subsection (1) and after "to receive" deleted "social security"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 516 in second sentence of (1), after "for payment of", deleted "wage supplement".

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

Section 26, Ch. 516, L. 1995, was a severability clause.

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

1987 Amendment: In (1) substituted language (see 1987 Session Law for text) for "If a claimant is receiving total disability compensation benefits and the claimant receives retirement social security benefits or disability social security benefits paid to the claimant are converted by law to retirement benefits, the claimant is considered to be retired and no longer in the open labor market. When the claimant is considered retired, the liability of the insurer is ended for payment of such compensation benefits. This section does not apply to permanent partial disability benefits. Medical benefits are expressly reserved to the claimant"; and inserted (2) (see 1987 Session Law for text).

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Denial of Rehabilitation Benefits Based on Social Security Entitlement — Violation of Equal Protection: The plaintiff, a 77-year-old workers' compensation claimant, was denied rehabilitation benefits in accordance with 39-71-710 based exclusively on his age-based eligibility to receive Social Security retirement benefits. The Workers' Compensation Court ruled in favor of the plaintiff. In affirming the lower court, the Supreme Court held that 39-71-710 violated the right to equal protection because the statute created two classes of similarly situated persons, distinguished only by age. The court further concluded that cost-containment of the workers' compensation system alone is not sufficient to justify disparate treatment between the classes and that the automatic denial of rehabilitation benefits to those eligible for Social Security benefits did not rationally relate to any legitimate governmental interest. Caldwell v. MACo Workers' Compensation Trust, 2011 MT 162, 361 Mont. 140, 256 P.3d 923 (distinguishing Satterlee v. Lumberman's Mut. Cas. Co., 2009 MT 368, 353 Mont. 265, 222 P.2d 566).

Constitutionality of Statute Providing That Permanent Workers' Compensation Benefits Not Permanent — No Equal Protection or Due Process Violation in Termination of Permanent Benefits Based on Social Security Retirement Eligibility:

Plaintiffs were granted permanent total disability benefits for work-related injuries, but the benefits were terminated pursuant to 39-71-710 when plaintiffs became eligible for Social Security retirement. Plaintiffs challenged the constitutionality of 39-71-710 on equal protection and due process grounds. The Workers' Compensation Court granted summary judgment for State Fund and plaintiffs appealed, but the Supreme Court affirmed. First, the statute does not discriminate based on age. Although the two classes of claimants — those who receive or are eligible to receive Social Security benefits, and those who do not or are not eligible to receive Social Security benefits — are similarly situated with regard to their eligibility and reliance on workers' compensation benefits, under rational basis analysis the objective of 39-71-710 is legitimate and bears a rational relationship to a legitimate governmental interest. Section 39-71-710 provides a sufficiently rational means of ensuring that workers' compensation benefits do not become a lifetime benefit and rationally advances the governmental purpose of providing wage loss benefits that bear a reasonable relationship to actual wages lost. The Workers' Compensation Court also properly considered cost containment, inasmuch as cost containment is a legitimate governmental interest that may be constitutionally pursued by the Legislature, and as long as cost containment is not the sole reason for disparate treatment and is achieved by rational means, the Legislature may attempt to improve the viability of the workers' compensation system without offending equal protection. Second, the statute does not violate substantive due process, as plaintiff argued, based on the lack of a quid pro quo for benefits lost after age 65. This argument ignores the fundamental compromise in the Workers' Compensation Act, that in exchange for no-fault recovery, employers gained the predictability of consistent workers' compensation payments that would be capped in a way that personal tort injury claims were not, thus making sufficiently rational the enactment of 39-71-710. Without a limitation on the duration of permanent total disability benefits, the cap and predictability of payments that employers bargained for in the Act would be lost, thus denying employers the benefit of the quid pro quo. The Workers' Compensation Court's grant of summary judgment to State Fund was affirmed. Satterlee v. Lumberman's Mut. Cas. Co., 2009 MT 368, 353 M 265, 222 P3d 566 (2009), following Ingraham v. Champion Int'l, 243 M 42, 793 P2d 769 (1990), distinguishing Reesor v. Mont. St. Fund, 2004 MT 370, 325 M 1, 103 P3d 1019 (2004).

In Caldwell v. MACo Workers' Compensation Trust, 2011 MT 162, 361 Mont. 140, 256 P.3d 923, the Supreme Court held that denial of rehabilitation benefits under 39-71-710 based solely on eligibility to receive Social Security benefits violated the equal protection clause of the Montana Constitution because cost-containment alone did not justify disparate treatment of similarly situated persons.

No Total Loss of Wages — Temporary Total Disability Not Payable: Aldrich suffered an occupational disease in 1994, and it was anticipated that additional surgery might be necessary. Aldrich began receiving Social Security disability benefits in 1994 and state permanent total disability benefits in 2001. Aldrich did not reach maximum medical improvement until 2003. In late 2003, the Social Security disability benefits were converted to full Social Security retirement benefits, at which time the permanent total disability benefits terminated. Aldrich had the anticipated additional surgery in 2005 and requested state temporary total disability benefits at that time. The Workers' Compensation Court correctly concluded that Aldrich's receipt of Social Security retirement benefits did not preclude the receipt of temporary total disability benefits, as long as the criteria of 39-71-710 were satisfied. The court found that Aldrich did not suffer a total loss of wages, so temporary total disability benefits were not payable. Aldrich appealed, but the Supreme Court affirmed. Aldrich was not earning a wage at the time of the 2005 surgery and treatment, nor were the Social Security benefits interrupted, and Aldrich was not seeking gainful employment and had no viable job prospects or other prospective source of wages that the surgery prevented him from receiving, so a total loss of wages did not occur and Aldrich was not entitled to temporary total disability benefits. Aldrich v. Mont. St. Fund, 2009 MT 40, 349 M 251, 203 P3d 783 (2009), distinguishing Wilson v. Sun River Cattle Co., 206 M 63, 670 P2d 931 (1983).

No Error in Refusal to Convert Total Disability Benefits to Partial Benefits When Claimant Not Entitled to Partial Benefits: Otteson was injured on the job in 1994, and his insurer accepted liability for workers' compensation payments and paid Otteson permanent total disability benefits. In 2003, the State Fund paid Otteson an impairment award pursuant to Rausch v. St. Comp. Ins. Fund, 2002 MT 203, 311 M 210, 54 P3d 25 (2002), and shortly thereafter, Otteson requested that the State Fund convert his permanent total disability benefits to permanent partial benefits on his 65th birthday, but the State Fund refused. The Workers' Compensation Court also declined to convert Otteson's benefits, and on appeal, the Supreme Court affirmed the Workers' Compensation Court. Pursuant to the applicable version of this section, permanent total benefits are terminated upon a claimant's retirement, but Otteson argued that the section did not preclude conversion of permanent total disability benefits to permanent partial benefits. However, based on the Legislature's elimination of the liberal construction provision, the Workers' Compensation Court was correct in not converting Otteson's benefits because Otteson was not entitled to permanent partial benefits. Otteson v. Mont. St. Fund, 2005 MT 198, 328 M 174, 119 P3d 1188 (2005), distinguishing Hunter v. Gibson Prod. of Billings Heights, 224 M 481, 730 P2d 1139 (1986), and Russette v. Chippewa Cree Housing Authority, 265 M 90, 874 P2d 1217 (1994).

Statute Unconstitutional Based on Equal Protection Analysis — No Rational Basis for Disparate Treatment Based on Age: Reesor was injured on the job when he was 65 years old and had been receiving Social Security retirement benefits for 9 months. Because of his age and pursuant to this section, he received no permanent partial disability benefits other than an impairment award. The Workers' Compensation Court upheld the award and found this section constitutional. On appeal, the Supreme Court held that the disparate treatment of partially disabled claimants based upon their age, because they are receiving or are eligible to receive Social Security retirement benefits, is not rationally related to a legitimate governmental interest, that there is no rational basis to deny a class of injured workers a category of benefits based on their age, and that this section is unconstitutional. Reesor v. Mont. St. Fund, 2004 MT 370, 325 M 1, 103 P3d 1019 (2004).

Impairment Award Payable Upon Receipt of Undisputed Impairment Rating: Several injured workers filed petitions claiming entitlement to immediate payment of impairment awards based on their respective impairment ratings. The State Fund denied immediate payment on grounds that impairment awards for permanently totally disabled claimants were not due until the claimants received or were entitled to receive Social Security benefits. The Workers' Compensation Court consolidated the cases and concluded that impairment awards for permanently disabled claimants were not authorized at all, so the court never reached the question of when impairment awards were payable. The Supreme Court reversed, holding that impairment awards were authorized for permanently totally disabled claimants, and then went on to address when impairment awards are payable. The court found that requiring the delay of an impairment award until retirement would create an absurd result that was not intended by the Legislature. Rather, an impairment award is due a permanently totally disabled claimant upon the claimant's receipt of an undisputed impairment rating. Rausch v. St. Comp. Ins. Fund, 2002 MT 203, 311 M 210, 54 P3d 25 (2002). However, see Rausch v. St. Comp. Ins. Fund, 2005 MT 140, 327 M 272, 114 P3d 192 (2005), in which it was held that permanent total disability claimants are not entitled to an impairment award under the 1987 and 1989 versions of the Workers' Compensation Act.

Impairment Award to Permanently Totally Disabled Claimant Considered Permanent Total Disability Benefit: On the question of how an impairment award to a permanently totally disabled claimant should be characterized, the Supreme Court held that the most logical approach was to characterize the impairment award consistently with the claimant's disability status, considering that the impairment is a result of the claimant's injury and a substantial factor in the disability. Therefore, in the case of a claimant who was permanently and totally disabled, the impairment award was characterized as a permanent total disability benefit. Rausch v. St. Comp. Ins. Fund, 2002 MT 203, 311 M 210, 54 P3d 25 (2002). However, see Rausch v. St. Comp. Ins. Fund, 2005 MT 140, 327 M 272, 114 P3d 192 (2005), in which it was held that permanent total disability claimants are not entitled to an impairment award under the 1987 and 1989 versions of the Workers' Compensation Act.

Permanently Totally Disabled Workers Entitled to Impairment Awards: Several injured workers filed petitions claiming entitlement to immediate payment of impairment awards based on their respective impairment ratings. The Workers' Compensation Court consolidated the cases and concluded that the only statute that expressly provides for impairment awards is 39-71-703, which pertains to compensation for permanently partially disabled claimants, but held that there was no statutory basis for an impairment award to permanently totally disabled claimants at all. The claimants appealed, and the Supreme Court reversed. Montana recognizes four distinct classes of disability benefits: (1) temporary total; (2) temporary partial; (3) permanent partial; and (4) permanent total. Impairment awards are not explicitly authorized in statute, but are impliedly authorized to injured workers in any of the four classes in 39-71-737 and this section. The Supreme Court found nothing in 39-71-703 that authorizes a limit on impairment awards only to partially disabled claimants. To provide an impairment award to permanently partially disabled claimants and deny impairment awards to permanently totally disabled claimants would lead to an absurd result and contravene the intent of the Workers' Compensation Act. Therefore, a permanently totally disabled claimant is legally entitled to an impairment award for the loss of physical function occasioned by a work-related injury pursuant to 39-71-737 and this section. Rausch v. St. Comp. Ins. Fund, 2002 MT 203, 311 M 210, 54 P3d 25 (2002). However, see Rausch v. St. Comp. Ins. Fund, 2005 MT 140, 327 M 272, 114 P3d 192 (2005), in which it was held that permanent total disability claimants are not entitled to an impairment award under the 1987 and 1989 versions of the Workers' Compensation Act.

Workers' Compensation Court Error in Amending Termination of Benefits Statute That Legislature Had Not Amended: The Workers' Compensation Court concluded that the Legislature's failure to amend this section to disallow retired claimants from receiving partial disability benefits, in light of the subsequent amendment of 39-71-703, was an obvious oversight. The court concluded, without any reference to legislative history, that it was not the Legislature's intent to allow such benefits. However, by its decision, the court amended the termination of benefits statute that the Legislature either failed or declined to amend and, in the process, erred by inserting into the statute what had been omitted. The Supreme Court strictly construed the statutory language, concluding that this section (1987) did not provide for termination of benefits that were awarded pursuant to 39-71-703 (1991) when claimant retired. The case was remanded for a determination of the duration over which claimant was entitled to permanent partial disability benefits. Russette v. Chippewa Cree Housing Authority, 265 M 90, 874 P2d 1217, 51 St. Rep. 414 (1994).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Lump-Sum Advance Properly Denied — No Abuse of Discretion: Claimant, who is totally disabled, petitioned the Workers' Compensation Court for a lump-sum advance against permanent partial disability benefits that would otherwise be available to her at age 65. The court concluded that claimant did not establish by a preponderance of credible evidence that the lump-sum advance requested was in her best interest and denied the petition. The Supreme Court affirmed. The best interests of the claimant, the claimant's family, and the general public are the primary factors to be considered when evaluating lump-sum settlements. For industrial accident claims, periodic payments should be the rule and lump-sum settlements should be the exception. Workers' Compensation Court decisions denying lump-sum settlements will not be interfered with on appeal unless there is an abuse of discretion. Sullivan v. Aetna Life & Cas., 271 M 12, 894 P2d 278, 52 St. Rep. 296 (1995).

Discount to Present Value Applicable Only to Permanent Total Disability Payments: The discount to present value provided for in 39-71-741 applies only to permanent total disability payments. The discount does not apply to permanent partial disability payments even though the claimant is eligible for permanent partial payments because of his status as a permanently totally disabled claimant who has reached the age of 65 and has retired. Franck v. St. Comp. Ins. Fund, 241 M 486, 787 P2d 1238, 47 St. Rep. 472 (1990).

Conversion of Temporary Total to Permanent Partial Benefits at Age Sixty-Five: Liberal construction of this section resulted in the conclusion that claimant was entitled to conversion of temporary total disability benefits to permanent partial benefits upon reaching age 65. Strict interpretation would have resulted in an absurdity whereby a worker past age 65 could recover compensation if partially disabled but not if totally disabled. Hunter v. Gibson Prod. of Billings Heights, 224 M 481, 730 P2d 1139, 43 St. Rep. 2352 (1986). (Annotator's note: The 1987 Legislature amended 39-71-710 by removing the sentence that stated the section did not apply to permanent partial disability benefits and by clarifying insurer liability for temporary total disability benefits for claimants eligible for social security retirement benefits.)

Early Retirement as Voluntary: Claimant seeking additional benefits argued that his retirement was not voluntary because the employer offered the plan to its employees rather than the plan being inspired by the claimant himself and that because the employer encouraged early retirement, subtle pressure was exerted. The Workers' Compensation Court denied benefits because claimant could have continued working, was adequately performing his duties, and was under no threat of being fired. The Supreme Court affirmed that retirement was voluntary and uncoerced, noting that retirement was offered to all employees with no special focus on claimant and that claimant had received $12,180 as consideration for his early retirement. Gierke v. Billings Gazette, 224 M 446, 730 P2d 1143, 43 St. Rep. 2322 (1986).

Law Review Articles

A Lack of Deference: Rational Basis With Bite in Caldwell v. MACO Workers' Compensation Trust, Morris, 73 Mont. L. Rev. 417 (2012).

39-71-711. Impairment evaluation — ratings.

Compiler's Comments

2011 Amendment: Chapter 167 in (1)(b) substituted "sixth edition" for "current edition"; in (1)(d) at end inserted "and may not be based exclusively on complaints of pain"; and made minor changes in style. Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

2009 Amendment: Chapter 112 in (2) near beginning after "evaluator" deleted "who is a medical doctor or from an evaluator who is a chiropractor if the injury falls within the scope of chiropractic practice", inserted reference to scope of evaluator's practice and type of evaluator, and inserted subsections (2)(a) through (2)(f) listing types of evaluators; deleted former (3) that read: "(3) An evaluator must be a physician licensed under Title 37, chapter 3, except if the claimant's treating physician is a chiropractor, the evaluator may be a chiropractor who is certified as an evaluator under chapter 12"; and made minor changes in style. Amendment effective July 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2005 Amendment: Chapter 141 in (4) substituted "are subject to the provisions of 39-71-605" for "are not subject to 39-71-605." Amendment effective March 30, 2005.

Effective Date — Applicability: Section 3, Ch. 141, L. 2005, provided: "[This act] is effective on passage and approval and applies to impairment evaluations completed on or after [the effective date of this act]." Effective March 30, 2005.

1995 Amendment: Chapter 243 inserted (1)(d) concerning objective medical findings; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

1991 Amendment: In (2), both before and after "a medical doctor or from", inserted "an evaluator who is", substituted "injury falls within the scope of chiropractic practice" for "claimant's treating physician is a chiropractor", and at end substituted "the mediation procedure in part 24 of this chapter" for "the procedure in subsection (3)"; deleted former (3) that set forth a procedure for making impairment ratings and reporting to the claimant, insurer, and Department and that stated when payment of impairment awards must begin (see 1989 MCA for text); in (3), at beginning, deleted provision that Department appoint impairment evaluators to render ratings and that it adopt rules on evaluator qualifications and exam locations and at end deleted provision allowing Department to seek nominations from Board of Medical Examiners and Board of Chiropractors for evaluators licensed under Title 37, ch. 12; deleted former (5) that stated that the cost of impairment evaluations was assessed to the insurer except that the cost was assessed to the claimant if he requested the evaluation; in (4), at beginning, deleted sentence providing that a party could dispute a final impairment rating by filing a petition with the Workers' Compensation Court within 15 days after the evaluator mailed the report and after "39-71-605" deleted "or to mandatory mediation"; and deleted former (7) that created a rebuttable presumption that an impairment rating was correct. Amendment effective July 1, 1991.

Applicability: Section 15, Ch. 558, L. 1991, provided: "[This act] applies to injuries that occur on or after [the effective date of this act]." Effective July 1, 1991.

1989 Amendment: Chapter 161 at end of first sentence of (2) substituted "a medical doctor or from a chiropractor if the claimant's treating physician is a chiropractor" for "a physician of the party's choice"; and in third sentence of (4) inserted "except if the claimant's treating physician is a chiropractor, the evaluator may be a chiropractor who is certified as an evaluator under chapter 12" and at end of fourth sentence inserted "for evaluators licensed under Title 37, chapter 3, and from the board of chiropractors for evaluators licensed under Title 37, chapter 12".

1989 Statement of Intent: The statement of intent attached to Ch. 161, L. 1989, provided: "This bill authorizes the board of chiropractors to adopt a rule for the certification of impairment evaluators within their profession. The board should consider the applicant's experience in treating industrial accidents and any academic training he may have in using the impairment rating guides recognized by the division of workers' compensation."

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Administrative Rules

ARM 24.29.1415 Impairment rating dispute procedure.

Case Notes

Judge May Determine Percentage Impairment Rating: This section's requirement that "an impairment rating . . . must be expressed as a percentage" does not expressly state who must translate an impairment evaluation into a percentage and does not specifically require that the impairment evaluator be the person translating an impairment evaluation into a percentage. The section's statement that "an impairment rating . . . is a purely medical determination and must be determined by an impairment evaluator" cannot be used to import into the requirement that an impairment rating be expressed as a percentage and that it is the impairment evaluator who must do so. To say that the doctor must determine a percentage impairment rating is unreasonable because this section also requires the doctor to base the impairment rating on the current edition of the Guides to the Evaluation of Permanent Impairment published by the AMA, and the guides specifically state that there is no empiric evidence supporting assigning a percentage figure to an impairment rating, that a percentage assignment cannot be done reliably, and that use of a percentage implies a certainty that does not exist. (See 2009 amendment deleting requirement that evaluator be a medical doctor.) In order to promote justice, the court will reject an interpretation leading to an unreasonable result in favor of an interpretation that produces a reasonable result. The statute allows the Workers' Compensation Judge to translate the impairment evaluator's determination into a percentage rating. This furthers the policy of the legislation as a whole and the legislative intent of compensating workers for physical injuries. S.L.H. v. St. Comp. Mut. Ins. Fund, 2000 MT 362, 303 M 364, 15 P3d 948, 57 St. Rep. 1543 (2000).

39-71-712. Temporary partial disability benefits.

Compiler's Comments

2009 Amendment: Chapter 112 deleted former (3) that read: "(3) Temporary partial disability benefits are limited to a total of 26 weeks. The insurer may extend the period of temporary partial disability payments"; and made minor changes in style. Amendment effective July 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2001 Amendments — Composite Section: Chapter 121 near end of (4)(c) inserted "for any reason except for the worker's incarceration as provided for in 39-71-744, resignation, or termination for disciplinary reasons caused by a violation of the employer's policies that provide for termination of employment"; and made minor changes in style. Amendment effective March 22, 2001.

Chapter 292 in (1) at beginning inserted "Subject to the provisions of subsection (6)"; in (4) at beginning inserted exception clause; inserted (6) outlining when injured worker with physical restriction who has not reached maximum healing may return to modified or alternative position with different employer at same or lower wage rate; inserted (7) requiring time-of-injury employer or different employer to pay expenses related to modified or alternative position and prohibiting deduction from or charge to injured employee's wages; inserted (8) providing that in wages dispute, employer at time of injury is primary employer; inserted (9) authorizing injured worker to refuse modified or alternative position without penalty and requiring written notice to employee of right of refusal. Amendment effective July 1, 2001.

Effective Date — Applicability: Section 2, Ch. 292, L. 2001, provided: "[This act] is effective July 1, 2001, and applies to a claim for benefits for an injury occurring on or after July 1, 2001."

1997 Amendment: Chapter 276 inserted (4), (4)(a), (4)(b), and first sentence in (c) providing circumstances under which a worker is not eligible for temporary partial or temporary total disability benefits; and in second sentence of (4)(c), after "modified", inserted "or alternative". Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 276, L. 1997, provided: "WHEREAS, it is the intent of the state compensation insurance fund to assist all Montanans by reducing the unfunded liability of the old fund, terminating the old fund liability tax when the old fund is adequately funded, which is currently estimated to occur as early as June 30, 1999, providing for the payment of dividends to policyholders, and maintaining a viable state compensation insurance fund; and

WHEREAS, there was an unfunded liability of $355 million as of June 30, 1996, for claims for workers' compensation injuries occurring before July 1, 1990, in the old fund, which included $129 million in outstanding bond debt; and

WHEREAS, the old fund is funded with the old fund liability tax paid by employers, employees, and self-employed persons, generating as much as $50 million each year; and

WHEREAS, the surplus of $231 [sic] in the new fund as of June 30, 1996, allowed the Board of Directors of the State Fund to declare a dividend of up to $109 million to retire the outstanding bond debt in the old fund; and

WHEREAS, the unfunded liability in the old fund will be an estimated $200 million deficit by June 30, 1997, and the surplus or the excess of assets above the reserves that are set aside to meet the claim liability in the new fund will be an estimated $127 million by June 30, 1997; and

WHEREAS, current state law requires the State Fund to use dividends to be applied first to old fund outstanding liability rather than paying dividends directly to policyholders, the State Fund shall, no later than June 30, 1998, transfer $63.8 million to the old fund account to pay old fund claims to allow direct payment of dividends to policyholders; and

WHEREAS, the $20 million appropriation received by the State Fund from the general fund during the June 1989 Special Session partially addressed the unfunded liability issue existing at that time in the old fund and canceled a planned 22% rate increase; and

WHEREAS, the State Fund now agrees to repay the $20 million appropriation to the general fund by June 30, 1999, in lieu of transferring additional funds to the old fund account to provide the general fund with additional revenue and to remove any perception that the State Fund remains a burden on the general fund; and

WHEREAS, because decreases in premium rates totaled 35% in fiscal years 1996 and 1997 and legislative changes in benefit levels have resulted in the return of private carriers, the 15% limitation on administration expenses as a percent of the prior year's premium will significantly impact the State Fund's ability to provide service to policyholders and their injured workers; and

WHEREAS, the State Fund seeks to improve the level of services provided to customers without increasing existing State Fund staffing levels by working with private sector-licensed insurance producers; and

WHEREAS, in response to Haag v. Montana Schools Group Insurance Authority, 274 M 109, 906 P.2d 693 (1995), in which the Montana Supreme Court ruled that an insurer's failure to comply with the time limitations for accepting or denying a workers' compensation claim constituted acceptance of the claim, current law needs to be clarified to provide that the failure to comply with the time limitations does not constitute acceptance of the claim."

Severability: Section 32, Ch. 276, L. 1997, was a severability clause.

Effective Date — Applicability: Section 34(2), Ch. 276, L. 1997, provided: "[Sections 7, 12 through 14 [section 13 is 39-71-712] and 29] are effective July 1, 1997, and apply to claims for injuries occurring on or after [the effective dates of sections 7, 12 through 14 and 29]."

1995 Amendment: Chapter 243 in (3) inserted second sentence concerning extension of payments; and substituted (5) concerning not crediting temporary partial disability award against permanent partial disability award or settlement under 39-71-703 for "Temporary partial disability may not be considered an element of permanent partial disability and may not be credited against any permanent impairment or any permanent partial disability award or settlement achieved after the injured worker reaches maximum healing." Amendment effective July 1, 1995.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

Effective Date: Section 30, Ch. 619, L. 1993, provided: "[This act] is effective July 1, 1993."

39-71-713. Compensation for occupational diseases and medical benefits — diminution of compensation.

Compiler's Comments

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

Case Notes

Medical Expenses Already Paid — Entity That Paid Did Not Seek Reimbursement — No Recovery Permitted by Employee Estate: The Workers' Compensation Court properly denied the estate of a deceased employee's motion for summary judgment and granted the workers' compensation insurance company's motion for summary judgment. In 2000, the employee's employer established and funded a plan to pay the medical expenses of its employees who were injured by exposure to asbestos. The plan paid $95,846 of the employee's medical expenses. The insurance company accepted liability for the workers' compensation claim and entered a settlement with the widow of the employee who worked for the company from 1963 until 1992. The insurance company agreed to reimburse Medicaid, other providers, and the widow personally for medical expenses each had paid for the employee's care. The insurance company did not reimburse the plan for the $95,846 of the employee's medical bills it had previously paid because the plan refused to accept it. The estate of the employee petitioned the Workers' Compensation Court for the insurance company to pay it the $95,846 that had been paid by the plan. The Workers' Compensation Court determined that paying an injured worker for medical expenses that were already paid by an entity not seeking reimbursement "is not furnishing medical services" under 39-71-704. The Workers' Compensation Court also concluded that the same issues were presented and decided in Shepard v. Glacier Gen. Assurance Co., 219 Mont. 124, 710 P.2d 1355 (1985). The Supreme Court affirmed the Workers' Compensation Court and the application of Shepard to the facts. Moreau v. Transp. Ins. Co., 2018 MT 1, 390 Mont. 102, 408 P.3d 538, following Shepard v. Glacier Gen. Assurance Co., 219 Mont. 124, 710 P.2d 1355 (1985).

39-71-714. Autopsy.

Compiler's Comments

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

39-71-715. Benefits for pneumoconiosis — definition.

Compiler's Comments

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

39-71-716. Prohibiting supplementing of benefits.

Compiler's Comments

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

39-71-717. Reopening of terminated medical benefits — medical review.

Compiler's Comments

2021 Amendment: Chapter 79 inserted (9) regarding joint petitions for the reopening of medical benefits; and made minor changes in style. Amendment effective March 24, 2021.

Effective Date: Section 34, Ch. 167, L. 2011, provided: "[This act] is effective on passage and approval."

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

39-71-721. Compensation for injury causing death — limitation.

Compiler's Comments

2011 Amendments — Composite Section: Chapter 36 in (1)(b) at end substituted "39-71-741(5)" for "39-71-741(3)". Amendment effective March 23, 2011.

Chapter 167 in (1)(b) at end substituted "39-71-741(5)" for "39-71-741(3)". Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

1997 Amendment: Chapter 310 in (1)(b) substituted "39-71-741(3)" for "39-71-741(5)". Amendment effective July 1, 1997.

Severability: Section 14, Ch. 310, L. 1997, was a severability clause.

1995 Amendments: Chapter 243 in (2), (3), and (5) substituted references to 39-71-116(5) for references to 39-71-116(3); and made minor changes in style. Amendment effective July 1, 1995.

Chapter 516 throughout section substituted references to 39-71-116(5) for references to 39-71-116(3); in (4), after "beneficiary", deleted "as defined in 39-71-116"; in (6), after "beneficiaries", deleted "as defined in 39-71-116"; deleted (8) stating the minimum and maximum weekly compensation for injury causing death for the period July 1, 1987, and ending June 30, 1991; and made minor changes in style.

The codifier has adjusted subsection references to reflect the amendment of 39-71-116.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

Section 26, Ch. 516, L. 1995, was a severability clause.

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

1991 Amendment: Throughout section changed subsection references to 39-71-116. Amendment effective July 1, 1992.

1989 Special Session Amendment: In (8) reimposed death benefit freeze that ended June 30, 1989, to continue through June 30, 1991. Amendment effective July 17, 1989.

Severability: Section 13, Ch. 9, Sp. L. June 1989, was a severability clause.

1987 Amendment: In (1)(a), in first sentence near middle after "deceased", deleted "as the case may be", at end deleted "but the period during which the death benefit is paid shall be reduced by the period during or for which compensation was paid for the injury", and inserted last sentence concerning death benefits; inserted (1)(b) concerning recovery of overpayments and lump-sum payments; in (2), at end of second sentence, inserted "at the time of injury" and near beginning of third sentence changed "compensation for death" to "compensation benefit"; in (3), at end of second sentence, inserted "at the time of injury"; in (5), in second sentence after "paid to a", substituted remainder of subsection establishing payment period for death benefits to spouse and then to other beneficiaries for "widow or widower for life or until remarriage, and in the event of remarriage, 2 years' benefits must be paid in a lump sum to the widow or widower"; inserted (7) precluding cost-of-living adjustments; inserted (8) setting caps on death benefits for 1987 biennium; and made minor changes in phraseology.

Uncodified Provision: Section 92-704.2, R.C.M. 1947, was not codified in the MCA because it was a temporary provision no longer effective when the MCA became effective.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Sole Remedy Aspect of Workers' Compensation Held Not to Deny Substantive Due Process or Full Legal Redress: The decedent, an unmarried worker with no children, was killed in an at-work accident and his mother, who was not his dependent, was paid $3,000 for his death. The mother then filed suit challenging the constitutionality (fundamental fairness) of the workers' compensation statutes, arguing that the quid pro quo of giving up the remedy of a legal action in exchange for only a $3,000 payment was insufficient to sustain the constitutionality of the statutes and citing Stratemeyer v. Lincoln County, 276 Mont. 67, 915 P.2d 175 (1996). The Supreme Court held that Stratemeyer was distinguishable, that the Legislature made a constitutional distinction in payable benefits between dependents and nondependents of injured or killed workers, and that the mother had not met her burden of proving beyond a reasonable doubt that the statutes were unconstitutional. Walters v. Flathead Concrete Products, Inc., 2011 MT 45, 359 Mont. 346, 249 P.3d 913.

Cap on Benefits Payments as Temporary — Statutory Rate at Time of Injury Following Termination of Cap: The 1987 Legislature placed an arbitrary cap on the benefits payable to injured workers, as an exception to the regular benefit rate provided in 39-71-701(3)(1987). The Supreme Court construed the cap according to standard rules of statutory construction and held that according to the plain meaning of the words used, 39-71-701 was clear and unambiguous in establishing a temporary rather than permanent cap on benefit payments. Following expiration of the benefit cap on June 30, 1991, the maximum benefit rate for workers is set at the state's average weekly wage at the time of the injury. Murer v. St. Comp. Mut. Ins. Fund, 267 M 516, 885 P2d 428, 51 St. Rep. 1145 (1994) (Murer II), clarified in Murer v. St. Comp. Mut. Ins. Fund, 283 M 210, 942 P2d 69, 54 St. Rep. 566 (1997) (Murer III), that the 1987 temporary cap applies to injuries that occurred between July 1, 1987, and June 30, 1989, and expired on June 30, 1989; that the 1989 temporary cap applies to injuries that occurred between July 17, 1989, and June 30, 1991, and expired on June 30, 1991; and that the 1989 temporary cap cannot be applied retroactively to injuries that occurred prior to July 17, 1989.

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Exclusion of Periods of Forced Idleness From Calculation of Benefits: The Supreme Court reversed an award of survivorship benefits that was based on calculations including periods of forced idleness that resulted from equipment failures, finding that to include such periods unfairly penalized decedent. Sandahl v. James A. Slack, Inc., 225 M 208, 732 P2d 831, 44 St. Rep. 174 (1987).

Law at Time of Injury to Govern: Benefits payable for injury sustained on January 8, 1974, are governed by section 92-704.2, R.C.M. 1947. The Workers' Compensation Court did not err in finding the Division of Workers' Compensation (now State Fund) liable for benefits when the injury occurred within the time frame of that section although the resulting death occurred outside the time frame. The statutes in effect on the date of the injury are controlling. There is no merit to the Division's (now State Fund's) argument that it was denied due process as to the effect of section 92-704.2, R.C.M. 1947. Young Motor Co. v. Div. of Workers' Comp., 219 M 1, 710 P2d 58, 42 St. Rep. 1796 (1985).

Decedent's Spouse's Rights — Law at Time of Injury as Governing: Employee was killed in 1973. Insurer began paying benefits to his wife, and insurer terminated benefits following her remarriage. The Legislature enacted, 2 weeks after employee's death, this section's provision that in the event of the widow's remarriage, 2 years' benefits must be paid in a lump sum. The widow was not entitled to a lump-sum payment under this provision as it was not in effect on the date of employee's fatal injury. Benefits are determined by the law in effect on the date of an employee's injury. Iverson v. Argonaut Ins. Co., 198 M 340, 645 P2d 1366, 39 St. Rep. 1040 (1982). See also Boehm v. Alanon Club, 222 M 373, 722 P2d 1160, 43 St. Rep. 1341 (1986).

Standard of Review in Workers' Compensation Cases — Conflicting Evidence: Conflicting evidence was given in this case claiming death benefits under the Workers' Compensation Act. One set of facts showed that death was caused by strenuous physical activity on the job prior to decedent's death, and the other testimony showed that decedent did nothing strenuous or unusual and that his activities on the job had no causal relationship to his death. The Workers' Compensation Court found the latter testimony more credible and entered findings accordingly. Where findings are based on conflicting evidence, the reviewing court's function is confined to determining whether there is substantial evidence supporting such findings. Following Jensen v. Zook Bros. Constr. Co., 178 M 59, 582 P2d 1191 (1978), substantial evidence supporting the findings existed here. It is not the court's function to determine whether there is sufficient evidence to support contrary findings. Stamatis v. Bechtel Power Corp., 184 M 64, 601 P2d 403, 36 St. Rep. 1866 (1979).

Lump-Sum Disability Payments: The court erred in awarding a lump-sum disability payment to the widow of a claimant who made no election to receive an indemnity payment prior to his death and who had no determination made that his healing period had ended since no compensation accrued to the claimant that remained unpaid. Hendricks v. The Anaconda Co., 173 M 59, 566 P2d 70 (1977).

"Proximate Cause" Defined: "Proximate cause" as used in statute means that cause which is natural and continuous sequence, unbroken by any new and independent cause produces death, without which it would not have occurred. It does not mean that injury must be sole cause of death but that injury must be substantial contributing cause in sense that death would not have occurred but for injuries. Head injury received in compensable industrial accident occurring more than 2 years previous to death was not proximate cause of death in view of evidence that deceased drank to excess before and after accident, that immediate cause of death was suffocation from vomit after drinking bout, and that even if deceased had taken six Nembutal tablets given on prescription of doctor to relieve headaches, it could not have caused or contributed to death.

Breen v. Indus. Accident Bd., 150 M 463, 436 P2d 701 (1968), followed in Nave v. St. Comp. Mut. Ins. Fund, 254 M 54, 835 P2d 706, 49 St. Rep. 620 (1992).

Conversion of Monthly Payments Into Lump Sum — Application of Beneficiary Essential: The widow of a decedent worker and her two minor children were his beneficiaries under the provisions of the Workmen's Compensation Act (now Workers' Compensation Act). She remarried and thereafter made application for a lump-sum settlement of the amounts still remaining due, in the form of a letter, signing it in her name as it was before remarriage. The Industrial Accident Board (now State Fund) granted the request. The guardian of the minors appointed after the death of the mother sued to recover the amount involved in the lump-sum settlement on the ground that the Board (now State Fund) acted without authority in making it. Since the mother at the time she signed the application for conversion, having then remarried, was no longer a beneficiary, the action of the Board (now State Fund) was void in the absence of an application for conversion signed by a beneficiary. Davis v. Indus. Accident Bd., 92 M 503, 15 P2d 919 (1932).

Happening of Contingency Destroying Right to Compensation: In determining the amount of a lump-sum settlement under 39-71-741, the Industrial Accident Board (now State Fund) must ascertain the present worth of the claimant's right to compensation, taking into consideration his expectancy of life, and in the case of a widow the added contingency of remarriage, the happening of either contingency destroying the right to continued monthly payments, and therefore the right of converting them into a lump sum. Cogdill v. Aetna Life Ins. Co., 90 M 244, 2 P2d 292 (1931).

39-71-723. How compensation to be divided among beneficiaries.

Compiler's Comments

1997 Amendment: Chapter 172 at end of third sentence deleted "and the question of dependency and amount is a question of fact for determination by the department"; and made minor changes in style. Amendment effective July 1, 1997.

Transition: Section 10, Ch. 172, L. 1997, provided: "Any surplus funds remaining in the underinsured employers' fund on [the effective date of this section] must be deposited in the uninsured employers' fund provided in 39-71-502 [now repealed]." Section 12(2), Ch. 172, L. 1997, provided that sec. 10 was effective on passage and approval. Approved March 28, 1997.

1995 Amendments — Composite Section: Chapter 243 in last sentence substituted "39-71-116(5)(e) and (5)(f)" for "39-71-116(3)(e) and (3)(f)"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 516 in second sentence substituted references to subsections (5)(e) and (5)(f) of 39-71-116 for references to subsections (3)(e) and (3)(f); and made minor changes in style.

The codifier has adjusted subsection references to reflect the amendment of 39-71-116.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

Section 26, Ch. 516, L. 1995, was a severability clause.

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

1991 Amendment: Changed subsection references to 39-71-116. Amendment effective July 1, 1992.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Case Notes

Waiver of Workers' Compensation Benefits Allowed — Distribution of Proportionate Share of Benefits: Decedent who died in the course of employment was survived by two children of a prior marriage and by the widow of a second marriage. Decedent's insurer and others with potential liability for death claims settled with the widow for substantial sums, but the children were not parties to the settlement. No workers' compensation claim was filed by the widow, though one was filed by decedent's employer. The compensation carrier began paying one-third of the compensation benefits to the widow and reserved two-thirds pending final determination of the children as beneficiaries. The widow advised the carrier that she did not wish to receive workers' compensation benefits and returned those she had been issued. The Workers' Compensation Court held that, as a matter of public policy, the widow could not waive death benefits and that the children's interest in the benefits would vest only if the widow died or remarried prior to the passing of 500 weeks after decedent's death. On rehearing, the court found the children to be stepchildren of the widow and therefore entitled to benefits, to be equally divided between the parties. The children appealed, contending that the widow should not be compelled to receive benefits she did not claim or intended to waive and that the children were each entitled to one-half of all available benefits. The Supreme Court held that under 1-3-204, the surviving widow could waive or abandon her right to benefits and that upon waiver the surviving children were entitled to no more than their proportionate share provided by law. In re Benefits of Gaither, 244 M 383, 797 P2d 208, 47 St. Rep. 1549 (1990).

Workers' Compensation Lump-Sum Advance — Guardian Ad Litem Appointments: A mother received a lump-sum workers' compensation advance payment. Her minor child had a separate, legally cognizable interest in present and future benefits, which might be prejudiced by any lump-sum payment to the mother; therefore, the Workers' Compensation Court should have either appointed a guardian ad litem to represent the child or made a finding stating why appointment was not necessary, and it was error to fail to do so. However, reversal was not required as there was a mutual benefit to mother and child in the payment of the benefits and the method of lump-sum advance repayment presented a very limited chance of financial loss to the child. Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981).

39-71-724. Payment of compensation to beneficiary not a resident of United States.

Compiler's Comments

1997 Amendment: Chapter 172 in (1), at end of first sentence, deleted "at such times and in such manner as may be required by the department"; in (2), at end, deleted "or the department, as the case may be"; and made minor changes in style. Amendment effective July 1, 1997.

Transition: Section 10, Ch. 172, L. 1997, provided: "Any surplus funds remaining in the underinsured employers' fund on [the effective date of this section] must be deposited in the uninsured employers' fund provided in 39-71-502 [now repealed]." Section 12(2), Ch. 172, L. 1997, provided that sec. 10 was effective on passage and approval. Approved March 28, 1997.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

39-71-725. Payment of burial expense.

Compiler's Comments

2021 Amendment: Chapter 132 increased burial expenses maximum payment from $4,000 to $10,000; and made minor changes in style. Amendment effective October 1, 2021.

1999 Amendment: Chapter 377 increased burial expenses maximum payment from $1,400 to $4,000; and made minor changes in style. Amendment effective July 1, 1999.

Severability: Section 24, Ch. 377, L. 1999, was a severability clause.

1981 Amendment: Increased maximum burial expense from $1,100 to $1,400.

Case Notes

1945 Amendment Unconstitutional: The 1945 amendment to this section by Chapter 213 is unconstitutional since the Legislature did not follow constitutional mandate of having the bill printed for use of the members and that fact shows affirmatively on the journals. O'Bannon v. Gustafson, 130 M 402, 303 P2d 938 (1956).

39-71-726. No compensation after death when death not result of injury.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Right to Permanent Partial Disability Benefits Following Death of Claimant: Justice Sheehy offered a brief and clearly well-documented explanation of the legal liability for payment of permanent partial disability benefits of a worker now expired. Citing Holton v. F.H. Stoltze Land & Lumber Co., 195 M 263, 637 P2d 10 (1981), and Grimshaw v. L. Peterson Larson Co., 213 M 291, 691 P2d 805 (1984), it was held that a worker's impairment rating is a medical component of a permanent partial disability rating and constitutes an irreducible minimum of payments that the worker is entitled to and that accrued at the time of his maximum healing. Because the date of accrual in this case was before the worker's death, his right to permanent partial disability benefits was properly an asset in his estate. Monroy v. Cenex, 246 M 365, 805 P2d 1343, 47 St. Rep. 2283 (1990).

Receiving Reduced Monthly Benefits After Settlement Not Evidence of Lack of Consideration: The claimant argued that after settling his claim with the State Fund, he received less in monthly benefits than he had prior to settling and that therefore the agreement should be void for lack of consideration. The Supreme Court affirmed the lower court's finding that the claimant had received other consideration, including the fact that after the settlement his benefits would continue to be paid to his estate. Hartfield v. St. Comp. Ins. Fund, 246 M 259, 805 P2d 1293, 47 St. Rep. 2001 (1990).

Disability Award to Widow: The widow of a claimant who had died from causes not related to the industrial injury and who was receiving total disability benefits at the time of death, and therefore, had made no election regarding partial disability benefits, was not entitled to a lump-sum payment. Hendricks v. The Anaconda Co., 173 M 59, 566 P2d 70 (1977).

Death From Cause Other Than Injury: This section means that if employee is receiving compensation as result of industrial injury and subsequently dies from causes other than injury, liability for further compensation by way of death benefits or continuing disability benefits is cut off. But statute does not terminate liability for compensation accrued prior to death and unpaid at time of death. Thus, compensation for permanent partial disability existing between time of injury and time of death is payable even after death. Breen v. Indus. Accident Bd., 150 M 463, 436 P2d 701 (1968).

39-71-727. Payment for prescription drugs — limitations.

Compiler's Comments

2009 Amendment: Chapter 112 in (5) after "establish" deleted "annually"; in (6) at beginning inserted exception clause; in (8) inserted second sentence allowing in-state mail service pharmacy; and made minor changes in style. Amendment effective July 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2007 Amendment: Chapter 117 substituted (5) concerning schedule of fees for prescription drugs for former text that read: "(5) Reimbursement rates payable by an insurer are limited to the average wholesale price of the product at the time of dispensing, plus a dispensing fee not to exceed $5.50 per product"; deleted former (7) that read: "(7) For purposes of this section, average wholesale prices must be updated weekly"; in (7) near middle after ""brand name"" deleted ""drug product""; and made minor changes in style. Amendment effective July 1, 2007.

1995 Amendment: Chapter 243 in (5), after "an insurer", deleted "subject to an agreement pursuant to 39-71-1102"; inserted (10) concerning an agreement with a preferred provider organization; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

1993 Amendment: Chapter 628 near end of (1), after "unless", deleted "the physician specifies no substitutions or"; in (2), in two places, substituted "reimbursement rate" for "cost"; in (4), before "generic-name", deleted "physician specified no substitutions or that the"; inserted (5) limiting certain rates to the average wholesale price; inserted (6) limiting dispensation to a 30-day supply; inserted (7) requiring update of average wholesale prices; and inserted (9) providing that a worker not be required to obtain medications from an out-of-state mail service pharmacy. Amendment effective July 1, 1993.

Severability: Section 16, Ch. 628, L. 1993, was a severability clause.

Effective Date: Section 4, Ch. 131, L. 1991, provided: "[This act] is effective July 1, 1991."

Administrative Rules

ARM 24.29.1416 Applicability of date of injury — date of service.

ARM 24.29.2851 Limitation on expenditures for medical benefits payable by UEF — applicability.

ARM 24.29.2853 Rights of third-party providers after UEF reaches $100,000 medical benefit expenditure limitation — applicability.

ARM 24.29.2855 Rights of third-party providers upon UEF's proportionate reduction in benefit payments — applicability.

39-71-736. Compensation — from what dates paid.

Compiler's Comments

2015 Amendment: Chapter 123 in (4) after "vacation leave" inserted "or paid time off leave, other than sick leave"; and made minor changes in style. Amendment effective July 1, 2015.

2011 Amendment: Chapter 167 in (1)(a) at beginning inserted exception clause and in two places substituted "worker" for "claimant"; inserted (1)(c) relating to payment of compensation retroactively; in (2)(a) after "subsection (3)" substituted "a worker" for "an injured worker"; inserted (2)(b) relating to election to receive retroactive compensation; in (4) substituted "a worker" for "an injured worker"; and made minor changes in style. Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

2003 Amendment: Chapter 486 in (1) in first sentence decreased time compensation may not be paid from 40 hours or 5 days to 32 hours or 4 days and in second sentence substituted "5th day" for "6th day"; in (2) near end substituted "4-day waiting period" for "5-day waiting period"; and made minor changes in style. Amendment effective July 1, 2003.

Effective Date — Applicability: Section 2, Ch. 486, L. 2003, provided: "[This act] is effective July 1, 2003, and applies to injuries occurring on or after July 1, 2003."

2001 Amendment: Chapter 274 in (1) in first sentence after "paid for the first" substituted "40 hours or 5 days'" for "48 hours or 6 days'" and in second sentence at end substituted "6th day" for "7th day"; in (2) at end substituted "5-day waiting period" for "6-day waiting period"; and made minor changes in style. Amendment effective July 1, 2001.

Effective Date — Applicability: Section 2, Ch. 274, L. 2001, provided: "[This act] is effective July 1, 2001, and applies to a claim for benefits for an injury occurring on or after July 1, 2001."

1993 Amendment: Chapter 619 in (2), near beginning after "section", inserted exception clause; inserted (3) relating to augmentation of temporary total disability benefits with sick leave; and inserted (4) relating to effect of vacation leave on eligibility for benefits. Amendment effective July 1, 1993.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

1989 Amendment: In (1), in first sentence, substituted "No compensation may be paid for the first 48 hours or 6 days' loss of wages, whichever is less, that the claimant is totally disabled and unable to work due to an injury" for "No compensation may be paid for the first 6 days' loss of wages due to an injury" and at end of second sentence deleted "of wage loss"; in middle of (2), after "is not considered to", substituted "be entitled to compensation benefits" for "have a wage loss"; and made minor changes in phraseology. Amendment effective July 1, 1989.

1987 Amendment: In (1)(a) increased time period from 5 days to 6 days and substituted last sentence establishing eligibility at 7th day of wage loss for "If loss of wages continues for more than 5 days, compensation shall be paid from the date of injury"; and inserted (2) providing for no wage loss if worker is receiving sick leave benefits.

Case Notes

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

No Denial of Full Legal Redress: Claimant was not denied full legal redress because of the requirement that a worker be disabled for more than 5 days to receive compensation. (See 2003 amendment.) Claimant argued that if he had remained off the job for more than 5 days (see 2005 amendment), he would have received full compensation under the Workers' Compensation Act, but because he missed only 2 days of work, the statutory requirement arbitrarily denies him his right to full legal redress. Claimant was not denied full legal redress because he has not been denied any compensation under the Workers' Compensation Act; he is entitled to benefits only under the Occupational Disease Act (now repealed and merged with Workers' Compensation Act). Eastman v. Atl. Richfield Co., 237 M 332, 777 P2d 862, 46 St. Rep. 845 (1989), distinguished in Henry v. St. Comp. Ins. Fund, 1999 MT 126, 294 M 449, 982 P2d 456, 56 St. Rep. 506 (1999).

1945 Amendment Unconstitutional: Chapter 213, L. 1945, is unconstitutional since the Legislature failed to follow constitutional mandate of having the bill printed for use of the members and that fact shows affirmatively on the journals. O'Bannon v. Gustafson, 130 M 402, 303 P2d 938 (1956).

Attorney General's Opinions

Supplementation of Workers' Compensation Benefits With Sick Leave Not Allowed: When a particular employment condition for public employees has been legislatively set, it may not be modified through collective bargaining without statutory authorization. The consequence of making payment of accrued sick leave benefits to an employee is that, effective July 1, 1987, the employee's eligibility for workers' compensation benefits is forfeited under this section. Therefore, a state agency is precluded from complying with a collective bargaining agreement that provides for supplementation of workers' compensation wage loss benefits with sick leave when entitlement to that compensation arose on or after July 1, 1987. 44 A.G. Op. 33 (1992), distinguishing 42 A.G. Op. 69 (1988).

Timing of Eligibility — Day of Wage Loss Defined: Pursuant to this section, a claimant is eligible for workers' compensation starting with the 7th day of wage loss. (See 2003 and 2005 amendments.) In the case of municipal and county employees, a day of wage loss is the loss of wages for 8 hours of work. 42 A.G. Op. 69 (1988).

39-71-737. Compensation to run consecutively — exceptions.

Compiler's Comments

1995 Amendment: Chapter 516 at end deleted "and wage supplement and partial rehabilitation benefits may be paid concurrently"; and made minor changes in style.

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

Severability: Section 26, Ch. 516, L. 1995, was a severability clause.

1987 Amendment: Substituted section (see 1987 Session Law for text) for former section that read: "(1) Compensation shall run consecutively and not concurrently, and payment shall not be made for two classes of disability over the same period except that indemnity benefits under 39-71-705 through 39-71-708 and temporary total disability benefits may be paid concurrently. However, subject to the provisions of 39-71-741, this section does not prevent:

(a) the payment of a lump-sum advance settlement against projected future permanent partial indemnity benefits while a claimant is receiving temporary total disability benefits; or

(b) a settlement of a combination of different classes of disability benefits into a lump sum or into a combination of periodic and lump-sum payments.

(2) A controversy between a claimant and an insurer regarding a settlement authorized under this section is a dispute for which the workers' compensation judge has jurisdiction to make a determination."

1985 Amendments: Chapter 374 in (1) at end of first sentence, inserted exception clause.

Chapter 502 in (1) inserted all language after first sentence allowing payment of lump-sum advance settlements or payment of settlement of combination of periodic and lump-sum amounts; and inserted (2) establishing Workers' Compensation Court jurisdiction over disputes under this section.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Impairment Award Payable Upon Receipt of Undisputed Impairment Rating: Several injured workers filed petitions claiming entitlement to immediate payment of impairment awards based on their respective impairment ratings. The State Fund denied immediate payment on grounds that impairment awards for permanently totally disabled claimants were not due until the claimants received or were entitled to receive Social Security benefits. The Workers' Compensation Court consolidated the cases and concluded that impairment awards for permanently disabled claimants were not authorized at all, so the court never reached the question of when impairment awards were payable. The Supreme Court reversed, holding that impairment awards were authorized for permanently totally disabled claimants, and then went on to address when impairment awards are payable. The court found that requiring the delay of an impairment award until retirement would create an absurd result that was not intended by the Legislature. Rather, an impairment award is due a permanently totally disabled claimant upon the claimant's receipt of an undisputed impairment rating. Rausch v. St. Comp. Ins. Fund, 2002 MT 203, 311 M 210, 54 P3d 25 (2002). However, see Rausch v. St. Comp. Ins. Fund, 2005 MT 140, 327 M 272, 114 P3d 192 (2005), in which it was held that permanent total disability claimants are not entitled to an impairment award under the 1987 and 1989 versions of the Workers' Compensation Act.

Impairment Award to Permanently Totally Disabled Claimant Considered Permanent Total Disability Benefit: On the question of how an impairment award to a permanently totally disabled claimant should be characterized, the Supreme Court held that the most logical approach was to characterize the impairment award consistently with the claimant's disability status, considering that the impairment is a result of the claimant's injury and a substantial factor in the disability. Therefore, in the case of a claimant who was permanently and totally disabled, the impairment award was characterized as a permanent total disability benefit. Rausch v. St. Comp. Ins. Fund, 2002 MT 203, 311 M 210, 54 P3d 25 (2002). However, see Rausch v. St. Comp. Ins. Fund, 2005 MT 140, 327 M 272, 114 P3d 192 (2005), in which it was held that permanent total disability claimants are not entitled to an impairment award under the 1987 and 1989 versions of the Workers' Compensation Act.

Permanently Totally Disabled Workers Entitled to Impairment Awards: Several injured workers filed petitions claiming entitlement to immediate payment of impairment awards based on their respective impairment ratings. The Workers' Compensation Court consolidated the cases and concluded that the only statute that expressly provides for impairment awards is 39-71-703, which pertains to compensation for permanently partially disabled claimants, but held that there was no statutory basis for an impairment award to permanently totally disabled claimants at all. The claimants appealed, and the Supreme Court reversed. Montana recognizes four distinct classes of disability benefits: (1) temporary total; (2) temporary partial; (3) permanent partial; and (4) permanent total. Impairment awards are not explicitly authorized in statute, but are impliedly authorized to injured workers in any of the four classes in 39-71-710 and this section. The Supreme Court found nothing in 39-71-703 that authorizes a limit on impairment awards only to partially disabled claimants. To provide an impairment award to permanently partially disabled claimants and deny impairment awards to permanently totally disabled claimants would lead to an absurd result and contravene the intent of the Workers' Compensation Act. Therefore, a permanently totally disabled claimant is legally entitled to an impairment award for the loss of physical function occasioned by a work-related injury pursuant to 39-71-710 and this section. Rausch v. St. Comp. Ins. Fund, 2002 MT 203, 311 M 210, 54 P3d 25 (2002). However, see Rausch v. St. Comp. Ins. Fund, 2005 MT 140, 327 M 272, 114 P3d 192 (2005), in which it was held that permanent total disability claimants are not entitled to an impairment award under the 1987 and 1989 versions of the Workers' Compensation Act.

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Prohibition Against Concurrent Payment of Different Classes of Benefits Inapplicable to Benefits Resulting From Separate Injuries: The Workers' Compensation Court correctly determined that Reeverts was permanently partially disabled from her original injury in 1984 and entitled to 500 weeks of permanent partial disability benefits but held that her entitlement to those benefits was terminated by a separate injury in 1989. The court cited this section as a basis for its decision prohibiting the payment of different classes of benefits at the same time. On appeal, the Supreme Court held that the prohibition applies to payment of two classes of benefits resulting from the same industrial injury and does not prohibit concurrent payment of benefits for different injuries. Reeverts v. Sears, Roebuck & Co., 266 M 509, 881 P2d 620, 51 St. Rep. 894 (1994).

Concurrent Payment of Disability and Rehabilitation Benefits Allowed: Plaintiff injured his back during the scope and course of his employment. Defendant accepted liability and began paying total disability benefits. Plaintiff entered a rehabilitation program, for which he began receiving rehabilitation benefits under Title 39, ch. 71, part 10. During his training, defendant wrote plaintiff that since his condition had stabilized, his benefits would be reduced to permanent partial benefits based on his impairment rate. Plaintiff appealed to the Workers' Compensation Court, which ruled claimant was entitled to receive benefits based on his impairment rating while concurrently receiving permanent total disability benefits during his retraining. On appeal, the Supreme Court held that the term "classes" of disability referred to in 39-71-737 refers to all of the various benefits provided by the Workers' Compensation Act that are not otherwise specifically excepted. The rehabilitation benefits are distinguishable from all other benefits pursuant to 39-71-1003 (now repealed). The court held that the concurrent payment of two classes of benefits provided under Title 39, ch. 71, part 7, is prohibited (but see 1985 amendment notes for this section) and that the benefits provided by part 10 are not affected. Plaintiff was entitled to total disability benefits and rehabilitation benefits during his rehabilitation program. Rehabilitation benefits are totally separate from and not counted against benefits provided in Title 39, ch. 71, part 7. When plaintiff has completed his rehabilitation program, he will be entitled to his partial disability benefits. Grimshaw v. L. Peter Larson Co., 213 M 291, 691 P2d 805, 41 St. Rep. 2123 (1984).

Classes of Disability: The meaning of the term "classes of disability" as used in the section (and as this act read in 1927) refers to the different types of disabilities, to wit: temporary total, permanent total, temporary partial, and permanent partial disability. Dosen v. E. Butte Copper Min. Co., 78 M 579, 254 P2d 880 (1927).

39-71-739. Compensation in case of changes in degree of injury.

Case Notes

Worsening of Carpal Tunnel Syndrome After Payment for Operations: State Fund paid for early 1988 carpal tunnel surgical procedures but refused to pay for further late 1992 and early 1993 surgeries, claiming that a second injury occurred in the worker's independent poultry business not covered by State Fund. The Workers' Compensation Court erred when it agreed with State Fund. State Fund offered no substantial evidence that maximum healing had been reached or that a second event or exposures caused the necessity for the second set of surgeries. In addition, the medical testimony showed that the claimant suffered worsening symptoms caused by the originally occurring carpal tunnel syndrome. Caekaert v. St. Comp. Mut. Ins. Fund, 268 M 105, 885 P2d 495, 51 St. Rep. 1202 (1994), followed, with regard to applicability of the last injurious exposure rule, in Liberty NW. Ins. Corp. v. Champion Int'l Corp., 285 M 76, 945 P2d 433, 54 St. Rep. 1051 (1997), and distinguished by Mont. St. Fund v. Liberty NW. Ins. Corp., 2018 MT 188, 392 Mont. 221, 425 P.3d 646, determining that worsening or aggravation of symptoms is not a relevant consideration when the employer remains the same.

Reduction or Termination of Benefits: The Workers' Compensation Court retains jurisdiction to reduce or terminate disability payments to meet changing conditions under this section. Walter v. Nat'l Auto. & Cas. Ins. Co., 181 M 109, 592 P2d 497 (1979).

Aggravation of Preexisting Condition: The language of this section indicates that the Legislature recognized the possibility that aggravation of an injury may occur after the normal period of compensation has expired, as occurred when an injury to one part of the employee's body resulted in the aggravation of a preexisting condition in another part of the body. Strandberg v. Reber Co., 179 M 173, 587 P2d 18, 35 St. Rep. 1742 (1978), distinguished in Wheeler v. Ins. Co. of N. Amer., 217 M 254, 704 P2d 49, 42 St. Rep. 1177 (1985).

Retaining Jurisdiction: When there was a question regarding a loss of earning capacity, awarding nominal disability benefits and retaining jurisdiction in the event there should be a subsequent loss of earning capacity were the proper ways for the worker to be protected. Ronshaugen v. Nat'l Ben Franklin Ins. Co., 166 M 214, 531 P2d 1348 (1975).

Deferring Payments Prohibited: Compensation shall be paid "during the period of disability", and there is no provision for deferring payments where there has been a delay in asserting them. Infelt v. Horen, 136 M 217, 346 P2d 556 (1959).

Continuing Jurisdiction of Board:

Where the evidence indicated that 200 weeks would be a reasonable period for the injured to recover and rehabilitate himself, an order granting payments for 200 weeks was not arbitrary. The statutory provisions for continuous review and revision of disability protect the claimant. Malmedal v. Indus. Accident Bd., 135 M 554, 342 P2d 745 (1959).

This section and 39-71-204 must be construed together and under them no case in which compensation has been awarded shall be finally closed until the maximum period of payments for the disability has expired, except in case of "any final settlement" which becomes final after expiration of the time specified in 39-71-204 and cases of compromise settlements. The board cannot divest itself of this continuing jurisdiction by designating an order for payment of compensation for a period less than the statutory maximum as "final". Meznarich v. Republic Coal Co., 101 M 78, 53 P2d 82 (1935).

Compensation for Full Period of Injury — Continuing Jurisdiction of Board: An award of compensation should be for the full period of disability, not exceeding the maximum, and the continuing jurisdiction of the Industrial Accident Board (now State Fund) may be invoked if the disability (on the facts considered) ceases or otherwise changes. Lunardello v. Republic Coal Co., 101 M 94, 53 P2d 87 (1935); Meznarich v. Republic Coal Co., 101 M 78, 53 P2d 82 (1935).

Reconsideration of Case: Where claimant petitioned for a rehearing on the ground that his original claim and proof of injury did not conform to the facts, and advanced an entirely new theory of the nature of the injury, the petition was properly dismissed, this section granting power to the Board (now State Fund) to make adjustments of compensation to meet changed conditions not contemplating reconsideration of a case on such grounds. Shugg v. Anaconda Copper Min. Co., 100 M 159, 46 P2d 435 (1935).

39-71-740. Payments — how made in most cases.

Case Notes

Lower Court — Wide Discretion in Determining Lump-Sum Proposals: The Supreme Court affirmed a lower court's decision employing a presumption favoring periodic payments. The court stated that it would afford lower courts wide discretion in reviewing lump-sum petitions because the lower courts occupy the best position to familiarize themselves with the needs of the claimant and the probable results of granting or denying the proposal. In reaching a decision, the courts must consider the best interests of the claimant, the claimant's family, and the public. Hernandez v. St. Comp. Ins. Fund, 236 M 210, 770 P2d 502, 46 St. Rep. 302 (1989).

Question of Equal Protection Not Reached: Claimant argued that the lower court's decision: (1) rested on the classification of individuals; and (2) held that persons with business acumen could receive lump-sum payments and those without business acumen could not. The Supreme Court found that the lower court had considered the interests of the claimant, the claimant's family, and the public, based its decision on the particular facts of the case, and concluded that the presumption favoring periodic payments applied. The court held that there existed no issue in the case before it of whether or not a classification based on possession of business acumen would survive equal protection analysis. Hernandez v. St. Comp. Ins. Fund, 236 M 210, 770 P2d 502, 46 St. Rep. 302 (1989).

Periodic Payments Preferred — Purpose: The purpose behind usually paying workers' compensation in periodic rather than lump-sum payments is to preclude an employee or his dependent from imprudently wasting his means of support and thereby becoming a burden upon society. Polich v. Whalen's O.K. Tire Warehouse, 194 M 167, 634 P2d 1162, 38 St. Rep. 1572 (1981).

Lump-Sum Settlement as Exception to General Rule: The intention of the Legislature in enacting the Workmen's Compensation Act (now Workers' Compensation Act) was that the periodical payment plan provided by this section should be the rule, and the lump-sum settlement authorized by 39-71-741 the exception. Davis v. Indus. Accident Bd., 92 M 503, 15 P2d 919 (1932).

39-71-741. Settlements and lump-sum payments — legislative intent.

Compiler's Comments

2011 Amendments — Composite Section: Chapter 36 in (1) in first sentence inserted "a claimant and an insurer may convert", after "this chapter" deleted "may be converted", at end of second sentence inserted "as provided in subsection (2)"; in (2) in first sentence substituted "settlement" for "compromise" and in third sentence substituted "a settlement agreement" for "an agreement"; in (2)(b) in second sentence substituted "lump-sum payment" for "permanent partial lump-sum conversion" and in third sentence substituted "payment amount" for "conversion amount"; in (2)(d) after "all other" deleted "compromise"; inserted (2)(f) regarding medical benefits; inserted (3) regarding parties to medical settlement agreement; in (7) after "agree to a" deleted "compromise and release" and at end inserted "without requesting mediation"; inserted (8) regarding settlement of undisputed medical claims; and made minor changes in style. Amendment effective March 23, 2011.

Chapter 167 in (1) near beginning inserted "a claimant and an insurer may convert", after "this chapter" deleted "may be converted", at end of second sentence inserted "as provided in subsection (2)"; in (2) in first sentence substituted "settlement" for "compromise" and in last sentence inserted "settlement" before "agreement"; in (2)(b) in second sentence near beginning substituted "lump-sum payment" for "permanent partial lump-sum conversion" and near end of last sentence after "lump-sum" deleted "conversion"; in (2)(c) in first sentence substituted "payments" for "conversions"; in (2)(d) after "all other" deleted "compromise"; inserted (2)(f) relating to medical benefits upon reaching maximum medical improvement; inserted (3) relating to provisions of a medical settlement agreement; in (5)(a) substituted "advance" for "payment"; in (7) after "agree to a" deleted "compromise and release" and at end inserted "without requesting mediation"; inserted (8) relating to legislative intent on certain settlements; and made minor changes in style. Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 5, Ch. 36, L. 2011, provided: "[Section 3] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled by [the effective date of this act]." Effective March 23, 2011.

Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

2005 Amendment: Chapter 103 in (1) near beginning of first sentence after "agreement" deleted "filed with the department", near beginning of second sentence after "agreement" inserted "that settles a claim for any type of benefit", and inserted third sentence concerning lump-sum advances and payment of accrued benefits in a lump sum; inserted (1)(e) concerning medical benefits on accepted claims; and made minor changes in style. Amendment effective July 1, 2005.

Effective Date — Applicability: Section 13, Ch. 103, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005."

1997 Amendment: Chapter 310 substituted (1) relating to what benefits may be converted to a lump sum, and how, for former (1) through (3) (see 1997 Session Law for former text); deleted (6) that required the Department to approve or deny a lump-sum settlement in writing, subject to the other provisions of this section, and to notify claimant of the approval or denial; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 14, Ch. 310, L. 1997, was a severability clause.

1995 Amendment: Chapter 243 in (1)(a), after "Benefits", inserted "under this chapter" and after "whole" inserted "or in part"; at beginning of (2)(a) deleted "If an insurer has accepted initial liability for an injury"; inserted (2)(a)(i) and (2)(a)(ii) concerning acceptance for initial liability and agreement to a lump-sum conversion; at end of (2)(b) deleted "or $20,000, whichever is less"; in (2)(c), in second sentence, substituted "lump-sum conversion" for "settlement"; in (2)(d), after "Upon approval", deleted "the agreement constitutes"; in (4), after "under", substituted "this section" for "subsection (3)"; at end of (5)(b) deleted "rounded to the nearest whole number"; in (6), in first sentence after "department", substituted "shall" for "has full power, authority, and jurisdiction to allow", after "approve" substituted "or deny in writing" for "or condition", and after "settlements" deleted "for any type of benefits provided for under this chapter" and deleted former second and third sentences that read: "All such compromise settlements and lump-sum payments are void without the approval of the department. Approval by the department must be in writing"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

1991 Amendment: In (1)(c), at end, deleted "or by any court"; deleted (1)(d) and former (2)(d) that read: "The parties' failure to reach an agreement is not a dispute over which a mediator or the workers' compensation court has jurisdiction"; in (2)(a), after "for an injury", deleted "permanent total and", after "permanent partial" substituted "disability" for "wage supplement", and after "whole" inserted "or in part"; deleted former (2)(b) that read: "(b) the conversion may be made only upon agreement between a claimant and an insurer"; inserted (2)(b) relating to the limitation on the total of lump-sum conversion in part; in (2)(c), after "the department may", deleted "approve an agreement if:

(i) there is a reasonable dispute concerning the amount of the insurer's future liability or benefits; or

(ii) the amount of the insurer's projected liability is reasonably certain and the settlement amount is not substantially less than the present value of the insurer's liability" and inserted language at end relating to disapproval of a settlement determined to be inadequate; in (2)(d), at end, deleted "or by any court"; deleted former (3) that provided: "(3) (a) Permanent partial wage supplement benefits may be converted in part to a lump-sum advance.

(b) The conversion may be made only upon agreement between a claimant and an insurer.

(c) The agreement is subject to department approval. The department may approve an agreement if the parties demonstrate that the claimant has financial need that:

(i) relates to the necessities of life or relates to an accumulation of debt incurred prior to injury; and

(ii) arises subsequent to the date of injury or arises because of reduced income as a result of the injury.

(d) The parties' failure to reach an agreement is not a dispute over which a mediator or the workers' compensation court has jurisdiction"; in (3), in first sentence after "converted", inserted "in whole or in part" and substituted "lump sum" for "lump-sum advance", in second sentence, after "all lump-sum", deleted "advance payments" and inserted "conversions in part that are awarded", and in fourth and fifth sentences, after "lump-sum", deleted "advance"; in (3)(a)(iii), after "self-employment venture", deleted "as set forth in 39-71-1026; and" and inserted "that is considered feasible under criteria set forth by the department; or"; inserted (4) relating to conversion of lump-sum benefits under subsection (3); in (5), after "lump-sum", substituted "payment" for "advance"; in (6), in first sentence, inserted "Subject to other provisions of this section", after "settlements" inserted "for any type of benefits provided for under this chapter", and after "or lump-sum" substituted "payments" for "advances"; in (7), at beginning of first sentence, deleted "Subject to 39-71-2401" and in middle, after "lump-sum", deleted "advance under subsection (4)" and in second sentence, after "or a lump-sum", substituted "payment" for "advance"; and made minor changes in style. Amendment effective July 1, 1991.

Severability: Section 15, Ch. 574, L. 1991, was a severability section.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1987 Amendment: Substituted section (see 1987 Session Law for text) for former section that read: "(1) The biweekly payments provided for in this chapter may be converted, in whole or in part, into a lump-sum payment. Regardless of the date of the injury or of a prior lump-sum payment, a lump-sum conversion of permanent total biweekly payments awarded or paid after April 15, 1985, must equal the estimated present value of the total unpaid permanent total biweekly payments, assuming interest at 7% per year, compounded annually, unless the conversion improves the financial condition of the worker or his beneficiary, as provided in subsection (2)(b). If the estimated duration of the compensation period is the remaining life expectancy of the claimant or the claimant's beneficiary, the remaining life expectancy must be determined by using the most recent table of life expectancy in years as published by the United States national center for health statistics.

(2) The conversion can only be made upon the written application of the injured worker or the worker's beneficiary, with the concurrence of the insurer, and approval of the conversion rests in the discretion of the division as to the amount of the lump-sum payment and the advisability of the conversion. It is presumed that biweekly payments are in the best interests of the worker or his beneficiary. The approval or award of a lump-sum conversion by the division or the workers' compensation judge must be the exception, not the rule, and may be given only if the worker or his beneficiary demonstrates that his ability to sustain himself financially is more probable with a whole or partial lump-sum conversion than with the biweekly payments and his other available resources. The following procedure must be used by the division and the workers' compensation judge in determining whether a lump-sum conversion of permanent total biweekly payments will be approved or awarded:

(a) The difference between the present discounted value of a lump sum and the future value of the biweekly payments cannot be the only grounds for approving or awarding a lump-sum conversion.

(b) A lump-sum conversion that improves the financial condition of the worker or his beneficiary over what would have been reasonably expected had the worker not been injured or died can be approved or awarded only if the lump-sum conversion is limited to the purchase price to the insurer of an annuity that would yield an amount equal to the biweekly benefits payable over the estimated duration of the compensation period. The worker or his beneficiary must demonstrate the financial condition that would have been reasonably expected, taking into consideration his age, education, work experience, and probable job promotions and pay increases.

(c) If the existing delinquent or outstanding debts are used as grounds for a lump-sum conversion, the worker or his beneficiary must demonstrate through a debt management plan that a lump sum for that purpose is necessary to sustain himself financially.

(d) If a business venture is used as grounds for a lump-sum conversion, the worker or his beneficiary must demonstrate through a business plan that a lump sum for that purpose is necessary to sustain himself financially. The business plan must at least show the feasibility of the business, given the market conditions in the intended market area, and the cash that will be available to him on a biweekly basis after start-up costs and other business expenses are considered throughout the expected life of the venture.

(3) If the division finds that an application for lump-sum conversion does not adequately demonstrate the ability of the worker or his beneficiary to sustain himself financially, the division may order, at the insurer's expense, financial, medical, vocational rehabilitation, educational, or other evaluative studies to determine whether a lump-sum conversion is in the best interest of the worker or his beneficiary.

(4) The division has full power, authority, and jurisdiction to allow and approve compromises of claims under this chapter. All settlements and compromises of compensation provided in this chapter are void without the approval of the division. Approval of the division must be in writing. The division shall directly notify every claimant of any division order approving or denying a claimant's settlement or compromise of a claim.

(5) A controversy between a claimant and an insurer regarding the conversion of biweekly payments into a lump sum is considered a dispute for which the workers' compensation judge has jurisdiction to make a determination."

1985 Amendment: In (1) inserted all language after first sentence (see 1987 amendment note for text); in (2) inserted all language after first sentence (see 1987 amendment note for text; inserted (3) allowing Division to order additional studies to determine if lump-sum conversion is in worker's best interest; and made minor changes in phraseology.

Applicability — Retroactive Effect: Section 6, Ch. 471, L. 1985 (section 1 of which extensively amended this section's tests for granting a lump sum), provided: "This act applies retroactively, within the meaning of 1-2-109, to injuries incurred and lump sums awarded or paid prior to the effective date of this act [April 15, 1985] if a lump sum is awarded or paid for the injury or the award or settlement is reopened and redetermined after the effective date of this act. The mere passage of this act is not grounds for reopening any case."

Administrative Rules

Title 24, chapter 29, subchapter 12, ARM Lump-sum conversion rules.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

No Error in Conversion of Permanent Total Disability Benefits to Lump-Sum Settlement in Excess of $20,000 for Necessities of Life: Barnard was awarded permanent total disability benefits and subsequently sought to convert those benefits to a lump-sum settlement. The insurer protested on grounds that a lump-sum settlement would exceed the $20,000 limit in 39-71-741(1)(c) and that Barnard had not shown that the settlement was required to meet Barnard's necessities of life. The Workers' Compensation Court disagreed and awarded Barnard the requested lump-sum payment, and the insurer appealed, but the Supreme Court affirmed. This section allows lump-sum payments in whole or in part, and the $20,000 limitation refers only to the total of all lump-sum conversions in part, not to a conversion of payments in whole, even though the conversion results in a payment in excess of $20,000. Barnard presented credible testimony that the lump sum would be used to purchase a custom mobile home that would allow increased access and mobility, to purchase a new vehicle, to gravel the driveway to the home, and to expand Barnard's cattle business, and the Workers' Compensation Court did not err in concluding that conversion of benefits to a lump sum was in Barnard's best interests to meet the necessities of life. Barnard v. Liberty NW Ins. Corp., 2008 MT 254, 345 M 81, 189 P3d 1196 (2008).

No Workers' Compensation Lump-Sum Award on Demand — Best Interests Test for Award of Lump-Sum Distribution: Martin unsuccessfully attempted to negotiate a lump-sum settlement with respondent insurer, so Martin petitioned the Workers' Compensation Court for an order awarding him a lump-sum distribution. The request was denied, and on appeal, the Supreme Court affirmed, noting that lump-sum distributions have always been the exception to the rule favoring periodic payments and that Montana's statutory scheme does not allow for the award of lump sums on demand. (See 2011 amendment.) Rather, the court set out a best interests test for evaluating lump-sum requests, allowing courts to consider all aspects of a claimant's personal situation, including: (1) physical and mental health; (2) family situation; (3) level of maturity; and (4) financial condition. Consideration of financial condition may encompass the claimant's outstanding indebtedness and pressing financial needs, as well as a spouse's income, which also must be considered to avoid an absurd treatment of the realities of a marital or family association. After hearing the evidence in this case, the Workers' Compensation Court properly concluded that Martin's financial situation was not pressing and that a lump sum was not in Martin's overall best interests, given that Martin: (1) had assets in excess of debt; (2) was doing well on biweekly benefits; (3) had monthly income in excess of expenses; (4) had other sources of income to allow for payment of extraordinary expenses; (5) was able to assist his children financially from time to time; (6) had invested in annuities and gold; and (7) was able to take periodic vacations. Martin v. The Hartford, 2004 MT 57, 320 M 206, 86 P3d 569 (2004).

Failure to Submit Medical Claims Within Sixty-Month Period Precluding Insurer Liability for Recurrence of Prior Injury: Wiard suffered a work-related injury in 1992, settled in 1994 with defendant who was the employer's insurer, including a reservation of future medical and hospital benefits, and returned to work. In 1995, Wiard was treated for additional pain from an injury on a different job, and defendant denied the claim because it was a new injury for which defendant was not the insurer. In 2000, Wiard began experiencing acute pain associated with the 1992 injury. Surgery was required, but defendant denied the claim because Wiard had not submitted a medical claim within 60 months, as required under 39-71-704 to avoid termination of benefits. The Workers' Compensation Court applied the 60-month limitation and denied benefits, and Wiard appealed, but the Supreme Court affirmed. The governing version of this section in effect in 1991 contained no provision for closing medical benefits at the time of settlement of an accepted liability claim, so by law, reasonably necessary medical benefits were reserved and payable under the settlement agreement, except as capped by the 60-month rule. Wiard filed no medical claim within the 60-month period, so benefits were properly denied. Wiard v. Liberty NW. Ins. Corp., 2003 MT 295, 318 M 132, 79 P3d 281 (2003), distinguished in Newlon v. Teck Am., Inc., 2015 MT 317, 381 Mont. 378, 360 P.3d 1134.

Reopening Workers' Compensation Settlement for Mutual Mistake — Statute of Limitations: Workers' compensation claimant was held to have discovered in October 1986 that back surgery was a possibility when at that time his doctor discussed with claimant the possibility of surgery and advised claimant to consider it. Furthermore, in that month, claimant's attorney for a social security disability claim notified the administrative law judge of the doctor's conclusion, and the judge's decision in claimant's favor was based in part on a possibility of surgery. Therefore, the 2-year statute of limitations for a claim based on mutual mistake (assuming that there was one) expired in October 1988 because a full and final compromise settlement approved by the Workers' Compensation Court was made without knowledge that surgery might well be necessary. The claim was barred because claimant's petition to reopen the compromise settlement was filed in July 1990. Rath v. St. Labre Indian School, 249 M 433, 816 P2d 1061, 48 St. Rep. 758 (1991).

Lump-Sum Application Procedure as Improper Delegation of Legislative Authority and Unconstitutional Deprivation of Access to Courts: Under this section, as amended in 1987, no application for a lump-sum conversion may be made to the Department of Labor and Industry unless the conversion is agreed upon by the claimant and the insurer. If they fail to agree, there is no dispute over which a mediator or the Workers' Compensation Court has jurisdiction. The effect of the amendment places a tilt in favor of the insurer or the claimant, either of whom can withhold consent for a conversion for any reason or for no reason. In cases when a claimant agrees with an insurer, the legislature has thus improperly and unconstitutionally delegated to the insurer an absolute discretion as to whether a lump-sum conversion of permanent partial wages settlement benefits will be converted. This not only deprives the Workers' Compensation Court of jurisdiction but it also deprives the Supreme Court of its appellate power, the only appeal allowed by law, amounting to an abrogation of the principle that judicial power cannot be taken away by legislative action and negating the constitutional mandate that insurers and claimants have the right of access to the courts. (This decision does not affect cases that occurred prior to the effective date of the 1987 amendment.) Ingraham v. Champion Int'l, 243 M 42, 793 P2d 769, 47 St. Rep. 650 (1990).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Lump-Sum Advance Properly Denied — No Abuse of Discretion: Claimant, who is totally disabled, petitioned the Workers' Compensation Court for a lump-sum advance against permanent partial disability benefits that would otherwise be available to her at age 65. The court concluded that claimant did not establish by a preponderance of credible evidence that the lump-sum advance requested was in her best interest and denied the petition. The Supreme Court affirmed. The best interests of the claimant, the claimant's family, and the general public are the primary factors to be considered when evaluating lump-sum settlements. For industrial accident claims, periodic payments should be the rule and lump-sum settlements should be the exception. Workers' Compensation Court decisions denying lump-sum settlements will not be interfered with on appeal unless there is an abuse of discretion. Sullivan v. Aetna Life & Cas., 271 M 12, 894 P2d 278, 52 St. Rep. 296 (1995).

Lump Sum Approved for Purchase of Apartment Building: After finding the investment to be active rather than passive and noting claimant's pressing need and lack of debilitating physical limitations, the Supreme Court affirmed the award of a lump sum for the purchase of an apartment building as being in claimant's best interests. Crittendon v. Terri's Restaurant & Lounge, 247 M 293, 806 P2d 534, 48 St. Rep. 203 (1991), distinguishing Daniels v. Kalispell Regional Hosp., 230 M 407, 750 P2d 455 (1988), and Komeotis v. Williamson Fencing, 232 M 340, 756 P2d 1153 (1988).

Posttrial Appraisals Not Violative of Right to Fair Hearing: After trial on the question of a lump-sum award, the Worker's Compensation Court requested appraisals on the heating, plumbing, and electrical systems of the apartment building that was the subject of the award, which State Fund contended was a deprivation of its right to examine opposing witnesses and allowed claimant to prove her case after trial. However, because the court reviewed claimant's evidence twice and reached its conclusion granting the lump sum without benefit of the posttrial appraisals, State Fund was not deprived of its right to a fair and impartial hearing. Crittendon v. Terri's Restaurant & Lounge, 247 M 293, 806 P2d 534, 48 St. Rep. 203 (1991).

Failure to Inform Claimant of Right to Attorney Not Constructive Fraud: The claimant argued that at the time he settled his claim, he was not informed that he could retain an attorney to handle his claim and that this failure constituted constructive fraud. The Supreme Court held that the lower court had not abused its discretion in finding that no constructive fraud existed because the claimant was articulate, had negotiated an earlier settlement with the State Fund, and was well aware of the significance of a sound economic future for himself and his family. Hartfield v. St. Comp. Ins. Fund, 246 M 259, 805 P2d 1293, 47 St. Rep. 2001 (1990).

No Unilateral Mistake of Law if Other Party Unaware of Misapprehension: The claimant argued that he had entered into the settlement believing that he was not entitled to receive benefits after age 65. The Supreme Court ruled that there can be no relief for a unilateral mistake of law unless it can be shown that the other party knew of the misapprehension. Hartfield v. St. Comp. Ins. Fund, 246 M 259, 805 P2d 1293, 47 St. Rep. 2001 (1990).

Discount to Present Value Applicable Only to Permanent Total Disability Payments: The discount to present value provided for in this section applies only to permanent total disability payments. The discount does not apply to permanent partial disability payments even though the claimant is eligible for permanent partial payments because of his status as a permanently totally disabled claimant who has reached the age of 65 and has retired. Franck v. St. Comp. Ins. Fund, 241 M 486, 787 P2d 769, 47 St. Rep. 472 (1990).

Lump-Sum Award Denied — Insufficient Proof It Would Alleviate Psychological Problems: The claimant argued that a lump-sum award would allow him to invest in a business, which would restore his sense of self-worth since he was no longer able to perform the physical labor he had done prior to his injury. There was conflicting testimony on whether the payment would relieve the claimant's depression. The Supreme Court held that it was not an abuse of discretion to deny the single payment. Reinhard v. St. Comp. Ins. Fund, 240 M 370, 784 P2d 398, 46 St. Rep. 2202 (1989).

Conversion to Lump Sum — Written Application by Claimant and Concurrence of State Fund Required: This section requires written application by the worker with the concurrence of the State Fund in order to effectuate conversion of biweekly benefits to a lump-sum payment. (Decision based on 1983 statutory language applicable to a pre-1985 injury; but see 1987 statutory changes applicable to later injuries.) Hilbig v. St. Comp. Ins. Fund, 238 M 375, 777 P2d 1296, 46 St. Rep. 1347 (1989).

Amount Awarded Insufficient to Meet Need: Claimant originally sought a lump sum to pay for a car that was repossessed before he could pay it off. He then financed a new car for a higher amount than he had originally requested. His attorney failed to amend the petition to request the higher amount needed to finance the new car. It was an abuse of discretion for the Workers' Compensation Court to limit the lump-sum award to an amount that was insufficient to meet the need that the court identified as proper. Claimant should be allowed the larger amount in a lump sum. Hedegaard v. St. Comp. Ins. Fund, 238 M 290, 776 P2d 1225, 46 St. Rep. 1275 (1989).

Weekly Recoupment of Lump Sum Allowed: An insurer is entitled to a weekly recoupment of a lump-sum advance prior to a final settlement of claimant's claim. Claimant is not entitled to double recovery of both a lump-sum advance and the biweekly payments. Hedegaard v. St. Comp. Ins. Fund, 238 M 290, 776 P2d 1225, 46 St. Rep. 1275 (1989), followed in Aetna Life & Cas. Co. v. Scribner, 253 M 236, 833 P2d 166, 49 St. Rep. 485 (1992).

Effect of Inflation on Award of Lump Sum: Claimant asserted that where a sound business proposal was coupled with evidence demonstrating health benefits from a lump-sum conversion, the rule against inflation as justification for granting a lump sum did not apply. However, the lower court's decision not to grant the lump sum because inflation might cause a future "pressing need" was consistent with previous dispositions in Belton v. Carlson Transp., 220 M 194, 714 P2d 148, 43 St. Rep. 286 (1986), and LaVe v. School District, 220 M 52, 713 P2d 546, 43 St. Rep. 165 (1986). Komeotis v. St. Comp. Ins. Fund, 232 M 340, 756 P2d 1153, 45 St. Rep. 1098 (1988).

Partial Conversion Denied — Depression Properly Considered: Claimant petitioned for lump sums of $10,000 to cover medical expenses and to purchase a reliable vehicle and $110,000 to purchase and operate rental property. Experts testified the rental property plan was financially feasible and would lessen claimant's severe depression but also revealed that claimant's physical and educational deficits would hamper his ability to care for the rentals and that other vocational options might ease his depression. The lower court granted the $10,000 request but denied the $110,000 request. On appeal, the Supreme Court noted the lower court may have understated the severity of depression but that rehabilitation and counseling could provide claimant with activity to alleviate his depression. It was within the lower court's discretion to conclude that claimant failed to overcome the presumption for periodic payments. Komeotis v. St. Comp. Ins. Fund, 232 M 340, 756 P2d 1153, 45 St. Rep. 1098 (1988), distinguishing Polich v. Whalen's O.K. Tire Warehouse, 194 M 167, 634 P2d 1162 (1981), Utick v. Utick, 181 M 351, 593 P2d 739 (1979), and Legowik v. Montgomery Ward, 157 M 436, 486 P2d 867 (1971).

Denial of Lump Sum for Backhoe Business — Too Speculative: Claimant's request for a lump sum to start a backhoe business was denied as too speculative and claimant's business role too tangential to justify risking a substantial portion of claimant's benefits. Evidence showed: (1) there were discrepancies in business income potential; (2) data used in the plan was outdated and did not reflect recent construction industry declines; (3) claimant's husband, who was to run the business, had little experience in the field; (4) there were already some 30 backhoe businesses in the area; and (5) the plan made no provisions for labor costs or depreciation. Daniels v. EBI/Orion Group, 230 M 407, 750 P2d 455, 45 St. Rep. 310 (1988).

Denial of Lump-Sum Housing Allowance: All of claimant's evidence justifying a lump sum for housing included property large enough to run a business, but a lump sum for the business was denied as speculative. The District Court properly denied the housing lump-sum request as inappropriate and agreed to reconsider the request on more appropriate evidence of nonbusiness-related housing. Daniels v. EBI/Orion Group, 230 M 407, 750 P2d 455, 45 St. Rep. 310 (1988).

Lump Sum for Business Venture Affirmed: A lump-sum payment of benefits for a proposed business venture was affirmed where: (1) claimant presented an extensive economic analysis of her proposed business and testified about steps she had already taken to start the venture; (2) her expert testified about projected market and earnings of the business over the first 3 years; and (3) her attorney pointed out that her permanent partial disability benefits would expire at age 40. There was substantial evidence that the venture was in claimant's best interest despite the state fund expert's conclusion that the venture was highly speculative. Lauderdale v. St. Comp. Ins. Fund, 229 M 188, 745 P2d 690, 44 St. Rep. 1883 (1987).

No Retroactive Application of Lump-Sum Discount: The 7% statutory discount provision of lump-sum conversions of future permanent total disability benefits and procedural requirements cannot be applied to a workers' compensation injury that occurred prior to April 15, 1985. Odenbach v. Buffalo Rapids Project, 225 M 96, 731 P2d 1297, 44 St. Rep. 67 (1987).

No Retroactive Application of Lump-Sum Conversion of Biweekly Workers' Compensation Benefits or Discount to Present Value Conversions — Prospective Application Not Violative of Equal Protection: The lump-sum conversion of biweekly workers' compensation benefits and discounting to present value conversions added to this section by 1985 amendment may not be constitutionally applied retroactively to injuries that occurred prior to April 15, 1985, the effective date of the amendment. However, prospective application of the procedure set out in subsection (2) of this section is not violative of the constitutional equal protection guaranties because the amendments merely codified in detailed form prior case law allowing a conversion and represented no significant change from the law as it existed prior to April 15, 1985. Buckman v. Mont. Deaconess Hosp., 224 M 318, 730 P2d 380, 43 St. Rep. 2216 (1986), followed in Komeotis v. Williamson Fencing, 225 M 356, 736 P2d 93, 44 St. Rep. 298 (1987).

Amendment of Method of Computing Lump-Sum Award — Best Interests of Claimant as Threshold Test: Although 1985 amendments to this section created new criteria for establishing the need for a lump-sum award and allowed discounting of lump-sum payments, the threshold test for a lump-sum award remained that of the best interests of the claimant. When the claimant did not demonstrate that a lump-sum award was in his best interests, he lacked standing to challenge the constitutionality of the methodology of computation of lump-sum awards. Stelling v. Rivercrest Ranches, Inc., 224 M 313, 730 P2d 388, 43 St. Rep. 2212 (1986).

Denial of Lump Sum for Purchase of House to Avoid Raise in Rent: Absent any age or health reasons necessitating purchase of a house, testimony by appellant that he wished to avoid future escalation of rent payments was not adequate to meet the burden of advancing substantial credible evidence of a "pressing need" to purchase a house. Therefore, denial of a lump-sum award for this purpose was proper. (1985 amendment not applicable to this case) Belton v. Carlson Transp., 220 M 194, 714 P2d 148, 43 St. Rep. 286 (1986). See also Garmann v. Employers Ins. Co. of Wausau, 226 M 432, 736 P2d 123, 44 St. Rep. 781 (1987).

Authority of Division of Workers' Compensation (Now State Fund) Limited to Allowing or Disallowing Settlement: The Division (now State Fund), under this section, has no authority to unilaterally rescind, alter, or amend the terms of a settlement agreement. It can only allow or disallow a proffered settlement agreement. Bowen v. The Anaconda Co., 220 M 185, 714 P2d 142, 43 St. Rep. 278 (1986).

Denial of Lump-Sum Payment for Investment: Claimant LaVe advanced two principal reasons for requesting a lump-sum payment of permanent total disability benefits: (1) her outstanding debts; and (2) her wish to invest the money and receive a return which would be greater than the weekly benefits. The Supreme Court, citing Kent v. Sievert, 158 M 79, 489 P2d 104 (1971), held that her desired investment was not reason by itself to award a lump-sum payment; otherwise, any claimant desiring a lump-sum award could secure one by proposing to invest it. This would defeat the statutory intent of 39-71-741, as lump-sum awards are to be the exception, not the rule. The court also noted that LaVe had received lump-sum advances approximate to her outstanding debts. Given these facts, the Supreme Court held that the Workers' Compensation Court did not abuse its discretion in denying the lump-sum payment. LaVe v. School District, 220 M 52, 713 P2d 546, 43 St. Rep. 165 (1986).

Lump-Sum Payment Discounted to Present Value — Not Authorized Under Former Version of Section: Claimant was to receive a lump-sum payment, but it was error for the Workers' Compensation Court to hold that the payment could be discounted to its present value before awarding it. The Supreme Court examined the legislative history of 39-71-741 (prior to its 1985 amendment) noting that from 1915 to 1975 the section specifically provided for a discount to present value, but the provision was removed by 1975 amendment. The court further held that a lump-sum award may be either a full or partial lump-sum payment, but such an award may not be discounted to present value. Willis v. Long Constr. Co., 213 M 203, 690 P2d 434, 41 St. Rep. 2050 (1984), followed in Madill v. St. Comp. Ins. Fund, 280 M 450, 930 P2d 665, 54 St. Rep. 4 (1997).

Lump-Sum Payment Not Appropriate — Claimant Did Not Submit Written Plan: The claimant is not entitled to a lump-sum payment of future disability payments as he has failed to submit a written plan setting forth the reasons for the lump-sum request and his plan for using the lump sum if granted. Claimant bypassed this statutory procedure, and this was sufficient grounds for the Workers' Compensation Court to deny his request for a lump-sum payment. Moilanen v. St. Comp. Ins. Fund, 214 M 367, 694 P2d 485, 42 St. Rep. 25 (1985).

Consideration of Claimant's Wife's Income Held Proper: In evaluating the need for a lump-sum benefit and the best interests of the parties involved, the court held in a pre-1985 amendment case that it was proper for the Workers' Compensation Court to consider the income of claimant's wife. Ruple v. Glacier Gen. Assurance Co., 209 M 276, 679 P2d 1252, 41 St. Rep. 704 (1984).

Lump Sum to Start Business Venture Denied: In requesting a lump-sum settlement the claimant testified that he was current on his monthly bills and could meet his projected monthly expenses. He requested the lump-sum settlement to start a business venture involving the consignment of used vehicles. Because the trial court was in a better position to evaluate the claimant's proposal, its denial was upheld. Bundtrock v. Duff Chevrolet, 199 M 128, 647 P2d 856, 39 St. Rep. 1211 (1982).

Permanent or Temporary Disability — Effect on Lump-Sum Benefits: The claimant's argument that the trial court's refusal to find him permanently disabled adversely affected the amount of a lump-sum settlement was without merit. Whether a claimant is entitled to a lump-sum settlement and whether he is temporarily or permanently disabled are two separate issues. Bundtrock v. Duff Chevrolet, 199 M 128, 647 P2d 856, 39 St. Rep. 1211 (1982).

Lump-Sum Payment Properly Denied — Poor Business Sense and Prospects: Although a lump-sum award of permanent total disability benefits may be made, the Workers' Compensation Court (in a pre-1985 amendment case) did not abuse its discretion in denying such award where claimant's disability, lack of business experience, incomplete consideration of objective data concerning his proposed project, and occasional nonavailability of his son's services militated against the probable success of the business venture for which he sought the lump-sum award. Krause v. Sears Roebuck & Co., 197 M 102, 641 P2d 458, 39 St. Rep. 394 (1982); distinguished from Utick v. Utick, 181 M 351, 593 P2d 739, 36 St. Rep. 799 (1979).

Appeal From Lump-Sum Advance — Standards of Review: Wide discretion will be afforded Workers' Compensation Court determination regarding lump-sum settlements, and the decision will not be interfered with by the Supreme Court unless there is an abuse of discretion. The court will be presumed correct and affirmed if supported by substantial evidence and reversed only if the evidence clearly preponderates against the findings. The Supreme Court is required to look to all evidence properly before the court below in deciding whether there is substantial evidence to support the lower court's findings and conclusions. Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981).

Workers' Compensation Lump-Sum Advance — Guardian Ad Litem Appointments: A mother received a lump-sum workers' compensation advance payment. Her minor child had a separate, legally cognizable interest in present and future benefits, which might be prejudiced by any lump-sum payment to the mother; therefore, the Workers' Compensation Court should have either appointed a guardian ad litem to represent the child or made a finding stating why appointment was not necessary, and it was error to fail to do so. However, reversal was not required as there was a mutual benefit to mother and child in the payment of the benefits and the method of lump-sum advance repayment presented a very limited chance of financial loss to the child. Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981).

Attorney Fees for Claimant Not Dependent on Carrier's Compliance With Chapter: Insurance carrier's compliance or noncompliance with this chapter was not relevant to the issue of whether claimant, who prevailed on petition for a lump-sum settlement in lieu of future periodic payments, was entitled to attorney fees and costs. Award of attorney fees and costs was governed by 39-71-612, and where claimant met that section's test and prevailed in a hearing wherein the sole controversy was the difference between amount tendered and amount awarded, he was entitled to attorney fees and costs. Polich v. Whalen's O.K. Tire Warehouse, 194 M 167, 634 P2d 1162, 38 St. Rep. 1572 (1981).

Lump-Sum Settlement for Health Reasons: In a pre-1985 amendment case, there was substantial evidence to support the conclusion below that a lump-sum settlement would be in petitioner's best interests, and judgment for conversion of periodic payments to a lump-sum payment was not an abuse of discretion, where petitioner's doctor warned him to avoid bending, crawling, heavy lifting, and overhead work; the slightest physical exertion was painful to him; his wife had diabetes, migraine headaches, and impaired circulation; they wished to move to Phoenix for their health; life away from Montana winters would be in their best interests in view of their ill health and advanced age; and the expense of moving gave rise to the lump-sum payment request. Polich v. Whalen's O.K. Tire Warehouse, 194 M 167, 634 P2d 1162, 38 St. Rep. 1572 (1981). On rehearing the court held that it was not required that conditions be placed on a lump-sum award. Polich v. Glacier Gen. Assurance Co., 203 M 280, 661 P2d 38, 40 St. Rep. 448 (1983).

Workers' Compensation Settlement — Mutual Mistake: Plaintiff injured his back when he fell in the restaurant where he worked and a rack of dishes fell on him. He submitted his claim to the Division of Workers' Compensation (now State Fund) but was not represented by an attorney. He was examined by physicians who found him to be 5% disabled. Plaintiff entered into a full and final compromise settlement. Later examinations by physicians showed that plaintiff's fall had aggravated his preexisting cerebral palsy condition. This information was not available to either party at the time the settlement was entered into. Both parties were mistaken as to a fact material to the contract. The court found that the need to fairly compensate the injured worker is the intent and purpose of the Workers' Compensation Act. The full and final compromise settlement was set aside for mutual mistake of a material fact as to the nature and extent of the injury caused by claimant's accident. The case was remanded to the Workers' Compensation Court to determine the extent of claimant's disability. Kienas v. Peterson, 191 M 325, 624 P2d 1, 37 St. Rep. 1747 (1980), followed in Weldele v. Medley Dev., 227 M 257, 738 P2d 1281, 44 St. Rep. 1062 (1987), Kimes v. Pac. Employers Ins. Co., 233 M 175, 759 P2d 986, 45 St. Rep. 1402 (1988), and Keller v. Liberty NW., Inc., 2010 MT 279, 358 Mont. 448, 246 P.3d 434.

Conscientious Administration in Award of Lump-Sum Payment: Although the favored method of paying benefits under worker's compensation is by regular periodic payments, the Division of Workers' Compensation (now State Fund) (in a pre-1985 amendment case) did not abuse its discretion in awarding a lump sum to a claimant to satisfy debts that have or will be incurred for basic necessities. A showing of exceptional circumstances must exist to justify such an award, but each case must be considered on its own merits. The Division (now State Fund) is in the best position to judge the needs of the claimant, and where their solution lies in conscientious administration, it will be affirmed unless there is an abuse of discretion or the evidence clearly preponderates against it. Willoughby v. Gen. Accident Fire & Life, 187 M 253, 609 P2d 700, 37 St. Rep. 620 (1980), followed in Ruple v. Glacier Gen. Assurance Co., 209 M 276, 679 P2d 1252, 41 St. Rep. 704 (1984), Johnson v. Fidelity & Cas. Co. of New York, 227 M 464, 740 P2d 665, 44 St. Rep. 1236 (1987), Phelps v. Hillhaven Corp., 231 M 245, 752 P2d 737, 45 St. Rep. 582 (1988), Aetna Life & Cas. Co. v. Scribner, 253 M 236, 833 P2d 166, 49 St. Rep. 485 (1992), and Sullivan v. Aetna Life & Cas., 271 M 12, 894 P2d 278, 52 St. Rep. 296 (1995).

Submission of Fraudulent Petition for Workers' Compensation Settlements: Under the language of the former statute dealing with the preparation of false evidence, preparation of a petition for lump-sum and compromise settlements prepared after the death of the claimant and submitted to the Division of Workers' Compensation (now State Fund) for the purpose of obtaining money that defendant knew he was not entitled to constituted preparation of false evidence in violation of the statute. The petitions were a statutory prerequisite to the awarding of settlements. St. v. Bretz, 185 M 253, 605 P2d 974, 36 St. Rep. 1037 (1979).

Best Interest of Claimant (Pre-1985 Amendment Cases):

Lump-sum payments are not looked upon with disfavor although they are an exception to the general rule that payments awarded under this chapter are periodic. Determinative criteria as to the advisability of awarding a lump-sum payment include: (1) the best interests of the claimant, his family, or the public; or (2) the existence of a pressing need or outstanding indebtedness. Utick v. Utick, 181 M 351, 593 P2d 739, 36 St. Rep. 799 (1979), followed in Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981), and Belton v. Carlson Transp., 220 M 194, 714 P2d 148, 43 St. Rep. 286 (1986), distinguished in Krause v. Sears Roebuck & Co., 197 M 102, 641 P2d 458, 39 St. Rep. 394 (1982).

Where it was demonstrated by the claimant without dispute by the insurer or the Workers' Compensation Court that claimant could utilize a lump-sum award to assure a substantial source of regular income for himself, such a lump sum should have been granted. Utick v. Utick, 181 M 351, 593 P2d 739 (1979).

Compensation benefits are a substitute for wages of the injured employee, and thus periodic payments are provided for by law. The purpose is to preclude any possibility of an imprudent employee or dependent wasting the means for support and thereby becoming a burden upon society. However, lump-sum awards should be permitted where the best interest of the parties demand it. Laukaitis v. Sisters of Charity of Leavenworth, 135 M 469, 342 P2d 752 (1959).

Limit on Benefits Inapplicable: Under former law, the claimant was entitled to waiver of the 36-month limitation because of potential total disability and because the defendant was largely responsible for the delay in necessary treatment by his refusal to pay benefits. Hutchison v. Liberty Mut. Ins. Co., 178 M 81, 582 P2d 1203, 35 St. Rep. 1126 (1978).

Lump-Sum Advance — Lump-Sum Settlement Distinguished: The Workers' Compensation Division (now State Fund) did not abuse its discretion in ordering a "lump-sum advance" as distinguished from a "lump-sum settlement", since the advance was not a calculation of the present worth of the deferred payments (decided prior to the 1985 amendment). This section is not applicable to the "lump-sum advance". Brurud v. Judge Moving & Storage, Inc., 172 M 249, 563 P2d 558 (1977).

Discretion of Division (Now State Fund): Discretion of Division (now State Fund) will not be disturbed in denying lump-sum settlement unless claimant shows good cause and substantial evidence does not support Division (now State Fund). McAlear v. McKee, 171 M 462, 558 P2d 1134 (1976); Skrukrud v. Gallatin Laundry Co., Inc. & Employees Commercial Union Ins. Co., 171 M 217, 557 P2d 278, 33 St. Rep. 1191 (1976).

Lump-Sum Settlement as Exception to General Rule: It was the intent of the Legislature that periodic payments should be the rule, and lump-sum settlements the exception. Kuehn v. Nat'l Farmers Union Property & Cas. Co., 164 M 303, 521 P2d 921 (1974); Kent v. Sievert, 158 M 79, 489 P2d 104 (1971); Laukaitis v. Sisters of Charity of Leavenworth, 135 M 469, 342 P2d 752 (1959); Moffett v. Indus. Accident Bd., 130 M 303, 301 P2d 340 (1956); Williams v. Indus. Accident Bd., 109 M 235, 97 P2d 1115 (1939); Davis v. Indus. Accident Bd., 92 M 503, 15 P2d 919 (1932).

Necessity for Lump-Sum Payment — Serious Debt Problem (Pre-1985 Amendment Cases):

It was proper to grant a lump-sum payment to a claimant who had past due indebtedness on installment payments on his home and pickup truck and miscellaneous bills, including attorney fees, and also where it could reasonably be inferred that if he were aided in becoming current on his various debts his prospects of sustaining himself on his workmen's compensation (now workers' compensation) and social security benefits would be improved. Kuehn v. Nat'l Farmers Union Property & Cas. Co., 164 M 303, 521 P2d 921 (1974).

It was correct to deny a lump-sum payment of an open-end award where claimant established no pressing need or outstanding debt, except for legal fees incurred by pursuing a petition for lump-sum settlement, and the only anticipated use of a lump sum was to put it "on interest". Kent v. Sievert, 158 M 79, 489 P2d 104 (1971).

Where a compensation claimant made no request to the Industrial Accident Board (now State Fund) for a lump-sum settlement, and no evidence appeared in the record on appeal on the question of the necessity or advisability of such a settlement, the trial court properly declined to pass upon the question, and the Supreme Court on appeal to it will do likewise. O'Neil v. Indus. Accident Bd., 107 M 176, 81 P2d 688 (1938).

Burden of Proof on Claimant: Claimant bears the burden of justifying departure from periodic compensation payments, and any plan presented for betterment and rehabilitation should demonstrate some reasonable basis for successful fulfillment. Legowik v. Montgomery Ward, 157 M 436, 486 P2d 867 (1971); Malmedal v. Indus. Accident Bd., 135 M 554, 342 P2d 745 (1959).

Lump-Sum Award — Total Disability Rating: Where the evidence before the District Court was ample to sustain that court's judgment that the claimant should be awarded total disability rating and that a lump-sum award and payment be made to him, such judgment will be affirmed. Kustudia v. Indus. Accident Bd., 127 M 115, 258 P2d 965 (1953).

Compromise of Claim — Dispute Essential: Requirement of this section that compromise and settlement of a compensation claim be approved by the board does not apply where no claim of the worker had been definitely established. There was no compromise between claimant and employer, but a receipt in full settlement of claimant's demand after he had fully recovered and returned to work had been executed by him. The board approved the transaction and declared that claimant was entitled to what he had received and receipted for. Shugg v. Anaconda Copper Min. Co., 100 M 159, 46 P2d 435 (1935).

Amount of Lump-Sum Settlement — How Determined: In determining the amount of a lump-sum settlement under this section, the Industrial Accident Board (now State Fund) must ascertain the present worth of the claimant's right to compensation, taking into consideration his expectancy of life, and in case of a widow the added contingency of remarriage, the happening of either contingency destroying the right to continued periodical payments, and therefore the right of converting them into a lump sum. Cogdill v. Aetna Life Ins. Co., 90 M 244, 2 P2d 292 (1931).

Law Review Articles

1987 Changes to Lump Sum Payment Provisions in the Montana Workers' Compensation Act, Smith, 50 Mont. L. Rev. 119 (1989).

Checklist for Drafting a Petition for Lump-Sum Conversion of Permanent Partial Workers' Compensation Benefits, Thompson, 47 Mont. L. Rev. 177 (1986).

39-71-742. Who may receive payment.

Compiler's Comments

2007 Amendment: Chapter 12 inserted (2) requiring that a payment due to a highway patrol member be made to the department of justice to offset the salary benefit until the member is no longer able to receive the salary benefit; and made minor changes in style. Amendment effective March 16, 2007.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Case Notes

Workers' Compensation Benefits as Marital Assets — Error to Preclude as Matter of Law: The District Court found as a matter of law that workers' compensation benefits of the husband were not marital assets. The Supreme Court vacated the judgment, ordering an evidentiary hearing because it was unable to make an informed opinion from the record. At the hearing, findings should address the terms and purpose of the workers' compensation award. Blankenship v. Blankenship, 210 M 31, 682 P2d 1354, 41 St. Rep. 901 (1984).

Conversion of Benefits by Widow: The Industrial Accident Board (now State Fund) was in error in allowing a conversion of biweekly compensation benefits to a widow who had remarried and who had two minor children who continued to be beneficiaries. Under such circumstances, the only person authorized to sign an application for a lump-sum payment would be a duly appointed guardian of the minors. Davis v. Indus. Accident Bd., 92 M 503, 15 P2d 919 (1932).

39-71-743. Assignment or attachment of payments.

Compiler's Comments

2017 Amendment: Chapter 433 in (3) in second sentence substituted "39-71-704(11)" for "39-71-704(10)". Amendment effective July 1, 2017.

2009 Amendment: Chapter 112 in (3) in second sentence substituted "39-71-704(10)" for "39-71-704(8)"; and made minor changes in style. Amendment effective July 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2007 Amendments — Composite Section: Chapter 12 inserted (1)(d) providing that payments under 39-71-742 may be assignable, subject to attachment or garnishment, or held liable for debts; and made minor changes in style. Amendment effective March 16, 2007.

Chapter 330 in (3) in second sentence in exception clause substituted "39-71-704(8)" for "39-71-704(7)". Amendment effective July 1, 2007.

2005 Amendments — Composite Section: Chapter 31 inserted (1)(d) concerning benefits to pay restitution; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 103 in (2)(b) substituted "necessary to pay current child support and" for "approved for payment on the basis of". Amendment effective July 1, 2005.

Chapter 416 in (1)(c) at end substituted "this chapter" for "chapter 71 or 72 of this title"; and in (3) after "Workers' Compensation Act" deleted "or Occupational Disease Act of Montana". Amendment effective July 1, 2005.

Effective Date — Applicability: Section 2, Ch. 31, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to benefits paid on or after July 1, 2005."

Section 13, Ch. 103, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005."

Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

1995 Amendments: Chapter 424 inserted (1)(c) concerning medical benefits; and made minor changes in style. Amendment effective April 13, 1995.

Chapter 546 in (2)(a) substituted "department of public health and human services" for "department of social and rehabilitation services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 628 at beginning of second sentence of (3) inserted exception clause; and made minor changes in style. Amendment effective July 1, 1993.

Severability: Section 16, Ch. 628, L. 1993, was a severability clause.

1989 Amendment: In (2)(a), after "promulgated", substituted reference to Department of Social and Rehabilitation Services for "in supreme court Order No. 86-223, dated January 13, 1987". Amendment effective July 1, 1989.

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

1987 Amendment: Inserted (1)(b) allowing assignment, attachment, and garnishment of payments to pay child support; inserted (2) stating amounts that may be diverted to pay child support; and made minor changes in phraseology.

1983 Amendment: At end of (1), inserted exception clause; and inserted (2) requiring insurer to pay compensable claim.

Administrative Rules

ARM 24.29.2851 Limitation on expenditures for medical benefits payable by UEF — applicability.

ARM 24.29.2853 Rights of third-party providers after UEF reaches $100,000 medical benefit expenditure limitation — applicability.

ARM 24.29.2855 Rights of third-party providers upon UEF's proportionate reduction in benefit payments — applicability.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Attorney Fee Lien Applicable to Medical Benefits Received in Workers' Compensation Settlement: Lockhart moved for an order directing the insurer to pay attorney fees out of the medical benefits owing to Lockhart under his successful workers' compensation claim. The Workers' Compensation Court denied the attorney fees on grounds that medical benefits are not benefits, but rather an imposition of liability imposed on the insurer, and that because an award of medical benefits does not entitle a claimant to receipt of money, there is no property against which an attorney fee lien can attach. The court held that when a claim has been denied and later found compensable by the court without a separate award of attorney fees, a contingent attorney fee may be computed based on medical benefits, but the amount may not be deducted from the compensation payable to the medical providers. The Supreme Court disagreed. Medical benefits are not the property of the medical providers simply because the medical providers are the actual recipients of the money, nor are medical benefits simply an obligation of the insurer. Instead, medical benefits are the property of the individual claimant, and, as such, the claimant should be allowed to pay attorney fees out of medical benefits. In the context of workers' compensation cases, attorney fee liens attach as a matter of law to all compensation, including medical benefits, upon the filing of an attorney retainer agreement with the Department of Labor and Industry. To require a claimant to pay a disproportionate amount of attorney fees from the claimant's personal resources would be unfair and contrary to the fundamental purpose of workers' compensation laws. Lockhart v. N.H. Ins. Co., 1999 MT 205, 295 M 467, 984 P2d 744, 56 St. Rep. 800 (1999), following Carlson v. Cain, 216 M 129, 700 P2d 607, 42 St. Rep. 695 (1985), and followed in Dildine v. Liberty NW. Ins. Corp., 2009 MT 87, 350 M 1, 204 P3d 729 (2009).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Disability Benefits Properly Included in Marital Estate: Disability benefits, including workers' compensation permanent total disability payments, may be properly included in the marital estate because they clearly come within the definition in 40-4-202 of property "however and whenever acquired". The provisions of this section that prohibit attachment or assignment of workers' compensation benefit payments do not bar classification of workers' compensation awards as marital property. In re Marriage of Schmitz, 255 M 159, 841 P2d 496, 49 St. Rep. 919 (1992).

Workers' Compensation — No Bankruptcy Exemption: Workers' compensation benefits are not exempt from federal bankruptcy. 42 St. Rep. 2043 (U.S. Bankruptcy Court for the District of Montana; order of Dec. 26, 1985).

Workers' Compensation Benefits as Marital Assets — Error to Preclude as Matter of Law: The District Court found as a matter of law that workers' compensation benefits of the husband were not marital assets. The Supreme Court vacated the judgment, ordering an evidentiary hearing because it was unable to make an informed opinion from the record. At the hearing, findings should address the terms and purpose of the workers' compensation award. Blankenship v. Blankenship, 210 M 31, 682 P2d 1354, 41 St. Rep. 901 (1984).

Exemption Absolute: Harry received $7,000 from the state Workers' Compensation Division (now State Fund) on June 10, 1980. The money was deposited in a bank and up until the date of this decision had never been commingled with any other funds. On November 5, 1981, Harry was charged with deliberate homicide. Counsel was appointed by the court in the homicide case with the proviso that he utilize the $7,000 to reimburse Glacier County for the cost of his defense. Harry objected to that proviso and appealed the order. The Supreme Court concluded that the exemption provided by 39-71-743 is absolute. State ex rel. Harry v. District Court, 192 M 332, 628 P2d 657, 38 St. Rep. 818 (1981).

39-71-744. Benefits not due while claimant is incarcerated — exceptions.

Compiler's Comments

1995 Amendments: Chapter 243 in (1), in first sentence after "incarcerated", inserted "for a period exceeding 30 days", after "institution" substituted "or jail" for "such as the Montana state prison or the Montana women's correctional center", and at end inserted "or a misdemeanor"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 308 at end of (2) substituted "39-71-118(1)(e)" for "39-71-118(1)(f)". Amendment effective July 1, 1995.

Chapter 546 in (1) substituted "Montana women's correctional system" for "Montana women's correctional center". Amendment effective July 1, 1995.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 457 at beginning of first sentence of (1) inserted exception clause and near middle, after "incarcerated", inserted "in a correctional institution, such as the Montana state prison or the Montana women's correctional center"; inserted (2) extending benefits to certain inmates employed while participating in prerelease center or diversionary programs; and made minor changes in style.

Code Commissioner Change: In (1) the Code Commissioner deleted a reference to the Swan River Forest Camp because Ch. 579, L. 1993, deleted the Swan River Forest Camp as a separate institution. Authority for the change is found in sec. 84, Ch. 10, L. 1993.

Case Notes

Ineligibility to Receive Workers' Compensation Benefits Due to Incarceration — Denial of Benefits Upheld: The plaintiffs filed suit against the State Fund alleging that it had wrongfully denied them partial disability benefits due to their incarceration. The State Fund argued that 39-71-744 of the Workers' Compensation Act expressly provides that a claimant is not entitled to benefits during a period of incarceration exceeding 30 days and that the time limits for receiving benefits are not extended due to a claimant's incarceration. The Workers' Compensation Court upheld the denial of benefits under 39-71-744. On appeal, the Supreme Court agreed that the denial of the benefits achieved the stated purpose of the Act to replace wages that a claimant could have earned but for the injury. In the case of incarceration, the claimant has been removed from the workforce by committing a crime. Goble v. Mont. St. Fund, 2014 MT 99, 374 Mont. 453, 325 P.3d 1211.

Statute Denying Benefits Due to Incarceration — Constitutional — No Violation of Due Process: The plaintiffs filed suit against the State Fund for wrongfully denying them partial disability benefits due to their incarceration. They alleged that 39-71-744 of the Workers' Compensation Act violated their substantive and procedural due process rights. The Workers' Compensation Court rejected their substantive due process argument, concluding that 39-71-744 effectuates the fundamental compromise embodied in the Act that is rationally related to a legitimate governmental interest. The Workers' Compensation Court also rejected the procedural due process claims regarding an alleged lack of notice prior to the forfeiture of benefits. On appeal, the Supreme Court agreed that the plaintiffs' argument failed because there was no risk of an erroneous deprivation of rights. Goble v. Mont. St. Fund, 2014 MT 99, 374 Mont. 453, 325 P.3d 1211.

Statute Denying Benefits Due to Incarceration — Constitutional — No Violation of Equal Protection: The plaintiffs filed suit against the State Fund for wrongfully denying them partial disability benefits due to their incarceration. They alleged that 39-71-744 of the Workers' Compensation Act violated their right to equal protection. The Workers' Compensation Court rejected their claim that the statute allowing the denial of benefits during incarceration violated their rights to equal protection because no similarly situated class existed. On appeal, the Supreme Court disagreed and concluded there was a similarly situated class. However, in applying the rational basis test, the Supreme Court concluded that allowing incarcerated claimants to collect benefits during their incarceration would undercut a principal objective of the Act. Therefore, because the statute rationally advances the governmental interests of the Act, it is constitutional. Goble v. Mont. St. Fund, 2014 MT 99, 374 Mont. 453, 325 P.3d 1211.

39-71-745. Calculation of volunteer firefighter benefits and premiums — definitions.

Compiler's Comments

Effective Date: Section 8, Ch. 412, L. 2013, provided: "[This act] is effective July 1, 2013."

Part 9

Subsequent Injury Received by Vocationally Handicapped

39-71-901. Definitions.

Compiler's Comments

2003 Amendment: Chapter 193 in definition of person with a disability near middle after "if the" substituted "person" for "employee". Amendment effective July 1, 2003.

Severability: Section 13, Ch. 193, L. 2003, was a severability clause.

Saving Clause: Section 14, Ch. 193, L. 2003, was a saving clause.

1999 Amendment: Chapter 389 in definition of fund inserted "in the proprietary fund category". Amendment effective July 1, 1999.

1997 Amendment: Chapter 472 in definition of certificate substituted "a person with a disability" for "vocationally handicapped"; substituted person with a disability for vocationally handicapped as defined term; and made minor changes in style.

1989 Amendment: In definition of certificate changed "division of workers' compensation" to "department". Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

39-71-903. Procedure.

Compiler's Comments

1997 Amendments: Chapter 284 after "receives" substituted "an injury, as defined in 39-71-119" for "a personal injury"; after "procedure" deleted "and practice"; and made minor changes in style. Amendment effective January 1, 1998.

Chapter 472 near beginning substituted "person with a disability" for "vocationally handicapped person"; and made minor changes in style.

Transfer and Credit of Excess Subsequent Injury Funds: Section 6, Ch. 284, L. 1997, provided: "On or before September 1, 1997, the department of labor and industry shall transfer $3.5 million of the funds retained in the fund to the fund in 39-71-201 and credit the amount to offset the insurer's assessment for the administration fund as follows:

(1) plan No. 1, $490,000;
(2) plan No. 2, $612,500; and
(3) plan No. 3, $2,397,500."

39-71-904. Rules for certification.

Compiler's Comments

1997 Amendment: Chapter 472 substituted "persons with disabilities" for "vocationally handicapped persons".

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Section 64, Ch. 613, L. 1989, provided that in this section the Code Commissioner is directed to change the term "administrator" or "his" to "department", meaning the Department of Labor and Industry.

39-71-905. Certification as person with disability — eligibility for benefits under fund.

Compiler's Comments

2009 Amendment: Chapter 112 in (1) in third sentence after "certification" deleted "before employment or within 60 days after the person becomes employed or reemployed and" and in fourth sentence after "effective" substituted "retroactively to the date the department received the application" for "on the date of employment or reemployment. Certification is effective on the date the application is approved for a person who applies for certification more than 60 days after employment or reemployment, but before an injury occurs". Amendment effective July 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2005 Amendment: Chapter 257 inserted (2) providing that a claim is eligible for benefits if subsection (1) is complied with and a subsequent claim has been accepted by the insurer; and made minor changes in style. Amendment effective April 15, 2005.

Retroactive Applicability: Section 4, Ch. 257, L. 2005, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to workers' compensation claims filed on or after July 1, 2004."

1999 Amendment: Chapter 377 deleted former last sentence that read: "Failure to apply before employment or within 60 days after employment or reemployment precludes the employer from the protection and benefits of this part" and inserted last sentence authorizing certification of disability on date application approved if application made more than 60 days after employment or reemployment; and made minor changes in style. Amendment effective July 1, 1999.

Severability: Section 24, Ch. 377, L. 1999, was a severability clause.

1997 Amendment: Chapter 472 in first sentence substituted "a person with a disability" for "vocationally handicapped"; in second sentence, before "certification", deleted "vocationally handicapped"; and made minor changes in style.

1991 Amendment: Substituted last three sentences requiring application for certification before employment or within 60 days after becoming employed or reemployed and before an injury occurs, stating that the certification is effective on the date of employment or reemployment, and providing that failure to apply in time precludes the employer from the protection and benefits of this part for "An employee who is requesting reemployment may be certified as vocationally handicapped. An employee who is not employed at the time of application for certification must be certified as vocationally handicapped before entering new employment in order for the new employer to receive the benefits of this part." Amendment effective July 1, 1991.

Applicability: Section 15, Ch. 558, L. 1991, provided: "[This act] applies to injuries that occur on or after [the effective date of this act]." Effective July 1, 1991.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1987 Amendment: In first sentence substituted "shall apply" for "may apply".

39-71-907. Certified person with a disability to be compensated for injury as provided by chapter — insurer liability for compensation limited.

Compiler's Comments

2007 Amendment: Chapter 48 inserted (2) limiting fund reimbursement liability to the amount in the fund at the time the reimbursement request is received and the amount collectible in the next assessment period; and made minor changes in style. Amendment effective July 1, 2007.

1999 Amendment: Chapter 389 deleted former (2) that read: "(2) The amounts necessary for the payment of benefits from this fund are statutorily appropriated, as provided in 17-7-502, from this fund"; and made minor changes in style. Amendment effective July 1, 1999.

1997 Amendments: Chapter 284 in first sentence in (1), after "who", substituted "receives an injury, as defined in 39-71-119, that results in death" for "receives a personal injury arising out of and in the course of employment and resulting in death"; and made minor changes in style. Amendment effective January 1, 1998.

Chapter 472 in (1), near beginning, substituted "having a physical or mental disability that constitutes or results in a substantial impediment to employment" for "vocationally handicapped"; and made minor changes in style.

Transfer and Credit of Excess Subsequent Injury Funds: Section 6, Ch. 284, L. 1997, provided: "On or before September 1, 1997, the department of labor and industry shall transfer $3.5 million of the funds retained in the fund to the fund in 39-71-201 and credit the amount to offset the insurer's assessment for the administration fund as follows:

(1) plan No. 1, $490,000;
(2) plan No. 2, $612,500; and
(3) plan No. 3, $2,397,500."

1993 Amendment: Chapter 555 inserted (2) statutorily appropriating amounts necessary to pay benefits; and made minor changes in style. Amendment effective July 1, 1993.

1987 Amendment: Substituted second sentence concerning limit of 104 weeks of medical and burial benefits for former sentence that read: "The liability of the employer for payment of compensation, for furnished medical care, and burial as provided in this chapter is limited to those benefits occurring during the period of 104 weeks after the date of injury"; and inserted third sentence concerning limit of 104 weeks of benefits.

39-71-908. Notification of fund of its potential liability under part — review by fund.

Compiler's Comments

1989 Amendment: In two places substituted "insurer" for "employer, carrier, or the industrial insurance fund"; and made minor change in phraseology. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

39-71-909. Effect of fund's failure to give notification of its intent to dispute liability — subsequent notification by fund authorized.

Compiler's Comments

1987 Amendment: Throughout section changed "carrier" and "employer, carrier, or industrial insurance fund" to "insurer"; and at end of first sentence substituted "in excess of the insurer's liability" for "that pertain to the period beyond 104 weeks after the date of the injury".

39-71-911. Obligation to make payments on behalf of fund not independent liability.

Compiler's Comments

2003 Amendment: Chapter 193 at beginning inserted exception clause. Amendment effective July 1, 2003.

Severability: Section 13, Ch. 193, L. 2003, was a severability clause.

Saving Clause: Section 14, Ch. 193, L. 2003, was a saving clause.

1989 Amendment: In two places changed "employer, carrier, or industrial insurance fund" to "insurer". Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

39-71-915. Assessment of insurer — employers — definition — collection.

Compiler's Comments

2015 Amendment: Chapter 123 in (2) in second sentence substituted "from April 1 of the previous year through March 31 of the current year paid by the fund plus" for "paid by the fund in the preceding fiscal year and". Amendment effective July 1, 2015.

2009 Amendment: Chapter 112 in (10) substituted "$1 million" for "$500,000". Amendment effective July 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2007 Amendment: Chapter 48 in (10) near beginning after "less than" substituted "$500,000" for "$200,000". Amendment effective July 1, 2007.

2005 Amendments — Composite Section: Chapter 69 in (2) in second sentence near beginning after "amount" substituted "paid by" for "of paid losses reimbursed from", after "preceding" substituted "fiscal" for "calendar", near end after "other" inserted "realized", and at end inserted "that is deposited in the fund"; and inserted (10) allowing the department to defer a total assessment of less than $200,000 in a year and add that amount to the assessment amount for the subsequent year. Amendment effective March 24, 2005.

Chapter 416 in (1) in introductory clause near middle after "covered by the" deleted "Montana" and after "Workers' Compensation Act" deleted "and the Occupational Disease Act of Montana". Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

2003 Amendment: Chapter 193 near beginning of (3) substituted "May 31" for "April 30". Amendment effective July 1, 2003.

Severability: Section 13, Ch. 193, L. 2003, was a severability clause.

Saving Clause: Section 14, Ch. 193, L. 2003, was a saving clause.

2001 Amendment: Chapter 214 in (1) after "Compensation Act" inserted "and the Occupational Disease Act of Montana"; in (2) in first sentence after "each" inserted "employer insured by a", after "insurer" inserted "plan No. 3, the state fund, with respect to claims arising before July 1, 1990", and before "plan No. 3" inserted "each employer insured by" and in third sentence after "plan No. 2" substituted "employers" for "insurers", after "state fund" inserted "and plan No. 3 employers", and before "paid losses" inserted "a proportionate share of"; in (3) at beginning of first and third sentences substituted "April 30" for "March 31", in first sentence after "assessed" deleted "against the employer, plan No. 2 insurer, or the state fund" and after "for" substituted "the ensuing fiscal year" for "that calendar year", and inserted second sentence requiring amount assessed against state fund to separately identify amount attributed to certain claims arising before and after July 1, 1990; substituted language in (5) and (6) relating to assessments attributable to claims arising before and after July 1, 1990, for former (5) and (6) that read: "(5) The portion of the plan No. 2 assessment subject to premium surcharge for an individual plan No. 2 insured employer is a proportionate amount of total plan No. 2 paid losses during the preceding calendar year that is equal to the percentage that the total paid losses of the individual plan No. 2 insured employer bore to the total paid losses of all plan No. 2 insurers during the preceding calendar year.

(6) The portion of the state fund assessment subject to premium surcharge for a state fund insured employer is a proportionate amount of total state fund paid losses during the preceding calendar year that is equal to the percentage that the total paid losses of the individual state fund insured employer bore to the total paid losses of state fund insured employers during the preceding calendar year"; deleted former (7) that read: "(7) Payment of assessments due must be made to the department semiannually on June 30 and December 31 of the year following the calendar year on which the assessment is based"; throughout (7) inserted reference to assessment premium surcharge and inserted last sentence requiring partial amount of total premium and assessment premium surcharge received to be applied first to assessment premium surcharge with remainder to premium due; inserted (8)(b) through (8)(e) regarding timing of assessment payment by plan No. 1 employer, plan No. 2 insurer, and plan No. 3, the state fund, and authorizing administrative fine plus interest on delinquent amount; inserted (9) regarding yearly comparison of assessment collected and use of undercollected or overcollected amount for following year's premium surcharge assessment; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 25, Ch. 214, L. 2001, was a severability clause.

Effective Date — Retroactive Applicability: Section 26, Ch. 214, L. 2001, provided: "(1) [This act] is effective July 1, 2001.

(2) [Sections 5(7)(c) and (8) and 13(3)][39-71-201(7)(c) and (8) and 39-71-915(3)] apply retroactively, within the meaning of 1-2-109, to assessments and assessment premium surcharges calculated by the department of labor and industry before March 30, 2001."

1999 Amendment: Chapter 377 in (2) in two places substituted reference to plan No. 2 insurer for reference to plan No. 2 insured employer; in (3) in first sentence after "employer" inserted "plan No. 2 insurer" and in second sentence after "plan No. 2 insurers" inserted "and plan No. 3" and at end substituted "after July 1 in that year" for "after January 1 in that calendar year"; inserted (6) establishing calculation method for portion of state fund assessment subject to premium surcharge for state fund insured employer; in (8) in first sentence after "insurance" inserted "and plan No. 3, the state fund" and at end substituted "shall collect from its policyholders the assessment in subsection (2)" for "may collect from each of its policyholders an amount equal to the insured employer's fund assessment through a surcharge based on premium" and near end of third sentence substituted "workers' compensation subsequent injury fund surcharge" for "workers' compensation policyholder surcharge"; and made minor changes in style. Amendment effective July 1, 2000.

Severability: Section 24, Ch. 377, L. 1999, was a severability clause.

Transfer and Credit of Excess Subsequent Injury Funds: Section 6, Ch. 284, L. 1997, provided: "On or before September 1, 1997, the department of labor and industry shall transfer $3.5 million of the funds retained in the fund to the fund in 39-71-201 and credit the amount to offset the insurer's assessment for the administration fund as follows:

(1) plan No. 1, $490,000;
(2) plan No. 2, $612,500; and
(3) plan No. 3, $2,397,500."

Effective Date: Section 9(1), Ch. 284, L. 1997, provided that this section is effective January 1, 1998.

Administrative Rules

Title 24, chapter 29, subchapter 9, ARM Workers' compensation administrative assessment.

39-71-916. Reimbursement of subsequent injury fund — effect on claims experience rating.

Compiler's Comments

Effective Date: Section 10, Ch. 48, L. 2007, provided that this section is effective July 1, 2007.

39-71-920. Concurrence of fund in settlements.

Compiler's Comments

Severability: Section 13, Ch. 193, L. 2003, was a severability clause.

Saving Clause: Section 14, Ch. 193, L. 2003, was a saving clause.

Effective Date: Section 15, Ch. 193, L. 2003, provided that this section is effective July 1, 2003.

Part 10

Stay-at-Work/Return-to-Work Assistance

Part Administrative Rules

Title 24, chapter 29, subchapter 17, ARM Rehabilitation.

Title 24, chapter 29, subchapter 18, ARM Stay at work/return to work.

Part Case Notes

DECISIONS UNDER CURRENT LAW

Appeal Process Related to Denial of Department Services Not Applicable to Denial of Funds From IAR Account: An injured worker who was denied funds from the industrial accident rehabilitation (IAR) account did not have adequate remedy at law and was entitled to a writ of mandate requiring payment of funds from the account. The appeal process provided for in 53-7-106 pertains only to relief for a party actually applying for services that are provided by the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) and does not apply to a party who was improperly denied payment of funds from the IAR account. (See 1997 amendment.) State ex rel. Cobbs v. Dept. of Social and Rehabilitation Services, 274 M 157, 906 P2d 204, 52 St. Rep. 1166 (1995).

Jurisdiction Declined — Review of Final Division Order Barred by Collateral Estoppel: The Workers' Compensation Court dismissed Martelli's petition for total disability benefits after Martelli failed to appeal the Employment Relations Division's final order within 10 working days of mailing. Because the interplay between the issue before the court and the issue previously litigated before the Division would have required relitigation of the issue of Martelli's disability that was decided by the Division, rehearing of the issue by the court was barred by collateral estoppel and jurisdiction by the court was properly declined. Martelli v. Anaconda-Deer Lodge County, 258 M 166, 852 P2d 579, 50 St. Rep. 479 (1993).

Statutory Procedures Not Followed — Total Rehabilitation Benefits Payable During Review Period: A claimant who met the definition of a disabled worker under this part prior to 1987 amendment was entitled to total rehabilitation benefits from the date of remand, which was held to constitute the date notice was given to the Department by the insurer that a rehabilitation provider had been designated. Under the language of former 39-71-1023 (repealed, 1987), an insurer was required to pay total rehabilitation benefits to a worker during the review by the rehabilitation panel and the Department. Failure of the Department to conduct a hearing or issue an order of determination based on the rehabilitation panel report constituted reversible error. Higginbotham v. Stoltze-Connor Lumber Co., 248 M 161, 810 P2d 295, 48 St. Rep. 372 (1991).

Concurrent Payment of Disability and Rehabilitation Benefits Allowed: Plaintiff injured his back during the scope and course of his employment. Defendant accepted liability and began paying total disability benefits. Plaintiff entered a rehabilitation program, for which he began receiving rehabilitation benefits under Title 39, ch. 71, part 10. During his training, defendant wrote plaintiff that since his condition had stabilized, his benefits would be reduced to permanent partial benefits based on his impairment rate. Plaintiff appealed to the Workers' Compensation

Court, which ruled claimant was entitled to receive benefits based on his impairment rating while concurrently receiving permanent total disability benefits during his retraining. On appeal, the Supreme Court held that the term "classes" of disability referred to in 39-71-737 refers to all of the various benefits provided by the Workers' Compensation Act that are not otherwise specifically excepted. The rehabilitation benefits are distinguishable from all other benefits pursuant to 39-71-1003 (now repealed). The court held that the concurrent payment of two classes of benefits provided under Title 39, ch. 71, part 7, is prohibited (but see 1985 amendment notes under 39-71-737) and that the benefits provided by part 10 are not affected. Plaintiff was entitled to total disability benefits and rehabilitation benefits during his rehabilitation program. Rehabilitation benefits are totally separate from and not counted against benefits provided in Title 39, ch. 71, part 7. When plaintiff has completed his rehabilitation program, he will be entitled to his partial disability benefits. Grimshaw v. L. Peter Larson Co., 213 M 291, 691 P2d 805, 41 St. Rep. 2123 (1984).

DECISIONS UNDER FORMER LAW

Claimant Not Required to Be Totally Permanently Disabled or Without Job Prospects to Receive Benefits: State Fund contended that the claimant was not entitled to receive benefits during vocational rehabilitation because she was not totally permanently disabled and she was not without job prospects. The Supreme Court held that the pertinent pre-1987 statutes did not require the claimant to be totally disabled or unable to obtain employment and that therefore she was entitled to receive benefits during vocational rehabilitation. Peile v. Dept. of Highways, 250 M 81, 817 P2d 1149, 48 St. Rep. 853 (1991), followed in Briceno v. Cereal Food Processors, Inc., 250 M 362, 820 P2d 1310, 48 St. Rep. 1031 (1991).

Permanent Total Disability — Nonmedical Components — Burden of Proof: Claimant injured her back in a fall from a ladder. The Workers' Compensation Court found that she had a 15% whole person impairment and that she was permanently totally disabled, until vocationally retrained, based on her medical condition and the presence of nonmedical elements of disability such as her lack of specialized training and limited work experience. The Supreme Court affirmed on the basis that there was substantial evidence to support the decision, particularly in light of the court's referral of the claimant for vocational rehabilitation. Once a claimant presents evidence showing there is no reasonable prospect of employment, the burden of proof shifts to the employer to show that suitable work is available. The employer failed to carry this burden when it did not introduce any evidence to establish that suitable work was available. Coles v. Seven Eleven Stores, 217 M 343, 704 P2d 1048, 42 St. Rep. 1238 (1985), followed in Madill v. St. Comp. Ins. Fund, 280 M 450, 930 P2d 665, 54 St. Rep. 4 (1997).

Employer's Waiver of Right to Contest Claimant's Actions to Start Occupational Retraining: Claimant requested occupational retraining from the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) at a time when he was not being paid workers' compensation benefits, since his claim for them had been denied. In connection with the Department's evaluation of claimant for retraining, it had him examined by Dr. Gilboy. The employer and claimant stipulated at trial before the Workers' Compensation Court that Dr. Gilboy's medical report could be considered on the nature and extent of claimant's disability claim. The employer claimed that the Supreme Court should nullify claimant's occupational training program because he should have started it with the Workers' Compensation Division (now State Fund) rather than with the Department. The Supreme Court first stated that it did not read 39-71-1001 (now repealed) in the same manner as did the employer and ruled that in any event the employer had waived its right to complain by agreeing to the use of the medical report obtained by claimant at the outset of his occupational training program. McCormack v. Sears, Roebuck & Co., 210 M 156, 682 P2d 1357, 41 St. Rep. 979 (1984).

39-71-1006. Rehabilitation benefits.

Compiler's Comments

2005 Amendment: Chapter 103 in (2) near middle of first sentence substituted "rehabilitation benefits" for "compensation benefits", at beginning of fifth sentence substituted "Rehabilitation benefits payable pursuant to a retraining rehabilitation plan" for "Benefits" and at end substituted "payable in a lump sum" for "subject to the lump-sum provisions of 39-71-741", and inserted sixth sentence concerning lump sum for job placement services. Amendment effective July 1, 2005.

Effective Date — Applicability: Section 13, Ch. 103, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005."

1997 Amendments: Chapter 122 in (1)(b), (1)(c), and (2), before references to worker, deleted "injured"; in (1)(c), in first sentence after "insurer", substituted "and a written copy of the plan is provided to the worker" for "is filed with the department" and substituted third sentence concerning costs of tuition, fees, books, and expenses for former sentence that read: "If the plan calls for the expenditure of funds under 39-71-1004, the department shall authorize the department of public health and human services to use the funds"; at beginning of (2) deleted "After filing the rehabilitation plan with the department"; inserted (3) concerning payments in addition to rehabilitation benefits; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 276 at beginning of (1) substituted "A worker is eligible" for "A disabled worker as defined in 39-71-1011 is eligible"; in (1)(a)(i) substituted "worker meets the definition of a disabled worker as provided in 39-71-1011" for "worker has an actual wage loss as a result of the injury"; inserted (1)(a)(ii) providing that a worker with a medically established impairment rating of 15% or greater and with no wage loss is eligible for rehabilitation benefits; in first sentence of (1)(b), before "reemployment", inserted "reasonable", inserted second sentence referring to a worker who, as a result of a 15% impairment rating and with rehabilitation, will have a reasonable increase in wage compared to the time of injury, and at beginning of third sentence inserted "If eligible because of a wage loss"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 9, Ch. 122, L. 1997, was a saving clause.

Preamble: The preamble attached to Ch. 276, L. 1997, provided: "WHEREAS, it is the intent of the state compensation insurance fund to assist all Montanans by reducing the unfunded liability of the old fund, terminating the old fund liability tax when the old fund is adequately funded, which is currently estimated to occur as early as June 30, 1999, providing for the payment of dividends to policyholders, and maintaining a viable state compensation insurance fund; and

WHEREAS, there was an unfunded liability of $355 million as of June 30, 1996, for claims for workers' compensation injuries occurring before July 1, 1990, in the old fund, which included $129 million in outstanding bond debt; and

WHEREAS, the old fund is funded with the old fund liability tax paid by employers, employees, and self-employed persons, generating as much as $50 million each year; and

WHEREAS, the surplus of $231 [sic] in the new fund as of June 30, 1996, allowed the Board of Directors of the State Fund to declare a dividend of up to $109 million to retire the outstanding bond debt in the old fund; and

WHEREAS, the unfunded liability in the old fund will be an estimated $200 million deficit by June 30, 1997, and the surplus or the excess of assets above the reserves that are set aside to meet the claim liability in the new fund will be an estimated $127 million by June 30, 1997; and

WHEREAS, current state law requires the State Fund to use dividends to be applied first to old fund outstanding liability rather than paying dividends directly to policyholders, the State Fund shall, no later than June 30, 1998, transfer $63.8 million to the old fund account to pay old fund claims to allow direct payment of dividends to policyholders; and

WHEREAS, the $20 million appropriation received by the State Fund from the general fund during the June 1989 Special Session partially addressed the unfunded liability issue existing at that time in the old fund and canceled a planned 22% rate increase; and

WHEREAS, the State Fund now agrees to repay the $20 million appropriation to the general fund by June 30, 1999, in lieu of transferring additional funds to the old fund account to provide the general fund with additional revenue and to remove any perception that the State Fund remains a burden on the general fund; and

WHEREAS, because decreases in premium rates totaled 35% in fiscal years 1996 and 1997 and legislative changes in benefit levels have resulted in the return of private carriers, the 15% limitation on administration expenses as a percent of the prior year's premium will significantly impact the State Fund's ability to provide service to policyholders and their injured workers; and

WHEREAS, the State Fund seeks to improve the level of services provided to customers without increasing existing State Fund staffing levels by working with private sector-licensed insurance producers; and

WHEREAS, in response to Haag v. Montana Schools Group Insurance Authority, 274 M 109, 906 P.2d 693 (1995), in which the Montana Supreme Court ruled that an insurer's failure to comply with the time limitations for accepting or denying a workers' compensation claim constituted acceptance of the claim, current law needs to be clarified to provide that the failure to comply with the time limitations does not constitute acceptance of the claim."

Severability: Section 32, Ch. 276, L. 1997, was a severability clause.

Effective Date — Applicability: Section 34(2), Ch. 276, L. 1997, provided: "[Sections 7, 12 through 14 [section 14 is 39-71-1006] and 29] are effective July 1, 1997, and apply to claims for injuries occurring on or after [the effective dates of sections 7, 12 through 14 and 29]."

1995 Amendments: Chapter 243 in (1) substituted "A disabled worker as defined in 39-71-1011" for "An injured worker"; substituted (1)(a) concerning actual wage loss as a result of injury for "the injury results in permanent partial disability or permanent total disability as defined in 39-71-116"; deleted former (1)(b) requiring physician to certify that worker is unable to work at job held at time of injury; at beginning of (1)(b) deleted "a rehabilitation plan completed by" and near end, after "reemployment", substituted "opportunity and will have a reasonable reduction in the worker's actual wage loss" for "and wage potential"; in (1)(c), after "plan", substituted "agreed upon" for "between" and inserted second full sentence requiring beginning and completion date; in (2), in first sentence, substituted "disabled" for "injured" and after "receive" substituted "biweekly compensation" for "rehabilitation", substituted third sentence requiring plan to be completed within 26 weeks for former third sentence that read: "Rehabilitation benefits must be paid during a reasonable period, not to exceed 10 weeks, while the worker is waiting to begin the agreed upon rehabilitation plan", in fourth sentence, after "paid", inserted "biweekly" and substituted "progressing in" for "completing", and inserted last sentence excepting benefits from lump-sum provision; deleted former (3) requiring job placement assistance and benefits to be paid during assistance and prohibiting crediting against maximum period of 104 weeks of rehabilitation benefits (see 1995 Session Law for text); deleted former (4) requiring evaluation of whether worker could return to job held at time of injury (see 1995 Session Law for text); in (3), after "temporary total", deleted "or biweekly permanent partial disability" and substituted "the benefits under subsection (2)" for "rehabilitation benefits"; in (4), after "continue to", deleted "work with and"; inserted (5) requiring eligibility by beginning the rehabilitation plan within 78 weeks of maximum healing; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (1)(c) substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 296 inserted (7) establishing a penalty for receipt of both wages and rehabilitation benefits; and made minor changes in style. Amendment effective July 1, 1993.

Severability: Section 15, Ch. 574, L. 1991, was a severability section.

Effective Date: Section 16, Ch. 574, L. 1991, provided that this section is effective July 1, 1991.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Denial of Rehabilitation Benefits Based on Social Security Entitlement — Violation of Equal Protection: The plaintiff, a 77-year-old workers' compensation claimant, was denied rehabilitation benefits in accordance with 39-71-710 based exclusively on his age-based eligibility to receive Social Security retirement benefits. The Workers' Compensation Court ruled in favor of the plaintiff. In affirming the lower court, the Supreme Court held that 39-71-710 violated the right to equal protection because the statute created two classes of similarly situated persons, distinguished only by age. The court further concluded that cost-containment of the workers' compensation system alone is not sufficient to justify disparate treatment between the classes and that the automatic denial of rehabilitation benefits to those eligible for Social Security benefits did not rationally relate to any legitimate governmental interest. Caldwell v. MACo Workers' Compensation Trust, 2011 MT 162, 361 Mont. 140, 256 P.3d 923 (distinguishing Satterlee v. Lumberman's Mut. Cas. Co., 2009 MT 368, 353 Mont. 265, 222 P.2d 566).

Rehabilitation Benefits Provided Under Workers' Compensation Act Inapplicable to Occupational Disease Act (Now Repealed and Merged With Workers' Compensation Act): Loss suffered from carpal tunnel syndrome and filed an occupational disease claim, which was paid by the insurer. Later, Loss sought total rehabilitation benefits pursuant to 39-71-2001 (renumbered 39-71-1006), which were denied by the insurer, and the denial was affirmed by the Workers' Compensation Court. The Supreme Court held that rehabilitation benefits payable under the Workers' Compensation Act pursuant to 39-71-2001 (renumbered 39-71-1006) are not available to a claimant proceeding under the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act). The Supreme Court noted in response to Loss's argument that 39-71-2001 (renumbered 39-71-1006) is a "stand alone" section that just happens to be codified in Title 39, ch. 71, but that applies with equal force to Title 39, ch. 72 (now repealed); that the Legislature had directed that 39-71-2001 (renumbered 39-71-1006) be codified as an integral part of Title 39, ch. 71; and that the provisions of Title 39, ch. 71, should apply to that section. The Supreme Court also distinguished Ingbretson v. La. Pac. Corp., 272 M 294, 900 P2d 912 (1995), by noting that 39-72-402 (now repealed), the section relied on by the Supreme Court in that case to apply Title 39, ch. 71, procedural sections to Title 39, ch. 72 (now repealed), stated that the "practice and procedure" of one act applied to the other. The Supreme Court concluded that a substantive section such as 39-71-2001 (renumbered 39-71-1006) dealing with benefits did not fall within the "practice and procedure" language of 39-72-402 (now repealed) to be applied to the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act). Loss v. Lumbermens Mut. Cas. Co., 282 M 80, 936 P2d 313, 54 St. Rep. 251 (1997).

Absence of Reasonableness of Rehabilitation Plan: Although this section encourages rehabilitation training for persons injured on the job, it does not obligate an insurer to pay for every rehabilitation plan that might be conceived by a qualified injured worker. The purpose of this section to return a worker to work as soon as possible after a work-related injury or disease would not be furthered when, as in this case, removal of the worker from the workplace for a 2-year "educational rehabilitation" involving getting a master's degree in counseling would not put the worker in a better position to obtain employment. The Supreme Court thus affirmed the Workers' Compensation Court's decision that the worker's proposed rehabilitation plan did not represent reasonable vocational goals and a reemployment and wage potential with rehabilitation as required under this section. Reeves v. Liberty Mut. Fire Ins. Co., 275 M 152, 911 P2d 839, 53 St. Rep. 88 (1996).

IAR Account Funds Not Limited to Department-Provided Services — Duty of Department to Disburse Funds: An injured worker settled a claim with the employer's insurer by agreeing to a rehabilitation plan that was approved by the Department of Labor and Industry and the Workers' Compensation Court. The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) refused to disburse the funds from the industrial accident rehabilitation (IAR) account based on its conclusion that the injured worker did not qualify for that Department's rehabilitation services. The worker applied for a writ of mandate, which was denied by the District Court. On appeal, the Supreme Court held that the Department has a clear legal duty to distribute funds from the IAR account when the Department of Labor and Industry authorizes the distribution and that the worker was entitled to a writ of mandate requiring payment from the IAR account. State ex rel. Cobbs v. Dept. of Social and Rehabilitation Services, 274 M 157, 906 P2d 204, 52 St. Rep. 1166 (1995).

39-71-1011. Definitions.

Compiler's Comments

2011 Amendment: Chapter 167 in lead-in substituted "part" for "chapter"; inserted definition of assistance fund; at end of definition of commission on rehabilitation counselor certification substituted "providers" for "practitioners"; inserted definition of insurer's stay-at-work/return-to-work assistance policy; inserted definition of stay-at-work/return-to-work assistance; and made minor changes in style. Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

2005 Amendment: Chapter 130 substituted commission on rehabilitation counselor certification for board of rehabilitation certification as defined term; and in definition of rehabilitation provider after "certified by the" substituted "commission on rehabilitation counselor certification" for "board for rehabilitation certification". Amendment effective October 1, 2005.

1997 Amendment: Chapter 122 in definition of rehabilitation benefits deleted "39-71-1003"; in definition of rehabilitation plan, before "individualized", inserted "written"; in definition of rehabilitation provider, at end, deleted "to the department or a department of public health and human services counselor when a worker has been certified by the department of public health and human services under 39-71-1003"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 9, Ch. 122, L. 1997, was a saving clause.

1995 Amendments: Chapter 243 in definition of disabled worker substituted "permanent impairment, established by objective medical findings" for "medically determined restriction" and at end inserted clause concerning a job with similar physical requirements and a wage loss; in definition of rehabilitation plan, at end, inserted clause concerning reduction in worker's wage loss; in definition of rehabilitation services substituted "implementation of a rehabilitation plan" for "delivery of goods and services"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in definition of rehabilitation provider, in two places, substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: Deleted former (3) that read: "(3) "I.W.R.P." means an individualized, written rehabilitation program prepared by the department of social and rehabilitation services"; in definition of rehabilitation benefits, before "39-71-1025", deleted "39-71-1023 through" and inserted reference to 39-71-2001 (renumbered 39-71-1006); inserted definition of rehabilitation plan; in definition of rehabilitation provider, near beginning after "rehabilitation counselor", deleted "other than the department of social and rehabilitation services" and inserted last phrase relating to a Department counselor when a worker has been certified by the Department; deleted (7) that read: "(7) (a) "Worker's job pool" means those jobs typically available for which a worker is qualified, consistent with the worker's age, education, vocational experience and aptitude and compatible with the worker's physical capacities and limitations as the result of the worker's injury. Lack of immediate job openings is not a factor to be considered.

(b) A worker's job pool may be either local or statewide, as follows:

(i) a local job pool is the job service office area that includes the worker's residence; and

(ii) the statewide job pool is the state of Montana"; and made minor changes in style. Amendment effective July 1, 1991.

Severability: Section 15, Ch. 574, L. 1991, was a severability section.

1989 Amendment: Chapter 333 in definition of worker's job pool, in (b)(i), substituted "a local job pool is the job service office area that includes the worker's residence" for former language that read: "a local job is one either in a central city that has within its economically integrated geographical area a population of less than 50,000 or in a city with a population of more than 50,000 as determined by the division" and in (b)(ii) substituted "the statewide job pool is the state of Montana" for "a statewide job is one anywhere in the state of Montana". Amendment effective July 1, 1989.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Administrative Rules

ARM 24.29.1705 Local job pool area definition.

Case Notes

Claimant's Lack of Knowledge of Disability — Time for Filing Claim to Run From Time of Knowledge of Disability: Tinker suffered a hip injury at work sometime in 2005, but the pain seemed to come and go, so Tinker reported the injury but continued to work. In 2007, the pain escalated to the point where Tinker had trouble getting in and out of a vehicle and performing his job. A visit to the doctor revealed a degenerative condition in the hip, and Tinker decided to file a workers' compensation claim. The State Fund denied the claim as untimely because it was not filed within 12 months of the injury as required by 39-71-601. Tinker contended that the claim should be compensable as an occupational disease or that the filing time should be waived. The Workers' Compensation Court concluded that the injury was not an occupational disease but held that Tinker lacked knowledge of the disability until he sought treatment in 2007, so Tinker's claim qualified for the waiver of the filing limitation and was thus compensable. The State Fund appealed, but the Supreme Court affirmed. The plain meaning of the Workers' Compensation Act clearly demonstrates that the term "disability" is tied to a wage loss or an impairment in the ability to earn wages through employment. Therefore, until a claimant knows that he or she is suffering some form of wage loss as a result of an injury, condition, or impairment, the claimant lacks knowledge of a disability. In this case, Tinker lacked knowledge of his disability until 2007 when he first sought medical treatment because his injury was preventing him from performing his job, so the Workers' Compensation Court did not err in waiving the filing requirement and compensating Tinker for the injury. Tinker v. Mont. St. Fund, 2009 MT 218, 351 M 305, 211 P3d 194 (2009).

39-71-1014. Rehabilitation services — required and provided by insurers.

Compiler's Comments

2005 Amendment: Chapter 130 in (2) at end after "certified by the" substituted "commission on rehabilitation counselor certification" for "board of rehabilitation certification". Amendment effective October 1, 2005.

1997 Amendment: Chapter 122 in (1)(a), at end, deleted "and notifying the department"; deleted former (1)(b) that read: "(b) the department by requiring the insurer to designate a rehabilitation provider"; deleted (2)(b) and (2)(c) that read: "(b) by a vocational rehabilitation counselor employed by the department of public health and human services; or

(c) by both"; deleted (3) that read: "(3) A disabled worker served by the department of public health and human services may receive only those vocational rehabilitation services as provided in Title 53, chapter 7, parts 1 and 2"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 9, Ch. 122, L. 1997, was a saving clause.

1995 Amendment: Chapter 546 in (2)(b) and (3) substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Administrative Rules

ARM 24.29.1701 Rehabilitation provider designation.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Privately Developed Rehabilitation Plan Expenses Payable From IAR Account: The plain language of 39-71-1011 and this section establishes that an injured worker may receive vocational rehabilitation solely from a private provider, without using Department of Social and Rehabilitation Services' (now Department of Public Health and Human Services) counselors, and that the expenses are payable out of the industrial accident rehabilitation (IAR) account. State ex rel. Cobbs v. Dept. of Social and Rehabilitation Services, 274 M 157, 906 P2d 204, 52 St. Rep. 1166 (1995).

39-71-1025. Auxiliary benefits.

Compiler's Comments

2011 Amendment: Chapter 167 in (1) in lead-in after "$4,000" inserted "adjusted as provided in subsection (2)", inserted "specialized job modification", and at end substituted "for any of the following" for "to"; inserted (2) relating to adjustment of the separate benefit; and made minor changes in style. Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

1991 Amendment: In (3), after "rehabilitation", deleted "program pursuant to a final order of determination by" and inserted "plan that has been filed with"; inserted (4) relating to on-the-job training programs; deleted former (2) that read: "(2) reasonable participation with an employer in an on-the-job training program"; and made minor changes in style. Amendment effective July 1, 1991.

Severability: Section 15, Ch. 574, L. 1991, was a severability section.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Administrative Rules

ARM 24.29.1710 Auxiliary rehabilitation benefits.

39-71-1031. Exchange of information.

Compiler's Comments

2011 Amendment: Chapter 167 substituted "insurer, the" for "insurer's designated"; and made minor changes in style. Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

1997 Amendment: Chapter 122 at beginning, after "The" deleted "department of public health and human services, the"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 9, Ch. 122, L. 1997, was a saving clause.

1995 Amendment: Chapter 546 substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

39-71-1032. Termination of benefits for noncooperation with rehabilitation provider — appeal.

Compiler's Comments

1999 Amendment: Chapter 442 substituted (2) concerning dispute over termination of benefits for former text that read: "(2) The worker may contest the insurer's termination of benefits by filing a written exception to the department within 20 working days after the date of the 14-day notice. The worker or insurer may request a hearing before the department. The department shall hold a hearing within 30 days of receipt of the request. The department shall issue an order within 15 days of the hearing"; and deleted former (3) and (4) that read: "(3) If the worker prevails at a hearing before the department, it may award attorney fees and costs to the worker under 39-71-612.

(4) Within 30 days after the department mails its order to the party's last-known address, a party may appeal to the workers' compensation court." Amendment effective April 23, 1999.

Preamble: The preamble attached to Ch. 442, L. 1999, provided: "WHEREAS, Montana's current employment statutes constitute a complex and often confusing body of law requiring specialized skills and knowledge to interpret; and

WHEREAS, most employers in the private sector employ 10 or fewer employees and function without the assistance of personnel officers or in-house legal staff; and

WHEREAS, employment-related disputes are currently heard in many different forums, including the Board of Personnel Appeals for wage and hour issues, the Board of Labor Appeals (now the Unemployment Insurance Appeals Board) for unemployment insurance issues, the Workers' Compensation Court for workers' compensation issues, the Commission for Human Rights for discrimination issues, and District Courts for the resolution of wrongful discharge conflicts; and

WHEREAS, the 1997 Legislature enacted House Joint Resolution No. 10, which directed the Department of Labor and Industry to convene a group of interested parties to explore, investigate, and report to the 1999 Legislature optional approaches to an integrated dispute resolution process for employment-related issues; and

WHEREAS, members of the Legislature and interest groups, including employers and employees from the private and public sectors, formed the House Joint Resolution No. 10 work group, which convened in September 1997 to begin studying the issues related to the employment dispute resolution process; and

WHEREAS, after approximately 10 meetings during the 1997 interim, the work group issued its report in November 1998, recommending that legislation be prepared for consideration by the 1999 Legislature to revise the dispute resolution process for employment-related issues."

Severability: Section 28, Ch. 442, L. 1999, was a severability clause.

Retroactive Applicability: Section 31(1), Ch. 442, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to claims for injuries occurring before April 23, 1999, unless a party elects, after notification by the department of labor and industry, to remain in the contested case process.

1997 Amendment: Chapter 122 in (1), near middle before "notice", inserted "written" and after "department" deleted "on a form approved by the department"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 9, Ch. 122, L. 1997, was a saving clause.

1995 Amendment: Chapter 243 in (1), near end after "terminate any", deleted "rehabilitation", after "benefits" inserted "except medical benefits and the impairment award, that", and after "receiving" deleted "under this part"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 27, Ch. 243, L. 1995, was a severability clause.

1991 Amendment: In (1), near beginning after "rehabilitation provider", deleted "or the department of social and rehabilitation services" and deleted last sentence that read: "If the worker is receiving wage supplement benefits, those benefits must continue until the department's determination under subsection (3) is made"; in (2), in first sentence, substituted "20 working days" for "10 working days", in second sentence substituted "before the department" for "or may hold a hearing on its own motion", inserted next to last sentence requiring a hearing within 30 days of receipt of the request, and in last sentence reduced time for order to 15 days from 30 days; in (3) deleted former first sentence that read: "If no exceptions are timely filed or the department determines the worker unreasonably refused to cooperate, the insurer may terminate wage loss supplement benefits the worker is receiving until the worker cooperates with the rehabilitation provider"; and in (4) substituted "30 days" for "10 working days". Amendment effective July 1, 1991.

Severability: Section 15, Ch. 574, L. 1991, was a severability section.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

39-71-1036. Medical status form.

Compiler's Comments

Effective Date: Section 34, Ch. 167, L. 2011, provided: "[This act] is effective on passage and approval."

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

39-71-1041. Stay-at-work/return-to-work goals and options — notification by department — agreement between worker and insurer.

Compiler's Comments

Effective Date: Section 34, Ch. 167, L. 2011, provided: "[This act] is effective on passage and approval."

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

39-71-1042. Request for and delivery of stay-at-work/return-to-work assistance.

Compiler's Comments

Effective Date: Section 34, Ch. 167, L. 2011, provided: "[This act] is effective on passage and approval."

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

39-71-1043. Rehabilitation provider — evaluation.

Compiler's Comments

Effective Date: Section 34, Ch. 167, L. 2011, provided: "[This act] is effective on passage and approval."

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

39-71-1049. Stay-at-work/return-to-work assistance fund — purpose — payment process — rulemaking.

Compiler's Comments

Transition: Section 30(1), Ch. 167, L. 2011, provided: "The department of labor and industry shall transfer $100,000 from the administration fund provided for by 39-71-201 to the stay-at-work/return-to-work assistance fund established in [section 19] [39-71-1049] to provide the initial funding for the fund."

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Effective Date: Section 34, Ch. 167, L. 2011, provided: "[This act] is effective on passage and approval."

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

39-71-1050. Assessment for stay-at-work/return-to-work assistance fund — definition.

Compiler's Comments

2015 Amendment: Chapter 365 in (7)(b) substituted "assessment premium surcharge described in 50-71-128, then to the assessment premium surcharge in this section" for "assessment premium surcharge in this section". Amendment effective July 1, 2015.

Transition: Section 30(2), Ch. 167, L. 2011, provided: "Effective for policies written or renewed in state fiscal year 2012 only, the premium surcharge rate to be levied by insurers on workers' compensation insurance premiums pursuant to [section 20] [39-71-1050] is 0.00082."

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Effective Date: Section 34, Ch. 167, L. 2011, provided: "[This act] is effective on passage and approval."

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

39-71-1051. Rulemaking authority.

Compiler's Comments

Effective Date: Section 34, L. 167, L. 2011, provided: "[This act] is effective on passage and approval."

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

Part 11

Treatment by Designated Providers

Part Compiler's Comments

Severability: Section 16, Ch. 628, L. 1993, was a severability clause.

Effective Date: Section 18, Ch. 628, L. 1993, provided: "[This act] [39-71-1101 through 39-71-1109, now repealed] is effective July 1, 1993."

39-71-1101. Choice of health care provider by worker — insurer designation or approval of treating physician or referral to managed care or preferred provider organization — payment terms — definition.

Compiler's Comments

2021 Amendment: Chapter 197 in (1) in two places substituted "39-71-116(42)" for "39-71-116(41)". Amendment effective April 14, 2021.

2015 Amendment: Chapter 55 in (10) near beginning after "worker" deleted "[whose injury is]". Amendment effective October 1, 2015.

2011 Amendment: Chapter 167 in (1) substituted current language for "Subject to subsection (3), a worker may choose the initial treating physician within the state of Montana"; inserted (2) allowing an insurer to designate or approve a treating physician; inserted (3) relating to referral to another health care worker; inserted (4) relating to 110% reimbursement; inserted (5) relating to 90% reimbursement; inserted (6) relating to 100% reimbursement; inserted (7) relating to rate on date service was provided; in (8) at beginning deleted "Authorization by the insurer is required to change treating physicians. If authorization is not granted", near beginning substituted "may" for "shall", and near middle substituted "or a preferred provider organization for designation of the treating physician" for "if any, or to a medical service provider who qualifies as a treating physician, who shall then serve as the worker's treating physician"; in (9) at beginning substituted "After the insurer directs a worker to a managed care organization or preferred provider organization, a health care provider" for "A medical service provider" and at end deleted "if"; deleted (9)(a) through (9)(d) that read: "(a) the injury results in a total loss of wages for any duration;

(b) the injury will result in permanent impairment;

(c) the injury results in the need for a referral to another medical provider for specialized evaluation or treatment; or

(d) specialized diagnostic tests, including but not limited to magnetic resonance imaging, computerized axial tomography, or electromyography, are required"; in (10) in first sentence after "notice of a referral" deleted "to a managed care organization", before "organization designated" deleted "managed care", and inserted reference to 39-71-1102, in second sentence after "treating physician in the" deleted "managed care", and in last sentence substituted "health care provider" for "medical service provider" and at end inserted "or a preferred provider organization"; in (11) at end substituted "the date of injury or occupational disease" for "the date that the injury meets the provisions of subsection (3). The notice must advise the worker of the worker's right to choose the initial treating physician under subsection (1)"; deleted former (6) that read: "(6) Any postings or other information regarding referral to a managed care organization on bulletin boards, in personnel policies, in company manuals, or by other general or broadcast means and any individual notice of referral to a managed care organization, whether before or after the occurrence of an injury, must include in prominent type advice of the worker's right to choose the initial treating physician pursuant to subsection (1)"; and made minor changes in style. Amendment effective April 12, 2011.

Code Commissioner Correction: The Code Commissioner inserted brackets around apparently erroneous language in (10) that refers to language that was deleted by the amendment of this section.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

1999 Amendment: Chapter 468 in (4) at beginning of first sentence inserted "After the date that" and after reference to subsection (3) inserted "receives individual written notice of a referral to a managed care organization, the worker"; inserted (5) providing that posting of managed care requirements in certain places is not individual written notice, which must be given in writing by mail or in person after the date that the injury meets the provisions of subsection (3) and which must advise the worker of the worker's right to choose the initial treating physician; inserted (6) providing that postings or other information as to referral to a managed care organization in certain places and individual notice of referral to a managed care organization must prominently include advice of the worker's right to choose the initial treating physician; and made minor changes in style. Amendment effective October 1, 1999.

Administrative Rules

ARM 24.29.1510 Selection of physician for claims arising from July 1, 1993, through June 30, 2013.

ARM 24.29.1512 Selection of physician for claims arising on or after July 1, 2013.

Case Notes

Failure to Qualify as Treating Physician Through Expiration of Medical License Held No Bar to Consideration of Physician's Testimony - Purpose of Act Considered: Because Hansen's medical license expired prior to trial, the insurer objected to consideration of Hansen's testimony as the treating physician. The Supreme Court held that it would be absurd and not in keeping with the purposes of the Workers' Compensation Act for the Workers' Compensation Court not to consider Hansen's testimony at trial just because he could not technically qualify as the treating physician at the time of trial because his license expired without his knowledge before trial. Wright v. ACE Am. Ins. Co., 2011 MT 43, 359 Mont. 332, 249 P.3d 485.

Employer Not Absolved of Liability by Employee's Failure to Receive Authorization for Treatment of Condition Unknown at Time of Settlement: A claimant's failure to comply with the rule requiring the insurer's authorization to treat with a second doctor does not necessarily absolve the insurer of liability for the cost of treatment rendered by an unauthorized physician. In this case, without obtaining the authorization of the insurer for treatment by a second physician, the employee went to a specialist who ran additional tests and discovered that the employee had suffered an odontoid fracture of the spine that was consistent with the job injury but that had been unnoticed at the time of the settlement, so the employee's failure to comply with the authorization rule was excused as a matter of law. The Supreme Court declined to apply the authorization rule in a manner that was inconsistent with the Workers' Compensation Act and affirmed the Workers' Compensation Court's conclusion that the employer was liable for the cost of the additional treatment despite the claimant's failure to comply with the authorization rule. Gamble v. Sears, 2007 MT 131, 337 M 354, 160 P3d 537 (2007), followed in Wright v. ACE Am. Ins. Co., 2011 MT 43, 359 Mont. 332, 249 P.3d 485.

39-71-1102. Preferred provider organizations — establishment — limitations.

Compiler's Comments

2011 Amendment: Chapter 167 in (1) in first sentence substituted "health care providers" for "medical providers" and deleted last sentence that read: "This section does not prohibit the worker from choosing the initial treating physician under 39-71-1101(1)"; in (2) at end deleted "The notice must advise the worker of the worker's right to choose the initial treating physician under 39-71-1101(1)"; deleted former (3) that read: "(3) Any postings or other information regarding referral to preferred providers on bulletin boards, in personnel policies, in company manuals, or by other general or broadcast means and any individual notice of referral to preferred providers, whether before or after the occurrence of an injury, must include in prominent type advice of the worker's right to choose the initial treating physician pursuant to subsection 39-71-1101(1)"; and made minor changes in style. Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

1999 Amendment: Chapter 468 in (1) in fourth sentence near beginning before "worker" inserted "injured" and after "given" inserted "an individual"; inserted (2) providing that posting of preferred provider requirements in certain places is not individual written notice, which must be given in writing by mail or in person after the date of injury and which must advise the worker of the worker's right to choose the initial treating physician; inserted (3) providing that postings or other information as to referral to preferred providers in certain places and individual notice of referral to a preferred provider must prominently include advice of the worker's right to choose the initial treating physician; and made minor changes in style. Amendment effective October 1, 1999.

39-71-1103. Workers' compensation managed care.

Administrative Rules

Title 24, chapter 29, subchapter 23, ARM Managed care organization certification.

39-71-1105. Managed care organizations — application — certification.

Compiler's Comments

2005 Amendment: Chapter 416 in (1) in first sentence near end after "managed care to" deleted "injured", after "injuries" inserted "or occupational diseases", and at end after "this chapter" deleted "or for occupational diseases that are covered under the Occupational Disease Act of Montana"; and made minor changes in style. Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

Administrative Rules

Title 24, chapter 29, subchapter 23, ARM Managed care organization certification.

39-71-1106. Compliance with medical treatment required — termination of compensation benefits for noncompliance.

Compiler's Comments

2011 Amendment: Chapter 167 in (1) inserted reference to preferred provider organization; in (3) substituted "health care providers" for "medical providers"; and made minor changes in style. Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability—Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

39-71-1107. Domiciliary care — requirements — evaluation.

Compiler's Comments

2007 Amendment: Chapter 117 in (4) at end of first sentence substituted "hourly mean wage by area for home health aides, as published by the department in the most recent edition of the Montana Informational Wage Rates by Occupation and adopted annually by the department prior to January 1" for "prevailing hourly wage" and at end of second sentence inserted "at the rate in effect at the time that the services are rendered"; and made minor changes in style. Amendment effective July 1, 2007.

Case Notes

Statutory Limitation on Workers' Compensation Family Member Domiciliary Care Benefits Justified — Not Violative of Equal Protection or Substantive Due Process: Plaintiff, injured in a vehicle accident in the scope of his employment, received disability benefits and payments for domiciliary care provided at home by his wife at the maximum rate permitted by this section. Plaintiff challenged the constitutionality of the limits on benefits for 24-hour care provided by a family caregiver, arguing that the cap violated his right to equal protection because it forced him to choose between being placed in a nursing home or having his wife assist him. His wife received less compensation as a result of his choice to live at home rather than at a skilled nursing facility. Additionally, plaintiff alleged that establishment of different benefit limits for family and nonfamily caregivers violates his right to substantive due process because it arbitrarily and unfairly balances cost containment with plaintiff's personal choice of who acts as his care provider. In affirming the District Court decision, the Supreme Court ruled that the differences in care provided by family member caregivers and nonfamily member caregivers offer significant justification for limiting compensation to family care member caregivers. As a result, family member caregivers and nonfamily caregivers are not similarly situated for purposes of equal protection, and the difference in family caregiver compensation is not arbitrary and capricious in violation of substantive due process, but is reasonably related to a permissible legislative objective. Powell v. St. Comp. Ins. Fund, 2000 MT 321, 302 M 518, 15 P3d 877, 57 St. Rep. 1353 (2000).

39-71-1108. Physician self-referral prohibition.

Compiler's Comments

1995 Amendment: Chapter 516 inserted (2) providing that subsection (1) does not apply to care or services provided directly to an injured worker by a treating physician with an ownership interest in a managed care organization that has been certified by the Department.

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

Severability: Section 26, Ch. 516, L. 1995, was a severability clause.

39-71-1110. Schedule II and III drugs — prescriber obligation.

Compiler's Comments

Effective Date: Section 3, Ch. 407, L. 2013, provided that this section is effective July 1, 2013.

Part 14
Presumptive Occupational Disease — Firefighters

39-71-1401. Presumptive occupational disease for firefighters — rebuttal — applicability — definitions.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 442, L. 2023. Amendment effective October 1, 2023.

Effective Date — Applicability: Section 8, Ch. 158, L. 2019, provided: "[This act] is effective July 1, 2019, and applies to presumptive occupational diseases diagnosed on or after July 1, 2019."

39-71-1402. Conditions for claiming presumptive occupational disease.

Compiler's Comments

Effective Date — Applicability: Section 8, Ch. 158, L. 2019, provided: "[This act] is effective July 1, 2019, and applies to presumptive occupational diseases diagnosed on or after July 1, 2019."

Part 15
Montana Safety Culture Act

Part Compiler's Comments

Saving Clause: Section 14, Ch. 295, L. 1993, was a saving clause.

Severability: Section 15, Ch. 295, L. 1993, was a severability clause.

39-71-1501. Short title.

Compiler's Comments

2003 Amendment: Chapter 170 at beginning substituted "This part" for "Section 2-15-1708 and this part". Amendment effective July 1, 2003.

Effective Date: Section 16, Ch. 295, L. 1993, provided that this section is effective January 1, 1994.

39-71-1502. Purpose.

Compiler's Comments

2003 Amendment: Chapter 170 near beginning of first sentence after "purpose" substituted "of this part" for "of 2-15-1708 and this part". Amendment effective July 1, 2003.

Effective Date: Section 16, Ch. 295, L. 1993, provided that this section is effective January 1, 1994.

39-71-1503. Safety consultation.

Compiler's Comments

2009 Amendment: Chapter 27 in (1) near beginning of first sentence after "insurer" inserted "or the department", after "aid an" deleted "insured", and in second sentence after "mail" inserted "electronically"; in (2)(b) before "employer" deleted "insured"; in (2)(c) at beginning inserted "education and"; in (2)(d) after "advised" deleted "insured" and before "employer's" deleted "insured"; and made minor changes in style. Amendment effective July 1, 2009.

Preamble: The preamble attached to Ch. 27, L. 2009, provided: "WHEREAS, Montana's general occupational safety act, the Montana Safety Act, was enacted in 1969, prior to the adoption of the federal Occupational Safety and Health Act of 1970; and

WHEREAS, as a result of the enactment of the federal Occupational Safety and Health Act of 1970, federal law has become the basis for occupational safety and health regulation in the private sector; and

WHEREAS, states have responsibility for nonfederal public sector compliance with occupational safety and health regulations; and

WHEREAS, since the creation of the federal Occupational Safety and Health Administration, the Montana Safety Act and the Occupational Health Act of Montana do not reflect the reality of federal occupational safety and health regulation and enforcement in Montana's private sector; and

WHEREAS, the Montana Safety Act contains various archaic rulemaking and hearings provisions because it was enacted prior to the adoption of the Montana Administrative Procedure Act; and

WHEREAS, the Occupational Health Act of Montana, enacted in 1971, suffers from many of the same jurisdictional and procedural flaws as does the Montana Safety Act; and

WHEREAS, it is appropriate to modernize Montana's occupational safety and health laws for occupations other than those in mining and consolidate them into a unified body of law that reflects the scope of state regulation of general occupational safety and health matters as limited to public sector employment."

Saving Clause: Section 25, Ch. 27, L. 2009, was a saving clause.

2003 Amendment: Chapter 170 near beginning of first sentence after "used" substituted "in this part" for "in 2-15-1708 and this part". Amendment effective July 1, 2003.

Effective Date: Section 16, Ch. 295, L. 1993, provided that this section is effective January 1, 1994.

39-71-1504. Safety programs — educational activities.

Compiler's Comments

2001 Amendment: Chapter 58 inserted (3) authorizing the department to issue a safety recommendation to an employer that fails to comply with certain statutory requirements or department rules. Amendment effective July 1, 2001.

Effective Date: Section 16, Ch. 295, L. 1993, provided that this section is effective January 1, 1994.

39-71-1505. Rulemaking authority.

Compiler's Comments

1995 Amendment: Chapter 238 in (2)(a), at beginning, inserted "subject to subsection (3)"; and inserted (3) authorizing the Department to adopt rules. Amendment effective March 24, 1995.

1993 Statement of Intent: The statement of intent attached to Ch. 295, L. 1993, provided: "A statement of intent is required for this bill because [section 5] [39-71-1505] authorizes the department of labor and industry to adopt rules to implement safety programs and to stimulate the creation of a safety culture in Montana workplaces. The rules adopted by the department must:

(1) be consistent with the provisions of [this act] [2-15-1708 and Title 39, ch. 71, part 15] and of Titles 33 and 39 and Title 50, chapter 71; and

(2) further the objectives of improving occupational safety and health and reducing the costs of the workers' compensation system by attempting to control or diminish the incidence of injury or illness."

Effective Date: Section 16, Ch. 295, L. 1993, provided that this section is effective July 1, 1993.

Administrative Rules

Title 24, chapter 30, subchapter 25, ARM Implementation of education-based safety programs for workers' compensation purposes.

39-71-1506. Notification of safety consultation services available by insurer.

Compiler's Comments

Effective Date: Section 16, Ch. 295, L. 1993, provided that this section is effective January 1, 1994.

39-71-1507. Safety consultation services — safety program as provision of insurance contract or agreement.

Compiler's Comments

Effective Date: Section 16, Ch. 295, L. 1993, provided that this section is effective January 1, 1994.

39-71-1508. Safety consultation services — insurer's exemption from civil liability — exceptions.

Compiler's Comments

Effective Date: Section 16, Ch. 295, L. 1993, provided that this section is effective January 1, 1994.

Part 21
Compensation Plan Number One

Part Administrative Rules

ARM 24.29.608 Election to be bound by compensation plan No. 1 — eligibility.

Part Case Notes

Self-Insured Employer — Employees Not Owed Fiduciary Duty: The District Court did not err in determining that a third-party employee claimant is not owed a fiduciary duty from a workers' compensation self-insured employer. The employees of a self-insured employer assume no new contractual rights or obligations as a result of their employer's choice to self-insure under plan No. 1. Consequently, an injured employee's position as a third-party claimant does not materially change in the context of self-insurance. Suzor v. Int'l Paper Co., 2016 MT 344, 386 Mont. 54, 386 P.3d 584, following Mtn. W. Farm Bureau Mut. Ins. Co. v. Brewer, 2003 MT 98, 315 Mont. 231, 69 P.3d 652.

Reduction of Benefits by Compensation Amount: The employer's obligation as a plan I self-insurer is neither increased nor diminished by the group disability policy, and the reduction of benefits under the policy by the amount of compensation paid under the act is proper to prevent duplication of wage-loss benefits and does not alter the employer's obligation. Carlson v. The Anaconda Co., 165 M 413, 529 P2d 356 (1974).

39-71-2101. General requirements for electing coverage under plan.

Compiler's Comments

1993 Amendment: Chapter 619 inserted (2) providing that employers complying with chapter and participating in Taft-Hartley trust funds are eligible to provide self-insured workers' compensation benefits; and made minor changes in style. Amendment effective July 1, 1993.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

1991 Amendment: Near beginning, after "department", inserted "and the Montana self-insurers guaranty fund" and near end, after "department", inserted "and with the concurrence of the guaranty fund".

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Administrative Rules

Title 24, chapter 29, subchapter 6, ARM Plan 1 self-insurance.

Attorney General's Opinions

Power of Fund to Prevent Sole Exercise of Departmental Powers: When presented with the question of interpretation of the phrase "with the concurrence of the Montana self-insurers guaranty fund", or equivalent phrase, used throughout the law governing the fund, the Attorney General held that the power to concur, by irresistible implication, also carries with it the power to withhold concurrence, but implies no power to initiate action. The Legislature gave the fund, through the power of concurrence, the power to prevent the sole exercise of discretion of statutory powers by the Department of Labor and Industry. 46 A.G. Op. 1 (1995).

39-71-2102. Proof of solvency to be filed.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Inconsistent Acts Repealed: Section 2, Ch. 183, L. 1965, repealed all acts and parts of acts in conflict therewith.

Administrative Rules

ARM 24.29.616 Excess insurance — when required.

ARM 24.29.618, 24.29.621, and 24.29.622 Initial election — permission to self-insure.

Case Notes

Failure to Review Application for Self-Insurance — Quasi-Judicial Immunity Not Applicable: The Division of Workers' Compensation (now State Fund) admitted negligence for failing to conduct an adequate review of a corporation's financial ability to self-insure under plan No. 1, but claimed immunity under the rationale of Koppen v. Bd. of Medical Examiners, 233 M 214, 759 P2d 173, 45 St. Rep. 1433 (1988), for its acts as a government agency. The Supreme Court, noting that for immunity to apply, the function of the Division (now State Fund) must be quasi-judicial rather than administrative or ministerial, distinguished Koppen based on the lack of discretion necessary for the Division (now State Fund) to perform its statutory duty. Because simply performing this duty did not involve the use of quasi-judicial discretion, the act was purely ministerial and not protected by quasi-judicial immunity. The discretionary function exemption will not apply when a statute, regulation, or policy specifically prescribes a course of action for an employee to follow and the employee has no rightful option but to adhere to the directive. State ex rel. Div. of Workers' Comp. v. District Court, 246 M 225, 805 P2d 1272, 47 St. Rep. 1911 (1990), following Berkovitz v. U.S., 486 US 531, 100 L Ed 2d 531, 108 S Ct 1945 (1988). See also Meinecke v. McFarland, 122 M 515, 206 P2d 1012 (1949).

39-71-2103. Employer permitted to carry on business and settle directly with employee — individual liability.

Compiler's Comments

1995 Amendment: Chapter 516 in two places in (1), before "year", deleted "fiscal"; in (2) inserted three references to a limited liability company; and made minor changes in style.

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

Severability: Section 26, Ch. 516, L. 1995, was a severability clause.

1991 Amendment: In (1), near beginning after "department", inserted "and the Montana self-insurers guaranty fund" and near middle, after "department", inserted "with the concurrence of the guaranty fund".

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1985 Amendment: Inserted (2) requiring self-insured employer in group to be jointly and severally liable for all claims against group and to maintain excess coverage for such liability.

Statement of Intent: Chapter 480, L. 1985, which enacted subsection (2) of this section and subsection (2) of 39-71-117, included the following statement of intent: "A statement of intent is required for this bill because it requires the adoption of rules by the workers' compensation division of the department of labor and industry.

The legislature intends that the division adopt only those rules required by section 4 of this bill (an uncodified extension of existing rulemaking authority).

The rules adopted by the division to implement section 4 should require the submission of information regarding the following:

(1) the requirements for formation and certification of an association, corporation, or organization of employers to operate as a group self-insured employer, including provisions for the addition of new members and the withdrawal of existing members;

(2) requirements for proof of solvency of the group self-insurer and to maintain security to insure payment of obligations under the act;

(3) requirements for an indemnity agreement and power of attorney between the individual employers within the group, including the requirement that all members of the group remain jointly and severally liable;

(4) requirements for and confirmation of excess liability insurance;

(5) requirements for management of the association and annual reports to the division;

(6) requirements for auditing the group self-insurer to determine that it is meeting its obligations under the Workers' Compensation Act;

(7) provisions for the termination of group self-insurance by the group on request and for termination by the division upon determination that the group no longer meets the requirements for certification as self-insured and for determining responsibility for pending claims.

The legislature intends that all group self-insured employers must comply with the provisions of the act and rules enacted thereunder. In developing rules, the legislature intends that employees of the group self-insurer have as much assurance as reasonably possible of the benefits to which they are entitled under the act."

Administrative Rules

ARM 24.29.616 Excess insurance — when required.

ARM 24.29.618, 24.29.621, and 24.29.622 Initial election — permission to self-insure.

Attorney General's Opinions

Power of Fund to Prevent Sole Exercise of Departmental Powers: When presented with the question of interpretation of the phrase "with the concurrence of the Montana self-insurers guaranty fund", or equivalent phrase, used throughout the law governing the fund, the Attorney General held that the power to concur, by irresistible implication, also carries with it the power to withhold concurrence, but implies no power to initiate action. The Legislature gave the fund, through the power of concurrence, the power to prevent the sole exercise of discretion of statutory powers by the Department of Labor and Industry. 46 A.G. Op. 1 (1995).

39-71-2104. Renewal of application.

Compiler's Comments

1993 Amendment: Chapter 555 in first sentence, after "shall", substituted "annually" for "at least 30 days before the expiration of each fiscal year", after "next" deleted "ensuing fiscal", and at end, after "year", deleted "and under like circumstances as those mentioned for the granting of such permission upon such first application" and inserted third sentence that read: "The annual renewal application must be in the form, for the period, and subject to the time limits prescribed by the department"; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendment: Near end, after "department may", inserted "with the concurrence of the Montana self-insurers guaranty fund".

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Administrative Rules

ARM 24.29.623 Renewal required.

ARM 24.29.624 Revocation, suspension, termination, and withdrawal of permission.

Case Notes

Failure to Review Application for Self-Insurance — Quasi-Judicial Immunity Not Applicable: The Division of Workers' Compensation (now State Fund) admitted negligence for failing to conduct an adequate review of a corporation's financial ability to self-insure under plan No. 1, but claimed immunity under the rationale of Koppen v. Bd. of Medical Examiners, 233 M 214, 759 P2d 173, 45 St. Rep. 1433 (1988), for its acts as a government agency. The Supreme Court, noting that for immunity to apply, the function of the Division (now State Fund) must be quasi-judicial rather than administrative or ministerial, distinguished Koppen based on the lack of discretion necessary for the Division (now State Fund) to perform its statutory duty. Because simply performing this duty did not involve the use of quasi-judicial discretion, the act was purely ministerial and not protected by quasi-judicial immunity. The discretionary function exemption will not apply when a statute, regulation, or policy specifically prescribes a course of action for an employee to follow and the employee has no rightful option but to adhere to the directive. State ex rel. Div. of Workers' Comp. v. District Court, 246 M 225, 805 P2d 1272, 47 St. Rep. 1911 (1990), following Berkovitz v. U.S., 486 US 531, 100 L Ed 2d 531, 108 S Ct 1945 (1988). See also Meinecke v. McFarland, 122 M 515, 206 P2d 1012 (1949).

Attorney General's Opinions

Power of Fund to Prevent Sole Exercise of Departmental Powers: When presented with the question of interpretation of the phrase "with the concurrence of the Montana self-insurers guaranty fund", or equivalent phrase, used throughout the law governing the fund, the Attorney General held that the power to concur, by irresistible implication, also carries with it the power to withhold concurrence, but implies no power to initiate action. The Legislature gave the fund, through the power of concurrence, the power to prevent the sole exercise of discretion of statutory powers by the Department of Labor and Industry. 46 A.G. Op. 1 (1995).

39-71-2105. Additional proof of solvency — revocation of order.

Compiler's Comments

2005 Amendment: Chapter 69 in (1) near end after "pay the" substituted "benefits" for "compensation" and at end after "chapter" deleted "and may at any time, upon notice to the employer of not less than 10 or more than 20 days, after and upon a full hearing, revoke any order or approval"; inserted (2) regarding the opportunity for administrative review; and inserted (3) regarding appeal of a decision revoking an order of approval. Amendment effective July 1, 2005.

1993 Amendment: Chapter 150 near beginning, after "department", inserted "with the concurrence of the Montana self-insurers guaranty fund"; and made minor changes in style.

Saving Clause: Section 3, Ch. 150, L. 1993, provided: "The department of labor and industry may require an employer, without concurrence of the Montana self-insurers guaranty fund, to give security in addition to the requirements described in 39-71-2105 and 39-71-2106 for workers' compensation liabilities that the employer accrued prior to July 1, 1989."

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Attorney General's Opinions

Concurrence of Guaranty Fund Required When Department Seeks Additional Security by Self-Insured Employer — Legal Effect of Saving Clause: The saving clause attached to Ch. 150, L. 1993, although not codified, was part of the enrolled bill and must be given legal effect. The saving clause controls by providing that in all cases except those involving workers' compensation liabilities accrued prior to July 1, 1989, the Department of Labor and Industry must obtain the concurrence of the Montana self-insurers guaranty fund when seeking to require an employer who self-insures to give security in addition to the security that the employer has already provided. 46 A.G. Op. 1 (1995).

Power of Fund to Prevent Sole Exercise of Departmental Powers: When presented with the question of interpretation of the phrase "with the concurrence of the Montana self-insurers guaranty fund", or equivalent phrase, used throughout the law governing the fund, the Attorney General held that the power to concur, by irresistible implication, also carries with it the power to withhold concurrence, but implies no power to initiate action. The Legislature gave the fund, through the power of concurrence, the power to prevent the sole exercise of discretion of statutory powers by the Department of Labor and Industry. 46 A.G. Op. 1 (1995).

39-71-2106. Requiring security of employer.

Compiler's Comments

2007 Amendment: Chapter 117 inserted (3)(d) concerning payment from security deposit. Amendment effective July 1, 2007.

1995 Amendment: Chapter 83 in (1)(a), at beginning of second sentence, deleted "Except as provided in subsection (1)(b)" and at end inserted "the Montana self-insurers guaranty fund" and at beginning of third sentence inserted "For the first 3 years of operating as a self-insured employer, the employer's security deposit"; in (1)(a)(ii) substituted "first 3 of the last 4 completed calendar years" for "past 3 calendar years"; in (1)(b), before "ability", deleted "solvency and financial" and before "provided" substituted "benefits" for "liabilities"; inserted (1)(c) providing that the Department may, with the concurrence of the Montana self-insurers guaranty fund, reduce the amount of security deposit; in (2)(a)(i), after "department", inserted "with the concurrence of the Montana self-insurers guaranty fund", after "lacks" substituted "the ability to pay the benefits" for "the financial ability to pay the compensation", after "expected" inserted "to be paid by the employer", and before "this chapter" inserted "the terms and conditions of"; in (2)(b), after "necessary to", substituted "pay the benefits provided under the terms and conditions of this chapter" for "meet all liabilities" and before "year" deleted "fiscal"; in (3)(a), in two places after "security", inserted "deposit"; near beginning of (3)(a)(i), after "department", deleted "in the amount to be fixed by it" and after "surety" deleted "which undertaking must be conditioned" and at beginning of second sentence inserted "The security deposit must state", after "employees" substituted "the amount" for "all sums and amounts", after "employer" substituted "was given permission under 39-71-2103 and for which the employer is liable" for "becomes liable", and after "terms" inserted "and conditions"; at beginning of (3)(a)(ii), before "state", inserted "Montana", after "bonds" deleted "or the bonds or evidence of indebtedness of any individuals or corporations", and after "department" inserted "and the Montana self-insurers guaranty fund";

in (3)(b), before "deposit", inserted "security", after "change" inserted "considered necessary", and after "department" substituted "and the Montana self-insurers guaranty fund" for "as it may require"; in three places in (3)(c) substituted "security deposit" for "securities"; in (4), after "safekeeping of all", substituted "security deposits" for "deposits or securities", after "demand of" deleted "a bondsman or", and after "account for the" substituted "security deposits" for "deposits or securities and the earnings of the deposits or securities"; and made minor changes in style. Amendment effective March 7, 1995.

1993 Amendments: Chapter 150 in (1)(a), (1)(b), (2)(a), and (2)(b), near beginning after "department", inserted "with the concurrence of the Montana self-insurers guaranty fund"; and made minor changes in style.

Chapter 555 inserted second sentence of (1)(a) that read: "All securities of the United States treasury must be in book-entry form"; near beginning of (2)(a)(i), before "lacks", deleted "is insolvent or" and near middle, before "year", deleted "fiscal"; near beginning of (2)(a)(ii) substituted "a group" for "an association, corporation, or organization"; at end of first sentence of (3)(a) deleted "and may be either an estimated percent of the employer's last preceding annual payroll or a percent of the established amount of his annual payroll for the fiscal year"; near beginning of (3)(a)(i), after "bond", deleted "or undertaking", near middle substituted "a surety" for "two or more sufficient sureties", and near end, before "year", deleted "fiscal"; inserted (3)(a)(iii) that read: "(iii) other security deposits allowed in subsection (1)(a)"; and made minor changes in style. Amendment effective July 1, 1993.

Saving Clause: Section 3, Ch. 150, L. 1993, provided: "The department of labor and industry may require an employer, without concurrence of the Montana self-insurers guaranty fund, to give security in addition to the requirements described in 39-71-2105 and 39-71-2106 for workers' compensation liabilities that the employer accrued prior to July 1, 1989."

1991 Amendments: Chapter 120 in (1)(a), at end of first sentence, inserted "in accordance with rules adopted by the department" and in second sentence inserted "certificate of deposit"; substituted present (2), describing when and in what amount additional security is required, for former (2) that read: "(2) If the department finds that an employer has lost his solvency or financial ability to pay the compensation herein provided to be paid which might reasonably be expected to be chargeable to the employer during the fiscal year to be covered by the permission or that the employer is an association, corporation, or organization of individual employers seeking permission to operate under compensation plan No. 1, the department must require the employer, before granting to him permission or before continuing or engaging in such employment subject to the provisions of compensation plan No. 1, to give security in addition to the security described in subsection (1) for the payment of compensation, which security must be in such an amount as the department finds is reasonable and necessary to meet all liabilities of the employer which may reasonably and ordinarily be expected to accrue during the fiscal year"; and made minor changes in style. Amendment effective March 20, 1991.

Chapter 558 in (1)(a), at beginning of second sentence, inserted exception clause; and inserted (1)(b) allowing Department to require a larger deposit as additional evidence of financial ability to pay. Amendment effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 120, L. 1991, provided: "A statement of intent has been prepared for this bill because it amends 39-71-2106 to expressly authorize the department of labor and industry to adopt rules governing security deposits required from employers who elect to be self-insured under workers' compensation plan No. 1.

It is the intent of the legislature that, in adopting rules, the department allow self-insured employers to provide a security deposit as provided in 39-71-2106 that must be:

(1) automatically renewable;

(2) accompanied by a properly executed security instrument that must be filed of record to protect against employer bankruptcy and other insolvency; and

(3) filed with any other information or documentation necessary to protect the department."

Saving Clause: Section 2, Ch. 120, L. 1991, was a saving clause.

Applicability: Section 15, Ch. 558, L. 1991, provided: "[This act] applies to injuries that occur on or after [the effective date of this act] [July 1, 1991]."

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1987 Amendment: Inserted (1) allowing Division to require security and establishing minimum deposit amount; in (2), near end after "to give security", inserted "in addition to the security described in subsection (1)"; and in (3), near beginning after "security", inserted "provided for in subsection (2)".

1985 Amendment: In (1), near beginning after "employer", substituted "has lost his solvency or financial ability to pay" for "does not have the financial responsibility for the payment of", near middle after "covered by the permission", inserted "or that the employer is an association, corporation, or organization of individual employers seeking permission to operate under compensation plan No. 1", and near end after "give security for", substituted "the payment of compensation" for "such payment".

Administrative Rules

ARM 24.29.610 When security required.

Attorney General's Opinions

Concurrence of Guaranty Fund Required When Department Seeks Additional Security by Self-Insured Employer — Legal Effect of Saving Clause: The saving clause attached to Ch. 150, L. 1993, although not codified, was part of the enrolled bill and must be given legal effect. The saving clause controls by providing that in all cases except those involving workers' compensation liabilities accrued prior to July 1, 1989, the Department of Labor and Industry must obtain the concurrence of the Montana self-insurers guaranty fund when seeking to require an employer who self-insures to give security in addition to the security that the employer has already provided. 46 A.G. Op. 1 (1995).

Power of Fund to Prevent Sole Exercise of Departmental Powers: When presented with the question of interpretation of the phrase "with the concurrence of the Montana self-insurers guaranty fund", or equivalent phrase, used throughout the law governing the fund, the Attorney General held that the power to concur, by irresistible implication, also carries with it the power to withhold concurrence, but implies no power to initiate action. The Legislature gave the fund, through the power of concurrence, the power to prevent the sole exercise of discretion of statutory powers by the Department of Labor and Industry. 46 A.G. Op. 1 (1995).

39-71-2107. When employer to make deposit or security to guarantee payment of compensation.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Administrative Rules

ARM 24.29.610 When security required.

39-71-2108. Failure of employer to pay benefits — duty of department.

Compiler's Comments

2005 Amendment: Chapter 69 throughout section substituted references to benefits for references to compensation; in first sentence near end after "sufficient" substituted "deposits" for "thereof into cash and"; inserted fourth sentence regarding retention of interest earnings on liquidated security deposits; and made minor changes in style. Amendment effective July 1, 2005.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

39-71-2115. Transfer of claim liabilities — rules.

Compiler's Comments

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Effective Date: Section 29(1), Ch. 112, L. 2009, provided that this section is effective July 1, 2009.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

Administrative Rules

ARM 24.29.631 Self-insured employers and groups — transfer of claim liabilities.

Part 22

Compensation Plan Number Two

Part Compiler's Comments

Transfer of Insurer Plan No. 2 Deposits: Section 12, Ch. 310, L. 1997, provided: "Section 12. Transfer of deposits and surplus funds. (1) All deposits held in trust by the department of labor and industry pursuant to 39-71-2206 [which was repealed by sec. 13 of Ch. 310] must be returned to the insurer who made the deposit on or before December 31, 1997.

(2) Any surplus funds remaining in the underinsured employers' fund on [the effective date of this act] [effective July 1, 1997] must be deposited in the uninsured employers' fund provided for in 39-71-502 [now repealed]."

Part Case Notes

Section Not Applicable to Lump-Sum Payment — Basis for Periodic Payments: Section 39-71-2207 (now repealed) provided a method for relieving an insurer of future liability for making periodic payments to a claimant, which may include the deposit of the present value of such payments with the Division of Workers' Compensation (now Department of Labor and Industry) for the administration of such payments. The lump sum is from the insurer to the Division (now Department), not the claimant. Willis v. Long Constr. Co., 213 M 203, 690 P2d 434, 41 St. Rep. 2050 (1984).

39-71-2201. Election to be bound by plan — captive reciprocal insurers.

Compiler's Comments

2007 Amendment: Chapter 117 inserted (3) concerning captive insurer; and made minor changes in style. Amendment effective July 1, 2007.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Administrative Rules

ARM 24.29.703 Election to be bound by compensation plan No. 2 or 3.

39-71-2203. Content of policies — policies subject to approval, change, or revision by department.

Compiler's Comments

2005 Amendment: Chapter 69 inserted (5) requiring that all Montana operations of an employer covered under plan No. 2 be insured by the same insurer; and made minor changes in style. Amendment effective July 1, 2005.

Applicability: Section 17(3), Ch. 69, L. 2005, provided: "[Sections 9 and 12] [amending 39-71-2203 and 39-71-2336] apply to policies written or renewed on or after July 1, 2005."

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Case Notes

Remedy: This section, along with 39-71-2206 (now repealed), provides a definite, certain, and comprehensive mode of procedure in enforcing payments due a claimant, and they are exclusive, at least until it is shown that such method is fruitless. State ex rel. Murray Hosp. v. District Court, 102 M 350, 57 P2d 813 (1936).

Liability:

This section imposes a liability running primarily and directly from the insurance carrier to the injured employee. Miller v. Aetna Life Ins. Co., 101 M 212, 53 P2d 704 (1936).

The employer who has insured with an insurance carrier is but a nominal party to a proceeding to recover compensation, and the insurance carrier assumes the risk of all accidents which are compensable. Moffett v. Bozeman Canning Co., 95 M 347, 26 P2d 973 (1933).

39-71-2204. Insurer to submit notice of coverage within 30 days — penalty for failure.

Compiler's Comments

2007 Amendment: Chapter 117 in (1) at beginning of second sentence deleted "Beginning January 1, 2006"; in (3) near middle of first sentence after "that" deleted "as a general business practice" and inserted second sentence concerning penalty assessment on each policy not reported in timely manner; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendment: Chapter 69 in (1) inserted second sentence requiring that notice filed on or after January 1, 2006, be provided electronically. Amendment effective July 1, 2005.

2001 Amendment: Chapter 214 in (2)(a) after "33-16-1023" inserted "or recognize other organizations"; at beginning of (2)(b) substituted "shall" for "may" and after "from the" substituted "agents recognized under subsection (2)(a)" for "advisory organization designated under 33-16-1023"; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 25, Ch. 214, L. 2001, was a severability clause.

1995 Amendment: Chapter 186 in (2)(a) and (2)(b) substituted "advisory organization designated under 33-16-1023" for "the national council on compensation insurance"; and made minor changes in style.

Saving Clause: Section 32, Ch. 186, L. 1995, was a saving clause.

Severability: Section 33, Ch. 186, L. 1995, was a severability clause.

Applicability: Section 34, Ch. 186, L. 1995, provided: "[This act] applies to rate filings by the advisory organization on or after [the effective date of this act] [effective October 1, 1995] and to rates filed by insurers on or after the effective date of the advisory organization's initially approved loss cost filing."

1993 Amendment: Chapter 555 inserted (2) allowing the Department to recognize the national council as an agent and to accept notice of coverage received from the national council; and made minor changes in style. Amendment effective July 1, 1993.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

39-71-2205. Policy in effect until canceled or replaced — 20-day notification of cancellation required — penalty.

Compiler's Comments

2007 Amendment: Chapter 117 in (1) at beginning of fourth sentence deleted "Beginning January 1, 2006"; in (3)(a) inserted second sentence concerning penalty assessment on each cancellation not reported in timely manner; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendment: Chapter 69 in (1) inserted fourth sentence requiring that notice filed on or after January 1, 2006, be provided electronically. Amendment effective July 1, 2005.

2001 Amendment: Chapter 214 in (2)(a) after "33-16-1023" inserted "or recognize other organizations"; at beginning of (2)(b) substituted "shall" for "may" and after "from the" substituted "agents recognized under subsection (2)(a)" for "advisory organization designated under 33-16-1023"; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 25, Ch. 214, L. 2001, was a severability clause.

1995 Amendment: Chapter 186 in (2)(a) and (2)(b) substituted "advisory organization designated under 33-16-1023" for "the national council on compensation insurance".

Saving Clause: Section 32, Ch. 186, L. 1995, was a saving clause.

Severability: Section 33, Ch. 186, L. 1995, was a severability clause.

Applicability: Section 34, Ch. 186, L. 1995, provided: "[This act] applies to rate filings by the advisory organization on or after [the effective date of this act] [effective October 1, 1995] and to rates filed by insurers on or after the effective date of the advisory organization's initially approved loss cost filing."

1993 Amendment: Chapter 555 inserted (2) allowing the Department to recognize the national council as an agent and to accept notice of cancellation received from the national council; and made minor changes in style. Amendment effective July 1, 1993.

1989 Amendment: Chapter 333 inserted (2) allowing Department to assess penalty against insurer not complying with subsection (1) and allowing insurer to contest assessment in hearing. Amendment effective July 1, 1989.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Case Notes

Termination Effective Without Notice: Where notice was not given to the Workers' Compensation Division (now Department of Labor and Industry) of cancellation of a policy of workers' compensation insurance as required by this section, the policy nevertheless terminated upon the effective date, as determined by the court, of the succeeding workers' compensation plan No. 3 insurance policy. Reiser v. St. Comp. Ins. Fund, 230 M 340, 750 P2d 109, 45 St. Rep. 256 (1988).

39-71-2211. Premium rates for construction industry — filing required.

Compiler's Comments

2017 Amendment: Chapter 193 in (4) in two places substituted "use" for "adopt"; and inserted (5) defining construction industry. Amendment effective April 13, 2017.

Applicability: Section 3, Ch. 193, L. 2017, provided: "[This act] applies to policies issued or renewed on or after July 1, 2017."

2005 Amendment: Chapter 26 in (2) near middle of second sentence substituted "state's average weekly wage" for "Montana average weekly wage". Amendment effective July 1, 2005.

Effective Date — Applicability: Section 12, Ch. 26, L. 2005, provided that this section is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005.

1999 Amendment: Chapter 131 in (2) reduced starting point of credit scale for computing premium rates from one and one-half times Montana average weekly wage to 1.168 times that wage. Amendment effective July 1, 1999.

Effective Date — Applicability: Section 2, Ch. 131, L. 1999, provided: "[This act] is effective July 1, 1999, and applies to premium rates computed for the construction industry beginning July 1, 2000."

1995 Amendment: Chapter 186 in (1) substituted "advisory organization designated under 33-16-1023" for "rating organization described in 33-16-1005"; in (3), before "organization", substituted "advisory" for "rating" and after "policies" deleted "by July 1, 1992"; and in (4), before "organization", substituted "designated advisory" for "rating".

Saving Clause: Section 32, Ch. 186, L. 1995, was a saving clause.

Severability: Section 33, Ch. 186, L. 1995, was a severability clause.

Applicability: Section 34, Ch. 186, L. 1995, provided: "[This act] applies to rate filings by the advisory organization on or after [the effective date of this act] [effective October 1, 1995] and to rates filed by insurers on or after the effective date of the advisory organization's initially approved loss cost filing."

1993 Amendment: Chapter 224 in second sentence in (2) inserted multiplier of one and one-half. Amendment effective July 1, 1994.

Name Change — Directions to Code Commissioner: Section 14, Ch. 630, L. 1993, provided: "Wherever the name "state compensation mutual insurance fund", meaning the fund established in 39-71-2313, appears in the Montana Code Annotated or in legislation enacted by the 1993 legislature, the code commissioner is directed to change the name to "state compensation insurance fund"." The phrase appeared in this section and was changed by the Code Commissioner as directed.

Effective Date: Section 12, Ch. 480, L. 1991, provided: "[This act] is effective July 1, 1992."

Part 23
Compensation Plan Number Three

Part Compiler's Comments

Study of State Fund Structure: Section 2, Ch. 16, Sp. L. August 2002, provided: "(1) There is a committee to study the structure of the state fund. The members of the committee consists of:

(a) three members of the house of representatives appointed by the speaker of the house;
(b) three members of the senate appointed by the president of the senate;

(c) a representative of employee groups appointed by the governor;
(d) a representative of the office of the state auditor appointed by the state auditor;
(e) a representative of plan 1 insurers appointed by the governor; and
(f) a representative of plan 2 insurers appointed by the governor.

(2) The committee is attached to the state fund for funding and administrative purposes. The legislative members of the committee are entitled to a salary as provided in 5-2-302(3). The other members of the committee serve for no salary. All members of the committee are entitled to reimbursement for travel, meals, and lodging as provided in Title 2, chapter 18, part 5. The payment of members' claims for salary, travel, meals, and lodging are the responsibility of the state fund.

(3) The state fund shall present the recommendations of the committee to the 58th legislature."

1990 Statement of Intent: The statement of intent attached to Ch. 4, Sp. L. May 1990, provided: "The legislature recognizes that the unfunded liability currently existing in the state fund cannot be fully addressed at this time. The legislature further recognizes that the unfunded liability will have to be addressed from time to time in future legislative sessions; that other sources of revenue may have to be obtained from time to time to assist in reducing the unfunded liability; and that because of the current state of the economy and because of the current premium rates being charged employers, there should not be a substantial increase in premium rates at this time."

Initial Operating Expenses: Section 3, Ch. 4, Sp. L. May 1990, provided: "During the fiscal year beginning July 1, 1990, the state fund shall transfer $12 million from money deposited under 39-71-2321 in the state fund before July 1, 1990, to the account created by 39-71-2321 for the administration and payment of claims for injuries resulting from accidents that occur on or after July 1, 1990."

Coordination With Occupational Disease Act of Montana: Section 18, Ch. 4, Sp. L. May 1990, provided: "For purposes of [this act] and the administration of Title 39, chapter 72, a reference in [this act] to an injury resulting from an accident or to a claim for an injury resulting from an accident includes a disablement as defined in 39-72-102(4) [now repealed]."

Settlement of Claims: Section 20, Ch. 4, Sp. L. May 1990, provided: "(1) If funds are available, the state fund may offer a negotiated claim settlement to each person who has a claim that arose before July 1, 1990, for which the state fund has accepted liability, other than liability for medical benefits, and has fixed benefits. Each settlement offer must contain a provision granting the state fund a full and unconditional release of liability, other than liability for medical benefits, in exchange for accepting the negotiated claim settlement. The claimant shall accept a negotiated claim settlement in writing before November 1, 1990, or the settlement offer is void. The negotiated claim settlement may be paid in a fixed amount without any justification by the claimant.

(2) If the negotiated claim settlement offer made pursuant to subsection (1) is not accepted, the lump-sum law in effect on the date of the injury applies."

Request for Proposals for Claim Settlement: Section 21, Ch. 4, Sp. L. May 1990, provided: "The state fund may prepare a request for proposals for contracting with private claims adjusters for settling the claims of persons whose benefits have not been determined under a claim that arose before July 1, 1990. The request for proposals may be based upon a dollar amount of unsettled claims or upon a percentage of claims for which benefits have not been determined. The state fund may not enter into a contract based upon a proposal until it has reported the results of the proposals to the 52nd legislature and has received legislative authorization to enter into a contract based upon a proposal."

Saving Clause: Section 26, Ch. 4, Sp. L. May 1990, was a saving clause.

Severability: Section 27, Ch. 4, Sp. L. May 1990, was a severability clause.

1989 Statement of Intent: The statement of intent attached to Ch. 613, L. 1989, provided: "A statement of intent is required for this bill because [section 8] [39-71-2316] grants rulemaking authority to the newly created state fund to adopt or repeal rules or amend existing rules to implement the new state compensation mutual insurance fund [now state compensation insurance fund]. The chief purposes of creating the state fund as a mutual insurer and placing it in a department other than the department of labor are:

(1) to remove the inherent conflict between the interests of the workers' compensation division in regulating all workers' compensation insurers in this state, including the state compensation insurance fund, and the interests of the state fund as a workers' compensation insurer; and

(2) to ensure the solvency of the new state fund.

The legislature recognizes that the fund actuary has determined that at June 30, 1988, a full funding deficiency of $157.3 million existed for the present state compensation insurance fund. The legislature intends that the new state compensation mutual insurance fund [now state compensation insurance fund] adopt rules in a manner that will assure the solvency of the new fund. Rates must be set on an actuarially sound basis as required by state law. The new state fund would be bound to insure all employers who apply to it for workers' compensation coverage and shall insure state agencies.

As the primary means of ensuring the solvency of the state fund, it must institute safety programs and set rates in a manner that awards employers who provide a safe working environment and penalizes employers who do not.

The legislature further intends that the new state fund institute programs to automate the processing of claims and payment of benefits. The state fund may contract out to the private sector certain claims administration and servicing functions if the state fund determines it to be cost-effective.

The legislature intends that the governor shall implement staggered terms in naming the initial members of the board."

Reorganization Procedure: Section 62, Ch. 613, L. 1989, provided: "(1) The provisions of sections 2-15-132 through 2-15-137 govern the creation of the state compensation mutual insurance fund [now state compensation insurance fund] and the transfer of the various functions contained in [this act] from the state compensation insurance fund to the state compensation mutual insurance fund [now state compensation insurance fund].

(2) It is intended that current employees of the division of workers' compensation whose functions are transferred to the state compensation mutual insurance fund [now state compensation insurance fund] shall retain employment rights consistent with their positions at the time of transfer."

Implementation: Section 63, Ch. 613, L. 1989, provided: "(1) The governor shall by executive order implement the provisions of [this act].

(2) The governor may by executive order assign to the state compensation mutual insurance fund [now state compensation insurance fund], in a manner consistent with [this act], functions allocated to the workers' compensation state fund provided for in Title 39, chapter 71, part 23, by the 51st legislature and not transferred by [this act]."

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided: "(1) In the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division", meaning the division of workers' compensation, are changed to "department of labor and industry" or "department", meaning the "department of labor and industry".

(2) The code commissioner shall designate, in a manner consistent with [this act], workers' compensation insurance regulatory functions allocated to the division of workers' compensation by the 51st legislature to the department of labor and industry that are not so designated by [this act].

(3) Wherever it appears in 39-71-205, 39-71-222 [now repealed] through 39-71-224, 39-71-613, 39-71-902 [now repealed], 39-71-904, 39-71-910 [now repealed], or in law enacted by the 51st legislature, the code commissioner is directed to change the term "administrator" or "his" to "department", meaning the department of labor and industry."

Part Administrative Rules

Title 2, chapter 55, subchapter 3, ARM Premium rates.

Title 2, chapter 55, subchapter 4, ARM Premium modifiers.

Title 2, chapter 55, subchapter 5, ARM Individual loss sensitive dividend distribution plan.

Part Case Notes

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Claims Examiner Not Authorized to Make Final Workers' Compensation Settlement for State Fund: Claimant was injured at work in 1973. Her employer was enrolled under Workers' Compensation Plan No. 3. State fund accepted liability and paid some compensation to claimant. For 1½ years state fund negotiated with claimant to reach a final settlement of claimant's disability benefits. Claimant was represented by counsel, and the negotiations were conducted through a claims examiner with state fund who was supervised by the state fund bureau chief. In March 1981, the parties reached a tentative settlement. Claimant and her lawyer signed a petition for full and final compromise settlement. When the petition was presented to the state fund bureau chief, he rejected it as being excessive and beyond the liability of the state as an insurer. Claimant brought the matter to the Workers' Compensation Court where she claimed that she had entered into a binding final agreement with state fund. The Supreme Court affirmed the Workers' Compensation Court ruling that no binding contract was created because the state fund bureau chief had not consented to the terms and the claims examiner had neither actual nor ostensible authority to bind the state fund to a settlement contract. Christenson v. Billings Livestock Comm'n Co., 201 M 207, 653 P2d 492, 39 St. Rep. 2060 (1982).

Part Attorney General's Opinions

OPINIONS PRIOR TO 1987 GENERAL REVISION

Unfunded Liability in Industrial Insurance Expendable Trust Fund Not State Debt: To the extent an unfunded liability may exist in the industrial insurance expendable trust fund, it has arisen not by conscious act of the Legislature but from a combination of circumstances that resulted in a mismatch between liability incurred and trust fund deposits. Further, no claim was made that the trust fund's corpus would be inadequate to satisfy accrued benefit payment obligations. For these reasons, the unfunded liability was not considered a "state debt" within the meaning of Art. VIII, sec. 8, Mont. Const. 42 A.G. Op. 46 (1987).

39-71-2311. Intent and purpose of plan — expense constant defined.

Compiler's Comments

2009 Amendment: Chapter 218 in (1) inserted last sentence requiring that the prediction must take into account the goal of pooling risk and may not place an undue burden on employers that are ineligible for the tier with the lowest rated premium; and made minor changes in style. Amendment effective July 1, 2009.

Preamble: The preamble attached to Ch. 218, L. 2009, provided: "WHEREAS, Workers' Compensation Plan No. 3, an insurer for all businesses in Montana, is a nonprofit, independent, public corporation that nevertheless is a creation of the state; and

WHEREAS, more than 90% of businesses in Montana have fewer than 20 employees and more than 80% of businesses in Montana have fewer than 10 employees, with many if not most of these small businesses obtaining workers' compensation insurance from the State Fund because not all private insurers write for small businesses; and

WHEREAS, Montana's workers' compensation rates among all insurers are the second highest in the nation and the current economic crisis has the potential to hit all employers hard, but especially small businesses that may have fewer lifelines for survival than larger businesses; and

WHEREAS, the opportunity to pool risk in a group that has made a commitment to safety yields the potential to benefit small businesses by reducing losses and possibly generating a return on premium."

Effective Date — Applicability: Section 5, Ch. 218, L. 2009, provided: "[This act] is effective July 1, 2009, and applies to groups formed on or after July 1, 2010."

2001 Amendment: Chapter 314 in (1) in last sentence substituted "the board of directors may implement multiple rating tiers as provided in 39-71-2330 and may assess an expense constant, a minimum premium, or both" for "the state fund shall implement variable pricing levels as provided in 39-71-2341 and the board of directors may, in its discretion, assess a policy charge, a minimum premium, or both"; and inserted (2) defining expense constant. Amendment effective July 1, 2002.

1995 Amendment: Chapter 305 in first sentence substituted "coverage with the state fund" for "coverage with a mutual insurance fund"; deleted former second sentence that read: "The state fund is required to insure any employer in this state requesting coverage, and it may not refuse coverage for an employer"; at end inserted language authorizing Board to assess policy charge, minimum premium, or both; and made minor changes in style. Amendment effective July 1, 1995.

1993 Amendment: Chapter 295 in second sentence, after "for an employer", deleted "unless an assigned risk plan established under 39-71-431 is in effect" and at end of section, after "variable pricing levels", substituted "as provided in 39-71-2341" for "within individual rate classifications to reward an employer with a good safety record and penalize an employer with a poor safety record. An employer's payroll reporting and premium history and other relevant factors may also be considered in implementing variable pricing levels." Amendment effective January 1, 1994.

1991 Amendment: Inserted last sentence regarding factors that may be considered in implementing variable pricing levels. Amendment effective July 1, 1991.

1990 Special Session Amendment: At end of first sentence substituted "mutual insurance fund" for "nonprofit, independent public corporation"; in fourth sentence, after "must be set", inserted "at least annually", after "level sufficient to" substituted "ensure the adequate funding of" for "fund", and at end inserted "during and at the end of the period for which the rates will be in effect"; and inserted fifth through seventh sentences providing procedure State Fund must follow in determining premium rates that adequately predict future costs and providing for refund of unnecessary surpluses. Amendment effective July 1, 1990.

House Bill No. 2 Clarification: In sec. 7 of HB No. 2 (Ch. 4, Sp. L. May 1990), at end of first sentence, the phrase "nonprofit, independent public corporation" was deleted but was not shown as stricken and "mutual insurance fund" was added but was not underlined.

Effective Date: Section 65, Ch. 613, L. 1989, provided that this section is effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

Attorney General's Opinions

OPINIONS AFTER 1987 GENERAL REVISION

Payment of All Potential Claims Under Plan No. 1 Not Ensured: Nothing in the law governing the self-insurers guaranty fund provides a mechanism that legally ensures that the fund will pay all covered workers' compensation claims against a fund member who becomes insolvent. The law only requires that the fund assume the workers' compensation obligations or liabilities of insolvent self-insurers. 46 A.G. Op. 1 (1995).

No Requirement That State Fund Provide Employers' Liability Insurance Coverage: Under 39-71-2316, the State Compensation Mutual Insurance Fund is authorized but not required to provide its policyholders with employers' liability insurance in connection with workers' compensation coverage and occupational disease coverage. 45 A.G. Op. 6 (1993).

39-71-2312. Definitions.

Compiler's Comments

2015 Amendment: Chapter 320 inserted definitions of commissioner, fiscal year, and guaranteed market; in definition of state fund at end of first sentence inserted "that serves as the guaranteed market for this state"; and made minor changes in style. Amendment effective January 1, 2016.

Applicability: Section 25, Ch. 320, L. 2015, provided that this section applies to rates that are effective on or after July 1, 2016, for new and renewal policies.

2005 Amendment: Chapter 26 deleted definition of department that read: ""Department" means the department of administration provided for in 2-15-1001"; and made minor changes in style. Amendment effective July 1, 2005.

Effective Date — Applicability: Section 12, Ch. 26, L. 2005, provided that this section is effective July 1, 2005, and applies to injuries occurring or occupational diseases contracted on or after July 1, 2005.

Name Change — Directions to Code Commissioner: Section 14, Ch. 630, L. 1993, provided: "Wherever the name "state compensation mutual insurance fund", meaning the fund established in 39-71-2313, appears in the Montana Code Annotated or in legislation enacted by the 1993 legislature, the code commissioner is directed to change the name to "state compensation insurance fund"." The phrase appeared in this section and was changed by the Code Commissioner as directed.

Effective Date: Section 65, Ch. 613, L. 1989, provided that this section is effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

39-71-2313. State compensation insurance fund created — obligation to insure.

Compiler's Comments

1995 Amendment: Chapter 305 inserted (2) requiring State Fund to insure any in-state employer requesting coverage and prohibiting Board from refusing coverage unless a default by employer remains unsatisfied; and made minor changes in style. Amendment effective July 1, 1995.

Name Change — Directions to Code Commissioner: Section 14, Ch. 630, L. 1993, provided: "Wherever the name "state compensation mutual insurance fund", meaning the fund established in 39-71-2313, appears in the Montana Code Annotated or in legislation enacted by the 1993 legislature, the code commissioner is directed to change the name to "state compensation insurance fund".” The phrase appeared in this section and was changed by the Code Commissioner as directed.

1990 Special Session Amendment: Deleted second sentence that provided State Fund exists as domestic mutual insurer as defined in 33-3-102. Amendment effective July 1, 1990.

Effective Date: Section 65, Ch. 613, L. 1989, provided that this section is effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

Attorney General's Opinions

OPINIONS AFTER 1987 GENERAL REVISION

No Requirement That State Fund Provide Employers' Liability Insurance Coverage: Under 39-71-2316, the State Compensation Mutual Insurance Fund is authorized but not required to provide its policyholders with employers' liability insurance in connection with workers' compensation coverage and occupational disease coverage. 45 A.G. Op. 6 (1993).

39-71-2315. Management of state fund — powers and duties of board — business plan required.

Compiler's Comments

2015 Amendment: Chapter 320 in (1) after “vested” deleted “solely” and at end inserted “subject to the statutory limitations imposed by this part”; in (2) in first sentence at end inserted “except that the board may not dissolve or liquidate the state fund”, in second sentence at beginning inserted “To fulfill the objectives and intent of this part”, in middle after “jurisdiction over the” deleted “state fund, either in the”, and at end substituted “and subject to the regulatory authority of the insurance commissioner in Title 33, except as provided in 33-1-115 and 39-71-2375” for “in order to fulfill the objectives and intent of this part”; in (4)(a) substituted “December 31” for “June 30”; in (6) substituted “January 1” for “July 1”, substituted “March 31” for “October 31”, and substituted “May 30” for “November 30”; and made minor changes in style. Amendment effective January 1, 2016.

Applicability: Section 25, Ch. 320, L. 2015, provided that this section applies to rates that are effective on or after July 1, 2016, for new and renewal policies.

1999 Amendment: Chapter 407 inserted (6) concerning in-house guidelines for certain procurements. Amendment effective April 21, 1999.

1993 Amendment: Chapter 619 inserted (3) requiring adoption of business plan; inserted (4) requiring business plan to be available to public for fee; and inserted (5) relating to public meeting and published report. Amendment effective July 1, 1993.

Severability: Section 29, Ch. 619, L. 1993, was a severability clause.

1990 Special Session Amendment: In (2) inserted third sentence prohibiting the Board, State Fund, or Executive Director from issuing bonds. Amendment effective July 1, 1990.

Effective Date: Section 65, Ch. 613, L. 1989, provided that this section is effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

39-71-2316. Powers of state fund.

Compiler's Comments

2015 Amendment: Chapter 320 in (1)(e) substituted current language regarding uniform classification system for former (1)(e) that read: “(e) adopt classifications and charge premiums for the classifications so that the state fund will be neither more nor less than self-supporting. Premium rates for classifications may be adopted and changed only by using a process, a procedure, formulas, and factors set forth in rules adopted under Title 2, chapter 4, parts 2 through 4. After the rules have been adopted, the state fund need not follow the rulemaking provisions of Title 2, chapter 4, when changing classifications and premium rates. The contested case rights and provisions of Title 2, chapter 4, do not apply to an employer's classification or premium rate. The state fund is required to belong to a licensed workers' compensation advisory organization or a licensed workers' compensation rating organization under Title 33, chapter 16, part 4, and may use the classifications of employment adopted by the designated workers' compensation advisory organization, as provided in Title 33, chapter 16, part 10, and corresponding rates as a basis for setting its own rates. Except as provided in Title 33, chapter 16, part 10, a workers' compensation advisory organization or a licensed workers' compensation rating organization under Title 33, chapter 16, part 4, or other person may not, without first obtaining the written permission of the employer, use, sell, or distribute an employer's specific payroll or loss information, including but not limited to experience modification factors”; inserted (1)(f) and (1)(g) regarding use of special classification codes and uniform experience rating plan; and made minor changes in style. Amendment effective January 1, 2016.

Applicability: Section 25, Ch. 320, L. 2015, provided that this section applies to rates that are effective on or after July 1, 2016, for new and renewal policies.

2005 Amendment: Chapter 130 in (1)(c) at beginning deleted "except as provided in section 21, Chapter 4, Special Laws of May 1990"; and made minor changes in style. Amendment effective October 1, 2005.

2003 Amendment: Chapter 603 inserted (2) concerning contractual restriction on use and transfer of money; and made minor changes in style. Amendment effective May 9, 2003.

Applicability: Section 6, Ch. 603, L. 2003, provided: "[This act] applies to policies issued or renewed by the state fund on or after [the effective date of this act]." Effective May 9, 2003.

2001 Amendment: Chapter 314 inserted (9) relating to alternative leave plans; inserted (12) relating to expenses for scholarships, education, and charity; inserted (13) allowing coverage under certain federal laws; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendment: (Temporary version) Chapter 276 inserted (1)(h) authorizing the State Fund to contract with licensed resident insurance producers; inserted (1)(i) authorizing the State Fund to enter into agreements with licensed insurers, associations, or producers in other states; inserted (2) requiring the State Fund to transfer $63.8 million to an account to pay claims for pre-1990 injuries before June 30, 1998; deleted (8) that authorized the State Fund to: "(8) declare dividends if there is an excess of assets over liabilities. However, dividends may not be paid until adequate actuarially determined reserves are set aside. If those reserves have been set aside, money that can be declared as a dividend must be transferred to the account created by 39-71-2321 for claims for injuries resulting from accidents that occurred before July 1, 1990, and used for the purposes of that account. After all claims funded by that account have been paid, dividends may be declared and paid to insureds"; and made minor changes in style. Amendment effective July 1, 1997, and terminates June 30, 1998.

(Version effective July 1, 1998) Chapter 276 deleted second sentence in (8) that read: "If those reserves have been set aside, money that can be declared as a dividend must be transferred to the account created by 39-71-2321 for claims for injuries resulting from accidents that occurred before July 1, 1990, and used for the purposes of that account. After all claims funded by that account have been paid, dividends may be declared and paid to insureds"; inserted (9) authorizing the State Fund to contract with licensed resident insurance producers; inserted (10) authorizing the State Fund to enter into agreements with licensed insurers, associations, or producers in other states; and made minor changes in style. Amendment effective July 1, 1998.

Preamble: The preamble attached to Ch. 276, L. 1997, provided: "WHEREAS, it is the intent of the state compensation insurance fund to assist all Montanans by reducing the unfunded liability of the old fund, terminating the old fund liability tax when the old fund is adequately funded, which is currently estimated to occur as early as June 30, 1999, providing for the payment of dividends to policyholders, and maintaining a viable state compensation insurance fund; and

WHEREAS, there was an unfunded liability of $355 million as of June 30, 1996, for claims for workers' compensation injuries occurring before July 1, 1990, in the old fund, which included $129 million in outstanding bond debt; and

WHEREAS, the old fund is funded with the old fund liability tax paid by employers, employees, and self-employed persons, generating as much as $50 million each year; and

WHEREAS, the surplus of $231 [sic] in the new fund as of June 30, 1996, allowed the Board of Directors of the State Fund to declare a dividend of up to $109 million to retire the outstanding bond debt in the old fund; and

WHEREAS, the unfunded liability in the old fund will be an estimated $200 million deficit by June 30, 1997, and the surplus or the excess of assets above the reserves that are set aside to meet the claim liability in the new fund will be an estimated $127 million by June 30, 1997; and

WHEREAS, current state law requires the State Fund to use dividends to be applied first to old fund outstanding liability rather than paying dividends directly to policyholders, the State Fund shall, no later than June 30, 1998, transfer $63.8 million to the old fund account to pay old fund claims to allow direct payment of dividends to policyholders; and

WHEREAS, the $20 million appropriation received by the State Fund from the general fund during the June 1989 Special Session partially addressed the unfunded liability issue existing at that time in the old fund and canceled a planned 22% rate increase; and

WHEREAS, the State Fund now agrees to repay the $20 million appropriation to the general fund by June 30, 1999, in lieu of transferring additional funds to the old fund account to provide the general fund with additional revenue and to remove any perception that the State Fund remains a burden on the general fund; and

WHEREAS, because decreases in premium rates totaled 35% in fiscal years 1996 and 1997 and legislative changes in benefit levels have resulted in the return of private carriers, the 15% limitation on administration expenses as a percent of the prior year's premium will significantly impact the State Fund's ability to provide service to policyholders and their injured workers; and

WHEREAS, the State Fund seeks to improve the level of services provided to customers without increasing existing State Fund staffing levels by working with private sector-licensed insurance producers; and

WHEREAS, in response to Haag v. Montana Schools Group Insurance Authority, 274 M 109, 906 P.2d 693 (1995), in which the Montana Supreme Court ruled that an insurer's failure to comply with the time limitations for accepting or denying a workers' compensation claim constituted acceptance of the claim, current law needs to be clarified to provide that the failure to comply with the time limitations does not constitute acceptance of the claim."

Severability: Section 32, Ch. 276, L. 1997, was a severability clause.

Termination: Section 35(2), Ch. 276, L. 1997, provided that the temporary version of 39-71-2316 terminates June 30, 1998.

1995 Amendments — Composite Section — Coordination: Chapter 26 in fifth sentence of (5), after "compensation insurance and", substituted "may" for "shall"; and made minor changes in style. Amendment effective February 2, 1995. This chapter was voided by sec. 30, Ch. 186, and sec. 5, Ch. 305, L. 1995, both coordination sections.

Chapter 186 in (5), in fifth sentence after "belong to", substituted "a licensed workers' compensation advisory organization or a licensed workers' compensation rating organization under Title 33, chapter 16, part 4" for "the national council on compensation insurance", substituted "may" for "shall", and substituted "designated workers' compensation advisory organization, as provided in Title 33, chapter 16, part 10" for "national council" and inserted last sentence prohibiting use, sale, or distribution of payroll or loss information without employer's prior written approval; and made minor changes in style.

Chapter 305 in (1), after "state", inserted language authorizing State Fund to provide related employers' liability insurance upon Board approval and deleted second sentence that read: "The state fund may charge a minimum yearly premium to cover its administrative costs for coverage of a small employer"; in fourth sentence in (5) substituted language requiring State Fund to belong to licensed workers' compensation advisory organization or licensed workers' compensation rating organization for "state fund must belong to the national council on compensation insurance" and at end substituted language authorizing use of classifications adopted by workers' compensation advisory organization for former language requiring State Fund to "use the classifications of employment adopted by the national council" and inserted last sentence prohibiting, except as provided by law, use, sale, or distribution by advisory or rating organization of employer's payroll or loss information without prior written permission; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Saving Clause: Section 32, Ch. 186, L. 1995, was a saving clause.

Severability: Section 33, Ch. 186, L. 1995, was a severability clause.

Applicability: Section 34, Ch. 186, L. 1995, provided: "[This act] applies to rate filings by the advisory organization on or after [the effective date of this act] [effective October 1, 1995] and to rates filed by insurers on or after the effective date of the advisory organization's initially approved loss cost filing."

1993 Amendment: Chapter 630 at end of first sentence of (1), after "state", deleted "and, in connection with the coverage, provide employers' liability insurance"; deleted former (3) that read: "(3) adopt, amend, and repeal rules relating to the conduct of its business"; and near middle of (9) substituted "private insurance carrier" for "domestic mutual insurer". Amendment effective July 1, 1993.

Severability: Section 15, Ch. 630, L. 1993, was a severability clause.

Saving Clause: Section 16, Ch. 630, L. 1993, was a saving clause.

1990 Special Session Amendment: In (4) inserted exception clause; in (6) inserted second through fourth sentences providing that rates must be adopted following rulemaking procedures under Montana Administrative Procedure Act, exempting State Fund from following Act when changing classifications and rates, and providing that contested case procedures do not apply to classification or premium rate; and in (9), in second sentence after "may not be paid", substituted "until adequate actuarially determined reserves are set aside" for "until the unfunded liability of the state fund is eliminated and adequate actuarially determined reserves are determined" and inserted third and fourth sentences providing that after reserves have been set aside, dividends may not be paid until claims for injuries resulting from accidents that occurred before July 1, 1990, have been paid. Amendment effective July 1, 1990.

Exemption From Notice Requirement: Section 12, Ch. 9, Sp. L. June 1989, provided: "The 30-day notice requirement imposed under 39-71-2304(1) does not apply to rate changes effective July 1, 1989, made in response to the provisions of [this act]."

1989 Statement of Intent: The statement of intent attached to Ch. 613, L. 1989, provided: "A statement of intent is required for this bill because [section 8] [39-71-2316] grants rulemaking authority to the newly created state fund to adopt or repeal rules or amend existing rules to implement the new state compensation mutual insurance fund [now state compensation fund]. The chief purposes of creating the state fund as a mutual insurer and placing it in a department other than the department of labor are:

(1) to remove the inherent conflict between the interests of the workers' compensation division in regulating all workers' compensation insurers in this state, including the state compensation insurance fund, and the interests of the state fund as a workers' compensation insurer; and

(2) to ensure the solvency of the new state fund.

The legislature recognizes that the fund actuary has determined that at June 30, 1988, a full funding deficiency of $157.3 million existed for the present state compensation insurance fund. The legislature intends that the new state compensation mutual insurance fund [now state compensation insurance fund] adopt rules in a manner that will assure the solvency of the new fund. Rates must be set on an actuarially sound basis as required by state law. The new state fund would be bound to insure all employers who apply to it for workers' compensation coverage and shall insure state agencies.

As the primary means of ensuring the solvency of the state fund, it must institute safety programs and set rates in a manner that awards employers who provide a safe working environment and penalizes employers who do not.

The legislature further intends that the new state fund institute programs to automate the processing of claims and payment of benefits. The state fund may contract out to the private sector certain claims administration and servicing functions if the state fund determines it to be cost-effective.

The legislature intends that the governor shall implement staggered terms in naming the initial members of the board."

Effective Date: Section 65, Ch. 613, L. 1989, provided that this section is effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

Case Notes

DECISIONS AFTER 1987 GENERAL REVISION

Contributory Negligence Defense Allowed in FELA Claim — Federal Law Applied: A railroad employee sued a railroad for injuries he received on the job while walking on a narrow, snowy, and slushy walkway instead of an alternative path, and the issue of contributory negligence was submitted to the jury. The Supreme Court determined that contributory negligence remains a valid defense in a Federal Employers' Liability Act (FELA) action and that some evidence existed indicating the employee's injury was attributable in part to his own actions. An employee is entitled to recover damages under FELA as long as the employer's negligence played any role in producing the employee's injury, but damages are reduced to the extent the employee was contributorily negligent. Cheff v. BNSF Ry. Co., 2010 MT 235, 358 Mont. 144, 243 P.3d 1115, following Taylor v. Burlington N. R.R. Co., 787 F2d 1309 (9th Cir. 1986).

State Fund Subject to MAPA Unless Changing Classifications or Rates — Formal Rule Adopting General Rules of Manual and Association Plans Not Required: After the State Fund published notice of its intent to adopt rules establishing classification rates, the Montana Health Care Association filed an action alleging that the State Fund had violated the Montana Administrative Procedure Act (MAPA) by not formally adopting the "General Rules" section of the Underwriting Manual or criteria for association plans. The Supreme Court upheld the lower court's decision. The State Fund is required to follow MAPA in establishing rates, but MAPA does not require the State Fund to adopt by formal rule either the Underwriting Manual or association plan criteria. Mont. Health Care Ass'n v. St. Fund, 256 M 146, 845 P2d 113, 50 St. Rep. 1 (1993).

Attorney General's Opinions

OPINIONS AFTER 1987 GENERAL REVISION

No Requirement That State Fund Provide Employers' Liability Insurance Coverage: Under this section, the State Compensation Mutual Insurance Fund (now State Compensation Insurance Fund) is authorized but not required to provide its policyholders with employers' liability insurance in connection with workers' compensation coverage and occupational disease coverage. (See 1993 amendment.) 45 A.G. Op. 6 (1993).

39-71-2317. Appointment of executive director — management staff.

Compiler's Comments

Effective Date: Section 65, Ch. 613, L. 1989, provided that this section is effective April 21, 1989.

Case Notes

Management Staff of State Workers' Compensation Fund Covered by Wrongful Discharge Act: This section, providing that management staff of the state workers' compensation fund "serves at the pleasure of the executive director", does not exempt the State Fund from the Wrongful Discharge From Employment Act; it only means that the executive director may hire and retain management staff at the director's choice without interference from the State Fund's board of directors. MacMillan v. St. Comp. Ins. Fund, 285 M 202, 947 P2d 75, 54 St. Rep. 1112 (1997).

39-71-2318. Personal liability excluded.

Compiler's Comments

Effective Date: Section 65, Ch. 613, L. 1989, provided that this section is effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

Case Notes

State Fund and Board of Investment Board Members Immune from Liability: The District Court properly denied the plaintiffs' motion to amend their complaint to assert claims against individual members of the State Fund Board of Directors and the Board of Investments. The board members are statutorily immune from liability and therefore it would be futile to name a member as a defendant. On appeal, the Supreme Court affirmed the denial of the plaintiffs' proposed amendment to their complaint. Moody's Market, Inc. v. Mont. St. Fund, 2020 MT 217, 401 Mont. 168, 471 P.3d 68.

39-71-2319. Assets and liabilities of prior state fund.

Compiler's Comments

1989 Code Commissioner Correction: The code commissioner substituted "former 39-71-2301, 39-71-2302, 39-71-2304 through 39-71-2306, and 39-71-2324 and 39-71-2321 through 39-71-2323, 39-71-2325 through 39-71-2327, 39-71-2336, 39-71-2339, and 39-71-2340" for "39-71-2301 through 39-71-2308 and 39-71-2321 through 39-71-2327" to reflect that some of those sections were repealed or renumbered.

Effective Date: Section 65, Ch. 613, L. 1989, provided that this section is effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

39-71-2320. Property of state fund — investment required — exception.

Compiler's Comments

2017 Special Session Amendment: Chapter 4 in first sentence at beginning and in second sentence at beginning inserted exception clause; and made minor changes in style. Amendment effective November 24, 2017, and terminates June 30, 2019.

Applicability: Section 5, Ch. 4, Sp. L. November 2017, provided: "[This act] applies to calendar years 2017 and 2018, and the 3% management rate is payable to the fire suppression account provided for in 76-13-150 by April 1, 2018, and April 1, 2019, respectively."

2003 Amendment: Chapter 603 at beginning of first sentence deleted "Except as provided in subsection (2)"; in second sentence after "state fund" inserted "for claims for injuries occurring on or after July 1, 1990" and at end inserted "and may not be transferred by the legislature to other funds or used for other programs"; at end of third sentence inserted "and subject to the investment agreement with the board of investments, the earnings on investments are the sole property of the state fund as provided in this section"; deleted former (2) that read: "(2) The state fund shall pay to the general fund:

(a) $10 million in the fiscal year ending June 30, 1998; and

(b) $10 million in the fiscal year ending June 30, 1999"; and made minor changes in style. Amendment effective May 9, 2003.

Applicability: Section 6, Ch. 603, L. 2003, provided: "[This act] applies to policies issued or renewed by the state fund on or after [the effective date of this act]." Effective May 9, 2003.

1997 Amendment: Chapter 276 at beginning of (1) inserted exception clause; inserted (2) requiring the State Fund to pay $10 million to the general fund by the end of fiscal years 1998 and 1999; and made minor changes in style. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 276, L. 1997, provided: "WHEREAS, it is the intent of the state compensation insurance fund to assist all Montanans by reducing the unfunded liability of the old fund, terminating the old fund liability tax when the old fund is adequately funded, which is currently estimated to occur as early as June 30, 1999, providing for the payment of dividends to policyholders, and maintaining a viable state compensation insurance fund; and

WHEREAS, there was an unfunded liability of $355 million as of June 30, 1996, for claims for workers' compensation injuries occurring before July 1, 1990, in the old fund, which included $129 million in outstanding bond debt; and

WHEREAS, the old fund is funded with the old fund liability tax paid by employers, employees, and self-employed persons, generating as much as $50 million each year; and

WHEREAS, the surplus of $231 [sic] in the new fund as of June 30, 1996, allowed the Board of Directors of the State Fund to declare a dividend of up to $109 million to retire the outstanding bond debt in the old fund; and

WHEREAS, the unfunded liability in the old fund will be an estimated $200 million deficit by June 30, 1997, and the surplus or the excess of assets above the reserves that are set aside to meet the claim liability in the new fund will be an estimated $127 million by June 30, 1997; and

WHEREAS, current state law requires the State Fund to use dividends to be applied first to old fund outstanding liability rather than paying dividends directly to policyholders, the State Fund shall, no later than June 30, 1998, transfer $63.8 million to the old fund account to pay old fund claims to allow direct payment of dividends to policyholders; and

WHEREAS, the $20 million appropriation received by the State Fund from the general fund during the June 1989 Special Session partially addressed the unfunded liability issue existing at that time in the old fund and canceled a planned 22% rate increase; and

WHEREAS, the State Fund now agrees to repay the $20 million appropriation to the general fund by June 30, 1999, in lieu of transferring additional funds to the old fund account to provide the general fund with additional revenue and to remove any perception that the State Fund remains a burden on the general fund; and

WHEREAS, because decreases in premium rates totaled 35% in fiscal years 1996 and 1997 and legislative changes in benefit levels have resulted in the return of private carriers, the 15% limitation on administration expenses as a percent of the prior year's premium will significantly impact the State Fund's ability to provide service to policyholders and their injured workers; and

WHEREAS, the State Fund seeks to improve the level of services provided to customers without increasing existing State Fund staffing levels by working with private sector-licensed insurance producers; and

WHEREAS, in response to Haag v. Montana Schools Group Insurance Authority, 274 M 109, 906 P.2d 693 (1995), in which the Montana Supreme Court ruled that an insurer's failure to comply with the time limitations for accepting or denying a workers' compensation claim constituted acceptance of the claim, current law needs to be clarified to provide that the failure to comply with the time limitations does not constitute acceptance of the claim."

Severability: Section 32, Ch. 276, L. 1997, was a severability clause.

1995 Amendment: Chapter 424 in (1) of contingent version inserted last sentence concerning investment in common stocks; and inserted (2) concerning limit on investment in common stocks. Amendment effective July 1, 1997.

Coordination Instruction: Section 5, Ch. 424, L. 1995, provided: "If House Bill No. 463 is not passed and approved by the electorate, then [section 3 of this act] [amending 39-71-2320] is void." House Bill No. 463, authorizing investment in common stocks, was submitted to the electorate as C-31 in the general election in November 1996. C-31 was not approved by the electorate.

Effective Date: Section 65, Ch. 613, L. 1989, provided that this section is effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

Case Notes

Constitutionality of Since-Terminated Statutes — No Longer Justiciable: Although the statutes at issue regarding the State Fund were still in effect at the time the plaintiffs brought suit in District Court challenging their constitutionality, the statutes terminated before the plaintiffs appealed to the Supreme Court. Therefore, the statutes were neither constitutional nor unconstitutional because they were no longer statutes, and the case before the Supreme Court was no longer justiciable. Moody's Market, Inc. v. Mont. St. Fund, 2020 MT 217, 401 Mont. 168, 471 P.3d 68.

39-71-2321. What to be deposited in state fund.

Compiler's Comments

2007 Amendment: Chapter 475 in (1) near middle of first sentence after "accordance with" substituted "17-2-124" for "15-1-501". Amendment effective May 8, 2007.

Retroactive Applicability: Section 31, Ch. 475, L. 2007, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all tax and fee periods beginning after December 31, 2006, and to taxes and fees collected by audit after December 31, 2006, or taxes and fees collected after December 31, 2006, if the payment was made after the date on which the tax was payable."

1999 Amendments — Composite Section: Chapter 184 in (1) in first sentence after "money" deleted "taxes collected under 39-71-2503 and 39-71-2505" and at beginning of second sentence inserted exception clause; and made minor changes in style. Amendment effective March 26, 1999.

Chapter 389 at end of (2) substituted "may be spent as provided in 17-8-101(2)(b)" for "are statutorily appropriated as provided in 17-7-502"; and made minor changes in style. Amendment effective July 1, 1999.

1997 Amendment: (Temporary version) Chapter 276 in (1), in first sentence after "money", inserted "taxes collected under 39-71-2503 and 39-71-2505, and the interest and penalties on the taxes in accordance with 15-1-501"; and made minor changes in style. Amendment effective July 1, 1997, and terminates on the date that the old fund liability tax is terminated pursuant to 39-71-2505 (now repealed).

(Version effective on occurrence of contingency) Chapter 276 in (1), in first sentence after "money", inserted "taxes collected under 39-71-2503 and 39-71-2505, and the interest and penalties on the taxes in accordance with 15-1-501"; deleted former (2) that read: "(2) The proceeds of bonds issued and loans given to the state fund under 39-71-2354 and 39-71-2355 must be deposited in the account for claims for injuries resulting from accidents that occurred before July 1, 1990"; and made minor changes in style. Amendment effective on the date that the budget director certifies that the old fund liability tax is terminated pursuant to 39-71-2505 (now repealed).

Preamble: The preamble attached to Ch. 276, L. 1997, provided: "WHEREAS, it is the intent of the state compensation insurance fund to assist all Montanans by reducing the unfunded liability of the old fund, terminating the old fund liability tax when the old fund is adequately funded, which is currently estimated to occur as early as June 30, 1999, providing for the payment of dividends to policyholders, and maintaining a viable state compensation insurance fund; and

WHEREAS, there was an unfunded liability of $355 million as of June 30, 1996, for claims for workers' compensation injuries occurring before July 1, 1990, in the old fund, which included $129 million in outstanding bond debt; and

WHEREAS, the old fund is funded with the old fund liability tax paid by employers, employees, and self-employed persons, generating as much as $50 million each year; and

WHEREAS, the surplus of $231 [sic] in the new fund as of June 30, 1996, allowed the Board of Directors of the State Fund to declare a dividend of up to $109 million to retire the outstanding bond debt in the old fund; and

WHEREAS, the unfunded liability in the old fund will be an estimated $200 million deficit by June 30, 1997, and the surplus or the excess of assets above the reserves that are set aside to meet the claim liability in the new fund will be an estimated $127 million by June 30, 1997; and

WHEREAS, current state law requires the State Fund to use dividends to be applied first to old fund outstanding liability rather than paying dividends directly to policyholders, the State Fund shall, no later than June 30, 1998, transfer $63.8 million to the old fund account to pay old fund claims to allow direct payment of dividends to policyholders; and

WHEREAS, the $20 million appropriation received by the State Fund from the general fund during the June 1989 Special Session partially addressed the unfunded liability issue existing at that time in the old fund and canceled a planned 22% rate increase; and

WHEREAS, the State Fund now agrees to repay the $20 million appropriation to the general fund by June 30, 1999, in lieu of transferring additional funds to the old fund account to provide the general fund with additional revenue and to remove any perception that the State Fund remains a burden on the general fund; and

WHEREAS, because decreases in premium rates totaled 35% in fiscal years 1996 and 1997 and legislative changes in benefit levels have resulted in the return of private carriers, the 15% limitation on administration expenses as a percent of the prior year's premium will significantly impact the State Fund's ability to provide service to policyholders and their injured workers; and

WHEREAS, the State Fund seeks to improve the level of services provided to customers without increasing existing State Fund staffing levels by working with private sector-licensed insurance producers; and

WHEREAS, in response to Haag v. Montana Schools Group Insurance Authority, 274 M 109, 906 P.2d 693 (1995), in which the Montana Supreme Court ruled that an insurer's failure to comply with the time limitations for accepting or denying a workers' compensation claim constituted acceptance of the claim, current law needs to be clarified to provide that the failure to comply with the time limitations does not constitute acceptance of the claim."

Transfer Of Funds: Section 30, Ch. 276, L. 1997 provided: "The balance remaining in the workers' compensation bond repayment account on June 30, 1997, must be deposited in the state fund as provided in 39-71-2321."

Severability: Section 32, Ch. 276, L. 1997, was a severability clause.

Contingent Termination: Section 35(1), Ch. 276, L. 1997, provided that the temporary version of 39-71-2321 terminates on the date that the old fund liability tax is terminated. On September 16, 1998, the budget director certified that the old fund liability tax terminates effective January 1, 1999.

1993 Amendment: Chapter 630 inserted (1)(b) statutorily appropriating funds deposited in the state fund. Amendment effective July 1, 1993.

Severability: Section 15, Ch. 630, L. 1993, was a severability clause.

Saving Clause: Section 16, Ch. 630, L. 1993, was a saving clause.

1991 Amendment: In (2) substituted "proceeds of bonds issued and loans given to the state fund under 39-71-2354 and 39-71-2355" for "loan proceeds given to the state fund under 39-71-2353". Amendment effective July 1, 1991.

Saving Clause: Section 10, Ch. 797, L. 1991, was a saving clause.

Severability: Section 11, Ch. 797, L. 1991, was a severability section.

1990 Special Session Amendment: In (1) inserted second sentence requiring separation into accounts of amounts relating to claims for injuries resulting from accidents that occurred before July 1, 1990, and claims for injuries resulting from accidents occurring on or after that date; and inserted (2) providing that loan proceeds under 39-71-2353 (now repealed) must be deposited in account for claims for injuries resulting from accidents that occurred before July 1, 1990. Amendment effective July 1, 1990.

1989 Amendment: At end changed "industrial insurance expendable trust fund" to "state fund"; and made minor changes in phraseology. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

1983 Amendment: At end of section, substituted "expendable trust fund" for "account in the agency fund".

Severability Clause: Section 23, Ch. 329, L. 1969, was a severability clause.

Attorney General's Opinions

Unfunded Liability in Industrial Insurance Expendable Trust Fund Not State Debt: To the extent an unfunded liability may exist in the industrial insurance expendable trust fund, it has arisen not by conscious act of the Legislature but from a combination of circumstances that resulted in a mismatch between liability incurred and trust fund deposits. Further, no claim was made that the trust fund's corpus would be inadequate to satisfy accrued benefit payment obligations. For these reasons, the unfunded liability was not considered a "state debt" within the meaning of Art. VIII, sec. 8, Mont. Const. 42 A.G. Op. 46 (1987).

39-71-2322. Money in state fund held in trust — disposition of funds upon repeal of chapter.

Compiler's Comments

2003 Amendment: Chapter 603 at beginning deleted "Except as provided in 39-71-2320"; and made minor changes in style. Amendment effective May 9, 2003.

Applicability: Section 6, Ch. 603, L. 2003, provided: "[This act] applies to policies issued or renewed by the state fund on or after [the effective date of this act]." Effective May 9, 2003.

1997 Amendment: Chapter 276 at beginning of first sentence inserted exception clause; and made minor changes in style. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 276, L. 1997, provided: "WHEREAS, it is the intent of the state compensation insurance fund to assist all Montanans by reducing the unfunded liability of the old fund, terminating the old fund liability tax when the old fund is adequately funded, which is currently estimated to occur as early as June 30, 1999, providing for the payment of dividends to policyholders, and maintaining a viable state compensation insurance fund; and

WHEREAS, there was an unfunded liability of $355 million as of June 30, 1996, for claims for workers' compensation injuries occurring before July 1, 1990, in the old fund, which included $129 million in outstanding bond debt; and

WHEREAS, the old fund is funded with the old fund liability tax paid by employers, employees, and self-employed persons, generating as much as $50 million each year; and

WHEREAS, the surplus of $231 [sic] in the new fund as of June 30, 1996, allowed the Board of Directors of the State Fund to declare a dividend of up to $109 million to retire the outstanding bond debt in the old fund; and

WHEREAS, the unfunded liability in the old fund will be an estimated $200 million deficit by June 30, 1997, and the surplus or the excess of assets above the reserves that are set aside to meet the claim liability in the new fund will be an estimated $127 million by June 30, 1997; and

WHEREAS, current state law requires the State Fund to use dividends to be applied first to old fund outstanding liability rather than paying dividends directly to policyholders, the State Fund shall, no later than June 30, 1998, transfer $63.8 million to the old fund account to pay old fund claims to allow direct payment of dividends to policyholders; and

WHEREAS, the $20 million appropriation received by the State Fund from the general fund during the June 1989 Special Session partially addressed the unfunded liability issue existing at that time in the old fund and canceled a planned 22% rate increase; and

WHEREAS, the State Fund now agrees to repay the $20 million appropriation to the general fund by June 30, 1999, in lieu of transferring additional funds to the old fund account to provide the general fund with additional revenue and to remove any perception that the State Fund remains a burden on the general fund; and

WHEREAS, because decreases in premium rates totaled 35% in fiscal years 1996 and 1997 and legislative changes in benefit levels have resulted in the return of private carriers, the 15% limitation on administration expenses as a percent of the prior year's premium will significantly impact the State Fund's ability to provide service to policyholders and their injured workers; and

WHEREAS, the State Fund seeks to improve the level of services provided to customers without increasing existing State Fund staffing levels by working with private sector-licensed insurance producers; and

WHEREAS, in response to Haag v. Montana Schools Group Insurance Authority, 274 M 109, 906 P.2d 693 (1995), in which the Montana Supreme Court ruled that an insurer's failure to comply with the time limitations for accepting or denying a workers' compensation claim constituted acceptance of the claim, current law needs to be clarified to provide that the failure to comply with the time limitations does not constitute acceptance of the claim."

Severability: Section 32, Ch. 276, L. 1997, was a severability clause.

1989 Amendment: In first sentence changed "industrial insurance expendable trust fund" to "state fund"; and made minor changes in phraseology. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

1983 Amendment: Near beginning of section, substituted "expendable trust fund" for "account in the agency fund".

39-71-2323. Surplus in state fund — payment of dividends.

Compiler's Comments

2015 Amendment: Chapter 320 in last sentence at beginning before "state fund" deleted "rules of the". Amendment effective January 1, 2016.

Applicability: Section 25, Ch. 320, L. 2015, provided that this section applies to rates that are effective on or after July 1, 2016, for new and renewal policies.

1999 Amendment: Chapter 407 at end of first sentence substituted "an appropriate surplus as determined by the board in accordance with 39-71-2330, and if the excess may be refunded safely, then the board, after consultation with the independent actuary engaged pursuant to 39-71-2330, may declare a dividend" for "a reasonable surplus and if the excess may be refunded safely, then the state fund may declare a dividend"; at end of second sentence deleted "chargeable to them in the fund for that year"; and deleted former third sentence that read: "In determining the amount or proportion of the balance to which the employer is entitled as dividends, the state fund shall give consideration to the prior paid premiums and accident experience of each individual employer during the dividend year." Amendment effective July 1, 1999.

1993 Amendment: Chapter 630 near beginning of first sentence, after "39-71-2316", deleted "(9)". Amendment effective July 1, 1993.

Severability: Section 15, Ch. 630, L. 1993, was a severability clause.

Saving Clause: Section 16, Ch. 630, L. 1993, was a saving clause.

1990 Special Session Amendment: Substituted first and second sentences allowing State Fund to declare dividend if excess of assets exists in account for claims for injuries resulting from accidents that occur on or after July 1, 1990, including necessary reserves and reasonable surplus, for former first sentence that allowed payment of dividend if excess of assets and reasonable surplus exist, including necessary reserves; and made minor changes in phraseology. Amendment effective July 1, 1990.

1989 Amendment: In two places changed "industrial insurance expendable trust fund" to "state fund" and in three places changed "division" to "state fund"; and made minor changes in phraseology. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

1983 Amendment: Substituted three references to the industrial insurance expendable trust fund for references to the industrial insurance account in the agency fund.

39-71-2325. State fund to keep accounts of segregations.

Compiler's Comments

1989 Amendment: Changed "division" to "state fund" and "industrial insurance expendable trust fund" to "state fund"; and made minor change in phraseology. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

1983 Amendment: Substituted two references to the industrial insurance expendable trust fund for references to the industrial insurance account in the agency fund.

39-71-2327. Earnings of state fund to be credited to fund — improper use a felony.

Compiler's Comments

2003 Amendment: Chapter 603 at beginning deleted "Except as provided in 39-71-2320"; and made minor changes in style. Amendment effective May 9, 2003.

Applicability: Section 6, Ch. 603, L. 2003, provided: "[This act] applies to policies issued or renewed by the state fund on or after [the effective date of this act]." Effective May 9, 2003.

1997 Amendment: Chapter 276 at beginning of first sentence inserted exception clause; and made minor changes in style. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 276, L. 1997, provided: "WHEREAS, it is the intent of the state compensation insurance fund to assist all Montanans by reducing the unfunded liability of the old fund, terminating the old fund liability tax when the old fund is adequately funded, which is currently estimated to occur as early as June 30, 1999, providing for the payment of dividends to policyholders, and maintaining a viable state compensation insurance fund; and

WHEREAS, there was an unfunded liability of $355 million as of June 30, 1996, for claims for workers' compensation injuries occurring before July 1, 1990, in the old fund, which included $129 million in outstanding bond debt; and

WHEREAS, the old fund is funded with the old fund liability tax paid by employers, employees, and self-employed persons, generating as much as $50 million each year; and

WHEREAS, the surplus of $231 [sic] in the new fund as of June 30, 1996, allowed the Board of Directors of the State Fund to declare a dividend of up to $109 million to retire the outstanding bond debt in the old fund; and

WHEREAS, the unfunded liability in the old fund will be an estimated $200 million deficit by June 30, 1997, and the surplus or the excess of assets above the reserves that are set aside to meet the claim liability in the new fund will be an estimated $127 million by June 30, 1997; and

WHEREAS, current state law requires the State Fund to use dividends to be applied first to old fund outstanding liability rather than paying dividends directly to policyholders, the State Fund shall, no later than June 30, 1998, transfer $63.8 million to the old fund account to pay old fund claims to allow direct payment of dividends to policyholders; and

WHEREAS, the $20 million appropriation received by the State Fund from the general fund during the June 1989 Special Session partially addressed the unfunded liability issue existing at that time in the old fund and canceled a planned 22% rate increase; and

WHEREAS, the State Fund now agrees to repay the $20 million appropriation to the general fund by June 30, 1999, in lieu of transferring additional funds to the old fund account to provide the general fund with additional revenue and to remove any perception that the State Fund remains a burden on the general fund; and

WHEREAS, because decreases in premium rates totaled 35% in fiscal years 1996 and 1997 and legislative changes in benefit levels have resulted in the return of private carriers, the 15% limitation on administration expenses as a percent of the prior year's premium will significantly impact the State Fund's ability to provide service to policyholders and their injured workers; and

WHEREAS, the State Fund seeks to improve the level of services provided to customers without increasing existing State Fund staffing levels by working with private sector-licensed insurance producers; and

WHEREAS, in response to Haag v. Montana Schools Group Insurance Authority, 274 M 109, 906 P.2d 693 (1995), in which the Montana Supreme Court ruled that an insurer's failure to comply with the time limitations for accepting or denying a workers' compensation claim constituted acceptance of the claim, current law needs to be clarified to provide that the failure to comply with the time limitations does not constitute acceptance of the claim."

Severability: Section 32, Ch. 276, L. 1997, was a severability clause.

1989 Amendment: Near beginning of first sentence changed "industrial insurance expendable trust fund" to "state fund"; and made minor changes in phraseology. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

1983 Amendment: Substituted three references to the industrial insurance expendable trust fund for references to the industrial insurance account in the agency fund.

39-71-2328. State fund alternative personal leave plan — exception — collective bargaining negotiation — personal leave definition.

Compiler's Comments

Report to Legislative Committee: Section 12, Ch. 314, L. 2001, provided: "Prior to the 2003 legislative session, the state compensation insurance fund shall report on the development of its alternative personal leave plan to the state administration, public retirement systems, and veterans' affairs interim committee [now state administration and veterans' affairs interim committee]."

Effective Date: Section 14(2), Ch. 314, L. 2001, provided that this section is effective July 1, 2001.

39-71-2330. Rate setting — surplus — multiple rating tiers.

Compiler's Comments

2015 Amendment: Chapter 320 in (1) at end of first sentence substituted "and the supplementary rate information to determine the applicable premium as provided in 39-71-2311 and 39-71-2316 and shall file the rates and supplementary rate information with the commissioner as provided in Title 33, chapter 16" for "for insurance"; in (2) at end of first sentence deleted "but shall maintain a minimum surplus of 25% of annual earned premium"; in (3) near beginning substituted "establish" for "implement" and inserted last sentence regarding filing multiple rating tiers. Amendment effective January 1, 2016.

Applicability: Section 25, Ch. 320, L. 2015, provided that this section applies to rates that are effective on or after July 1, 2016, for new and renewal policies.

2001 Amendment: Chapter 314 inserted (3) authorizing multiple rating tiers. Amendment effective July 1, 2002.

1999 Amendment: Chapter 407 in (1) at end of third sentence substituted "an excess of surplus over the amount produced by the national association of insurance commissioners' risk-based capital requirements for a casualty insurer" for "by July 1, 2003, a surplus of 25% of the annual premium"; and inserted (2) concerning determination of appropriate level of surplus. Amendment effective July 1, 1999.

Severability: Section 15, Ch. 630, L. 1993, was a severability clause.

Saving Clause: Section 16, Ch. 630, L. 1993, was a saving clause.

Effective Date: Section 18(2), Ch. 630, L. 1993, provided that this section is effective July 1, 1993.

39-71-2331. Workplace safety program.

Compiler's Comments

Preamble: The preamble attached to Ch. 218, L. 2009, provided: "WHEREAS, Workers' Compensation Plan No. 3, an insurer for all businesses in Montana, is a nonprofit, independent, public corporation that nevertheless is a creation of the state; and

WHEREAS, more than 90% of businesses in Montana have fewer than 20 employees and more than 80% of businesses in Montana have fewer than 10 employees, with many if not most of these small businesses obtaining workers' compensation insurance from the State Fund because not all private insurers write for small businesses; and

WHEREAS, Montana's workers' compensation rates among all insurers are the second highest in the nation and the current economic crisis has the potential to hit all employers hard, but especially small businesses that may have fewer lifelines for survival than larger businesses; and

WHEREAS, the opportunity to pool risk in a group that has made a commitment to safety yields the potential to benefit small businesses by reducing losses and possibly generating a return on premium."

Effective Date — Applicability: Section 5, Ch. 218, L. 2009, provided: "[This act] is effective July 1, 2009, and applies to groups formed on or after July 1, 2010."

39-71-2332. Pooled risk safety group.

Compiler's Comments

2015 Amendment: Chapter 320 in (1) at beginning inserted "Subject to Title 33, chapter 16"; and made minor changes in style. Amendment effective January 1, 2016.

Applicability: Section 25, Ch. 320, L. 2015, provided that this section applies to rates that are effective on or after July 1, 2016, for new and renewal policies.

Preamble: The preamble attached to Ch. 218, L. 2009, provided: "WHEREAS, Workers' Compensation Plan No. 3, an insurer for all businesses in Montana, is a nonprofit, independent, public corporation that nevertheless is a creation of the state; and

WHEREAS, more than 90% of businesses in Montana have fewer than 20 employees and more than 80% of businesses in Montana have fewer than 10 employees, with many if not most of these small businesses obtaining workers' compensation insurance from the State Fund because not all private insurers write for small businesses; and

WHEREAS, Montana's workers' compensation rates among all insurers are the second highest in the nation and the current economic crisis has the potential to hit all employers hard, but especially small businesses that may have fewer lifelines for survival than larger businesses; and

WHEREAS, the opportunity to pool risk in a group that has made a commitment to safety yields the potential to benefit small businesses by reducing losses and possibly generating a return on premium."

Effective Date — Applicability: Section 5, Ch. 218, L. 2009, provided: "[This act] is effective July 1, 2009, and applies to groups formed on or after July 1, 2010."

39-71-2336. Manner of electing — contract or policy of insurance — payment of premium.

Compiler's Comments

2005 Amendment: Chapter 69 inserted third sentence requiring that all operations of a Montana employer covered by plan No. 3 be insured by the state compensation insurance fund; and made minor changes in style. Amendment effective July 1, 2005.

Applicability: Section 17(3), Ch. 69, L. 2005, provided: "[Sections 9 and 12] [amending 39-71-2203 and 39-71-2336] apply to policies written or renewed on or after July 1, 2005."

1989 Amendment: In five places changed "division" to "state fund"; at end of second sentence changed "division" to "department"; at end of third sentence substituted "state fund" for "industrial insurance expendable trust fund"; and made minor changes in phraseology. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

1983 Amendment: At end of section, substituted "expendable trust fund" for "account in the agency fund".

Case Notes

When Coverage Effective: An application for workers' compensation plan No. 3 coverage was made on an obsolete form, six entities were listed on the form rather than one as required by administrative rule, and the application had not been processed by the Workers' Compensation Division (now State Fund) and approved or disapproved prior to the time of a claim under the policy. The court held that coverage was effective as of the date the Division (now State Fund) received the application in the mail, pursuant to ARM 24.29.3501 (now repealed). Reiser v. St. Comp. Ins. Fund, 230 M 340, 750 P2d 109, 45 St. Rep. 256 (1988).

Failure to Adopt Procedural Rules — Coverage Mandatory: Defendant established Bennett Well Service in 1975 and enrolled in the Workers' Compensation program, including an election to cover himself as a sole employer. In June 1979, his son began work for him. On June 26, the son fractured his leg. An injury report was filed July 2, 1979. On July 13, 1979, defendant elected coverage for his son and on July 31, 1979, the end of the quarter, sent in quarterly reports and premiums, including a premium for his son. Section 39-71-203 gives the Division (now State Fund) the authority to administer the Workers' Compensation Act. This section orders the Division (now State Fund) to prescribe procedures by which employers may elect to be bound by compensation plan No. 3, including the effective time of the election. The Division (now State Fund) failed to adopt rules prescribing the proper procedure other than reporting and paying procedures, which defendant followed. Because it had not adopted rules governing the election procedure, the Division (now State Fund) could not deny coverage of plaintiff. Bennett v. Bennett, 196 M 22, 637 P2d 512, 38 St. Rep. 2091 (1981).

39-71-2337. State fund to submit notice of coverage within 30 days — penalty for failure.

Compiler's Comments

2007 Amendment: Chapter 117 in (1) at beginning of second sentence deleted "Beginning January 1, 2006"; in (3) near middle of first sentence after "if" deleted "as a general business practice" and inserted second sentence concerning penalty assessment on each policy not reported in timely manner; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendment: Chapter 69 in (1) inserted second sentence requiring that notice filed on or after January 1, 2006, be provided electronically. Amendment effective July 1, 2005.

2001 Amendment: Chapter 214 inserted (2) authorizing department to recognize advisory organization designated under 33-16-1023 or other organizations as state fund agents and requiring notice of coverage received by agents as state fund coverage notice; and made minor changes in style. Amendment effective July 1, 2001.

Effective Date: Section 65, Ch. 613, L. 1989, provided that this section is effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

39-71-2339. Cancellation of coverage — 20-day notice required.

Compiler's Comments

2009 Amendment: Chapter 112 in (1) in last sentence at beginning deleted "Beginning January 1, 2006"; inserted (3)(b) authorizing penalty assessment for each policy cancellation; and made minor changes in style. Amendment effective July 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2005 Amendment: Chapter 69 in (1) inserted seventh sentence requiring that notice filed on or after January 1, 2006, be provided electronically. Amendment effective July 1, 2005.

2001 Amendment: Chapter 214 in (1) in second sentence after "insured" inserted "and the department"; inserted (2) authorizing department to recognize advisory organization designated under 33-16-1023 or other organizations as state fund agents and requiring notice of coverage received by agents as state fund coverage notice; inserted (3) authorizing department to assess penalty against state fund for noncompliance with notice requirement and providing hearing to contest notice penalty assessment; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 25, Ch. 214, L. 2001, was a severability clause.

1995 Amendment: Chapter 305 in two places decreased notice requirement for cancellation of coverage from 30 days to 20 days; and made minor changes in style. Amendment effective July 1, 1995.

1991 Amendment: In first sentence substituted "coverage under this part" for "right to operate under plan No. 3 of the Workers' Compensation Act", after "failure to" inserted "report payroll or", and after "premiums due" inserted "or for another cause provided in the insurance policy", substituted second through fifth sentences regarding cancellation and replacement policies for former second sentence that read: "When the state fund cancels an employer's coverage, it shall notify the employer of its intent to cancel the employer at least 30 days before the cancellation becomes effective", and at end, after "Act", inserted "unless a replacement or succeeding insurance policy has been issued". Amendment effective July 1, 1991.

1989 Amendment: In two places changed "division" to "state fund"; near beginning of second sentence, after "cancels", substituted "an employer's coverage" for "an employer's right for failure to pay premiums"; and made minor changes in phraseology. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

39-71-2340. Collection in case of default.

Compiler's Comments

1989 Amendment: In four places changed "division" to "state fund"; and made minor changes in phraseology. Amendment effective on the earlier of signing of executive order creating state compensation mutual insurance fund (now state compensation insurance fund) or January 1, 1990.

39-71-2351. Purpose of separation of state fund liability as of July 1, 1990, and of separate funding of claims before and on or after that date.

Compiler's Comments

2015 Amendment: Chapter 320 deleted former (1) that read: "(1) An unfunded liability exists in the state fund. It has existed since at least the mid-1980s and has grown each year. There have been numerous attempts to solve the problem by legislation and other methods. These attempts have alleviated the problem somewhat, but the problem has not been solved"; in (1) in first sentence at end substituted "guaranteed market" for "insurer of last resort", in second sentence near beginning inserted "previous years of" and inserted "and prior to July 1, 1990"; in (2) in first sentence after "clarified and" substituted "regulation" for "legislative oversight" and at end substituted "effective January 1, 2016, and subject to 33-1-115 and 39-71-2375, should be under Title 33, which governs plan No. 2 and plan No. 3 insurers operating in this state" for "should be increased"; and made minor changes in style. Amendment effective January 1, 2016.

Applicability: Section 25, Ch. 320, L. 2015, provided that this section applies to rates that are effective on or after July 1, 2016, for new and renewal policies.

1997 Amendment: (Version effective on occurrence of contingency) Chapter 276 deleted (2)(b) that read: "(b) create an old fund liability tax provided for in 39-71-2503 and dedicate the tax money first to the repayment of bonds issued under 39-71-2354 and 39-71-2355 and then to the repayment of loans given under 39-71-2354 and 39-71-2355 and the direct payment of the costs of administering and paying claims for injuries from accidents that occurred before July 1, 1990"; and made minor changes in style. Amendment effective on the date that the budget director certifies that the old fund liability tax is terminated pursuant to 39-71-2505 (now repealed).

Preamble: The preamble attached to Ch. 276, L. 1997, provided: "WHEREAS, it is the intent of the state compensation insurance fund to assist all Montanans by reducing the unfunded liability of the old fund, terminating the old fund liability tax when the old fund is adequately funded, which is currently estimated to occur as early as June 30, 1999, providing for the payment of dividends to policyholders, and maintaining a viable state compensation insurance fund; and

WHEREAS, there was an unfunded liability of $355 million as of June 30, 1996, for claims for workers' compensation injuries occurring before July 1, 1990, in the old fund, which included $129 million in outstanding bond debt; and

WHEREAS, the old fund is funded with the old fund liability tax paid by employers, employees, and self-employed persons, generating as much as $50 million each year; and

WHEREAS, the surplus of $231 [sic] in the new fund as of June 30, 1996, allowed the Board of Directors of the State Fund to declare a dividend of up to $109 million to retire the outstanding bond debt in the old fund; and

WHEREAS, the unfunded liability in the old fund will be an estimated $200 million deficit by June 30, 1997, and the surplus or the excess of assets above the reserves that are set aside to meet the claim liability in the new fund will be an estimated $127 million by June 30, 1997; and

WHEREAS, current state law requires the State Fund to use dividends to be applied first to old fund outstanding liability rather than paying dividends directly to policyholders, the State Fund shall, no later than June 30, 1998, transfer $63.8 million to the old fund account to pay old fund claims to allow direct payment of dividends to policyholders; and

WHEREAS, the $20 million appropriation received by the State Fund from the general fund during the June 1989 Special Session partially addressed the unfunded liability issue existing at that time in the old fund and canceled a planned 22% rate increase; and

WHEREAS, the State Fund now agrees to repay the $20 million appropriation to the general fund by June 30, 1999, in lieu of transferring additional funds to the old fund account to provide the general fund with additional revenue and to remove any perception that the State Fund remains a burden on the general fund; and

WHEREAS, because decreases in premium rates totaled 35% in fiscal years 1996 and 1997 and legislative changes in benefit levels have resulted in the return of private carriers, the 15% limitation on administration expenses as a percent of the prior year's premium will significantly impact the State Fund's ability to provide service to policyholders and their injured workers; and

WHEREAS, the State Fund seeks to improve the level of services provided to customers without increasing existing State Fund staffing levels by working with private sector-licensed insurance producers; and

WHEREAS, in response to Haag v. Montana Schools Group Insurance Authority, 274 M 109, 906 P.2d 693 (1995), in which the Montana Supreme Court ruled that an insurer's failure to comply with the time limitations for accepting or denying a workers' compensation claim constituted acceptance of the claim, current law needs to be clarified to provide that the failure to comply with the time limitations does not constitute acceptance of the claim."

Severability: Section 32, Ch. 276, L. 1997, was a severability clause.

Delayed Effective Date — Contingency: Section 34(3), Ch. 276, L. 1997, provided: "[Sections 8, 19, 22 [39-71-2351], 24, and 31(2)] are effective on the date that the budget director certifies that the old fund liability tax is terminated pursuant to [section 28] [39-71-2505, now repealed]." On September 16, 1998, the budget director certified that the old fund liability tax terminates effective January 1, 1999.

1993 Amendment: Chapter 637 in (2)(b), before "39-71-2503", substituted "create an old fund liability tax provided for in" for "extend the payroll tax imposed by". Amendment effective May 13, 1993.

Severability: Section 10, Ch. 637, L. 1993, was a severability clause.

Retroactive Applicability: Section 14, Ch. 637, L. 1993, provided: "The workers' compensation old fund liability tax imposed on sole proprietors, subchapter S. corporation shareholders, partners of partnerships, and members and managers of limited liability companies applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1992."

1991 Amendment: In (2)(b), after "repayment of", substituted "bonds issued under 39-71-2354 and 39-71-2355" for "loan given under 39-71-2353 [now repealed]" and after "then to the" inserted "repayment of loans given under 39-71-2354 and 39-71-2355 and the". Amendment effective July 1, 1991.

Saving Clause: Section 10, Ch. 797, L. 1991, was a saving clause.

Severability: Section 11, Ch. 797, L. 1991, was a severability section.

Effective Date: Section 29(1), Ch. 4, Sp. L. May 1990, provided that this section is effective July 1, 1990.

39-71-2352. Separate payment structure and sources for claims for injuries resulting from accidents that occurred before July 1, 1990, and on or after July 1, 1990 — spending limit — authorizing transfer of money.

Compiler's Comments

2017 Amendment: Ch. 429 in (3) substituted "$625,000 a year" for "$1.25 million a year". Amendment effective on occurrence of contingency and terminates June 30, 2019.

Contingent Effective Date: Section 13, Ch. 429, L. 2017, provided that the bracketed language in subsection (3) replaces the amount of $1.25 million if: (1) "the amount of the certified unaudited state general fund revenue and transfers into the general fund received at the end of fiscal year 2017 is less than $2,204,000,000, as determined by the state treasurer on or before August 15, 2017"; or (2) "the amount of the certified unaudited state general fund revenue and transfers into the general fund received at the end of fiscal year 2018 is at level 2 or below as provided in [section 10(3)], and if prior general fund collections for fiscal year 2017 were high enough to prevent implementation of subsection (1)". On August 1, 2017, the state treasurer reported that the amount of the unaudited and unadjusted general fund revenue and transfers-in for the fiscal year ended June 30, 2017, was $2,139,414,715.40.

2011 Purported Amendment — Line-Item Veto: Section 5, Ch. 312, L. 2011, purported to amend this section. The Governor removed this section from the bill in a line-item veto issued May 4, 2011.

2009 Amendment: Chapter 2 deleted former (5)(a) through (5)(c) that read: "(5) Based on audited financial statements adjusted for unrealized gains and losses for each fiscal year, funds in excess of the adequate funding amount established in subsection (4) must be transferred as follows:

(a) Prior to June 30, 2003:

(i) the amount of $1.9 million must be transferred to the general fund to be transferred to the state library equipment account and appropriated to the university system and the department of public health and human services;

(ii) the amount of $2.1 million must be transferred to the school flexibility fund, provided for in 20-9-543; and

(iii) the amount of $9,178,000 must be transferred to the general fund.

(b) Prior to June 30, 2004, an amount up to $4.3 million in available excess funds from fiscal year 2003 must be transferred to the general fund.

(c) Prior to June 30, 2005, an amount up to $3.78 million in available excess funds from fiscal year 2004 must be transferred to the general fund"; at beginning of (5) deleted "In the fiscal years 2004 and 2005, any remaining amount, and in subsequent fiscal years"; and made minor changes in style. Amendment effective October 1, 2009.

2003 Amendment: Chapter 588 deleted former (4)(c) that read: "(c) an additional amount equal to 10% of the total of the amounts in subsections (4)(a) and (4)(b)"; in (5) in introductory clause after "losses for" substituted "each fiscal year" for "the fiscal year ending June 30, 2002"; inserted (5)(a)(iii) requiring transfer of $9,178,000 to the general fund; inserted (5)(b) requiring transfer of up to $4.3 million in available excess funds from fiscal year 2003 to the general fund; inserted (5)(c) requiring transfer of up to $3.78 million in available excess funds from fiscal year 2004 to the general fund; in (5)(d) near beginning after "fiscal" substituted "years 2004 and 2005" for "year ending June 30, 2003", after "subsection (4)" inserted "based on audited financial statements adjusted for unrealized gains and losses", and after "transferred to the" substituted "general fund" for "account established in 39-71-2321 to pay claims for injuries resulting from accidents that occurred on or after July 1, 1990. The total amount of funds transferred under this subsection may not exceed $63.8 million"; and made minor changes in style. Amendment effective May 9, 2003.

Transfer of Excess Reserves: Section 2, Ch. 588, L. 2003, provided: "On [the effective date of this act] [effective May 9, 2003], the state compensation insurance fund shall transfer the 10% of funds that was required to be reserved pursuant to 39-71-2352(4) as follows:

(1) $3,522,295 to the state general fund; and

(2) the remainder to the state general fund."

2002 Amendment: Chapter 16 substituted (5) concerning transfers based on audited financial statements adjusted for unrealized gains and losses for former text that read: "By October 1 of each year following the first full fiscal year after termination of the old fund liability tax, any funds in excess of the adequate funding amount established in subsection (4) must be returned to the account established in 39-71-2321 to pay claims for injuries resulting from accidents that occurred on or after July 1, 1990. The total amount of funds returned to the account under this section may not exceed $63.8 million"; inserted (5)(a) providing for the transfer of funds to the general fund for the state library equipment account, university system, department of public health and human services, and school flexibility fund; inserted (5)(b) providing for the transfer of funds to pay certain injury claims occurring on or after July 1, 1990; in (6) near middle after "any amount" substituted "necessary to pay claims" for "returned to the account in 39-71-2321 to pay claims for injuries resulting from accidents that occurred on or after July 1, 1990, must be transferred back to the account established in 39-71-2321 to pay claims" and at end inserted "must be transferred from the general fund to the account provided for in 39-71-2321"; and made minor changes in style. Amendment effective August 20, 2002.

Effective Date — Retroactive Applicability: Section 3, Ch. 16, Sp. L. August 2002, provided "[This act] is effective on passage and approval [approved August 20, 2002], and [section 1] [39-71-2352] applies retroactively, within the meaning of 1-2-109, to excess funds that have been transferred or are available to be transferred for the fiscal year ending June 30, 2002."

1999 Amendment: Chapter 184 in (3) decreased $3 million to $1.25 million; inserted (4) defining adequately funded; inserted (5) providing for disposition of funds in excess of the adequate funding amount; inserted (6) providing for the transfer of funds for inadequately funded injury claims; and inserted (7) providing for the yearly projection of unpaid claims liability for claims for accidents that occurred before July 1, 1990. Amendment effective March 26, 1999.

1997 Amendment: (Temporary version) Chapter 276 in second sentence in (1), before "39-71-2354", deleted reference to 39-71-2316. Amendment effective July 1, 1997, and terminates on the date that the old fund liability tax is terminated pursuant to 39-71-2505 (now repealed).

(Version effective on occurrence of contingency) Chapter 276 at beginning of second sentence in (1) deleted "Except as provided in 39-71-2316 and 39-71-2354"; and made minor changes in style. Amendment effective on the date that the budget director certifies that the old fund liability tax is terminated pursuant to 39-71-2505 (now repealed).

Preamble: The preamble attached to Ch. 276, L. 1997, provided: "WHEREAS, it is the intent of the state compensation insurance fund to assist all Montanans by reducing the unfunded liability of the old fund, terminating the old fund liability tax when the old fund is adequately funded, which is currently estimated to occur as early as June 30, 1999, providing for the payment of dividends to policyholders, and maintaining a viable state compensation insurance fund; and

WHEREAS, there was an unfunded liability of $355 million as of June 30, 1996, for claims for workers' compensation injuries occurring before July 1, 1990, in the old fund, which included $129 million in outstanding bond debt; and

WHEREAS, the old fund is funded with the old fund liability tax paid by employers, employees, and self-employed persons, generating as much as $50 million each year; and

WHEREAS, the surplus of $231 [sic] in the new fund as of June 30, 1996, allowed the Board of Directors of the State Fund to declare a dividend of up to $109 million to retire the outstanding bond debt in the old fund; and

WHEREAS, the unfunded liability in the old fund will be an estimated $200 million deficit by June 30, 1997, and the surplus or the excess of assets above the reserves that are set aside to meet the claim liability in the new fund will be an estimated $127 million by June 30, 1997; and

WHEREAS, current state law requires the State Fund to use dividends to be applied first to old fund outstanding liability rather than paying dividends directly to policyholders, the State Fund shall, no later than June 30, 1998, transfer $63.8 million to the old fund account to pay old fund claims to allow direct payment of dividends to policyholders; and

WHEREAS, the $20 million appropriation received by the State Fund from the general fund during the June 1989 Special Session partially addressed the unfunded liability issue existing at that time in the old fund and canceled a planned 22% rate increase; and

WHEREAS, the State Fund now agrees to repay the $20 million appropriation to the general fund by June 30, 1999, in lieu of transferring additional funds to the old fund account to provide the general fund with additional revenue and to remove any perception that the State Fund remains a burden on the general fund; and

WHEREAS, because decreases in premium rates totaled 35% in fiscal years 1996 and 1997 and legislative changes in benefit levels have resulted in the return of private carriers, the 15% limitation on administration expenses as a percent of the prior year's premium will significantly impact the State Fund's ability to provide service to policyholders and their injured workers; and

WHEREAS, the State Fund seeks to improve the level of services provided to customers without increasing existing State Fund staffing levels by working with private sector-licensed insurance producers; and

WHEREAS, in response to Haag v. Montana Schools Group Insurance Authority, 274 M 109, 906 P.2d 693 (1995), in which the Montana Supreme Court ruled that an insurer's failure to comply with the time limitations for accepting or denying a workers' compensation claim constituted acceptance of the claim, current law needs to be clarified to provide that the failure to comply with the time limitations does not constitute acceptance of the claim."

Severability: Section 32, Ch. 276, L. 1997, was a severability clause.

Contingent Termination: Section 35(1), Ch. 276, L. 1997, provided that the temporary version of 39-71-2352 terminates on the date that the old fund liability tax is terminated. On September 16, 1998, the budget director certified that the old fund liability tax terminates effective January 1, 1999.

1993 Amendment: Chapter 630 near beginning of second sentence of (1), after "39-71-2316", deleted "(9)". Amendment effective July 1, 1993.

Severability: Section 15, Ch. 630, L. 1993, was a severability clause.

Saving Clause: Section 16, Ch. 630, L. 1993, was a saving clause.

1991 Amendment: In second sentence of (1) substituted reference to 39-71-2354 for reference to 39-71-2353. Amendment effective July 1, 1991.

Saving Clause: Section 10, Ch. 797, L. 1991, was a saving clause.

Severability: Section 11, Ch. 797, L. 1991, was a severability section.

Effective Date: Section 29(1), Ch. 4, Sp. L. May 1990, provided that this section is effective July 1, 1990.

39-71-2356. Mutually agreeable lump-sum settlements.

Compiler's Comments

Saving Clause: Section 10, Ch. 797, L. 1991, was a saving clause.

Severability: Section 11, Ch. 797, L. 1991, was a severability section.

Effective Date: Section 14, Ch. 797, L. 1991, provided that this section is effective July 1, 1991.

39-71-2361. Legislative audit of state fund.

Compiler's Comments

2015 Amendment: Chapter 320 in first sentence inserted "by persons appointed under 5-13-305" and in second sentence after "evaluations of" deleted "the claims reservation process" and after "amounts reserved" deleted "and the current report of the state fund's actuary"; deleted former (2) that read: "(2) provide the results of the financial and compliance audit for operations related to claims for injuries resulting from accidents on or after July 1, 1990, as provided in subsection (1), and the rate review as provided in 39-71-2362 to the insurance commissioner. The insurance commissioner shall review the financial and compliance audit and rate review and report any concerns or recommendations based on the review to the governor, the legislative audit committee, and the economic affairs interim committee"; and made minor changes in style. Amendment effective January 1, 2016.

Applicability: Section 25, Ch. 320, L. 2015, provided that this section applies to rates that are effective on or after July 1, 2016, for new and renewal policies.

2011 Amendment: Chapter 167 inserted (2) relating to the insurance commissioner and results of the audit and rate review; and made minor changes in style. Amendment effective April 12, 2011.

Saving Clause: Section 32, Ch. 167, L. 2011, was a saving clause.

Severability — Nonseverability: Section 33, Ch. 167, L. 2011, was a severability/nonseverability clause.

Applicability — Retroactive Applicability: Section 35, Ch. 167, L. 2011, provided: "(1) Except as provided in subsections (2) and (3), [this act] applies to injuries and occupational diseases occurring on or after July 1, 2011.

(2) The use of the sixth edition of the American medical association's Guides to the Evaluation of Permanent Impairment, referenced in 39-71-116, 39-71-703, and 39-71-711, as amended by [this act], is retroactive to January 1, 2008, for impairment ratings issued after that date.

(3) [Section 14] [39-71-741] applies retroactively, within the meaning of 1-2-109, to claims for injuries or occupational diseases for which all benefits have not been settled.

(4) The provisions of [sections 15 through 23] [39-71-1011, 39-71-1025, 39-71-1031, 39-71-1041 through 39-71-1043, and 39-71-1049 through 39-71-1051], apply to injuries occurring on or after July 1, 2012."

Effective Date: Section 29(1), Ch. 4, Sp. L. May 1990, provided that this section is effective July 1, 1990.

39-71-2363. Agency law — annual report.

Compiler's Comments

2015 Amendment: Chapter 320 deleted former (2)(b) that read: "(b) Upon approval of the estimated budget for the succeeding fiscal year, the state fund shall, no later than October 1 of each year, submit the approved annual budget for review to the legislative fiscal analyst. The budget must be submitted in an electronic format"; and made minor changes in style. Amendment effective January 1, 2016.

Applicability: Section 25, Ch. 320, L. 2015, provided that this section applies to rates that are effective on or after July 1, 2016, for new and renewal policies.

2013 Amendment: Chapter 120 in (2)(b) substituted "legislative fiscal analyst" for "legislative finance committee established under 5-12-201" and inserted last sentence requiring report to be provided in electronic format. Amendment effective July 1, 2013.

2001 Amendments — Composite Section: Chapter 7 in (2)(a) at beginning of second sentence inserted "Subject to the provisions of subsection (2)(b)"; and made minor changes in style. Amendment effective October 1, 2001. The amendment by Ch. 314 rendered the amendment by Ch. 7 void.

Chapter 314 in (2) deleted former second sentence that read: "The administrative expenditures approved by the board may not exceed 15% of the earned annual premium of the prior fiscal year"; deleted former (2)(b) that read: "(b) The board may approve administrative expenditures in excess of 15% of the earned annual premium of the prior fiscal year, but the excess amount approved may not exceed one-half of the investment income earned in the prior fiscal year"; and made minor changes in style. Amendment effective April 21, 2001.

1997 Amendment: Chapter 276 at beginning of (2)(a) inserted exception clause; inserted (2)(b) authorizing the Board to approve administrative expenditures in excess of 15% of prior year's premium, not to exceed one-half of prior fiscal year's earned investment income; inserted (2)(c) requiring the State Fund to submit budget report to Finance Committee; inserted (2)(d) prohibiting inclusion of dividends as administrative expenditures; and made minor changes in style. Amendment effective July 1, 1997.

Preamble: The preamble attached to Ch. 276, L. 1997, provided: "WHEREAS, it is the intent of the state compensation insurance fund to assist all Montanans by reducing the unfunded liability of the old fund, terminating the old fund liability tax when the old fund is adequately funded, which is currently estimated to occur as early as June 30, 1999, providing for the payment of dividends to policyholders, and maintaining a viable state compensation insurance fund; and

WHEREAS, there was an unfunded liability of $355 million as of June 30, 1996, for claims for workers' compensation injuries occurring before July 1, 1990, in the old fund, which included $129 million in outstanding bond debt; and

WHEREAS, the old fund is funded with the old fund liability tax paid by employers, employees, and self-employed persons, generating as much as $50 million each year; and

WHEREAS, the surplus of $231 [sic] in the new fund as of June 30, 1996, allowed the Board of Directors of the State Fund to declare a dividend of up to $109 million to retire the outstanding bond debt in the old fund; and

WHEREAS, the unfunded liability in the old fund will be an estimated $200 million deficit by June 30, 1997, and the surplus or the excess of assets above the reserves that are set aside to meet the claim liability in the new fund will be an estimated $127 million by June 30, 1997; and

WHEREAS, current state law requires the State Fund to use dividends to be applied first to old fund outstanding liability rather than paying dividends directly to policyholders, the State Fund shall, no later than June 30, 1998, transfer $63.8 million to the old fund account to pay old fund claims to allow direct payment of dividends to policyholders; and

WHEREAS, the $20 million appropriation received by the State Fund from the general fund during the June 1989 Special Session partially addressed the unfunded liability issue existing at that time in the old fund and canceled a planned 22% rate increase; and

WHEREAS, the State Fund now agrees to repay the $20 million appropriation to the general fund by June 30, 1999, in lieu of transferring additional funds to the old fund account to provide the general fund with additional revenue and to remove any perception that the State Fund remains a burden on the general fund; and

WHEREAS, because decreases in premium rates totaled 35% in fiscal years 1996 and 1997 and legislative changes in benefit levels have resulted in the return of private carriers, the 15% limitation on administration expenses as a percent of the prior year's premium will significantly impact the State Fund's ability to provide service to policyholders and their injured workers; and

WHEREAS, the State Fund seeks to improve the level of services provided to customers without increasing existing State Fund staffing levels by working with private sector-licensed insurance producers; and

WHEREAS, in response to Haag v. Montana Schools Group Insurance Authority, 274 M 109, 906 P.2d 693 (1995), in which the Montana Supreme Court ruled that an insurer's failure to comply with the time limitations for accepting or denying a workers' compensation claim constituted acceptance of the claim, current law needs to be clarified to provide that the failure to comply with the time limitations does not constitute acceptance of the claim."

Severability: Section 32, Ch. 276, L. 1997, was a severability clause.

1995 Amendment: Chapter 424 in (1) inserted last sentence concerning debt collection procedures. Amendment effective April 13, 1995.

Severability: Section 15, Ch. 630, L. 1993, was a severability clause.

Saving Clause: Section 16, Ch. 630, L. 1993, was a saving clause.

Effective Date — Applicability: Section 18(1), Ch. 630, L. 1993, provided that this section was effective on passage and approval. Approved May 11, 1993. Section 18(3), Ch. 630, L. 1993, provided that this section applies to the budget for fiscal year 1994.

39-71-2370. Claims expenditures codes.

Compiler's Comments

Effective Date: Section 23, Ch. 555, L. 1993, provided: "[This act] is effective July 1, 1993."

39-71-2375. Operation of state fund as authorized insurer — issuance of certificate of authority — exceptions — use of calendar year — risk-based capital — reporting requirements.

Compiler's Comments

2021 Amendments — Composite Section: Chapter 261 in (5)(a) in second sentence near end inserted "in accordance with 5-11-210". Amendment effective April 20, 2021.

Chapter 501 inserted (2)(d) concerning applicability of Title 33, chapter 2, part 24, when the state contracts with one or more pharmacy benefit managers. Amendment effective January 1, 2022.

Severability: Section 24, Ch. 501, L. 2021, was a severability clause.

Transition: Section 23, Ch. 320, L. 2015, provided: "As part of the documentation required in [section 1(2)(b)] [33-1-115(2)(b) and 39-71-2375(2)(b)], the state fund provided for in 39-71-2313 shall develop and submit to the insurance commissioner a transition plan to fully implement the designated advisory organization's requirements applicable under Title 33, chapter 16, part 10, to the state fund. The plan must be submitted no later than January 1, 2016. The state fund and the insurance commissioner shall provide periodic updates to the economic affairs interim committee."

Effective Date — Applicability: Section 25, Ch. 320, L. 2015, provided: "[This act] is effective January 1, 2016, and applies to rates that are effective on or after July 1, 2016, for new and renewal policies."

Part 24
Mediation

Part Compiler's Comments

Prior Law Superseded: Section 8, Ch. 664, L. 1987, provided: "[This act] [Title 39, Ch. 71, part 24] hereby supersedes the provisions of 1-2-113 as it may apply to [this act] [Title 39, Ch. 71, part 24]."

Part Administrative Rules

Title 24, chapter 28, ARM Workers' compensation mediation.

Part Case Notes

Retroactive Application of Mediation Procedure — Unconstitutional Impairment of Contracts: The 1987 amendments to the Workers' Compensation Act concerning dispute resolution and mediation may not be applied retroactively to cases in which a petition was filed prior to July 1, 1987, because such application would unconstitutionally impair a contractual obligation. In analyzing a contract clause challenge, the court adopted a three-tier analysis: (1) Is the state law a substantial impairment of contractual relationship? (2) Does the state have a significant and legitimate purpose for the law? (3) Does the law impose reasonable conditions reasonably related to achieving a legitimate and public purpose? The court held that the delay occasioned by the requirement to mediate a dispute represents a substantial impairment of the employee's contractual rights under the insurance policy, that the state has a legitimate and significant purpose for the law because it is intended to encourage out-of-court settlements and lessen the volume of cases in the Workers' Compensation Court, and that there is insufficient evidence to show that the mediation process would achieve a more manageable caseload for the Workers' Compensation Court. Carmichael v. Workers' Comp. Court, 234 M 410, 763 P2d 1122, 45 St. Rep. 2012 (1988), distinguished in Synek v. St. Comp. Mut. Ins. Fund, 272 M 246, 900 P2d 884, 52 St. Rep. 651 (1995). See also Billings v. County Water District of Billings Heights, 281 M 219, 935

P2d 246, 54 St. Rep. 144 (1997), wherein the three-tiered Carmichael analysis was applied to a water rate contract.

No Retroactive Applicability of 1987 Amendments: The 1987 amendments to the Workers' Compensation Act concerning dispute resolution and mediation do not apply retroactively to cases in which a petition was filed prior to July 1, 1987. State ex rel. Pac. Employers Ins. Co. v. Workers' Comp. Court, 230 M 233, 749 P2d 522, 45 St. Rep. 167A (1988).

39-71-2401. Disputes — jurisdiction — settlement requirements — mediation.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

2005 Amendment: Chapter 416 in (1) in first sentence near middle after "under this chapter" deleted "or chapter 72". Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

1991 Amendment: Deleted former (4) that read: "(4) The common law and statutory rules of evidence do not apply in a case brought to hearing before the department". Amendment effective July 1, 1991.

Applicability: Section 15, Ch. 558, L. 1991, provided: "[This act] applies to injuries that occur on or after [the effective date of this act]." Effective July 1, 1991.

1989 Amendment: Chapter 427 near beginning of (5)(c) inserted "or upon the mediator's own motion" and inserted second sentence relating to form of petition for dismissal; and made minor changes in phraseology.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Applicability: Section 72, Ch. 464, L. 1987, provided: "(1) Sections 8 [39-71-2401] and 52 through 57 [39-71-2406 through 39-71-2411] apply retroactively, within the meaning of 1-2-109, to all injuries and diseases, regardless of the date of occurrence. With respect to rehabilitation disputes, sections 8 [39-71-2401] and 52 through 57 [39-71-2406 through 39-71-2411] apply retroactively, within the meaning of 1-2-109, unless the division had jurisdiction over the dispute under the law in effect at the time of injury.

(2) The remaining portions of this act apply only to injuries, diseases, and events occurring after June 30, 1987."

Case Notes

Failure to Dispute Benefit Calculation Within Statutory Time Limit — Amendment of Final Calculation Error: Under 39-71-520, a limit is set on the time within which a claimant may dispute a determination of benefits regardless of the merits of the claimant's position, and the time limit is mandatory and jurisdictional. In this case, an error was made in a death benefit calculation, but failure of the parties to exercise ordinary diligence to seek correction of the error within 90 days rendered the erroneous calculation final and not subject to revision by the Workers' Compensation Court. Colmore v. Uninsured Employers' Fund, 2005 MT 239, 328 M 441, 121 P3d 1007 (2005).

No Due Process Violation of Workers' Compensation Claimant Who Uses Available Statutory Processes: Following a work-related injury in 1992, Wiard did not submit a medical claim within 60 months, as required under 39-71-704 to avoid termination of benefits. When a subsequent claim based on the 1992 injury was denied in 2000, Wiard asserted that the denial of benefits was a due process violation because there was no notice and opportunity to be heard prior to termination of Wiard's property right in workers' compensation benefits. The Supreme Court held that Wiard's claim of a violation of due process was properly dismissed because Wiard availed himself of the mediation process and trial before the Workers' Compensation Court and thus was afforded due process. Wiard v. Liberty NW. Ins. Corp., 2003 MT 295, 318 M 132, 79 P3d 281 (2003).

Failure to Exercise Statutory Procedural Right Held Not to Violate Due Process: Grooms filed a workers' compensation claim with her insurer, the State Fund, alleging that she suffered from a skin allergy condition. The State Fund denied liability under the Workers' Compensation Act and requested the Department of Labor and Industry to process the claim under the Occupational

Disease Act of Montana (now repealed and merged with Workers' Compensation Act). Subsequently, Grooms claimed that the decision to process her claim under the Occupational Disease Act (now repealed and merged with Workers' Compensation Act) rather than the Workers' Compensation Act denied her due process of law by denying her notice and an opportunity to be heard. The Workers' Compensation Court concluded that when her claim was denied under the Workers' Compensation Act, Grooms retained the statutory rights to have her claim resolved by mediation and to have her claim heard by the Workers' Compensation Court and, therefore, Grooms was not denied due process of law. The Supreme Court affirmed the Workers' Compensation Court, holding that Grooms still had available to her various statutory remedies that she chose not to pursue after her claim was denied by the State Fund. The Supreme Court held that her failure to pursue those remedies did not result in a denial of due process. Grooms v. Ponderosa Inn, 283 M 459, 942 P2d 699, 54 St. Rep. 725 (1997).

Jurisdiction of Court to Award Penalty: Lovell, who was a painter, roofer, and lawn mower, stopped by the Oak Room Bar for a drink after work and was asked by the owner to help unload a truck. In the process, Lovell injured his knee and was found by the State Fund to be temporarily totally disabled. The Workers' Compensation Court later awarded a penalty against the State Fund for miscalculating mileage benefits owed Lovell and for incorrectly reducing his benefit payments. The State Fund argued that the Workers' Compensation Court had no jurisdiction to award the penalties because the parties had not complied with the dispute resolution process and mediation requirements and because Lovell had not included the issue of his social security payments offset in his petition. The Supreme Court noted that the State Fund had included the satisfaction of the dispute resolution requirements in a pretrial order, which the fund had signed, and that the pretrial order also included the issue of whether the fund had unreasonably delayed or denied payment of Lovell's benefits. The Supreme Court held that for these reasons, there was substantial evidence to support the Workers' Compensation Court's findings of unreasonableness and that therefore the Workers' Compensation Court had jurisdiction to apply the penalties. Lovell v. St. Comp. Mut. Ins. Fund, 260 M 279, 860 P2d 95, 50 St. Rep. 1043 (1993).

Appeal to Be Filed With Workers' Compensation Court: Any appeal of a workers' compensation decision must be filed with the Workers' Compensation Court, not the District Court. Cottonwood Hills, Inc. v. St., 238 M 404, 777 P2d 1301, 46 St. Rep. 1371 (1989).

39-71-2406. Purpose.

Compiler's Comments

2005 Amendment: Chapter 416 in first sentence near middle after "relating to claims under" substituted "this chapter" for "chapter 71 or 72 of this title". Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

1989 Amendment: Inserted last three sentences relating to the purpose of mediation, provision for judicial review of additional evidence, and remand to mediator if new issue is raised at judicial review.

Applicability: Section 72, Ch. 464, L. 1987, provided: "(1) Sections 8 [39-71-2401] and 52 through 57 [39-71-2406 through 39-71-2411] apply retroactively, within the meaning of 1-2-109, to all injuries and diseases, regardless of the date of occurrence. With respect to rehabilitation disputes, sections 8 [39-71-2401] and 52 through 57 [39-71-2406 through 39-71-2411] apply retroactively, within the meaning of 1-2-109, unless the division had jurisdiction over the dispute under the law in effect at the time of injury.

(2) The remaining portions of this act apply only to injuries, diseases, and events occurring after June 30, 1987."

39-71-2408. Mandatory, nonbinding mediation.

Compiler's Comments

2005 Amendment: Chapter 416 in (1) near beginning after "dispute arising under" substituted "this chapter" for "chapter 71 or 72 of this title". Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

Case Notes

Action Not Commenced by Petition for Mediation: An action includes a special proceeding of a civil nature. However, mediation under the Workers' Compensation Act is a nonbinding and informal meeting that is not considered a special proceeding, so a petition for mediation does not commence an action as defined in 27-2-101. Preston v. Transp. Ins. Co., 2004 MT 339, 324 M 225, 102 P3d 527 (2004).

Tolling of Statute of Limitations During Statutorily Required Workers' Compensation Mediation: After waiting more than 9 months after a mediator issued a report, Preston petitioned the Workers' Compensation Court for a hearing regarding the reopening of a formerly settled claim. At the hearing, the court determined that a mutual mistake of fact existed concerning the severity of Preston's mental illness that arose as the result of an industrial accident. However, the court also concluded that reopening the claim based on the mutual mistake of fact was time-barred under the 2-year statute of limitations in 27-2-203. On appeal, the Supreme Court disagreed. The statute of limitations did not begin to run until Preston became aware of the mistake of fact, which occurred during the 62-day statutorily mandated mediation. Given that mediation was mandatory and that Preston had to wait until satisfying the dispute resolution requirements to petition the Workers' Compensation Court, the statute of limitations tolled during mediation and Preston had an additional 62 days to file the petition. The case was remanded for further proceedings. Preston v. Transp. Ins. Co., 2004 MT 339, 324 M 225, 102 P3d 527 (2004).

39-71-2409. Duties of mediator.

Compiler's Comments

1989 Amendment: In (2) substituted "information" for "evidence".

39-71-2410. Limitations on mediation proceedings.

Compiler's Comments

2005 Amendment: Chapter 39 in (1) near middle substituted "39-71-2411(8)(c)" for "39-71-2411(7)(c)"; in (3) after "to all" inserted "persons"; and made minor changes in style. Amendment effective October 1, 2005.

1991 Amendment: In (1) changed subsection reference to 39-71-2401. Amendment effective July 1, 1991.

Applicability: Section 15, ch. 558, L. 1991, provided: "[This act] applies to injuries that occur on or after [the effective date of this act]." Effective July 1, 1991.

1989 Amendment: At beginning of (1) inserted exception clause; and near end of (5) inserted "before the workers' compensation court".

39-71-2411. Mediation procedure.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 39 inserted (4) requiring attendance of certain people at mediation conference; and made minor changes in style. Amendment effective October 1, 2005.

Chapter 416 in (1) near middle after "benefits under" substituted "this chapter" for "chapter 71 or 72 of this title". Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

1995 Amendment: Chapter 516 in (6), in first sentence, substituted 25-day notice for 45-day notice; and made minor changes in style.

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

Severability: Section 26, Ch. 516, L. 1995, was a severability clause.

1989 Amendment: Chapter 427 in (3) and (5) substituted "argument" for "evidence"; in middle of (4), after "argument", substituted "must fully present the party's case" for "must include the evidence the party would present if the case were being presented to the worker's compensation judge"; and made minor changes in phraseology.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Administrative Rules

Title 24, chapter 28, subchapter 1, ARM Workers' compensation dispute mediation — jurisdiction, procedures, and reports.

Case Notes

Tolling of Statute of Limitations During Statutorily Required Workers' Compensation Mediation: After waiting more than 9 months after a mediator issued a report, Preston petitioned the Workers' Compensation Court for a hearing regarding the reopening of a formerly settled claim. At the hearing, the court determined that a mutual mistake of fact existed concerning the severity of Preston's mental illness that arose as the result of an industrial accident. However, the court also concluded that reopening the claim based on the mutual mistake of fact was time-barred under the 2-year statute of limitations in 27-2-203. On appeal, the Supreme Court disagreed. The statute of limitations did not begin to run until Preston became aware of the mistake of fact, which occurred during the 62-day statutorily mandated mediation. Given that mediation was mandatory and that Preston had to wait until satisfying the dispute resolution requirements to petition the Workers' Compensation Court, the statute of limitations tolled during mediation and Preston had an additional 62 days to file the petition. The case was remanded for further proceedings. Preston v. Transp. Ins. Co., 2004 MT 339, 324 M 225, 102 P3d 527 (2004).

Part 26
Self-Insurers Guaranty Fund

Part Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 244, L. 1989, provided: "A statement of intent accompanies this bill because [section 6] [39-71-2610] delegates to the newly established board of directors of the Montana self-insurers guaranty fund rulemaking authority to administer the guaranty fund.

The fund is a private, nonprofit legal entity. The members of the board of directors must be elected by members of the fund, except for the initial appointments, which must be made by the governor.

It is the intent of [section 4] [39-71-2604] that the governor have the authority to implement staggered terms for board members during the initial appointing process.

It is the intent of [section 6] [39-71-2610] that the board of directors of the Montana self-insurers guaranty fund have the general authority to adopt rules to implement and enforce [this act] [Title 39, Ch. 71, part 26]. The rules should provide:

(1) a process for electing members and officers of the board;
(2) a method for filling any vacancy on the board;
(3) a description of the duties of board members;
(4) a method of keeping records of the board;
(5) a method for transacting the business of the board; and
(6) a description of the banking and investment policy of the board.

The rules should also establish the general duties and powers of operation of the fund. These include establishing a method of assessing contributions to the fund and a method of prorating payment if available funds are not sufficient to pay all claims."

Effective Date: Section 16, Ch. 244, L. 1989, provided: "(1) [Section 14] [a noncodified extension of rulemaking authority] and [this section] are effective on passage and approval.

(2) [Sections 1 through 13] [39-71-2601 through 39-71-2604, 39-71-2609 through 39-71-2611, and 39-71-2615 through 39-71-2620] and [section 15] [a noncodified codification instruction] are effective July 1, 1989." Approved March 22, 1989.

39-71-2602. Purpose — construction.

Attorney General's Opinions

Payment of All Potential Claims Under Plan No. 1 Not Ensured: Nothing in the law governing the self-insurers guaranty fund provides a mechanism that legally ensures that the fund will pay all covered workers' compensation claims against a fund member who becomes insolvent. The law only requires that the fund assume the workers' compensation obligations or liabilities of insolvent self-insurers. 46 A.G. Op. 1 (1995).

39-71-2609. Establishment of fund — employer participation required.

Compiler's Comments

1991 Amendment: Deleted (3) that read: "(3) The department shall consult with the board regarding the suitability of allowing an employer to self-insure or to continue as a self-insured employer".

Administrative Rules

ARM 24.29.607 Public employers other than state agencies.
ARM 24.29.624 Revocation, suspension, termination, and withdrawal of permission.

39-71-2610. Rulemaking — powers of fund.

Attorney General's Opinions

Proceedings of Workers' Compensation Board of Directors Subject to Montana Administrative Procedure Act: The Board of Directors of the Montana self-insurers guaranty fund fits the definition of "agency" in state law. The fund is considered a public organization because it a public purpose and because it has been granted statutory authority to adopt public rules and to enter public contracts. Therefore, when the Board adopts rules or resolves contested cases, it must comply with the provisions of the Montana Administrative Procedure Act. 46 A.G. Op. 1 (1995).

Payment of All Potential Claims Under Plan No. 1 Not Ensured: Nothing in the law governing the self-insurers guaranty fund provides a mechanism that legally ensures that the fund will pay all covered workers' compensation claims against a fund member who becomes insolvent. The law only requires that the fund assume the workers' compensation obligations or liabilities of insolvent self-insurers. 46 A.G. Op. 1 (1995).

39-71-2611. Duties, liabilities, and rights of fund.

Compiler's Comments

1991 Amendment: Inserted (4) requiring fund concurrence in Department decisions relating to allowing an employer to self-insure.

Attorney General's Opinions

Payment of All Potential Claims Under Plan No. 1 Not Ensured: Nothing in the law governing the self-insurers guaranty fund provides a mechanism that legally ensures that the fund will pay all covered workers' compensation claims against a fund member who becomes insolvent. The law only requires that the fund assume the workers' compensation obligations or liabilities of insolvent self-insurers. 46 A.G. Op. 1 (1995).

Power of Fund to Prevent Sole Exercise of Departmental Powers: When presented with the question of interpretation of the phrase "with the concurrence of the Montana self-insurers guaranty fund", or equivalent phrase, used throughout the law governing the fund, the Attorney General held that the power to concur, by irresistible implication, also carries with it the power to withhold concurrence, but implies no power to initiate action. The Legislature gave the fund, through the power of concurrence, the power to prevent the sole exercise of discretion of statutory powers by the Department of Labor and Industry. 46 A.G. Op. 1 (1995).

39-71-2615. Initial fee — assessment.

Compiler's Comments

2003 Amendment: Chapter 226 in first sentence in (3) after "fund" substituted "in any year" for "for 3 years" and at end of second sentence substituted "annual assessment" for "termination of the member's status as a private self-insurer". Amendment effective April 3, 2003.

2001 Amendment: Chapter 68 in (2)(a) in second sentence substituted "following benefits" for "indemnity compensation"; inserted (2)(a)(i) and (2)(a)(ii) regarding types of benefits; in (3) in second sentence substituted "benefits" for "compensation" and substituted "calendar year" for "approval year"; and made minor changes in style. Amendment effective March 16, 2001.

1993 Amendment: Chapter 555 in second sentence of (3), before "immediately", substituted "compensation paid during the last approval year" for "12-month period". Amendment effective July 1, 1993.

Part 29
Workers' Compensation Judge

Part Administrative Rules

ARM 24.5.101 Organization of office of the Workers' Compensation Judge.

Title 24, chapter 5, subchapter 3, ARM Office of the Workers' Compensation Judge — procedural rules.

Part Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Standing for Personal Representative in Workers' Compensation Court: As personal representative of her husband's estate, the petitioner filed a claim in the Workers' Compensation Court for occupational disease benefits with her husband's insurance carrier. The insurance company then accepted liability for the medical expenses incurred by the petitioner's husband. The husband's former employer and the fund established to pay the medical expenses of injured employees refused reimbursement from the insurance company. The petitioner then demanded that the nonreimbursed amount be paid to the estate or to a charity, which the insurance company denied. The petitioner then filed a second claim in the Workers' Compensation Court, but the court concluded that she lacked standing to proceed since her husband received the medical care and the care was paid for by his employer's fund. The Supreme Court reversed the Workers' Compensation Court, concluding that the Workers' Compensation Act is binding on the employee and the employee's personal representative and that the plain language of this section entitled the petitioner to bring the matter before the Workers' Compensation Court. Moreau v. Transp. Ins. Co., 2015 MT 5, 378 Mont. 10, 342 P.3d 3.

No Workers' Compensation Court Jurisdiction Upon Repudiation of Workers' Compensation Claim: A 14-year-old employee was injured as a passenger in an automobile accident while on the way to a job. A workers' compensation claim was filed by the minor's father, who was an employee of the same company. The State Fund accepted liability and paid indemnity and medical benefits. Having determined that it owed the minor permanent partial and temporary total disability benefits, the State Fund initiated a petition seeking the Workers' Compensation Court's direction regarding the best method of paying the benefits, in view of the claimant's minority age. The court appointed a guardian ad litem to represent the minor's interests. The guardian investigated the accident and concluded that because the minor might not have been in the course and scope of employment at the time of the accident, the minor might have a claim against the employer based on the driver's negligence. When the minor reached 18 years of age, he filed a claim in Workers' Compensation Court, naming both the State Fund and the employer as adverse parties, seeking a determination that the injury was not suffered in the course and scope of employment and repudiation of the workers' compensation claim in order to pursue a tort claim against the driver and the insurer. The court decided that the claim could be repudiated, in which case the petition would be dismissed for lack of a justiciable controversy, or that the claim could be ratified, in which case the court would determine the best method of payment of benefits. The court vacated a scheduled hearing and gave the employee 30 days to decide upon an option. The employee opted to repudiate the workers' compensation claim and pursue a tort action, so the court dismissed the petition, and the employer appealed. The Supreme Court affirmed. The Workers' Compensation Court's jurisdiction over the prerepudiation dispute between the employee and the State Fund did not extend to the dispute between the employee and employer by virtue of the employee's naming the employer in the workers' compensation petition. The Workers' Compensation Court correctly determined that it did not have jurisdiction over the dispute between the employee and employer regarding whether the employee was injured in the course and scope of employment, and once the workers' compensation claim was repudiated, the employee's petition was properly dismissed. In addition, the Workers' Compensation Court did not act arbitrarily by raising the subject matter jurisdiction sua sponte, vacating the hearing, and granting the employee a 30-day period to consider whether to repudiate the claim. In re Workers' Comp. Benefits of Noonkester, 2006 MT 169, 332 M 528, 140 P3d 466 (2006), following St. v. Tweedy, 277 M 313, 922 P2d 1134 (1996), and applying Alaska Pac. Assurance v. L.H.C., Inc., 191 M 120, 622 P2d 224 (1981).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Exercise of Court's Discretion in Failure to Award Nominal Benefit Award — Proposed Conclusion of Law Not Judicial Admission: In a proposed conclusion of law, the insurer restated its position that claimant had sustained no loss of earning capacity as a result of his industrial injury and recommended award of a nominal disability payment under former 39-71-2906. This did not have the effect of a confessory pleading or evidentiary admission and could not be used as a substitute for legal evidence at trial. Further, it was within the court's discretion, after considering the actual facts and observing the character and demeanor of witnesses, to decline to grant even a nominal disability award. White v. Ford, Bacon & Davis Tex., Inc., 256 M 9, 843 P2d 787, 49 St. Rep. 1117 (1992).

Award for Occupational Deafness Properly Computed: The Workers' Compensation Court properly calculated monaural and binaural hearing impairments of an employee suffering from occupational deafness and properly exercised its discretion in awarding the claimant the larger sum to which he was statutorily entitled. Beach v. St. Comp. Ins. Fund, 231 M 310, 752 P2d 200, 45 St. Rep. 635 (1988).

Jurisdiction and Nature of Workers' Compensation Court: A driver was injured while operating a tractor-trailer owned by one company and leased to another company that was in turn a division of a third company. The driver was awarded workers' compensation benefits. When the Workers' Compensation Uninsured Employers' Fund sought to collect the amount of the benefits from the company that owned the rig and from the third company, both companies denied any responsibility for the employment of the injured man. The Workers' Compensation Court and the Fund could not agree on the court's jurisdiction, and the instant appeal followed. The Supreme Court determined that the dispute involved benefits payable to the claimant, the Workers' Compensation Court has exclusive jurisdiction, the legislative history relied upon by the Fund and the history of the court indicated that the jurisdiction of the Workers' Compensation Court went beyond adjudication of workers' claims only when a dispute is related to benefits payable to a claimant, and that the Workers' Compensation Court has declaratory power under the Montana Administrative Procedure Act. State ex rel. St. Uninsured Employers' Fund v. Hunt, 191 M 514, 625 P2d 539, 38 St. Rep. 421 (1981).

Incomplete Conclusions of Law: A Workers' Compensation Court conclusion that "claimant is totally disabled within the meaning of the Workers' Compensation Law" and that insurer "is liable to the claimant for all compensation provided by the Workers' Compensation Laws of the state of Montana" is incomplete and fails to provide the Supreme Court with a final judgment capable of being reviewed on appeal. Jensen v. Zook Bros. Constr. Co., 174 M 78, 568 P2d 555, 34 St. Rep. 1022 (1977).

Scope of Judicial Review Where Additional Evidence Presented: When the appeal to the court from the Workers' Compensation Division (now Department of Labor and Industry) is heard only on the certified record or when the court permits additional evidence that is not important or adds nothing new to the case, the findings and decision of the Division of Workers' Compensation (now Department) are presumed to be correct and, if supported by credible evidence, must be affirmed. Miller v. Billings, 171 M 91, 555 P2d 747 (1976).

Scope of Judicial Review: On appeal from the findings of the Workers' Compensation Division (now Department of Labor and Industry), the court is justified in reversing the findings only when there exists a clear preponderance of the evidence against the findings. Beatty v. Wellman Power & Gas, Inc., 167 M 271, 538 P2d 1 (1975).

39-71-2901. Location of office — court powers — withdrawal — substitution — vacancy.

Compiler's Comments

2021 Amendment: Chapter 62 in (4) in middle of first sentence substituted "Title 3, chapter 1, part 9" for "Title 3, chapter 1, part 10"; and in (5) in last sentence near end substituted "Title 3, chapter 1, part 9" for "Title 3, chapter 1, part 10". Amendment effective March 16, 2021.

2015 Amendment: Chapter 39 inserted (4) and (5) concerning appointment of a substitute judge to fill a vacancy; in (7) near middle inserted "or a vacancy"; and made minor changes in style. Amendment effective October 1, 2015.

2009 Amendment: Chapter 20 inserted (3) and (4) providing a process for the withdrawal and substitution of the workers' compensation judge; and made minor changes in style. Amendment effective March 17, 2009.

1987 Amendment: Inserted (2) stating procedural powers of Workers' Compensation Court.

Administrative Rules

Title 24, chapter 5, subchapter 3, ARM Office of the Workers' Compensation Judge — procedural rules.

Case Notes

No Authority for District Judge to Substitute for Workers' Compensation Court Judge Upon Recusal: There is no statutory authority for a District Court Judge to substitute for a Workers' Compensation Court Judge upon recusal, nor does an administrative rule, of itself, provide a source of authority by which a District Court Judge may assume jurisdiction over a case in Workers' Compensation Court. Absent that authority, a District Court Judge who assumed jurisdiction over a workers' compensation case had no more authority than any member of the general public, and all orders issued by the District Court Judge in the case were of no legal effect. (See 2009 amendment.) Pinnow v. Mont. St. Fund, 2007 MT 332, 340 M 217, 172 P3d 1273 (2007).

Court's Discretion in Reopening Case: The Workers' Compensation Court has discretion under ARM 24.5.316 to reopen a case and to allow additional evidence. It was not an abuse of discretion for the court to refuse to allow additional evidence when it had sound reasons for refusal. Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

Deposing of Nonresident Claims Adjuster: A nonresident claims adjuster can be compelled by the Workers' Compensation Court to be deposed in Montana as a logical extension of an insurer's obligation to designate a resident adjuster under ARM 24.29.804. Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

Pretrial Order Construed to Include Issue of Whether Additional Workers' Compensation Benefits Payable: Garcia claimed that in holding that she was not entitled to any benefits beyond the amount paid, the Workers' Compensation Court exceeded the issue of whether or not she was injured, depriving her of her right to notice and opportunity to be heard. However, Garcia's first contention in the pretrial order was that of whether she was entitled to temporary total disability payments. The court had wide discretion in determining that the issue of compensation was within the scope of the pretrial order. The Supreme Court found that Garcia was adequately advised by the pretrial order of the presence of the disability issue and could not claim surprise on appeal. Garcia v. St. Comp. Mut. Ins. Fund, 253 M 196, 832 P2d 770, 49 St. Rep. 440 (1992).

Reversal of Hearing Examiner's Findings — Power of Workers' Compensation Court to Order New Trial: The Workers' Compensation Court appointed a hearing examiner to hear evidence in an injury case, but it was for the court to make the final decision. The examiner's findings, conclusions, and proposed decision were submitted to the court for approval. It was within the court's power to order a new trial on the ground that the examiner apparently disregarded or was not aware of evidence crucial to the case. Gould v. Liberty Mut. Fire Ins. Co., 233 M 494, 766 P2d 213, 45 St. Rep. 1671 (1988), distinguishing Walter v. Evans Prod. Co., 207 M 26, 672 P2d 613 (1983).

39-71-2902. Operating expenses.

Attorney General's Opinions

Employees of Office of Workers' Compensation Judge — Exempt From Classification Plan: The question of whether or not the employees of the office of the Workers' Compensation Judge are exempt from the state classification plan (Title 2, ch. 18) depended upon whether the office was part of the judicial branch or the executive branch. The similarities to state courts, the qualifications for office, the statutory provisions regarding the Judge and the court, statutory construction, and the legislative intent derived from the history supported the conclusion that the office performs a judicial function. Therefore, the employees are employees of the judicial branch and exempt from the state classification plan. 38 A.G. Op. 27 (1979).

39-71-2903. Administrative procedure act and rules of evidence applicable.

Compiler's Comments

1987 Amendment: In second sentence substituted "is bound" for "is not bound" and made minor changes in phraseology.

Administrative Rules

Title 24, chapter 5, subchapter 3, ARM Office of the Workers' Compensation Judge — procedural rules.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Admissibility of Unsworn Medical Reports: Under the rationale of ARM 24.5.317, adopted in 1990, medical records based on an examination of the claimant and exchanged between the parties are admissible without the necessity of foundation testimony. Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994), overruling Hert v. Lumberman Mut. Cas. Co., 178 M 355, 584 P2d 656 (1978).

Court's Discretion in Reopening Case: The Workers' Compensation Court has discretion under ARM 24.5.316 to reopen a case and to allow additional evidence. It was not an abuse of discretion for the court to refuse to allow additional evidence when it had sound reasons for refusal. Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

Pretrial Disclosure of Videotape Proof of Material Issue: A workers' compensation claimant who worked as a dog groomer claimed a shoulder injury. The Workers' Compensation Court properly excluded State Fund's videotape showing claimant grooming her horses because the state violated ARM 24.5.318(5)(g), requiring pretrial disclosure of substantive exhibits intended to prove a material point in issue. State Fund's argument that disclosure was not required because the tape impeached the claimant's shoulder injury claim failed because the tape showed the claimant engaged in activity she had said she could perform, but only on a limited basis. State Fund intended to use the tape to contradict other testimony, and the tape thus was direct evidence and subject to the pretrial disclosure rule. Simons v. St. Comp. Mut. Ins. Fund, 262 M 438, 865 P2d 1118, 50 St. Rep. 1628 (1993).

Relaxation of Evidentiary Rules Because of Prevalence of Procedural Irregularities — Failure to Lay Adequate Foundation for Evidence: It is not within the purview of the Supreme Court to allow a relaxation of the order of presentation of evidence in the Workers' Compensation Court on the ground that procedural irregularities often occur there. The Legislature has directed that the Workers' Compensation Court is bound by the common law and statutory rules of evidence. Therefore, the exclusion of State Fund's offered videotape that the Workers' Compensation Court ruled was direct evidence subject to the pretrial disclosure rule would not be overturned on the argument that the tape was rebuttal evidence for which State Fund had laid an inadequate foundation because of time constraints. Simons v. St. Comp. Mut. Ins. Fund, 262 M 438, 865 P2d 1118, 50 St. Rep. 1628 (1993).

Adoption by Workers' Compensation Court of Claimant's Proposed Findings, Conclusions, and Judgment: Appellant claimed reversible error by the Workers' Compensation Court's substantial, although not verbatim, adoption of claimant's proposed findings, conclusions, and judgment. Although under this section that court is governed by the Montana Administrative Procedure Act rather than by the Montana Rules of Civil Procedure, there is nothing in the Montana Administrative Procedure Act or the rules of the Workers' Compensation Court that prohibits the verbatim adoption of the prevailing party's proposed findings, conclusions, and judgment in a manner similar to that allowed for District Courts under former Rule 52(a), M.R.Civ.P. (now superseded). Wolfe v. Webb, 251 M 217, 824 P2d 240, 49 St. Rep. 1 (1992).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Lack of Substantial Credible Evidence — Workers' Compensation Court's Findings Reviewed De Novo: Citing McIntyre v. Glen Lake Irrigation District, 249 M 63, 813 P2d 451 (1991), and White v. Ford, Bacon & Davis Tex., Inc., 256 M 9, 843 P2d 787 (1992), the Supreme Court held that to the extent that the Workers' Compensation Court's findings of fact are based upon deposition testimony, the Supreme Court sits in as good a position as the Workers' Compensation Court to review the evidence de novo. The Supreme Court therefore reviewed the deposition testimony of the physicians and rehabilitation counselors and found that there was insufficient evidence from which the Workers' Compensation Court could determine that Larson had a reasonable prospect for employment. Larson v. Cigna Ins. Co., 276 M 283, 915 P2d 863, 53 St. Rep. 394 (1996).

Claimant's Witness Qualified as Expert Over Defendant's Objection: The lower court's decision to allow the claimant's medical witness to be qualified as an expert witness was affirmed on appeal on the basis that prior to the 1987 revision, the Workers' Compensation Judge was not bound by common law or statutory rules of evidence. Roadarmel v. Royal Ins. Co., 237 M 163, 772 P2d 1259, 46 St. Rep. 705 (1989).

Relitigation Denied for Undiscovered Facts: An insurer who initially failed to conduct proper discovery and who had constructive notice of the claimant's self-employment may not relitigate the same liability issue based upon the discovery of the self-employment issue several years later. Res judicata may not be avoided on discovery of a fact or event involved in the original action that, had it been discovered earlier, may have resulted in a different legal situation. Rightnour v. Intermtn. Ins. Co., 236 M 108, 768 P2d 871, 46 St. Rep. 220 (1989).

Pretrial Discovery of Medical Information in Workers' Compensation Court — Source of Rules: Pretrial discovery of medical information in a workers' compensation case is governed by statutes applicable to the Workers' Compensation Court and by the Procedural Rules of the Workers' Compensation Court found in the Montana Rules of Court (1987 Desk Copy), published by West Publishing Company, beginning at page 245. Bowen v. Liberty Mut. Ins. Co., 229 M 84, 745 P2d 330, 44 St. Rep. 1799 (1987).

Decedent's Statements About His Stress Not Hearsay: Workers' Compensation Court did not err in admitting testimony about statements decedent made on the day of his death. The statements allegedly showed decedent's job-related mental and emotional stress. The court is not bound by common law or statutory rules of evidence, and even if it were, the statements were not hearsay. Their purpose was to show what decedent thought and felt shortly before he died of heart failure. Tocco v. Great Falls, 220 M 221, 714 P2d 160, 43 St. Rep. 310 (1986).

Application of MAPA to Workers' Compensation Court — Court to Be Guided by Rules of Civil Procedure: Proceedings in the Workers' Compensation Court are governed not by the Rules of Civil Procedure but by the Montana Administrative Procedure Act. The Workers' Compensation Court may, however, be guided by the Rules of Civil Procedure to the extent that reference to those rules lies within the discretion of the court under ARM 2.52.224 (now 24.5.349). Moen v. Peter Kiewit & Sons' Co., 201 M 425, 655 P2d 482, 39 St. Rep. 2209 (1982).

Hearsay Evidence Admissible in Workers' Compensation Court: On appeal from the Workers' Compensation Court, appellant contended opinion evidence of a real estate appraiser not qualified as an expert was hearsay and should not have been admitted. The Supreme Court noted that the Workers' Compensation Court was not bound by common law or statutory rules of evidence and found that the lower court in its findings did not unduly rely on the questionable hearsay evidence offered. Krause v. Sears Roebuck & Co., 197 M 102, 641 P2d 458, 39 St. Rep. 394 (1982), followed in Brown v. St. Comp. Ins. Fund, 231 M 158, 752 P2d 171, 45 St. Rep. 508 (1988).

Evidence — Lack of Injury: An employee had severe back pain at work and went home at the end of his shift. He later called his supervisor and stated he had hurt his back and was going to see a doctor and would not be at work for his next shift. Evidence that he failed to notify his employer at that time that he had been injured in an accident on the job was evidence that employee may not have believed he had suffered an on-the-job injury but was not evidence that employee did not suffer an on-the-job injury. Employee had 60 days to give employer notice of an on-the-job injury; that requirement was met by employee's written notice less than 3 weeks after the alleged injury, and there was no requirement that he notify employer of an accident or injury within hours or days of its occurrence. Jones v. St. Regis Paper Co., 196 M 138, 639 P2d 1140, 38 St. Rep. 2201 (1981).

Applicability of Rules of Civil Procedure to Workers' Compensation Court: Since the Workers' Compensation Court is expressly made subject to the Montana Administrative Procedure Act and the Act allows each agency subject to the Act to promulgate its own procedural rules, the Montana Rules of Civil Procedure are not directly applicable to the court. Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981).

Jurisdiction and Nature of Workers' Compensation Court: A driver was injured while operating a tractor-trailer owned by one company and leased to another company that was in turn a division of a third company. The driver was awarded workers' compensation benefits. When the Workers' Compensation Uninsured Employers' Fund sought to collect the amount of the benefits from the company that owned the rig and from the third company, both companies denied any responsibility for the employment of the injured man. The Workers' Compensation Court and the Fund could not agree on the court's jurisdiction, and the instant appeal followed. The Supreme Court determined that the dispute involved benefits payable to the claimant, the Workers' Compensation Court had exclusive jurisdiction, the legislative history relied upon by the Fund and the history of the court indicated that the jurisdiction of the Workers' Compensation Court went beyond adjudication of workers' claims only when a dispute is related to benefits payable to a claimant, and that the Workers' Compensation Court had declaratory power under the Montana Administrative Procedure Act. State ex rel. St. Uninsured Employers' Fund v. Hunt, 191 M 514, 625 P2d 539, 38 St. Rep. 421 (1981).

Harmless Error — Consideration of Records Not Presented at Hearing: Where no timely objection was made at the time the Workers' Compensation Judge made known that he would consider an additional physical examination of the claimant after the close of the hearing, it was not error to include the results of the examination in the findings and conclusions filed by the Judge. The Judge also considered claimant's Veterans' Administration (now Veterans Affairs) medical records, which were not presented at the hearing. Since these records corroborated claimant's testimony, however, it was harmless error to consider them. Hume v. St. Regis Paper Co., 187 M 53, 608 P2d 1063, 37 St. Rep. 378 (1980).

Computation of Time Limit for Appeal in Workers' Compensation Case — Civil Procedure Rules Applied: A person who appeals from a final decision of the Workers' Compensation Court should in all fundamental fairness be given the benefit of that provision of former Rule 5, M.R.App. Civ.P. (now M.R.App.P., now superseded), which stated that ". . . except that in cases where service of notice of entry of judgment is required by [former] Rule 77(d) of the M.R.Civ.P. the time shall be 30 days from the service of notice of entry of judgment". When service of notice of the final decision is made as mandated by 2-4-623 and that service is made by mail, the provisions of former Rule 21(c), M.R.App.Civ.P. (now M.R.App.P., now superseded), were automatically put into play adding 3 days to the prescribed 30-day time limit for filing the notice of appeal set by former Rule 4(a), M.R.App.Civ.P. (now M.R.App.P., now superseded). However, when the final day of the period falls on a Sunday, former Rule 21(a), M.R.App.Civ.P. (now M.R.App.P., now superseded), came into play extending the time limit to the next day. Dumont v. Aetna Fire Underwriters, 183 M 190, 598 P2d 1099, 36 St. Rep. 1471 (1979).

Cross-Examination and Evidence: Parties before the Workers' Compensation Court have a right to cross-examination, which is a fundamental right and not an evidentiary rule. Statements contained in documents which are part of the case file, either before the Division of Workers' Compensation (now Department of Labor and Industry) or the court, cannot be considered by the court unless offered in evidence at the hearing, unless it is material of which the court may take judicial notice. Hert v. Lumberman Mut. Cas. Co., 179 M 160, 587 P2d 11 (1978), clarifying and denying rehearing of Hert v. Lumberman Mut. Cas. Co., 178 M 355, 584 P2d 656 (1978). Hert was held to no longer be authority for admissibility of medical records, in light of the 1990 adoption of ARM 24.5.317, in Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

Evidence That May Be Considered — Judicial Notice: The Montana Rules of Evidence are more relaxed in an administrative proceeding than in a court of law, but due process will not be disregarded. The right to cross-examine is a constitutionally protected fundamental right and not an evidentiary rule. Section 2-4-612(5) makes this right absolute. The Workers' Compensation Judge may only consider evidence which is offered at the hearing or of which he may take judicial notice. A judicially noticed fact must be one not subject to reasonable dispute. Disputed medical conclusions by doctors contained in medical reports cannot be judicially noticed. Hert v. Lumberman Mut. Cas. Co., 179 M 160, 587 P2d 11, 35 St. Rep. 1345 (1978), distinguishing Stevens v. Glacier Gen. Assurance Co., 176 M 61, 575 P2d 1326 (1978), and clarifying and denying rehearing of Hert v. Lumberman Mut. Cas. Co., 178 M 355, 584 P2d 656 (1978). Hert was held to no longer be authority for admissibility of medical records, in light of the 1990 adoption of ARM 24.5.317, in Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

Medical Reports Considered: The Workers' Compensation Court properly considered unsworn written medical reports without violating Montana Rules of Evidence regarding hearsay, since the court is not bound by common law and statutory rules of evidence, and without violating claimant's right to cross-examination because she had the opportunity at the hearing to present rebutting medical evidence. Stevens v. Glacier Gen. Assurance Co., 176 M 61, 575 P2d 1326, 35 St. Rep. 278 (1978).

Proceedings Administrative and Quasi-Judicial: Workers' Compensation Court proceedings are administrative in nature and quasi-judicial. Skrukrud v. Gallatin Laundry Co., Inc. & Employees Commercial Union Ins. Co., 171 M 217, 557 P2d 278 (1976).

39-71-2904. Direct appeal to supreme court.

Case Notes

No Workers' Compensation Court Jurisdiction Upon Repudiation of Workers' Compensation Claim: A 14-year-old employee was injured as a passenger in an automobile accident while on the way to a job. A workers' compensation claim was filed by the minor's father, who was an employee of the same company. The State Fund accepted liability and paid indemnity and medical benefits. Having determined that it owed the minor permanent partial and temporary total disability benefits, the State Fund initiated a petition seeking the Workers' Compensation Court's direction regarding the best method of paying the benefits, in view of the claimant's minority age. The court appointed a guardian ad litem to represent the minor's interests. The guardian investigated the accident and concluded that because the minor might not have been in the course and scope of employment at the time of the accident, the minor might have a claim against the employer based on the driver's negligence. When the minor reached 18 years of age, he filed a claim in Workers' Compensation Court, naming both the State Fund and the employer as adverse parties, seeking a determination that the injury was not suffered in the course and scope of employment and repudiation of the workers' compensation claim in order to pursue a tort claim against the driver and the insurer. The court decided that the claim could be repudiated, in which case the petition would be dismissed for lack of a justiciable controversy, or that the claim could be ratified, in which case the court would determine the best method of payment of benefits. The court vacated a scheduled hearing and gave the employee 30 days to decide upon an option. The employee opted to repudiate the workers' compensation claim and pursue a tort action, so the court dismissed the petition, and the employer appealed. The Supreme Court affirmed. The Workers' Compensation Court's jurisdiction over the prerepudiation dispute between the employee and the State Fund did not extend to the dispute between the employee and employer by virtue of the employee's naming the employer in the workers' compensation petition. The Workers' Compensation Court correctly determined that it did not have jurisdiction over the dispute between the employee and employer regarding whether the employee was injured in the course and scope of employment, and once the workers' compensation claim was repudiated, the employee's petition was properly dismissed. In addition, the Workers' Compensation Court did not act arbitrarily by raising the subject matter jurisdiction sua sponte, vacating the hearing, and granting the employee a 30-day period to consider whether to repudiate the claim. In re Workers' Comp. Benefits of Noonkester, 2006 MT 169, 332 M 528, 140 P3d 466 (2006), following St. v. Tweedy, 277 M 313, 922 P2d 1134 (1996), and applying Alaska Pac. Assurance v. L.H.C., Inc., 191 M 120, 622 P2d 224 (1981).

Standard of Review for Factfindings Made by Workers' Compensation Court: The following are principles applicable to a Supreme Court review of findings of fact made by the Workers'

Compensation Court: (1) the Supreme Court cannot substitute its judgment for that of the trial court regarding the weight of evidence on questions of fact; (2) when there is substantial evidence to support the Workers' Compensation Court, the Supreme Court cannot overturn the decision; (3) the Supreme Court will not substitute its judgment for that of the Workers' Compensation Court in matters of witness credibility and the weight of witness testimony; and (4) it is not the responsibility of the Supreme Court to determine whether sufficient evidence supports a contrary finding—rather, review entails a determination of whether substantial evidence supports the decision of the Workers' Compensation Court. Stevens v. St. Comp. Mut. Ins. Fund, 268 M 460, 886 P2d 962, 51 St. Rep. 1396 (1994). See also Wood v. Consol. Freightways, Inc., 248 M 26, 808 P2d 502 (1991), Nave v. St. Comp. Mut. Ins. Fund, 254 M 54, 835 P2d 706 (1992), and Houts v. Kare-Mor, Inc., 257 M 65, 847 P2d 701 (1993).

Substantial Credible Evidence:

The Workers' Compensation Court's findings regarding the evidence were supported by substantial evidence. The testimony of claimant and his wife contained numerous inconsistencies, which the court noted, and the court rejected some of their testimony on credibility grounds. The record also contained conflicting medical evidence. Burns v. Plum Creek Timber Co., 268 M 82, 885 P2d 508, 51 St. Rep. 1175 (1994), followed in EBI/Orion Group v. Blythe, 1998 MT 90, 288 M 356, 957 P2d 1134, 55 St. Rep. 359 (1998).

Decisions of the Workers' Compensation Court will not be overturned if there is substantial evidence to support its findings and conclusions. Strickland v. St. Comp. Mut. Ins. Fund, 273 M 254, 901 P2d 1391, 52 St. Rep. 962 (1995); Smith v. Liberty Mut. Ins. Co., 254 M 71, 835 P2d 717, 49 St. Rep. 629 (1992); Wolfe v. Webb, 251 M 217, 824 P2d 240, 49 St. Rep. 1 (1992); Giacoletto v. Indus. Indem. Co., 231 M 191, 751 P2d 1059, 45 St. Rep. 536 (1988); Tenderholt v. Travel Lodge Int'l, 218 M 523, 709 P2d 1011, 42 St. Rep. 1792 (1985); Head v. Missoula Serv. Co., 181 M 129, 592 P2d 507 (1979); Close v. St. Regis Paper Co., 175 M 158, 573 P2d 163 (1977); Ramsey v. Argonaut NW. Ins. Co., 174 M 438, 571 P2d 384 (1977); Flansburg v. Pack River Co., 172 M 163, 561 P2d 1329 (1977); Skrukrud v. Gallatin Laundry Co., Inc. & Employees Commercial Union Ins. Co., 171 M 217, 557 P2d 278 (1976).

In ruling that substantial evidence supported the Workers' Compensation Court's decision, the Supreme Court noted: (1) the claimant, the decedent's surviving spouse, was found to be a credible witness; (2) the claimant's hypothetical question presented to each party's expert was found to be accurate; (3) the claimant's medical expert was found to be more qualified and his opinion was accorded greater weight; and (4) the nature of decedent's work and the particular activity he was engaged in at the time the initial heart attack occurred supported the Workers' Compensation Court's order. Davis v. Jones, 216 M 300, 701 P2d 351, 42 St. Rep. 840 (1985).

The Supreme Court cannot substitute its judgment for that of the Workers' Compensation Court, and its function on review of a decision of that court is to determine whether there is substantial evidence to support the findings and conclusions of the court. Where there is substantial evidence to support the findings and conclusions of the court, the Supreme Court cannot overturn the decision. Keene v. Anaconda Co., 201 M 102, 652 P2d 216, 39 St. Rep. 1982 (1982); Green v. C. R. Anthony Co., 194 M 102, 634 P2d 629, 38 St. Rep. 1638 (1981).

On appeal, where essentially the only question of liability is as between two insurers and where the claimant is assured of compensation, it is unnecessary for him to make an appearance other than the filing of a short brief stating his position and that he will not appear. Therefore, claimant will not be awarded attorney fees or costs for the appeal. Little v. Structural Systems, 188 M 482, 614 P2d 516, 37 St. Rep. 1187 (1980).

Where the only credible substantial evidence in the entire record concerning causation and injury supports the claimant, the findings, conclusions, and judgment of the Workers' Compensation Court to the contrary are not supported by the record. Termination of claimant's benefits was improper, and the decision was reversed. Hume v. St. Regis Paper Co., 187 M 53, 608 P2d 1063, 37 St. Rep. 378 (1980).

Where there is sufficient credible evidence in the record to support the decision of the Workers' Compensation Court, the Supreme Court on appeal is bound by the Workers' Compensation Court's decision on the facts. Catteyson v. Glacier Gen. Assurance Co., 183 M 284, 599 P2d 341, 36 St. Rep. 1443 (1979), following McGee v. Bechtel Corp., 182 M 149, 595 P2d 1156, 36 St. Rep. 220 (1979).

Testimony Solely by Deposition — Court May Assess Evidence More Closely:

Although the Supreme Court reviews findings and conclusions of the Workers' Compensation Court by determining whether substantial credible evidence exists to support them, the Supreme Court may review and reweigh medical testimony offered by deposition. It was not error for the Workers' Compensation Court to give greater weight to the treating physician's testimony than it gave to that of State Fund's physician. State Fund's physician had treated claimant, a dog groomer, for a prior injury to the same part of the body as that injured in this case, and State Fund argued that its physician had greater knowledge of claimant's medical background, physical condition and abilities, and job duties. However, the initial opinion of State Fund's physician agreed with that of the treating physician, and he changed it to disagree only after he viewed a videotape of the claimant grooming her horses, which was properly excluded at trial because of State Fund's failure to disclose it prior to trial, and a videotape of a person who was not the claimant, but who he assumed was the claimant, grooming a dog. Simons v. St. Comp. Mut. Ins. Fund, 262 M 438, 865 P2d 1118, 50 St. Rep. 1628 (1993).

When testimony in the Workers' Compensation Court was solely by deposition, the Supreme Court was free to examine the lower court's findings more closely because the Supreme Court was in the same position as the lower court in assessing the evidence. Scyphers v. H&H Lumber, 237 M 424, 774 P2d 393, 46 St. Rep. 919 (1989).

"Clearly Erroneous" Test Applicable to Review of Agency Decision: In reviewing the findings of a trial court sitting without a jury, the Supreme Court will apply the following three-part test to determine if the trial court's findings on an agency decision are clearly erroneous: (1) the record will be reviewed to see if the findings are supported by substantial evidence; (2) if the findings are supported by substantial evidence, it will be determined whether the trial court misapprehended the effect of evidence; and (3) if substantial evidence exists and the effect of evidence has not been misapprehended, the Supreme Court may still decide that a finding is clearly erroneous when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed. St. Comp. Mut. Ins. Fund v. Lee Rost Logging, 252 M 97, 827 P2d 85, 49 St. Rep. 102 (1992), following Interstate Prod. Credit Ass'n v. DeSaye, 250 M 320, 820 P2d 1285, 48 St. Rep. 986 (1991), overruling any conflicting standard delineated in Billings v. Billings Firefighters Local No. 521, 200 M 421, 651 P2d 627 (1982), and followed in Total Mechanical Heating & Air Conditioning v. Employment Relations Div., 2002 MT 55, 309 M 84, 50 P3d 108 (2002). The test was also applied in In re Fair Hearing of Hofer v. Dept. of Public Health and Human Services, 2005 MT 302, 329 M 368, 124 P3d 1098 (2005), and McCormick v. Brevig, 2007 MT 195, 338 M 370, 169 P3d 352 (2007).

Issue Not Raised by Appellant: The appellant's workers' compensation benefits had been terminated on the basis that his conviction for growing marijuana demonstrated that his injury was not permanent. The State Fund argued that the appellant should have been ordered to reimburse the fund for all payments received. The Supreme Court held that the issue had not been raised by cross-appeal and therefore was not properly before the court. Baldwin v. St. Comp. Ins. Fund, 242 M 373, 791 P2d 49, 47 St. Rep. 810 (1990).

Appeal of Hearings Examiner's Decision to Supreme Court — No Jurisdiction: Where a workers' compensation claimant appealed an order of a hearings examiner directly to the Supreme Court, the case was remanded because this section and 39-71-2907 are unequivocally clear that the court only has jurisdiction to consider an appeal from an order of the Workers' Compensation Judge, not from an order of a hearings examiner. O'Donnell v. Ryans, Inc., 227 M 48, 736 P2d 965, 44 St. Rep. 883 (1987).

Causal Relationship Found on Undisputed Evidence: The record on appeal supported the lower court's finding and conclusion that a causal relationship between the accident and resulting physical disability was sufficiently established where testimony of the worker's physician set forth medical symptomatology from which the court could fairly conclude that claimant suffered an injury causing the physical disability, the employer failed to produce any evidence as to the specific cause of the injury or to disprove causation, and the court rightfully relied upon the worker's testimony. Frost v. Anaconda Co., 216 M 387, 701 P2d 987, 42 St. Rep. 889 (1985).

Substantial Evidence That Industrial Accident Caused Seizures: The Supreme Court upheld the Workers' Compensation Court's decision that claimant's epileptic seizures stemmed from an industrial accident which also resulted in a brain concussion. The Supreme Court reviewed critical medical testimony entered through depositions and found substantial evidence to support the Workers' Compensation Court's findings of fact. The Supreme Court declined appellant's directive to accord greater weight to one witness as the most qualified expert witness. Where findings are based on conflicting evidence, the Supreme Court's function on review is confined to determining whether there is substantial evidence to support the findings and not to determining whether there is sufficient evidence to support contrary findings. Lamb v. Universal Ins. Co., 211 M 360, 684 P2d 498, 41 St. Rep. 1414 (1984), followed in Hengel v. Pac. Hide & Fur Depot, 224 M 525, 730 P2d 1163, 43 St. Rep. 2387 (1986).

Redetermination — Remanded to Workers' Compensation Court for Review of Oral Testimony: When the medical evidence concerning claimant's ability to return to work was in conflict, the Workers' Compensation Court resolved the conflict in the testimony by finding as facts those medical opinions that would substantiate claimant's claim for compensation. On appeal, the Supreme Court ruled that this disregarding of evidence by the Workers' Compensation Court was error and remanded the case for redetermination. The Supreme Court stated that it could not review the medical evidence because, in addition to depositions, there had been oral testimony in the Workers' Compensation Court. Soelter v. Aetna Life & Cas. Co., 211 M 50, 683 P2d 480, 41 St. Rep. 1205 (1984).

Lack of Medical Evidence on Cause of Disability — Burden of Proof in Light of Purposes of Act — Standard of Appellate Review: Where the claimant and insurer presented medical evidence as to the uncertainty of the cause of the claimant's multiple sclerosis (MS) but it was shown that the onset of claimant's MS coincided with a job-related injury, the Supreme Court held that there was substantial evidence to support the findings of the Workers' Compensation Court that the claimant's MS was caused by that injury. Under the rationale of Moffett v. Bozeman Canning Co., 95 M 347, 26 P2d 973 (1933), the Workers' Compensation Court properly considered the timing of the claimant's traumatic injury and the purposes of the Workers' Compensation Act along with the evidence of a lack of medical certainty as to the cause of the claimant's disease. Given all these factors and the standard of appellate review of decisions of the Workers' Compensation Court established in McGee v. Bechtel Corp., 182 M 149, 595 P2d 1156 (1979), the Supreme Court could not conclude that the Workers' Compensation Court was clearly erroneous. Conway v. Missoula Serv. Co., 205 M 459, 669 P2d 225, 40 St. Rep. 1427 (1983), followed in Hengel v. Pac. Hide & Fur Depot, 224 M 525, 730 P2d 1163, 43 St. Rep. 2387 (1986).

Evidence of Injury — Claimant's Prior Denial of Injury: Employee's alleged denial of on-the-job accident causing injury was not necessarily inconsistent with conclusion of Supreme Court, on appeal from denial of workers' compensation benefits, that the clear preponderance of evidence indicated employee suffered a series of small on-the-job injuries during the year preceding his final breakdown, which were attributable to his work and aggravated a preexisting back condition and resulted in a herniated disc, total disability, a subsequent spinal fusion, and a disabled condition the extent of which had not yet been determined. Jones v. St. Regis Paper Co., 196 M 138, 639 P2d 1140, 38 St. Rep. 2201 (1981).

Review of Critical Deposition Evidence — Reversal for Direct Conflict With Medical Depositions: Ordinarily, the Supreme Court will defer to the Workers' Compensation Court's assessment of the demeanor and credibility of witnesses and will not substitute its judgment for that of the Workers' Compensation Court in determining the weight and credibility to be given testimony. However, where critical evidence, particularly medical evidence, was entered by deposition, the Supreme Court was in as good a position as the Workers' Compensation Court to judge the weight to be given it and reversed the judgment that compensable injury was not suffered where it was evident that the Workers' Compensation Court paid little heed to the evidence of claimant's doctors and where the findings and conclusions were directly contradicted by a preponderance of the evidence. Jones v. St. Regis Paper Co., 196 M 138, 639 P2d 1140, 38 St. Rep. 2201 (1981), followed in Shupert v. Anaconda Alum. Co., 215 M 182, 696 P2d 436, 42 St. Rep. 277 (1985), and Frost v. Anaconda Co., 216 M 387, 701 P2d 987, 42 St. Rep. 889 (1985).

Finding of Aggravation of Preexisting Disease Sustained: Where the Workers' Compensation Court finding that preexisting spinal disease was aggravated or accelerated by the accident was based on conflicting evidence, the Supreme Court's function on review was confined to determining whether there was substantial evidence on the whole record supporting the finding. The finding was supported and was upheld where the evidence consisted of claimant's testimony that he received a back injury and production of shirt showing holes where tines of a front-end loader pinned him between the loader and the steering wheel of tractor he was operating, nurse's notes and charts indicating claimant had complained about his back following the accident, and the depositions of the attending physician and another physician stating they found no aggravation by the accident of the preexisting spinal disease. Wight v. Hughes Livestock Co., Inc., 194 M 109, 634 P2d 1189, 38 St. Rep. 1632 (1981).

Appeal From Lump-Sum Advance — Standards of Review: Wide discretion will be afforded Workers' Compensation Court determination regarding lump-sum settlements, and the decision will not be interfered with by the Supreme Court unless there is an abuse of discretion. The court will be presumed correct and affirmed if supported by substantial evidence and reversed only if the evidence clearly preponderates against the findings. The Supreme Court is required to look to all evidence properly before the court below in deciding whether there is substantial evidence to support the lower court's findings and conclusions. Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981).

Standards for Review of Lump-Sum Settlement: Findings of a lower tribunal in deciding a petition for conversion of future periodic workers' compensation payments into a lump-sum payment will be presumed correct and affirmed if supported by substantial evidence. Such tribunal is in a better position than the Supreme Court to learn petitioner's circumstances and to consider his needs and the results that would probably follow from a grant or denial of the petition. Polich v. Whalen's O.K. Tire Warehouse, 194 M 167, 634 P2d 1162, 38 St. Rep. 1572 (1981).

Computation of Time Limit for Appeal in Workers' Compensation Case — Civil Procedure Rules Applied:

For an appeal from a final decision of the Workers' Compensation Judge to be filed in the manner provided by law for appeals from the District Court in civil cases, there must be a date that is the starting point for the running of the period for filing notice of appeal under former Rule 5, M.R.App.Civ.P. (now M.R.App.P., now superseded). In that there is no judgment book in the Workers' Compensation Court in which to enter the judgment and therefore there can be no notice of entry of judgment, the court established, under the powers granted by Art. VII, sec. 2, Mont. Const., that the date on which a decision becomes final under ARM 2.52.222 (now repealed) shall be the starting point for the running of the period for filing the notice of appeal. McMahon v. The Anaconda Co., 194 M 546, 828 P2d 374, 38 St. Rep. 1233 (1981).

A person who appeals from a final decision of the Workers' Compensation Court should in all fundamental fairness be given the benefit of that provision of former Rule 5, M.R.App.Civ.P. (now M.R.App.P., now superseded). When service of notice of the final decision is made as mandated by 2-4-623 and that service is made by mail, the provisions of former Rule 21(c), M.R.App. Civ.P. (now M.R.App.P., now superseded), were automatically put into play adding 3 days to the prescribed 30-day time limit for filing the notice of appeal set by former Rule 4(a), M.R.App.Civ.P. (now M.R.App.P., now superseded). However, when the final day of the period falls on a Sunday, former Rule 21(a), M.R.App.Civ.P. (now M.R.App.P., now superseded), came into play extending the time limit to the next day. Dumont v. Aetna Fire Underwriters, 183 M 190, 598 P2d 1099, 36 St. Rep. 1471 (1979).

Scope of Review:

In an appeal from the award of workers' compensation benefits, where the only issue raised before the Workers' Compensation Court was whether there should be a trial de novo, the issue of sufficiency of the evidence to support the award could not be raised on appeal. Johnston v. Nat'l Auto. & Cas. Ins. Co., 184 M 538, 604 P2d 297, 36 St. Rep. 1871 (1979).

Review of Workers' Compensation Court proceedings under this section should be no different in scope from review of decisions of the Workmen's Compensation Division (now Department of Labor and Industry) under prior law; decisions of the court will not be disturbed if supported by substantial evidence. Skrukrud v. Gallatin Laundry Co., Inc. & Employees Commercial Union Ins. Co., 171 M 217, 557 P2d 278 (1976).

Standard of Review in Workers' Compensation Cases — Conflicting Evidence: Conflicting evidence was given in this case claiming death benefits under the Workers' Compensation Act. One set of facts showed that death was caused by strenuous physical activity on the job prior to decedent's death, and the other testimony showed that decedent did nothing strenuous or unusual and that his activities on the job had no causal relationship to his death. The Workers' Compensation Court found the latter testimony more credible and entered findings accordingly. Where findings are based on conflicting evidence, the reviewing court's function is confined to determining whether there is substantial evidence supporting such findings. Following Jensen v. Zook Bros. Constr. Co., 178 M 59, 582 P2d 1191 (1978), substantial evidence supporting the findings existed here. It is not the court's function to determine whether there is sufficient evidence to support contrary findings. Stamatis v. Bechtel Power Corp., 184 M 64, 601 P2d 403, 36 St. Rep. 1866 (1979), followed in Wilson v. Glacier Gen. Assurance Co., 206 M 63, 670 P2d 931, 40 St. Rep. 1509 (1983).

Appellate Reversal — Clear Preponderance Against Findings: The findings and conclusions of the Workers' Compensation Court, as in the case of District Courts, may not stand when there is a clear preponderance of the evidence against such findings or conclusions when viewed in the light most favorable to the prevailing party. Hert v. Lumberman Mut. Cas. Co., 179 M 160, 587 P2d 11 (1978), clarifying and denying rehearing of Hert v. Lumberman Mut. Cas. Co., 178 M 355, 584 P2d 656 (1978). Hert was held to no longer be authority for admissibility of medical records, in light of the 1990 adoption of ARM 24.5.317, in Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

Weight of Evidence: The Supreme Court will not substitute its judgment for that of the Workers' Compensation Court as to the weight of evidence on questions of fact. Robins v. Anaconda Aluminum Co., 175 M 514, 575 P2d 67 (1978); Brurud v. Judge Moving & Storage Co., 172 M 249, 563 P2d 558 (1977).

Incomplete Conclusions of Law: A Workers' Compensation Court conclusion that "claimant is totally disabled within the meaning of the Workers' Compensation Law" and that insurer "is liable to the claimant for all compensation provided by the Workers' Compensation Laws of the state of Montana" is incomplete and fails to provide the Supreme Court with a final judgment capable of being reviewed on appeal. Jensen v. Zook Bros. Constr. Co., 174 M 78, 568 P2d 555, 34 St. Rep. 1022 (1977).

39-71-2905. Petition to workers' compensation judge — time limit on filing.

Compiler's Comments

2009 Amendment: Chapter 112 in (1) near beginning after "insurer" inserted reference to employer alleged to be uninsured employer or its fund; and made minor changes in style. Amendment effective April 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

1997 Amendment: Chapter 276 inserted (2) requiring that petition for hearing before Workers' Compensation Judge be filed within 2 years after denial of benefits. Amendments effective July 1, 1997.

Preamble: The preamble attached to Ch. 276, L. 1997, provided: "WHEREAS, it is the intent of the state compensation insurance fund to assist all Montanans by reducing the unfunded liability of the old fund, terminating the old fund liability tax when the old fund is adequately funded, which is currently estimated to occur as early as June 30, 1999, providing for the payment of dividends to policyholders, and maintaining a viable state compensation insurance fund; and

WHEREAS, there was an unfunded liability of $355 million as of June 30, 1996, for claims for workers' compensation injuries occurring before July 1, 1990, in the old fund, which included $129 million in outstanding bond debt; and

WHEREAS, the old fund is funded with the old fund liability tax paid by employers, employees, and self-employed persons, generating as much as $50 million each year; and

WHEREAS, the surplus of $231 [sic] in the new fund as of June 30, 1996, allowed the Board of Directors of the State Fund to declare a dividend of up to $109 million to retire the outstanding bond debt in the old fund; and

WHEREAS, the unfunded liability in the old fund will be an estimated $200 million deficit by June 30, 1997, and the surplus or the excess of assets above the reserves that are set aside to meet the claim liability in the new fund will be an estimated $127 million by June 30, 1997; and

WHEREAS, current state law requires the State Fund to use dividends to be applied first to old fund outstanding liability rather than paying dividends directly to policyholders, the State Fund shall, no later than June 30, 1998, transfer $63.8 million to the old fund account to pay old fund claims to allow direct payment of dividends to policyholders; and

WHEREAS, the $20 million appropriation received by the State Fund from the general fund during the June 1989 Special Session partially addressed the unfunded liability issue existing at that time in the old fund and canceled a planned 22% rate increase; and

WHEREAS, the State Fund now agrees to repay the $20 million appropriation to the general fund by June 30, 1999, in lieu of transferring additional funds to the old fund account to provide the general fund with additional revenue and to remove any perception that the State Fund remains a burden on the general fund; and

WHEREAS, because decreases in premium rates totaled 35% in fiscal years 1996 and 1997 and legislative changes in benefit levels have resulted in the return of private carriers, the 15% limitation on administration expenses as a percent of the prior year's premium will significantly impact the State Fund's ability to provide service to policyholders and their injured workers; and

WHEREAS, the State Fund seeks to improve the level of services provided to customers without increasing existing State Fund staffing levels by working with private sector-licensed insurance producers; and

WHEREAS, in response to Haag v. Montana Schools Group Insurance Authority, 274 M 109, 906 P.2d 693 (1995), in which the Montana Supreme Court ruled that an insurer's failure to comply with the time limitations for accepting or denying a workers' compensation claim constituted acceptance of the claim, current law needs to be clarified to provide that the failure to comply with the time limitations does not constitute acceptance of the claim."

Severability: Section 32, Ch. 276, L. 1997, was a severability clause.

Effective Date — Applicability: Section 34(2), Ch. 276, L. 1997, provided: "[Sections 7, 12 through 14 and 29 [39-71-2905]] are effective July 1, 1997, and apply to claims for injuries occurring on or after [the effective date of sections 7, 12 through 14 and 29]."

1995 Amendment: Chapter 516 inserted second sentence allowing a District Court with jurisdiction over a pending action under 39-71-515 to request the Workers' Compensation Judge to determine the amount of recoverable damages due the employee; and made minor changes in style. Amendment effective April 25, 1995.

Saving Clause: Section 25, Ch. 516, L. 1995, was a saving clause.

Severability: Section 26, Ch. 516, L. 1995, was a severability clause.

1987 Amendment: At end of first sentence, after "dispute", inserted "after satisfying dispute resolution requirements otherwise provided in this chapter", at beginning of fourth sentence inserted "After parties have satisfied dispute resolution requirements provided elsewhere in this chapter" and near end inserted reference to 39-71-317, and near end of fifth sentence, after "assessed", inserted "by the workers' compensation judge".

1985 Amendment: In fourth sentence, at end, inserted exception clause referring to 39-71-516.

Administrative Rules

ARM 24.29.207 Contested cases.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Workers' Compensation Court (WCC) Lacks Jurisdiction to Consider Constitutional Challenges to WCC and Workers' Compensation Act (WCA) After All Disputes Involving WCA Benefits Are Settled — WCC Has Authority to Rule Over Constitutional Challenges to WCC or WCA Only in Context of Benefit Dispute and Only as to Applicability of Statute, Rule, or Order to That Dispute. Allum v. Mont. St. Fund, 2023 MT 121, 412 Mont. 546, 531 P.3d 560.

Standing for Personal Representative in Workers' Compensation Court: As personal representative of her husband's estate, the petitioner filed a claim in the Workers' Compensation Court for occupational disease benefits with her husband's insurance carrier. The insurance company then accepted liability for the medical expenses incurred by the petitioner's husband. The husband's former employer and the fund established to pay the medical expenses of injured employees refused reimbursement from the insurance company. The petitioner then demanded that the nonreimbursed amount be paid to the estate or to a charity, which the insurance company denied. The petitioner then filed a second claim in the Workers' Compensation Court, but the court concluded that she lacked standing to proceed since her husband received the medical care and the care was paid for by his employer's fund. The Supreme Court reversed the Workers' Compensation Court, concluding that the Workers' Compensation Act is binding on the employee and the employee's personal representative and that the plain language of this section entitled the petitioner to bring the matter before the Workers' Compensation Court. Moreau v. Transp. Ins. Co., 2015 MT 5, 378 Mont. 10, 342 P.3d 3.

Failure to File for Hearing Within Required Time — Claim Properly Denied: Boyd was injured on the job in January 2005 and filed a first report of injury in March 2005. Boyd's claim for benefits was denied in October 2006. Boyd continued seeking treatment, and his claim was again denied in December 2006. Following further medical consultations, Boyd's claim was again denied in March 2009. Boyd filed a petition for a hearing in May 2009, and in August 2009 the employer was granted summary judgment on grounds that Boyd failed to file the petition within 2 years of initial denial of benefits. Boyd appealed, but the Supreme Court affirmed. The court applied the specific statute of limitations in 39-71-2905 rather than the more general statute of limitations in 27-2-203, but under either statute of limitations, Boyd's petition for hearing was not timely. The October 2006 letter firmly established denial of benefits and the existence of a dispute over liability, thus triggering the 2-year statute of limitations. The limitations period began to run on October 27, 2006, was tolled for 79 days for mediation, and expired on January 14, 2009. Boyd did not file for a hearing until May 2009, and the filing was therefore untimely. Summary judgment for the employer was affirmed. Boyd v. Zurich Am. Ins. Co., 2010 MT 52, 355 Mont. 336, 227 P.3d 1026, overruled in part in Ford v. Sentry Cas. Co., 2012 MT 156, 365 Mont. 405, 282 P.3d 687.

Retroactivity Dependent on Whether Claim Final or Settled — Settled Claim Defined: State Fund asserted that the Workers' Compensation Court erred by refusing to adopt the 2-year statute of limitations in 39-71-2905 as a limit on the retroactive effect of judicial decisions in workers' compensation claims. The Supreme Court held that retroactivity for workers' compensation claims is dependent on whether a claim is final or settled. A settled claim is a department-approved or court-ordered compromise of benefits between a claimant and an insurer, or a claim that was paid in full. The court refused to adopt a 2-year limit on retroactivity on all workers' compensation claims when the clear intent of 39-71-2905 is to apply the limit only to particular cases. There is no specific statutory cutoff point for most workers' compensation claims, and as stated in Dempsey v. Allstate Ins. Co., 2004 MT 391, 325 M 207, 104 P3d 483 (2004), the interests of fairness and finality are not generally served by drawing an arbitrary distinction between litigants based merely on the timing of their claims. Flynn v. Mont. St. Fund, 2008 MT 394, 347 M 146, 197 P3d 1007 (2008). See also Schmill v. Liberty NW. Ins. Corp., 2005 MT 144, 327 M 293, 114 P3d 204 (2005), and Flynn v. Montana State Fund, 2011 MT 300, 363 Mont. 55, 267 P.3d 23 (Flynn III). In Flynn III, the Supreme Court affirmed the Workers' Compensation Court's definition of "paid in full" for a "settled" workers' compensation claim. The actual payment of a benefit, and not the potential of a future benefit, makes a claim not "paid in full". Hence, a settled claim for purposes of retroactivity is either: (1) a settlement agreement ordered by a court or approved by the Department of Labor and Industry; or (2) a claim in which the claimant received all applicable benefits prior to a new judicial decision and has not received benefits on the predecision claims.

No Authority for Departmental Resolution of Workers' Compensation Attorney Fee Disputes — Administrative Rule Ineffective: Plaintiff had a dispute over attorney fees payable pursuant to a workers' compensation claim. Plaintiff argued that the Workers' Compensation Court lacked authority to resolve the dispute because A.R.M. 24.29.3802 required the court to transfer the dispute to the Department of Labor and Industry for resolution. The Supreme Court disagreed. An administrative agency does not have the power to create or divest a court of subject matter jurisdiction. Thus, to the extent that the administrative provision attempted to divest the Workers' Compensation Court of jurisdiction over the attorney fee dispute, the provision was ineffective. Pinnow v. Mont. St. Fund, 2007 MT 332, 340 M 217, 172 P3d 1273 (2007), following Kelleher Law Office v. St. Comp. Ins. Fund, 213 M 412, 691 P2d 823 (1984).

Statute of Limitations on Filing for Occupational Disease Benefits Not to Run Until Evaluation Report Issued — Evaluation Required Prior to Filing Dispute When Liability Not Accepted by Insurer: Kessel filed an asbestos-related occupational disease claim in 2001, but the insurer denied the claim on grounds that there was insufficient evidence that the claim was related to Kessel's employment. In late 2004, Kessel underwent an occupational disease panel evaluation, and the doctor who conducted the evaluation concluded that Kessel was suffering from asbestos-related lung disease as a result of Kessel's employment. Kessel then petitioned for a hearing with the Workers' Compensation Court, but the insurer moved for summary judgment, asserting that the 2-year statute of limitations had run prior to Kessel filing his petition. Prior to trial, the statute of limitations question was certified as final for appeal to the Supreme Court. The Supreme Court affirmed the Workers' Compensation Court decision. When an insurer has not accepted liability, an occupational disease evaluation must occur before a dispute can be presented to and resolved by the Workers' Compensation Court. (Note: This ruling applies only to occupational disease cases arising before June 30, 2005, when medical evaluations have already occurred.) Kessel v. Liberty NW. Ins. Corp., 2007 MT 305, 340 M 92, 172 P3d 599 (2007).

Workers' Compensation Court Authorized to Issue Only Limited Declaratory Judgments: Several workers filed claims in the Workers' Compensation Court seeking benefits. In a separate action, the workers filed a petition for a declaratory judgment in the Workers' Compensation Court seeking a declaration that the claimant disclosure waiver procedures in 39-71-604(3) and 50-16-527(5) violated the workers' right to privacy and deprived them of property without due process. The Workers' Compensation Court granted summary judgment for the workers and declared the statutory provisions unconstitutional. On appeal, the Supreme Court reversed. The Workers' Compensation Court erred in concluding that it had jurisdiction to enter a declaratory judgment in the context of this case. As a court of limited jurisdiction, the Workers' Compensation Court is statutorily authorized to issue declaratory rulings only in the context of a dispute concerning benefits under the Workers' Compensation Act and only as to the applicability of any statutory provision, rule, or order of an agency to that dispute. Benefits were not at issue in this case, so the Workers' Compensation Court did not have jurisdiction to issue a declaratory judgment concerning the constitutionality of 39-71-604(3) and 50-16-527(5), nor is the Workers' Compensation Court a court of record because it does not appear in the list in 3-1-102. (Note that the Legislature added the Workers' Compensation Court to the list of courts of record effective October 1, 2007.) Thompson v. St., 2007 MT 185, 338 M 511, 167 P3d 867 (2007). See also Allum v. Mont. St. Fund, 2023 MT 121, 412 Mont. 546, 531 P.3d 560.

Sufficient Evidence for Rescission of Workers' Compensation Settlement Agreement Based on Mutual Mistake of Material Fact Not Discovered Until After Settlement: Gamble was injured on the job, the parties entered a settlement agreement, and the employer began paying benefits based on a medical diagnosis, yet Gamble's condition worsened. Finally, Gamble went to a specialist who ran additional tests and discovered that Gamble had suffered an odontoid fracture of the spine that was consistent with the job injury but that had been unnoticed at the time of the settlement. Gamble's request for additional medical benefits was denied by the employer because payment for the fracture was not part of the settlement. The Workers' Compensation Court held that the fracture was compensable, and the employer appealed, but the Supreme Court affirmed. If Gamble's fracture existed at the time of settlement, the parties were mutually mistaken regarding the material fact concerning the nature of Gamble's injury, requiring that the agreement be rescinded. The Supreme Court reviewed the findings and found that substantial credible evidence supported the facts that: (1) the fracture was consistent with and caused by the on-the-job injury; (2) Gamble's symptoms were consistent with the injury; (3) there was a basis for ruling out other potential causes of injury; and (4) there was an explanation as to why the injury was not diagnosed at the time of settlement. Because the mutual mistake of fact existed, the settlement agreement was properly rescinded. Gamble v. Sears, 2007 MT 131, 337 M 354, 160 P3d 537 (2007).

No Workers' Compensation Court Jurisdiction Upon Repudiation of Workers' Compensation Claim: A 14-year-old employee was injured as a passenger in an automobile accident while on the way to a job. A workers' compensation claim was filed by the minor's father, who was an employee of the same company. The State Fund accepted liability and paid indemnity and medical benefits. Having determined that it owed the minor permanent partial and temporary total disability benefits, the State Fund initiated a petition seeking the Workers' Compensation Court's direction regarding the best method of paying the benefits, in view of the claimant's minority age. The court appointed a guardian ad litem to represent the minor's interests. The guardian investigated the accident and concluded that because the minor might not have been in the course and scope of employment at the time of the accident, the minor might have a claim against the employer based on the driver's negligence. When the minor reached 18 years of age, he filed a claim in Workers' Compensation Court, naming both the State Fund and the employer as adverse parties, seeking a determination that the injury was not suffered in the course and scope of employment and repudiation of the workers' compensation claim in order to pursue a tort claim against the driver and the insurer. The court decided that the claim could be repudiated, in which case the petition would be dismissed for lack of a justiciable controversy, or that the claim could be ratified, in which case the court would determine the best method of payment of benefits. The court vacated a scheduled hearing and gave the employee 30 days to decide upon an option. The employee opted to repudiate the workers' compensation claim and pursue a tort action, so the court dismissed the petition, and the employer appealed. The Supreme Court affirmed. The Workers' Compensation Court's jurisdiction over the prerepudiation dispute between the employee and the State Fund did not extend to the dispute between the employee and employer by virtue of the employee's naming the employer in the workers' compensation petition. The Workers' Compensation Court correctly determined that it did not have jurisdiction over the dispute between the employee and employer regarding whether the employee was injured in the course and scope of employment, and once the workers' compensation claim was repudiated, the employee's petition was properly dismissed. In addition, the Workers' Compensation Court did not act arbitrarily by raising the subject matter jurisdiction sua sponte, vacating the hearing, and granting the employee a 30-day period to consider whether to repudiate the claim. In re Workers' Comp. Benefits of Noonkester, 2006 MT 169, 332 M 528, 140 P3d 466 (2006), following St. v. Tweedy, 277 M 313, 922 P2d 1134 (1996), and applying Alaska Pac. Assurance v. L.H.C., Inc., 191 M 120, 622 P2d 224 (1981).

Authority of Workers' Compensation Court to Award Common Fund Attorney Fees: At the beginning of Schmill's workers' compensation claim, her attorneys pleaded for statutory attorney fees. However, following the decision in Schmill v. Liberty NW. Ins. Corp., 2003 MT 80, 315 M 51, 67 P3d 290 (2003) (Schmill I), Schmill's attorneys pleaded for, and the Workers' Compensation

Court awarded, common fund attorney fees on remand. Defendant contended that the court did not have the authority to award common fund attorney fees because Schmill's attorneys failed to plead common fund attorney fees in their initial petition. The Supreme Court held that the timing for pleading common fund attorney fees was appropriate because the common fund did not arise until after the issuance of Schmill I, so it was appropriate for Schmill's attorneys to wait until postremand proceedings to request common fund attorney fees, and it was within the discretion of the Workers' Compensation Court to award the fees pursuant to this section. Schmill v. Liberty NW. Ins. Corp., 2005 MT 144, 327 M 293, 114 P3d 204 (2005). See also Kunst v. Pass, 1998 M 71, 288 M 264, 957 P2d 1 (1998).

Tolling of Statute of Limitations During Statutorily Required Workers' Compensation Mediation: After waiting more than 9 months after a mediator issued a report, Preston petitioned the Workers' Compensation Court for a hearing regarding the reopening of a formerly settled claim. At the hearing, the court determined that a mutual mistake of fact existed concerning the severity of Preston's mental illness that arose as the result of an industrial accident. However, the court also concluded that reopening the claim based on the mutual mistake of fact was time-barred under the 2-year statute of limitations in 27-2-203. On appeal, the Supreme Court disagreed. The statute of limitations did not begin to run until Preston became aware of the mistake of fact, which occurred during the 62-day statutorily mandated mediation. Given that mediation was mandatory and that Preston had to wait until satisfying the dispute resolution requirements to petition the Workers' Compensation Court, the statute of limitations tolled during mediation and Preston had an additional 62 days to file the petition. The case was remanded for further proceedings. Preston v. Transp. Ins. Co., 2004 MT 339, 324 M 225, 102 P3d 527 (2004).

No Due Process Violation of Workers' Compensation Claimant Who Uses Available Statutory Processes: Following a work-related injury in 1992, Wiard did not submit a medical claim within 60 months, as required under 39-71-704 to avoid termination of benefits. When a subsequent claim based on the 1992 injury was denied in 2000, Wiard asserted that the denial of benefits was a due process violation because there was no notice and opportunity to be heard prior to termination of Wiard's property right in workers' compensation benefits. The Supreme Court held that Wiard's claim of a violation of due process was properly dismissed because Wiard availed himself of the mediation process and trial before the Workers' Compensation Court and thus was afforded due process. Wiard v. Liberty NW. Ins. Corp., 2003 MT 295, 318 M 132, 79 P3d 281 (2003).

Workers' Compensation Court Without Power to Decide Common-Law Tort Actions: Liberty insured Brand S Lumber, which employed McNeilly Line Logging as an independent contractor. The State Fund sent a letter to Brand S Lumber informing it that McNeilly had applied for coverage for its workers and that the State Fund would inform Brand S Lumber if cancellation proceedings were initiated against McNeilly for any reason. One of McNeilly's employees was injured on the job, and it was discovered that McNeilly had not obtained coverage. As a result, Liberty began paying benefits to the employee because Montana law holds an employer (Brand S Lumber) that contracts with an independent contractor (McNeilly) liable for payment of benefits to the independent contractor's employees if the independent contractor has not complied with the coverage provisions of state law. Liberty sued the State Fund on the basis of the letter that it had written to Brand S lumber, arguing that the State Fund had a duty to inform the lumber company that McNeilly had not obtained coverage, that Brand S Lumber had a right to rely on the representations made by the State Fund, and that Liberty was entitled to be reimbursed by the State Fund for any losses that it incurred because of the State Fund's negligence. The Workers' Compensation Court granted the State Fund's motion to dismiss, stating that it had no jurisdiction over the controversy. The Supreme Court held that the Workers' Compensation Court was without jurisdiction to hear a common-law tort case for damages because its jurisdiction was limited to disputes payable under the Workers' Compensation Act. Liberty NW. Ins. Corp. v. St. Comp. Ins. Fund, 1998 MT 169, 289 M 475, 962 P2d 1167, 55 St. Rep. 684 (1998).

Failure to Exhaust Required Rehabilitation Services Administrative Remedy: Under the 1989 version of the Workers' Compensation Act, which contained rehabilitation services provisions in 39-71-1001 through 39-71-1033 that mandated participation in the rehabilitation procedures, the Workers' Compensation Court lacked jurisdiction to determine a disability status claim prior to the claimant's exhaustion of the rehabilitation panel procedures. Bare v. Liberty Mut. Fire Ins. Co., 1998 MT 106, 288 M 440, 958 P2d 71, 55 St. Rep. 405 (1998).

Failure to Exercise Statutory Procedural Right Held Not to Violate Due Process: Grooms filed a workers' compensation claim with her insurer, the State Fund, alleging that she suffered from a skin allergy condition. The State Fund denied liability under the Workers' Compensation Act and requested the Department of Labor and Industry to process the claim under the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act). Subsequently, Grooms claimed that the decision to process her claim under the Occupational Disease Act (now repealed and merged with Workers' Compensation Act) rather than the Workers' Compensation Act denied her due process of law by denying her notice and an opportunity to be heard. The Workers' Compensation Court concluded that when her claim was denied under the Workers' Compensation Act, Grooms retained the statutory rights to have her claim resolved by mediation and to have her claim heard by the Workers' Compensation Court and, therefore, Grooms was not denied due process of law. The Supreme Court affirmed the Workers' Compensation Court, holding that Grooms still had available to her various statutory remedies that she chose not to pursue after her claim was denied by the State Fund. The Supreme Court held that her failure to pursue those remedies did not result in a denial of due process. Grooms v. Ponderosa Inn, 283 M 459, 942 P2d 699, 54 St. Rep. 725 (1997).

District Court Jurisdiction to Determine Unfair Trade Practices Alleged Before Workers' Compensation Settlement Agreement: Poteat brought a District Court complaint alleging unfair trade practices, breach of contract, and actual malice under 33-18-242. Because the underlying claim contained unresolved future workers' compensation medical benefits and the Workers' Compensation Court has exclusive jurisdiction over workers' compensation claims, the District Court determined that it had no jurisdiction to hear an unfair trade practices case until Poteat obtained a judgment or settlement of the entire underlying claim. The Supreme Court determined that counts one and four alleged actual malice and unfair trade practices before the settlement agreement, which were not based on an underlying claim that had not been settled or adjudicated, and that counts two and three alleged breach of contract and unfair trade practices after the settlement agreement, which concerned the unresolved issue of future medical benefits not yet adjudicated by the Workers' Compensation Court. The District Court erred in dismissing the entire case on grounds of lack of jurisdiction. The counts regarding unfair practices *before* settlement had their basis in a valid existing settlement agreement, and Poteat was therefore entitled to pursue the counts regarding presettlement trade practices. However, Poteat was not entitled to pursue the counts regarding unfair practices *after* settlement until the issue of future medical benefits was adjudicated. The case was thus affirmed regarding counts two and three and reversed regarding counts one and four. Poteat v. St. Paul Mercury Ins. Co., 277 M 117, 918 P2d 677, 53 St. Rep. 568 (1996).

No Statutory Authority for Setting Aside Workers' Compensation Court Judgment: Although under some circumstances the Workers' Compensation Court may have inherent equitable power to set aside its judgment, under this section, the court's authority extends only to the initial resolution of disputes and provides no authority for setting aside a judgment entered by the court beyond whatever time period is provided in the court's rules or other applicable procedural rules. St. Comp. Ins. Fund v. Chapman, 267 M 484, 885 P2d 407, 51 St. Rep. 1070 (1994).

Uninsured Employer — Jurisdiction: Petitioner filed an independent cause of action against an employer not enrolled in a workers' compensation plan and then petitioned the Workers' Compensation Court for a hearing. The District Court stayed its proceedings pending a determination by the Workers' Compensation Court of the extent of injuries and calculation of damages. The Workers' Compensation Court dismissed the petition on the grounds that it lacked jurisdiction over the action. On appeal, the Supreme Court affirmed. The Workers' Compensation Court does not have jurisdiction over actions filed in the District Court, and the District Court's jurisdiction is not confined to liability issues. Bohmer v. Uninsured Employers' Fund, 266 M 289, 880 P2d 816, 51 St. Rep. 824 (1994).

Court's Authority to Determine Time and Manner of Determining Benefits: The Workers' Compensation Court's authority to fix and determine benefits extends to the authority to determine the time and manner in which the benefits will be determined. Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

Burden of Proving That Injury on Job Caused Current Condition: A claimant has the burden of proving by a preponderance of the evidence that the claimant sustained an injury, that the injury occurred while on the job, and that there is a causal connection between the injury and the claimant's current condition. Walker v. United Parcel Serv., 262 M 450, 865 P2d 1113, 50 St. Rep. 1634 (1993), followed in Briney v. Pac. Employers Ins. Co., 283 M 346, 942 P2d 81, 54 St. Rep. 608 (1997).

Standard of Review: The standard of review for a decision of the Workers' Compensation Court is whether there is substantial credible evidence to support the court's decision. However, when critical medical testimony is presented through depositions, the Supreme Court can assess that evidence as well as the lower court. Walker v. United Parcel Serv., 262 M 450, 865 P2d 1113, 50 St. Rep. 1634 (1993), followed in Briney v. Pac. Employers Ins. Co., 283 M 346, 942 P2d 81, 54 St. Rep. 608 (1997).

Jurisdiction Declined — Review of Final Division Order Barred by Collateral Estoppel: The Workers' Compensation Court dismissed Martelli's petition for total disability benefits after Martelli failed to appeal the Employment Relations Division's final order within 10 working days of mailing. Because the interplay between the issue before the court and the issue previously litigated before the Division would have required relitigation of the issue of Martelli's disability that was decided by the Division, rehearing of the issue by the court was barred by collateral estoppel and jurisdiction by the court was properly declined. Martelli v. Anaconda-Deer Lodge County, 258 M 166, 852 P2d 579, 50 St. Rep. 479 (1993).

Authority of Workers' Compensation Court to Reopen Final Compromise Settlement Agreement Based on Mutual Mistake: Settlement agreements for workers' compensation benefits, like other agreements, are subject to the law of contracts. A Montana court that is not otherwise limited by statute, including the Workers' Compensation Court, has the authority to set those contracts aside based upon a mutual mistake regarding the nature and extent of a claimant's injuries even when express language in the settlement agreement purports to prohibit setting the agreement aside. Wolfe v. Webb, 251 M 217, 824 P2d 240, 49 St. Rep. 1 (1992), distinguishing Hutchinson v. Pierce Packing Co., 219 M 18, 710 P2d 64 (1985), and Bowen v. Anaconda Co., 220 M 185, 714 P2d 142 (1986), and followed in Gamble v. Sears, 2007 MT 131, 337 M 354, 160 P3d 537 (2007).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Untimely Filed Findings of Fact and Conclusions of Law: The Workers' Compensation Court did not abuse its discretion in not considering claimant's proposed findings of fact and conclusions of law that were not timely filed. Smith v. Liberty Mut. Ins. Co., 254 M 71, 835 P2d 717, 49 St. Rep. 629 (1992).

Jurisdiction Prior to Division Determination of Subrogation Rights: The claimant received $25,000 from his own insurer, and the State Fund ordered him to pay $12,500 of those funds over to the Fund under its subrogation rights. The Workers' Compensation Court ordered the money returned, stating that the Fund had no right to any of the money until the Division made a determination as to subrogation rights. The Supreme Court affirmed, ruling that although the Workers' Compensation Court did not have jurisdiction to determine subrogation rights, it did have jurisdiction to determine that the Fund had no right to claim any subrogation funds prior to a ruling by the Division. Malek v. St. Comp. Ins. Fund, 242 M 311, 790 P2d 965, 47 St. Rep. 568 (1990).

Amount Awarded Insufficient to Meet Need: Claimant originally sought a lump sum to pay for a car that was repossessed before he could pay it off. He then financed a new car for a higher amount than he had originally requested. His attorney failed to amend the petition to request the higher amount needed to finance the new car. It was an abuse of discretion for the Workers' Compensation Court to limit the lump-sum award to an amount that was insufficient to meet the need that the court identified as proper. Claimant should be allowed the larger amount in a lump sum. Hedegaard v. St. Comp. Ins. Fund, 238 M 290, 776 P2d 1225, 46 St. Rep. 1275 (1989).

Reversal of Hearing Examiner's Findings — Power of Workers' Compensation Court to Order New Trial: The Workers' Compensation Court appointed a hearing examiner to hear evidence in an injury case, but it was for the court to make the final decision. The examiner's findings, conclusions, and proposed decision were submitted to the court for approval. It was within the court's power to order a new trial on the ground that the examiner apparently disregarded or was not aware of evidence crucial to the case. Gould v. Liberty Mut. Fire Ins. Co., 233 M 494, 766 P2d 213, 45 St. Rep. 1671 (1988), distinguishing Walter v. Evans Prod. Co., 207 M 26, 672 P2d 613 (1983).

No Retroactive Applicability of 1987 Amendments: The 1987 amendments to the Workers' Compensation Act concerning dispute resolution and mediation do not apply retroactively to cases in which a petition was filed prior to July 1, 1987. State ex rel. Pac. Employers Ins. Co. v. Workers' Comp. Court, 230 M 233, 749 P2d 522, 45 St. Rep. 167A (1988).

Claimant's Bid to Submit New Evidence: The Workers' Compensation Court did not abuse its discretion in denying claimant's motion for a rehearing to submit additional medical evidence of claimant's condition. The court determined that the evidence presented at hearing was insufficient to prove claimant's claim, and that decision will not be overturned absent an abuse of discretion. Currey v. St. Comp. Ins. Fund, 226 M 445, 736 P2d 113, 44 St. Rep. 790 (1987).

Res Judicata Inapplicable — Issues Not Same: Plaintiff suffered a back injury in October 1980, underwent surgery, and was judged to have reached a stationary state. Plaintiff was given an impairment rating of 25% and in August 1981 entered a final settlement for 125 weeks of permanent and partial disability benefits. In June 1981, while employed by a different employer, plaintiff experienced a sexual incident which she characterized as a sexual assault. In September 1981, while employed by a third employer, plaintiff suffered an industrial accident. In March 1984, the Workers' Compensation Court determined that the sexual incident did not constitute a compensable injury and that plaintiff as of that date was entitled to temporary total disability benefits by reason of the September 1981 injury. The benefits were to continue until the disability ceased. In October 1984, plaintiff sought to have the settlement entered in August 1981 set aside, claiming mutual mistake of fact. The Workers' Compensation Court held that its March 1984 decision barred this issue as res judicata. On appeal, the Supreme Court held that the issues were not identical so that res judicata was inapplicable. In the first case, the question was basically one of amount. In the second case, the question went to the validity of the settlement itself. The mistake plaintiff alleged was her total disability by reason of the second industrial accident. No ruling in the first case addressed whether the settlement had to be reopened in light of the Supreme Court's decision in Holton v. F.H. Stoltze Land & Lumber Co., 195 M 263, 637 P2d 10, 38 St. Rep. 1835 (1981). The court also noted that the question of mutual mistake of fact could not have been raised in the first case. The case was reversed and remanded with directions to hear the petition on its merits. Phelan v. St. Paul Mercury Ins. Co. 220 M 296, 716 P2d 601, 43 St. Rep. 381 (1986).

Jurisdiction and Nature of Workers' Compensation Court:

Hospital brought an action against Angel for services rendered, and Angel admitted the essential allegations of the complaint. Angel then filed a third-party complaint alleging that the injuries were caused by an industrial accident while the employer was insured with Travelers Insurance Company and demanding judgment against Travelers for all sums that might be adjudged owing by her to the hospital. The same claim for payment was the subject of an action pending before the Workers' Compensation Court. The District Court dismissed Angel's third-party complaint. The Supreme Court upheld the dismissal on the grounds that the Workers' Compensation Court has exclusive jurisdiction to resolve the dispute under State ex rel. St. Uninsured Employers Fund v. Hunt, 191 M 514, 625 P2d 539, 38 St. Rep. 421 (1981). Under the provisions of 39-71-704, an insurer must furnish reasonable medical services, thus the services provided by the hospital in this case are benefits under the Workers' Compensation Act over which the Workers' Compensation Court has exclusive jurisdiction. Billings Deaconess Hosp. v. Angel, 219 M 490, 712 P2d 1323, 43 St. Rep. 115 (1986).

A driver was injured while operating a tractor-trailer owned by one company and leased to another company that was in turn a division of a third company. The driver was awarded workers' compensation benefits. When the Workers' Compensation Uninsured Employers' Fund sought to collect the amount of the benefits from the company that owned the rig and from the third company, both companies denied any responsibility for the employment of the injured man. The Workers' Compensation Court and the Fund could not agree on the court's jurisdiction, and the instant appeal followed. The Supreme Court determined that the dispute involved benefits payable to the claimant, the Workers' Compensation Court has exclusive jurisdiction, the legislative history relied upon by the Fund and the history of the court indicated that the jurisdiction of the Workers' Compensation Court went beyond adjudication of workers' claims only when a dispute is related to benefits payable to a claimant, and that the Workers' Compensation Court has declaratory power under the Montana Administrative Procedure Act. State ex rel. St. Uninsured Employers' Fund v. Hunt, 191 M 514, 625 P2d 539, 38 St. Rep. 421 (1981).

Preponderance of Medical Evidence Required to Prove Type of Disability: The claimant was injured in April 1981 and executed a final settlement in September 1981. In December 1982, he petitioned the Workers' Compensation Court for a rescission of the settlement agreement and reinstatement of benefits. The Workers' Compensation Court set aside the settlement and awarded the claimant permanent total disability benefits. The Supreme Court affirmed the rescission and remanded the cause for further proceedings on the issue of disability benefits because there was a lack of a preponderance of medical evidence as to permanent partial disability, temporary total disability, or permanent total disability. Hutchinson v. Pierce Packing Co., 219 M 18, 710 P2d 64, 42 St. Rep. 1810 (1985).

Technical Procedural Requirements — Workers' Compensation Court: The Supreme Court upheld a Workers' Compensation Court order that complied with the substance of former Rule 41(b), M.R.Civ.P. (now superseded), but not with the former Rule's formal technical requirements.

The Supreme Court reasoned that the primary purpose of the former Rule's requirement is that of notice for res judicata, estoppel, and appeal and that it is not proper to require an administrative tribunal to conform strictly to technical requirements of the rules of practice. Wheeler v. Ins. Co. of N. Amer., 217 M 254, 704 P2d 49, 42 St. Rep. 1177 (1985).

Claimant's Proof of Injury and Proximate Cause: A claimant must prove by a preponderance of the evidence that he suffered an injury arising out of and in the course of his employment and that the injury was the proximate cause of his disabling condition. Frost v. Anaconda Co., 216 M 387, 701 P2d 987, 42 St. Rep. 889 (1985).

Domiciliary Care as Medical Expense — Jurisdiction: On remand from the Supreme Court to the Workers' Compensation Court for a determination of reasonable costs and attorney fees, the Workers' Compensation Court determined that domiciliary care provided by claimant's mother was necessary as a medical expense; however, the court ruled that it did not have jurisdiction to set a value on the services because they constituted "other treatment" that must be approved by the Division of Workers' Compensation (now Department of Labor and Industry). The Supreme Court reversed and held that once the Workers' Compensation Court has acquired jurisdiction of a dispute under the Workers' Compensation Act, it has jurisdiction to try and decide all of the issues that arise between the parties, and in this case the Workers' Compensation Court should have fixed a dollar amount on the domiciliary care. Carlson v. Cain, 216 M 129, 700 P2d 607, 42 St. Rep. 695 (1985).

Workers' Compensation Court — No Interest on Claimants' Judgments: On remand from the Supreme Court to the Workers' Compensation Court for a determination of reasonable costs and attorney fees, the Workers' Compensation Court determined that claimant was not entitled to interest based on past due compensation and medical benefits awarded by its earlier judgment. The Supreme Court affirmed. The penalties and assessments allowed against an insurer under the Workers' Compensation Act are the exclusive penalties and assessments that can be assessed against an insurer in absence of authorizing legislation. Carlson v. Cain, 216 M 129, 700 P2d 607, 42 St. Rep. 695 (1985).

Jurisdictional Authority of Workers' Compensation Court to Extend to Payment of Attorney Fees, Related Costs: Whenever a dispute is related to workers' compensation benefits payable to a claimant, the jurisdiction of the Workers' Compensation Court goes beyond merely providing a forum for adjudicating workers' claims. This extended jurisdictional authority includes the issue of payment of attorney fees and related costs. Kelleher Law Office v. St. Comp. Ins. Fund, 213 M 412, 691 P2d 823, 41 St. Rep. 2203 (1984), followed in Pinnow v. Mont. St. Fund, 2007 MT 332, 340 M 217, 172 P3d 1273 (2007), and Dildine v. Liberty NW. Ins. Corp., 2009 MT 87, 350 M 1, 204 P3d 729 (2009).

State Fund Liable for Bad Faith in Settlement: Plaintiff suffered an injury compensable under the state Workers' Compensation Act. His employer was insured by the state fund in accordance with Plan III, under Title 39, ch. 71, part 23. After plaintiff achieved maximum healing, settlement negotiations were begun. After unsuccessful attempts at settlement, the state fund's counteroffer was reduced to writing and a formal petition for full and final settlement was submitted to plaintiff. Plaintiff's attorney, after initially rejecting the offer, waived his fees and drafted a cover letter accepting the terms of the petition. Plaintiff went to the state fund office to accept the offer, but the state fund withdrew its previous offer because it took exception to the language of the cover letter. Plaintiff filed suit alleging bad faith by the state fund. The District Court granted summary judgment to the state fund, relying on the exclusive remedy provisions of 39-71-411 and 39-71-2905. The Supreme Court reversed, relying on the reasoning of its opinions in Hayes v. Aetna Fire Underwriters, 187 M 148, 609 P2d 257 (1980), and Vigue v. Evans Products Co., 187 M 1, 608 P2d 488 (1980), relating to Plan I and Plan II insurers. The court held that the tortious conduct did not arise within the employment relationship and was not work-related and was therefore not covered by the exclusive remedy provisions. The court said that since the insurance code played no part in the Hayes and Vigue cases, those decisions were equally applicable to the state fund. Birkenbuel v. Mont. St. Comp. Ins. Fund, 212 M 139, 687 P2d 700, 41 St. Rep. 1647 (1984).

Surprise Medical Witness Who Did Not Examine Claimant: Workers' Compensation Court had broad discretion in deciding to disallow as evidence the deposition of a doctor where he was not listed as a witness in the pretrial order, no notice of desire to depose him was given until several months after the hearing, he had never seen or examined claimant, and the request was untimely and in violation of court rule. Wight v. Hughes Livestock Co., Inc., 194 M 109, 634 P2d 1189, 38 St. Rep. 1632 (1981).

Exhaustion of Administrative Workers' Compensation Remedies: Where a claim for a $6,000 advance of workers' compensation benefits was made to the Workers' Compensation Division (now State Fund), upon a dispute between the Division (now State Fund) and the claimant, a petition for a hearing was made to the Workers' Compensation Court asking for a $19,622.72 advance, and the Division (now State Fund) argued an appeal from that court that the larger advance should not have been considered because it was not presented to the Division (now State Fund) and because the Workers' Compensation Court hearing was on appeal from an agency requiring claimant to raise all issues before the agency and exhaust administrative remedies before being heard in court, the court properly entertained the question of the $19,622.72 advance, because the Division (now State Fund) had stated that the dispute was over the method of repayment and not the amount of the advance. Therefore, a dispute as to repayment method did in fact exist. There was no failure to exhaust administrative remedies as the Workers' Compensation Court is an administrative court deciding benefits disputes in a de novo hearing, and the Division (now State Fund) had adequate notice and opportunity to defend. Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981).

Jurisdiction of Disputes and Issues: Workers' Compensation Court is an administrative law court with limited jurisdiction to decide disputes relating to benefits in a de novo proceeding, not a full-blown District Court acting in review of an agency decision. In order to obtain review by the court, it should be sufficient to present issues at any time before the agency or the court. Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981).

Workers' Compensation Court — Declaratory Judgment — Frivolous Appeal: The Workers' Compensation Court properly refused to take jurisdiction of a petition seeking, in essence, a declaratory judgment that petitioner, Raines, was an employee rather than an independent contractor so as to relieve him of liability in a wrongful death action filed in District Court. The decision was one for the District Court since the Workers' Compensation Court is not empowered to issue declaratory judgments. The insurance company and its counsel are charged with such minimum knowledge, and thus must pay a $500 penalty for filing a frivolous appeal. Alaska Pac. Assurance Co. v. L.H.C., Inc., 191 M 120, 622 P2d 224, 37 St. Rep. 1616 (1980).

Award of Lump-Sum Payment — Discretion of Judge: The Workers' Compensation Judge, being in the best position to judge the needs of the claimant, will be afforded wide discretion in determining whether a lump-sum settlement provided in 39-71-741 should or should not be granted even though it is an extraordinary type of payment. When the Judge awarded a lump sum for debts incurred or to be incurred for basic necessities of life, there was no abuse of discretion because his decision lay in conscientious administration. Willoughby v. Gen. Accident Fire & Life, 187 M 253, 609 P2d 700, 37 St. Rep. 620 (1980).

Exclusive Jurisdiction — Exception: A claimant who sustains an injury covered by the Workers' Compensation Act may assert a separate action for damages in District Court against an insurer and its adjuster for the commission of intentional torts in the processing and handling of a workers' compensation claim. Vigue v. Evans Prod. Co., 187 M 1, 608 P2d 488, 37 St. Rep. 474 (1980).

39-71-2907. Increase in award for unreasonable delay or refusal to pay.

Compiler's Comments

1991 Amendment: At beginning of (1) deleted "when payment of compensation has been unreasonably delayed or refused by an insurer, either" and inserted first phrase relating to powers of Workers' Compensation Judge; inserted (1)(a) relating to unreasonable delay or refusal in making payments; in (1)(b), after "claimant", deleted "compensation", after "benefits, the" deleted "full amount of the compensation benefits due a claimant between the time compensation benefits were delayed or refused and the date of the order granting a claimant compensation benefits may be increased by the workers' compensation judge by 20%", and inserted last phrase relating to unreasonable delay or refusal; and made minor changes in style.

Applicability: Section 2, Ch. 174, L. 1991, provided: "[This act] applies to workers' compensation claims filed on or after October 1, 1991."

1987 Amendment: Inserted (2) providing that a finding of unreasonableness does not constitute bad faith or violation of unfair trade practices provisions.

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

No Attorney Fees or Penalty When Claimant Fails to Prevail: A claim must be adjudged compensable in order for a claimant to be entitled to attorney fees under 39-71-611 or the 20% penalty under 39-71-2907. Ford v. Sentry Cas. Co., 2012 MT 156, 365 Mont. 405, 282 P.3d 687.

Failure of Claimant to Show Unreasonableness of Denial of Claim — Attorney Fees and Penalty Properly Declined: In order to qualify for an award of attorney fees or a statutory penalty, a claimant must show that the State Fund's actions in denying a claim were unreasonable. In this case, the claimant failed to demonstrate that the Workers' Compensation Court's findings on the issue of the State Fund's actions in denying the claim were not supported by credible evidence and unreasonable. Denial of attorney fees and a statutory penalty were affirmed. Tinker v. Mont. St. Fund, 2009 MT 218, 351 M 305, 211 P3d 194 (2009).

Unreasonable Offer of Payment for Domiciliary Care Benefits — Penalty Warranted: On the eve of Quick's Workers' Compensation Court (WCC) trial for domiciliary care benefits, State Fund offered Quick $7.50 an hour for 24-hour care. After considering testimony from multiple doctors and nurses, the WCC awarded Quick $20 an hour for care and assessed State Fund a 20% penalty on the difference between $7.50 an hour and $20 an hour. State Fund appealed the penalty, but the Supreme Court affirmed. Based on substantial credible evidence, State Fund's offer was unreasonable, and the 20% penalty was appropriate. Quick v. Mont. St. Fund, 2009 MT 162, 350 M 455, 208 P3d 415 (2009).

Aggravation of Unknown Preexisting Condition by Industrial Accident — Burden of Proof of Causality Satisfied — Attorney Fees, Costs, and Statutory Penalty Affirmed: Narum injured his hip in an industrial accident and filed a workers' compensation claim. Defendant insurer accepted liability and began paying benefits. Although Narum had never experienced hip pain prior to the accident, medical examination revealed the existence of a degenerative joint disease in the hip. The insurer's examining physician opined that the degenerative condition was aggravated by the accident and that the injury was not connected to the workers' compensation claim because it was more than likely a preexisting condition that was exacerbated by work. The insurer continued making payments until Narum was determined to have reached maximum medical improvement based on an 8% impairment. The parties then negotiated a settlement, which provided $25,000 and allowed Narum to reserve medical benefits because possible hip surgery was anticipated. Narum later underwent hip surgery, but the insurer refused any subsequent payments, so Narum filed a workers' compensation claim seeking medical and hospital benefits, attorney fees and costs, and a statutory penalty based on the insurer's refusal to pay benefits. The Workers' Compensation Court found that the insurer was bound by the settlement to pay medical and hospital costs and that Narum was entitled to attorney fees and costs and a statutory penalty award based on the insurer's unreasonable refusal to pay benefits. The insurer appealed, but the Supreme Court affirmed on all issues. Narum met the burden of proof in this case by showing that the injury was established by objective medical findings and that it was more probable than not that the claimed injury aggravated a preexisting condition, causing the need for the hip surgery and for other treatment before and after the surgery. An award of attorney fees and costs was affirmed because the insurer denied liability for a claim that was later judged compensable, and the insurer's actions in denying liability were unreasonable in that the insurer originally agreed to pay for the hip surgery in the settlement and then denied liability and suddenly stopped paying benefits for treatment, without notice, after initially accepting liability for Narum's condition. Lastly, a statutory penalty was warranted based on the substantial credible evidence of unreasonableness. Narum v. Liberty NW. Ins. Corp., 2009 MT 127, 350 M 252, 206 P3d 964 (2009), distinguished in Stewart v. Liberty NW. Ins. Corp., 2013 MT 107, 370 Mont. 19, 299 P.3d 820. See also Best v. St. Comp. Ins. Fund, 276 M 302, 916 P2d 108 (1996).

Costs and Fees on Denied Claim Later Held Compensable: Attorney fees and costs are payable only on denial of a claim or termination of benefits later found to be compensable. Simms v. St. Comp. Ins. Fund, 2005 MT 175, 327 M 511, 116 P3d 773 (2005).

Denial of Payment for Medicine for Stress Based on Doctor's Statement That Stress Was Caused by Injury and by Proceedings in Case: A State Fund claims examiner's investigation into a doctor's prescription of medicine for exacerbated gastroesophageal reflux consisted solely of her reading of the doctor's notes, which stated that the exacerbation was caused by stress connected to her injury, subsequent problems, trial of the case, rehabilitation, and other matters connected to the case. She then denied payment for the medication. At least a minimal investigation of a claim's validity is necessary for denial to be reasonable. The payment was properly denied because there was evidence in the doctor's notes to support a reasonably debatable argument that the need for the medicine arose from the trial and matters associated with it, not from the injury itself. Therefore, the worker was not entitled to penalties or attorney fees for denial of the payment. S.L.H. v. St. Comp. Mut. Ins. Fund, 2000 MT 362, 303 M 364, 15 P3d 948, 57 St. Rep. 1543 (2000).

Penalty, Award of Attorney Fees, or Sanction for Settling on Courthouse Steps: State Fund, without investigating and with no factual or legal basis, claimed a $50,000 subrogation right during a 6-month period, taking the position that it was the worker's burden to prove that there was no subrogation right. A week before trial, State Fund conceded the issue. The lower court's holding that a claim for subrogation as to benefits already paid does not constitute benefits due and cannot give rise to penalties or attorney fees under 39-71-612 or this section was proper. "Benefits" and "compensation" do not include subrogation, and a judge awards no benefits or compensation in deciding a subrogation claim. The Supreme Court agreed with the lower court's opinion that State Fund's actions were worthy of sanctions. Section 39-71-2914 allows imposition of a sanction in a case such as this, and although the worker did not request a sanction, the lower court should have imposed one on its own initiative. However, because the worker did not raise the issue on appeal, the Supreme Court did not remand for imposition of a sanction. S.L.H. v. St. Comp. Mut. Ins. Fund, 2000 MT 362, 303 M 364, 15 P3d 948, 57 St. Rep. 1543 (2000).

Causation Disputable at Time of Trial — Case Remanded to Workers' Compensation Court for Determination of Statutory Penalty — Fees and Costs Awarded: Briney injured his back in 1981 in a work-related accident but was allowed by his physician to return to work the same year. In the years following the injury, Briney had good days and bad days, was treated by several physicians, and sometimes missed work. In 1993, he underwent unrelated surgery and, because he was inactive for a period of time following surgery, was not able to continue his exercise regimen to strengthen his back. Consequently, his back condition deteriorated and he was unable to return to work after the surgery. After his employer's workers' compensation insurer agreed to pay temporary total disability, Briney sought compensation for a permanent partial disability, but the Workers' Compensation Court Judge denied the claim, holding that Briney's current condition was not caused by the 1981 work-related injury but was caused by multiple injuries or aggravations over the years since 1981. The Supreme Court reversed, pointing to testimony linking Briney's current physical condition to his 1981 injury and relying upon its holding in Walker v. United Parcel Serv., 262 M 450, 865 P2d 1113 (1993), in which the Supreme Court held that once a worker has proved a work-related injury and produces evidence that the injury is the cause of the worker's present condition, the burden shifts to the insurer to prove that the worker's present condition is due to other injuries. Because the Supreme Court found that no such evidence had been presented by the insurer, it held that the Workers' Compensation Court erred in denying benefits. However, the Supreme Court refused to hold that, as a matter of law, causation was indisputable at the time that the trial before the Workers' Compensation Court began and that a penalty should therefore be awarded pursuant to Holton v. F.H. Stoltze Land & Lumber Co., 195 M 263, 637 P2d 10 (1981). The Supreme Court therefore remanded the case to the Workers' Compensation Court to determine whether Briney was entitled to the statutory penalty. However, the Supreme Court did award costs and attorney fees because the insurer denied that Briney's disability was related to his 1981 injury. Briney v. Pac. Employers Ins. Co., 283 M 346, 942 P2d 81, 54 St. Rep. 608 (1997).

Denial of Attorney Fees and Penalty Proper: Correspondence from a doctor created an issue with regard to petitioner's physical complaints. Therefore, it was not unreasonable for the insurer to rely on that information as a basis for termination of benefits. The Workers' Compensation Court did not err in its denial of attorney fees and a 20% penalty. Satterlee v. Lumbermen's Mut. Cas. Co., 280 M 85, 929 P2d 212, 53 St. Rep. 1310 (1996).

Employer Investigation of Injury — No Duty to Ignore Statements Employee Made While in Pain: A self-insured employer's duty to reasonably investigate and evaluate a claim would not be expanded by the court to require the employer to ignore the employee's initial statements to his supervisors and to doctors or to ignore the doctors' reports, on the basis that at the time of the employee's statements to the supervisors and doctors, he was, allegedly, in agonizing pain. Marcott v. La. Pac. Corp., 275 M 197, 911 P2d 1129, 53 St. Rep. 106 (1996).

Employer Investigation of Injury — No Duty to Try to Uncover Facts Conflicting With Initial Statements of Employee: A self-insured employer's duty to reasonably investigate and evaluate a claim would not be expanded by the court to require the employer to ask the employee followup questions to attempt to uncover any facts additional to or different from those that the employee initially provided. Marcott v. La. Pac. Corp., 275 M 197, 911 P2d 1129, 53 St. Rep. 106 (1996).

Leg Injury Occurring While Walking — Reasonableness of Denial of Claim: At the time that a torn leg muscle injury occurred, the employee told several supervisors and several examining doctors that it occurred while he was merely walking. The employer denied compensation on this basis and after obtaining legal advice. More than a month later, a letter from the employee's attorney, stating that the injury occurred when the employee turned sharply while walking quickly, caused the employer to reevaluate its denial. The employer again denied compensation, saying that a factual dispute requiring resolution by the Workers' Compensation Court had arisen as to the circumstances surrounding the injury and as to the employee's credibility. Substantial evidence supported that court's determination that the employer's denial of compensation based on the existence of a factual dispute was reasonable. That court's further decision, that the employer was not unreasonable in the employer's interpretation of the law as allowing the employer to claim that the injury was not compensable, was supported by the case law, a reading of which did not clearly show that there was no genuine doubt of compensability from a legal standpoint. Marcott v. La. Pac. Corp., 275 M 197, 911 P2d 1129, 53 St. Rep. 106 (1996).

No Duty to Accept Claim Merely Because One Doctor for Employee Says Injury Is Work-Related When Substantial Prior Evidence Shows It Is Not: The employer did not have a legal duty to accept a claim and pay compensation as of the time that the employer received from one of the employee's doctors an indication that the injury was work-related. Prior to that, the employer had received numerous indications from the employee and his doctors that the injury was not compensable, raising a genuine doubt over liability. Marcott v. La. Pac. Corp., 275 M 197, 911 P2d 1129, 53 St. Rep. 106 (1996).

Failure to Accept or Deny Claim Within Thirty Days Is Acceptance as Matter of Law — Solheim Reversed — Options for Insurer: After Haag injured his shoulder while working for a school district, he filed a timely claim with the district's workers' compensation insurer. More than 2 months later, the claims adjuster for the district's insurer denied the claim. The Workers' Compensation Court, relying upon Solheim v. Ranch, 208 M 265, 677 P2d 1034 (1984), held that the insurer's failure to respond within the 30-day time period provided in 39-71-606(1) was not an automatic acceptance of the claim. The Supreme Court reversed, overruling Solheim. The Supreme Court held that in deciding Solheim, it had exceeded its proper role as a court, that 39-71-608 provides an insurer with an alternative to admitting liability, and that 39-71-609 and 39-71-610 provide an insurer with a means to subsequently deny liability after accepting liability under 39-71-606 or beginning payments with a reservation of rights under 39-71-608. The Supreme Court also noted that in this case, the insurer could not later contest the claim on the basis of fraud because the issue of fraud was not properly before the Workers' Compensation Court. Haag v. Mont. Schools Group Ins. Authority, 274 M 109, 906 P2d 693, 52 St. Rep. 1146 (1995).

Penalty Not Limited to Cases Under Workers' Compensation Act: The Workers' Compensation Court had direct jurisdiction when the case was not an appeal from a final determination by the Department of Labor and Industry but was a benefits dispute in which it had already been established that the employee suffered an occupational disease. Because the Occupational Disease Act of Montana (now repealed and merged with Workers' Compensation Act) provides that practice and procedures prescribed in the Workers' Compensation Act apply to proceedings under the Occupational Disease Act (now repealed and merged with Workers' Compensation Act), the court did not err in applying the penalty. Ingbretson v. Louisiana-Pacific Corp., 272 M 294, 900 P2d 912, 52 St. Rep. 764 (1995).

No Authority Under Occupational Disease Act (Now Repealed and Merged With Workers' Compensation Act) for Award of Assessments and Penalties: The Workers' Compensation Act, Title 39, ch. 71, authorizes the Workers' Compensation Court to increase by 20% the full amount of benefits due a claimant if an insurer unreasonably delays or refuses to pay benefits. The Occupational Disease Act of Montana, Title 39, ch. 72 (now repealed and merged with Workers' Compensation Act), contains no similar penalty provision. The court's broad jurisdiction under the Workers' Compensation Act differs substantially under the Occupational Disease Act (now repealed and merged with Workers' Compensation Act) and cannot be superimposed upon and override the limited jurisdiction under the latter. Thus, the court did not err in denying a claimant's petition for a penalty based on an employer's unreasonable delay in accepting liability for an occupational disease claim. Wunderlich v. Lumbermens Mut. Cas. Co., 270 M 404, 892 P2d 563, 52 St. Rep. 251 (1995).

Loss of Part of Toe, Fracture of Another, and Resultant Sensitivity to Cold as Permanent Partial Disability — Justifiable Dispute as to Benefits: The insurer did not act unreasonably in denying permanent partial disability benefits. Therefore, the court properly denied claimant legal fees and a 20% penalty. There was a valid factual dispute and a valid question of legal interpretation of the pertinent statute. Claimant lost part of his fifth toe and had a fracture of his largest toe. Cold temperatures caused the foot and toes to ache. He was given an impairment rating of 1% of the whole man. The treating doctor's treatment notes did not indicate impairment of work, and the doctor's deposition was not clear on the issue. Claimant and the insurer disagreed on whether there was work impairment, and the Workers' Compensation Court found impairment. The pertinent statute had been amended in 1991 to provide that a claimant was not entitled to permanent partial disability benefits unless the medically determined physical restriction impaired the claimant's ability to work. Claimant's interpretation of the statute was justifiably disputed by the insurer, and there was no case law to aid in interpretation. Williams v. Plum Creek Timber Co., 270 M 209, 891 P2d 502, 52 St. Rep. 148 (1995).

Lack of Minimal Review and Evaluation of Validity of Claim as Unreasonable Conduct — Award of Fees Warranted: The Workers' Compensation Court held that a claimant's benefits were improperly terminated, but declined to award penalty fees and attorney fees to claimant. Issues of penalty and attorney fees must be decided based upon a determination of whether the insurer was unreasonable in terminating benefits. An insurer has a duty to make at least a minimal investigation of a claim's validity. Absent an investigation, denial of a claim for benefits is unreasonable. The failure to provide even a minimal review and evaluation once investigations are completed rises to the level of unreasonable conduct by State Fund, and the award of penalty fees and attorney fees is warranted. Stevens v. St. Comp. Mut. Ins. Fund, 268 M 460, 886 P2d 962, 51 St. Rep. 1396 (1994). See also Gaumer v. Dept. of Highways, 243 M 414, 795 P2d 77 (1990), Lovell v. St. Comp. Mut. Ins. Fund, 260 M 279, 860 P2d 95 (1993), and Stordalen v. Ricci's Food Farm, 261 M 256, 862 P2d 393 (1993).

Benefits Calculated Correctly — No Basis for Penalty: In a case in which the insurer did not deny the full amount of benefits but rather calculated the benefits correctly, there was no basis for a penalty award. David v. St. Comp. Mut. Ins. Fund, 267 M 435, 884 P2d 778, 51 St. Rep. 1105 (1994).

Refusal of Payments Reasonable — Penalty Properly Denied:

A finding by the Workers' Compensation Court that a legitimate dispute occurred between the parties and that evidence did not support a finding that the employer unreasonably delayed or denied claimant's benefits was sufficient to affirm refusal of a penalty pursuant to this section. Reeverts v. Sears, Roebuck & Co., 266 M 509, 881 P2d 620, 51 St. Rep. 894 (1994).

The Workers' Compensation Court did not err in denying a penalty against an insurer whose actions in refusing to pay for unsupervised exercise were reasonable. Chapman v. Research Cottrell, 259 M 329, 856 P2d 234, 50 St. Rep. 819 (1993).

Finding of Not Unreasonable Not Amounting to Finding of Reasonable: Workers' compensation claimant who was successful in the Workers' Compensation Court and on appeal requested costs and attorney fees, claiming that State Fund was unreasonable in delaying and in the manner of handling the claim and benefits. The Supreme Court agreed with the lower court's finding that State Fund was not unreasonable but also stated that the finding was not the equivalent to a finding of reasonable conduct, quoting the Workers' Compensation Court's conclusion that "the Court has been hindered throughout this case by the convenient forgetfulness of the parties, disappearance of key bits of evidence and the self-serving testimony by the parties. The Court reaches the conclusion that neither party is credible and both parties have been less than candid with the Court. The present case epitomizes Webster's definition of a dog-and-pony show". Simons v. St. Comp. Mut. Ins. Fund, 262 M 438, 865 P2d 1118, 50 St. Rep. 1628 (1993).

Reasonableness to Include Delay or Refusal of Payment and Manner of Conducting Defense, but Not Difference Between Requested and Granted Amounts: A State Fund defense to a claim is not reasonable merely because State Fund believes it is necessary to defend the claim. Reasonableness also refers to the manner in which the defense is conducted and delay in or refusal to make payments. In addition, reasonableness had nothing to do with the amount of benefits claimant requested, the amount awarded by the Workers' Compensation Court, or whether claimant requested more than was awarded. Simons v. St. Comp. Mut. Ins. Fund, 262 M 438, 865 P2d 1118, 50 St. Rep. 1628 (1993).

Attorney Fees and Penalty to Be Imposed if State Fund Acted Unreasonably: The Workers' Compensation Court found that the State Fund acted unreasonably in denying Stordalen's request for a consultive examination but determined that Stordalen was not entitled to receive a penalty or attorney fees. The Supreme Court held that the Workers' Compensation Court should make an award when it determines that the State Fund acted unreasonably. Stordalen v. St. Comp. Mut. Ins. Fund, 261 M 256, 862 P2d 393, 50 St. Rep. 1311 (1993), followed in Taylor v. St. Comp. Ins. Fund, 275 M 432, 913 P2d 1242, 53 St. Rep. 201 (1996).

Duty of State Fund to Investigate Receipt of Collateral Benefits — Penalty for Unreasonable Termination of Benefits: Lovell, who was a painter, roofer, and lawn mower, stopped by the Oak Room Bar for a drink after work and was asked by the owner to help unload a truck. In the process, Lovell injured his knee and was found by the State Fund to be temporarily totally disabled. The State Fund paid disability benefits of $8.26 per week based upon the bar owner's testimony that he intended to pay Lovell $4.75 per hour for a 2-hour job. After receiving a computer printout showing that Lovell was receiving social security payments, the State Fund computed an offset against Lovell's benefits, reduced his payments to zero, and also erroneously reduced mileage payments to Lovell. The Workers' Compensation Court imposed a 20% penalty against the State Fund for these calculations and reductions. The Supreme Court found that the State Fund had a duty under 39-71-701 to investigate the reason for the social security payments and that had it done so, the State Fund would have discovered the payments were for alcoholism and not the knee injury. Thus, the action of the State Fund in miscalculating Lovell's benefits was unreasonable and the penalty applied was proper. Action by the State Fund to settle the disputed amounts "on the courthouse steps" does not negate liability for the penalty. Lovell v. St. Comp. Mut. Ins. Fund, 260 M 279, 860 P2d 95, 50 St. Rep. 1043 (1993), followed in Mintyala v. St. Comp. Ins. Fund, 276 M 521, 917 P2d 442, 53 St. Rep. 503 (1996).

Jurisdiction of Court to Award Penalty: Lovell, who was a painter, roofer, and lawn mower, stopped by the Oak Room Bar for a drink after work and was asked by the owner to help unload a truck. In the process, Lovell injured his knee and was found by the State Fund to be temporarily totally disabled. The Workers' Compensation Court later awarded a penalty against the State Fund for miscalculating mileage benefits owed Lovell and for incorrectly reducing his benefit payments. The State Fund argued that the Workers' Compensation Court had no jurisdiction to award the penalties because the parties had not complied with the dispute resolution process and mediation requirements and because Lovell had not included the issue of his social security payments offset in his petition. The Supreme Court noted that the State Fund had included the satisfaction of the dispute resolution requirements in a pretrial order, which the fund had signed, and that the pretrial order also included the issue of whether the fund had unreasonably delayed or denied payment of Lovell's benefits. The Supreme Court held that for these reasons, there was substantial evidence to support the Workers' Compensation Court's findings of unreasonableness and that therefore the Workers' Compensation Court had jurisdiction to apply the penalties. Lovell v. St. Comp. Mut. Ins. Fund, 260 M 279, 860 P2d 95, 50 St. Rep. 1043 (1993).

Insurer's Failure to Make Minimal Investigation: The insurer summarily denied benefits to the claimant on the grounds that the exact chemical agent that harmed the claimant was unknown. The Supreme Court held that an insurer has a duty to make at least a minimal investigation. Absent an investigation, the denial of a claim is unreasonable and the claimant is entitled to a penalty under the statute. Gaumer v. St. Comp. Ins. Fund, 243 M 414, 795 P2d 77, 47 St. Rep. 1202 (1990).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

Assessment of Penalty on Entire Amount of Medical Expenses Unreasonably Delayed or Refused: Galetti suffered a compensable back injury in 1983 while employed by Montana Power Company (MPC), and MPC accepted liability for the injury. Following a snowmobile outing in 1994, Galetti suffered a flareup of the back injury. Galetti's medical costs were paid by his health insurance, and Galetti then sought recovery of expenses through workers' compensation. MPC offered Galetti a cash amount to settle without accepting liability, but Galetti declined and later filed this action. At a Workers' Compensation Court hearing, MPC accepted liability. The court assessed a 20% penalty against the portion of the payments attributable to Galetti's contribution to the health plan. Galetti appealed, asserting error in the court's failure to impose the penalty on all the medical benefits that MPC unreasonably delayed or refused. The Supreme Court concurred. Under this section, a penalty for unreasonable delay or refusal is limited to 20% of the full amount of benefits due a claimant, including medical expenses, and the full amount is the entire amount of compensable medical expenses unreasonably refused or delayed. The statute is not limited to only those compensable medical expenses that were personally paid by the claimant. Here, MPC unreasonably refused or delayed payment of all workers' compensation benefits associated with Galetti's back condition flareup. Thus, the Supreme Court concluded that the Workers' Compensation Court committed reversible error by not ordering a penalty on the entire amount of medical expenses incurred as a result of the flareup. Galetti v. Mont. Power Co., 2000 MT 234, 301 M 314, 8 P3d 812, 57 St. Rep. 971 (2000). See also Belton v. Carlson Transp., 220 M 194, 714 P2d 148 (1986).

Proper Termination of Benefits — Plaintiff Not Entitled to Attorney Fees, Costs, or Penalty: After Beery was injured in a fall from an oil rig in 1984, he was evaluated by a medical panel that concluded that he did not need domiciliary care. CNA Insurance Company, Beery's workers' compensation insurer, reviewed the findings of the panel and terminated coverage for domiciliary care in August of 1991. The Supreme Court found that because CNA had properly terminated domiciliary care benefits, Beery was not entitled to attorney fees, costs, or a penalty. Beery v. Grace Drilling, 260 M 157, 859 P2d 429, 50 St. Rep. 980 (1993).

When Penalty Available:

The statutory penalty applied when an insurer acted unreasonably by ignoring the opinion of claimant's treating physician and refusing to pay for prescribed medicine. The penalty was available even though the insurer conceded liability and agreed to pay for the medicine 8 days prior to trial. Plooster v. Pierce Packing Co., 256 M 287, 846 P2d 287, 50 St. Rep. 59 (1993), followed in Mintyala v. St. Comp. Ins. Fund, 276 M 521, 917 P2d 442, 53 St. Rep. 503 (1996).

The penalty under this section is available when an insurer unreasonably delays paying a claim until the claimant takes the case to trial. Further, the Workers' Compensation Court may award a penalty when payment of benefits has been unreasonably delayed until midtrial. Handlos v. Cyprus Indus. Minerals, 243 M 314, 794 P2d 702, 47 St. Rep. 1329 (1990), distinguishing Perry v. Tomahawk Transp., 226 M 318, 735 P2d 308 (1987), and followed in Jaenish v. EBI/Orion Group, 248 M 383, 812 P2d 1241, 48 St. Rep. 474 (1991), and Mintyala v. St. Comp. Ins. Fund, 276 M 521, 917 P2d 442, 53 St. Rep. 503 (1996), but see Field v. Sears, Roebuck & Co., 257 M 81, 847 P2d 306, 50 St. Rep. 166 (1993). Field was overruled, to the extent limited in the opinion, by Madill v. St. Comp. Ins. Fund, 280 M 450, 930 P2d 665, 54 St. Rep. 4 (1997).

Nature of Injury Not Self-Evident and Medical Evidence Equivocal — Denial of Penalty Proper: Denial of a penalty against insurer was not unreasonable when it was not self-evident that a back injury was caused by accident and when medical evidence linking the injury to the accident was submitted 3 years after the accident and was somewhat equivocal. Weaver v. Buttrey Food & Drug, 255 M 90, 841 P2d 476, 49 St. Rep. 897 (1992).

Penalty Not Imposed Despite Lack of Proper Investigation: The lower court was justified in failing to assess a 20% penalty when, despite the fact that the State Compensation Mutual Insurance Fund failed to properly investigate and determine whether it was mistaken about the nature of claimant's injury, State Fund incurred medical expense to send claimant a considerable distance to a highly qualified specialist. Wolfe v. Webb, 251 M 217, 824 P2d 240, 49 St. Rep. 1 (1992).

Inability of Workers' Compensation Court to Decide on Disability and Benefits After Initial Hearing — Award of Penalty Properly Denied: Claimant asserted that she was entitled to a 20% penalty under this section, arguing that there was no legitimate dispute between the parties that justified rejection of her claim after payment of less than 1 month's benefits. Denial of the penalty was proper, however, in light of the Workers' Compensation Court's inability to come to a conclusion as to disability and benefits after the initial hearing. Winchell v. G&B Motors, Inc., 246 M 320, 805 P2d 1323, 47 St. Rep. 2070 (1990).

Worker's Condition as Far Restored as Permanent Character of Injury Permits: The Supreme Court affirmed the lower court's finding that substantial evidence existed to justify changing the claimant's benefits to those due under permanent partial disability. Sharkey v. Atl. Richfield Co., 238 M 159, 777 P2d 870, 46 St. Rep. 1169 (1989).

Failure of Insurer to Forward Letter to Subsequent Insurer — Not Unreasonable Delay: Claimant argued she was entitled to an award increase for unreasonable delay based on an insurer's failure to promptly forward to a subsequent insurer a letter it received from claimant's physician, causing claimant to needlessly prosecute claims against both insurers. The Supreme Court reviewed the letter and noted it did not set forth a medical opinion or diagnosis. The letter merely relayed claimant's belief that her current medical problem was related to a previous industrial injury. The court concluded that the letter did not constitute the type of evidence that could serve as a basis for a finding of unreasonable delay or refusal to pay. Guild v. Rockwood Ins. Co., 229 M 466, 747 P2d 217, 44 St. Rep. 2139 (1987).

Appeal of Hearings Examiner's Decision to Supreme Court — No Jurisdiction: Where a workers' compensation claimant appealed an order of a hearings examiner directly to the Supreme Court, the case was remanded because 39-71-2904 and this section are unequivocally clear that the court only has jurisdiction to consider an appeal from an order of the Workers' Compensation Judge, not from an order of a hearings examiner. O'Donnell v. Ryans, Inc., 227 M 48, 736 P2d 965, 44 St. Rep. 883 (1987).

Penalty Imposed Only on Benefits Due: The District Court erroneously imposed a 20% penalty on benefits that had been paid for 1 year prior to final judgment. This section clearly authorizes imposition of the penalty only on those benefits that are due, that is, owed and payable at the time the penalty is imposed. Perry v. Tomahawk Transp., 226 M 318, 735 P2d 308, 44 St. Rep. 686 (1987), cited in Thompson v. Cigna, 2000 MT 306, 302 M 399, 14 P3d 1222, 57 St. Rep. 1292 (2000) (affirming the Workers' Compensation Court's refusal to assess a 20% penalty for an unreasonable delay of a request for conversion from biweekly benefits to lump sum because only biweekly benefits were statutorily owed and payable).

Penalty Not Warranted — Legitimate Dispute as to Connection Between Injury and Disability: The Workers' Compensation Court did not err in refusing to assess a penalty against an insurer that claimed denial of benefits was reasonable in light of substantial credible evidence of a legitimate dispute as to the causal connection between the injury and claimant's disability. Hengel v. Pac. Hide & Fur Depot, 224 M 525, 730 P2d 1163, 43 St. Rep. 2387 (1986).

Litigation of Clearly Decided Issue as Grounds for Penalty: Assessment of a penalty was proper when insurer chose to litigate an issue clearly decided in a previous instance and insurer's attorney was aware of the former decision, having represented the claimant in the previous case. Hunter v. Gibson Prod. of Billings Heights, 224 M 481, 730 P2d 1139, 43 St. Rep. 2352 (1986).

Finding of Permanent Total Disability — Increase in Award Appropriate: Workers' Compensation Court concluded that claimant failed to meet the burden of establishing that he was entitled to permanent total disability and that respondent's actions in delay or refusal to pay benefits would have been unreasonable if "the record had not supported the conclusion that claimant was permanent partial, not permanent total". The Supreme Court found claimant had met his burden, reversed and remanded, and held that since the claimant was permanent total, he was entitled to the 20% penalty pursuant to this section. Brewington v. Employers' Fire Ins. Co., 222 M 505, 723 P2d 938, 43 St. Rep. 1458 (1986).

Reasonable Insurer and Unreasonable Claimant: Delay in payment of a workers' compensation insurance claim for permanent total disability benefits was not unreasonable when record showed that claimant unreasonably refused an early tender of partial payment, that much of the delay was due to claimant's repeated requests for extensions of time in which to complete depositions, that the insurer's initial denial of permanent total disability benefits was not unreasonable when the lower court at first agreed that the insurer was not liable for such benefits, and that generally the insurer was reasonable in the negotiations and conduct of the case. Shepard v. Glacier Gen. Assurance Co., 219 M 124, 710 P2d 1355, 42 St. Rep. 1892 (1985).

Payment of Back Payments Before Trial: When the insurer terminated temporary total disability payments and refused to pay permanent total disability benefits but did pay back payments due just prior to hearing date, the Workers' Compensation Court found the insurer's actions unreasonable and assessed a penalty. The Supreme Court affirmed. Whether the insurer's conduct was unreasonable is a factual question, and, on appeal, a finding of unreasonableness will not be overturned if supported by substantial evidence. Coles v. Seven Eleven Stores, 217 M 343, 704 P2d 1048, 42 St. Rep. 1238 (1985).

Penalty When State Fund Incorrectly Canceled Coverage: Due to an error by the State Compensation Insurance Fund, when claimant filed a claim for coverage in October 1981, his lawyer was told that claimant's employer was uninsured. There was no further communication among any of the parties until March 1983, when claimant filed a petition for an emergency hearing. By July 1983, the state fund had learned of its error and admitted liability. At the time of oral argument before the Workers' Compensation Court in October 1983, the claimant still had not received any benefits. The lower court assessed a penalty only on the temporary total disability benefits due the claimant between July and October 1983. The Supreme Court ruled that the lower court was incorrect in its assumption that no part of the temporary total disability benefits or medical benefits already due in July 1983 could be subject to the statutory penalty, and remanded the case for a determination of the extent of the penalty, if any, to be charged on those benefits. Putnam v. Castle Mtn. Corp., 216 M 306, 702 P2d 333, 42 St. Rep. 833 (1985).

Penalty — Medical Payments Treated as Compensation Benefits: On remand from the Supreme Court to the Workers' Compensation Court for a determination of reasonable costs and attorney fees, the Workers' Compensation Court determined that it could not assess a penalty for unreasonable delay in payment of medical expenses because medical expenses are not "compensation benefits" within the meaning of the penalty statute. The Supreme Court reversed and held that for purposes of assessing a penalty for wrongful refusal or delay in payment, medical payments should be treated as a compensation benefit. It was irrelevant that payments were made directly to the medical providers and not to the claimant herself. Carlson v. Cain, 216

M 129, 700 P2d 607, 42 St. Rep. 695 (1985), followed in Belton v. Carlson Transp., 220 M 194, 714 P2d 148, 43 St. Rep. 286 (1986); Putnam v. Castle Mtn. Corp., 216 M 306, 702 P2d 333, 42 St. Rep. 833 (1985).

Workers' Compensation Court — Should Have Decided Penalty Issue: The Workers' Compensation Court properly ruled that the State Compensation Insurance Fund wrongfully terminated the claimant, but failed to rule on the necessary question of whether this constituted an unreasonable refusal to pay benefits. Therefore, the issue was remanded to the trial court for a determination of whether the 20% penalty should have been assessed. Moilanen v. St. Comp. Ins. Fund, 214 M 367, 694 P2d 485, 42 St. Rep. 25 (1985).

Penalty Increase Denied — Unreasonableness Question of Fact: The determination of what is unreasonable delay or refusal is a question of fact. When claimant received partial lump-sum advances totaling $6,000, plus overpayments totaling $7,287.97, and total disability payments up through the time of hearing, the Supreme Court affirmed trial court's determination that there was no basis for consideration of a penalty. Metzger v. Chemetron Corp., 212 M 351, 687 P2d 1033, 41 St. Rep. 1788 (1984).

Liability for Failure to Notify of Claim Denial Subject to Existence of Employer/Employee Relationship: The plaintiff owner of a semitrailer truck who was injured while unloading the defendant's hay brought an action in the Workers' Compensation Court for payment for his injuries. On appeal of that court's judgment, the Supreme Court affirmed, holding that the plaintiff's argument that the insurer was liable for benefits because of its failure to deny benefits within 30 days ignored the fact that there was no employer/employee relationship between the parties. The 20% penalty provided in 39-71-2907 for paying unreasonably delayed claims applies to delays in denial longer than the 30 days specified in 39-71-606 and provides sufficient protection for persons in the position of the plaintiff. That section is therefore inapplicable in the absence of the requisite employee relationship. Solheim v. Tom Davis Ranch, 208 M 265, 677 P2d 1034, 41 St. Rep. 326 (1984), overruled in Haag v. Mont. Schools Group Ins. Authority, 274 M 109, 906 P2d 693, 52 St. Rep. 1146 (1995).

Reasonableness of Withholding or Delay — Question of Fact: This section was not intended to eliminate the assertion of a legitimate defense by an insurer. To prevail under this section, a claimant must show that the withholding or delay of payment was unreasonable. The determination of what is unreasonable is a question of fact. In this case, claimant has alleged that her injury aggravated two preexisting medical conditions. Aggravation of a preexisting condition is well recognized as a compensable injury, but the question of whether there was an aggravation is one of fact. With respect to claimant's preexisting medical condition of multiple sclerosis, the Supreme Court affirmed the District Court's judgment that a 20% penalty should not be awarded. With respect to claimant's preexisting medical condition of spinal stenosis, the Supreme Court remanded the case for further factual findings on whether the insurance company's offers to claimant were reasonable in light of the medical verification that had been received by the insurance company. Paulson v. Bozeman Deaconess Foundation Hosp., 207 M 440, 673 P2d 1281, 41 St. Rep. 62 (1984), followed in Milender v. Carpenter, 230 M 1, 748 P2d 932, 44 St. Rep. 2204 (1987), and Taylor v. St. Comp. Ins. Fund, 275 M 432, 913 P2d 1242, 53 St. Rep. 201 (1996).

Unclear Medical Releases — Penalty Not Supported by Evidence: The claimant underwent surgery and hospitalization after a September 1978 industrial accident. Claimant's doctor, knowing that claimant intended to return to school and not to his job, released him to resume "full, normal activities and duties" in January of 1979. In March of 1979 claimant's surgical incision herniated, thereby necessitating corrective surgery. Claimant's doctor again released him for full activity in May of 1979. Claimant received his degree in August of 1979. The insurance carrier paid the claimant temporary total disability from the date of the accident until January of 1979 and from March of 1979 through May of 1979. The court awarded the claimant temporary total disability from the date of the accident until August of 1979 and imposed a penalty of 20% because of the insurance carrier's unreasonable delay and refusal to pay. Because it was not unreasonable for the insurance carrier to rely on the medical releases, the penalty was not supported by substantial evidence. Van Daveer v. Stauffer Chem. Co., 200 M 218, 657 P2d 1142, 39 St. Rep. 1698 (1982).

Refusal to Pay After Disability Found — Penalty Upheld: The plaintiff was injured on his job in August 1978, and after several physicians found no disability, a Dr. Peterson found a disability in December 1979. Plaintiff's employer refused to pay disability benefits, forcing plaintiff to file a claim with the Workers' Compensation Court in July 1980. Although the Supreme Court reversed the Workers' Compensation Court's finding of a permanent and total disability, it held that the employer's refusal to pay compensation after December 1979 was unreasonable and that upon remand, the Workers' Compensation Judge could apply the statutory penalty to whatever amount of disability was eventually awarded to the plaintiff. Keene v. Anaconda Co., 201 M 102, 652 P2d 216, 39 St. Rep. 1982 (1982).

Duty to Pay Undisputed Compensation — Failure as Triggering Penalty: Claimant injured his back on November 8, 1972. Claimant's physician reported to the insurer on March 29, 1974, that claimant had suffered a 5% impairment to the whole body. Sometime prior to March 31, 1975, the insurer's own physician estimated a 10% impairment to the whole body. The insurer took no action between April 4, 1975, when claimant rejected a 10% settlement and August 13, 1979, when claimant petitioned for a hearing. Although the total amount of compensation may be in dispute, the insurer has a duty to pay any undisputed compensation. The insurer in the instant case was at least responsible for payment of a 10% disability claim prior to the formal hearing. Once claimant has shown a delay in payment, the insurer has the burden of justifying the delay. The only legitimate excuse for delay is the existence of genuine doubt, from a medical or legal standpoint, that the liability exists. Here, both parties agreed that at least a 10% disability claim should have been paid. There was no legitimate excuse for the delay, and the penalty provided by this section was justified. Holton v. F. H. Stoltze Land & Lumber Co., 195 M 263, 637 P2d 10, 38 St. Rep. 1835 (1981), followed in Sampson v. Broadway Yellow Cab Co., 226 M 273, 735 P2d 298, 44 St. Rep. 649 (1987).

Benefits Improperly Terminated — Penalty and Fees Awarded: Plaintiff was injured when a refrigerator he was lifting fell and smashed his hand and wrist. Plaintiff received temporary total benefits from December 7, 1976, until terminated on May 2, 1979. Plaintiff had heart surgery in 1977. In 1979 defendant terminated plaintiff's benefits claiming that he had no permanent disability from the accident and that his medical problems were nonindustrially related. The Workers' Compensation Court found that plaintiff's benefits were improperly terminated. The letter to plaintiff terminating his benefits was not supported by medical evidence. The Workers' Compensation Court properly awarded plaintiff a penalty amount of 20% and attorney fees because his benefits were improperly terminated. Novak v. Montgomery Ward & Co., Inc., 195 M 219, 638 P2d 390, 38 St. Rep. 1803 (1981).

Penalty Increase Denied Where Bona Fide Controversy: Substantial evidence to support the finding that the insurer unreasonably delayed or refused compensation benefits could not be found and the finding and statutory 20% penalty award based on it was set aside, where insurer promptly paid medical expenses and lost wages when the claim was submitted and discontinued payments when claimant returned to work, and some 2 years later claimant contended for the first time that he had become totally and permanently disabled as a result of the accident, insurer disputed and refused to honor the claim and went to hearing on the issue, there was a bona fide controversy on the issue, and claimant's physician and another physician supported the insurer. Wight v. Hughes Livestock Co., Inc., 194 M 109, 634 P2d 1189, 38 St. Rep. 1632 (1981), followed in Meidinger v. W. Energy Co., 254 M 18, 834 P2d 1382, 49 St. Rep. 601 (1992). See also Garmann v. Employers Ins. Co. of Wausau, 226 M 432, 736 P2d 123, 44 St. Rep. 781 (1987).

Review of Fact Question of Unreasonableness: Whether the insured's action is unreasonable under this section is a question of fact and subject on appeal to the limited review of the substantial evidence test. If there is substantial evidence to support a finding of unreasonableness, the Supreme Court cannot overturn the finding. Wight v. Hughes Livestock Co., Inc., 194 M 109, 634 P2d 1189, 38 St. Rep. 1632 (1981), followed in Johnson v. Fidelity & Cas. Co. of New York, 227 M 464, 740 P2d 665, 44 St. Rep. 1236 (1987).

Knowledge and Refusal of Defendant: The assessment of a statutory penalty of 10% (prior to 1979 amendment) was merited since Liberty Mutual denied the compensability of plaintiff's claim for 3 years, refused to pay weekly compensation and medical benefits after it had been ordered to do so, knew that claimant was entitled to the minimum compensation compelled by statute, and recognized certain medical bills as being related to the injury but refused to pay them. Hutchison v. Liberty Mut. Ins. Co., 178 M 81, 582 P2d 1203, 35 St. Rep. 1126 (1978).

Substantial Evidence Supporting Award of Increase: Based upon the "substantial evidence" test, the Supreme Court upheld a finding of the Workers' Compensation Court that the insurer's actions constituted an "unreasonable delay or refusal" to make compensation payments, thus entitling claimant to a 10% (prior to 1979 amendment) increase in award pursuant to this section. Smith v. Pac. Ins. Co., 177 M 267, 581 P2d 834 (1978).

Penalty Justified: Sufficient evidence was present to support the finding and conclusion that compensation had been unreasonably delayed and the 10% (prior to 1979 amendment) penalty as provided for in this section was justified. Steffes v. USF&G Co., 177 M 83, 580 P2d 450 (1978).

39-71-2909. Authority to review, diminish, or increase awards.

Compiler's Comments

1995 Amendment: Chapter 235 in first sentence, after "changed", inserted "or that the claimant received benefits through fraud or deception" and inserted second sentence requiring the filing of a petition within 2 years of discovery of fraud. Amendment effective July 1, 1995.

1987 Amendment: At end of section, after "judge", deleted "or benefits received by a claimant through settlement agreements. However, the judge may not change any final settlement or award of compensation more than 4 years after the settlement has been approved by the division or any order approving a full and final compromise settlement of compensation."

Case Notes

INJURIES OCCURRING AFTER 1987 GENERAL REVISION

Nine Elements of Fraud Applied in Workers' Compensation Case: Taylor submitted workers' compensation claims for three injuries that he alleged occurred in February and November of 1990 and in April of 1991. State Fund paid benefits but later asserted that the claims were fraudulent and then denied benefits. Taylor filed a petition to have the benefits reinstated, and the Workers' Compensation Court found that two of claims were fraudulent. The Supreme Court held that there was substantial credible evidence to support the Workers' Compensation Court's holding that State Fund proved the nine elements of fraud on two of Taylor's three claims. Taylor v. St. Comp. Ins. Fund, 275 M 432, 913 P2d 1242, 53 St. Rep. 201 (1996).

No Record or Evidence on Appeal of Failure Below to Set Aside Final Settlement: A petition to the Workers' Compensation Court requesting that a final settlement be set aside was decided by granting the insurer's motion for summary judgment on grounds of lack of jurisdiction. The Supreme Court had no record of facts and no evidence that would enable the Supreme Court to conclude whether the settlement should be set aside. The Supreme Court declined to set aside the settlement and to decide whether to grant claimant costs, attorney fees, and a statutory penalty. The case was remanded for further proceedings. Martin v. St. Comp. Ins. Fund, 275 M 190, 911 P2d 848, 53 St. Rep. 128 (1996).

Workers' Compensation Court Jurisdiction of Petition to Set Aside Final Settlement: The Workers' Compensation Court had jurisdiction to consider a January 1995 petition to set aside a final settlement. That court decided that provisions in 39-71-204 and this section, stating that the Workers' Compensation Court could not change a final settlement more than 4 years after the settlement, which provisions were deleted by 1987 amendments, were substantive rather than procedural in nature and acted as a statute of limitations, which could not be retroactively changed. The Supreme Court reversed the decision and barred the petition in this case. Martin v. St. Comp. Ins. Fund, 275 M 190, 911 P2d 848, 53 St. Rep. 128 (1996).

Lack of Mutual Mistake as to When Injury Occurred Supported by Substantial Credible Evidence: Claimant asserted that because evidence showed that, unknown to the parties, further injury (resulting from initial on-the-job injury) to his knee occurred before settlement with State Fund, the settlement should be set aside on grounds of mutual mistake of the parties. The Supreme Court would not do so because the evidence also showed that the further injury could have occurred after the settlement, that the existence of the further injury was implied in various doctors' diagnoses made before the settlement, and that the possibility of future further injury was included in the diagnoses. Sanford v. St. Comp. Mut. Ins. Fund, 268 M 8, 885 P2d 444, 51 St. Rep. 1187 (1994).

No Statutory Authority for Setting Aside Workers' Compensation Court Judgment: Although under some circumstances the Workers' Compensation Court may have inherent equitable power to set aside its judgment, under this section, the court's authority extends only to the review of a benefit award based on a finding that the disability of the claimant has changed. As a "change in condition" statute, this section serves a limited purpose and provides no authority for setting aside a judgment entered by the court. Thus, it was error for the court to set aside its previous judgment and require claimant's attorney to repay attorney fees and costs. St. Comp. Ins. Fund v. Chapman, 267 M 484, 885 P2d 407, 51 St. Rep. 1070 (1994).

INJURIES OCCURRING PRIOR TO 1987 GENERAL REVISION

No Mutual Mistake in Workers' Compensation Settlement: Claimant sought to have his workers' compensation settlement reopened on grounds of mutual mistake. The Supreme Court affirmed the District Court's denial of the request after finding: (1) claimant was capable of understanding the terms of the settlement agreement; (2) although claimant may have experienced an increased level of pain, there was no evidence to indicate the parties were mutually mistaken about the condition of claimant's back at the time of settlement; (3) there was no evidence to link claimant's personality disorder to his back injury; and (4) the claim was barred by the statute of limitations. Whitcher v. Pac. Employers Ins. Co., 236 M 289, 769 P2d 1215, 46 St. Rep. 367 (1989).

Adequate Evidence of Impairment to Reopen Settlement Agreement: An impairment rating increase from 20% to 35%, together with lifting restrictions and testimony of a rehabilitation consultant, was sufficient evidence to enable the Workers' Compensation Court to reopen a settlement agreement within the 4-year time period authorized under a prior version of this section. Rightnour v. Intermtn. Ins. Co., 236 M 108, 768 P2d 871, 46 St. Rep. 220 (1989).

Res Judicata — Workers' Compensation Court: Claimant's lump-sum award was reduced to its present value. Subsequently the Supreme Court (prior to the 1985 amendment) decided, in a different case, that lump-sum awards cannot be discounted to present value. However, the doctrine of res judicata bars the reopening of claimant's case on the issue of the lump-sum award. Cole v. Greyhound Lines, Inc., 220 M 503, 716 P2d 611, 43 St. Rep. 562 (1986), followed in Wegmuller v. L.E. Myers Co., 224 M 69, 727 P2d 937, 43 St. Rep. 2024 (1986).

Full and Final Compromise Settlement — Effect of Annulment: Under 39-71-204 and 39-71-2909, the Workers' Compensation Court has no authority to rescind, alter, or amend a full and final settlement agreement except on a showing of fraud, mutual mistake of fact, or personal incapacity of claimant to make a binding contract. However, when the Division of Workers' Compensation (now Department of Labor and Industry), in entering an order approving the compromise settlement as required by 39-71-741, perceived an inconsistency in the settlement agreement as originally drafted by the parties and in its approval order revised the agreement, the Division (now Department) exceeded its authority under 39-71-741 and such order became a nullity, even though subsequently approved by the Workers' Compensation Court. In this situation, the Workers' Compensation Court is not precluded from reconsidering the settlement agreement and approving it as originally drafted. Bowen v. The Anaconda Co., 220 M 185, 714 P2d 142, 43 St. Rep. 278 (1986).

Final Settlement — Basis for Rescission: The claimant was injured in April 1981 and executed a final settlement in September 1981. In December 1982, he petitioned the Workers' Compensation Court for a rescission of the settlement agreement and reinstatement of benefits. The Workers' Compensation Court set aside the settlement on the basis of the doctrine of mutual mistake. The Supreme Court affirmed on different grounds, holding that a claimant has alternate theories available for rescission, i.e., for good cause under 39-71-204 and on the grounds that the disability has changed under 39-71-2909. The Supreme Court found that the findings of fact of the Workers' Compensation Court afforded a sufficient basis for rescission by the Workers' Compensation Judge under either theory. Hutchinson v. Pierce Packing Co., 219 M 18, 710 P2d 64, 42 St. Rep. 1810 (1985).

Medical Possibility Evidence — Weight: In claimant's appeal of a Workers' Compensation Court order dismissing his petition for a rehearing, he asserted that the standard for reopening a Workers' Compensation Act claim under 25-11-102 is that it was medically possible that an occupational injury aggravated a preexisting condition. The Supreme Court affirmed the order, stating that medical possibility evidence alone does not mandate a conclusion that the claimant has met his burden of proof under the Act; rather, medical possibility is to be weighed just as any other evidence. If supported by other independent evidence, it is acceptable for use by the court in making its determination. Wheeler v. Ins. Co. of N. Amer., 217 M 254, 704 P2d 49, 42 St. Rep. 1177 (1985). See also Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

Reopening Limited: The Workers' Compensation Division (now State Fund) may reopen an award under this section only if it finds that the disability of the claimant has changed. Further, the reopening proceeding may not be used to retry issues settled in the original proceeding. Wheeler v. Ins. Co. of N. Amer., 217 M 254, 704 P2d 49, 42 St. Rep. 1177 (1985), followed in Wegmuller v. L.E. Myers Co., 224 M 69, 727 P2d 937, 43 St. Rep. 2024 (1986).

Workers' Compensation Settlement — Lack of Foresight of Future Symptoms Not Basis for Rescission: Claimant entered a final settlement agreement on September 8, 1981, and on December 27, 1982, petitioned the Workers' Compensation Court for rescission of the agreement. The District Court rescinded the agreement and awarded permanent total disability benefits on the ground of mistake. The Supreme Court reversed and stated that a mistake justifying rescission must be a mistake made in unconscious ignorance of a past or present fact and that because speculation as to later symptoms is a conscious ignorance of future fact, an error of foresight cannot justify a finding of rescission for mistake. The Supreme Court found claimant's reported symptoms were not credible evidence of past or present disability or a change in disability and distinguished Kienas v. Peterson, 191 M 325, 624 P2d 1, 37 St. Rep. 1747 (1980), in which medical evidence became available later as to true extent of injury at time of settlement. Supreme Court also held that claimant did not suffer economic duress in freely accepting offer of settlement. Claimant must rely on statutory scheme of award modification despite fact that he entered into settlement only months before Supreme Court ruling making tender of value of an undisputed impairment rating mandatory. Claimant could not claim detrimental reliance on "good cause" clause in agreement when agreement was a standard form prepared by the Workers' Compensation Division (now Department of Labor and Industry) and not the insurer. When there was no medical evidence in record that claimant's disability had changed, the Workers' Compensation Court was statutorily without power to reopen the settlement. Veterans' Administration (now Veterans Affairs) disability ratings are irrelevant under Montana workers' compensation laws. Hutchinson v. Pierce Packing Co., 41 St. Rep. 2298 (1984), opinion withdrawn and replaced by 219 M 18, 710 P2d 64, 42 St. Rep. 1810 (1985).

Reclassification — Pleading Requirement — Best Interests: Plaintiff was injured when a refrigerator he was lifting fell and smashed his hand and wrist. Plaintiff received temporary total benefits from December 7, 1976, until terminated on May 2, 1979. Plaintiff had heart surgery in 1977. In 1979 defendant terminated plaintiff's benefits claiming that he had no permanent disability from the accident and that his medical problems were nonindustrially related. The Workers' Compensation Court found that plaintiff's benefits were improperly terminated. Defendant alleged that because plaintiff failed to specifically plead for reclassification from temporary total disability to permanent partial disability, the Workers' Compensation Court could not reclassify him and award a lump-sum payment. The Supreme Court held that it was in the best interest of the plaintiff and judicial economy to resolve the entire matter. The Supreme Court declined to second-guess the Workers' Compensation Court's ruling as to the effect to be given to medical impairment ratings. Novak v. Montgomery Ward & Co., Inc., 195 M 219, 638 P2d 390, 38 St. Rep. 1803 (1981). See also Nielsen v. Fireman's Fund Ins. Co., 203 M 339, 661 P2d 47, 40 St. Rep. 489 (1983), and Wolfe v. Webb, 251 M 217, 824 P2d 240, 49 St. Rep. 1 (1992).

Finality of Workers' Compensation Decision — Grounds for Overturning: A full and final compromise settlement agreement between an injured worker and the Workers' Compensation State Fund was set aside because of mutual mistake of material fact by both parties. Kienas v. Peterson, 191 M 325, 624 P2d 1, 37 St. Rep. 1747 (1980), distinguished in Sollie v. Travelers Indem. Co., 212 M 197, 686 P2d 920, 41 St. Rep. 1684 (1984), and followed in Weldele v. Medley Dev., 227 M 257, 738 P2d 1281, 44 St. Rep. 1062 (1987). A petition for rehearing was filed. The Supreme Court reaffirmed the decision. The petitioner argued the Workers' Compensation Court had no power to alter or rescind the agreement 4 years after its execution. The Supreme Court pointed out that it, not the Workers' Compensation Court, set aside the agreement. It noted the scope of its appellate power and also the code provision on lack of consent through mutual mistake of material fact. The Supreme Court was not broadening the possibilities of reopening such settlements; it merely found that no contract existed initially. Kienas v. Peterson, 38 St. Rep. 320 (1981) (apparently not reported in Montana Reports or Pacific 2d Reporter), followed in Kimes v. Pac. Employers Ins. Co., 233 M 175, 759 P2d 986, 45 St. Rep. 1402 (1988).

Permanent Disability Award May Be Reviewed: The Workers' Compensation Court has continuing jurisdiction to review an award of permanent disability. Hert v. Lumberman Mut. Cas. Co., 179 M 160, 587 P2d 11 (1978), clarifying and denying rehearing of Hert v. Lumberman Mut. Cas. Co., 178 M 355, 584 P2d 656 (1978). Hert was held to no longer be authority for admissibility of medical records, in light of the 1990 adoption of ARM 24.5.317, in Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

39-71-2910. Stay pending posttrial motions and appeal.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Effective Date: Section 4, Ch. 74, L. 1989, provided that this section is effective March 13, 1989.

Severability: Section 5, Ch. 74, L. 1989, was a severability clause.

Retroactive Applicability: Section 6, Ch. 74, L. 1989, provided: "[This act] is procedural in nature and applies retroactively, within the meaning of 1-2-109, to any case pending before the workers' compensation judge that has not been appealed to the Montana supreme court on or before [the effective date of this act]." Effective March 13, 1989.

39-71-2911. Stay pending determination by district court.

Compiler's Comments

Effective Date: Section 29, Ch. 243, L. 1995, provided that this section is effective July 1, 1995.

39-71-2914. Signing of petitions, pleadings, motions, and other papers — requirements — sanctions.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Case Notes

Penalty, Award of Attorney Fees, or Sanction for Settling on Courthouse Steps: State Fund, without investigating and with no factual or legal basis, claimed a $50,000 subrogation right during a 6-month period, taking the position that it was the worker's burden to prove that there was no subrogation right. A week before trial, State Fund conceded the issue. The lower court's holding that a claim for subrogation as to benefits already paid does not constitute benefits due and cannot give rise to penalties or attorney fees under 39-71-612 or 39-71-2907 was proper. "Benefits" and "compensation" do not include subrogation, and a judge awards no benefits or compensation in deciding a subrogation claim. The Supreme Court agreed with the lower court's opinion that State Fund's actions were worthy of sanctions. This section allows imposition of a sanction in a case such as this, and although the worker did not request a sanction, the lower court should have imposed one on its own initiative. However, because the worker did not raise the issue on appeal, the Supreme Court did not remand for imposition of a sanction. S.L.H. v. St. Comp. Mut. Ins. Fund, 2000 MT 362, 303 M 364, 15 P3d 948, 57 St. Rep. 1543 (2000).

Part 40
Catastrophically Injured Worker's Travel Assistance Act

Part Compiler's Comments

Effective Date — Applicability: Section 8, Ch. 345, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to catastrophic injuries or occupational diseases occurring on or after July 1, 2005."

CHAPTER 73
SILICOSIS BENEFITS

Part 1
General Provisions

39-73-101. Definitions.

Compiler's Comments

2007 Amendment: Chapter 232 in (2) near end increased income level from $300 to $350 a month; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendment: Chapter 474 in (2) at end increased income figure from $150 to $300; and made minor changes in style. Amendment effective July 1, 2005.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

Administrative Rules

ARM 24.29.205 Issuing orders — appeal.

39-73-102. Administration — duties of department.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1989 Amendment: Chapter 370 deleted former (3) that read: "(3) publish an annual report and interim reports as may be necessary or required or asked for by the governor".

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

39-73-103. Conformity with acts of federal government.

Compiler's Comments

2007 Amendment: Chapter 232 in second sentence increased payment cap from $300 to $350. Amendment effective July 1, 2007.

2005 Amendment: Chapter 474 in second sentence increased payments cap from $250 to $300 a month. Amendment effective July 1, 2005.

2001 Amendment: Chapter 214 in second sentence increased monthly silicosis payment from $200 to $250; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 25, Ch. 214, L. 2001, was a severability clause.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1981 Amendment: Changed payments from "$175" to "$200".

39-73-104. Eligibility requirements for benefits.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 2 in (3) substituted "39-71-715" for "39-71-115". Amendment effective October 1, 2009.

Chapter 112 in (3) substituted "39-71-715" for "39-71-115". Amendment effective July 1, 2009.

Saving Clause: Section 28, Ch. 112, L. 2009, was a saving clause.

Retroactive Applicability: Section 30, Ch. 112, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to liens filed by the department of labor and industry on judgments issued against uninsured employers prior to [the effective date of this act] [April 1, 2009] and to actions pending within the department of labor and industry or the workers' compensation court on [the effective date of this act] [April 1, 2009] regarding benefit disputes and penalty disputes as provided in [sections 3, 12, and 24] [39-71-541, 39-71-506, and 39-71-2905]."

2007 Amendment: Chapter 232 in (3) at end after "sum of" substituted "$350" for "$300". Amendment effective July 1, 2007.

2005 Amendments — Composite Section: Chapter 416 in (3) after "compensation under" substituted "39-71-715" for "The Occupational Disease Act of Montana, as provided by chapter 72 of this title"; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 474 in (3) at end increased dollar amount from $200 to $300; and made minor changes in style. Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

1981 Amendment: Changed payments from "$175" to "$200".

39-73-105. Application for payment.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

39-73-106. Investigation of applications.

Compiler's Comments

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation",

"division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

39-73-107. Amount of payments.

Compiler's Comments

2007 Amendment: Chapter 232 in first sentence near end and in second sentence in two places increased payment amount from $300 to $350; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendments — Composite Section: Chapter 416 in second sentence near beginning after "payments under" and near end after "received under" substituted "39-71-715" for "the Occupational Disease Act of Montana, as provided by chapter 72 of this title". Amendment effective July 1, 2005.

Chapter 474 in first sentence near end increased payment from $250 to $300 a month; and in second sentence after "less in the aggregate than" substituted "$300" for "$200" and at end substituted "$300" for "$250". Amendment effective July 1, 2005.

Severability: Section 42, Ch. 416, L. 2005, was a severability clause.

Effective Date — Applicability: Section 43, Ch. 416, L. 2005, provided: "[This act] is effective July 1, 2005, and applies to occupational diseases that occur on or after July 1, 2005."

2001 Amendment: Chapter 214 in two places increased monthly silicosis payment from $200 to $250; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 25, Ch. 214, L. 2001, was a severability clause.

Name Change — Code Commissioner Instruction: Section 64, Ch. 613, L. 1989, provided that in the provisions of the Montana Code Annotated, the terms "division of workers' compensation", "division", and "workers' compensation division" are changed to "department of labor and industry" or "department", meaning the "department of labor and industry". Such change was made in this section.

1981 Amendment: Changed payments from "$175" to "$200".

39-73-108. Payment of benefits when person entitled is in institution.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1991 Amendment: At end deleted subsection reference to 39-71-116. Amendment effective July 1, 1992.

39-73-109. Payment of benefits to surviving spouse.

Compiler's Comments

2007 Amendment: Chapter 232 in (2) near end after "receiving" substituted "$350" for "$300"; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendment: Chapter 474 in (2) at end increased amount from $150 to $300 and deleted former second sentence that read: "However, a person is not eligible for these payments if the spouse's taxable income is $6,800 or more a year." Amendment effective July 1, 2005.

2001 Amendment: Chapter 214 in (2) at end of first sentence substituted "$150 a month" for "one-half of those payments"; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 25, Ch. 214, L. 2001, was a severability clause.

39-73-111. Representative payee — appointment — duties.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: Throughout section substituted references to Department of Labor and Industry for references to Division of Workers' Compensation.

CHAPTER 74
CRITICAL INCIDENT STRESS MANAGEMENT

Part 1
General Provisions

Part Compiler's Comments

Preamble: The preamble attached to Ch. 238, L. 2009, provided: "WHEREAS, it is in the public interest to promote the mental health and well-being of emergency responders and to protect their ability to cope with abnormally tragic events."

Effective Date: Section 7, Ch. 238, L. 2009, provided: "[This act] is effective on passage and approval." Approved April 16, 2009.

TITLE 40
FAMILY LAW

CHAPTER 1
MARRIAGE

Chapter Compiler's Comments

Uniform Law: Chapter 1 contains the marriage provisions of the Uniform Marriage and Divorce Act as promulgated by the National Conference of Commissioners on Uniform State Laws and enacted in Montana.

Section Not Codified: Section 48-301, R.C.M. 1947, a short title clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 536, L. 1975.

Chapter Administrative Rules

Title 37, chapter 8, subchapter 6, ARM Marriage.

Chapter Law Review Articles

Removal of the Impediment: The State of Transgender Marriage in Montana, Parks, 74 Mont. L. Rev. 309 (2013).

Love or Confusion? Common Law Marriage, Homosexuality and the Montana Supreme Court in Snetsinger v. Montana University System, Coleman, 66 Mont. L. Rev. 445 (2005).

Montana's Marriage Amendment: Unconstitutionally Denying a Fundamental Right, Polk, 66 Mont. L. Rev. 405 (2005).

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Williams, 46 Mont. L. Rev. 119, at 158 through 164 (1985).

Family Law, Mattix, 44 Mont. L. Rev. 329 (1983).

Family Law, Moe, 43 Mont. L. Rev. 317 (1982).

Family Law, Opp, 42 Mont. L. Rev. 413 (1981).

Family Law, Winnie, 41 Mont. L. Rev. 135 (1980).

Family Law, Snyder & Sharrock, 40 Mont. L. Rev. 75 (1979).

Recent Developments in Family Law in Montana, Mahan, 39 Mont. L. Rev. 1 (1978).

Presumptions Concerning Family Law, Clarke, 37 Mont. L. Rev. 102 (1976).

Chapter Collateral References

Getting Married, https://courts.mt.gov/Forms/Marriage.

Marriage, https://MontanaLawHelp.org.

Part 1
General Provisions

Part Law Review Articles

Marriage—Statutes of Limitations, Special Issue Mont. L. Rev. (1977).

The Uniform Marriage and Divorce Act: New Statutory Solutions to Old Problems, Townsend, 37 Mont. L. Rev. 119 (1976).

Character of Marriage Under Montana Statutes, Briggs, 4 Mont. L. Rev. 27 (1943).

40-1-101. Purposes.

Commissioners' Note

This sets forth the underlying purposes and objectives of the measure, as a foundation for construction of the Act. As indicated in the prefatory note, the enumeration of underlying purposes of the Act which are appropriate to legislation on marriage or divorce, respectively, may be utilized separately, if it is desired to place the marriage or divorce parts of the act in different divisions of the state statutes. On the use of such purpose provisions as guides to statutory construction, see Merrill, Uniformly Correct Construction of Uniform Laws, 49 Am.Bar Assoc. Jour. 545, 546 (1963) with citation of cases. None of the enumerations of purposes is intended to exclude, in construction and application, the consideration of other purposes spelled out in provisions of the Act.

Compiler's Comments

Source: Section 102(1) and (2), Uniform Marriage and Divorce Act. Section 102(3) through (6) is contained in 40-4-101.

Case Notes

Best Interests to Control: The Uniform Marriage and Divorce Act attempts to do away with all restrictive views and procedures in order to accomplish what is in the best interest of not only the children, if any, but also the husband or wife without regard to type of relief husband and wife may be seeking. Rogers v. Rogers, 169 M 403, 548 P2d 141 (1976).

40-1-102. Uniformity of application and construction.

Commissioners' Note

This is the standard Conference provision on uniformity and construction in aid thereof. This means that, once a provision has been judicially construed, courts of other states should follow that construction unless convinced by overwhelming demonstration that the pristine rendition unquestionably was in error. See Commercial Nat. Bank v. Canal-Louisiana Bank, 1916, 35 S.Ct. 194, 197, 239 U.S. 520, 528, 60 L.Ed. 417, 421.

Compiler's Comments

Source: Section 103, Uniform Marriage and Divorce Act.

40-1-103. Formalities.

Commissioners' Note

The effect of this section is to validate all marriages performed in the enacting state in accordance with its provisions. The provision does not necessarily invalidate marriages performed in the state which are not "licensed, solemnized, and registered" in accordance with this Act. For example, although an applicant for a marriage license may have given a false name to the clerk (see section 202(a)) [40-1-107(a)] the general policy favoring the validity of marriages would require that the marriage be held valid. This position is in accord with the case law. See Clark, Domestic Relations 41 (1968). Indeed, because Section 208 [40-1-402] narrowly circumscribes the traditional annulment remedy, formal errors committed during the licensing, solemnization, or registration process could not be raised under that section.

In accordance with established usage, marriage is required to be between a man and a woman. These terms refer to all persons authorized by the Act to marry, and are not confined to those who have attained the legal age of majority. Cochran v. State, 91 Ga. 763, 185 S.E. 16 (1893); Thomas v. Navas, 47 Haw. 605, 393 P.2d 645 (1964); State v. Burt, 75 N.H. 64, 71 A. 30, Ann.Cas.1912A, 232 (1908); Kenyon v. Peo., 26 N.Y. 203, 84 Am.Dec. 177 (1863) (per Baltron, J.); Blackburn v. State, 22 Ohio St. 102 (1871); Massa v. State, 37 Ohio App. 532, 175 N.E. 219 (1930); State v. Seiler, 106 Wis. 346, 82 N.W. 167 (1908). The general course of decision holds that not every deviation from formal prescribed procedures renders a marriage subject to successful attack. Substantial compliance, in the light of attendant circumstances and statutory policy, results in a sustainable marriage. Wallace v. Screws, 227 Ala. 183, 149 So. 226 (1923); Russell v. Taglialovore, 153 So. 44 (La.App.1934); Knapp v. Knapp, 149 Md. 263, 131 A. 329 (1925); Johnson v. Johnson, 214 Minn. 462, 8 N.W.2d 620 (1943); Hartman v. Valier & Spies Milling Co., 356 Mo. 424, 202 S.W.2d 1 (1947); Christensen v. Christensen, 144 Neb. 763, 14 N.W.2d 613 (1944); Ponina v. Leland, 454 P.2d 16 (Nev.1969); Portwood v. Portwood, 109 S.W.2d 515 (Tex.Civ.App.1937) (writ of error dismissed or refused). As to attacks on marriages which, though performed in accordance with the formal requirements of the Act, are either prohibited or are not permitted by the regulatory provisions of Section 202-207 [40-1-107, 40-1-202, 40-1-212, 40-1-213, 40-1-301, 40-1-321(1), 40-1-401], consult Section 208 [40-1-402], and comment thereto.

This section additionally emphasizes the legal concept of marriage as a civil contractual status, in distinction from any religious significance also attached thereto. In prescribing that a "marriage may be contracted, maintained, invalidated or dissolved only as provided by law," it does not preclude giving effect to the statutes and decisions of jurisdictions other than the enacting state.

Compiler's Comments

Source: Section 201, Uniform Marriage and Divorce Act.

Case Notes

Prohibition on Same-Sex Marriage Unconstitutional: Under the due process and equal protection clauses of the 14th amendment to the United States Constitution, same-sex couples have a fundamental right to marry. A state is required to license a marriage between same-sex couples and to recognize a same-sex marriage validly performed out of state. A state law that provides otherwise is unconstitutional. Obergefell v. Hodges, 576 US 644, 135 S. Ct. 2584 (2015).

Right of Consortium:

The mutual rights which arise in the husband and wife upon marriage, termed contractual or legal rights, included rights which are embraced within the term consortium. Dutton v. Hightower & Lubrecht Constr. Co., 214 F. Supp. 298 (D.C. Mont. 1963); Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D.C. Mont. 1961).

Under section 48-101, R.C.M. 1947 (since repealed), and 40-2-101 a woman by her marriage obtained a contractual right to consortium. Dutton v. Hightower & Lubrecht Constr. Co., 214 F. Supp. 298 (D.C. Mont. 1963), distinguished in Hall v. U.S., 266 F. Supp. 671 (D.C. Mont. 1967).

Law Review Articles

"Contract Marriage" Is Invalid, Briggs, 18 Mont. L. Rev. 43 (1956).

40-1-104. Application.

Commissioners' Note

This section serves two purposes. It insures that the Act's marriage regulations will not be used to invalidate marriages contracted before it takes effect. More importantly, it codifies the emerging conflicts principle that marriages valid by the laws of the state where contracted should be valid everywhere, even if the parties to the marriage would not have been permitted to marry in the state of their domicil[e]. See Restatement Second of Conflict of Laws, Section 283 (Proposed Official Draft (1969)). However, the section expressly fails to incorporate the "strong public policy" exception of the Restatement and hence may change the law in some jurisdictions. This section will preclude invalidation of many marriages which would have been invalidated in the past.

The Conference has withdrawn its approval of the Uniform Marriage Evasion Act. This section and the provisions of Section 207 [40-1-401] are inconsistent with that Act. A state adopting this Act should repeal the earlier one, if it exists therein.

Compiler's Comments

Source: Section 210, Uniform Marriage and Divorce Act.

40-1-105. Application of Montana Rules of Civil Procedure.

Compiler's Comments

1999 Amendment: Chapter 91 in (1) after "Jurisdiction" inserted "and Enforcement". Amendment effective October 1, 1999.

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

1997 Amendment: Chapter 343 in (2), in second sentence at beginning, substituted "A parenting" for "A custody" and near end substituted "(parenting)" for "(custody)"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Not Uniform Act: This section is not part of the Uniform Marriage and Divorce Act.

Case Notes

Action to Reopen and Modify Dissolution Decree After Sixty Days — Not Timely: The husband and wife were married in 1945. In 1975, the wife vanished and her whereabouts is unknown. In 1976, the husband filed for dissolution. The wife was served by publication. The court entered its decree but made no order with respect to distribution of property. In 1983, the husband started a quiet title action to jointly held property. Three months later, the daughter commenced an action in which her mother was determined to be presumed dead. The daughter was named personal representative of the mother's estate. As personal representative, the daughter filed a motion in the dissolution action to reopen and modify the decree regarding property disposition. The District Court refused to reopen the decree. On appeal, the Supreme Court pointed out that this section makes the Rules of Civil Procedure applicable to all proceedings relating to marital dissolutions. Section 40-4-208 provides that the provisions of the decree relating to property disposition may not be revoked or modified by the court unless it finds conditions justifying the reopening of a judgment. The court held that even if the District Court failed in its mandatory duty to equitably apportion the property, the decree was final, and that under former Rule 60(b), M.R.Civ.P. (now superseded), the motion to reopen had to be brought within 60 days. Once the judgment was final, it was too late to raise issues of misrepresentation that could have been contested in the cause prior to entry of judgment. In re Marriage of Woolsey, 214 M 106, 692 P2d 451, 41 St. Rep. 2349 (1984).

Effect of Not Following Procedure Strictly: Even though procedure requirements were not strictly followed, this alone did not outweigh the "best interest of the child" standard. Lehman v. Billman, 178 M 367, 584 P2d 662 (1978).

40-1-106. Parts of code not applicable.

Compiler's Comments

Not Uniform Act: This section is not part of the Uniform Marriage and Divorce Act.

40-1-107. Form of application, license, marriage certificate, and consent.

Commissioners' Note

The Act assumes that each state will adapt its existing marriage licensing statute so that it conforms to the substantive regulatory provisions of the Act. Such statutes vary substantially from state to state; and there is no special interest in obtaining uniformity as to the form utilized for marriage licenses and registrations. This section permits the state to forego legislative regulation by leaving the elaboration of forms to an appropriate state official. States unwilling to break completely with past legislative patterns nonetheless may want to review, modernize, and simplify legislation delineating license and registration forms. The inclusion of social security numbers will facilitate the enforcement of duties of support, if this later becomes necessary. The information regarding prior marriages and their termination similarly will prove helpful in a variety of situations making investigation appropriate. Information as to occupation may be useful to a determination of whether an underage marriage should be approved (Section 205) [40-1-213], or in passing on issues as to maintenance, support, property division, or child custody. The name of a party who has been married previously of course should be that which he or she bore during that marriage.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 16, Ch. 685, L. 2023. Amendment effective October 1, 2023.

Severability: Section 42, Ch. 685, L. 2023, was a severability clause.

2001 Amendment: Chapter 91 deleted former (1)(e) that read: "(e) the name and date of birth of any child of whom both parties are parents born prior to the making of the application, unless their parental rights and the parent and child relationship with respect to the child have been terminated"; inserted (4) providing that marriage license information is subject to certain statutory disclosure restrictions; and made minor changes in style. Amendment effective October 1, 2001.

Preamble: The preamble attached to Ch. 91, L. 2001, provided: "WHEREAS, an opinion by the Attorney General, issued on March 23, 2000, 48 A.G. Op. 10, held that applications for marriage licenses should be treated as confidential records once they have been completed and filed with the Clerk of the District Court; and

WHEREAS, the same opinion interprets the intent of the Legislature in enacting sections 50-15-121 and 50-15-122, MCA, to allow general information about a marriage to be made public, while safeguarding the detailed background information about the bride and groom; and

WHEREAS, the opinion seeks to clarify who is entitled to receive marriage license application information that is not made available to the public."

Severability: Section 4, Ch. 91, L. 2001, was a severability clause.

1997 Amendment: Chapter 552 in (1)(a) inserted "social security number"; and inserted (3) providing that the license, certificate, or consent may not contain the Social Security number and requiring the Department to keep the number from this source confidential except for purposes of Title IV-D. Amendment effective July 1, 1997.

Contingent Termination — Request for Federal Exemptions: Section 104, Ch. 552, L. 1997, contained the following contingent termination provisions and order that the Department of Public Health and Human Services seek federal exemptions:

"(1) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];
(b) [section 11] [40-5-924];
(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];
(d) [section 93] [50-15-403];
(e) [section 95] [61-5-107];
(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that the federal government has granted this state an exemption from one of the following provisions, the provision terminates on the date the exemption takes effect:

(a) [section 9] [40-5-922];
(b) [section 11] [40-5-924];
(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];
(d) [section 93] [50-15-403, certification filed April 24, 1998];
(e) [section 95] [61-5-107];
(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(5) (a) The department of public health and human services shall do everything reasonably within its power to obtain, as soon as possible, federal government exemptions from the provisions listed in subsection (4).

(b) Because section 395(c) of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) allows a grace period for states to amend their constitutions in order to comply with PRWORA and because the Montana legislature believes that the section of PRWORA prohibiting a jury trial in a paternity proceeding violates Article II, section 26, of the Montana constitution and is therefore rejected, the department of public health and human services shall seek a federal government exemption from the jury trial prohibition in PRWORA as the first exemption it seeks under subsection (5)(a). [This exemption was received on December 8, 1997.]

(6) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate July 1, 1999.

(7) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement."

1995 Amendments: Chapter 418 in (1) and (2) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (1) and (2) substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, and sec. 571, Ch. 546, L. 1995, were saving clauses.

Source: Section 202, Uniform Marriage and Divorce Act.

Montana Changes: The Montana version of the Uniform Marriage and Divorce Act does not require the application form to include the occupation and social security number of the parties.

Attorney General's Opinions

Marriage License Application — Disclosure of Vital Statistics: An applicant for a marriage license can be required to disclose information concerning his or her dependents, race, education, and support obligations. 37 A.G. Op. 159 (1978).

Part 2
License Provisions

Part Compiler's Comments

Severability Clause: Section 8, Ch. 208, L. 1947 (section 48-141, R.C.M. 1947), was a severability section.

40-1-201. License application.

Compiler's Comments

2017 Amendment: Chapter 393 in (1) at beginning substituted "Parties" for "A Montana resident"; and in (3) deleted former first sentence that read: "If both parties are nonresidents of the state, the license may be obtained from the clerk of the district court of the county where the marriage ceremony is to be performed", at beginning of current first sentence substituted "If an applicant for a marriage license" for "If one of the persons", after "license is to issue, the" substituted "nonresident applicant's part" for "nonresident's part", and near end substituted "the nonresident applicant" for "that person". Amendment effective October 1, 2017.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1983 Amendment: At end of (1), deleted "of the county in which one of the parties has resided for at least 5 days immediately prior to making application therefor".

Not Uniform Act: This section is not part of the Uniform Marriage and Divorce Act.

Attorney General's Opinions

Declaration of Marriage Without Solemnization: A marriage license is not a requirement for a valid marriage by written declaration. 37 A.G. Op. 12 (1977).

Law Review Articles

Waiting Period Following Application for License, 22 Mont. L. Rev. 115 (1961).

40-1-202. License issuance.

Commissioners' Note

To avoid inconvenience when one of the parties to the prospective marriage is residing, temporarily or permanently, outside the state, the Act requires that only one of the parties appear personally before the clerk to provide the information required by this section. Both parties must have signed the application. It is not intended that the state should create a new office to handle marriage license applications; the title of the official presently charged with the responsibility should be substituted for the bracketed phrase "[marriage license]" clerk wherever it appears in this Part. Each state should insert in the brackets its marriage license fee.

If both parties to the marriage have reached the age of 18, neither parental nor judicial consent is required to obtain a license. A number of states have already adopted this position; and it is consistent with the trend in federal as well as state law to lower to 18 the age at which persons are permitted to vote and to make autonomous decisions about important matters affecting their lives. A party under 18 must have consent of both of his parents to the marriage, if both are living and have capacity to consent. If one of his parents is unavailable, or if either or both of his parents refuses for any reason to consent, judicial approval must be obtained pursuant to the provisions of Section 205 [40-1-213]. The Act requires judicial as well as parental consent to the marriage if one of the parties is below the age of 16. The provision respecting the issuance of a license for marriage to persons under the age of 16 is bracketed, to signify that states having a policy against marriage by persons so young may omit that provision, without doing violence to the concept of uniformity. The standard governing judicial approval is provided in Section 205 [40-1-213].

"Satisfactory proof" of age and of required consent includes such methods as may be prescribed under Section 202(b) [40-1-107(2)] in the license form, or any other proof that should satisfy a reasonable official exercising unarbitrary judgment. See United States v. Lee Huen, 118 Fed. 442, 457 (N.D.N.Y.1902).

The Conference concluded that the traditional forms of premarital medical examination, now required by the marriage laws of most of the states, need not be preserved. The premarital medical examination requirement serves either to inform the prospective spouses of health hazards that may have an impact on their marriage or to warn public health officials of the presence of venereal disease. For the latter purpose, the statutes have been proved to be both avoidable and highly inefficient. See Monahan, State Legislation and Control of Marriage, 2 Journal of Family Law 30, 34-35 (1962). Moreover, the cursory blood test which satisfies the requirements of most states provides very little service to the prospective spouses themselves. If a state decides to preserve its traditional premarital examination, a reference to its statute should be included in the cross-references to this section.

Compiler's Comments

2019 Amendment: Chapter 43 deleted former (3) that read: "(3) a certificate of the results of any medical examination required by the laws of this state or a waiver of the medical certificate requirement as provided in 40-1-203"; and made minor changes in style. Amendment effective March 7, 2019.

Applicability: Section 6, Ch. 43, L. 2019, provided: "[This act] applies to marriage licenses applied for on or after [the effective date of this act]." Effective March 7, 2019.

2007 Amendments — Composite Section: Chapter 235 at beginning of introductory clause inserted exception clause; and made minor changes in style. Amendment effective April 24, 2007.

Chapter 294 in (3) at end inserted language concerning waiver as provided in 40-1-203; and made minor changes in style. Amendment effective October 1, 2007.

2005 Amendment — Coordination: Section 10, Ch. 493, L. 2005, a coordination section, amended this section as follows: in introductory clause increased marriage license fee from $30 to $53. Amendment effective July 1, 2005.

The amendments made to this section by sec. 4, Ch. 114, L. 2005, and sec. 6, Ch. 493, L. 2005, were rendered void by sec. 10, Ch. 493, L. 2005, a coordination section.

1981 Amendment: Increased marriage license fee from $25 to $30.

Source: Section 203, Uniform Marriage and Divorce Act.

Montana Changes: The Montana version requires proof that the parties will be 18 years of age at the time of marriage or will be 16 years of age and have judicial approval as required by 40-1-213.

Attorney General's Opinions

Confidentiality of Marriage License Applications: Pursuant to 50-15-121 and 50-15-122, an application for a marriage license should be treated as a confidential record once the application is completed and filed with the Clerk of the District Court. Once a marriage is reported by the Department of Public Health and Human Services, the Department or the Clerk of the District Court may disclose to the public the record of marriage, consisting of the names of the bride and groom, the date and place of the marriage, the name of the officiant, and whether the ceremony was religious or civil. 48 A.G. Op. 10 (2000). See also 48 A.G. Op. 17 (2000), in which the Attorney General clarified 48 A.G. Op. 10 (2000), by holding that 48 A.G. Op. 10 (2000), applied to all marriage applications on file with a Clerk of the District Court, not to only applications filed after the date of that opinion. (See 2001 amendment.)

Law Review Articles

Age of Consent, Townsend, 37 Mont. L. Rev. 120 (1976).

40-1-203. Proof of age.

Compiler's Comments

2021 Amendment: Chapter 14 at end of section deleted brackets around "and, if the applicant is a minor, the approval required by 40-1-213". Amendment effective October 1, 2021.

2019 Amendment — Code Commissioner Correction: Chapter 43 deleted former text concerning premarital blood testing for rubella immunity and waiver of rubella immunity testing (see 2019 Session Law for former text); and made minor changes in style. Amendment effective March 7, 2019.

The Code Commissioner reinserted the bracketed language, which was inadvertently deleted by sec. 2, Ch. 43, L. 2019.

Applicability: Section 6, Ch. 43, L. 2019, provided: "[This act] applies to marriage licenses applied for on or after [the effective date of this act]." Effective March 7, 2019.

2007 Amendment: Chapter 294 in (1) in second sentence near beginning after "services" inserted "or as provided in subsection (2)" and in third sentence near middle substituted "blood test for rubella immunity" for "standard serological test", substituted "test results" for "results of the serological test", and at end deleted "of the serological test"; inserted (2) concerning filing informed consent form relating to rubella immunity; in (3) in first sentence after "tests" inserted "or waivers" and after "required" inserted "or allowed"; and made minor changes in style. Amendment effective October 1, 2007.

1995 Amendments — Composite Section: Chapter 418 in (1), in second sentence, substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (1), in second sentence, substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, and sec. 571, Ch. 546, L. 1995, were saving clauses.

1989 Amendment: In (1), after "other person authorized by", substituted "rule of the department" for "laws of Montana" and after "a standard serological test" deleted "performed not more than 6 months before the date of issuance of the license".

1983 Amendment: Near middle of (1), substituted "Each female applicant, unless exempted on medical grounds by rule of the department of health and environmental sciences, shall file with the license issuer" for "and shall file with him"; increased the time period a test is valid from 20 days to 6 months; near end of (1), after "applicant" inserted "tested"; and made minor changes in phraseology.

Statement of Intent: The statement of intent attached to Ch. 154, L. 1983, provided: "A statement of intent is necessary for Senate Bill 180 because it adds to the laws relating to premarital serological tests rulemaking authority for the Department of Health and Environmental Sciences [now Department of Public Health and Human Services] to specify allowable exceptions to the test requirement.

Present law defines a premarital serological test as including both a test for rubella immunity and a test for syphilis. Senate Bill 180 eliminates the syphilis test requirement and requires the rubella test only of female applicants for a marriage license, since the purpose of the rubella test is to alert the license applicants to lack of immunity to the disease which could result in damage to a fetus if rubella were contracted during pregnancy. Since the test is of value only to women capable of bearing children, there is no purpose in requiring the test of women incapable of doing so. Therefore, the rules would define those categories of women whose medical status precludes them, with reasonable medical certainty, from bearing children, including, but not limited to, women over childbearing age and those whose physicians certify they are incapable of bearing children."

1981 Amendment: Deleted "duly qualified" between "medical certificate from a" and "physician" in (1); deleted "an examination, including" before "a standard serological test" in (1); substituted "performed" for "made" following "standard serological test" in (1).

Not Uniform Act: This section is not part of the Uniform Marriage and Divorce Act.

Saving Clause: Section 11, Ch. 228, L. 1981, was a saving section.

Severability: Section 12, Ch. 228, L. 1981, was a severability section.

Attorney General's Opinions

Declaration of Marriage Without Solemnization: A marriage license is not a requirement for a valid marriage by written declaration. 37 A.G. Op. 12 (1977).

40-1-210. No license to be issued when applicants under influence of liquor or drug.

Compiler's Comments

Not Uniform Act: This section is not part of the Uniform Marriage and Divorce Act.

40-1-212. Effective period of license.

Commissioners' Note

A relatively short premarital waiting period has been chosen. The information available suggests that longer waiting periods do not discourage potentially unstable marriages; and, at any event, are often waived by judges. The other major function served by a waiting period, to discourage or eliminate the "dare" and "gin" marriages, can be accomplished by the three day delay required by this section. [Montana has deleted this requirement.] See Ellsey, Marriage or

Divorce?, 22 U.Kan.City L.Rev. 9, 17 (1953). Each state should insert in the brackets the name of the appropriate court. The 180 day limit on the effectiveness of license is for the convenience of engaged couples who need to plan for wedding dates long in advance. Obviously, this limit applies to all licenses.

Compiler's Comments

1987 Amendment: Substituted language providing that a marriage license is effective upon issuance and expires after 180 days for former language that read: "A license to marry becomes effective throughout this state 3 days after the date of issuance, unless the judge of the district court orders that the license is effective when issued, and expires 180 days after it becomes effective."

Source: Section 204, Uniform Marriage and Divorce Act.

Montana Changes: See 1987 amendment note.

40-1-213. Judicial approval.

Commissioners' Note

The court given responsibility for approving youthful marriages should be identified in the statute. Many states, continuing existing practice, will assign this to the juvenile court; in other states, the probate court is used and in still others the designated court is a family court or the trial court of general jurisdiction. In accordance with the decision taken in Section 203 [40-1-202], in respect to marriages of persons under 16 years of age, the provision concerning issuance to such persons has been bracketed.

The Act deliberately avoids detailing procedural rules to govern the judicial proceedings it establishes unless some special procedural device is essential to accomplish a substantive result sought by the Act. Thus, subsection (a) requires only that the court make a "reasonable effort" to notify the parents that an underaged party has sought judicial approval of a marriage license. (As to what constitutes reasonable effort to notify a person, see Merrill on Notice, Chapters 13, 14 and 19.) Since a party under the age of 16 years needs the consent of both his parents, if they are alive and have capacity to consent, as well as judicial approval, the court clerk will have to notify both parents when the judicial proceeding is commenced. But when a person aged 16 or 17 seeks judicial approval because one of his parents refuses to consent, the court can approve the application if the parent cannot be located or even if a recalcitrant parent avoids receiving formal notification.

The legal standard for judicial approval requires the judge to estimate the capacity of the underaged party to assume the responsibility of marriage and to determine whether the marriage would serve the best interest of that party. The judge obviously will want to obtain personal information about the other party to the prospective marriage as well; but the statute does not permit the judge to refuse his approval because he believes the marriage would not serve the best interest of the party over 18. The substantive standard necessarily is somewhat vague. Nonetheless, a number of considerations are implicit in the language and structure of the subsection: since judicial approval is a substitute for parental consent for 16 and 17 year old applicants, such applicants cannot be denied judicial approval solely because a parent or parents have refused to consent to the marriage; although the prospective wife's pregnancy is not alone a sufficient ground for judicial approval, neither does the subsection mean that the judge may withhold approval solely because the prospective wife (whether she or her prospective spouse is the applicant) is pregnant. Pregnancy is one, but only one, of the relevant considerations the judge will weigh in determining the applicant's best interest. Although the standard is the same whether the applicant is between the ages of 16 and 18 or is under the age of 16, the judge no doubt will investigate younger applicants more thoroughly. The provision indicates that the judge would be abusing his discretion if he were to decide that no 16 or 17 year old is mature enough to marry.

Compiler's Comments

1997 Amendment: Chapter 343 in (1), in first sentence near middle after "actual care", substituted "parenting authority" for "custody"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Source: Section 205, Uniform Marriage and Divorce Act.

Montana Changes: Section 40-1-213 eliminates the "reasonable effort to notify" provision of section 205, Uniform Marriage and Divorce Act. The Montana version differs from the Uniform Act by not requiring a reasonable effort to notify the parents or guardian of an underaged party. While the Uniform Act provides for issuance of a license when both parents consent, the Montana act provides that the parent having the actual care, custody, and control of the underage applicant may consent to his or her marriage. The Montana act does not provide for the issuance of a marriage license and certificate to persons under age 16 when both parents consent, as does the Uniform Act. The Montana act adds provisions for marriage counseling.

Part 3
Solemnization

40-1-301. Solemnization and registration.

Commissioners' Note

Subsection (a) [(1)] lists the officials permitted to solemnize marriage. The clause, "no individual acting alone", was designed to take account of the increasing tendency of marrying couples to want a personalized ceremony, without traditional church, religious or civil trappings. This provision authorizes one of the parties to such a marriage ceremony to complete the marriage certificate form and forward it to the appropriate official for registration. The phrase "Native Group", was added to take account of indigenous or other aboriginal cultural groups who do not consider themselves to be Nations or Tribes, such as some of the native groups found in Alaska and Hawaii.

Subsection (b) [(2)] authorizes the solemnization of marriage by proxy. During World War II, special proxy marriage statutes were enacted to facilitate marriages when one of the prospective spouses could not be present because of military responsibilities. Although it is not expected that proxy marriages will be common, there are many reasons why, in individual cases, couples may prefer such a ceremony. So long as the marriage license procedure has been followed and the official performing the ceremony has no reason to doubt the intentions of the absent prospective spouse, there is no reason why a proxy marriage should be prohibited. As to the form of proxy, any written document in the well-known form of a proxy such as is used in other serious transactions suffices. Compare State v. Anderson, 239 Ore. 200, 396 P.2d 558 (1964). The proceeding for an order authorizing proxy marriage is special, and may be informal, so long as the two conditions precedent to solemnization by proxy are demonstrated to the court's judicial satisfaction. If the official solemnizing the marriage is not satisfied that the absent party has consented to the marriage, he may refuse to perform the ceremony until the parties obtain a court order authorizing the marriage by proxy. (Section 205(b).) [See 40-1-213(2).]

Subsection (d) [(3)] states definitely what probably would be the meaning of the section without it. However, it probably is wise to remove any possibility of misconception.

Compiler's Comments

2019 Amendment: Chapter 123 in (1) in first sentence near middle inserted "by a notary public authorized pursuant to 1-5-630"; and made minor changes in style. Amendment effective October 1, 2019.

2007 Amendment: Chapter 235 inserted (4) requiring one party to a proxy marriage to be a member of the armed forces of the United States on federal active duty or a resident of Montana; and made minor changes in style. Amendment effective April 24, 2007.

1985 Amendment: In (1) in first sentence, inserted "city judge".

Source: Section 206(a), (b), and (d), Uniform Marriage and Divorce Act. Subsection (c) of the Uniform Act and the commentary to it is contained in 40-1-321(1).

Montana Change: See 1985 amendment note.

Attorney General's Opinions

Declaration of Marriage Without Solemnization: A marriage license is not a requirement for a valid marriage by written declaration. No fee may be charged for filing the declaration of marriage without solemnization. 37 A.G. Op. 12 (1977).

40-1-311. Declaration of marriage without solemnization.

Compiler's Comments

2019 Amendment: Chapter 43 in (1) in first sentence substituted "Persons may consummate a marriage" for "Persons desiring to consummate a marriage" and after "40-1-301" deleted "shall, prior to executing the declaration, secure the medical certificate required by this chapter" and in second sentence after "declaration" deleted "and the certificate or waiver provided for in 40-1-203". Amendment effective March 7, 2019.

Applicability: Section 6, Ch. 43, L. 2019, provided: "[This act] applies to marriage licenses applied for on or after [the effective date of this act]." Effective March 7, 2019.

2009 Amendment: Chapter 249 in (1) at beginning of second sentence inserted "The declaration and the certificate or the waiver provided for in 40-1-203", and after "must be" deleted "firmly attached to the declaration and must be"; and made minor changes in style. Amendment effective October 1, 2009.

2005 Amendment — Coordination: Section 11, Ch. 493, L. 2005, a coordination section, amended this section as follows: in (4) increased fee for filing declaration from $30 to $53; and made minor changes in style. Amendment effective July 1, 2005.

The amendments made to this section by sec. 5, Ch. 114, L. 2005, and sec. 7, Ch. 493, L. 2005, were rendered void by sec. 11, Ch. 493, L. 2005, a coordination section.

1983 Amendment: Inserted (4) relating to filing fee.

Not Uniform Act: This section is not part of the Uniform Marriage and Divorce Act.

Attorney General's Opinions

License Not Required: A marriage license is not a requirement for a valid marriage by written declaration. 37 A.G. Op. 12 (1977).

Law Review Articles

Love or Confusion? Common Law Marriage, Homosexuality and the Montana Supreme Court in Snetsinger v. Montana University System, Coleman, 66 Mont. L. Rev. 445 (2005).

Purpose of Declaration of Marriage in Montana, Webb, 10 Mont. L. Rev. 76 (1949).

40-1-312. Persons who may prepare declaration of marriage.

Commissioners' Note

Subsection (c) [1] does not deal with the subject of procuring a copy of the registration of the marriage. This will be governed by the law of each state as to the procurement of certified copies of public records. A state that does not provide for the registration of marriages should make provision therefor upon adoption of this Act, either through a special statute or by administrative rule.

Subsection (d) [2] states definitely what probably would be the meaning of the section without it. However, it probably is wise to remove any possibility of misconception.

Compiler's Comments

2019 Amendment: Chapter 214 substituted current section text for former text that read: "It is unlawful for any person other than the parties to the written declaration to draw any declaration of marriage unless the person is licensed to practice law in the state of Montana." Amendment effective October 1, 2019.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Source: Section 206(c), Uniform Marriage and Divorce Act.

40-1-313. Penalty.

Compiler's Comments

Not Uniform Act: This section is not part of the Uniform Marriage and Divorce Act.

40-1-321. Registration of marriage.

Compiler's Comments

Not Uniform Act: This section is not part of the Uniform Marriage and Divorce Act.

40-1-322. Certificate and copy presumptive evidence.

Compiler's Comments

Not Uniform Act: This section is not part of the Uniform Marriage and Divorce Act.

40-1-323. Proof of solemnized marriage when no record.

Compiler's Comments

Not Uniform Act: This section is not part of the Uniform Marriage and Divorce Act.

40-1-324. Declaration to be acknowledged and recorded.

Compiler's Comments

Not Uniform Act: This section is not part of the Uniform Marriage and Divorce Act.

Part 4

Validity of Marriages — Declaration of Invalidity

40-1-401. Prohibited marriages — contracts.

Commissioners' Note

The Act eliminates most of the traditional marriage prohibitions and, consistent with the national trend, eliminates all affinity prohibitions. Only bigamous and incestuous marriages are prohibited. The Act follows the recent legislative trend toward permitting first cousin marriages, but uncle-niece and aunt-nephew marriages are prohibited unless such marriages are permitted by the established custom of aboriginal cultures. The phrase, "aboriginal cultures", is based on language employed in government documents. It is used to denote a cultural practice recognized by the original or earliest known inhabitants of a region (see Random House Dictionary's illustration: "aboriginal customs"). The intent is to save those special customs of Indian tribes, of Alaskan natives of various ethnic origins, and of Polynesians, which may not accord with the incest taboos of Western culture. Rhode Island, in considering this section, must take into account the effect of R.I. Gen. Laws (1956) § 15-1-4, in order to determine whether the Uniform Act, in this respect, should be conformed to local policy. See In re May's Estate, 305 N.Y. 486, 114 N.E.2d 4 (1957). Marriages of brothers and sisters by adoption are prohibited because of the social interest in discouraging romantic attachments between such persons even if there is no genetic risk. The adoption provision is addressed directly to avoiding questions as to the impact of adoption on marriage law, since the adoption statutes in many states have not expressly resolved the issue. Cf. 6 & 7 Eliz., 2 c. 5 § 13(3) (1958). The Act does not prohibit uncle-niece and aunt-nephew marriages where an adoption has created the relationship.

Subsection (b) [(2)] is intended to cure a defect arising under the laws of many states. For one reason or another, many persons, whose marriages are invalid because of prohibitions, neglect to contract formal marriages after the impediment is removed. If they reside in a state where common law marriage is recognized, there is no problem. But, in other jurisdictions, serious harm can result to legitimate interests of the surviving partner, of a sort which the legislators very likely would not have sanctioned had the possibility occurred to them. This subsection is intended to protect those interests.

Subsection (c) [(3)] enacts the general modern trend to treat the offspring of prohibited marriages as legitimate.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 17, Ch. 685, L. 2023. Amendment effective October 1, 2023.

Severability: Section 42, Ch. 685, L. 2023, was a severability clause.

1997 Amendment: Chapter 424 inserted (1)(d) relating to marriages between persons of the same sex; and inserted (4) relating to void contractual relationships.

Source: Section 207, Uniform Marriage and Divorce Act.

Montana Changes: Subsection (1)(b) of the Montana act eliminates the Uniform Act's restriction on the adoptive brothers and sisters and adds the first cousin relationship. The Montana act eliminates an exception to subsection (1)(c) of marriages permitted by established customs of aboriginal cultures.

Case Notes

Prohibition on Same-Sex Marriage Unconstitutional: Under the due process and equal protection clauses of the 14th amendment to the United States Constitution, same-sex couples have a fundamental right to marry. A state is required to license a marriage between same-sex couples and to recognize a same-sex marriage validly performed out of state. A state law that provides otherwise is unconstitutional. Obergefell v. Hodges, 576 US 644, 135 S. Ct. 2584 (2015).

Presumption of Matrimony — Requirement of Immediacy of Common-Law Marriage Overruled: The parties declared their intent to be married in an informal ceremony in Washington in 1994. They moved to Montana in 1995 and bought a ranch together. The District Court held a hearing in 2006 on the issue of whether the parties were married under common-law. Although the husband disclaimed any intent to have entered a marriage, the court decided that the parties' consent to marry in Washington ripened into a common-law marriage under Montana law after the parties moved to Montana, so the court dissolved the marriage and distributed the marital assets. Because the state of Washington does not recognize common-law marriage, the husband contended that the Washington vows of consent could not have ripened into a Montana common-law marriage. The Supreme Court first noted the rebuttable presumption that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage and that because the presumption of marriage is one of the strongest known to law, a finding of matrimony is favored. Citing In re Estate of Murnion, 212 M 107, 686 P2d 893 (1984), the court concluded that once the impediment of Washington law was removed by the parties' relocation to Montana, the relationship ripened into a valid marriage under Montana law. The court further addressed the statements in prior cases that a common-law marriage must take place immediately or instantly, or not at all. A party seeking to establish a common-law marriage must prove that the parties were competent to enter marriage, that there was assumption of a marital relationship by mutual consent and agreement, that the parties cohabited, and that the parties acquired the reputation, character, and status of marriage in public. However, the party is not held to the impossible burden of proving that all these elements happened immediately or instantly. In re Marriage of Swanner-Renner, 2009 MT 186, 351 M 62, 209 P3d 238 (2009), overruling Miller v. Townsend Lumber Co., 152 M 210, 448 P2d 148 (1968), In re Estate of McClelland, 168 M 160, 541 P2d 780 (1975), and other prior cases stating that a common-law marriage must take place immediately or instantly, or not at all.

Marriage Between First Cousins — Retroactive Decree: Earl Adams married Mildred Adams on September 13, 1977. They were first cousins. On November 20, 1977, Earl commenced an action for a declaration of invalidity of his marriage to Mildred. The Supreme Court found that a marriage between first cousins is void ab initio. The court found that the interests of justice would not be served by making the decree of invalidity not retroactive. Adams v. Adams, 185 M 63, 604 P2d 332 (1979), overruled, with regard to elements of collateral estoppel, in Dagel v. Great Falls, 250 M 224, 819 P2d 186, 48 St. Rep. 919 (1991).

Removal of Impediment — Common-Law Marriage — Fact Question: Ralph, the deceased, married Fern and then married Elsie while married to Fern. Fern died in 1973 and Ralph died in 1976. Ralph's will, executed in 1975, failed to mention Elsie or the two children he had by her. Elsie filed a petition for spouse's elective share. Summary judgment against Elsie was reversed and remanded because factual issues existed regarding whether Fern's death removed the impediment to Ralph's second marriage resulting in common-law marriage and whether the two children were issue of the decedent. In re Estate of Schanbacher, 182 M 176, 595 P2d 1171 (1979).

Prosecution for Bigamy: Although bigamous marriage may have been void from beginning for civil purposes, it nevertheless rendered subsequent marriage bigamous under 45-5-611 for criminal purposes, unless defendant could show that previous bigamous marriage was pronounced void, annulled, or dissolved by competent court as provided under 45-5-611. Crosby v. Ellsworth, 431 F2d 35 (9th Cir. 1970).

Voidness of Former Marriage: Under 45-5-611 voidness of former marriage must have been declared by a court of competent jurisdiction; such a determination of voidness could not be made under section 48-111, R.C.M. 1947 (since repealed), by the person involved to avoid being charged with the crime of bigamy under 45-5-611. St. v. Crosby, 148 M 307, 420 P2d 431 (1966).

Parties to Be Capable of Contracting — Second Contract: Proof of consent, cohabitation, and bearing of children, coupled with reputation as husband and wife, are insufficient when woman at the time of alleged common-law marriage had a husband living, because parties must be capable of contracting a marriage and she was incapable of entering into the second contract. Shepherd & Pierson Co. v. Baker, 81 M 185, 262 P 887 (1927). See also Welch v. All Persons, 78 M 370, 254 P 179 (1927).

Rebuttable Presumption That Prior Marriage Was Dissolved by Death or Divorce: Burden of proof is on one who attacks validity of second marriage, as law rebuttably presumes prior marriage was dissolved by death or divorce. Shepherd & Pierson Co. v. Baker, 81 M 185, 262 P 887 (1927).

Communication Regarding Divorce — Ignorance of Previous Marriage: Marriage contracted while man was corresponding with first wife relative to a divorce was void, even if woman was ignorant of previous marriage. In re Huston's Estate, 48 M 524, 139 P 458 (1914).

Law Review Articles

Removal of the Impediment: The State of Transgender Marriage in Montana, Parks, 74 Mont. L. Rev. 309 (2013).

Montana's Marriage Amendment: Unconstitutionally Denying a Fundamental Right, Polk, 66 Mont. L. Rev. 405 (2005).

Prohibited Marriages, Townsend, 37 Mont. L. Rev. 120 (1976).

Constitutionality of Laws Against Miscegenated Marriages, Conner, 11 Mont. L. Rev. 53 (1950).

40-1-402. Declaration of invalidity.

Commissioners' Note

This section is designed to replace the traditional law of annulment of marriage. Some of the common grounds for annulment, such as fraud, have been abolished completely. Others have been restated to avoid unnecessary overlap with the dissolution sections.

This section states the circumstances under which the marriage may be terminated by a "declaration of invalidity," and establishes the "defenses" to each of the bases for a declaration. Subsection (b) [(2)] states a general policy against declarations of invalidity after the death of either party to the marriage, and subsection (e) [(5)] states a policy in favor of applying the dissolution provisions of Part III [Ch. 4] to the spouses' financial affairs following a declaration of invalidity.

Subsection (a) (1) [(1) (a)] states that declaration of invalidity may be obtained where there is proof that one of the parties to the marriage lacked capacity to consent to the marriage because of emotional illness or other mental disturbance or because of the incapacitating effect of alcohol or drugs. In the case of drugs and alcohol, the court is entitled to be somewhat skeptical about a claim of incapacity because of the protective features of the three day waiting period required by Section 204 [40-1-212]. Courts construing the "lacks capacity to consent" language of Subsection (a) (1) [(1) (a)] will undoubtedly continue to apply existing stringent standards by holding that a declaration of invalidity is appropriate only if the petitioner offers clear and definite evidence that one of the spouses lacked "sufficient mental capacity to understand intelligently the marriage contract...and the obligations it imposed upon him." Ertel v. Ertel, 40 N.E.2d 85, 313 Ill.App. 326 (1942)....

Subsection (a) (2) [(1) (b)] authorizes a declaration of invalidity if one of the spouses was unable to consummate the marriage by sexual intercourse, so long as the other spouse did not know of the condition at the time of the ceremony....Since the marriage cannot be invalidated after the death of either spouse, and since the spouses' finances can be adjusted as if a divorce had been granted under subsection (e) [(5)], there is no reason to compel the spouses to make a more rapid decision about continuing the marriage....the court would be warranted in assuming that the...period begins shortly after the ceremony rather than at some later date.

The phrase, "obtained knowledge of the described condition," in subsection (b) (1) and (2) [(2)(a)-(d)], is intended to mean awareness of the event, including information from a reliable source. In light of the public interest favoring promptness in bringing the petition, "knowledge" should be construed to include the possession of information sufficient to arouse inquiry concerning the existence of the condition. See Merrill, Notice § 4 (1952).

Subsection (a) (3) [(1) (c)] provides that, if one of the spouses was under the age of 18 at the time of the ceremony and married without satisfying the consent requirements of Section 203 [40-1-202] or Section 205 [40-1-213], that party or his parent or guardian may obtain a declaration of invalidity. There are, however, two important limitations to this ground for a declaration of invalidity: (1) a party to the marriage who was over 18, or a party under the age of 18 who had fulfilled the requirements of Section 203 [40-1-202] or Section 205 [40-1-213], is not entitled to a declaration of invalidity because there is no reason to permit that party to invalidate a marriage he was authorized to contract; (2) the underaged party or his representative is not entitled to a declaration of invalidity when he reaches the age of 18 (or 17, if he had parental consent and lacked only approval from the appropriate judicial officers)....

The provisions of subsection (b) [(2)], stating that no declaration of invalidity may be "sought" after the death of either party is intended to prohibit such a collateral attack upon the marriage, in lieu of a declaration, in all proceedings, including probate proceedings. Moreover, the use of the word "sought" rather than "commenced" implies that the death of a party to the marriage at any time before the entry of final judgment would terminate a proceeding attacking the marriage. The underlying policy reasons for this principle are clear; the traditional "void marriage" doctrine often imposed unwise and unfair penalties on innocent "spouses" in stable family situations long after the questioned marriage had occurred. The penalties serve no effective deterrent purpose, but cause severe economic dislocations; a spouse may be denied workmen's compensation and social security benefits, or even a share in a spouse's estate, after the marriage has been terminated by the death of the other spouse, despite the fact that the surviving spouse had no reason to suspect the invalidity of the marriage.

Subsection (e) [(5)] authorizes the court to treat declarations of invalidity as what they have in fact become—substitutes for divorce. After considering all relevant circumstances, especially the impact of a retroactive decree upon the spouses, their children and other third parties, the court may make the decree not retroactive and may then apply the provisions of Part III [Chapter 4] in distributing the parties' property and in determining maintenance and child support. Even if the decree is made retroactive, the court may have to distribute property acquired by the spouses during the marriage. In the past this has been accomplished by analogy to partnership law. Cf. N.H.Rev.Stat.Ann. § 458:19 (1955); Clark, Domestic Relations 136 (1968).

Compiler's Comments

1997 Amendment: Chapter 343 in (5), in second sentence near middle, substituted "parenting" for "custody"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

1995 Amendment: Chapter 109 inserted (6) providing that the Clerk of the Court give notice of the entry of the decree declaring the invalidity of a marriage; and made minor changes in style.

Source: Section 208 (a)(1), (2), (3), (4), (b), alternative B(d) and (e), Uniform Marriage and Divorce Act.

Montana Changes: The provisions of section 208, Uniform Marriage and Divorce Act, have not been adopted completely. This section varies from the Uniform Act as follows (comments by Herma Hill Kay in State Bar Uniform Marriage and Divorce Act Manual, pp. 7 and 8):

"The Montana version of this section departs from the UMDA chiefly by lengthening the periods of time within which the action for declarations of invalidity may be brought. Thus, Montana allows 1 year, rather then (sic) 90 days, for commencing the suit where a party lacked mental capacity due to infirmity or the use of alcohol, drugs or other incapacitating substances; two years for force or fraud; and four years for lack of capacity to consummate the marriage. (The UMDA periods are 90 days and one year, respectively.)

Montana also changes the youthful marriage provision of 208(a) (3) to conform to its prior requirement of judicial, not merely parental, consent. Montana chose alternative A, which requires declarations of invalidity in the case of prohibited marriages—bigamy and incest—to be commenced prior to the death of one of the parties. That is the alternative I prefer, so I'm glad you chose it.

The last section of this provision may require some explaination (sic). It gives the Court an alternative to the so-called "retroactive effect" of traditional annullment (sic) law. While the section is drafted to have retroactivity as the normal result it permits the Court in the interest of justice to invalidate the marriage as of the date of the decree. In such cases, the provisions of the act relating to property, maintenance, support and child custody will apply—thus obliterating the practical significance of the difference between annullment (sic) and divorce."

Case Notes

Requisite Capacity to Enter Into Marriage Challenged — Finding of Capacity Upheld: The decedent was diagnosed with cancer and given a month to live. The day before he passed away, he and his longtime companion of 17 years were married. The decedent's brother challenged the marriage, claiming that his brother had lacked the requisite mental capacity to enter into marriage. However, a declaration of invalidity may not be sought after the death of either party to the marriage. Accordingly, the District Court held that the brother's claim was barred. On appeal, the Supreme Court affirmed. In re Estate of Cook, 2020 MT 240, 401 Mont. 374, 472 P.3d 1179.

Action to Declare Marriage Invalid Commenced After Decedent's Death Void: On May 31, 1994, Joseph executed a will bequeathing his estate to his former wife, Mary. On June 14, 1994, while Joseph was in a nursing home, Joseph and Mary signed a declaration of marriage. On July 1, 1994, Joseph executed a will renouncing the marriage and bequeathing the estate to a sister. Mary initiated informal probate proceedings under the May 31 will, and the sister initiated informal probate proceedings under the July 1 will. The court concluded that the July 1 will was valid and declared the declaration of marriage void. On appeal, the Supreme Court held that it was a violation of the provisions of this section to commence legal action to declare the marriage invalid after Joseph's death. The lower court's judgment declaring the marriage invalid was vacated. In re Estate of Flynn, 274 M 199, 908 P2d 661, 52 St. Rep. 1190 (1995).

Immaturity of Parties — No Basis for Invalid Marriage: Wife appealed from District Court order granting husband's petition declaring the marriage invalid on the basis of immaturity of the parties. The Supreme Court stated that immaturity of the parties and misunderstandings between the parties do not establish the absence of capacity to consent to the marriage.

Accordingly, the court found no basis to declare the marriage invalid for fraud. In re Marriage of Helsel, 223 M 85, 723 P2d 963, 43 St. Rep. 1551 (1986).

Reinstatement of Maintenance Not Automatic Upon Annulment of Second Marriage: Upon the divorce of the parties in 1980, the husband was ordered to pay maintenance to the wife until she remarried, which she did in 1982 and the former husband stopped maintenance payments. When the wife's second marriage was annulled 2 months later, the District Court ordered that the husband's maintenance obligation was automatically restored. The Supreme Court reversed on appeal, holding that the first husband was a "third party" within the language of 40-1-402(5) and that under the rationale of Ferguson v. Ferguson, 564 P2d 1380 (Utah, 1977), the obligation of maintenance should not be automatically reinstated and the District Court ordering the dissolution should have made findings necessary to order the retroactivity or nonretroactivity of the annulment. In re Marriage of Williams, 208 M 252, 677 P2d 585, 41 St. Rep. 356 (1984).

Marriage Between First Cousins — Retroactive Decree: Earl Adams married Mildred Adams on September 13, 1977. They were first cousins. On November 20, 1977, Earl commenced an action for a declaration of invalidity of his marriage to Mildred. The Supreme Court found that a marriage between first cousins is void ab initio. The court found that the interests of justice would not be served by making the decree of invalidity not retroactive. Adams v. Adams, 185 M 63, 604 P2d 332 (1979), overruled, with regard to elements of collateral estoppel, in Dagel v. Great Falls, 250 M 224, 819 P2d 186, 48 St. Rep. 919 (1991).

Necessity for Judicial Declaration: In view of statute providing that either party to void marriage could have it declared so judicially, former statute making it unlawful to marry again until 6 months after a judgment of divorce meant that marriage in violation thereof should be void only from time its nullity was declared so judicially. State ex rel. Angvall v. District Court, 151 M 483, 444 P2d 370 (1968).

Law Review Articles

Invalid Marriages, Declarations, Townsend, 37 Mont. L. Rev. 121 (1976).

Bad Laws Make Hard Cases: State ex rel. Angvall v. District Court and the Law of Annulment in Montana, Molloy, 36 Mont. L. Rev. 267 (1975).

Distinction Between Void and Voidable Marriages, Briggs, 4 Mont. L. Rev. 14 (1943).

Status of Marriage Subject to Annulment Under Montana Statutes, Briggs, 4 Mont. L. Rev. 31 (1943).

Conflict of Laws Governing Annulment, Swanberg, 1 Mont. L. Rev. 56 (1940).

Collateral References

Invalidity of Marriage, https://courts.mt.gov/Forms/end_marriage.

40-1-403. Validity of common-law marriage.

Commissioners' Note

These alternatives [of invalidity or permitting common law marriage] are presented because the line of cleavage in the states, between those which consider the common law marriage to be a highly useful social institution and those which insist that all marriages *de jure* should be contracted in accordance with prescribed statutory formalities, proved impossible to erase. In view of this basic conflict as to policy, the Conference concluded that there was no hope of achieving uniformity of enactment, no matter which rule was adopted. Accordingly, the alternative versions of this section permit each state to make its decision in accordance with its own view as to policy, and to change its law at any time desired without destroying the effect of its adoption of the Uniform Act. Alternative A would preserve common law marriage in the form it has already taken by judicial decision. Alternative B would make clear that common law marriages contracted in the adopting state in the future are not to be recognized. The alternatives are a signal to the state legislatures that this issue should be re-examined even if the state is one of those which has already abolished common law marriage.

Compiler's Comments

Source: Section 211, Uniform Marriage and Divorce Act. Montana adopted alternative A of the UMDA and continued recognition of written declarations of marriage.

Case Notes

Same-Sex Long-Term Partners — Common-Law Marriage Established: The petitioner and the respondent were a same-sex couple who had been in a relationship for 2 decades, during which their children were born. After the respondent moved out of the family home, the petitioner filed a petition for dissolution seeking child support and maintenance. Over the respondent's objections that the relationship did not constitute a common-law marriage, the District Court ruled that the parties had a common-law marriage and awarded the petitioner child support and attorney fees. The respondent appealed, arguing that the District Court had erred in concluding that the parties had entered into a common-law marriage. The Supreme Court affirmed, finding that same-sex couples can enter into common-law marriages and that the petitioner had established the elements for a common-law marriage. In re J.K.N.A., 2019 MT 286, 398 Mont. 72, 454 P.3d 642.

Petition for Dissolution Dismissed — No Common-Law Marriage When No Witnesses Viewed Cohabitants as Married Couple: The petitioner claimed that she and the respondent had a common-law marriage and filed a petition for dissolution. The District Court dismissed her petition, finding that although the cohabitants had a long-term relationship, she had not established the elements of common-law marriage. On appeal, the Supreme Court affirmed, noting that the respondent had never held himself out as the petitioner's husband, that he had always kept his finances separate, and that no other witnesses besides the petitioner viewed the two as a married couple. In re Marriage of Hansen, 2019 MT 284, 398 Mont. 64, 453 P.3d 1210.

Presumption of Matrimony — Requirement of Immediacy of Common-Law Marriage Overruled: The parties declared their intent to be married in an informal ceremony in Washington in 1994. They moved to Montana in 1995 and bought a ranch together. The District Court held a hearing in 2006 on the issue of whether the parties were married under common-law. Although the husband disclaimed any intent to have entered a marriage, the court decided that the parties' consent to marry in Washington ripened into a common-law marriage under Montana law after the parties moved to Montana, so the court dissolved the marriage and distributed the marital assets. Because the state of Washington does not recognize common-law marriage, the husband contended that the Washington vows of consent could not have ripened into a Montana common-law marriage. The Supreme Court first noted the rebuttable presumption that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage and that because the presumption of marriage is one of the strongest known to law, a finding of matrimony is favored. Citing In re Estate of Murnion, 212 M 107, 686 P2d 893 (1984), the court concluded that once the impediment of Washington law was removed by the parties' relocation to Montana, the relationship ripened into a valid marriage under Montana law. The court further addressed the statements in prior cases that a common-law marriage must take place immediately or instantly, or not at all. A party seeking to establish a common-law marriage must prove that the parties were competent to enter marriage, that there was assumption of a marital relationship by mutual consent and agreement, that the parties cohabited, and that the parties acquired the reputation, character, and status of marriage in public. However, the party is not held to the impossible burden of proving that all these elements happened immediately or instantly. In re Marriage of Swanner-Renner, 2009 MT 186, 351 M 62, 209 P3d 238 (2009), overruling Miller v. Townsend Lumber Co., 152 M 210, 448 P2d 148 (1968), In re Estate of McClelland, 168 M 160, 541 P2d 780 (1975), and other prior cases stating that a common-law marriage must take place immediately or instantly, or not at all.

Sufficient Evidence of Common-Law Marriage to Allow Conviction for Incest With Stepchild: Following conviction for incest with his stepdaughter, Bullman asserted that the state failed to prove sufficient evidence that Bullman was married to the victim's mother, so the victim was not Bullman's stepdaughter and Bullman could not be convicted of incest. However, the jury concluded that a common-law marriage existed based on facts that: (1) Bullman and the victim's mother lived together as husband and wife for many years and had children together; (2) Bullman supported the mother and her children, including the victim; (3) Bullman purchased a house and the mother was "on the deed"; (4) the mother filed joint tax returns while Bullman was incarcerated; (5) the mother testified that Bullman sometimes referred to her as his wife in front of others; (6) the victim testified that Bullman assumed a father-daughter relationship and asked her to call him "Dad"; and (7) the mother had obtained a divorce decree that was filed over Bullman's objection. The evidence of a common-law marriage, although circumstantial, was sufficient for the jury to conclude that Bullman and the victim's mother were married at the time the sexual contact occurred. St. v. Bullman, 2009 MT 37, 349 M 228, 203 P3d 768 (2009).

Sufficient Showing of Common-Law Marriage: After Ober died, Selma came forward and asserted that she was Ober's common-law wife and should be appointed personal representative of Ober's estate. Two of Ober's brothers contested Selma's claims, noting that: (1) Selma did not assume Ober's last name; (2) the parties maintained separate property and bank accounts; (3) the parties filed tax returns and documents with the farm service agency as single persons; (4) Ober did not designate Selma as a beneficiary on a life insurance policy; (5) Ober did not report Selma as his spouse to his employer; (6) Ober granted one brother power of attorney in three separate documents; (7) Ober continued to pay rent on an apartment in Conrad even after he moved into Selma's apartment near Power; and (8) Selma continued to receive her widow's survivor benefit from the Social Security Administration under the name of her deceased husband. Contrarily, Selma testified that: (1) Ober had proposed to her and she had accepted; (2) the couple had exchanged rings shortly after the proposal; (3) Ober had used address labels that read "John or Selma Ober"; and (4) Ober carried a photograph of Selma in his wallet on which he had written "my wife". The District Court properly assessed the credibility of the witnesses and concluded that a common-law marital relationship existed by mutual consent. The court further evaluated the testimony of more than 30 witnesses as to their opinions about the relationship in concluding that Ober and Selma had established a common-law marriage by public repute. The Supreme Court held that based on the evidence in the record and testimony given by Selma as surviving spouse, the burden of proving mutual consent and confirmation of common-law marriage by public repute was satisfied. The District Court was affirmed. In re Estate of Ober, 2003 MT 7, 314 M 20, 62 P3d 1114 (2003). See also In re Estate of Alcorn, 263 M 353, 868 P2d 629 (1994), and In re Estate of Hunsaker, 1998 MT 279, 291 M 412, 968 P2d 281 (1998).

Common-Law Marriage — Not Necessary to Prove Exact Date Mutual Consent and Agreement to Enter Into Marriage Takes Place — District Court Overturned: Anne and Maurice lived together 9 years. After Maurice's death, his family challenged Anne's status as the deceased's spouse and sole heir of the estate. The District Court ruled that the evidence did not establish common-law marriage. Although mutual consent and agreement to enter into a marriage must take place at a set time, the party asserting that a common-law marriage exists does not need to prove the exact date that it occurred. However, the party must prove that the three elements for a common-law marriage all existed at one time. The Supreme Court held that a sign in front of the couple's home indicating that it was the Hunsakers' and a grandfather clock engraved with their initials, among other things, indicated that the couple held themselves out as a married couple. Although there was substantial evidence to support the District Court's findings of fact, the Supreme Court stated that its review of the record led it to believe that the court misapprehended the effect of the evidence and erred in ruling that the evidence presented did not establish that Anne was the common-law wife of Maurice. In re Estate of Hunsaker, 1998 MT 279, 291 M 412, 968 P2d 281, 55 St. Rep. 1144 (1998).

Consent to Common-Law Marriage Impossible Until Former Marriage Dissolved: Kathee and Fred cohabited from August 1981 until Fred died in May 1991. In May 1985, Kathee divorced her former husband, from whom she was separated when she began cohabiting with Fred. Kathee and Fred were unable to consent to a common-law marriage until the divorce but were able to consent after the divorce. In re Estate of Alcorn, 263 M 353, 868 P2d 629, 51 St. Rep. 87 (1994).

Substantial Evidence of Common-Law Marriage:

Kathee's ring, which she claimed was a wedding ring Fred gave her, had intertwining horseshoes, and the sidewalk of the ranch house in which they cohabited had intertwining horseshoes with the couple's names written beneath the horseshoes. The two owned racehorses and were racing enthusiasts. They had joint checking accounts and entertained together, and she cared for him when he was ill, which was often. Others testified that they acted as a married couple and were so thought of. Kathee testified that she and Fred had agreed to a common-law marriage. They cohabited for about 9 years, from the day they met until Fred died. The law did not require her to assume Fred's last name or to list him as her beneficiary on insurance, retirement, or health insurance forms, and she testified that she filed a separate income tax return because her accountants told her to and because she thought she had to since the marriage was not recorded. There was much evidence that they held themselves out as married. The lower court properly found that a common-law marriage existed, even though other evidence was to the contrary, such as Fred's wills in which he stated that he was single. In re Estate of Alcorn, 263 M 353, 868 P2d 629, 51 St. Rep. 87 (1994).

The District Court correctly deduced that Boyd and Peggy were married by mutual agreement and established the marriage by cohabitation and repute upon a showing of substantial evidence that the parties: (1) were competent to consent to marriage; (2) exchanged wedding rings, intending to be husband and wife and go through the actual ceremony at a later time; (3) lived together and held themselves out to be a married couple; (4) were presumed to be married by friends, family, coworkers, and the contractor who designed their home; and (5) issued invitations for the wedding of Peggy's daughter in the name "Mr. and Mrs. Boyd Mahaffey". It was further noted that Boyd introduced Peggy as "my wife" and insured her on his automobile liability policy as Peggy Mahaffey. In re Marriage of Mahaffey, 245 M 424, 801 P2d 1335, 47 St. Rep. 1172 (1990).

Elements of Common-Law Marriage Similar in Iowa: Because elements of common-law marriage were similar in Montana and Iowa in 1973, it was not improper for the District Court to find inception of common-law marriage in that year without finding that Iowa law was applicable. In reviewing Iowa law (since the parties were Iowa residents in 1973), the Supreme Court found ample evidence to justify a finding of common-law marriage. In re Marriage of Hurley, 222 M 287, 721 P2d 1279, 43 St. Rep. 1271 (1986).

Common-Law Marriage — Move From Washington to Montana After Cohabitation Begun — Montana Law Applicable: Michael Murnion died in a fall from a scaffolding in Colstrip. In order to settle Murnion's estate and determine heirs, a guardian for his minor daughter by a prior marriage brought an action to be declared sole heir. This was challenged by Pauline Imel, his alleged common-law wife. The issue was whether Pauline Imel was his common-law wife. The District Court found in favor of Pauline Imel, and the guardian appealed. Murnion and Imel had begun cohabiting in June 1981 in the state of Washington. Murnion was offered a job at Colstrip. The parties agreed to move to Colstrip as man and wife. Washington does not recognize common-law marriages. The guardian alleged that since the alleged marriage arose in Washington, Washington law should apply. In determining that Montana law was applicable, the Supreme Court relied on Restatement Second of Conflicts, section 6, which provides that the state with the most significant relationship to the spouses is the state whose law will determine the validity of a marriage. The court, relying on Montana statutory and case law, held that a marriage which may be invalid where contracted but which would be valid in Montana will be recognized as valid if it otherwise comports with Montana's marriage laws if, under choice of law rules, Montana law is to be applied. The court held that Murnion and Imel had fulfilled the requirements of cohabitation and public repute. The requirement of certainty of time was fulfilled when the parties moved to Montana. The marriage was valid, and Imel was Murnion's surviving spouse. In re the Estate of Murnion, 212 M 107, 686 P2d 893, 41 St. Rep. 1627 (1984).

Action for Formal Intestacy Proceedings by Claimed Common-Law Wife: In an action for formal intestacy proceedings by a claimed common-law wife, the Supreme Court affirmed the trial court's dismissal of appellant's petition. Here the facts used to support the existence of a common-law marriage are mere isolated instances in which appellant allegedly represented herself as decedent's wife. The facts fail to show any specific agreement between appellant and the decedent concerning marriage; they do not establish a continuous marital relationship and are in conflict with testimony presented by respondent. In re Estate of Peltomaa, 193 M 74, 630 P2d 215, 38 St. Rep. 943 (1981).

Removal of Impediment — Common-Law Marriage — Fact Question: Ralph, the deceased, married Fern and then married Elsie while married to Fern. Fern died in 1973 and Ralph died in 1976. Ralph's will, executed in 1975, failed to mention Elsie or the two children he had by her. Elsie filed a petition for spouse's elective share. Summary judgment against Elsie was reversed and remanded because factual issues existed regarding whether Fern's death removed the impediment to Ralph's second marriage resulting in common-law marriage and whether the two children were issue of the decedent. In re Estate of Schanbacher, 182 M 176, 595 P2d 1171 (1979).

Common-Law Marriage Not to Be Created Piecemeal: Where conflicting testimony is presented upon issue of existence of common-law marriage, it was proper for District Court to find common-law marriage did not exist to give supposed common-law wife priority to name an administrator, as common-law marriage must take place immediately and cannot be created piecemeal for benefit of parties when it was advantageous to be married and not asserted when it would be to one of the parties' disadvantage to be married. In re Estate of McClelland, 168 M 160, 541 P2d 780 (1975), overruled, on issue of common-law marriage taking place immediately, in In re Marriage of Swanner-Renner, 2009 MT 186, 351 M 62, 209 P3d 238 (2009).

Cohabitation Alone Insufficient: Evidence of cohabitation alone was insufficient to justify findings of common-law marriage. In re Estate of Slavens, 162 M 123, 509 P2d 293 (1973).

Continued Use of Previous Name: Man and woman who exchanged wedding rings, mutually declared their marriage, and thereafter openly lived together, were legally married even though wife continued to use her previous name for business purposes. Estate of Swanson, 160 M 271, 502 P2d 33 (1972).

Evidence to Support Common-Law Marriage: Finding that claimant and deceased workman had been married at common law was not supported by evidence, instances of their cohabitation warranting conclusion of meretricious relations as easily as any other. Miller v. Townsend Lumber Co., 152 M 210, 448 P2d 148 (1968), overruled, on issue of common-law marriage taking place immediately, in In re Marriage of Swanner-Renner, 2009 MT 186, 351 M 62, 209 P3d 238 (2009).

Evidence of Mutual Consent: Failure to treat statutory presumption that persons deporting themselves as husband and wife have entered into a lawful contract of marriage and to weigh against the presumption of other facts was error. Spradlin v. U.S., 262 F. Supp. 502 (D.C. Mont. 1967).

Rebuttable Presumption of Valid Marriage:

In view of statute recognizing consensual or common-law marriage, presumption that man and woman deporting themselves as husband and wife had entered into lawful contract of marriage was itself proof of marriage, and was overcome as matter of law only when in light of proved facts reasonable men could no longer find in accordance with the presumed fact. Presumption was not overcome by the fact that mother claimed a ceremonial marriage and produced no evidence of mutual consent to common-law marriage. Spradlin v. U.S., 262 F. Supp. 502 (D.C. Mont. 1967).

Cohabitation and reputation are merely evidence of the existence and reality of parties' consent; the fact children were born is insufficient to prove consent. The law will imply consent from conduct of the parties when facts permit and will presume a man and woman holding themselves out as husband and wife have entered into a lawful contract of marriage; however, such presumption disappears in the face of contrary facts. Welch v. All Persons, 85 M 114, 278 P 110 (1929).

Presumption of law is in favor of matrimony and against concubinage; however, the presumption is rebuttable and disappears where the parties did not contemplate a present assumption of the relation as distinguished from a future union because in the absence of a solemnization there must be a public assumption of the relation. There is no common-law marriage in Montana where such public assumption was absent. St. v. Newman, 66 M 180, 213 P 805 (1923).

Reputation Needed to Establish Common-Law Marriage to Be Complete and Sincere, Not Partial: Where parties kept alleged relationship of husband and wife secret at their home, among people of their community, and among their relatives, only holding themselves out as husband and wife in hotels, motels, and cabins distant from their residence, they did not establish requisite reputation of being husband and wife necessary to establish a common-law marriage. Miller v. Sutherland, 131 M 175, 309 P2d 322 (1957), followed in In re Estate of Vandenhook, 259 M 201, 855 P2d 518, 50 St. Rep. 758 (1993).

Burden of Proof as to Validity of Common-Law Marriage Where Relationship Initially Illicit: Burden rests upon one asserting validity of a common-law marriage to establish that initial illicit relationship did not continue but was changed to a lawful marriage. Stevens v. Woodmen of the World, 105 M 121, 71 P2d 898 (1937).

Elements of Common-Law Marriage: In order to establish a valid common-law marriage there must be mutual consent of the parties able to consent and competent to enter into a ceremonial marriage and an assumption of such relationship by consent and agreement as of a time certain, followed by cohabitation and repute. Stevens v. Woodmen of the World, 105 M 121, 71 P2d 898 (1937). See also Elliott v. Indus. Accident Bd., 101 M 246, 53 P2d 451 (1936), In re Estate of Vandenhook, 259 M 201, 855 P2d 518, 50 St. Rep. 758 (1993), and In re Estate of Alcorn, 263 M 353, 868 P2d 629, 51 St. Rep. 87 (1994).

Parties to Be Capable of Contracting — Second Contract: Proof of consent, cohabitation, and bearing of children, coupled with reputation as husband and wife, are insufficient when woman at the time of alleged common-law marriage had a husband living, because parties must be capable of contracting a marriage and she was incapable of entering into the second contract. Shepherd & Pierson Co. v. Baker, 81 M 185, 262 P 887 (1927).

Rebuttable Presumption That Prior Marriage Was Dissolved by Death or Divorce: Burden of proof is on one who attacks validity of second marriage, as law rebuttably presumes prior marriage was dissolved by death or divorce. Shepherd & Pierson Co. v. Baker, 81 M 185, 262 P 887 (1927).

Requirement of Solemnization: Clandestine cohabitation in the face of insufficient evidence to show "public assumption of marital relation" does not constitute a valid marriage in absence of a solemnization. In re Huston's Estate, 48 M 524, 139 P 458 (1914).

Cohabitation as Indispensable Element: Cohabitation is an indispensable element to the existence of a common-law marriage or of the "mutual and public assumption of the marriage relation". O'Malley v. O'Malley, 46 M 549, 129 P 501 (1913).

State Party to Marriage: State makes itself a party to every marriage by requiring the contract to be entered into before officers designated by itself or by mutual and public assumption by the parties of the marriage relation. Franklin v. Franklin, 40 M 348, 106 P 353 (1910).

Attorney General's Opinions

Declaration of Marriage Without Solemnization: A marriage license is not a requirement for a valid marriage by written declaration. No fee may be charged for filing the declaration of marriage without solemnization. 37 A.G. Op. 12 (1977).

Law Review Articles

Love or Confusion? Common Law Marriage, Homosexuality and the Montana Supreme Court in Snetsinger v. Montana University System, Coleman, 66 Mont. L. Rev. 445 (2005).

Common-Law Marriage, Townsend, 37 Mont. L. Rev. 122 (1976).

40-1-404. Putative spouse.

Commissioners' Note

The best known method used by the courts to protect the "marital" interests of persons who have established a stable family relationship which cannot be recognized as a marriage (a marriage which is labelled "void" under current law, perhaps, or parties who have cohabited as husband and wife without marrying ceremonially) is the common law marriage doctrine. See Section 211 [40-1-403]. But a variety of other equitable doctrines have also been utilized—one or another can be found in almost every state—to preserve, if not the status, the financial incidents of valid marriage in such circumstances. See e.g., Weyrauch, Informal and Formal Marriage—An Appraisal of Trends in Family Organization, 28 U.Chi.L.Rev. 88 (1960); Danes v. Smith, 104 A.2d 455, 30 N.J.Super. 292 (1954). In the absence of doctrines such as these, many persons who in good faith consider themselves married, and who have established and maintained over a long period a stable family relationship, would be denied both the economic and status incidents of marriage. This section makes it clear that the Act was not intended to abolish such doctrines. In addition, it codifies one of the equitable doctrines which has proved, in California and other experience, to be especially useful. For illustrations of the application of the putative spouse doctrine in California, see Comment, Rights of the Putative and Meretricious Spouse in California, 50 Calif.L.Rev. 866 (1962). Cases from other jurisdictions illustrative of the putative spouse concept include Walker v. Walker, 47 N.W.2d 633, 330 Mich. 332, 31 A.L.R.2d 1250 (1951) and annotation; Chrismond v. Chrismond, 52 So.2d 624, 211 Miss. 746 (1951); Barone v. Barone, 294 P.2d 609, 207 Ore. 26 (1956); Brandt v. Brandt, 333 P.2d 887, 215 Ore. 423 (1958); Buck v. Buck, 427 P.2d 954, 19 Utah 2d 161 (1967).

It is possible for a person to have more than one putative spouse at the same time, since good faith is the test. In addition, a putative spouse and a legal spouse may be able to claim from a single estate or from other funds legally available to a spouse. A common situation of the latter type might involve a bigamous marriage in which the second spouse was never married or had been divorced. In such cases, the court is instructed to apportion property and the other financial incidents of marriage between the legal and the putative spouse, or among putative spouses. A fair and efficient apportionment standard is likely to be the length of time each spouse cohabited with the common partner. For illustrative cases, see Estate of Ricci, 201 Cal.App.2d 146; 19 Cal.Rptr. 739 (1962); Sousa v. Freitas, 10 Cal.App.3d 660; 89 Cal.Rptr. 485 (1970). Because the codification of any particular equitable doctrine designed to protect the financial interests of innocent parties is bound to be controversial, this section has been bracketed. Passage of the Act without this section should not, therefore, be taken to imply a legislative judgment adverse to continuing development of this or similar doctrines by the case law.

The adoption of this section is most desirable (1) to provide legislative foundation for achieving the obviously just results provided by the putative spouse doctrine; (2) to spell out specifically the rights conferred upon a putative spouse; (3) to state specifically when the status of putative spouse terminates; (4) to eliminate any distinction which some courts might attempt between prohibited marriages and those which merely are subject to declaration of invalidity; (5) to provide specifically for equitable apportionment, on the basis of justice and the special circumstances of each case, either where there are a legal spouse and a putative spouse, or where there are several putative spouses. Some judges have expressed difficulties in this regard, but the standard is a workable one which the courts are accustomed to apply in many fields, and there is a body of available authority to afford guidance, as indicated previously in this Comment.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Source: Section 209, Uniform Marriage and Divorce Act.

Case Notes

Opportunity for Opposing Parties to Present Facts Relevant to Summary Judgment Motion Required: The District Court granted summary judgment in a probate case, awarding a putative common-law spouse a portion of the estate. However, in this case, summary judgment constituted reversible error because the estate was not given notice and a full and fair opportunity to present facts relative to the summary judgment motion and to address issues of material fact regarding the claims of the putative spouse. In re Estate of Marson, 2005 MT 222, 328 M 348, 120 P3d 382 (2005), following Hereford v. Hereford, 183 M 104, 598 P2d 600 (1979).

CHAPTER 2
HUSBAND AND WIFE

Chapter Case Notes

Interspousal Tort Immunity Abolished: The defense of interspousal tort immunity is abolished, overruling previous decisions to the contrary. The historical reasons for retention of immunity, i.e., unity of husband and wife as one person, family harmony, and the possibility of fraud and collusion, are no longer valid. Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986).

Contractual Obligations Not Extinguished: Montana adheres to the majority view that Montana's "Married Women's Act" (Title 40, ch. 2, parts 1 through 3) abrogated the rule that contractual obligations are extinguished by marriage. In re Marriage of Reilly, 176 M 239, 577 P2d 840 (1978).

Action for Loss of Consortium: A wife can maintain an action for loss of consortium when such loss is the result of negligent injury to her husband. Dutton v. Hightower & Lubrecht Constr. Co., 214 F. Supp. 298 (D.C. Mont. 1963), distinguished in Hall v. U.S., 266 F. Supp. 671 (D.C. Mont. 1967); Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D.C. Mont. 1961).

Purpose of Married Women's Act: The primary purpose of the "Married Women's Act" (Title 40, ch. 2, parts 1 through 3) was to free the wife from certain disabilities imposed upon her by the common law, under which her legal personalty and property were merged in the husband, i.e., to place the wife upon an equal footing with the husband as to the ownership, control, and enjoyment of property as to contractual rights in general, with an equal right to resort to the courts, nothing appearing therein to disturb the marital unity otherwise. Conley v. Conley, 92 M 425, 15 P2d 922 (1932), overruled in Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986).

Purchase at Judicial Sale: A wife may purchase her husband's real estate at execution or foreclosure sale and hold it as her separate property, if the transaction is bona fide and payment is made with her own money. Marcellus v. Wright, 51 M 599, 154 P 714 (1916).

Chapter Law Review Articles

Family Law, Snyder & Sharrock, 40 Mont. L. Rev. 25 (1979).

Recent Developments in Family Law in Montana, Mahan, 39 Mont. L. Rev. 1 (1978).

Presumptions Concerning Family Law, Clarke, 37 Mont. L. Rev. 102 (1976).

Part 1
Joint Interests, Obligations, and Powers

Part Case Notes

Value of Tribal Trust Land Improperly Included in Marital Estate: The District Court erred in including in the wife's share of the marital estate the value of tribal trust land upon which the parties' mobile home and garage were located. Neither the wife nor the husband held title to the tribal trust land, and the husband was not an enrolled member of the tribe. A state District Court cannot adjudicate Indian trust land by bringing it into state court for valuation prior to a division of proceeds. In re Baker, 2010 MT 124, 356 Mont. 363, 234 P.3d 70.

Marriage Dissolution Brought by Tribal Member Against Non-Indian Spouse — Jurisdiction to Apportion Indian Trust Land: Wife who was a member of the Blackfeet Tribe sought a marriage dissolution in state court from her husband who was a non-Indian. The District Court granted the dissolution but held it did not have jurisdiction to apportion the parties' marital estate, which consisted of about 4,000 acres of Indian trust land on the Blackfeet Reservation, and granted wife's motion to dismiss. On appeal, husband contended that the state court had jurisdiction, relying on a provision in the Blackfeet Tribal Law and Order Code that all divorces must be consummated in accordance with Montana law. However, that provision did not cede jurisdiction to the state but merely governed the tribal court's choice of law. While the state has an interest in ensuring the existence of a forum in which marital property within its borders may be apportioned upon a dissolution, that interest is met by the availability of an alternative forum in the Blackfeet Tribal Court. The state's interest in the property and proceedings is inconsequential compared with the federal and tribal interests at stake. Therefore, the District Court did not err in concluding that it lacked jurisdiction to adjudicate the disposition of the Indian trust land that was the parties' only significant marital asset. In re Marriage of Wellman, 258 M 131, 852 P2d 559, 50 St. Rep. 462 (1993), following White Mtn. Apache v. Bracker, 448 US 136, 65 L Ed 2d 665, 100 S Ct 2578 (1980), and N. Mex. v. Mescalero Apache Tribe, 462 US 324, 76 L Ed 2d 611, 103 S Ct 2375 (1983), distinguishing Sheppard v. Sheppard, 655 P2d 895 (Idaho 1982), and followed in Smith v. McKeon, 284 M 528, 946 P2d 117, 54 St. Rep. 990 (1997), as to a trial court's lack of authority to order an appraisal of Indian trust land.

Exclusive Jurisdiction of Crow Tribal Court: The Crow Tribal Court exercises exclusive jurisdiction over divorce actions between tribal members living on the reservation by virtue of the duly enacted Crow Tribal Code. Thus, prohibition is a proper remedy to dismiss a divorce action in state District Court filed by a member residing on the reservation. State ex rel. Stewart v. District Court, 187 M 209, 609 P2d 290 (1980). See also In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

Part Law Review Articles

Interspousal Tort Immunity in Montana, Tobias, 47 Mont. L. Rev. 23 (1986).

40-2-101. Mutual obligations of husband and wife.

Case Notes

Loss of Consortium Claim Independent as to Damages, but Derivative as to Liability: Mickelson was injured when the fire truck that he was driving was struck by a Montana Rail Link (MRL) train. His spouse and children sought damages for loss of consortium. The District Court held that the loss of consortium claims should be reduced by the percentage of negligence attributed to Mickelson. When a plaintiff's contributory negligence is determined to be not greater than the tortfeasor's negligence, then damages for loss of consortium, being independent and not contingent upon the rights or liabilities of a parent or spouse, may not be reduced by the other spouse's negligence. However, because the language in 27-1-702 provides that any damages allowed must be diminished in the proportion to the amount of negligence attributable to the person recovering, a loss of consortium claim is considered independent as to damages and derivative as to liability. In other words, a defendant must be more liable for a plaintiff's injuries than the plaintiff before there can be any recovery, whether it is on the plaintiff's personal injury claim or on a loss of consortium claim stemming from those injuries. For example, if plaintiff is determined to be 50% or less contributorily negligent for plaintiff's injuries, then a spouse or child could recover 100% of a loss of consortium claim; however, if plaintiff is determined to be 51% or more contributorily negligent for plaintiff's injuries, then a spouse or child would recover nothing on a loss of consortium claim. Therefore, the Supreme Court directed that, on retrial, any contributory negligence attributable to Mickelson could not be imputed to the spouse and children to reduce a loss of consortium award, but if Mickelson was found more liable than MRL, there could be no recovery for loss of consortium. Mickelson v. Mont. Rail Link, Inc., 2000 MT 111, 299 M 348, 999 P2d 985, 57 St. Rep. 446 (2000), following Herold v. Burlington N., Inc., 761 F2d 1241 (8th Cir. 1985).

No Evidence Concerning Injury to Marital Relationship — Failure to Prove Claim for Loss of Consortium: Husband was rendered a quadriplegic in an automobile accident, and wife sued for her loss of consortium. Assessing any damages for wife's loss requires some proof of the established marital lifestyle of the couple prior to the accident. A claim for loss of consortium is based on the husband and wife contracting for obligations of mutual respect, fidelity, and support; therefore, the claimant must offer proof that these mutual obligations were fulfilled prior to the other spouse's injury and that, due to the injury, fulfillment of these obligations has been impaired. In this case, no evidence was offered to establish the nature of the marital relationship enjoyed by the parties prior to the accident and the jury was entitled to conclude that wife had not met her burden of proving damages on her claim. Gunning v. Gen. Motors Corp., 239 M 104, 779 P2d 64, 46 St. Rep. 1546 (1989).

Action for Consortium Distinct from Claim of Injured Spouse: In a personal injury action by wife for physical injuries received in car accident and by husband for loss of consortium, the court held that husband's cause is separate and distinct from claim of injured wife. The basis for a consortium claim lies in this statute because consortium includes a legal right to the aid, protection, affection, and society of the other spouse. Bain v. Gleason, 223 M 442, 726 P2d 1153, 43 St. Rep. 1897 (1986).

Consortium Claim Subject to "Each Person" Limit of Liability Coverage: Under mandatory motor vehicle insurance coverage statutes, husband's cause of action for consortium and wife's cause of action for bodily injuries are subject to the "one person limitation" set forth in 61-6-103 as referred to in 61-6-301. The policy in question does not extend coverage beyond the statutory requirements. Therefore, husband is not entitled to recover from the insurance company an amount over the limit specified for one person for consequential damages to himself resulting from injuries to his wife, such as loss of her services or consortium. Bain v. Gleason, 223 M 442, 726 P2d 1153, 43 St. Rep. 1897 (1986), distinguished in Treichel v. St. Farm Mut. Auto. Ins. Co., 280 M 443, 930 P2d 661, 54 St. Rep. 1 (1997).

Law Review Articles

Loss of Consortium and Loss of Services Actions: A Legacy of Separate Spheres, Ridgeway, 50 Mont. L. Rev. 349 (1989).

40-2-102. Duties of husband and wife as to support.

Case Notes

Divorce Decree Without Support Provisions: The fact that a divorce decree is silent as to support does not relieve the husband of his legal duty to support his family if he is able, particularly where repeated attempts are made to get support. Murphy v. Murphy, 134 M 594, 335 P2d 296 (1959).

Interest of Wife in Estate: The services which a wife owes her husband do not create for her a joint interest in his estate. In re Marsh's Estate, 125 M 239, 234 P2d 459 (1951).

Ability of Husband to Support: The fact that person has no property does not relieve him of his obligation to support his wife and children when it is shown that he has the ability to provide such support by his labor. State ex rel. Houtchens v. District Court, 122 M 76, 199 P2d 272 (1948).

Husband Liable for Necessities:

When the husband fails or refuses to furnish the wife the things necessary for her support, she may, while living with him or while living separate from him because of his misconduct, bind him by her contracts with third persons for such necessaries; under such circumstances the law creates an implied agency on the part of the wife, his consent being implied by reason of the marital relationship. McQuay v. McQuay, 86 M 535, 284 P 532 (1930).

This section makes it the duty of the husband to support his wife out of his property or labor, and by the provisions of 40-2-103, if he neglects to do so (unless the wife has abandoned him without justification), any person may in good faith supply her with articles necessary for her support and recover value therefor from him. State ex rel. La Point v. District Court, 69 M 29, 220 P 88 (1923).

Presumption of Duty to Support: The law imposes upon the husband the legal duty of supporting his wife out of his property or by his labor, if he is able to do so, and a mere showing that the parties are married may raise a presumption that the wife is legally entitled to be supported by the husband. Goodwin v. Elm Orlu Min. Co., 83 M 152, 269 P 403 (1928); State ex rel. Robison v. District Court, 56 M 592, 186 P 335 (1919).

Action Against Third Persons for Wrongful Death: Although the wife and children have been deprived of this support by the death of the father, caused by the wrongful act or neglect of another, they do not have a cause of action under 27-1-513 against such other person unless the father, if death had not ensued, could have maintained an action in his own behalf. Melville v. Butte-Balaklava Copper Co., 47 M 1, 130 P 441 (1913).

40-2-103. Support of spouse.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Attachment: Contracts made by the wife for necessaries under authority of this section, where the husband fails or refuses to furnish them, are his contracts and the obligations arising thereunder are his obligations; the agency referred to above is statutory but the husband's obligations are contractual. Therefore, attachment may issue in an action to recover for necessaries furnished the wife as upon contracts "express or implied, for the direct payment of money" within the meaning of 27-18-101. McQuay v. McQuay, 86 M 535, 284 P 532 (1930).

Attorney Fees in Divorce Action Not "Necessary": An action for attorney fees in a divorce action is not maintainable under this section, impliedly conferring authority upon the wife to charge her husband, as his agent, for the value of articles necessary for her support, a divorce not being a "necessary" as that term is employed in this section. Grimstad v. Johnson, 61 M 18, 201 P 314 (1921).

40-2-104. Liability of married person when abandoned by spouse.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Wife Sued for Recovery of Medical Expenses of Estranged Husband — Material Question of Fact Whether Husband Abandoned Wife or Whether They Were Separated by Agreement as Precluding Summary Judgment: The husband moved from the family home, the wife filed for divorce, and the husband died a few weeks later after incurring $32,496 in medical expenses. The wife served as personal representative of her husband's estate and claimed the family allowance as his surviving spouse. Plaintiff was assigned the debt for medical services for purposes of collection. Citing Missoula YWCA v. Bard, 1999 MT 177, 295 M 260, 983 P2d 933 (1999), plaintiff argued that the medical expenses were necessaries of the family and that the wife was therefore responsible for the debt under 40-2-106, while the wife argued that she was not responsible because the parties were legally separated at the time that the expenses were incurred and because the husband had not supported the family during that time. The District Court concluded that because the wife acted as personal representative and received the family allowance as surviving spouse, she was estopped from arguing that she was not legally married and that because there were no factual disputes, plaintiff was entitled to summary judgment. The wife appealed, and the Supreme Court reversed. Nothing in statute precludes an abandoned or separated spouse from acting as personal representative of a deceased spouse's estate, nor does the role of personal representative preclude a spouse from arguing abandonment or separation by agreement. This section provides an exception to liability imposed under 40-2-106 if a spouse has been abandoned or if spouses are living separately by agreement. Because a question of material fact existed as to whether the wife was abandoned or separated, summary judgment was inappropriate, so the case was remanded for further proceedings. Balyeat Collection Professionals v. Garland, 2002 MT 167, 310 M 464, 51 P3d 1127 (2002).

Grounds for Abandonment: A mere showing that parties are married may raise a presumption that the wife is legally entitled to be supported by the husband, but where she was and had been for 4 years living apart from him and had refused to return to the home provided by him because he declined to also receive as a member of the household her son by a former marriage who was capable of caring for himself, which the husband was not required to do under 40-6-217, her refusal was unreasonable and constituted desertion on her part, and under this section he was not liable for her support. Goodwin v. Elm Orlu Min. Co., 83 M 152, 269 P 403 (1928).

40-2-105. Husband and wife as joint tenants.

Case Notes

Death of Spouse Before Final Disposition — Distribution as Severance of Joint Tenancy: Wife contended that: (1) because husband died before final resolution of property division, her right of survivorship remained; and (2) the District Court erred in refusing to recognize that the property was held in joint tenancy and should therefore have given the wife the property upon husband's death. On review, the Supreme Court found that a lower court order distributing the property in question to the husband effectively severed the joint tenancy. In re Marriage of Butler, 232 M 419, 756 P2d 1159, 45 St. Rep. 1160 (1988).

Proceeds From Sale of Real Property: In absence of agreement to the contrary, proceeds of a sale of joint tenancy property pursuant to a contract are held in joint tenancy. In re Estate of Rickner, 164 M 51, 518 P2d 1160 (1974).

40-2-106. Liability for acts or debts of spouse.

Compiler's Comments

2009 Amendment: Chapter 327 inserted (2) clarifying statute of limitations for liability for acts or debts of spouse is governed by 27-2-202; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Wife Sued for Recovery of Medical Expenses of Estranged Husband — Material Question of Fact Whether Husband Abandoned Wife or Whether They Were Separated by Agreement as Precluding Summary Judgment: The husband moved from the family home, the wife filed for divorce, and the husband died a few weeks later after incurring $32,496 in medical expenses. The wife served as personal representative of her husband's estate and claimed the family allowance as his surviving spouse. Plaintiff was assigned the debt for medical services for purposes of collection. Citing Missoula YWCA v. Bard, 1999 MT 177, 295 M 260, 983 P2d 933 (1999), plaintiff argued that the medical expenses were necessaries of the family and that the wife was therefore responsible for the debt under this section, while the wife argued that she was not responsible because the parties were legally separated at the time that the expenses were incurred and because the husband had not supported the family during that time. The District Court concluded that because the wife acted as personal representative and received the family allowance as surviving spouse, she was estopped from arguing that she was not legally married and that because there were no factual disputes, plaintiff was entitled to summary judgment. The wife appealed, and the Supreme Court reversed. Nothing in statute precludes an abandoned or separated spouse from acting as personal representative of a deceased spouse's estate, nor does the role of personal representative preclude a spouse from arguing abandonment or separation by agreement. Section 40-2-104 provides an exception to liability imposed under this section if a spouse has been abandoned or if spouses are living separately by agreement. Because a question of material fact existed as to whether the wife was abandoned or separated, summary judgment was inappropriate, so the case was remanded for further proceedings. Balyeat Collection Professionals v. Garland, 2002 MT 167, 310 M 464, 51 P3d 1127 (2002).

Loss of Consortium Claim Independent as to Damages, but Derivative as to Liability: Mickelson was injured when the fire truck that he was driving was struck by a Montana Rail Link (MRL) train. His spouse and children sought damages for loss of consortium. The District Court held that the loss of consortium claims should be reduced by the percentage of negligence attributed to Mickelson. When a plaintiff's contributory negligence is determined to be not greater than the tortfeasor's negligence, then damages for loss of consortium, being independent and not contingent upon the rights or liabilities of a parent or spouse, may not be reduced by the other spouse's negligence. However, because the language in 27-1-702 provides that any damages allowed must be diminished in the proportion to the amount of negligence attributable to the person recovering, a loss of consortium claim is considered independent as to damages and derivative as to liability. In other words, a defendant must be more liable for a plaintiff's injuries than the plaintiff before there can be any recovery, whether it is on the plaintiff's personal injury claim or on a loss of consortium claim stemming from those injuries. For example, if plaintiff is determined to be 50% or less contributorily negligent for plaintiff's injuries, then a spouse or child could recover 100% of a loss of consortium claim; however, if plaintiff is determined to be 51% or more contributorily negligent for plaintiff's injuries, then a spouse or child would recover nothing on a loss of consortium claim. Therefore, the Supreme Court directed that, on retrial, any contributory negligence attributable to Mickelson could not be imputed to the spouse and children to reduce a loss of consortium award, but if Mickelson was found more liable than MRL, there could be no recovery for loss of consortium. Mickelson v. Mont. Rail Link, Inc., 2000 MT 111, 299 M 348, 999 P2d 985, 57 St. Rep. 446 (2000), following Herold v. Burlington N., Inc., 761 F2d 1241 (8th Cir. 1985).

Legal Services Provided in Obtaining Protective Order Considered Necessary Articles: The wife retained the services of an attorney to obtain an order of protection against her husband and to petition for dissolution of marriage. The protective order was granted. The wife died shortly thereafter, and dissolution proceedings were abated. The attorney sued the husband for attorney fees. Citing In re Marriage of White, 218 M 343, 708 P2d 267 (1985), the District Court dismissed the action on grounds that there was no set of facts under which the attorney would be entitled to relief. In general, a person is not liable for debts contracted by one's spouse. One exception is for "necessary articles" for the husband, wife, or children. Distinguishing White, the Supreme Court reversed, citing McAlear v. Unemployment Comp. Comm'n, 145 M 458, 405 P2d 219 (1965), for the proposition that attorney services are a necessary article when provided to a wife to obtain orders of protection from an abusive spouse, thereby obligating the spouse to pay attorney fees so incurred. Missoula YWCA v. Bard, 1999 MT 177, 295 M 260, 983 P2d 933, 56 St. Rep. 692 (1999).

No State Jurisdiction to Collect Medical Debts of Non-Indian Spouse From Tribal Member: A tribal member wife was sued by non-Indian creditors in state District Court to collect debts for medical bills incurred by her nonmember husband both on and off the Flathead Reservation.

Citing the holdings in Williams v. Lee, 358 US 217 (1959), and Kennerly v. District Court, 400 US 423 (1971), and applying the three-part test articulated in State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973), for determining whether the state courts of Montana have jurisdiction over transactions occurring on a reservation, the Supreme Court held that the state has no jurisdiction over the action against the wife to collect debts incurred by her non-Indian spouse at an off-reservation clinic. This section does not apply to members of the tribes residing within the exterior boundaries of the reservation or independently confer state jurisdiction. The wife did not engage in significant off-reservation contacts that would subject her to the state court's jurisdiction for collection of the off-reservation debts. Balyeat Law, PC v. Pettit, 1998 MT 252, 291 M 196, 967 P2d 398, 55 St. Rep. 1038 (1998). In In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, the Supreme Court overruled Iron Bear in its entirety and Balyeat Law, PC v. Pettit to the extent it relied on the Iron Bear test.

Effect of Dissolution Proceedings on Spousal Authority to Conduct Independent Financial Transactions: The statutory authority of spouses to conduct independent financial transactions is not controlling on the distribution of marital property in dissolution proceedings. In re Marriage of Dalley, 232 M 235, 756 P2d 1131, 45 St. Rep. 1017 (1988).

Defense Against Child Abuse Charges — Attorney Fee: Attorney fee incurred by one spouse to defend himself against child abuse charges is not a "necessary" within the meaning of this section. Therefore, when only the husband contracted with the attorney, the attorney fee is the husband's sole responsibility; the wife is not liable for this debt, although it was incurred during the couple's marriage. In re Marriage of White, 218 M 343, 708 P2d 267, 42 St. Rep. 1634 (1985), distinguished in Missoula YWCA v. Bard, 1999 MT 177, 295 M 260, 983 P2d 933, 56 St. Rep. 692 (1999).

Divorce Court Powers: A court which severs the marriage ties by granting a divorce possesses the necessary power to compel the ex-husband to support his minor children. State ex rel. Lay v. District Court, 122 M 61, 198 P2d 761 (1948).

Joinder of Spouses in Action: Joining of husband and wife by collection agency in all actions where a claim against either was involved, although the facts in nowise justified the practice under this section or the necessity of life theory, at least amounted to sharp practice. State ex rel. Freebourn v. Merchants' Credit Serv., Inc., 104 M 76, 66 P2d 337 (1937).

College Education of Children: Application of wife for modification of divorce decree to compel defendant father to contribute $35 per month toward minor son's expenses in attending college was properly granted, since this section makes education of the child the responsibility of both parents and extends to college education of a child. Refer v. Refer, 102 M 121, 56 P2d 750 (1936).

Husband Liable for Necessities: When the husband fails or refuses to furnish the wife the things necessary for her support, she may, while living with him or while living separate from him because of his misconduct, bind him by her contracts with third persons for such necessaries; under such circumstances the law creates an implied agency on the part of the wife, his consent being implied by reason of the marital relationship. McQuay v. McQuay, 86 M 535, 284 P 532 (1930).

Law Review Articles

Attorney Fees as Necessaries of Life: Expanding a Domestic Violence Victim's Access to Safety and Justice, Zielinski, 60 Mont. L. Rev. 201 (1999).

40-2-107. May sue and be sued.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Interspousal Tort Immunity Abolished: The defense of interspousal tort immunity is abolished, overruling previous decisions to the contrary. The historical reasons for retention of immunity, i.e., unity of husband and wife as one person, family harmony, and the possibility of fraud and collusion, are no longer valid. Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986).

Interspousal Immunity Maintained: Common-law doctrine of interspousal tort immunity is unchanged by procedural statute creating right of married person to sue or be sued as though single. Statute creates no new right allowing tort suits between spouses. St. Farm Mut. Auto. Ins. Co. v. Leary, 168 M 482, 544 P2d 444 (1975), overruled in Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986). See 40-2-109.

Action for Loss of Consortium: A wife can maintain an action for loss of consortium when such loss is the result of negligent injury to her husband. Dutton v. Hightower & Lubrecht Constr. Co., 214 F. Supp. 298 (D.C. Mont. 1963), distinguished in Hall v. U.S., 266 F. Supp. 671 (D.C. Mont. 1967); Duffy v. Lipsman-Fulkerson & Co., 200 F. Supp. 71 (D.C. Mont. 1961).

Removal of Common-Law Disability: This section and section 36-110, R.C.M. 1947 (now repealed), are procedural and create no new rights, but only remove the common-law disability of married women to enforce their rights otherwise created and existing. Dutton v. Hightower & Lubrecht Constr. Co., 214 F. Supp. 298 (D.C. Mont. 1963).

Actions Against Husband: Granting the right to a married woman to prosecute actions for injury to person, property, etc., in her own name, when read in connection with other sections of the "Married Women's Act" (Title 40, ch. 2, parts 1 through 3) did not confer upon the wife the right to sue her husband for a personal tort, a right denied her under the common law (see 40-2-109). Kelly v. Williams, 94 M 19, 21 P2d 58 (1933), overruled in Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986); Conley v. Conley, 92 M 425, 15 P2d 922 (1932), overruled in Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986).

Law Review Articles

Toward Abolition of Interspousal Tort Immunity, Karell, 36 Mont. L. Rev. 251 (1975).

Consortium, Action in Montana, Leaphart & McCann, 34 Mont. L. Rev. 75 (1973).

Discrimination Against Married Women Under Title VII of the Civil Rights Act of 1964, Bender, 32 Mont. L. Rev. 238 (1971).

40-2-108. Married person as personal representative, guardian, conservator, or trustee.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

40-2-109. Right of person to sue spouse for intentional tort.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Certified Question — Interspousal Tort Immunity Abolished: In an original proceeding for declaratory judgment on two certified questions from U.S. District Court, the Supreme Court held that it abolished the defense of interspousal tort immunity in Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986), because historical reasons for that immunity were no longer valid. Therefore, that doctrine did not bar claim of wife-passenger against her husband-driver for negligence in operation of motor vehicle. Noone v. Fink, 222 M 273, 721 P2d 1275, 43 St. Rep. 1258 (1986).

Interspousal Tort Immunity Abolished: The defense of interspousal tort immunity is abolished, overruling previous decisions to the contrary. The historical reasons for retention of immunity, i.e., unity of husband and wife as one person, family harmony, and the possibility of fraud and collusion, are no longer valid. Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986).

No Interspousal Immunity for Property Damages: There is no interspousal tort immunity for property damage claims by one spouse against the other. Norick v. Dove Constr., 204 M 57, 662 P2d 1318, 40 St. Rep. 660 (1983).

Law Review Articles

Toward Abolition of Interspousal Tort Immunity, Karell, 36 Mont. L. Rev. 251 (1975).

Part 2
Individual Property

40-2-201. When husband's and wife's interests separate.

Case Notes

Exclusion From Dwelling During Divorce Action: In a divorce action, under the facts of the case, the husband could not lawfully be excluded from the family dwelling. Emery v. Emery, 122 M 201, 200 P2d 251 (1948).

40-2-202. Individual property of married person.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Effect of Dissolution Proceedings on Spousal Authority to Conduct Independent Financial Transactions: The statutory authority of spouses to conduct independent financial transactions is not controlling on the distribution of marital property in dissolution proceedings. In re Marriage of Dalley, 232 M 235, 756 P2d 1131, 45 St. Rep. 1017 (1988).

Military Retirement Benefits: The Supreme Court held that military retirement benefit pay is analogous to any pension fund and constitutes a marital asset. Pursuant to 40-2-202, which requires apportionment of all property and assets of parties to a dissolution, military retirement pay must be included for purposes of establishing the marital estate. Although the marriage spanned only three-fourths of husband's military service, an equal division of the retirement benefits evidenced no abuse of discretion by the trial judge. Kecskes v. Kecskes, 210 M 479, 683 P2d 478, 41 St. Rep. 1170 (1984).

Conveyance of Individual Property Before Petition Filed: In the fall of 1977, after suffering a stroke, the husband initiated real property conveyances to his children to ensure their future security in the event of his death. On June 2, 1978, the wife left the family home, the husband being unaware of her intention to divorce him. On June 5, 1978, the conveyances were completed. On June 16, 1978, the wife filed a petition for dissolution. Because this section allows a married person to transfer his property to another without consent of his spouse and because there was substantial evidence that the conveyances were not fraudulent, the property was not part of the marital estate under 40-4-202. In re Marriage of Crabtree, 200 M 178, 651 P2d 29, 39 St. Rep. 1668 (1982).

40-2-203. Inventory of individual personal property of married person.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Adequate Consideration of Parties' Circumstances to Warrant Maintenance Award: The trial court awarded the wife maintenance payments of $750 a month. The husband appealed on grounds that the court had previously denied the wife's pretrial request for maintenance in a temporary order on the basis that she had sufficient premarital assets to provide for her needs pending trial and because the court's findings and conclusions noted that the wife's assets considerably exceeded the husband's assets. Nevertheless, the Supreme Court affirmed the maintenance award. The District Court properly considered the factors in this section, including the parties' physical and emotional health, employment prospects, ability to meet monthly needs and living expenses, duration of the marriage, and standard of living attained during the marriage. In re Marriage of Grende, 2004 MT 36, 320 M 38, 85 P3d 788 (2004).

Recording as Constructive Notice: Evidence in an action for the conversion of restaurant fixtures claimed by the wife of a judgment debtor as her separate property and seized by the attaching creditor with constructive notice of plaintiff's claim by reason of an inventory filed by her under 40-2-204, over plaintiff's protests and objections, thus destroying a prosperous business in an effort to coerce her to pay her husband's debt, was sufficient to warrant an award of exemplary damages. Wray v. Great Falls Paper Co., 72 M 461, 234 P 486 (1925).

Necessity for Inventory: The inventory of the separate property of the wife is necessary to protect such property only when it is in the exclusive possession of the husband, and third persons deal with him on the credit thereof without knowledge of the claim of the wife. Chan v. Slater, 33 M 155, 82 P 657 (1905).

Filing Before Marriage: A statute providing for the recording by a married woman of a list of her separate property, in order to exempt the same from liability for her husband's debts, is substantially complied with though such list be recorded by a woman in her maiden name, provided it contains a notification of her approaching marriage and the name of her intended husband. Palmer v. Murray, 6 M 125, 9 P 896 (1886). See Palmer v. Murray, 8 M 174, 19 P 553 (1888).

40-2-205. Earnings and accumulations of married person.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Case Notes

Writ of Attachment by Husband's Creditor: When wife raised and accumulated sheep and chickens seized under attachment by husband's creditor, verdict for wife in her action for conversion was supported by the evidence as creditor failed to prove: a conspiracy existed between spouses to defraud husband's creditors; that the property in litigation belonged to the husband, and not the wife; and that the husband conveyed the property to the wife without adequate consideration or that he purchased the property with his funds; that the property was in sole and exclusive possession of the husband; and that the creditor dealt with the husband on the credit of such property. Yates v. Commercial Bank & Trust Co., 79 M 100, 255 P 8 (1927).

After-Acquired Property: Property acquired by the wife subsequent to the contracting of a debt by the husband cannot be held liable for such debt. Chan v. Slater, 33 M 155, 82 P 657 (1905).

40-2-206. Earnings and accumulations — when separated.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Date of Dissolution Is Valuation Date: The date of the dissolution of marriage and not the date of separation is the date to be used for the valuation of the marital estate. In re Marriage of Krum, 188 M 498, 614 P2d 525, 37 St. Rep. 1291 (1980).

40-2-207. Work and labor of married person.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Recovery for Loss of Time: A married woman is entitled to recover damages for the impairment of her ability to work, independently of the husband's right to recover for the loss of her time. Risken v. N. Pac. Ry., 137 M 57, 350 P2d 831 (1960).

Duty to Serve Husband: The common-law rule that the wife owes the duty to the husband to attend to all ordinary household duties and labor in the advancement of the husband's interests without compensation was not changed, but is recognized by this section, in providing that all work and labor performed by a married woman for a person other than her husband and children is presumed to be performed for her own account. Gates v. Powell, 77 M 554, 252 P 377 (1926).

Amount of Compensation: A married woman who works for a corporation with the permission of its officers may recover such compensation for her services as they are reasonably worth. Trogdon v. Hanson Sheep Co., 49 M 1, 139 P 792 (1914).

40-2-208. Debts of spouse contracted before marriage.

Case Notes

Child Support — Assets of Present Spouse Unavailable: In an action to increase child support payments, the trial court considered the income of the father's present wife in its determination of the father's ability to pay increased child support. The clear effect of the court's order is to make the father's present spouse's property or income indirectly available to pay child support for her husband's children by a previous marriage. This cannot be done. Duffey v. Duffey, 193 M 241, 631 P2d 697, 38 St. Rep. 1105 (1981).

40-2-209. Individual property of married person — how far liable.

Case Notes

Separate Estate: Property purchased with the money of the wife becomes a part of her separate estate. It is exempt from liability for the debts of the husband, with only a few exceptions. Beard v. Myers, 136 M 350, 347 P2d 719 (1960), following Kranjcec v. Belinak, 114 M 26, 132 P2d 150 (1942).

Instructions to Jury: In an action by wife for conversion of her separate property by means of a levy of execution, instruction that if jury found she actually owned the property, verdict should go in her favor was not erroneous as against contention it failed to advise jury as to a creditor's right to levy on it for husband's debt where creditor was misled into believing it belonged to her husband. Brennan v. Mayo, 100 M 439, 50 P2d 245 (1935).

Pleadings: Where it does not appear in a complaint or otherwise in an action against a husband and wife on an account stated that the articles were of the character mentioned in this section, for which the separate property of the wife would be liable, no account was stated as to her and a judgment against her was unwarranted. O'Hanlon Co. v. Jess, 58 M 415, 193 P 65 (1920).

Sale of Personal Property From Husband to Wife: If a sale of personal property is sufficient to pass title from the husband to the wife, as between themselves, the property actually becomes the separate property of the wife. Webster v. Sherman, 33 M 448, 84 P 878 (1906).

Curtesy: A section of the Compiled Statutes of 1887 somewhat similar to the above freed the duly listed property of married woman from debts and liabilities of the husband, unless contracted for necessary articles for the wife and minor children, but did not give a married woman in reference to such property complete status as a femme sole and did not deprive a husband of curtesy in such property. Allen v. Roush, 15 M 446, 39 P 459 (1895).

40-2-210. Necessity determined by standard of living.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Fair Debt Collection Practices Act — Claimant Not Required to Dispute Debt Within 30 Days — Debt Not Misrepresented: The plaintiff sued the defendants alleging violations of the Fair Debt Collection Practices Act (FDCPA). The lawsuit concerned the defendants' attempt to collect a dental bill, which the plaintiff did not dispute with the defendants within 30 days. The District Court granted summary judgment for the defendants, holding that the plaintiff did not dispute her debt within 30 days and this barred her FDCPA claims. The Supreme Court disagreed with the District Court's reasoning that the FDCPA requires a claimant to dispute the debt within 30 days. However, the Supreme Court found that the District Court's grant of summary judgment was appropriate because the defendants did not misrepresent the debt and were entitled to charge fees in the collection of the debt. Serrania v. LPH, Inc., 2015 MT 113, 379 Mont. 17, 347 P.3d 1237.

Wife Sued for Recovery of Medical Expenses of Estranged Husband — Material Question of Fact Whether Husband Abandoned Wife or Whether They Were Separated by Agreement as Precluding Summary Judgment: The husband moved from the family home, the wife filed for divorce, and the husband died a few weeks later after incurring $32,496 in medical expenses. The wife served as personal representative of her husband's estate and claimed the family allowance as his surviving spouse. Plaintiff was assigned the debt for medical services for purposes of collection. Citing Missoula YWCA v. Bard, 1999 MT 177, 295 M 260, 983 P2d 933 (1999), plaintiff argued that the medical expenses were necessaries of the family and that the wife was therefore responsible for the debt under 40-2-106, while the wife argued that she was not responsible because the parties were legally separated at the time that the expenses were incurred and because the husband had not supported the family during that time. The District Court concluded that because the wife acted as personal representative and received the family allowance as surviving spouse, she was estopped from arguing that she was not legally married and that because there were no factual disputes, plaintiff was entitled to summary judgment. The wife appealed, and the Supreme Court reversed. Nothing in statute precludes an abandoned or separated spouse from acting as personal representative of a deceased spouse's estate, nor does the role of personal representative preclude a spouse from arguing abandonment or separation by agreement. Section 40-2-104 provides an exception to liability imposed under 40-2-106 if a spouse has been abandoned or if spouses are living separately by agreement. Because a question of material fact existed as to whether the wife was abandoned or separated, summary judgment was inappropriate, so the case was remanded for further proceedings. Balyeat Collection Professionals v. Garland, 2002 MT 167, 310 M 464, 51 P3d 1127 (2002).

Legal Services Provided in Obtaining Protective Order Considered Necessary Articles: The wife retained the services of an attorney to obtain an order of protection against her husband and to petition for dissolution of marriage. The protective order was granted. The wife died shortly thereafter, and dissolution proceedings were abated. The attorney sued the husband for attorney fees. Citing In re Marriage of White, 218 M 343, 708 P2d 267 (1985), the District Court dismissed the action on grounds that there was no set of facts under which the attorney would be entitled to relief. In general, a person is not liable for debts contracted by one's spouse. One exception is for "necessary articles" for the husband, wife, or children. Distinguishing White, the Supreme Court reversed, citing McAlear v. Unemployment Comp. Comm'n, 145 M 458, 405 P2d 219 (1965), for the proposition that attorney services are a necessary article when provided to a wife to obtain orders of protection from an abusive spouse, thereby obligating the spouse to pay attorney fees so incurred. Missoula YWCA v. Bard, 1999 MT 177, 295 M 260, 983 P2d 933, 56 St. Rep. 692 (1999).

Law Review Articles

Attorney Fees as Necessaries of Life: Expanding a Domestic Violence Victim's Access to Safety and Justice, Zielinski, 60 Mont. L. Rev. 201 (1999).

Part 3

Power of Married Persons to Contract

Part Law Review Articles

The Doctrine of Incorporation by Reference: In re Herzog's Estate, Mazurek, 35 Mont. L. Rev. 376 (1974).

40-2-301. Husband and wife may contract.

Case Notes

Existence of Postnuptial Agreement Contingent on Interests Not Yet Vested: In a dissolution of marriage action, the wife argued that there was a postnuptial agreement. The conditions were that the wife would assume credit card debt for everyday expenses, and the husband would repay her from the proceeds of his mother's trust, which named him as a beneficiary. The Supreme Court found that the trust was contingent because the terms of the trust could be modified by the husband's mother, so the husband's interest had not vested. Therefore, any postnuptial agreement was also contingent on interests that had not yet vested. In re Marriage of Parker, 2013 MT 194, 371 Mont. 74, 305 P.3d 816.

Effect of Dissolution Proceedings on Spousal Authority to Conduct Independent Financial Transactions: The statutory authority of spouses to conduct independent financial transactions is not controlling on the distribution of marital property in dissolution proceedings. In re Marriage of Dalley, 232 M 235, 756 P2d 1131, 45 St. Rep. 1017 (1988).

Interspousal Tort Immunity Abolished: The defense of interspousal tort immunity is abolished, overruling previous decisions to the contrary. The historical reasons for retention of immunity, i.e., unity of husband and wife as one person, family harmony, and the possibility of fraud and collusion, are no longer valid. Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986).

Agreement Unconscionable When Instigated to Get Wife's Property as Condition of Continuing Marriage: Petitioner appealed a judgment awarding approximately one-sixth of the marital property to him and the balance to the respondent wife. Petitioner contended that the trial court abused its discretion when it refused to divide the marital property 50-50 under an agreement executed between the parties. The Supreme Court held that the trial court properly refused to divide the property according to the agreement, stating that the result would be the same whether the agreement was a separation agreement or, as the husband contended, a postnuptial agreement. The evidence showed that in instigating the agreement the husband took advantage of his wife regarding her property as a condition to continuing the marriage, contrary to what is required of one in a confidential relationship. The agreement was unconscionable as a matter of law even though the trial court did not specifically find unconscionability. Myers v. Myers, 210 M 173, 682 P2d 718, 41 St. Rep. 990 (1984).

Spouse's Lost Investments Not in Marital Estate — Right to Contract With Others: A dissolution award that includes in the marital estate assets which the appellant invested and lost 1 year before the dissolution ignores fundamental legal principles of marital status and thus constitutes an abuse of discretion. Spouses possess mutual powers, obligations, and interests which endure until lawfully modified or terminated, and although appellant may have used poor judgment in his business transactions regarding the family assets, he possessed the power to freely contract with others regarding marital property. Lippert v. Lippert, 192 M 222, 627 P2d 1206, 38 St. Rep. 625 (1981), followed by Peterson v. Peterson, 195 M 157, 636 P2d 821, 38 St. Rep. 1723 (1981).

Presumption That Interspousal Transfer Is Gift: A transfer between spouses is presumed to be a gift, absent consideration, but when the circumstances showed that the wife did not have donative intent at the time of transferring stock to her husband, the presumption was overcome. Myhre v. Myhre, 170 M 410, 554 P2d 276 (1976).

Interspousal Immunity Maintained: Common-law doctrine of interspousal tort immunity was unchanged by procedural statute creating right of married person to sue or be sued as though

single. Statute created no new right allowing tort suits between spouses. St. Farm Mut. Auto. Ins. Co. v. Leary, 168 M 482, 544 P2d 444 (1975), overruled in Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986).

Scrutiny of Transaction: Husband, who was well along in years, quit claimed property to his wife in consideration for her promise that she would not put him off such property. The parties were later divorced and wife rented the premises. The Supreme Court stated that a court of equity will closely scrutinize all transactions between a husband and wife, so that injustice and oppression will not result. The court would not tolerate a breach of the confidence reposed on technical grounds. The case was remanded for further proceedings. Erdmann v. Erdmann, 127 M 252, 261 P2d 367 (1953), following DeAtley v. Streit, 81 M 382, 263 P 967 (1928).

Marriage Defense to Tort Actions: Common-law doctrine under which one spouse may not sue the other for a personal tort was in force in Montana. Therefore, wife could not maintain action against her husband for personal injuries sustained by negligence of husband's chauffeur while she was riding in his car. Conley v. Conley, 92 M 425, 15 P2d 922 (1932), overruled in Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986).

Purpose of Act: The primary purpose of the "Married Women's Act" (Title 40, ch. 2, parts 1 through 3) was to free the wife from certain disabilities imposed upon her by the common law, under which her legal personalty and property were merged in the husband, i.e., to place the wife upon an equal footing with the husband as to the ownership, control, and enjoyment of property as to contractual rights in general, with an equal right to resort to the courts, nothing appearing therein to disturb the marital unity otherwise. Conley v. Conley, 92 M 425, 15 P2d 922 (1932), overruled in Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986).

Wife as Assuming Personal Liability When Signs Note and Mortgage With Husband: When a married woman joins her husband in making of a note and mortgage, she makes debt her own and assumes a personal liability and she may not thereafter assert that in attaching her signature she merely did so for the purpose of hypothecating her inchoate right of dower in the mortgaged property or that she signed because she was told to do so because she was the wife of the maker and mortgagor. Ferrell v. Elling, 84 M 384, 276 P 432 (1929).

Conveyances Between Husband and Wife:

In an action in conversion of personal property seized under attachment, in which defendants alleged that the property seized belonged to the plaintiff's husband, that she and he had conspired to defraud his creditors and for that purpose the husband had fraudulently transferred his property to plaintiff who paid no consideration therefor, and that other property had been purchased by her with the husband's money, the verdict in plaintiff's favor was supported by the evidence. Yates v. Commercial Bank & Trust Co., 79 M 100, 255 P 8 (1927).

While transfers of property by a husband to his wife should when charged as being fraudulent be very closely scrutinized on account of the opportunities afforded by the confidential relation of the parties for the perpetration of fraud, yet a husband honestly indebted to his wife may give her a valid preference, either by transfer of money or property in payment, or by giving security to the same extent as he may prefer any other creditors, and such a preference is fraudulent as to other creditors of the husband. Harrison v. Riddell, 64 M 466, 210 P 460 (1922); Koopman v. Mansolf, 51 M 48, 149 P 491 (1915); Lambrecht v. Patten, 15 M 260, 38 P 1063 (1895).

When under a contract made by defendant landowner with plaintiffs (two individuals and a corporation) jointly, which authorized them to sell his property at a fixed price on a commission basis, a sale made to four persons, two of whom were the wives of the individual plaintiffs, was voidable at defendant's option, the fact that the two other purchasers bore no relation whatever to such plaintiffs not altering the rule condemning the sale. Crowley v. Rorvig, 61 M 245, 203 P 496 (1921).

A wife intended to convey property owned by her in her own right to an only daughter. The influence of her husband, made possible by reason of the confidential relations between them, so changed her intentions as to cause her to convey to him instead. This was based upon his promise to make a will devising such property, as well as his own, to the daughter and a son in equal shares. This promise was broken after the wife's death and the will theretofore made was destroyed. The husband was rightfully declared an involuntary trustee of the property, in favor of the daughter, the intended beneficiary. Huffine v. Lincoln, 52 M 585, 160 P 820 (1916).

Contract of Separation: Under 40-2-303, 40-2-304, and this section, husband and wife may agree in writing to an immediate separation making provision for the support of either of them, the mutual consent of the parties being a sufficient consideration; and if it is fairly made and executed, free from fraud or imposition, coercion, or duress, courts will uphold and enforce such an agreement. Lee v. Lee, 55 M 426, 178 P 173 (1919).

Law Review Articles

Discrimination Against Married Women Under Title VII of the Civil Rights Act of 1964, Bender, 32 Mont. L. Rev. 238 (1971).

40-2-302. Liability of spouse.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Effect of Dissolution Proceedings on Spousal Authority to Conduct Independent Financial Transactions: The statutory authority of spouses to conduct independent financial transactions is not controlling on the distribution of marital property in dissolution proceedings. In re Marriage of Dalley, 232 M 235, 756 P2d 1131, 45 St. Rep. 1017 (1988).

40-2-303. Alteration of legal relation by contract — separation agreement.

Case Notes

Void Provisions: Provision of antenuptial agreement that in event either party shall institute divorce action the party bringing the action covenants to pay all expenses and covenants that other party shall never be called on to pay alimony, separate maintenance, costs of suit, or any other expense incurred by party bringing action, is contrary to public policy and void, and court was justified in awarding alimony and suit money to wife instituting divorce action. Stefonick v. Stefonick, 118 M 486, 167 P2d 848, 164 ALR 1211 (1946).

Attachment Lies Where Obligations Contractual and Not Decretal: When the court approved a property settlement contract entered into during the pendency of a divorce action, and defendant ceased payments on the agreed $150 per month support money when the minor child reached majority, the rights and obligations of the parties were contractual and not decretal, and therefore attachment lay against his contention that the sum payable was not for a certain sum; such agreements regulate the rights and obligations inter se, and his remedy was for reformation of the agreement until which time the contract must stand. State ex rel. Towne v. District Court, 114 M 1, 132 P2d 161 (1942).

Remedy Where Contract Does Not Provide for Modifications: Where a contract entered into between husband and wife pending divorce suit, approved by the court, provided for modification upon remarriage of the wife, but nothing was said as to modification in payments upon the daughter reaching the age of majority, the latter matter can be cured only by an appropriate action in equity for reformation or some other suitable proceeding to obtain suitable adjustment, until which time the contract is one for a sum certain and therefore attachment lies. State ex rel. Towne v. District Court, 114 M 1, 132 P2d 161 (1942).

Successive Suits on Delinquent Alimony Installments: There is nothing in 28-2-1501, or in any other section of the Codes, to prevent the bringing of successive suits for recovery of delinquent alimony installments fixed by an agreement between the parties, in different departments of the same court. State ex rel. Towne v. District Court, 114 M 1, 132 P2d 161 (1942).

Enforcement of Bad Bargain: It is the duty of the court to enforce a contract even though the complaining party may have made a bad bargain. Viers v. Webb, 76 M 38, 245 P 257 (1926).

Permission to Use Furniture — Bailment: Where under a separation agreement the wife accepted certain real property in full satisfaction of her rights in the property of the husband, and the latter granted her permission to use household furniture owned by him until he should want it, the transaction constituted a bailment for the benefit of the wife for an indefinite period—a loan within the meaning of 70-7-102. Viers v. Webb, 76 M 38, 245 P 257 (1926).

Agreement No Bar to Divorce: An agreement by husband and wife for immediate separation, making provision for the support of either and of their children, authorized by this section, if fairly made and executed and free from fraud or imposition, coercion or duress, will be enforced, and is not ordinarily a bar to an action for divorce for cause then existing or arising subsequently thereto, in the absence of covenant, express or implied, not to sue for past offenses. Sherman v. Sherman, 65 M 227, 211 P 321 (1922).

Collusion:

An agreement between husband and wife for immediate separation and providing for support of the parties and their children, entered into with the intent of bringing about or facilitating a divorce, is void. Sherman v. Sherman, 65 M 227, 211 P 321 (1922).

An agreement between husband and wife, whereby the latter promised to convey a lot to the former in consideration of his failure to fight a divorce action instituted by her, was collusive and void as against public policy. Clary v. Fleming, 60 M 246, 198 P 546 (1921).

Agreement to Be in Writing: An agreement between husband and wife providing for a property settlement between them must, under this section, be in writing. Clary v. Fleming, 60 M 246, 198 P 546 (1921).

Burden of Proof as to Compliance With Provisions: When the husband, on application by his wife for temporary alimony pending determination of an action for divorce, relied upon a separation agreement as a bar to her right to relief, the burden rested upon him to allege and prove that the agreement complied in all respects with this section. State ex rel. Robison v. District Court, 56 M 592, 186 P 335 (1919).

Essentials of Contracts Generally: Tested by rules of common law, an agreement between husband and wife providing for a separation, an adjustment of their respective interests in property and for support of wife, is valid only when it is to take effect at once and is immediately complied with, and when marital relations are of such a character as to render a separation necessary for the health or happiness of one or the other. Stebbins v. Morris, 19 M 115, 47 P 642 (1897). See Lee v. Lee, 55 M 426, 178 P 173 (1919); State ex rel. Giroux v. Giroux, 19 M 149, 47 P 798 (1897).

Law Review Articles

Antenuptial Agreements, Mazurek, 35 Mont. L. Rev. 376 (1974).

40-2-304. Consideration for separation.

Case Notes

Bad Bargain Enforceable: Where the wife entered into a separation agreement under which she received a piece of property in full satisfaction of her rights in the property of her husband, it was the duty of the court to enforce the agreement even though the wife may have made a bad bargain. Viers v. Webb, 76 M 38, 245 P 257 (1926).

40-2-311. Rights of husband and wife — how governed.

Case Notes

Divorce: Parts 1 through 3 of this chapter are not controlling after dissolution of the marriage by divorce. Cook v. Cook, 159 M 98, 495 P2d 591 (1972), followed in In re Marriage of Dalley, 232 M 235, 756 P2d 1131, 45 St. Rep. 1017 (1988).

40-2-312. Marriage settlement contracts — how executed.

Compiler's Comments

1987 Amendment: Inserted exception clause at beginning of section.

Case Notes

Written and Oral Real Property Agreements — No Timing of Valuation Provision: The parties were married in 1973. They entered a prenuptial agreement providing that the real and personal property of each would remain separate. In 1974, defendant brought a quiet title action against his sisters. He executed a handwritten agreement with plaintiff that if she would finance the legal expenses of the action he would give her 10% of the land or the value thereof. He was successful, and the parties entered into an oral agreement containing the same provisions for appellate costs. The trial court found that defendant owed plaintiff 20% of the value of the land and that the value was to be determined at the time he elected to pay and be based on 20% of the value of all the land. The Supreme Court held that the defendant, under the clear terms of the written contract, had the option to select the acreage which he wished to convey. The District Court disregarded this language in ordering him to convey the percentage of his land as a whole. Since no contract provision addressed the timing of the valuation of the land and conflicting evidence was presented, the District Court's determination that it be valued at the time of payment was upheld. Kartes v. Kartes, 195 M 383, 636 P2d 272, 38 St. Rep. 1941 (1981).

Law Review Articles

Antenuptial Agreements, Mazurek, 35 Mont. L. Rev. 376 (1974).

40-2-314. Effect of recording.

Compiler's Comments

1987 Amendment: Inserted exception clause at beginning of section.

Part 6
Uniform Premarital Agreement Act

Part Commissioners' Note

The number of marriages between persons previously married and the number of marriages between persons each of whom is intending to continue to pursue a career is steadily increasing. For these and other reasons, it is becoming more and more common for persons contemplating marriage to seek to resolve by agreement certain issues presented by the forthcoming marriage. However, despite a lengthy legal history for these premarital agreements, there is a substantial uncertainty as to the enforceability of all, or a portion, of the provisions of these agreements and a significant lack of uniformity of treatment of these agreements among the states. The problems caused by this uncertainty and nonuniformity are greatly exacerbated by the mobility of our population. Nevertheless, this uncertainty and nonuniformity seem reflective not so much of basic policy differences between the states but rather a result of spasmodic, reflexive response to varying factual circumstances at different times. Accordingly, uniform legislation conforming to modern social policy which provides both certainty and sufficient flexibility to accommodate different circumstances would appear to be both a significant improvement and a goal realistically capable of achievement.

This Act is intended to be relatively limited in scope. Section 1 [40-2-603] defines a "premarital agreement" as "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage." Section 2 [40-2-604] requires that a premarital agreement be in writing and signed by both parties. Section 4 [40-2-606] provides that a premarital agreement becomes effective upon the marriage of the parties. These sections establish significant parameters. That is, the Act does not deal with agreements between persons who live together but who do not contemplate marriage or who do not marry. Nor does the Act provide for postnuptial or separation agreements or with [sic] oral agreements.

On the other hand, agreements which are embraced by the act are permitted to deal with a wide variety of matters and Section 3 [40-2-605] provides an *illustrative* list of those matters, including spousal support, which may properly be dealt with in a premarital agreement.

Section 6 [40-2-608] is the key operative section of the Act and sets forth the conditions under which a premarital agreement is not enforceable. An agreement is not enforceable if the party against whom enforcement is sought proves that (a) he or she did not execute the agreement voluntarily or that (b) the agreement was unconscionable when it was executed and before execution of the agreement, he or she (1) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party, (2) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided, *and* (3) did not have, or reasonably could not have had, an adequate knowledge of the property and financial obligations of the other party.

Even if these conditions are not proven, if a provision of a premarital agreement modifies or eliminates spousal support, and that modification or elimination would cause a party to be eligible for support under a program of public assistance at the time of separation, marital dissolution, or death, a court is authorized to order the other party to provide support to the extent necessary to avoid that eligibility.

These sections form the heart of the Act; the remaining sections deal with more tangential issues. Section 5 [40-2-607] prescribes the manner in which a premarital agreement may be amended or revoked; Section 7 [40-2-609] provides for very limited enforcement where a marriage is subsequently determined to be void; and Section 8 [40-2-610] tolls any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement during the parties' marriage.

Part Compiler's Comments

Severability: Section 16, Ch. 189, L. 1987, was a severability section.

Applicability: Section 17, Ch. 189, L. 1987, provided that this act applies to premarital agreements executed on or after October 1, 1987.

Uniform Law: Part 6 contains the provisions of the Uniform Premarital Agreement Act as promulgated by the National Conference of Commissioners on Uniform State Laws and as enacted in Montana.

Part Case Notes

No Error in Determining Firearms Belonged to Wife of Felon in Valid Prenuptial Agreement After Blissful Marriage Fell Apart: The District Court did not err in finding a prenuptial agreement valid and enforceable because the record contained no evidence that the agreement was fraudulent or that the husband lacked capacity, was under duress, or was subject to undue influence when he signed it. Accordingly, because the agreement stated that property gifted to either party would be owned separately, the District Court did not err in finding that guns gifted to the wife by the husband partially because the husband had a federal conviction and could not legally own them properly belonged to the wife. In re Marriage of Bliss, 2016 MT 51, 382 Mont. 370, 367 P.3d 395.

Premarital Agreement — Allocation of 40% Ownership Interest in Brokerage Service Company Upheld: A wife argued that the District Court erred in allocating a 40% ownership interest in a brokerage service company to her husband. The Supreme Court held that the transfer was enforceable under 30-18-106 even though the wife had provided $280,000, which was transferred to the husband's separate checking account without an acknowledgment before a notary public. The $280,000 was a loan from the wife that was repaid in full. The $20,000 used to purchase the initial interest was a gift since no repayment schedule was ever executed and no consideration was requested. In addition, under 28-3-206, uncertainty is to be resolved against the party who caused the uncertainty to exist. With respect to the loan, the Supreme Court remanded after applying 31-1-106 and holding that the wife's loan of $280,000 was not interest-free. In re Marriage of Weiss, 2010 MT 188, 357 Mont. 320, 239 P.3d 123.

In Weiss v. Weiss, 2011 MT 240, 362 Mont. 157, 261 P.3d 1034, the Supreme Court concluded that the District Court correctly determined on remand that the $280,000 loan was paid off in full by the husband and that the District Court's calculation of simple interest on the loan was correct.

Signing of Prenuptial Agreement Under Duress — Requiring Spouse to Pay Maintenance and Immigration Legal Fees Legitimate Allocation of Marital Debt: A doctor brought a Russian woman and her son to Montana under a fiancee visa. As the visa was running out, the couple had to marry or return the woman and her son to Russia, so they signed a prenuptial agreement and married. The agreement kept their premarital property separate in case of dissolution and provided that if the marriage ended before the wife obtained a permanent visa, the doctor would pay reasonable transportation expenses for her and her son to return to Russia. Shortly thereafter, the doctor fell and suffered a traumatic head injury. When he got home about 5 months later, he discovered that the wife had moved out and that the court-appointed guardian had purchased a new car for her and was paying her expenses, so he filed for dissolution. The District Court held that the prenuptial agreement was not entered voluntarily by the wife, gave her the car, ordered maintenance for 20 months, and ordered the husband to pay the expenses of the wife's immigration attorney. On appeal, the Supreme Court found no abuse of discretion in the trial court's findings and affirmed. Under the unique circumstances of this case, the prenuptial agreement was invalid because the wife, under duress, signed an agreement that she did not understand in order to remain in this country. Maintenance was appropriate in order to put the wife in a self-sustaining position, given her limited job opportunities and understanding of English. Further, she would not have been able to obtain legal residency without the assistance of an immigration attorney, so requiring the husband to pay the immigration legal fees was a legitimate allocation of the marital debt. In re Marriage of Shirilla, 2004 MT 28, 319 M 385, 89 P3d 1 (2004).

Prenuptial Agreement — Recitation of Full Disclosure of Assets Held Sufficient: Before Everett and Eleanor were married, they executed a prenuptial agreement containing a statement that each party had disclosed assets to the other. Upon Everett's death, Eleanor attempted to elect against Everett's will and produced evidence that although she had signed the agreement containing the disclosure statement, there in fact had been no disclosure but that she had chosen not to raise the issue at the time that the prenuptial agreement was signed. The Supreme Court held that 72-2-102 (renumbered 72-2-224 and now repealed) did not require a written disclosure or listing of the parties' assets, that the statute was complied with in this case by inclusion of the recitation of disclosure, and that the District Court was entitled to determine the credibility of Eleanor's testimony. The Supreme Court also held that the Uniform Prenuptial Agreement Act (Uniform Premarital Agreement Act) did not apply to the case before the court because the Act was not in force at the time that the agreement was entered into. In re Estate of Thies, 273 M 272, 903 P2d 186, 52 St. Rep. 970 (1995).

Part Law Review Articles

Premarital Agreements in Montana, Barrett, 49 Mont. L. Rev. 56 (1988).

Part Collateral References

Marriage, https://MontanaLawHelp.org.

40-2-601. Short title.

Commissioners' Note

This is the customary "short title" clause, which may be placed in that order in the bill for enactment as the legislative practice of the state prescribes.

Compiler's Comments

Source: Section 10, Uniform Premarital Agreement Act.

40-2-602. Application and construction.

Commissioners' Note

Section 9 is a standard provision in all Uniform Acts.

Compiler's Comments

Source: Section 9, Uniform Premarital Agreement Act.

40-2-603. Definitions.

Commissioners' Note

The definition of "premarital agreement" set forth in subsection (1) is limited to an agreement between prospective spouses made in contemplation of and to be effective upon marriage. Agreements between persons living together but not contemplating marriage (see Marvin v. Marvin, 18 Cal.3d 660 (1976), judgment after trial modified, 122 Cal.App.3d 871 (1981)) and postnuptial or separation agreements are outside the scope of this Act. Formal requirements are prescribed by Section 2 [40-2-604]. An illustrative list of matters which may be included in an agreement is set forth in Section 3 [40-2-605].

Subsection (2) is designed to embrace all forms of property and interests therein. These may include rights in a professional license or practice, employee benefit plans, pension and retirement accounts, and so on. The reference to income or earnings includes both income from property and earnings from personal services.

Compiler's Comments

Source: Section 1, Uniform Premarital Agreement Act.

40-2-604. Formalities.

Commissioners' Note

This section restates the common requirement that a premarital agreement be reduced to writing and signed by both parties (see Ariz.Rev.Stats. § 25-201; Ark.Stats. § 55-310; Cal.Civ.C. § 5134; 13 Dela.Code 1974 § 301; Idaho Code § 32-917; Ann.Laws Mass. ch. 209, § 25; Minn. Stats.Ann. § 519.11; Montana Rev.C. § 36-123; New Mex. Stats.Ann. 1978 40-2-4; Ore.Rev.Stats. § 108.140; Vernon's Texas Codes Ann. § 5.44; Vermont Stats.Ann. Title 12, § 181). Many states also require other formalities, including notarization or an acknowledgement (see, e.g., Arizona, Arkansas, California, Idaho, Montana, New Mexico) but may then permit the formal statutory requirement to be avoided or satisfied subsequent to execution (see In re Marriage of Cleveland, 76 Cal.App.3d 357 (1977) (premarital agreement never acknowledged but "proved" by sworn testimony of parties in dissolution proceeding)). This act dispenses with all formal requirements except a writing signed by both parties. Although the section is framed in the singular, the agreement may consists of one or more documents intended to be part of the agreement and executed as required by this section.

Section 2 [40-2-604] also restates what appears to be the almost universal rule regarding the marriage as consideration for a premarital agreement (see, e.g., Ga.Code § 20-303; Barnhill v. Barnhill, 386 So.2d 749 (Ala.Civ.App.1980); Estate of Gillilan v. Estate of Gillilan, 406 N.E.2d 981 (Ind.App.1980); Friedlander v. Friedlander, 494 P.2d 208 (Wash.1972); but cf. Wilson v. Wilson, 170 A.2d 679, 685 (Me.1961)). The primary importance of this rule has been to provide a degree of mutuality of benefits to support the enforceability of a premarital agreement. A marriage is a prerequisite for the effectiveness of a premarital agreement under this act (see Section 4 [40-2-606]). This requires that there be a ceremonial marriage. Even if this marriage is subsequently determined to have been void, Section 7 [40-2-609] may provide limits of enforceability of an agreement entered into in contemplation of that marriage. Consideration as such is not required and the standards for enforceability are established by Sections 6 [40-2-608] and 7 [40-2-609]. Nevertheless, this provision is retained here as a desirable, if not essential, restatement of the law. On the other hand, the fact that marriage is deemed to be consideration for the purpose of this act does not change the rules applicable in other areas of law (see, e.g., 26 U.S.C.A. §§ 2043 (release of certain marital rights not treated as consideration for federal estate tax, 2512; Merrill v. Fahs, 324 U.S. 308, rehearing denied 324 U.S. 888 (release of marital rights in premarital agreement not adequate and full consideration for purposes of federal gift tax).

Finally, a premarital agreement is a contract. As required for any other contract, the parties must have the capacity to contract in order to enter into a binding agreement. Those persons who lack the capacity to contract but who under other provisions of law are permitted to enter into a binding agreement may enter into a premarital agreement under those other provisions of law.

Compiler's Comments

Source: Section 2, Uniform Premarital Agreement Act.

Case Notes

Signing of Prenuptial Agreement Under Duress — Requiring Spouse to Pay Maintenance and Immigration Legal Fees Legitimate Allocation of Marital Debt: A doctor brought a Russian woman and her son to Montana under a fiancee visa. As the visa was running out, the couple had to marry or return the woman and her son to Russia, so they signed a prenuptial agreement and married. The agreement kept their premarital property separate in case of dissolution and provided that if the marriage ended before the wife obtained a permanent visa, the doctor would pay reasonable transportation expenses for her and her son to return to Russia. Shortly thereafter, the doctor fell and suffered a traumatic head injury. When he got home about 5 months later, he discovered that the wife had moved out and that the court-appointed guardian had purchased a new car for her and was paying her expenses, so he filed for dissolution. The District Court held that the prenuptial agreement was not entered voluntarily by the wife, gave her the car, ordered maintenance for 20 months, and ordered the husband to pay the expenses of the wife's immigration attorney. On appeal, the Supreme Court found no abuse of discretion in the trial court's findings and affirmed. Under the unique circumstances of this case, the prenuptial agreement was invalid because the wife, under duress, signed an agreement that she did not understand in order to remain in this country. Maintenance was appropriate in order to put the wife in a self-sustaining position, given her limited job opportunities and understanding of English. Further, she would not have been able to obtain legal residency without the assistance of an immigration attorney, so requiring the husband to pay the immigration legal fees was a legitimate allocation of the marital debt. In re Marriage of Shirilla, 2004 MT 28, 319 M 385, 89 P3d 1 (2004).

Unexecuted Copy of Prenuptial Agreement Inadmissible as Representation of Executed Agreement: The husband alleged that he lost or at least could not find an original prenuptial agreement and then offered other evidence that a properly executed prenuptial agreement existed that would determine the rights of the parties. The District Court did not limit the introduction of the evidence pursuant to Rule 1004, M.R.Ev. (Title 26, ch. 10), even though that rule pertains to the contents of rather than the actual existence of a document. To prove the content of a writing under Montana's best evidence rule, Rule 1002, M.R.Ev. (Title 26, ch. 10), the original writing is required; however, under Rule 1004, M.R.Ev., secondary evidence is admissible over a best evidence objection if the requirements of the rule are met and a proper foundation is laid, so the husband's unsigned copy of the allegedly lost original document was admissible. However, the only evidence that the document was ever signed was the husband's testimony of his own recollection, which was rebutted by the wife's testimony that the signing never occurred. The secondary evidence could not establish that an enforceable prenuptial contract, which by definition requires the signatures of both parties, ever existed. Thus, the District Court did not abuse its discretion in determining that the husband failed to present evidence that an enforceable prenuptial contract was executed. In re Marriage of Gochanour, 2000 MT 156, 300 M 155, 4 P3d 643, 57 St. Rep. 619 (2000).

40-2-605. Content.

Commissioners' Note

Section 3 [40-2-605] permits the parties to contract in a premarital agreement with respect to any matter listed and any other matter not in violation of public policy or any statute imposing a criminal penalty. The matters are intended to be illustrative, not exclusive. Paragraph (4) of subsection (a) specifically authorizes the parties to deal with spousal support obligations. There is a split in authority among the states as to whether a premarital agreement may control the issue of spousal support. Some few states do not permit a premarital agreement to control this issue (see, e.g., In re Marriage of Winegard, 278 N.W.2d 505 (Iowa 1979); Fricke v. Fricke, 42 N.W.2d 500 (Wis.1950)). However, the better view and growing trend is to permit a premarital agreement to govern this matter if the agreement and the circumstances of its execution satisfy certain standards (see, e.g., Newman v. Newman, 653 P.2d 728 (Colo.Sup.Ct.1982); Parniawski v. Parniawski, 359 A.2d 719 (Conn.1976); Volid v. Volid, 286 N.E.2d 42 (Ill.1972); Osborne v.

Osborne, 428 N.E.2d 810 (Mass.1981); Hudson v. Hudson, 350 P.2d 596 (Okla.1960); Unander v. Unander, 506 P.2d 719 (Ore.1973)) (see Sections 7 [40-2-609] and 8 [40-2-610]).

Paragraph (8) of subsection (a) makes clear that the parties may also contract with respect to other matters, including personal rights and obligations, not in violation of public policy or a criminal statute. Hence, subject to this limitation, an agreement may provide for such matters as the choice of abode, the freedom to pursue career opportunities, the upbringing of children, and so on. However, subsection (b) of this section makes clear that an agreement may not adversely affect what would otherwise be the obligation of a party to a child.

Compiler's Comments

Source: Section 3, Uniform Premarital Agreement Act.

Case Notes

Premarital Agreement Enforceable — Premarital Agreement Between Father and Surrogate Mother Signed Voluntarily Without Undue Influence or Duress — Parent-Child Relationship Provision Not Equitably Unconscionable. Sayler v. Yan Sun, 2023 MT 175, 413 Mont. 303, 536 P.3d 399.

Choice of Law — Enforceable Premarital Agreement — No Error: The District Court concluded that a premarital agreement should be construed according to Nevada law because it explicitly contained a choice-of-law provision. However, the District Court also concluded that Montana law applied to the agreement's enforceability because the dissolution and division of assets were occurring in Montana. On appeal, the Supreme Court held that only Nevada law applied to the interpretation of the premarital agreement's enforceability but that Montana law applied to the dissolution proceeding as a whole. The District Court did not err in enforcing the premarital agreement because, under Nevada law, the challenging spouse did not prove that she did not execute the agreement voluntarily, that the agreement was unconscionable when executed, or that she was not provided a fair and reasonable disclosure of the other spouse's property and financial obligation prior to signing. In re Marriage of Hutchins, 2018 MT 275, 393 Mont. 283, 430 P.3d 502.

Premarital Agreement — Allocation of 40% Ownership Interest in Brokerage Service Company Upheld: A wife argued that the District Court erred in allocating a 40% ownership interest in a brokerage service company to her husband. The Supreme Court held that the transfer was enforceable under 30-18-106 even though the wife had provided $280,000, which was transferred to the husband's separate checking account without an acknowledgment before a notary public. The $280,000 was a loan from the wife that was repaid in full. The $20,000 used to purchase the initial interest was a gift since no repayment schedule was ever executed and no consideration was requested. In addition, under 28-3-206, uncertainty is to be resolved against the party who caused the uncertainty to exist. With respect to the loan, the Supreme Court remanded after applying 31-1-106 and holding that the wife's loan of $280,000 was not interest-free. In re Marriage of Weiss, 2010 MT 188, 357 Mont. 320, 239 P.3d 123.

In Weiss v. Weiss, 2011 MT 240, 362 Mont. 157, 261 P.3d 1034, the Supreme Court concluded that the District Court correctly determined on remand that the $280,000 loan was paid off in full by the husband and that the District Court's calculation of simple interest on the loan was correct.

Antenuptial Agreement Regarding Property Division Not Preclusion to Award of Maintenance: An antenuptial agreement provided a waiver by each party of any claim to the previously acquired property of the other in the event of dissolution. Husband contended that wife's consent to the waiver also prohibited any future award of maintenance if the payment came from income derived from that property. However, the agreement language dealt only with property division and was silent regarding maintenance. Maintenance waivers were prohibited because they were against public policy at the time the agreement was drafted in 1984, in accord with Stefonick v. Stefonick, 118 M 486, 167 P2d 848 (1946). (Not until the 1987 enactment of this section were parties allowed to contract for modification or elimination of spousal support.) The clear language of the agreement precluded husband from arguing in 1992 for implication of a provision that would have been void at the time the parties executed it. In re Marriage of Harris, 252 M 291, 828 P2d 1365, 49 St. Rep. 255 (1992).

40-2-606. When agreement becomes effective.

Commissioners' Note

This section establishes a marriage as a prerequisite for the effectiveness of a premarital agreement. As a consequence, the act does not provide for a situation where persons live together without marrying. In that situation, the parties must look to the other law of the jurisdiction (see Marvin v. Marvin, 18 Cal.3d 660 (1976); judgment after trial modified, 122 Cal.App.3d 871 (1981)).

Compiler's Comments

Source: Section 4, Uniform Premarital Agreement Act.

Case Notes

Unexecuted Copy of Prenuptial Agreement Inadmissible as Representation of Executed Agreement: The husband alleged that he lost or at least could not find an original prenuptial agreement and then offered other evidence that a properly executed prenuptial agreement existed that would determine the rights of the parties. The District Court did not limit the introduction of the evidence pursuant to Rule 1004, M.R.Ev. (Title 26, ch. 10), even though that rule pertains to the contents of rather than the actual existence of a document. To prove the content of a writing under Montana's best evidence rule, Rule 1002, M.R.Ev. (Title 26, ch. 10), the original writing is required; however, under Rule 1004, M.R.Ev., secondary evidence is admissible over a best evidence objection if the requirements of the rule are met and a proper foundation is laid, so the husband's unsigned copy of the allegedly lost original document was admissible. However, the only evidence that the document was ever signed was the husband's testimony of his own recollection, which was rebutted by the wife's testimony that the signing never occurred. The secondary evidence could not establish that an enforceable prenuptial contract, which by definition requires the signatures of both parties, ever existed. Thus, the District Court did not abuse its discretion in determining that the husband failed to present evidence that an enforceable prenuptial contract was executed. In re Marriage of Gochanour, 2000 MT 156, 300 M 155, 4 P3d 643, 57 St. Rep. 619 (2000).

40-2-607. Amendment — revocation.

Commissioners' Note

This section requires the same formalities of execution for an amendment or revocation of a premarital agreement as are required for its original execution (cf. Estate of Gillilan v. Estate of Gillilan, 406 N.E.2d 981 (Ind.App.1980) (agreement may be altered by subsequent agreement but not simply inconsistent acts).

Compiler's Comments

Source: Section 5, Uniform Premarital Agreement Act.

40-2-608. Enforcement.

Commissioners' Note

This section sets forth the conditions which must be proven to avoid the enforcement of a premarital agreement. If prospective spouses enter into a premarital agreement and their subsequent marriage is determined to be void, the enforceability of the agreement is governed by Section 7 [40-2-609].

The conditions stated under subsection (a) are comparable to concepts which are expressed in the statutory and decisional law of many jurisdictions. Enforcement based on disclosure and voluntary execution is perhaps most common (see, e.g., Ark.Stats. § 55-309; Minn.Stats. Ann. § 519.11; In re Kaufmann's Estate, 171 A.2d 48 (Pa.1961) (alternate holding)). However, knowledge or reason to know, together with voluntary execution, may also be sufficient (see, e.g., Tenn.Code Ann. § 36-606; Barnhill v. Barnhill, 386 So.2d 479 (Ala.Civ.App.1980); Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla.1962); Coward and Coward, 582 P.2d 834 (Or.App.1978); but see Matter of Estate of Lebsock, 618 P.2d 683 (Colo.App.1980)) and so may a voluntary, knowing waiver (see Hafner v. Hafner, 295 N.W.2d 567 (Minn.1980)). In each of these situations, it should be underscored that execution must have been voluntary (see Lutgert v. Lutgert, 338 So.2d 1111 (Fla.1976); see also 13 Dela.Code 1974 § 301 (10 day waiting period)). Finally, a premarital agreement is enforceable if enforcement would not have been unconscionable at the time the agreement was executed (cf. Hartz v. Hartz, 234 A.2d 865 (Md.1967) (premarital agreement upheld if no disclosure but agreement was fair and equitable under the circumstances)).

The test of "unconscionability" is drawn from Section 306 of the Uniform Marriage and Divorce Act (UMDA) (see Ferry v. Ferry, 586 S.W.2d 782 (Mo.1979); see also Newman v. Newman, 653 P.2d 728 (Colo.Sup.Ct.1982) (maintenance provisions of premarital agreement tested for unconscionability at time of marriage termination)). The following discussion set forth in the Commissioner's Note to Section 306 of the UMDA is equally appropriate here:

"Subsection (b) undergirds the freedom allowed the parties by making clear that the terms of the agreement respecting maintenance and property disposition are binding upon the court unless those terms are found to be unconscionable. The standard of unconscionability is used in commercial law, where its meaning includes protection against one-sidedness, oppression, or unfair surprise (see section 2-302, Uniform Commercial Code), and in contract law, Scott v. U.S., 12 Wall (U.S.) 443 (1870) ('contract . . . unreasonable and unconscionable but not void for fraud'); Stiefler v. McCullough, 174 N.E. 823, 97 Ind.App. 123 (1931); Terre Haute Cooperage v. Branscome, 35 So.2d 537, 203 Miss. 493 (1948); Carter v. Boone County Trust Co., 92 S.W.2d 647, 338 Mo. 629 (1936). It has been used in cases respecting divorce settlements or awards. Bell v. Bell, 371 P.2d 773, 150 Colo. 174 (1962) ('this division of property is manifestly unfair, inequitable and unconscionable'). Hence the act does not introduce a novel standard unknown to the law. In the context of negotiations between spouses as to the financial incidents of their marriage, the standard includes protection against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other.

"In order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties resulting from the agreement, and any other relevant evidence such as the conditions under which the agreement was made, including the knowledge of the other party. If the court finds the agreement not unconscionable, its terms respecting property division and maintenance may not be altered by the court at the hearing." (Commissioner's Note, Sec. 306, Uniform Marriage and Divorce Act.)

Nothing in Section 6 [40-2-608] makes the absence of assistance of independent legal counsel a condition for the unenforceability of a premarital agreement. However, lack of that assistance may well be a factor in determining whether the conditions stated in Section 6 [40-2-608] may have existed (see, e.g., Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla.1962)).

Even if the conditions stated in subsection (a) are not proven, if a provision of a premarital agreement modifies or eliminates spousal support, subsection (b) authorizes a court to provide very limited relief to a party who would otherwise be eligible for public welfare (see, e.g., Osborne v. Osborne, 428 N.E.2d 810 (Mass.1981) (dictum); Unander v. Unander, 506 P.2d 719 (Ore.1973) (dictum)).

No special provision is made for enforcement of provisions of a premarital agreement relating to personal rights and obligations. However, a premarital agreement is a contract and these provisions may be enforced to the extent that they are enforceable are [sic] under otherwise applicable law (see Avitzur v. Avitzur, 459 N.Y.S.2d 572 (Ct.App.).

Section 6 [40-2-608] is framed in a manner to require the party who alleges that a premarital agreement is not enforceable to bear the burden of proof as to that allegation. The statutory law conflicts on the issue of where the burden of proof lies (contrast Ark.Stats. § 55-313; 31 Minn. Stats.Ann. § 519.11 with Vernon's Texas Codes Ann. § 5.45). Similarly, some courts have placed the burden on the attacking spouse to prove the invalidity of the agreement. Linker v. Linker, 470 P.2d 921 (Colo.1970); Matter of Estate of Benker, 296 N.W.2d 167 (Mich.App.1980); In re Kaufmann's Estate, 171 A.2d 48 (Pa.1961). Some have placed the burden upon those relying upon the agreement to prove its validity. Hartz v. Hartz, 234 A.2d 865 (Md.1967). Finally, several have adopted a middle ground by stating that a premarital agreement is presumptively valid but if a disproportionate disposition is made for the wife, the husband bears the burden of proof of showing adequate disclosure. (Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla.1962); Christians v. Christians, 44 N.W.2d 431 (Iowa 1950); In re Neis' Estate, 225 P.2d 110 (Kans.1950); Truitt v. Truitt's Adm'r, 162 S.W.2d 31 (Ky.1942); In re Estate of Strickland, 149 N.W.2d 344 (Neb.1967); Kosik v. George, 452 P.2d 560 (Or.1969); Friedlander v. Friedlander, 494 P.2d 208 (Wash.1972).

Compiler's Comments

Source: Section 6, Uniform Premarital Agreement Act.

Case Notes

Premarital Agreement Enforceable — Premarital Agreement Between Father and Surrogate Mother Signed Voluntarily Without Undue Influence or Duress — Parent-Child Relationship Provision Not Equitably Unconscionable. Sayler v. Yan Sun, 2023 MT 175, 413 Mont. 303, 536 P.3d 399.

Signing of Prenuptial Agreement Under Duress — Requiring Spouse to Pay Maintenance and Immigration Legal Fees Legitimate Allocation of Marital Debt: A doctor brought a Russian woman and her son to Montana under a fiancee visa. As the visa was running out, the couple had to marry or return the woman and her son to Russia, so they signed a prenuptial agreement and married. The agreement kept their premarital property separate in case of dissolution and provided that if the marriage ended before the wife obtained a permanent visa, the doctor would pay reasonable transportation expenses for her and her son to return to Russia. Shortly thereafter, the doctor fell and suffered a traumatic head injury. When he got home about 5 months later, he discovered that the wife had moved out and that the court-appointed guardian had purchased a new car for her and was paying her expenses, so he filed for dissolution. The District Court held that the prenuptial agreement was not entered voluntarily by the wife, gave her the car, ordered maintenance for 20 months, and ordered the husband to pay the expenses of the wife's immigration attorney. On appeal, the Supreme Court found no abuse of discretion in the trial court's findings and affirmed. Under the unique circumstances of this case, the prenuptial agreement was invalid because the wife, under duress, signed an agreement that she did not understand in order to remain in this country. Maintenance was appropriate in order to put the wife in a self-sustaining position, given her limited job opportunities and understanding of English. Further, she would not have been able to obtain legal residency without the assistance of an immigration attorney, so requiring the husband to pay the immigration legal fees was a legitimate allocation of the marital debt. In re Marriage of Shirilla, 2004 MT 28, 319 M 385, 89 P3d 1 (2004).

Mental Weakness Short of Incapacity Not Sufficient to Invalidate Premarital Agreement: When Mary and Larry were married, Mary was 21 and developmentally disabled and Larry was 62 and in poor health. Larry had three children from a previous marriage. Two days before the marriage, Mary and Larry signed a prenuptial agreement prepared by Larry's attorney that provided that each would keep the individual's separate property, whether owned then or acquired thereafter, free from any claim of the other by virtue of the marriage. Two years later, Larry died, and Mary brought an action to challenge the enforcement of the premarital agreement on grounds that, because of her disability, she was incapable of understanding the agreement and thus could not have given the required consent. The District Court found that Mary was mentally competent to understand the agreement when she signed it and that the contract was valid. The Supreme Court applied Gen. Motors v. Jackson, 900 P2d 345 (Nev. 1995), for the proposition that a person is mentally defective for purposes of capacity when the party, for any reason, is incapable of understanding the force and effect of the agreement, but that a mere mental weakness short of incapacity does not invalidate the agreement because capacity deals with the ability to understand the terms of the agreement, not a person's actual understanding. Capacity relates to the status of the person rather than the circumstances surrounding the transaction. Mary attended special education classes, but nevertheless graduated from high school. She could read and write, although poorly, and could drive a car, although she had no license. Absent any medical or expert testimony regarding Mary's level of competency, the District Court relied on lay testimony, including Mary's, to determine whether Mary met the burden of establishing incompetence. Substantial evidence supported the court's conclusion that Mary failed to meet her burden of proof, and the Supreme Court affirmed the validity of the premarital contract. Wilkes v. Estate of Wilkes, 2001 MT 118, 305 M 335, 27 P3d 433 (2001).

No Finding of Unconscionability in Premarital Agreement: When Mary and Larry were married, Mary was 21 and developmentally disabled and Larry was 62 and in poor health. Larry had three children from a previous marriage. Two days before the marriage, Mary and Larry signed a prenuptial agreement prepared by Larry's attorney that provided that each would keep the individual's separate property, whether owned then or acquired thereafter, free from any claim of the other by virtue of the marriage. Two years later, Larry died, and Mary brought an action to challenge the enforcement of the premarital agreement on grounds that the agreement was unconscionable. The District Court concluded that although Mary's circumstances were not enviable in some respects, it was logical that Larry would desire to, and had the right to, protect the assets that he acquired during a lifetime of work and pass them on to his children. The mere fact that Mary functioned at a low intellectual level did not make it less conscionable that she would keep only what she brought to the marriage and share only whatever assets might have been added to the marital estate had the marriage lasted longer. The court properly applied the guidelines in 72-2-224 (now repealed), and absent clear error, the validity of the premarital agreement was affirmed. Wilkes v. Estate of Wilkes, 2001 MT 118, 305 M 335, 27 P3d 433 (2001).

Lack of Knowledge of Future Conduct and Finances Not Basis to Prevent Enforcement of Agreement: Thomas and Dorothy were married in 1987 after signing a premarital agreement at Dorothy's request. Before they were married, Dorothy raised cattle on leased land. Later, as a condition of remaining married, Thomas insisted that Dorothy give up the leased land, which she did. Dorothy was subsequently forced to sell her cattle. The parties were then divorced. Dorothy claimed that the premarital agreement should not be enforced because she did not know that Thomas would force her to give up the lease and because she did not know the extent of Thomas's assets before they married. The Supreme Court held that neither reason was sufficient to prevent enforcement of the agreement. Dorothy cited no authority for the proposition that Thomas's future conduct should prevent the enforcement of the agreement, and she did not claim that a fair and reasonable disclosure of Thomas's assets was not made, only that she did not know the extent of them. In fact, the agreement was drafted by her attorney. The District Court therefore properly concluded that the agreement was enforceable. In re Marriage of Stout, 261 M 10, 861 P2d 856, 50 St. Rep. 1119 (1993).

Right of Action for Damages Against Former Husband Not to Be Resolved by Property Settlement: Thomas and Dorothy were married in 1987 after signing a premarital agreement at Dorothy's request. Before they were married, Dorothy raised cattle on leased land. Later, as a condition of remaining married, Thomas insisted that Dorothy give up the leased land, which she did. Dorothy was subsequently forced to sell her cattle. The parties were then divorced. Dorothy claimed that even if the premarital agreement precluded her from having any interest in Thomas's assets, she should not be precluded from collecting damages for being required to break the lease and sell her cattle. The Supreme Court held that any right of action against Thomas for having to break the lease is separate and distinct from her property settlement rights, which are governed exclusively by the premarital agreement. In re Marriage of Stout, 261 M 10, 861 P2d 856, 50 St. Rep. 1119 (1993).

40-2-609. Enforcement when marriage void.

Commissioners' Note

Under this section a void marriage does not completely invalidate a premarital agreement but does substantially limit its enforceability. Where parties have married and lived together for a substantial period of time and one or both have relied on the existence of a premarital agreement, the failure to enforce the agreement may well be inequitable. This section, accordingly, provides the court discretion to enforce the agreement to the extent necessary to avoid the inequitable result (see Annot., 46 A.L.R.3d 1403).

Compiler's Comments

Source: Section 7, Uniform Premarital Agreement Act.

Montana Changes: At beginning substituted "If a marriage is declared invalid" for "If a marriage is determined to be void".

40-2-610. Limitation of actions.

Commissioners' Note

In order to avoid the potentially disruptive effect of compelling litigation between the spouses in order to escape the running of an applicable statute of limitations, Section 8 [40-2-610] tolls any applicable statute during the marriage of the parties (contrast Dykema v. Dykema, 412 N.E.2d 13 (Ill.App.1980) (statute of limitations not tolled where fraud not adequately pleaded, hence premarital agreement enforced at death)). However, a party is not completely free to sit on his or her rights because the section does preserve certain equitable defenses.

Compiler's Comments

Source: Section 8, Uniform Premarital Agreement Act.

CHAPTER 3
RECONCILIATION

Chapter Law Review Articles

Family Law, Snyder & Sharrock, 40 Mont. L. Rev. 75 (1979).
Recent Developments in Family Law in Montana, Mahan, 39 Mont. L. Rev. 1 (1978).
Presumptions Concerning Family Law, Clarke, 37 Mont. L. Rev. 102 (1976).

Part 1
Montana Conciliation Law

Part Case Notes

Appointment of Director as "Suitable Process or Mode of Proceeding": Appointment of a Director of Family Court Services was a "suitable process or mode of proceeding" within the meaning of 3-1-113 for the District Court to follow to carry out its statutorily mandated duties under the provisions of the Montana Conciliation Law. Since the District Court acted properly, the position was entitled to be funded. The Commissioners' refusal to comply with the funding order was an arbitrary and capricious abuse of the powers of their office. Bd. of Comm'rs v. District Court, 182 M 463, 597 P2d 728 (1979).

40-3-102. Purposes.

Compiler's Comments

2019 Amendment: Chapter 350 at end substituted "without the deadlines associated with pending litigation" for "and the amicable settlement of domestic and family controversies". Amendment effective May 7, 2019.

40-3-130. Filing of stipulation to stay.

Compiler's Comments

Effective Date: Section 12, Ch. 350, L. 2019, provided that this section is effective on passage and approval. Approved May 7, 2019.

40-3-131. Stipulation form and contents.

Compiler's Comments

Effective Date: Section 12, Ch. 350, L. 2019, provided that this section is effective on passage and approval. Approved May 7, 2019.

40-3-132. No fees.

Compiler's Comments

Effective Date: Section 12, Ch. 350, L. 2019, provided that this section is effective on passage and approval. Approved May 7, 2019.

40-3-133. Stay.

Compiler's Comments

Effective Date: Section 12, Ch. 350, L. 2019, provided that this section is effective on passage and approval. Approved May 7, 2019.

40-3-134. Orders.

Compiler's Comments

Effective Date: Section 12, Ch. 350, L. 2019, provided that this section is effective on passage and approval. Approved May 7, 2019.

CHAPTER 4

TERMINATION OF MARRIAGE, CHILD CUSTODY, SUPPORT

Chapter Compiler's Comments

Uniform Act: This chapter contains the divorce provisions of the Uniform Marriage and Divorce Act as enacted in Montana.

Section Not Codified: Section 48-301, R.C.M. 1947, a short title clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 1, Ch. 536, L. 1975.

Commission on Practice — Recommendations on Joint Petitions: The following letter from the Secretary of the Commission on Practice of the Supreme Court of the state of Montana appeared on page 3 of the September 1980 publication of The Montana Lawyer:

"The Commission on Practice was established for the purpose of receiving and investigating complaints of alleged misconduct on the part of lawyers committed in the State of Montana. We have been increasingly concerned about the number of complaints received from parties to a dissolution of marriage, which problems stem from alleged multiple representation of the two parties.

The Legislature is establishing so called "No Fault Divorce," provided in Section 40-4105 [40-4-105], subsection 2, that either or both parties may initiate the proceeding. It is this provision authorizing the filing of a joint petition for dissolution of marriage that gives rise to the complaints being filed before the Commission. The complaints received allege violations of Disciplinary Rule 5-105-a, which deals with multiple employment and provides in substance that a lawyer should decline proffered employment if the exercise of his independent professional judgement in behalf of the client will be, or is likely to be, adversely affected by the acceptance of the proffered employment. In short, while the Legislature has authorized the filing of a joint petition for dissolution of marriage, the Canons of Ethics and the decisions and opinions of other states all indicate that separate and independent lawyers for each of the parties in a dissolution proceeding is almost a mandate.

In examining and investigating the complaints we have received we find that in most cases the attorney involved has conscientiously attempted to be fair to both parties, and in far too many cases, the client who was satisfied with the original property settlement or custody arrangements has now determined that he or she was not treated fairly and was taken advantage of by the attorney. Frequently, an investigation reveals that one of the parties has secured the services of an attorney, and the other party does not secure counsel and simply signs the agreement as prepared by the attorney. Again, all too often the other party, in hindsight, contends that he or she relied on the attorney for fair and equitable treatment, and considered that the attorney represented both parties.

The problems that can arise with multiple representation are vividly demonstrated in the Montana case of Pilati v. Pilati, cited in Volume 36, State Reporter, at Page 619.

With the legislative authorization of the filing of joint petitions and the mandates prohibiting multiple representation in most cases, what can the practitioner do to avoid being the subject of inquiry by the Commission? Our personal views are these:

1. Urge independent representation in all cases.
2. Avoid, if possible, the filing of joint petitions. (With the abolishment of cause for divorce, there is no particular stigma attached to being either a petitioner or a respondent).
3. If circumstances are such that a joint petition is used, secure a document in writing from the other party that you are only representing Client A, and that Client B is urged to seek independent counsel.
4. Sign a joint petition as "Attorney for Petitioner 'A'," rather than as attorney for both petitioners.
5. In framing a property settlement, use the proposed terminology in the Montana Legal Secretaries Handbook: . . . "(Husband, wife) has retained and been represented by (name of attorney) in connection with the negotiations for the drafting of this agreement. (Husband, wife) is not represented by counsel, although (he, she) understands (his, her) right to be so represented, and has knowingly waived the services of counsel."

Lastly, it should be noted that decisions of other jurisdictions indicate that in advising that separate counsel be obtained for one of the parties, it is considered unethical to recommend a specific attorney for the other party's representation.

I am hopeful that by following these simple guidelines, Montana practitioners can avoid the embarrassment of receiving a letter from the Commission on Practice."

Chapter Case Notes

Wife Not Domiciled in State for 90 Days Preceding Petition for Dissolution — Cured by Supplemental Pleading: The wife filed for dissolution of marriage and later filed a supplemental pleading establishing Montana residency meeting the 90-day requirement in 40-4-104. The husband did not dispute the supplemental pleading; however, he moved to dismiss because the wife had not resided in Montana for 90 days prior to the initial pleading. On appeal, the Supreme Court held that the legislative purpose underlying the 90-day domicile requirement was not harmed by allowing the case to proceed and the supplemental pleading cured any jurisdictional defect. In re Marriage of Buck, 2014 MT 344, 377 Mont. 393, 340 P.3d 546.

Name of Child When Agreed-to Pretrial Order and Birth Certificate Conflict at Trial: A pretrial order signed by both parties' attorneys and the judge stated that the child's last name would remain Rager. Later, it was discovered, and the lower court determined, that the child's legal last name was Worman, as stated on the birth certificate. The Supreme Court ruled that because the husband did not request a name change in the lower court and because the pretrial order was legally and factually in error, the birth certificate name of Worman would remain the legal name until the name was changed by adoption, a statutory petition for a name change, or other legal means. In re Marriage of Rager, 263 M 361, 868 P2d 625, 51 St. Rep. 91 (1994).

Enforcement of Wyoming Decree in Montana: Wyoming residents were divorced under a Wyoming divorce decree which provided that disagreements between the parties arising out of any transaction relating to the decree were to be submitted to the Wyoming District Court for resolution. A disagreement arose in connection with the parties' interests in property located in Montana. Husband filed suit in Montana, and wife sought a ruling that the Montana court lacked jurisdiction and that the Wyoming court was the proper forum. The Montana District Court properly decided that it should decline to exercise jurisdiction on the basis of the doctrine of comity, though it did have jurisdiction. Application of the comity doctrine did not contravene the public policy of Montana or the open court policy mandated by the Montana Constitution. Kane v. Kane, 198 M 335, 646 P2d 505, 39 St. Rep. 1036 (1982).

Scope of Judicial Remedies: A District Court, sitting in a marriage dissolution case, has the same broad powers as a court of equity in fashioning decrees that will be responsive to the fact situations before it, effective to accomplish the objectives that the District Court, through its judgment determines must ensue, and to do complete justice. Karr v. Karr, 192 M 388, 628 P2d 267, 38 St. Rep. 506 (1981), certiorari denied, 455 US 1016, 72 L Ed 2d 132, 102 S Ct 1709 (1982), rehearing denied, 456 US 985, 72 L Ed 2d 864, 102 S Ct 2260 (1982).

Statutory Requirements to Be Followed in Marriage Dissolution Cases: The wife appealed from a marriage dissolution judgment granting child custody to the husband, ordering her to pay child support, and dividing the marital assets. The Supreme Court found that the trial court's findings of fact were inadequate on all the issues involved. The Uniform Marriage and Divorce Act was not considered. The child custody factors of 40-4-212 were not considered. The child support factors of 40-4-204 were ignored. The property distribution factors in 40-4-202 were not used. The interests of justice required the judgment to be vacated on all points except the dissolution itself, and a new hearing was ordered. Tomaskie v. Tomaskie, 191 M 508, 625 P2d 536, 38 St. Rep. 416 (1981).

Procedures to Be Rigorously Followed: While there is some overlap in the various statutory schemes governing the termination of parental rights and the custody of children as to general subject matter, each is used for a distinct purpose and sets forth specific procedures which must be rigorously followed before a valid judgment or order may be issued, to insure that the minors involved receive the full protection of these laws. In re Guardianship of Aschenbrenner, 182 M 540, 597 P2d 1156 (1979).

Postjudgment Powers of Court: A District Court has power to award necessary maintenance, child support, and suit money after judgment in a marital dissolution case during the pendency of appeal. To hold otherwise would leave a hiatus in the remedial power of the court that could cause unmeasured hardship and distress. State ex rel. Kaasa v. District Court, 177 M 547, 582 P2d 772 (1978).

Best Interests to Control: Uniform Marriage and Divorce Act attempts to do away with all restrictive views and procedures in order to accomplish what is in the best interest of not only the children, if any, but also husband or wife without regard to type of relief husband and wife may be seeking. Rogers v. Rogers, 169 M 403, 548 P2d 141 (1976).

Chapter Law Review Articles

Family Mediation After Hendershott: The Case for Uniform Domestic Violence Screening and Opt-In Provision in Montana, Capulong, 74 Mont. L. Rev. 273 (2013).

Tax Consequences of Divorce and Legal Separation, Peete & Coffee, 55 Mont. L. Rev. 359 (1994).

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Williams, 46 Mont. L. Rev. 119, at 158 through 164 (1985).

Family Law, Mattix, 44 Mont. L. Rev. 329 (1983).

Family Law, Moe, 43 Mont. L. Rev. 317 (1982).

Family Law, Opp, 42 Mont. L. Rev. 413 (1981).

Family Law, Winnie, 41 Mont. L. Rev. 135 (1980).

Family Law, Snyder & Sharrock, 40 Mont. L. Rev. 75 (1979).

Recent Developments in Family Law in Montana, Mahan, 39 Mont. L. Rev. 1 (1978).

Presumptions Concerning Family Law, Clarke, 37 Mont. L. Rev. 102 (1976).

The Uniform Marriage and Divorce Act: New Statutory Solutions to Old Problems, Townsend, 37 Mont. L. Rev. 119 (1976).

Part 1

Separation — Dissolution of Marriage

Part Case Notes

Action to Be Dismissed Upon Death of Either Spouse During Pendency of Dissolution Proceeding — ". . . Until Death Do You Part": One spouse in a dissolution action died shortly after a hearing was held on his petition for dissolution of marriage, but no judgment had yet been entered, either written or oral. In affirming the District Court in dismissing the petition, the Supreme Court held that death terminates a marriage as a matter of law; therefore, there is nothing for the court to dissolve. The death of either spouse during the pendency of a dissolution action prior to the entry of judgment divests the court of all jurisdiction over the action, including matters involving the distribution of property. In re Marriage of Lawrence, 212 M 327, 687 P2d 1026, 41 St. Rep. 1771 (1984).

Divorce Proceeding — Counselor Testimony Available at Trial: Husband argued that a new divorce trial was justified by the fact that a psychiatrist who had counseled both parties prior to the dissolution of their marriage decided to testify. He refused to testify at the original hearing because the parties agreed that the information obtained by him in counseling would not be used in court. However, he was later willing to testify. He was available at the time of trial and could have been subpoenaed. The evidence did not come to the knowledge of husband after the trial, and husband lacked diligence as to the testimony. The materiality of the evidence was not so great as to produce a different result by the District Court. Therefore, the District Court did not abuse its discretion by denying a new trial. Cherewick v. Cherewick, 205 M 75, 666 P2d 742, 40 St. Rep. 1106 (1983).

Dissolution Proceeding — Distribution of Property: In a dissolution proceeding, the District Court must place a value upon all of the assets within a marital estate and determine the net worth of the parties before distributing property within that estate, regardless of whether the parties entered into any stipulation concerning their marital property. Cook v. Cook, 188 M 472, 614 P2d 511 (1980).

Invalidity of Marriage as Affirmative Defense — Burden of Proof: Where, following a Mexican wedding ceremony between the parties, the respondent sought a decree of divorce and child support, the appellant's contention that the marriage was invalid should have been raised by affirmative defense. The appellant had the burden of proof to overcome the respondent's allegation that the marriage was lawful. Wilson v. Wilson, 186 M 290, 607 P2d 539 (1980).

Validity of Marriage Not Determined in Paternity Action: Where appellant allegedly fathered the child of the parties in 1962 and respondent subsequently sought and obtained a paternity decree against appellant in 1964 stating that the child was born "out of wedlock", a subsequent divorce action by the respondent was not barred by the doctrine of res judicata, as the validity of the parties' Mexican marriage was not material to the 1964 paternity decree and was never actually and necessarily adjudicated in the 1964 proceeding. Wilson v. Wilson, 186 M 290, 607 P2d 539 (1980).

Part Law Review Articles

Treatment of Professional Degree or License in a Marital Dissolution, Nelson, 47 Mont. L. Rev. 449 (1986).

Montana's New Domestic Abuse Statutes: A New Response to an Old Problem, Women's Law Caucus, Univ. of Mont., 47 Mont. L. Rev. 403 (1986).

Part Collateral References

Dissolution, https://MontanaLawHelp.org.

Divorce, Dissolution, Legal Separation, Annulment, https://courts.mt.gov/Forms/end_marriage.

40-4-101. Purposes.

Commissioners' Note

This sets forth the underlying purposes and objectives of the measure, as a foundation for construction of the Act....[The] enumeration of underlying purposes of the Act which are appropriate to legislation on marriage or divorce, respectively, may be utilized separately, if it is desired to place the marriage or divorce parts of the act in different divisions of the state statutes. On the use of such purpose provisions as guides to statutory construction, see Merrill, Uniformly Correct Construction of Uniform Laws, 49 Am. Bar Assoc. Jour. 545, 546 (1963) with citation of cases. None of the enumerations of purposes is intended to exclude, in construction and application, the consideration of other purposes spelled out in provisions of the Act.

Compiler's Comments

Source: Section 102(2) through (6), Uniform Marriage and Divorce Act.

Case Notes

Injured Worker Intervening in Dissolution Proceeding — No Standing to Challenge Whether Marriage Is Irretrievably Broken: Faw was injured while employed at the Heidemas' ranch, and they did not have workers' compensation coverage. His medical expenses from his injuries exceeded $1 million. Faw sued the Heidema brothers, whose wives subsequently during the same month each filed for divorce. Faw alleged that the dissolution proceeding between Sydne Heidema and Jack Heidema was a sham to protect the wife's interest in the ranch assets. Faw's motion to intervene in the dissolution action was granted, and subsequently, the final decree of dissolution was granted by the District Court. Faw appealed, arguing that the marriage was not irretrievably broken and that he was prejudiced by entry of the decree before the Heidemas had responded to his discovery requests regarding asset disclosure. In dicta, the Supreme Court stated that it was questionable whether the District Court should have allowed Faw to intervene but that the Heidemas had not appealed that order. The Supreme Court held that Faw was not prejudiced by entry of the decree because there was no relief that he could have obtained in the dissolution action because he was not a party to the marriage. The Supreme Court held that the District Court did not have the jurisdiction under a dissolution action to have the marital assets placed with a third party to preserve the assets because the lower court only had authority to apportion marital assets between the spouses. The Supreme Court further held that Faw, by not being a party to the marriage, had no right to assert that the marriage was or was not irretrievably broken. In re Marriage of Heidema, 2007 MT 20, 335 M 362, 152 P3d 112 (2007).

No Duty of Attorney to Nonclient in Child Custody Case: An attorney must be able to vigorously advocate a client's interests in litigation without being compromised by obligations to nonclients. If an attorney were considered to owe the same duty of care to both a parent and child in an adversarial custody case, neither parent nor child would be served effectively. Because the interests of a parent and those of a child may not be identical, the attorney's duty runs solely to the client except if the conduct rises to the level of deceit or collusion or is intentionally reckless. Rhode v. Adams, 1998 MT 73, 288 M 278, 957 P2d 1124, 55 St. Rep. 303 (1998). See also Redies v. Attorneys Liability Protection Soc'y, 2007 MT 9, 335 M 233, 150 P3d 930 (2007).

Prior Custody Decree Not Modified: Upon a petition for habeas corpus filed by a natural father for transfer of his child out of the temporary custody of the child's grandparents back to the father who was initially awarded custody, the District Court erred in awarding custody to a third party who had not even sought custody and the court erred in dismissing the father's petition. A District Court is without authority to award custody to a nonpetitioning party under ordinary circumstances. Moreover, where, as here, grandparents are seeking to modify a custody decree awarded to a natural parent, the District Court was bound to follow the law as set out in Schiele v. Sager, 174 M 533, 571 P2d 1142 (1977), Holm v. Holm, 172 M 81, 560 P2d 905 (1977), Groves v. Groves, 173 M 291, 567 P2d 459 (1977), and Easton v. Easton, 175 M 416, 574 P2d 989 (1978), that sections 40-4-211 through 40-4-221 are designed to favor custodial continuity over the rights of the custodians. In re Marriage of Korol, 188 M 351, 613 P2d 1016 (1980).

Postjudgment Powers of Court: A District Court has power to award necessary maintenance, child support, and suit money after judgment in a marital dissolution case during the pendency of appeal. To hold otherwise would leave a hiatus in the remedial power of the court that could cause unmeasured hardship and distress. State ex rel. Kaasa v. District Court, 177 M 547, 582 P2d 772 (1978).

Best Interest to Control: Uniform Marriage and Divorce Act attempts to do away with all restrictive views and procedures in order to accomplish what is in the best interest of not only the children, if any, but also husband or wife without regard to type of relief husband and wife may be seeking. Rogers v. Rogers, 169 M 403, 548 P2d 141 (1976).

40-4-102. Uniformity of application and construction.

Commissioners' Note

This is the standard Conference provision on uniformity and construction in aid thereof. This means that, once a provision has been judicially construed, courts of other states should follow that construction unless convinced by overwhelming demonstration that the pristine rendition unquestionably was in error. See Commercial Nat. Bank v. Canal-Louisiana Bank, 1916, 35 S.Ct. 194, 197, 239 U.S. 520, 528, 60 L.Ed. 417, 421.

Compiler's Comments

Source: Section 103, Uniform Marriage and Divorce Act.

Case Notes

Indians — Subject Matter Jurisdiction Over Dissolution of Marriage — Different Residences of Parties — Factors to Be Considered — Bertelson Followed: Stacey, an enrolled member of the Fort Peck Tribes, married Shane, a non-Indian. After the marriage ceremony, Stacey returned to the Fort Peck Indian Reservation and Shane went to Forsyth, where his parents lived and where he worked. Some time later, Stacey had a child who also became an enrolled member and lived with Stacey on the Fort Peck Indian Reservation. Still later, Shane filed a dissolution action in a state District Court. The District Court ordered joint custody and ordered that Shane would be the primary residential custodian. Approximately 1 month later, the Fort Peck Tribal Court awarded temporary custody to Stacey. She then filed a motion in District Court under former Rules 12(h) and 60, M.R.Civ.P. (now superseded), to dismiss Shane's dissolution action for lack of subject matter jurisdiction. The District Court held that it had subject matter jurisdiction over the case and issued a final decree of dissolution. In that decree, the District Court held that the parties' child had significant contacts both off and on the reservation, held that the District Court shared concurrent jurisdiction with the tribal court, and therefore denied Stacey's motion to dismiss. The Supreme Court reviewed its previous holdings regarding tribal jurisdiction and child custody jurisdiction under the Uniform Child Custody Jurisdiction Act. The Supreme Court also reviewed the purposes of the Indian Child Welfare Act, which, while not strictly applicable to the case before it, cautions that state courts should be careful not to erode the sovereignty of tribes and tribal courts. In reliance upon In re Bertelson, 189 M 524, 617 P2d 121 (1980), the Supreme Court held that the best interests of the child should be determined and followed in deciding whether a state or tribal court has jurisdiction for the purposes of awarding custody but that when an Indian child resides off the reservation, state courts and tribal courts share concurrent jurisdiction. The Supreme Court then held, in further reliance upon Bertelson, that even when jurisdiction is concurrent, it does not mean that states courts should exercise jurisdiction and that in deciding whether to exercise concurrent jurisdiction, the state courts should consider: (1) 40-4-107, 40-4-211, 40-7-108, and this section; (2) certain policy issues; and (3) the residence of the parties pursuant to 1-1-215. For this reason, the Supreme Court remanded the case to the District Court for a determination of the residence of Stacey and her child, saying that if the District Court determines that both reside on the reservation, the District Court must dismiss the case. However, if the District Court finds that Stacey's child is not a resident of the reservation and that the District Court shares jurisdiction with the tribal court, the District Court must then consider factors from Bertelson, previously discussed by the Supreme Court, to determine whether the District Court or the tribal court is better able to determine the best interests of the child. In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

40-4-103. Application of Montana Rules of Civil Procedure.

Commissioners' Note

The basic philosophy of this part of the draft is to utilize the procedural systems of the several states, so far as possible, in divorce litigation. However, in certain respects, the change from "fault" to "no-fault" basis dictates the use of terms and of procedures different from those which have become thoroughly associated with fault-orientation, in order to impress bench and bar with the break from past concepts....

Subsection (a) [(1)] makes the state's normal procedural rules applicable to proceedings under this Act, except where it specifically provides otherwise. Procedural provisions in the Act include subsections (b) and (c) of Section 301 [subsections (2) and (3) of 40-4-103]; Section 304 [40-4-121]; Section 311 [40-4-206]; Section 314 [40-4-108]; Section 316 [40-4-208]; Section 403 [40-4-213]; Section 406 [40-4-216]; and Section 410 [40-4-220].

Subsection (b) [(2)] incorporates suggestions made by several writers that substitution of a neutral case title ("In re the Marriage of _____ and _____") for the customary adversary title ("_____ v. _____"), will help to reduce the hostile atmosphere of marital actions. The Act adopts this suggestion and extends it to independent custody and support proceedings. A custody or support proceeding commenced as part of a proceeding for dissolution or legal separation need not be separately entitled.

Subsection (c) [(3)], like subsection (b) [(2)], is intended to reduce the adversary trappings of family cases by substituting a "proceeding" for the customary "action" and denominating the pleadings "petition" and "response" rather than "complaint" and "answer." Similar provisions are West's Ann.Calif.Civ.Code (1970) §§ 4503, 4504; Iowa General Assembly, 1970 Regular Session H.F. 1156. The practice in states that already use a "petition" for the initial pleading in all civil cases will not be affected by this subsection.

Subsection (d) [(4)] is designed to prevent any confusion from variance in terms.

Subsection (e) [(5)] emphasizes the nonadversary philosophy by providing, in accordance with the practice of some states, that decrees of dissolution or separation shall not be awarded to either party. Instead they are to specify the change in the status of the parties.

Since the Rules of Civil Practice are made applicable to proceedings under the Act, such procedural tools as discovery procedures, bills of particulars, etc., may be required in proper cases. Obviously, the nonadversary nature of the proceedings makes such tools inappropriate to the issue of irretrievable breakdown and the court should not permit their use. In matters of property division, the propriety of separation or maintenance agreements, and of provision for children, these tools may be extremely useful, and are not precluded by the Act, if they are found in the state's arsenal of procedural weapons.

Compiler's Comments

1999 Amendment: Chapter 91 in (1) after "Jurisdiction" inserted "and Enforcement". Amendment effective October 1, 1999.

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

1997 Amendment: Chapter 343 in (2), in second sentence in two places, substituted "parenting" for "custody"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Source: Section 301, Uniform Marriage and Divorce Act.

Case Notes

No District Court Jurisdiction to Enter Marriage Dissolution in Favor of One Party Absent Service of Dissolution Petition and Summons on Other Party: On August 15, 2003, the parties entered a property settlement agreement dividing the marital estate, and the wife also signed a consent to entry of judgment agreeing to dissolution if the property settlement agreement was presented to the District Court for approval and made an integral part of the dissolution. The husband then filed a petition for dissolution and included the settlement agreement and the wife's consent to entry of judgment, but did not serve the wife with any of the filings. The District Court held a hearing without the wife being present, adopted the settlement agreement, and entered a decree of dissolution. The husband's counsel mailed a copy of the judgment to the wife, who then filed a motion under former Rule 60(b), M.R.Civ.P. (now superseded), to set aside the judgment, claiming that the decree was void because the husband failed to have a summons issued and to serve her with process. The motion was denied, but on appeal, the Supreme Court vacated the judgment. Dissolution proceedings are not exempt from rules regarding service of process, and if one party commences a dissolution proceeding, the other party must be served as provided in the Montana Rules of Civil Procedure. Further, a petition for dissolution must be signed under oath by both parties. The wife's execution of the documents prior to the filing of the case did not constitute a voluntary appearance in the action, nor does notice of a hearing substitute for service of summons. A District Court may obtain personal jurisdiction through strict compliance with the mandatory rules for service of process, and in this case, the wife's signing of documents prior to the filing of the dissolution petition did not confer jurisdiction on the court absent service of process. Thus, the District Court abused its discretion in failing to grant the wife's motion to set aside the judgment, and the case was remanded for further proceedings. In re Marriage of Zacher, 2004 MT 249, 323 M 54, 98 P3d 309 (2004), following Marriage of Blaskovich, 249 M 248, 815 P2d 581 (1991), and In re Marriage of Grounds/Coward, 271 M 350, 897 P2d 200 (1995).

Oral Decree of Dissolution Improperly Granted at Hearing — Continuing Jurisdiction by District Court: At a hearing on the parties' petition for dissolution, the court orally granted the petition but reserved its judgment on the issues of custody, maintenance, and support. The Supreme Court held that the District Court improperly granted an oral decree of dissolution and was without jurisdiction to do so. The Supreme Court noted that under subsection (4) of this section, a decree includes a judgment and that under former Rule 54(a), M.R.Civ.P. (now superseded), a judgment is the final determination of the rights of the parties. In this case, because the District Court did not intend its decree to be its final determination, the Supreme Court held that the District Court had continuing jurisdiction over the rights of the parties following the oral decree. In re Marriage of Bukacek, 274 M 98, 907 P2d 931, 52 St. Rep. 1141 (1995).

Late Filing of Proposed Findings and Conclusions Allowed by Extension of Time: In a divorce proceeding, the wife filed proposed findings of fact and conclusions of law the day before the trial. On the day of the trial, the husband requested sanctions for late filing, and the judge prohibited the wife from presenting any evidence at trial. When reminded by the wife that he had previously agreed to allow her an extension of time to file her proposals, the judge withdrew the sanction. In the absence of a showing that the judge abused his discretion, the Supreme Court would not overturn the ruling. In re Marriage of Dirnberger, 237 M 398, 773 P2d 330, 46 St. Rep. 898 (1989).

Initial Pleadings: An action for dissolution of marriage is initiated by a petition and response as specified in this section; if there are further pleadings, the Montana Rules of Civil Procedure apply to those pleadings. Knudson v. Knudson, 186 M 8, 606 P2d 130 (1980).

No Responsive Pleading Required: Section 40-4-121 does not require a response but merely limits the time within which a response may be filed. This construction is required both by the permissive terms of the provision and by reference to 40-4-103 and former Rule 7(b), M.R.Civ.P. (now superseded), regarding the form of motions. A motion is not a pleading and does not require responsive pleadings, hence the husband's failure to file a response under 40-4-121 did not render the motion an order. Houtchens v. Houtchens, 181 M 70, 592 P2d 158 (1979).

Effect of Not Following Procedure Strictly: Even though procedure requirements were not strictly followed, this alone did not outweigh the "best interest of the child" standard. Lehman v. Billman, 178 M 367, 584 P2d 662 (1978).

Action in Rem — Decree in Absence of Party: A decree of dissolution affects the status of the parties and so is an action in rem. Therefore, the court did not err in entering a decree even in the absence of the respondent. In re Marriage of Blair, 178 M 220, 583 P2d 403 (1978).

40-4-104. Dissolution of marriage — legal separation.

Commissioners' Note

Subsection (a) [(1)] lists the three findings that a court must make before it has jurisdiction to enter a decree of dissolution of marriage: first, it must find that one party to the marriage has established an appropriate connection with the state; second, it must find that the marriage is irretrievably broken; and finally, to the extent it has jurisdiction to do so, it must have considered and passed on the issues of custody, support, maintenance, and property disposition. If the court lacks jurisdiction to act upon any of the matters listed in subsection (a) (3) [(1) (c)] without acting upon that matter, it may enter a decree of dissolution of marriage. Thus, if the court is acting upon the petition of one spouse only and the other spouse is not subject to the personal jurisdiction of the court, the court lacks jurisdiction to decide issues relating to maintenance, Vanderbilt v. Vanderbilt, 354 U.S. 416, 1 L.Ed.2d 1456, 77 S.Ct. 1360 (1957); Estin v. Estin, 334 U.S. 541, 92 L.Ed. 1561, 68 S.Ct. 1213, 1 A.L.R.2d 1412 (1948), or the distribution of property not before the court, see Fall v. Eastin, 215 U.S. 1, 54 L.Ed. 65, 30 S.Ct. 3, 23 LRANS 924, 17 Ann. Cas. 853 (1909); and may not have jurisdiction, acting alone to decide issues relating to support, consult the Uniform Reciprocal Enforcement of Support Act, or child custody, May v. Anderson, 345 U.S. 528, 97 L.Ed. 1221, 73 S.Ct. 840 (1953), consult the Uniform Child Custody Jurisdiction Act. In such a case, the court has jurisdiction only to dissolve the marriage and it may enter its decree of dissolution after making the findings set forth in subsection (a) (1) and (2) [(1) (a) and (b)].

The 90 day period of subsection (a) (1) [(1) (a)] is intended to be continuous and to apply both to domiciliaries and to members of the armed services. It may be started at any time, but it must exist at the commencement of the action and it must have been maintained for 90 days next preceding the findings by the court. Obviously, dependent upon circumstances, it may commence, effectively, sometime before the initiation of the action. One who has just entered the forum state may commence the proceeding immediately, thus enabling the court to enter such temporary orders as are necessary to protect the rights of the parties. Since the test is domicil[e], the party need not remain physically present throughout the 90 day period, so long as he has acquired no new domicil[e]. Similarly, a member of the armed forces might be outside the boundary lines, if he remained "stationed" therein. A showing that either party satisfies, the 90 day requirement is sufficient; hence a petitioner may utilize fulfillment of the 90 day period by the respondent.

Subsection (a) (2) [(1) (b)] embodies the basic shift from fault to no-fault grounds for dissolution of the marriage which is the primary object of this part of the Act. Many terms might have been used to characterize the concept. "Irretrievably broken" was chosen because this has become a term of common use in the literature of divorce reform, and so has gained a significant meaning upon which judges may rely for guidance. It is closely related to the standards recently adopted in California ("irremediable breakdown") and in Iowa ("breakdown of the marriage relationship... no reasonable likelihood that the marriage can be preserved") and equates to the doctrinal result attained under the concept of incompatibility, Newman v. Newman, 391 P.2d 902 (Okla.1964) ("irremediable rift...such a conflict of personalities as to destroy the legitimate ends of matrimony and the possibility of reconciliation"). Two guidelines are set up for evidence sufficient to support a finding that the marriage is irretrievably broken: (i) that the parties have lived separate and apart for more than 180 days next preceding the commencement of the proceeding for dissolution; (ii) that there exists "serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage." These provisions satisfy the desire of those who wish to have specific guidelines to assist the court in determining what is irretrievable breakdown. At the same time, the second provision retains all the judicial discretion to weigh all the evidence bearing upon the death of the marriage which was envisioned in the original draft of this section as approved by the Conference in St. Louis in 1970.

Subsection (a) (3) [(1) (c)] prescribes that the court must find specifically either that the conciliation provisions of Section 305 [40-4-107] do not apply or that they have been met. This guards against overlooking the Act's policy to encourage conciliation procedures in situations where there is promise of success.

The phrase, "considered, approved, or provided for," in subsection (a) (4) [(1) (d)] is intended to confer upon the court the authority to refuse to make any award, if the evidence justifies an outright denial, as well as the authority to make such allotment as the facts require. To avoid any doubt, the court is authorized expressly to provide for a later hearing to complete action on these matters, if necessary. Probably this would be within the general scope of judicial authority in most states.

Subsection (b) [(2)] means that the court may not grant a decree of legal separation over the objection of one of the parties. In cases where both parties are before the court, if one party requests a decree of legal separation and the other party requests a decree of dissolution, the court lacks jurisdiction to enter a decree of legal separation. If only one party is before the court and the court lacks personal jurisdiction over the other party, the court may enter a decree of legal separation at the petitioner's request. A similar provision is found in the California Family Law Act of 1969, California Civil Code section 4508(b).

Compiler's Comments

2019 Amendment: Chapter 350 deleted former (1)(c) that read: "(c) the court finds that the conciliation provisions of the Montana Conciliation Law and of 40-4-107 either do not apply or have been met; and"; and made minor changes in style. Amendment effective May 7, 2019.

2003 Amendment: Chapter 314 in (1)(a) inserted "as provided in 25-2-118" and at end substituted "filing of the action" for "making of the findings". Amendment effective October 1, 2003.

1997 Amendment: Chapter 343 in (1)(d), near middle after "provision for", substituted "parenting" for "child custody"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

1985 Amendment: In (1)(d) near end, after "property", deleted "or provided for a separate, later hearing to complete these matters".

Source: Section 302, Uniform Marriage and Divorce Act.

Montana Changes: Subsection (1)(c) modifies the Uniform Marriage and Divorce Act by incorporating the Montana Conciliation Law, 40-3-101, et seq. Subsection (1)(d) modifies the UMDA by deleting the provision that provides for a separate hearing to complete the matters stated in that subsection. See also 1985 amendment note.

Case Notes

Wife Lived in Montana for More Than Ninety Days — Jurisdiction by District Court Over Dissolution Action: A husband and wife separated, and the wife moved from California to Montana. After living in Montana for 100 days, the wife filed a petition for dissolution. The Supreme Court confirmed that the District Court had broad discretion to divide the marital estate in a manner equitable to each party under the circumstances, including by dividing the anticipated proceeds from the husband's personal injury lawsuit. In re Marriage of Hardman, 2019 MT 152, 396 Mont. 238, 443 P.3d 1108.

Wife Not Domiciled in State for 90 Days Preceding Petition for Dissolution — Cured by Supplemental Pleading: The wife filed for dissolution of marriage and later filed a supplemental pleading establishing Montana residency meeting the 90-day requirement in 40-4-104. The husband did not dispute the supplemental pleading; however, he moved to dismiss because the wife had not resided in Montana for 90 days prior to the initial pleading. On appeal, the Supreme Court held that the legislative purpose underlying the 90-day domicile requirement was not harmed by allowing the case to proceed and the supplemental pleading cured any jurisdictional defect. In re Marriage of Buck, 2014 MT 344, 377 Mont. 393, 340 P.3d 546.

Jurisdictional Requirement Over Dissolution Proceeding Satisfied by Party's Residence — Inconvenient Forum Improperly Applied Absent Opportunity to Respond to Motion: After several years of a difficult relationship, the husband was charged with partner or family member assault and the wife moved to Oregon with the four children. An Oregon court determined that it had temporary emergency jurisdiction over the children, issued a restraining order against the husband, and granted residential custody to the wife. The husband subsequently filed for dissolution and a parenting plan in Montana. The District Court ordered the wife to show cause why the parenting plan should not be adopted. The wife moved to vacate the hearing, claiming that the Montana court did not have jurisdiction and that it was an inconvenient forum. The District Court vacated the show cause hearing without allowing the husband to respond to the motion and dismissed the dissolution petition without explanation. The husband appealed and the Supreme Court reversed. Oregon's exercise of temporary emergency jurisdiction over the children did not automatically divest Montana of jurisdiction over the same parenting issues. Neither party had initiated dissolution proceedings at the time that the husband's petition was filed, so no concurrent jurisdiction issue existed regarding dissolution. Because the husband resided in Montana for 90 days prior to filing the petition, the jurisdiction requirements of this section were satisfied. However, jurisdiction over a dissolution of marriage does not necessarily confer jurisdiction over related child custody issues. Once the Montana court was notified of the child custody proceedings in Oregon, the Montana court was obligated by 40-7-204 to contact the Oregon court regarding potential jurisdictional conflicts, but that was not done, so the Montana court's decision to decline to address the parenting issues in the husband's petition because the Oregon court had already exercised jurisdiction was reversed. Further, the inconvenient forum argument was also inappropriate because the husband was not given the opportunity to submit arguments on the issue as required under 40-7-108. In re Marriage of Vanlaarhoven, 2002 MT 222, 311 M 368, 55 P3d 942 (2002).

Dissolution Decree Granting Ranch to Husband — Wife Not Entitled to Appreciation or Subject to Liability Accruing on Property — Judgment Interest Owing on Money Judgment: A dissolution decree entered in 1996 granted ranch property to the husband and a liquidated money judgment of $305,855 to the wife. When the remainder of the issues concerning the marital estate was finally addressed in 1999, the wife contended that the subsequent appreciation of the ranch marital assets must be accounted for in determining the final disposition of the 1996 decree. The Supreme Court held that the wife was not entitled either to appreciation or, conversely, to any liability that may have accrued on the property because the ranch was exclusively awarded to the husband. However, the wife was entitled to judgment interest on the money as a statutory right pursuant to 25-9-205. On remand, the Supreme Court applied the statutory 10% interest rate to the balance of the wife's money judgment that remained unpaid following entry of the decree, not including interest accruing during the pendency of the appeal. The Supreme Court refigured the dollar amount due the wife after adjusting the figure, which had been incorrectly offset by the District Court because of the wife's alleged receipt of livestock and sales and an interest debt allegedly due to the husband's mother under a "conspiratorial sham" designed to deprive the wife of her interest in the farm property and to directly benefit the husband. In re Marriage of Pospisil, 2000 MT 132, 299 M 527, 1 P3d 364, 57 St. Rep. 547 (2000).

Analysis Regarding Irretrievable Breakdown Distinct From Criteria for Division of Property — Property Valuation at Time of Separation Proper: The analysis regarding irretrievable breakdown of a marriage is distinct from the criteria for division of the property of the marital estate. Here, the wife contended that the District Court improperly valued the estate at the time of the parties' separation because the marriage was not irretrievably broken until she filed the petition for dissolution. However, the point in time of irretrievable breakdown does not determine when the court values the marital estate or how the court distributes marital property, but rather provides the necessary basis for dissolving the marriage. It is the point at which, for practical purposes, the marital relationship ended, not the point of irretrievable breakdown, that is relevant to the valuation of the marital estate. In the present case, following the date of separation, the parties lived at separate locations, maintained separate financial and retirement accounts, made separate financial decisions, did not jointly own property, and did not contribute either monetary or nonmonetary resources to each other for 9 years. The District Court did not err in using the separation date as the point of valuation of the marital estate, rather than the date on which the petition for dissolution was filed. In re Marriage of Geror, 2000 MT 60, 299 M 33, 996 P2d 381, 57 St. Rep. 285 (2000), following In re Marriage of Kraut, 215 M 170, 696 P2d 981, 42 St. Rep. 268 (1985).

Determination That Marriage Irretrievably Broken Judicial Function, Not Conclusive Presumption: Before a court can enter a decree of dissolution, it must find that the marriage is irretrievably broken. The determination that a marriage is irretrievably broken is a judicial function, rather than a conclusive presumption arising from the parties' testimony or from the petition for dissolution. The finding of irretrievable breakdown must be supported by evidence that the parties have lived apart for more than 180 days prior to the filing of the petition for dissolution or that there is serious marital discord that adversely affects the attitude of one or both of the parties toward the marriage. If the court finds that the marriage is irretrievably broken and satisfies the other requirements of this section, the court shall enter a decree of dissolution. In re Marriage of Geror, 2000 MT 60, 299 M 33, 996 P2d 381, 57 St. Rep. 285 (2000), following In re Marriage of Kraut, 215 M 170, 696 P2d 981, 42 St. Rep. 268 (1985).

Oral Decree of Dissolution Improperly Granted at Hearing — Continuing Jurisdiction by District Court: At a hearing on the parties' petition for dissolution, the court orally granted the petition but reserved its judgment on the issues of custody, maintenance, and support. The Supreme Court held that the District Court improperly granted an oral decree of dissolution and was without jurisdiction to do so. The Supreme Court noted that under 40-4-103(4), a decree includes a judgment and that under former Rule 54(a), M.R.Civ.P. (now superseded), a judgment is the final determination of the rights of the parties. In this case, because the District Court did not intend its decree to be its final determination, the Supreme Court held that the District Court had continuing jurisdiction over the rights of the parties following the oral decree. In re Marriage of Bukacek, 274 M 98, 907 P2d 931, 52 St. Rep. 1141 (1995).

Applicability of Soldiers' and Sailors' Civil Relief Act — Failure to Appear: Husband contended that the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. 501, et seq., precluded the District Court from dissolving the marriage and distributing marital property without giving him an opportunity to defend against wife's claims because he was stationed with the military throughout the proceedings. Section 520 of the Act sets forth procedural safeguards and relief when there is a default of appearance by a defendant in the military, but in order for that section to apply, the defendant must fail to make any appearance in the proceedings whatsoever, not simply fail to appear at a single stage of the proceedings. Because husband filed a response, a counterpetition, a financial declaration, and motions, there was no default of any appearance within the meaning of the Act that would preclude dissolution. In re Marriage of Miller, 260 M 15, 858 P2d 338, 50 St. Rep. 912 (1993).

Marriage Dissolution Brought by Tribal Member Against Non-Indian Spouse — Jurisdiction to Apportion Indian Trust Land: Wife who was a member of the Blackfeet Tribe sought a marriage dissolution in state court from her husband who was a non-Indian. The District Court granted the dissolution but held it did not have jurisdiction to apportion the parties' marital estate, which consisted of about 4,000 acres of Indian trust land on the Blackfeet Reservation, and granted wife's motion to dismiss. On appeal, husband contended that the state court had jurisdiction, relying on a provision in the Blackfeet Tribal Law and Order Code that all divorces must be consummated in accordance with Montana law. However, that provision did not cede jurisdiction to the state but merely governed the tribal court's choice of law. While the state has an interest in ensuring the existence of a forum in which marital property within its borders may be apportioned upon a dissolution, that interest is met by the availability of an alternative forum in the Blackfeet Tribal Court. The state's interest in the property and proceedings is inconsequential compared with the federal and tribal interests at stake. Therefore, the District Court did not err in concluding that it lacked jurisdiction to adjudicate the disposition of the Indian trust land that was the parties' only significant marital asset. In re Marriage of Wellman, 258 M 131, 852 P2d 559, 50 St. Rep. 462 (1993), following White Mtn. Apache v. Bracker, 448 US 136, 65 L Ed 2d 665, 100 S Ct 2578 (1980), and N. Mex. v. Mescalero Apache Tribe, 462 US 324, 76 L Ed 2d 611, 103 S Ct 2375 (1983), distinguishing Sheppard v. Sheppard, 655 P2d 895 (Idaho 1982), and followed in Smith v. McKeon, 284 M 528, 946 P2d 117, 54 St. Rep. 990 (1997), as to a trial court's lack of authority to order an appraisal of Indian trust land.

Entering Decree of Dissolution Prior to Judgment Relating to Disposition of Marital Property Improper: The District Court entered a decree of dissolution on November 2, 1987, but did not enter final judgment regarding disposition of the marital property until February 6, 1989, in violation of this section. Although not reversible error in this case, the property disposition judgment should always be entered prior to the decree of dissolution in order to avoid intolerable delays. In re Marriage of Skinner, 240 M 299, 783 P2d 1350, 46 St. Rep. 2141 (1989).

Retention of Jurisdiction to Reexamine Future Custody Arrangements: In light of a bitter and hostile custody battle, it was not error for a court to retain jurisdiction to reexamine physical custody arrangements after seeing how initial joint custody arrangements developed. In re Marriage of Allen, 237 M 64, 771 P2d 578, 46 St. Rep. 624 (1989).

General Jurisdictional Rules for Divorce, Custody, and Child Support: A divorce action is generally in rem as to the status of the parties and in personam as to other matters. Thus, the lower court did not need in personam jurisdiction to grant dissolution to wife living in Montana when husband was in Tennessee. The court could grant the wife custody of the children living in Montana, but not of the child living in Tennessee with his father, since 40-4-211 specifically granted jurisdiction to determine custody of children living in Montana. The court was without jurisdiction to award child support because the court did not have in personam jurisdiction over the father under former Rule 4, M.R.Civ.P. (now superseded). In re Marriage of Appleton, 234 M 345, 763 P2d 658, 45 St. Rep. 1959 (1988).

Mutual Failure to File Support Brief and Response Pleading — Technical Errors Cured by Oral Argument: Husband pointed out that wife filed no pleading in response to his motion to void her divorce decree and no brief in support of her motion for modification of child support and that thus the Montana Uniform District Court Rules dictated his motion should be deemed "well-taken" and hers deemed "without merit". However, wife did file an affidavit in support of her motion, and that is all husband filed in support of his motion. Neither party responded to the other's motion. The lower court held oral argument on both motions, thus giving each party a chance to argue in support of its motion and against the other's. This was a wise course, and the Supreme Court would not overturn the decision on technical grounds. In re Marriage of Appleton, 234 M 345, 763 P2d 658, 45 St. Rep. 1959 (1988).

Bifurcation of Question of Common-Law Marriage From Issues of Child Custody, Property Distribution, and Maintenance: Subsection (1)(d) of this section did not prohibit bifurcation of proceedings (to determine if parties had a common-law marriage) before hearing evidence on custody, property distribution, and maintenance. The trial court lacked authority to grant the requested relief until a determination of the marital relationship was completed because it could not dissolve or equitably distribute the fruits of that which may not exist. Bifurcation was well within the wide discretion of the court. In re Marriage of Geertz, 232 M 141, 755 P2d 34, 45 St. Rep. 942 (1988).

Final Custody Plan and Maintenance Schedule Required: Where the District Court on one hand stated that the sale of the family home "should be retained as an available option" and on the other hand set terms of a 30-day buy-out or sale period, the case was remanded for determination of a final custody plan and maintenance schedule, since resolution of custody and maintenance hinged on sale of the home. In re Marriage of Ensign, 227 M 357, 739 P2d 479, 44 St. Rep. 1146 (1987).

Petitioner Present in State Preceding Dissolution but Not Preceding Filing of Dissolution Petition — Residency Requirement Met: Husband spent about 1 ½ months in New Mexico during the 120-day period preceding his filing for dissolution, and wife claimed the District Court did not have jurisdiction over the dissolution proceeding as a result. However, the Supreme Court noted that under this section the District Court need only find that one party was domiciled in Montana for 90 days next preceding the making of the findings. Since both sides agreed husband was domiciled in Montana for 90 days preceding the actual dissolution order and findings, the District Court properly assumed jurisdiction. In re Marriage of Cox, 226 M 176, 736 P2d 97, 44 St. Rep. 567 (1987).

Paternity Contested After Adjudication of Marital Dissolution — Relitigation Barred by Collateral Estoppel: When paternity was contested in response to an action to collect past child support payments, the District Court properly ruled that the issue of paternity had previously been adjudicated during the marriage dissolution proceeding and that relitigation of the issue was barred by collateral estoppel. In re Marriage of Holland, 224 M 414, 730 P2d 410, 43 St. Rep. 2293 (1986).

Dissolution of Marriage — Hearing Requirement Not Jurisdictional: Wife sought to have judgment dissolving her marriage declared void and vacated under former Rule 60(b), M.R.Civ.P. (now superseded), on the grounds that the trial judge did not hold a hearing and receive evidence on the issue of irretrievable breakdown of marriage and was therefore without jurisdiction to dissolve the marriage. Supreme Court affirmed District Court decision that the judgment was premature because there was no hearing, but that failure to hold a hearing was a procedural rather than jurisdictional defect rendering the judgment voidable but not void. The premature summary judgment in this case is not yet ripe for appeal because issues collateral to the dissolution remain undecided. The premature summary judgment could be reviewed by the Supreme Court at this point only with a certification under former Rule 54(b), M.R.Civ.P. (now superseded), which plaintiff had not attempted. In re Marriage of Kraut, 215 M 170, 696 P2d 981, 42 St. Rep. 268 (1985), followed, regarding the need for evidence and hearing but not for express testimony on irretrievable breakdown, in In re Marriage of Miller, 260 M 15, 858 P2d 338, 50 St. Rep. 912 (1993), and In re Marriage of Geror, 2000 MT 60, 299 M 33, 996 P2d 381, 57 St. Rep. 285 (2000), regarding the determination that a marriage is irretrievably broken is a judicial function, rather than a conclusive presumption arising from the parties' testimony or from the petition for dissolution.

Action to Be Dismissed Upon Death of Either Spouse During Pendency of Dissolution Proceeding — ". . . until death do you part": One spouse in a dissolution action died shortly after a hearing was held on his petition for dissolution of marriage, but no judgment had yet been entered, either written or oral. In affirming the District Court in dismissing the petition, the Supreme Court held that death terminates a marriage as a matter of law; therefore, there is nothing for the court to dissolve. The death of either spouse during the pendency of a dissolution action prior to the entry of judgment divests the court of all jurisdiction over the action, including matters involving the distribution of property. In re Marriage of Lawrence, 212 M 327, 687 P2d 1026, 41 St. Rep. 1771 (1984).

Overly Extended Proceedings — Valuation of Property — Present Fair Market Values to Be Used: The parties were granted a decree of dissolution on May 17, 1978. The decree did not make a property disposition, but rather the District Court expressly reserved jurisdiction to make the disposition at a later date. A special master completed a report valuing stocks and oil and gas interests on January 31, 1981. On March 3, 1981, the property distribution hearing was held. The court made findings of facts and conclusions of law on June 22 and entered judgment on September 16, 1982. On appeal, the Supreme Court noted the time lapse of 34 months from the date of dissolution to the hearing on property distribution. The Supreme Court encouraged District Court to conclude all matters upon entry of a decree of dissolution. In unusual cases where it is not able to make the property distribution at the time, the District Court must make written findings that a postponement of the property disposition is in the best interest of the parties and must set either a time for a specific hearing date or a time period for final disposition. Present fair market values should be used for valuation although there may be more than one valuation point. There was abuse of discretion because there were substantial differences in the value of assets from the court's valuation dates to the time of the dispositional hearing. In re Marriage of Krause, 200 M 368, 654 P2d 963, 39 St. Rep. 1809 (1982). (Decided prior to 1985 amendment that deleted the provision allowing for a separate hearing to complete the matters stated in subsection (1)(d), which was amended by sec. 1, Ch. 392, L. 1985.)

Domicile — Failure to Find — Waiver on Appeal: Failure of husband suing for divorce to except to the findings of the trial court on the grounds that the court did not find that the marriage was irretrievably broken and that one of the parties had been domiciled in Montana for 90 days was fatal to his claim on appeal where the substantial rights of the parties were not affected. The court's failure was merely a technical oversight, and the record supported jurisdiction over both the subject matter and the parties. Laster v. Laster, 197 M 470, 643 P2d 597, 39 St. Rep. 737 (1982).

Jurisdiction Over Indian Divorce:

In 1979, the Northern Cheyenne Appellate Court issued an advisory opinion holding that the tribal court has exclusive jurisdiction over dissolution of marriage actions arising between members of the tribe residing within the reservation. The Supreme Court applied the doctrine of abstention as a matter of comity with the Northern Cheyenne Tribe. It held that there is no basis for the state to assume jurisdiction that would interfere with tribal self-government. The Supreme Court expressly overruled Bad Horse v. Bad Horse, 163 M 445, 517 P2d 893 (1974), because of the interpretation of tribal law in the advisory opinion. Limpy v. Limpy, 195 M 314, 636 P2d 266, 38 St. Rep. 1885 (1981). See also In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998). In In re Estate of Big Spring, 2011 MT 109, 360 Mont. 370, 255 P.3d 121, the Supreme Court overruled Iron Bear in its entirety and Skillen in part and overruled Krause and Bad Horse to the extent they relied on Iron Bear or Skillen.

State had jurisdiction over divorce action brought by an Indian plaintiff against an Indian defendant, both residing on an Indian reservation, since federal law has not preempted state activities in the area of marriage and divorce and the tribe had determined not to exercise jurisdiction in that area by virtue of a tribal enactment. State ex rel. Iron Bear v. District Court, 162 M 335, 512 P2d 1292 (1973), distinguished in Fisher v. District Court, 424 US 382, 47 L Ed 2d 106, 96 S Ct 943 (1976).

Property Distribution — Outside of Decree for Dissolution: In 40-4-104 the Legislature intended to grant the District Court the power to sever a decree of property from a decree of dissolution. The interests of justice and judicial economy are best served by giving District Courts broad discretion in the conduct of their proceedings and the severance of the various elements of dissolution decrees. In re Marriage of Miller, 189 M 356, 616 P2d 313, 37 St. Rep. 1523 (1980).

(Decided prior to 1985 amendment that deleted the provision allowing for a separate hearing to complete the matters stated in subsection (1)(d), which was amended by sec. 1, Ch. 392, L. 1985.)

Evidentiary Hearing Required: A District Court may not grant a judgment on the pleadings dissolving a marriage when both parties allege the marriage is irretrievably broken without an evidentiary hearing and entry of findings to that effect supported by the evidence. State ex rel. Marlenee v. District Court, 181 M 59, 592 P2d 153 (1979).

Admissibility of Evidence Regarding Disposable Income: In dissolution of marriage proceedings, testimony elicited from husband consisting of figures as to husband's "disposable income" from memorandum that had been prepared by accountant for husband was clearly hearsay, and testimony on issue of income or money available to husband should have come from husband's own personal knowledge based on his tax returns, or, if an exhibit was used, from person preparing it who would be subject to cross-examination. In re Marriage of Capener, 177 M 437, 582 P2d 326 (1978).

Findings Required: Unless proper findings and conclusions are entered in first instance, modification of divorce proceedings, should they occur, will be meaningless inasmuch as there is nothing upon which court may act, absent proper findings and conclusions. In re Marriage of Capener, 177 M 437, 582 P2d 326 (1978).

Divorce Granted to Defendant: Where plaintiff filed complaint seeking divorce, then defendant filed cross-complaint, judge had discretion to find that plaintiff had not proven his allegations but that defendant had proven hers, and to grant divorce to defendant. Whitman v. Whitman, 164 M 124, 519 P2d 966 (1974).

Law Review Articles

Foreign Decrees, Muckelston, 31 Mont. L. Rev. 107 (1969).

40-4-105. Procedure — commencement — pleadings — abolition of existing defenses.

Commissioners' Note

Subsection (a) [(1)] provides for commencement of proceedings in whatever way is required by the local practice rules or act.

Subsection (b) [(2)] lists the necessary allegations of the petition. Other appropriate allegations may be included at the pleader's discretion. Residence, of course, has the meaning "domicil[e]," as this is made the basis of jurisdiction in Section 302 (a) (1) [40-4-104] and the comment thereto. If a petitioner is a member of the armed services, the allegation of residence in the state is satisfied by an allegation of the length of time petitioner has been stationed within the state as provided in Section 302 (a) (1) [40-4-104]. "Occupation" means vocation, not avocation. If the petitioner has grounds for relying upon both (i) and (ii) in support of the allegation of irretrievable breakdown, he may allege them conjunctively, and, if the proof supports either one, he will be entitled to his decree under Section 302 [40-4-104]. Subsection (b) (5) [(2) (e)] does not require the parties to allege their arrangements as to property division, since, under Section 306 [40-4-201] they may choose to keep these arrangements private. In such cases, the court's duty under Section 302(a) (3) [40-4-104(1) (c)] to consider, approve, or make provision for property disposition may be satisfied by inquiring of both parties whether they have freely arrived at a mutually satisfactory disposition of their property.

Subsection (c) [(3)] permits joint initiation of the proceeding by both spouses, thereby shifting from the traditional doctrine of the law forbidding so-called collusive divorce.

Subsection (d) [(4)] provides for service of process, petition, or notice, as the case may be, in the manner prescribed by local practice rules or codes, but requires a verified response, if any, and prescribes its filing within 30 days after date of service. This is another of the procedures designed to affirm the variance of the non-fault divorce procedure from the traditional litigation based on fault grounds.

Subsection (e) [(5)] abolishes the traditional defenses to divorce and legal separation. A state that recognizes other defenses should add those to the list in this subsection and again in the specific repealer, Section 504(3). The intention is that the sole defense, other than jurisdictional defenses, to dissolution of marriage or legal separation will be that the marriage is not irretrievably broken.

Subsection (f) [(6)] is designed to insure to the court full authority to cause additional parties to be joined, whenever necessary to the complete effectuation of any of its duties or functions in administering the Act. Under the procedures of some states, it appears that it is necessary to provide expressly for this authority. The method for serving these new parties will be any method available under the state's general procedural rules or statutes.

Compiler's Comments

2021 Amendment: Chapter 131 inserted (1)(h) concerning the petitioner's acknowledgment that the automatic restraining order applies to the petitioner; and made minor changes in style. Amendment effective October 1, 2021.

2013 Amendment: Chapter 88 in (3) in two places extended deadline for responses and decrees from 20 to 21 days; in (6) inserted second sentence concerning inclusion of social security number in state case registry and vital statistics reporting form and in last sentence at beginning deleted "At the request of a person subject to a decree of dissolution or a support order"; inserted (7) concerning privacy of financial account information; and made minor changes in style. Amendment effective October 1, 2013.

Applicability: Section 11, Ch. 88, L. 2013, provided: "[This act] applies to proceedings filed after [the effective date of this act]." Effective October 1, 2013.

1999 Amendment: Chapter 545 at beginning of second sentence in (6) inserted "At the request of a person subject to a decree of dissolution or a support order"; and made minor changes in style. Amendment effective July 1, 1999.

1997 Amendments: Chapter 343 in (1)(e), after "support", deleted "custody, and visitation"; inserted (1)(f) concerning parenting plan"; and made minor changes in style.

Chapter 552 inserted (6) requiring the records to include, if known, the Social Security number of a person subject to a dissolution or support decree and requiring the recordkeeper to keep the number confidential, except for providing it to the Department for Title IV-D purposes; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Contingent Termination — Request for Federal Exemptions: Section 104, Ch. 552, L. 1997, contained the following contingent termination provisions and order that the Department of Public Health and Human Services seek federal exemptions:

"(1) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];
(b) [section 11] [40-5-924];
(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];
(d) [section 93] [50-15-403];
(e) [section 95] [61-5-107];
(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that the federal government has granted this state an exemption from one of the following provisions, the provision terminates on the date the exemption takes effect:

(a) [section 9] [40-5-922];
(b) [section 11] [40-5-924];
(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];
(d) [section 93] [50-15-403, certification filed April 24, 1998];

(e) [section 95] [61-5-107];

(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(5) (a) The department of public health and human services shall do everything reasonably within its power to obtain, as soon as possible, federal government exemptions from the provisions listed in subsection (4).

(b) Because section 395(c) of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) allows a grace period for states to amend their constitutions in order to comply with PRWORA and because the Montana legislature believes that the section of PRWORA prohibiting a jury trial in a paternity proceeding violates Article II, section 26, of the Montana constitution and is therefore rejected, the department of public health and human services shall seek a federal government exemption from the jury trial prohibition in PRWORA as the first exemption it seeks under subsection (5)(a). [This exemption was received on December 8, 1997.]

(6) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate July 1, 1999.

(7) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement."

Source: Section 303, Uniform Marriage and Divorce Act.

Montana Changes: Montana deletes subsection (a) of the Uniform Act, and provides for 20 days in which to respond instead of 30 days in subsection (3). Montana also adds the language: "No decree may be entered until 20 days after the date of service" in subsection (3).

Case Notes

Wife Lived in Montana for More Than Ninety Days — Jurisdiction by District Court Over Dissolution Action: A husband and wife separated, and the wife moved from California to Montana. After living in Montana for 100 days, the wife filed a petition for dissolution. The Supreme Court confirmed that the District Court had broad discretion to divide the marital estate in a manner equitable to each party under the circumstances, including by dividing the anticipated proceeds from the husband's personal injury lawsuit. In re Marriage of Hardman, 2019 MT 152, 396 Mont. 238, 443 P.3d 1108.

Collateral Estoppel Not Bar to Challenge of Marital Property Disposition by Titleholder Not Party to Dissolution: While defendant was married, her husband allegedly conspired with his sister to hide his interest in a parcel of real property in Lincoln County by placing the property in the sister and her husband's name. When the Flathead County District Court distributed the marital estate, the court ordered the sister and her husband to convey the property to the wife and ordered the wife to sell the property, with the proceeds to be equitably distributed between the husband and wife. The sister and her husband were never named as parties to the underlying dissolution action, nor were they served with a summons, and they argued that for these reasons, the District Court lacked jurisdiction over them and had no authority to order them to convey the property to the wife. The District Court disagreed, ruled that the court had jurisdiction over the property by virtue of its status as part of the marital estate, and held that the court had authority to terminate the sister and her husband's title in the property and to order that it be transferred to the wife. The sister and her husband did not appeal the ruling, but 3 days after the Flathead County District Court directed the property to be transferred to the wife, the sister and her husband filed the present action in Lincoln County to quiet title in the property. The Lincoln County District Court held that the sister and her husband were barred by collateral estoppel from challenging the Flathead County District Court in Lincoln County, and the sister and her husband appealed. The Supreme Court noted that one element of the doctrine of collateral estoppel that must be satisfied requires that the party against whom preclusion is asserted must have been afforded a full and fair opportunity to litigate any issues that might be barred. Additionally, under Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Foundation, 402 US 313 (1971), when a court entertains litigation that could terminate the real estate interests of third parties, this element of collateral estoppel requires, at a minimum, that they be made parties to the proceedings and served with notice of the fact that their interests in the real property could be affected. In this case, the sister and her husband were never afforded an opportunity to litigate their property ownership, so the Lincoln County District Court erred in concluding that all elements of collateral estoppel were satisfied and that the doctrine precluded the sister and her husband's quiet title action. Without expressing an opinion as to the merits of the quiet title action, the Supreme Court reversed for further proceedings. Kubacki v. Molchan, 2007 MT 306, 340 M 100, 172 P3d 594 (2007), distinguishing In re Marriage of Heidema, 2007 MT 20, 335 M 362, 152 P3d 112 (2007).

No District Court Jurisdiction to Enter Marriage Dissolution in Favor of One Party Absent Service of Dissolution Petition and Summons on Other Party: On August 15, 2003, the parties entered a property settlement agreement dividing the marital estate, and the wife also signed a consent to entry of judgment agreeing to dissolution if the property settlement agreement was presented to the District Court for approval and made an integral part of the dissolution. The husband then filed a petition for dissolution and included the settlement agreement and the wife's consent to entry of judgment, but did not serve the wife with any of the filings. The District Court held a hearing without the wife being present, adopted the settlement agreement, and entered a decree of dissolution. The husband's counsel mailed a copy of the judgment to the wife, who then filed a motion under former Rule 60(b), M.R.Civ.P. (now superseded), to set aside the judgment, claiming that the decree was void because the husband failed to have a summons issued and to serve her with process. The motion was denied, but on appeal, the Supreme Court vacated the judgment. Dissolution proceedings are not exempt from rules regarding service of process, and if one party commences a dissolution proceeding, the other party must be served as provided in the Montana Rules of Civil Procedure. Further, a petition for dissolution must be signed under oath by both parties. The wife's execution of the documents prior to the filing of the case did not constitute a voluntary appearance in the action, nor does notice of a hearing substitute for service of summons. A District Court may obtain personal jurisdiction through strict compliance with the mandatory rules for service of process, and in this case, the wife's signing of documents prior to the filing of the dissolution petition did not confer jurisdiction on the court absent service of process. Thus, the District Court abused its discretion in failing to grant the wife's motion to set aside the judgment, and the case was remanded for further proceedings. In re Marriage of Zacher, 2004 MT 249, 323 M 54, 98 P3d 309 (2004), following Marriage of Blaskovich, 249 M 248, 815 P2d 581 (1991), and In re Marriage of Grounds/Coward, 271 M 350, 897 P2d 200 (1995).

Unintentional Default for Failure to Appear in Dissolution Proceeding — Abuse of Discretion in Refusal to Set Aside Default Judgment: On November 9, 1998, the wife gave her husband a copy of a petition for dissolution and summons. In early December 1998, the wife's Montana attorney contacted the husband by telephone at his home in Nevada and asked if the husband had reviewed the petition. The husband replied that he had only looked at it briefly and had not retained counsel. Following the conversation, the husband signed the acknowledgment of receipt of summons and petition and sent it back to the attorney, who did not receive it until December 10. However, because the acknowledgment had not been received within the specified timeframe, the attorney had the husband served personally on December 8. Believing that he had responded appropriately and that the wife would propose a property settlement agreement, the husband took no further action. On December 29, 1998, default judgment was entered against the husband and on January 5, 1999, a final decree was entered, apportioning most of the marital debt to the husband. Upon receipt of the notice of entry of judgment, the husband retained counsel and, within a week, filed a motion to alter or amend judgment, for a new trial, or for relief from judgment. Both parties were granted extensions for further briefing. Subsequently, the parties realized that because the District Court had not issued a formal opinion within 60 days of the motion, as required in former Rule 60(b), M.R.Civ.P. (now superseded), the husband's motion was considered denied. He appealed, contending that he had met his burden for setting aside the default judgment. The Supreme Court agreed. The husband's default was unintentional, based on the mistaken belief that the wife's attorney was going to prepare a property settlement proposal and that the husband's acknowledgment of service was the only act required of him until the parties negotiated an agreement. The Supreme Court favors resolution on the merits, and because the husband fulfilled the requirements of former Rules 55(c) and 60(b), M.R.Civ.P. (now superseded), the District Court's refusal to set aside the default judgment amounted to an abuse of discretion and reversible error. In re Marriage of Winckler, 2000 MT 116, 299 M 428, 2 P3d 229, 57 St. Rep. 486 (2000).

No Need for Testimony or Findings on Question of Pregnancy: Statutory requirements are met if the petition for dissolution sets forth whether the wife is pregnant. Testimony and findings on the subject are not required. In re Marriage of Miller, 260 M 15, 858 P2d 338, 50 St. Rep. 912 (1993).

Intervention in Divorce Denied to Parents Merely Claiming Mortgage Interest in Couple's Home: The District Court Judge did not err in denying parents' motion to intervene in their son's marriage dissolution proceeding to protect parents' interest in a home the parents alleged was built with the parents' $63,630 loan to the married couple. The daughter-in-law sought the home free and clear of any obligation to her husband's parents. Parents' rights in the home were not the central issue in the case, and any decree would not prohibit them from bringing separate proceedings against the son, the daughter-in-law, or both. Furthermore, parents had no prima facie case because they had no written evidence of a debt, and a mortgage on real property can only be created by a written instrument. In re Marriage of Aniballi, 255 M 384, 842 P2d 342, 49 St. Rep. 995 (1992).

Plaintiff's Understandable Failure to Plead Pertinent Facts — No Constructive Fraud: Wife pleaded a 1965 marriage and did not mention husband's 1972 Tennessee divorce obtained while he was living in that state and his wife was living in Texas, and she did not plead a common-law marriage or mention that her husband lived in Tennessee. However, husband did not inform wife of the Tennessee divorce until almost 8 years after it occurred, when she told him she was going to sue for a Montana divorce, and it was understandable she might not believe him. When wife filed, she knew of no address for husband other than his most recent (Montana) address. She filed on August 1, and he was found and served in Tennessee on August 11. In addition, the two had lived together and held themselves out as husband and wife in Texas and Montana; therefore, a common-law marriage existed. Wife's divorce and the child support decree were not based on extrinsic, constructive fraud by wife. A court hearing a divorce action sits in equity. Given husband's acts of deceit and wife's good faith in pleading, the Supreme Court saw no reason to grant husband equitable relief by voiding wife's decree. In re Marriage of Appleton, 234 M 345, 763 P2d 658, 45 St. Rep. 1959 (1988).

Division of Marital Estate — Method of Pleading: A petition for marriage dissolution need not set forth how the petitioner believes the marital estate should be divided because the purpose of the petition is simply to inform the trial court of the parties' property acquired during the course of the marriage, and that the court should equitably divide it in the event the parties cannot reach an agreement in this regard. Knudson v. Knudson, 186 M 8, 606 P2d 130 (1980).

Law Review Articles

Pleading a Cause of Action in Divorce, Pope, 9 Mont. L. Rev. 1 (1948).

Collateral References

Dissolution, https://MontanaLawHelp.org.

Divorce, Dissolution, Legal Separation, Annulment, https://courts.mt.gov/Forms/end_marriage.

40-4-107. Irretrievable breakdown.

Commissioners' Note

This section, with others, embodies a new approach to dissolution of marriage. It provides that the only basis upon which a marriage may be dissolved is that a court has found that the marriage has broken down irretrievably. The traditional grounds for divorce, which assumed that one party had been at fault by committing an act giving rise to a cause of action for divorce, are abolished. The legal assignment of blame is here replaced by a search for the reality of the marital situation: whether the marriage has ended in fact. The public policy embodied in this section was recognized in DeBurgh v. DeBurgh, 250 P.2d 598, 601, 39 Cal.2d 858, 863-44 (1952) (Traynor, J.): "when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted." California, Iowa, and other states have adopted the non-fault approach to marriage dissolution proposed by this section.

This section makes the determination of whether the marriage is irretrievably broken, in all cases, a matter for determination by the court, "after hearing," which means "upon evidence." Shields v. Utah Idaho Central R.R. Co., 59 S.Ct. 160, 305 U.S. 177, 83 L.Ed. 111 (1938); Juster Bros. v. Christgau, 7 N.W.2d 501, 214 Minn. 108 (1943); State ex rel. Ellis v. State Road Com., 131 S.E. 7, 100 W.Va. 531 (1925). In procedural terms, it distinguishes two types of cases. In the group of cases covered by subsection (a) [(1)], the only evidence presented to the court supports the allegation of the petition that the marriage is irretrievably broken. Either both parties have so stated whether in the petition or by oral or written testimony before the court, or one party has done so without objection from the other. In this group of cases, the court must make a finding, after hearing, whether the marriage is irretrievably broken. The Conference concluded, even as to this category of cases, that the determination of breakdown should be a judicial function rather than a conclusive presumption arising from the parties' testimony or from the petition.

This decision accords with the position taken in California and in Iowa. The alternative of adjournment, provided by subsection (b) [(2)] for cases in which there is a dispute as to whether the marriage is irretrievably broken, is not available in these cases. In most cases falling under the terms of subsection (a) [(1)], it is anticipated that the court will find that the marriage is irretrievably broken because there will be no evidence before the court that might support a contrary finding. In rare cases, however, the court may not find the evidence credible. In such cases, the court normally will permit the parties to produce other evidence that the court may find persuasive. For this purpose, normal practice will permit the parties to request that the hearing be continued for a short time. Power to continue is implicit in the power to hear.

Subsection (b) [(2)] covers the situation in which the parties are in dispute as to whether their marriage is irretrievably broken. In these circumstances, the court is directed to consider the factors relevant to marital breakdown, including the petitioner's reasons for seeking a dissolution of the marriage and the prospect that the parties may achieve a reconciliation, and to decide forthwith or at an adjourned hearing whether the marriage is irretrievably broken.

Because the defense of recrimination and other concepts associated with fault are abolished by the Act (sections 303(e) [40-4-105(5)] and 503), the court may not refuse to find that the marriage has broken down irretrievably merely because of petitioner's conduct during the marriage. If the court decides to adjourn the matter as provided in subsection (b) (2) [(2) (b)], it may suggest that the parties seek counseling during the period of adjournment. The waiting period must be no shorter than thirty days and, if possible in light of the court's calendar, no longer than sixty days after the previous hearing. The court must make its final decision as to whether the marriage is irretrievably broken at the adjourned hearing. The section does not contemplate more than one adjourned hearing, although certainly a hearing not completed at one session may be continued. The power of either party, or of the court, to require a conciliation conference, is in aid of the policy to encourage conciliation, and, in appropriate cases, resort to counseling, without invoking the controversial tool of compulsory counseling.

Section 305 [40-4-107] intentionally makes no distinction between childless marriages and those with minor children. If the parties establish that their marriage has broken down irretrievably, the court is not authorized to make a contrary finding because of the impact of a dissolution of the marriage upon the minor children. Under former law, if the parties established the existence of a ground for divorce and no defenses existed, the court lacked jurisdiction to deny the divorce simply because of its views about divorce or the impact of divorce on minor children. There is no intention to change this rule. The court's power in this regard is limited to seeing that provision has been made for the custody and support of minor children as contemplated by Section 302(a) (4) [40-4-104(1) (d)].

Because it is expected that the parties themselves will be the primary source of evidence as to irretrievable breakdown, the Act has eliminated any requirement of corroboration.

The Conference took no position as to whether a family court should be established as an adjunct to the Act, because it felt that the subject was one in which uniformity was not essential, and, indeed, that uniformity by statute would be impossible, in view of differing state constitutional provisions. The Act does not forbid the creation of a family court, or the use of a family court division within a court having jurisdiction over divorce and related subjects.

Subsection (c) [(3)] insures that the court, in finding irretrievable breakdown, will consider whether there is any *reasonable* prospect of reconciliation. The remedy for a determination of any relevant fact issue, contrary to the evidence, is afforded by the usual channels of appeal.

Compiler's Comments

2019 Amendment: Chapter 350 in (2)(b) after first sentence deleted "The court at the request of either party shall, or on its own motion may, order a conciliation conference"; deleted former (4) that read: "(4) Nothing in this section shall be interpreted to affect the provisions of chapter 3 of this title, known as the Montana Conciliation Law"; and made minor changes in style. Amendment effective May 7, 2019.

Source: Section 305, Uniform Marriage and Divorce Act.

Montana Changes: The Montana version added a provision that nothing in this section shall be interpreted to affect its conciliation law.

Case Notes

Analysis Regarding Irretrievable Breakdown Distinct From Criteria for Division of Property — Property Valuation at Time of Separation Proper: The analysis regarding irretrievable breakdown of a marriage is distinct from the criteria for division of the property of the marital estate. Here, the wife contended that the District Court improperly valued the estate at the time of the parties' separation because the marriage was not irretrievably broken until she filed the petition for dissolution. However, the point in time of irretrievable breakdown does not determine when the court values the marital estate or how the court distributes marital property, but rather provides the necessary basis for dissolving the marriage. It is the point at which, for practical purposes, the marital relationship ended, not the point of irretrievable breakdown, that is relevant to the valuation of the marital estate. In the present case, following the date of separation, the parties lived at separate locations, maintained separate financial and retirement accounts, made separate financial decisions, did not jointly own property, and did not contribute either monetary or nonmonetary resources to each other for 9 years. The District Court did not err in using the separation date as the point of valuation of the marital estate, rather than the date on which the petition for dissolution was filed. In re Marriage of Geror, 2000 MT 60, 299 M 33, 996 P2d 381, 57 St. Rep. 285 (2000), following In re Marriage of Kraut, 215 M 170, 696 P2d 981, 42 St. Rep. 268 (1985).

Determination That Marriage Irretrievably Broken Judicial Function, Not Conclusive Presumption: Before a court can enter a decree of dissolution, it must find that the marriage is irretrievably broken. The determination that a marriage is irretrievably broken is a judicial function, rather than a conclusive presumption arising from the parties' testimony or from the petition for dissolution. The finding of irretrievable breakdown must be supported by evidence that the parties have lived apart for more than 180 days prior to the filing of the petition for dissolution or that there is serious marital discord that adversely affects the attitude of one or both of the parties toward the marriage. If the court finds that the marriage is irretrievably broken and satisfies the other requirements of 40-4-104, the court shall enter a decree of dissolution. In re Marriage of Geror, 2000 MT 60, 299 M 33, 996 P2d 381, 57 St. Rep. 285 (2000), following In re Marriage of Kraut, 215 M 170, 696 P2d 981, 42 St. Rep. 268 (1985).

Indians — Subject Matter Jurisdiction Over Dissolution of Marriage — Different Residences of Parties — Factors to Be Considered — Bertelson Followed: Stacey, an enrolled member of the Fort Peck Tribes, married Shane, a non-Indian. After the marriage ceremony, Stacey returned to the Fort Peck Indian Reservation and Shane went to Forsyth, where his parents lived and where he worked. Some time later, Stacey had a child who also became an enrolled member and lived with Stacey on the Fort Peck Indian Reservation. Still later, Shane filed a dissolution action in a state District Court. The District Court ordered joint custody and ordered that Shane would be the primary residential custodian. Approximately 1 month later, the Fort Peck Tribal Court awarded temporary custody to Stacey. She then filed a motion in District Court under former Rules 12(h) and 60, M.R.Civ.P. (now superseded), to dismiss Shane's dissolution action for lack of subject matter jurisdiction. The District Court held that it had subject matter jurisdiction over the case and issued a final decree of dissolution. In that decree, the District Court held that the parties' child had significant contacts both off and on the reservation, held that the District Court shared concurrent jurisdiction with the tribal court, and therefore denied Stacey's motion to dismiss. The Supreme Court reviewed its previous holdings regarding tribal jurisdiction and child custody jurisdiction under the Uniform Child Custody Jurisdiction Act. The Supreme Court also reviewed the purposes of the Indian Child Welfare Act, which, while not strictly applicable to the case before it, cautions that state courts should be careful not to erode the sovereignty of tribes and tribal courts. In reliance upon In re Bertelson, 189 M 524, 617 P2d 121 (1980), the Supreme Court held that the best interests of the child should be determined and followed in deciding whether a state or tribal court has jurisdiction for the purposes of awarding custody but that when an Indian child resides off the reservation, state courts and tribal courts share concurrent jurisdiction. The Supreme Court then held, in further reliance upon Bertelson, that even when jurisdiction is concurrent, it does not mean that states courts should exercise jurisdiction and that in deciding whether to exercise concurrent jurisdiction, the state courts should consider: (1) 40-4-102, 40-4-211, 40-7-108, and this section; (2) certain policy issues; and (3) the residence of the parties pursuant to 1-1-215. For this reason, the Supreme Court remanded the case to the District Court for a determination of the residence of Stacey and her child, saying that if the District Court determines that both reside on the reservation, the District Court must dismiss the case. However, if the District Court finds that Stacey's child is not a resident of the reservation and that the District Court shares jurisdiction with the tribal court, the District Court must then consider factors from Bertelson, previously discussed by the Supreme Court, to determine whether the District Court or the tribal court is better able to determine the best interests of the child. In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

Voidable Judgment — No Reason to Set Aside: Although the District Court's summary judgment on issue of dissolution of marriage based on irretrievable breakdown was voidable for lack of a required hearing, it would not be set aside on appeal because the appellant failed to show that the premature judgment had denied her substantial rights. In re Marriage of Kraut, 220 M 267, 714 P2d 167, 43 St. Rep. 350 (1986).

Dissolution of Marriage — Hearing Requirement Not Jurisdictional: Wife sought to have judgment dissolving her marriage declared void and vacated under former Rule 60(b), M.R.Civ.P. (now superseded), on the grounds that the trial judge did not hold a hearing and receive evidence on the issue of irretrievable breakdown of marriage and was therefore without jurisdiction to dissolve the marriage. Supreme Court affirmed District Court decision that the judgment was premature because there was no hearing, but that failure to hold a hearing was a procedural rather than jurisdictional defect rendering the judgment voidable but not void. The premature summary judgment in this case is not yet ripe for appeal because issues collateral to the dissolution remain undecided. The premature summary judgment could be reviewed by the Supreme Court at this point only with a certification under former Rule 54(b), M.R.Civ.P. (now superseded), which plaintiff had not attempted. In re Marriage of Kraut, 215 M 170, 696 P2d 981, 42 St. Rep. 268 (1985), followed, regarding the need for evidence and hearing but not for express testimony on irretrievable breakdown, in In re Marriage of Miller, 260 M 15, 858 P2d 338, 50 St. Rep. 912 (1993), and In re Marriage of Geror, 2000 MT 60, 299 M 33, 996 P2d 381, 57 St. Rep. 285 (2000), regarding the determination that a marriage is irretrievably broken is a judicial function, rather than a conclusive presumption arising from the parties' testimony or from the petition for dissolution.

Failure to Find Irretrievable Breakdown — Waiver on Appeal: Failure of husband suing for divorce to except to the findings of the trial court on the grounds that the court did not find that the marriage was irretrievably broken and that one of the parties had been domiciled in Montana for 90 days was fatal to his claim on appeal where the substantial rights of the parties were not affected. The court's failure was merely a technical oversight, and the record supported jurisdiction over both the subject matter and the parties. Laster v. Laster, 197 M 470, 643 P2d 597, 39 St. Rep. 737 (1982).

Hearing and Findings Required: The parties both alleged that the marriage was irretrievably broken. They entered a judgment on the pleadings. The Supreme Court held that the judgment was prematurely entered. The specific statute, 40-4-107, controls and requires the court to make findings supported by evidence after a hearing. State ex rel. Marlenee v. District Court, 181 M 59, 592 P2d 153 (1979).

Law Review Articles

Grounds Under UMDA, Townsend, 37 Mont. L. Rev. 123 (1976).

40-4-108. Decree.

Commissioners' Note

Subsection (a) [(1)] abolishes interlocutory periods in those states which have them. The decree of dissolution or separation will be effective when entered, subject to the right of appeal. The second sentence of subsection (a)[(1)] is intended to authorize an appeal from a decree of dissolution which does not challenge the decree insofar as it is based on a finding that the marriage is irretrievably broken. In such cases, either party is free to remarry as soon as the time for taking appeal has expired, despite the fact that an appeal which does not challenge the dissolution may be pending.

Subsection (b) [(2)] permits either party to a proceeding for legal separation to move, six months after entry of the decree, to convert the decree of legal separation into a decree of dissolution of marriage. The section does not authorize the court to deny the motion. In such cases, the court will enter its order that the original decree be deemed a decree of dissolution of marriage, as of the date the motion for conversion is made.

Subsection (c) [(3)] establishes a procedure for the registration of a decree of dissolution of marriage or of legal separation in the place where the marriage was originally registered. The purpose of this subsection is to aid in the often difficult problem of proving whether a marriage has been terminated.

Subsection (d) [(4)] expressly authorizes restoration of the maiden name or any former name of a wife, upon dissolution of a marriage or declaration of its invalidity. By the better authority, this power exists in the court without express provision. Reinken v. Reinken, 351 Ill. 409, 639 (1933); W. v. H., 103 N.J.Super. 24, 240 A.2d 501 (1968); Day v. Day, 1 P.2d 123, 137 Ore. 159 (1931); Hartman v. Chumley, 266 S.W.2d 444 (Tex.Civ.App.1924). This provision removes all doubt as to judicial power. Whether the provision as to the power being exercised "upon request by the wife" precludes action by the court upon its own initiative in a proper instance may be a matter for judicial construction. One ill-reasoned opinion so holds, as to the words if the wife "so desires". Terrell v. Terrell, 352 S.W.2d 195 (Ky.1961). The less preemptive language of this provision, in connection with the general principle of the Act that the rules of practice shall govern procedure generally, point to the conclusion that, in an appropriate instance, the court might exercise a proper judicial discretion to order restoration of name without wifely request.

Compiler's Comments

2019 Amendment: Chapter 180 in (5) substituted "party" for "wife" and substituted "party's maiden or birth name" for "wife's maiden name". Amendment effective April 18, 2019.

2015 Amendment: Chapter 137 inserted (4) providing a procedure to obtain a decree of dissolution without a hearing when the dissolution is uncontested; and made minor changes in style. Amendment effective October 1, 2015.

Applicability: Section 2, Ch. 137, L. 2015, provided: "[This act] applies to dissolution cases filed on or after October 1, 2015."

1995 Amendment: Chapter 109 in (3), after "dissolution", deleted "or legal separation"; in (3)(a), after "dissolution", deleted "or separation"; and made minor changes in style.

Source: Section 314, Uniform Marriage and Divorce Act.

Montana Changes: Subsection (4) of Montana's enactment is different from the Model Act in that it omits the language "may, and if there are no children of the parties," following "Court".

Case Notes

Oral Decree of Dissolution Improperly Granted at Hearing — Continuing Jurisdiction by District Court: At a hearing on the parties' petition for dissolution, the court orally granted the petition but reserved its judgment on the issues of custody, maintenance, and support. The Supreme Court held that the District Court improperly granted an oral decree of dissolution and was without jurisdiction to do so. The Supreme Court noted that under 40-4-103(4), a decree includes a judgment and that under former Rule 54(a), M.R.Civ.P. (now superseded), a judgment is the final determination of the rights of the parties. In this case, because the District Court did not intend its decree to be its final determination, the Supreme Court held that the District Court had continuing jurisdiction over the rights of the parties following the oral decree. In re Marriage of Bukacek, 274 M 98, 907 P2d 931, 52 St. Rep. 1141 (1995).

Name of Child When Agreed-to Pretrial Order and Birth Certificate Conflict at Trial: A pretrial order signed by both parties' attorneys and the judge stated that the child's last name would remain Rager. Later, it was discovered, and the lower court determined, that the child's legal last name was Worman, as stated on the birth certificate. The Supreme Court ruled that because the husband did not request a name change in the lower court and because the pretrial order was legally and factually in error, the birth certificate name of Worman would remain the legal name until the name was changed by adoption, a statutory petition for a name change, or other legal means. In re Marriage of Rager, 263 M 361, 868 P2d 625, 51 St. Rep. 91 (1994).

No Final Judgment When Conditions in Decree Anticipate Subsequent Modification — Appeal of Decree Not Limited: An original dissolution decree was made conditional on whether wife exercised her option to purchase the family business, leaving the rights and obligations of the parties with regard to maintenance, child support, and other matters uncertain until the purchase option period expired. After several court orders rendered her efforts to exercise the option unsuccessful, wife appealed 170 days after the original decree was entered, which husband contended was barred by the 30-day appeal limit in former Rule 5, M.R.App.P. (now superseded). While noting that under this section a decree of dissolution is final when entered, the Supreme Court nevertheless adopted the holding in Heater v. Boston & Mont. Corp., 84 M 500, 277 P 11 (1929), that the finality of a judgment depends to a great extent on its apparent purpose and whether it contains provisions for subsequent modification. Because of the conditional language in the original decree, it could not be considered final until the option period expired, and orders issued prior to that time were interlocutory in effect, absent a final determination of the parties' rights. Wife's appeal filed 6 days after expiration of the option period was therefore timely and subject to appellate review. In re Marriage of Griffin, 260 M 124, 860 P2d 78, 50 St. Rep. 945 (1993).

Final Custody Plan and Maintenance Schedule Required: Where the District Court on one hand stated that the sale of the family home "should be retained as an available option" and on the other hand set terms of a 30-day buy-out or sale period, the case was remanded for determination of a final custody plan and maintenance schedule, since resolution of custody and maintenance hinged on sale of the home. In re Marriage of Ensign, 227 M 357, 739 P2d 479, 44 St. Rep. 1146 (1987).

Effective Date of Dissolution: This section delays the effectiveness of decrees of dissolution only for appeals that challenge the finding that the marriage is irretrievably broken. In appeals of procedures only, a decree is effective when it is originally entered. In re Marriage of Kraut, 220 M 267, 714 P2d 167, 43 St. Rep. 350 (1986).

Wife's Appeal Held Meritorious — Remand for Redetermination of Maintenance and Attorney Fees: Since wife's appeal had merit, husband's assertion that it did not and his request for damages were denied where, among other things, the court was sympathetic to a claim but did not agree with it, a request for a redetermination of the maintenance award was granted, and a request for attorney fees was remanded for a determination. In re Marriage of Perry, 217 M 162, 704 P2d 41, 42 St. Rep. 1101 (1985).

Consent to Retroactive Increase in Judgment — Merits of Increase Waived: Wife obtained an increase in child support and maintenance after claiming the original amounts were not correctly determined. Husband consented to retroactively apply the increase back to the date of the original decree. This consent made it unnecessary for the Supreme Court to consider the merits of the wife's request for modification. The consent indicated the original decree was not correct. In re Marriage of Wilson, 216 M 392, 701 P2d 1372, 42 St. Rep. 894 (1985).

Modification of Incorrect Money Judgment — Interest Due on Retroactively Due Increase: If a judgment is effective from the date of entry and any changes to the judgment relate back to the entry date, it follows that interest is assessed from the date of judgment. Where a child support and maintenance decree was later modified and larger payments granted, with the increase made retroactive to the date of the original decree, interest was due on that retroactive amount, beginning on the date of the original decree. In re Marriage of Wilson, 216 M 392, 701 P2d 1372, 42 St. Rep. 894 (1985).

Action to Be Dismissed Upon Death of Either Spouse During Pendency of Dissolution Proceeding — ". . . until death do you part": One spouse in a dissolution action died shortly after a hearing was held on his petition for dissolution of marriage, but no judgment had yet been entered, either written or oral. In affirming the District Court in dismissing the petition, the Supreme Court held that death terminates a marriage as a matter of law; therefore, there is nothing for the court to dissolve. The death of either spouse during the pendency of a dissolution action prior to the entry of judgment divests the court of all jurisdiction over the action, including matters involving the distribution of property. In re Marriage of Lawrence, 212 M 327, 687 P2d 1026, 41 St. Rep. 1771 (1984).

Ex Parte Maintenance Order Entered After Final Decree Upheld: It was proper for the District Court to award wife temporary maintenance ex parte even though the effect of the award was amendment of the dissolution decree without holding the hearing required by former Rule 52(b), M.R.Civ.P. (now superseded). The Supreme Court held that since the intent of the District Court's earlier order, i.e., that the wife be maintained pending final disposition of the matter, was not being carried out, it was within the District Court's discretion to grant the wife temporary maintenance. In re Marriage of Rohrich, 211 M 130, 683 P2d 1308, 41 St. Rep. 1261 (1984).

Challenge of Decree and Property Settlement After Six Years — Res Judicata: A property settlement and decree entered in 1974 cannot be set aside in 1980 on the grounds of unconscionability. The failure of the spouse to appeal the court's decree in 1974 has rendered the issue res judicata. Hadford v. Hadford, 194 M 518, 633 P2d 1181, 38 St. Rep. 1308 (1981).

Effect of Fraud on Divorce Decree: After the decree in a divorce action, death of one of the parties does not deprive the trial court of its power to purge its records of a void or voidable decree procured by fraud. Fraunhofer v. Price, 182 M 7, 594 P2d 324 (1979).

Immediate Appeal From Partial Judgment: This is a proper case for a Writ of Supervisory Control because relator wife has no plain, speedy, and adequate remedy at law by appeal. Neither 40-4-108 nor former Rule 1, M.R.App.Civ.P. (now M.R.App.P., now superseded), provides for immediate appeal from a partial judgment. Instead, the right of immediate appeal from a judgment on part but not all of the claims for relief in a single action is governed by former Rule 54(b), M.R.Civ.P. (now superseded). State ex rel. Marlenee v. District Court, 181 M 59, 592 P2d 153 (1979).

Postjudgment Powers of Court: A District Court has power to award necessary maintenance, child support, and suit money after judgment in a marital dissolution case during the pendency of appeal. To hold otherwise would leave a hiatus in the remedial power of the court that could cause unmeasured hardship and distress. State ex rel. Kaasa v. District Court, 177 M 547, 582 P2d 772 (1978).

"Plain Error": In adopting the "plain error" doctrine appellate courts have a duty to determine whether the parties before them have been denied substantial justice by the trial court, and

when that has occurred they can, within sound discretion, consider whether the trial court has deprived a litigant of a fair and impartial trial, even though no objection was made to the conduct during the trial. Such was the case when appellant was denied his day in court by the trial judge's recess and failure to reconvene. Halldorson v. Halldorson, 175 M 170, 573 P2d 169 (1977).

Attorney General's Opinions

Dissolution Fee Not Chargeable Under Motion to Convert: A District Court Clerk may not charge a fee for filing a petition for dissolution under 25-1-201(1)(a) when a motion is made under 40-4-108(2) to convert a decree of legal separation to a decree of dissolution because the motion to convert is a continuation of the initial separation action and does not entail commencement of a new action. 42 A.G. Op. 56 (1988).

40-4-109. Independence of provisions of decree or temporary order.

Commissioners' Note

This section is intended to abolish self-help remedies, now all too common in family litigation, whereby one party withholds support or maintenance payments to force the other party to comply with visitation orders and vice-versa. Disputes of this kind should be settled by the court.

Compiler's Comments

1997 Amendment: Chapter 343 near end, after "permit", substituted "parental contact with the child" for "visitation"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Source: Section 315, Uniform Marriage and Divorce Act.

Case Notes

Unilateral Modification — Contempt: The husband under a dissolution decree stopped making house payments required by the decree. The wife moved to have him held in contempt. After a hearing the court modified custody but also found the husband in contempt. Sixteen months later the husband stopped making payments again. The husband was again held in contempt, as no changed circumstances existed. A party may not unilaterally modify a decree. State ex rel. Voorhies v. District Court, 668 P2d 241, 40 St. Rep. 1368 (1983) (apparently not reported in Montana Reports).

40-4-110. Costs — professional fees.

Commissioners' Note

The purpose of this section is to authorize the payment of costs and a reasonable fee by one party to the other party's attorney if the court, after considering the financial resources available to both parties, determines the order to be necessary. The section extends authority to make several orders for costs and fees at different stages of the proceedings, and permits an attorney to enforce the order directly.

Compiler's Comments

1997 Amendment: Chapter 343 in (1), near middle before "fees", substituted "professional" for "attorney's" and after "legal" inserted "and professional" and in second sentence, near middle after "directly to the", substituted "professional" for "attorney"; inserted (2) concerning access by both parties to marital financial resources; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Source: Section 313, Uniform Marriage and Divorce Act.

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GENERAL

Significant Changes in Income and Parenting — Child Support Reduction Proper — Attorney Fees for District Court Proceedings and on Appeal Proper Under Clear Terms of Dissolution Agreement: At the time of their divorce, the parties executed an agreement whereby the husband paid roughly a quarter of his salary to the wife for support of their three children. Though both parties were physicians, the wife stayed at home with the children and they resided with her on a primary basis. Five years later, the husband moved to modify child support, claiming that there had been a significant change in circumstances, namely that the children resided equally with each parent and that the wife was now working part-time. Ultimately, the District Court ordered that the husband's child support obligation be vastly reduced, that the wife pay the husband for his overpayments retroactive to the time he filed his motion to modify child support, and that the wife pay for the husband's attorney fees pursuant to the parties' dissolution agreement. The wife appealed, contending that the District Court's findings regarding the parties' change in circumstances were insufficient and that the District Court erred in awarding the husband his attorney fees. The Supreme Court agreed with the District Court that there was sufficient evidence of a substantial change in circumstance to warrant a modification of support and that under the express terms of the parties' dissolution agreement, the husband, as the prevailing party, was entitled to attorney fees for the District Court and appellate proceedings. In re Marriage of Damschen, 2011 MT 297, 363 Mont. 19, 265 P.3d 1245.

Continued Obstruction of Property Settlement Agreement — Refusal to Comply with Court Order — Finding of Contempt Not Error — Award of Attorney Fees Proper: The divorcing parties entered into a property settlement agreement whereby the wife gave up her interest in the parties' two businesses in exchange for a promissory note and the right to request and receive financial information regarding the businesses. After the wife learned that the businesses were failing under the husband's control, the parties agreed that the wife would assume managerial and operational control of the businesses. The husband, however, obstructed the wife's ability to manage the businesses. Even after the District Court issued an order requiring the husband to cooperate with the wife and allow her access to the businesses' records, the husband sold business assets and had vendors pay him individually. Ultimately, the District Court found the husband in contempt and awarded the wife attorney fees. The husband appealed, arguing that the court erred by finding him in contempt and that the judge should have removed himself for bias against the husband. The Supreme Court affirmed, noting that an adverse ruling does not establish bias that would disqualify a judge, and that attorney fees were properly awarded as they were provided for in the property settlement agreement. In re Marriage of Cini, 2011 MT 295, 363 Mont. 1, 266 P.3d 1257.

Amendment of Pretrial Order to Include Attorney Fees Not Listed in Pretrial Order — No Requirement to Plead Attorney Fees in Marriage Dissolution Case: During the second day of trial in a marriage dissolution case, the wife offered copies of her attorney fee bills, and the District Court, over the husband's objection, allowed the pretrial order to be amended on the issue of attorney fees. The husband cited Naftco Leasing Ltd. Partnership 301 v. Finalco, Inc., 254 M 89, 835 P2d 729 (1992), and contended that because the wife made no showing of manifest injustice, as required by former Rule 16(e), M.R.Civ.P. (now superseded), to modify the pleadings, the District Court erred by awarding the wife her attorney fees and costs when they were not listed in the pretrial order. The Supreme Court distinguished Naftco, noting that that case was not a dissolution action and that the trial court in Naftco never had the opportunity to consider amending the pleadings at trial. Further, former Rule 16(e), M.R.Civ.P., must be read together with former Rule 15(b), M.R.Civ.P. (now superseded), which requires a showing by the objecting party that amendment of the pleadings would be prejudicial. The husband never claimed prejudice or sought a continuance to enable him to meet the wife's attorney fee evidence. Although it is good practice to plead attorney fees, it is not required in marriage dissolution actions under this section. Rather, this section gives the trial court the discretion to order payment from time to time, after considering the financial resources of the parties. The husband failed to demonstrate an abuse of the court's discretion, and the Supreme Court affirmed the fee award. In re Marriage of Schmieding, 2000 MT 237, 301 M 336, 9 P3d 52, 57 St. Rep. 983 (2000).

Attorney Fees in Marriage Dissolution Considered Judgment Debt — Not Assessable Against Exempt VA Disability Benefits: The District Court included a portion of the husband's Veterans Benefits Association (VA) disability benefits as part of the division of marital property and assessed attorney fees against the husband. He contended that federal law precluded both and that because his VA benefits composed his sole source of income, his wife's attorney fees would have to be paid from property that was exempt from execution under 38 U.S.C. 5301 and

25-13-608. The Supreme Court reversed, agreeing that VA disability benefits are not considered "disposable retired pay" to be treated as marital property and holding that an award of attorney fees in a dissolution action comprises a judgment debt that may not be executed against exempt federal disability benefits. Under Montana law prior to adoption of the Uniform Marriage and Divorce Act, attorney fees were treated as a form of temporary support or alimony pendente lite. However, that Act contains separate statutory provisions for an award of costs and attorney fees and an award of temporary maintenance or support, expressing a legislative intent that a judgment for attorney fees not be characterized as a form of maintenance or support (see also 27B C.J.S. Divorce §343). In this case, the District Court did not direct the payment of attorney fees from the husband's disability benefits, so the Supreme Court directed that, on remand, the District Court revisit the issue after considering property distribution, maintenance, and child support, with the husband's payment potentially coming instead from the value of his nonexempt property. In re Marriage of Strong, 2000 MT 178, 300 M 331, 8 P3d 763, 57 St. Rep. 709 (2000), following Dyche v. Dyche, 507 SW 2d 293 (Mo. 1978).

Absence in Record of Competent Evidence, Reasonableness, or Necessity for Attorney Fees — Award Reversed: An attorney fee awarded pursuant to this section must be reasonable, necessary, and based on competent evidence, and a hearing regarding reasonableness is required to allow oral testimony, the introduction of exhibits, and an opportunity to cross-examine. Here, no hearing regarding the award of fees was held, the trial court's findings did not appear to be supported by substantial competent evidence, and the reasonableness and necessity of the award were unclear, so the Supreme Court reversed the award and remanded for a hearing to receive evidence concerning reasonableness and necessity. In re Marriage of Harkin, 2000 MT 105, 299 M 298, 999 P2d 969, 57 St. Rep. 422 (2000).

Equity Claim Without Merit — Attorney Fees Properly Awarded as Set Out in Settlement Agreement: The parties' separation agreement provided that reasonable attorney fees would be awarded to the prevailing party in a future action to enforce, modify, or interpret the terms of the agreement. The father prevailed on all motions before the court, and his attorney fees and costs were awarded. The mother claimed that the award should be reversed because it was inequitable and asserted financial hardship because requiring her to pay an amount equal to 3 years of her gross wages would adversely affect her ability to support her children. However, her claims of financial hardship had been previously found to be without merit, so the award of attorney fees, as set out in the agreement language, was affirmed. In re Marriage of Pearson, 1998 MT 236, 291 M 101, 965 P2d 268, 55 St. Rep. 992 (1998).

Failure to Respond to Motion for Attorney Fees — Grounds for Granting Motion: Uniform District Court Rule (2)(b)'s provision that failure to file an answer brief to a motion within 10 days is an admission that the motion is well taken does not require the District Court to grant the unanswered motion. Therefore, the District Court did not have to grant former wife's motion for attorney fees in her proceeding for modification of child support on the ground that former husband did not respond to the motion. In re Marriage of Dishon, 277 M 501, 922 P2d 1186, 53 St. Rep. 816 (1996).

Award of Attorney Fees Based Upon Property Settlement Agreement Upheld: Debra and Kenneth were divorced, settling their differences in support, maintenance, and property division by signing an agreement addressing all issues. The agreement also provided that if one of the parties had to pay a debt of the other, the paying party could recoup the payment with interest and fees. Later, Debra sought reimbursement for debts that belonged to Kenneth but that were not disclosed at the time of the divorce. The Supreme Court held that attorney fees were properly payable under the language of the agreement. The fact that there was no clear winner in the proceedings and that there was no showing by Debra that she was without resources to pay her own fees was irrelevant because the award of fees was pursuant to the agreement and not pursuant to statute. In re Marriage of Craib & Rhodes, 266 M 483, 880 P2d 1379, 51 St. Rep. 937 (1994). See also In re Marriage of Cini, 2011 MT 295, 363 Mont. 1, 266 P.3d 1257.

Montana Legal Services Association or Pro Bono Client Entitled to Award of Attorney Fees: Sandy was represented in a dissolution action by a pro bono attorney at the request of the Montana Legal Services Association. The District Court awarded the attorney $300 for his legal services. Sandy's ex-husband argued that the attorney was not entitled to any fees and that under Thompson v. Thompson, 193 M 127, 630 P2d 243 (1981), fees could not be awarded to a legal services attorney because no expense was incurred by the client. The Supreme Court held that because no justification was submitted by Sandy's attorney, the award was improper. The Supreme Court therefore reversed and remanded for an evidentiary hearing to determine the necessity and reasonableness of any award for fees. The Supreme Court also overruled its opinion in Thompson and held that allowing the Montana Legal Services Association or a pro bono attorney to be awarded fees would encourage representation of indigent clients. The Supreme Court therefore held that the criteria under this section should be necessity and the reasonableness of the requested fee, considering the financial resources of both parties. In re Marriage of Malquist, 266 M 447, 880 P2d 1357, 51 St. Rep. 914 (1994).

Costs and Attorney Fees in Challenge of Separation Agreement: A District Court decision that each party pay its own costs and attorney fees was reversed and the case was remanded for determination of costs and attorney fees to be awarded to husband in wife's unsuccessful action to interpret and modify a separation agreement that provided for costs and attorney fees for the successful party in an action to enforce, modify, or interpret the agreement. In re Marriage of Caras, 263 M 377, 868 P2d 615, 51 St. Rep. 98 (1994).

Failure of Litigant to Provide Discovery and to Appear at Trial: Because husband failed to appear on the first hearing date and because he failed to provide the court and his wife with requested discovery material, the court properly ordered him to pay his wife's attorney fees and costs for the trial. His conduct was unreasonable and vexatious and multiplied the litigation by necessitating a second hearing. In re Marriage of Rager, 263 M 361, 868 P2d 625, 51 St. Rep. 91 (1994).

Husband Ordered to Pay Attorney Fees Even Though Wife's Income Greater — Award Reversed: The trial court found that wife had a higher monthly income than husband, but then determined that husband was more financially able to pay wife's attorney fees. Notwithstanding the fact that husband's conduct necessitated wife's obligation to pay attorney fees, she had sufficient resources to pay the fees while he did not. The award of attorney fees and costs to wife was reversed. In re Marriage of Zander, 262 M 215, 864 P2d 1225, 50 St. Rep. 1522 (1993), distinguishing In re Marriage of Syljuberget, 234 M 178, 763 P2d 323 (1988).

Attorney Fee Provision in Separation Agreement — Fees Not Granted: More than 2 years after the dissolution order, Wise brought a motion to set aside the property settlement agreement drawn up by her attorney, contending that her husband had committed fraud against her and the court in that he told her that his work pension was not a marital asset. The agreement also contained a provision that if either party initiated an action to interpret or enforce the agreement, the successful party would be entitled to attorney fees. The Supreme Court held that fraud upon the court had not been committed but that the husband was not entitled to attorney fees because the action did not concern interpretation or enforcement of the agreement. Wise v. Nirider, 261 M 310, 862 P2d 1128, 50 St. Rep. 1334 (1993).

Grandparents Properly Required to Pay Attorney Fees Incurred by Grandchildren's Mother in Opposing Motion to Stay Execution of Custody Order: The grandparents, after having their motion to intervene in a dissolution proceeding for the purpose of obtaining custody of the grandchildren denied, moved for a stay of execution of the custody provisions of the dissolution in order to allow them to appeal the custody award. In opposing the stay, the children's mother requested attorney fees. The lower court awarded fees based on the limited finances of the mother. The grandparents argued that the lower court was without jurisdiction to award fees and that it should not have awarded fees because the parents of the children's mother were paying her attorney fees. The Supreme Court held that this section illustrates the unique character of a District Court's ongoing jurisdiction in dissolution proceedings in that the statute specifically allows for attorney fees incurred after entry of judgment. The Supreme Court further ruled that there was evidence that the mother paid some of her fees and that the lower court had not abused its discretion in awarding her attorney fees incurred in opposing the appeal. In re Custody of R.R.K., R.D.K., & L.M.K., 260 M 191, 859 P2d 998, 50 St. Rep. 1002 (1993).

Order That Husband Pay One-Third of Wife's Attorney Fees Upheld: Wife sought relief for nonpayment of maintenance. Husband countered with a petition for elimination of maintenance, and wife in turn petitioned for doubling of maintenance. Maintenance was retained at the original amount. The District Court properly ruled that husband should pay $1,000 of wife's $2,966 in legal fees based on the respective financial positions of the parties. In re Marriage of Burris, 258 M 265, 852 P2d 616, 50 St. Rep. 525 (1993).

Proper Award of Attorney Fees for Motion to Modify Child Support: On appeal, father maintained that ordering him to pay attorney fees related to a motion to modify child support obligations was a substantial injustice. However, in light of the fact that he failed to object to the finding that the award was proper or to the reasonableness of the fees, the grant of attorney fees was affirmed. In re Marriage of Howard, 255 M 64, 840 P2d 1217, 49 St. Rep. 894 (1992).

Proceedings Outside Scope of Annual Support Recalculation — Attorney Fees Appropriate: Appellant contended that attorney fees were inappropriate because the dissolution agreement anticipated annual recalculation of child support and the parties could not have reasonably intended the award of attorney fees in the annual recalculation proceedings. However, the Supreme Court found attorney fees were appropriate when appellant's case also included a disagreement over visitation and when appellant's failure to provide documents during discovery added to respondent's legal costs. In re Marriage of Chiovaro, 247 M 185, 805 P2d 575, 48 St. Rep. 156 (1991).

Attorney Fees Awarded for Past Actions, Not Modification Action: As part of a modification order awarding physical custody of a child to the father, the court awarded attorney fees to the mother. The father contended that no fees should have been assessed because the action was for modification. The Supreme Court affirmed after noting that the award was for fees necessitated by the father's past legal actions and not by the modification action. In re Marriage of Arbuckle, 243 M 10, 792 P2d 1123, 47 St. Rep. 1150 (1990).

Fees Awarded Under Terms of Decree: The respondent argued that the court should not award attorney fees because the petitioner had brought the action for back support under false pretext. The Supreme Court ruled that while an error did exist in the initial claim, the petitioner had corrected the error upon learning of it and that under the clear terms of the original decree, since she was forced to initiate a suit for back support and had prevailed, she was entitled to attorney fees. In re Marriage of Wroot, 240 M 409, 784 P2d 904, 46 St. Rep. 2237 (1989).

Financial Disparity Between Parties — Award of Fees Proper: Husband made approximately three times more in salary than wife, and his disposable income increased after the divorce. Based on the great financial disparity between the parties, the award of attorney fees to wife was proper. In re Marriage of Skinner, 240 M 299, 783 P2d 1350, 46 St. Rep. 2141 (1989).

Spouse's Conduct as Justification for Award of Fees: Where a majority of legal fees were due solely to husband's lack of cooperation, including demands for discovery, contempt proceedings for failure to pay support, and an injunction from entering the family home, an award of attorney fees to the wife was proper. In re Marriage of Syljuberget, 234 M 178, 763 P2d 323, 45 St. Rep. 1825 (1988), followed in In re Marriage of Schnell, 273 M 466, 905 P2d 144, 52 St. Rep. 1059 (1995). See also In re Marriage of Lewton, 2012 MT 114, 365 Mont. 152, 281 P.3d 181.

Attorney Fees Awarded to Wife Despite Her Willingness to Pay: The husband argued that the District Court improperly ordered the husband to pay wife's attorney fees. He based his argument on cross-examination in which wife testified that her present husband would be willing to help her pay attorney fees. She also testified that she felt it was her obligation to pay them, and she would pay them without her present husband's help. The Supreme Court held that, in itself, that testimony is not determinative of the issue. The District Court concluded in its findings that the wife did not have the means to pay attorney fees at the time of the divorce action and that she still did not. In re Marriage of Wengeler, 219 M 452, 712 P2d 1336, 43 St. Rep. 86 (1986).

Attorney's Obligation to Deal in Good Faith: Because of the inequality that exists between attorney and client in bargaining over a fee, attorney has an obligation to deal fairly and in good faith when negotiating, charging, and collecting a fee. In a fee dispute over handling of dissolution, client pleaded sufficient facts to raise question whether there was a breach of the obligation owed to deal fairly and in good faith. District Court erred in granting summary judgment for attorney. Supreme Court reversed and remanded for trial, giving client leave to amend counterclaim to specifically describe a breach of the implied covenant. Morse v. Espeland, 215 M 148, 696 P2d 428, 42 St. Rep. 251 (1985).

Award of Attorney Fees — Reasonableness Not Questioned: The District Court found that wife lacked sufficient property to provide for her reasonable needs and that she was unable to support herself without a maintenance award. The District Court made a finding that the wife does not possess sufficient funds with which to pay her attorney fees. Since the reasonableness of attorney fees was never questioned by the husband before appeal and the fees were accepted by the District Court as reasonable, the Supreme Court rejected husband's contention that he is financially unable to pay and upheld the award of attorney fees to the wife. In re Marriage of Loegering, 212 M 499, 689 P2d 260, 41 St. Rep. 1892 (1984).

Amount of Attorney's Fees Not to Be Prorated on Basis of Success on Individual Claims: In a proceeding for modification of a divorce decree, the respondent incorrectly contended that the petitioner's attorney fees should be prorated on the basis of her success on the claims raised against the respondent. The trial court is to base its award of attorney's fees on the case as a whole. It is not required to dissect the anatomy of the lawsuit to find a bone here, some fat there, and solid meat elsewhere. In re Marriage of Baer, 199 M 21, 647 P2d 835, 39 St. Rep. 1178 (1982).

Failure to Perform Property Agreement — Basis for Attorney Fees: At the time of their divorce, the parties entered into a property agreement which was approved by the court and entered into the decree of dissolution. Appellant failed to perform as agreed, and respondent filed suit seeking to have appellant held in contempt and requiring him to perform under the decree. The District Court ordered appellant to perform under the terms of the decree, to pay a sum respondent had incurred as a result of a tax lien on her property because of appellant's failure to perform, and to pay respondent's attorney fees. Appellant contended the wife made no showing of necessity and therefore could not recover attorney fees. The Supreme Court upheld the award, saying substantial evidence in the record, showing appellant's actions had required the wife to bring the action, supported the award. In re Marriage of Grace, 198 M 97, 643 P2d 1188, 39 St. Rep. 791 (1982).

Prerequisites to Award — Necessity, Competent Evidence, and Reasonableness: A petitioner is not entitled to attorney fees under this section unless a showing of necessity is made. The award must be based on competent and reasonable evidence, and reasonableness is shown by means of a hearing allowing for oral testimony, exhibits, and opportunity to cross-examine. Award of attorney fees and travel costs to wife was supported by the record and would not be overturned on appeal where testimony was presented and necessity shown with respect to the fees and an uncontested affidavit was submitted showing the travel costs. Laster v. Laster, 197 M 470, 643 P2d 597, 39 St. Rep. 737 (1982). See also In re Marriage of Barnard, 241 M 147, 785 P2d 1387, 47 St. Rep. 152 (1990).

Montana Legal Services Association Client Not Entitled to Attorney Fees: Where the appellee applied for and received the assistance of counsel employed by the Montana Legal Services Association to obtain her divorce from her husband, the District Court did not err in denying her request that her husband be ordered to pay her attorney fees. The purpose of the attorney fees provisions of the Uniform Marriage and Divorce Act was to equalize the status of the parties to the dissolution proceeding. In this case, the wife incurred no personal expense in the employment of counsel and could therefore show no necessity for an award of attorney fees. Thompson v. Thompson, 193 M 127, 630 P2d 243, 38 St. Rep. 1022 (1981), overruled in In re Marriage of Malquist, 266 M 447, 880 P2d 1357, 51 St. Rep. 914 (1994).

Award of Attorney Fees to Wife: The Supreme Court affirmed the lower court judgment in favor of the wife, including an award of attorney fees. Both contractual and statutory bases are present for awarding attorney fees, the parties' separation agreement and this section. Jensen v. Jensen, 192 M 547, 629 P2d 765, 38 St. Rep. 927 (1981).

Attorney Fees — Related to Property Distribution: In an appeal from the modification of a decree issued upon dissolution of her marriage, the wife urged that the District Court erred in not awarding her attorney fees. She argued that the improper determination of net worth and improper distribution of property necessitated reversal of the fees decision. The Supreme Court felt it was best, in light of its decision to remand the case regarding the property issues, to vacate the order of the District Court regarding the attorney fees and leave it to the discretion of that court to modify the attorney fees order or not after rehearing. Tefft v. Tefft, 192 M 456, 628 P2d 1094, 38 St. Rep. 837 (1981).

Speculative Attorneys Fees: This section contemplates that under normal circumstances an order for attorney fees will be permitted only after counsel for the benefited party has completed his services. Thus, a $3,000 attorney fee order was manifestly in error when it was granted to compensate the wife's attorney for work on appeal when he had performed only 20% of such services. In re Marriage of Bliss, 187 M 331, 609 P2d 1209 (1980).

Application of M.R.Civ.P. to Petition to Amend or Alter Order With Regard to Fees and Costs: Former Rule 59(g), M.R.Civ.P. (now superseded), which requires that a motion to alter or amend a judgment be served not later than 10 days after notice of the entry of judgment, applies to petitions for attorney's fees filed after entry of judgment, and the court was without jurisdiction to grant a petition requesting attorney's fees filed some 3 months after notice of entry of an order that required each party to pay his own attorney's fees and costs. McDonald v. McDonald, 183 M 312, 599 P2d 356 (1979).

Stipulation as to Attorney Fees: Where it was stipulated and agreed to by counsel that the wife's attorney fees were to be paid out of any judgment received by her, the court may approve that stipulation. Downs v. Downs, 181 M 163, 592 P2d 938 (1979).

Standard of Review: When reviewing the discretion vested in the District Court to award costs and attorney's fees in a dissolution proceeding, the reviewing court is guided by the standard that when there is substantial evidence to support the findings of the District Court, such findings will not be disturbed on appeal. Brown v. Brown, 179 M 417, 587 P2d 361 (1978), followed in In re Marriage of Hall, 244 M 428, 798 P2d 117, 47 St. Rep. 1705 (1990). See also In re Marriage of Roullier, 229 M 348, 746 P2d 1081, 44 St. Rep. 2035 (1987).

Attorney Fees — Vexatious Custody Modification: The Supreme Court affirmed a trial court award of attorney fees based on a finding that the modification of custody action was vexatious and constituted harassment. Easton v. Easton, 175 M 416, 574 P2d 989 (1978).

Attorney Fees — Pleading: While this section does not require attorney fees to be prayed for, it is good practice to request such fees in the pleadings. Johnsrud v. Johnsrud, 175 M 117, 572 P2d 902 (1977).

JURISDICTION OF TRIAL COURT

Grandparents Properly Required to Pay Attorney Fees Incurred by Grandchildren's Mother in Opposing Motion to Stay Execution of Custody Order: The grandparents, after having their motion to intervene in a dissolution proceeding for the purpose of obtaining custody of the grandchildren denied, moved for a stay of execution of the custody provisions of the dissolution in order to allow them to appeal the custody award. In opposing the stay, the children's mother requested attorney fees. The lower court awarded fees based on the limited finances of the mother. The grandparents argued that the lower court was without jurisdiction to award fees and that it should not have awarded fees because the parents of the children's mother were paying her attorney fees. The Supreme Court held that this section illustrates the unique character of a District Court's ongoing jurisdiction in dissolution proceedings in that the statute specifically allows for attorney fees incurred after entry of judgment. The Supreme Court further ruled that there was evidence that the mother paid some of her fees and that the lower court had not abused its discretion in awarding her attorney fees incurred in opposing the appeal. In re Custody of R.R.K., R.D.K., & L.M.K., 260 M 191, 859 P2d 998, 50 St. Rep. 1002 (1993).

Award of Attorney Fees on Remand Improper: On remand from the Supreme Court, the District Court granted the mother's motion for attorney fees for the first trial and appeal. The District Court was without jurisdiction to grant attorney fees. The original judgment did not provide for attorney fees, and the judgment would have had to be amended before either party could be ordered to pay those fees. A motion to amend a judgment must be made within 10 days of its entry. This rule applies to requests for attorney fees and is not overridden by 40-4-110. Since mother's motion was not timely, the District Court was without jurisdiction to grant attorney fees for the first trial. R.L.S. & T.L.S v. Barkhoff, 207 M 199, 674 P2d 1082, 40 St. Rep. 1982 (1983).

SUFFICIENCY OF EVIDENCE, FINDINGS

Attorney Fee Award Based on Insufficient Evidence and Justification Remanded: An award of attorney fees should be reasonable and based on necessity and competent evidence. In this case, the District Court awarded the wife $10,000 for attorney fees, but failed to hold a hearing on the matter. The award was not considered reasonable when the wife herself testified that her fees were about $6,000, nor did the court provide adequate justification for the award, but simply stated that the husband should pay the wife's fees, without establishing any necessity for the award or considering the parties' financial resources. The award was an abuse of discretion, and the Supreme Court remanded for further findings on the necessity of the award. In re Marriage of Dennison, 2006 MT MT 56, 331 M 315, 132 P3d 535 (2006). See also In re Marriage of Crowley, 2014 MT 42, 374 Mont. 48, 318 P.3d 1031.

Settlement Agreement Providing Attorney Fees to Successful Party — Proof of Amount and Reasonableness of Attorney Fees Required: A settlement agreement provided for reasonable attorney fees to the successful party. The wife was successful in an action regarding maintenance, and the District Court simply awarded her all her attorney fees without discussion. However, the general rule is that an award of attorney fees in a contract action requires introduction of proof from which a reasonable fee may be determined, even if the contract terms provide for payment of a fee. Thus, the District Court erred in awarding the wife all her attorney fees without assessing reasonableness, and the Supreme Court remanded for a proper determination of fees. In re Marriage of Mease, 2004 MT 59, 320 M 229, 92 P3d 1148 (2004).

Award of Attorney Fees Set Aside Pending Revaluation and Distribution of Premarital and Marital Estate: The District Court awarded attorney fees to the wife based on alleged discovery abuses, but the court failed to cite any authority as justification for the award on discovery issues. Thus, the Supreme Court examined the question in the context of 40-4-255 and this section to determine if the award was proper. To justify an award under this section, the wife had to demonstrate an inability to pay her own fees; however, there was no finding to that effect in light of the award to the wife of $209,226.14 from the marital estate. Under 40-4-255, the noncomplying party may be required to pay attorney fees for failing to comply with the provisions of 40-4-251 through 40-4-258. The record showed that the husband executed a preliminary declaration of disclosure pursuant to 40-4-252 and served it to the wife and that neither party filed a final declaration of disclosure pursuant to 40-4-253, so the wife could not be considered a complying party entitled to an award under 40-4-255. Thus, the Supreme Court set aside the award of attorney fees subject to reconsideration by the District Court on remand following revaluation, including consideration of premarital debt, and distribution of the marital estate. In re Marriage of Steinbeisser, 2002 MT 309, 313 M 74, 60 P3d 441 (2002), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Award of Attorney Fees Based on Imputed Income Affirmed: An award of attorney fees must be necessary, reasonable, and based on competent evidence. Here, petitioner requested attorney fees in a dissolution and custody proceeding, and the District Court ordered respondent to pay petitioner's attorney fees of $1,000. Respondent argued that no evidence existed to support the necessity for or amount of the award. However, absent any of respondent's financial records, the District Court imputed income of $24,835 a year to respondent, and noted that petitioner's income was about $10,000 a year. Petitioner's attorney charged $100 an hour for dissolution cases and had worked at least 10 hours on the case. The evidence was credible and substantial, establishing both the necessity for the award based on the disparity between the parties' incomes and on the reasonable amount of the fees. The award was affirmed. In re Marriage of Fishbaugh, 2002 MT 175, 310 M 519, 52 P3d 395 (2002).

Award of Attorney Fees Based on Parent's Imputed Income, Relief From Litigation Expenses, and Other Parent's Inability to Pay: The District Court assigned the wife's attorney fees to the husband based on the wife's lack of sufficient funds to pay, and the husband appealed. The Supreme Court examined each party's ability to pay the party's own fees, as well as the relative financial positions of the parties. The husband did not dispute the wife's inability to pay or contend that her attorney fees were unreasonable, but did claim that the District Court did not take into account his own lack of financial resources. The District Court found that when monthly child support, child care, maintenance, and the children's insurance costs were deducted from the husband's actual income, he was left with $728 a month, compared to the wife's monthly income of $2,065. However, the husband had the potential to increase his monthly income to $6,250 a month by securing full-time work in the area of his professional expertise, which would leave him $4,478 a month after expenses when the imputed income was used as the basis for projecting his ability to pay. The court also noted that the husband's father had relieved the husband's litigation expenses, enhancing the husband's ability to pay the wife's fees. Proof of the wife's inability to pay her attorney fees, in conjunction with competent evidence of the husband's release from the obligation to pay his own litigation costs and the demonstrated capacity to earn considerably greater income in the near future, supported the District Court's award of reasonable attorney fees and costs to the wife. However, the wife's request for costs of appeal was denied, because the record did not include up-to-date evidence regarding the parties' respective financial circumstances since the dissolution. In re Marriage of Bee, 2002 MT 49, 309 M 34, 43 P3d 903 (2002).

Mere Consideration of Parties' Resources Insufficient Basis for Award of Attorney Fees: The District Court awarded attorney fees to wife after stating that it had considered the parties' financial resources. The court made no other findings that indicated how a consideration of financial resources dictated the award, nor was evidence presented that clarified how the parties' respective financial resources led to or supported the court's conclusion. Reversing the award, the Supreme Court held that mere consideration of the parties' financial resources, without more, is an insufficient basis upon which to determine that an attorney fee award is necessary. In re Marriage of Pfeifer, 282 M 461, 938 P2d 684, 54 St. Rep. 432 (1997).

Unequal Attorney Fees Incurred by Parties — Payment From Marital Estate Abuse of Discretion: Linda incurred less than $8,000 worth of attorney fees and Alan incurred over $11,000 worth of fees in the dissolution of their marriage. The District Court noted that the amounts incurred were "roughly equal" and therefore required that both party's fees be paid from the marital estate. The Supreme Court held that if the amounts were consolidated and then divided, each party would be required to pay $9,500 in fees, or an award of $1,500 to Alan. The Supreme Court noted that payment of each party's fees from the marital estate had been upheld in In re Marriage of Cole, 224 M 207, 729 P2d 1276 (1986), but in that case, the District Court specifically found that the wife was without means to pay her own fees. Because the District Court did not find that Alan was without means to pay all of his fees, as required by this section, the Supreme Court held that the District Court abused its discretion in allocating the fees to the marital estate. In re Marriage of Meeks, 276 M 237, 915 P2d 831, 53 St. Rep. 365 (1996).

Continuing Changed Circumstances Required: Seven months after Raymond was ordered to pay child support, he petitioned to have it modified. Evidence showed, among other things, that he testified that his circumstances were essentially the same as at the time of the original support order, that, in the year of his petition, he deposited over $135,000 in the bank, that he received $62,000 that year from the sale of a house, and that he chose to pay off a $24,000 note and over $21,000 in credit card bills with the house sale money instead of paying child support, for which he was in arrears. Clearly, he failed to show a change in circumstances so substantial and continuing as to make the existing support order unconscionable, and the lower court did not abuse its discretion in refusing to modify the order. In addition, the District Court properly ordered him to pay his former wife's court costs and attorney fees and the Supreme Court ordered him to pay her costs and attorney fees for the appeal. In re Marriage of Paunovich, 270 M 200, 890 P2d 1291, 52 St. Rep. 144 (1995).

Insufficient Findings for Determination of Attorney Fees in Light of Large Personal Injury Award: The parties filed cross-motions for modification of a child support order after the father was injured in a work-related accident and awarded a large personal injury award. The District Court denied the mother's request for her attorney fees. The Supreme Court held that the findings on the financial resources of the parties were insufficient to allow the Supreme Court to make a determination concerning payment of attorney fees and remanded to the District Court for it to make additional findings. In re Marriage of Durbin, 251 M 51, 823 P2d 243, 48 St. Rep. 1142 (1991). For a discussion of the correct standard of review, see In re Marriage of Kovash, 270 M 517, 893 P2d 860, 52 St. Rep. 280 (1995).

No Abuse of Discretion: Because wife suffered from poor health and husband had ability to earn income and manage assets, the trial court did not abuse its discretion by awarding attorney fees. In re Marriage of Dzivi, 247 M 165, 805 P2d 567, 48 St. Rep. 140 (1991).

Financial Resources Properly Considered: Appellant averred District Court error in awarding costs and attorney fees without consideration of the parties' financial resources, but the Supreme Court affirmed the award after noting that the lower court heard evidence on both parties' employment and living arrangements and held a separate hearing to determine the amount of attorney fees. In re Marriage of Gravely, 248 M 105, 809 P2d 582, 48 St. Rep. 353 (1991).

Failure to Consider Estate's Liabilities — Fee Award Remanded: Since the court failed to determine the liabilities of the marital estate, it could not have properly considered the financial resources of the parties when it ordered the husband to pay $3,000 of wife's attorney fees and costs. The attorney fee award was vacated, and the issue was remanded. In re Marriage of Dirnberger, 237 M 398, 773 P2d 330, 46 St. Rep. 898 (1989).

Examination of Parties' Financial Positions and Health — Award Justified: Attorney fees were properly awarded to wife after an examination of the parties' financial positions and health revealed that wife worked as a homemaker and took care of two children, required additional vocational training, was under a physician's care, and earned $800 a month, while the husband earned $2,400 a month and was in good health. The trial court did not abuse its discretion in finding that under the circumstances wife was unable to afford attorney fees despite husband's contention that award of income-producing property to wife precluded award of fees. In re Marriage of Manus, 225 M 457, 733 P2d 1275, 44 St. Rep. 398 (1987).

Findings Required:

The rule that failure to set forth specific reasons for denial of attorney fees constituted remandable error was held to be much too harsh to be applied on a general basis. The Supreme Court adopted a more appropriate standard of review based on whether the trial court abused its discretion in refusing to award attorney fees, which was held to be more in line with other standards of review in dissolution actions and with this section. To the extent this new standard conflicts with decisions such as Lewis, infra, the previous decisions are overruled. In re Marriage of Gallinger & Weissman, 221 M 463, 719 P2d 777, 43 St. Rep. 976 (1986), followed in In re Marriage of Nalivka, 222 M 84, 720 P2d 683, 43 St. Rep. 1079 (1986), In re Marriage of J.J.C. & P.R.C., 227 M 264, 739 P2d 465, 44 St. Rep. 1068 (1987), In re Marriage of Jacobson, 228 M 458, 743 P2d 1025, 44 St. Rep. 1678 (1987), In re Marriage of Anderson, 230 M 89, 748 P2d 469, 45 St. Rep. 40 (1988), In re Marriage of Smith, 242 M 495, 791 P2d 1373, 47 St. Rep. 925 (1990), In re Marriage of Peetz, 252 M 448, 830 P2d 543, 49 St. Rep. 362 (1992), In re Marriage of Wackler, 258 M 12, 850 P2d 963, 50 St. Rep. 406 (1993), and In re A.R.A., 277 M 66, 919 P2d 388, 53 St. Rep. 543 (1996). See also In re Marriage of Becker, 244 M 469, 798 P2d 124, 47 St. Rep. 1729 (1990), In re Marriage of Lozon, 256 M 59, 843 P2d 793, 49 St. Rep. 1135 (1992), and In re Marriage of Walls, 278 M 413, 925 P2d 483, 53 St. Rep. 974 (1996).

When the District Court refuses to award reasonable attorney's fees, the court must indicate in the findings of fact, conclusions of law, or order why attorney's fees were not awarded. Bowman v. Bowman, 194 M 233, 633 P2d 1198, 38 St. Rep. 1515 (1981), following Kronovich v. Kronovich, 179 M 335, 588 P2d 510 (1978), followed in In re Marriage of Lewis, 198 M 51, 643 P2d 604, 39 St. Rep. 759 (1982), and Gauthier v. Gauthier, 201 M 320, 654 P2d 517, 39 St. Rep. 2137 (1982).

Attorney Fees in Divorce Actions — Contingency Fees Impermissible — Findings Required: The District Court order entered in a proceeding to enforce a decree of dissolution of marriage awarded attorney fees to the respondent. The court made findings as to the reasonableness of the amount of the award of attorney fees but made no findings as to the wife's need for the award. The court awarded the respondent $6,506 for maintenance arrearages and then found that one-third of the recovery, or $2,146, was a reasonable attorney fee. Noting that the Rules of Professional Conduct prohibit contingency fees in domestic relations actions, the Supreme Court vacated the award for attorney fees and remanded the case for reconsideration and entry of findings by the District Court on the fee issue. In re Marriage of Jones, 218 M 441, 709 P2d 158, 42 St. Rep. 1722 (1985).

Denial of Attorney Fees Without Stating Reason — Remand: A court refusing to allow attorney fees in a dissolution of marriage proceeding must indicate why in the findings of fact. Since the court failed in this case to do so, wife's request for an award must be considered on remand and, if denied, the denial must be substantiated. In re Marriage of Perry, 217 M 162, 704 P2d 41, 42 St. Rep. 1101 (1985).

Evidence Insufficient:

Wife sought $13,283 in attorney fees and was granted $2,500. The amount granted was not supported by substantial evidence, and the case was remanded for a hearing to determine an adequate fee. In re Marriage of Wilson, 216 M 392, 701 P2d 1372, 42 St. Rep. 894 (1985).

The District Court awarded the defendant $500 in attorney's fees. The award was not upheld because there was insufficient evidence to substantiate the $500 amount. An award of fees, like any other award, must be based on competent evidence. Phennicie v. Phennicie, 185 M 120, 604 P2d 787 (1979).

Substantial Evidence to Support Award of Attorney Fees: In his third time before the Supreme Court in a domestic law case, husband contested attorney fees of $1,727 awarded after the first appeal and attorney fees of $757.50 awarded pursuant to the specific order of the Supreme Court. The court rejected his arguments that the $1,727 award was improper on the grounds that Milanovich I reversed the judgment of the District Court. In Milanovich II the Supreme Court had affirmed the District Court order, which found the husband's conduct toward the wife vexatious, harassing, and unreasonable, and that she was entitled to reasonable attorney fees. As for the $757.50 award, the court found no abuse of discretion in its award. In re Marriage of Milanovich, 215 M 367, 697 P2d 927, 42 St. Rep. 436 (1985).

Reasonableness of Attorney Fee Award — Hearing Required: The court remanded on the attorney fee award issue because the trial court failed to conduct a hearing to determine the reasonableness of the wife's fee of $1,576 ordered paid by husband. In re Marriage of Buxbaum, 214 M 1, 692 P2d 411, 41 St. Rep. 2243 (1984).

Failure to Make Findings Denying Attorney Fees — Not Reversible Error — Limited Proceeding: Although expressing disapproval, the Supreme Court held it was not reversible error for the District Court to fail to make findings when it denied attorney's fees and ordered each side to bear its own costs since the proceeding was only a dismissal by the District Court of a petition to modify a decree and of motions by both parties. In re Marriage of Pickering, 209 M 159, 678 P2d 1146, 41 St. Rep. 617 (1984), distinguishing Kronovich v. Kronovich, 179 M 335, 588 P2d 510 (1978).

Disparity in Income and Health Justifying Award of Attorney Fees: Husband and wife were married for 19 years. During the marriage wife was a homemaker, took care of the parties' two children, and did not work outside the home. One child has now reached adulthood. Both children live with the wife. The wife has no vocational skills and is not in good health. She earns $3.50 an hour. Husband earns $1,980.42, net, a month on his regular job and earns extra money selling health care products. He is in good health, and his job is secure. The District Court ordered that the husband pay maintenance, child support, and the wife's attorney fees. Husband appealed the maintenance and attorney fees awards. The Supreme Court ruled that in view of the evidence presented on the parties' relative financial situations, the award of maintenance was not clearly erroneous. The Supreme Court further ruled that for similar reasons, the District Court did not abuse its discretion in awarding attorney fees to the wife. Carr v. Carr, 205 M 269, 667 P2d 425, 40 St. Rep. 1263 (1983), followed in In re Marriage of Merry, 213 M 141, 689 P2d 1250, 41 St. Rep. 2009 (1984), and In re Marriage of Korpela, 219 M 150, 710 P2d 1359, 42 St. Rep. 1912 (1985).

De Minimis Award of Attorney's Fees Not Reversed for Failure to Hold Hearing: Where the District Court awarded $400 in attorney fees in a divorce proceeding without holding an evidentiary hearing on the size of the fee, as required by the Supreme Court in Phennicie v. Phennicie, 185 M 120, 604 P2d 787 (1979), the Supreme Court refused to reverse the District Court award, saying that a reversal would result in costs to the parties which would exceed the original award. In re Marriage of Chapin, 202 M 153, 655 P2d 991, 39 St. Rep. 2392 (1982), followed in In re Marriage of Castor, 249 M 495, 817 P2d 665, 48 St. Rep. 807 (1991).

Statutory Factors Considered and Referred to Sufficient — Findings as to Mineral Interest and Attorney Fees Required: In awarding child custody to the husband, the court included in its finding the factors outlined in 40-4-212. In ordering the husband to pay maintenance, the court applied the factors set forth in 40-4-203 and referred to them in its findings of fact. There is no clear abuse of discretion by the District Court on either of these issues, and therefore the findings are affirmed. The District Court did not, however, place a value on a mineral interest, and the findings do not explain this exclusion. The court also failed to substantiate why attorney fees were not awarded to the wife. The case is therefore remanded to make findings on the value of the mineral interest and to state reasons as to the grant or denial of the wife's attorney fees. In re Marriage of Hammeren, 201 M 443, 663 P2d 1152, 39 St. Rep. 2222 (1982). See also In re Marriage of Rolfe, 216 M 39, 699 P2d 79, 42 St. Rep. 623 (1985), and In re Marriage of Forsman, 229 M 411, 747 P2d 861, 44 St. Rep. 2093 (1987).

Award of Attorney Fees Prior to Appeal Reversed as Error: Where, in an action for dissolution of the parties' marriage, the trial court awarded the wife $2,500 for the purposes of bringing an appeal, the action of the court was in error, as an award of attorney fees must be based on competent evidence that the fees are reasonable and written findings are required to establish both the party's necessity for payment from the opposing party and to establish the reasonableness of the fee. Because the hearing to establish the amount of the fee was insufficient and because no written findings were made, the award must be vacated and the case remanded for proper proceedings. Bier v. Sherrard, 191 M 215, 623 P2d 550, 38 St. Rep. 158 (1981).

Moving Expenses and Attorney Fees Upon Dissolution of Marriage — Failure to Make Findings and Conclusions: When, following entry of the court's order dissolving the marriage of the parties, the Supreme Court remanded the case to the District Court for additional findings of fact concerning a military pension, the District Court was also directed to rule on and make findings of fact concerning the appellant's requests for moving expenses and attorney fees if the appellant renews her requests. Failure of the District Court to make findings only results in needless remands of the case to the District Court for determination of the issues. Ebert v. Ebert, 189 M 477, 616 P2d 379, 37 St. Rep. 1674 (1980).

Showing of Need — Failure of Husband to Introduce Evidence: The District Court did not err in awarding attorney fees to the respondent when the respondent made a showing of necessity and the appellant did not introduce any evidence as to his current income. In re the Marriage of Dahl, 188 M 128, 612 P2d 196 (1980).

Written Findings Required: The District Court erred in awarding attorney's fees in a dissolution action by oral order. Written findings are required to establish both the party's necessity for payment from the opposing party and to establish the reasonableness of the fees. In re Marriage of Gohner, 187 M 206, 609 P2d 288 (1980). See also Duffey v. Duffey, 193 M 241, 631 P2d 697, 38 St. Rep. 1105 (1981); Collett v. Collett, 190 M 500, 621 P2d 1093, 38 St. Rep. 36 (1981).

Necessity to Consider Financial Positions: In a custody modification action where the father was employed and the mother was indigent and appealed in forma pauperis, it was error to award the father attorney's fees where nothing in the trial court's findings of fact or order suggested it had considered her financial position. McLean v. Seright, 187 M 194, 609 P2d 282 (1980).

No Showing of Necessity: Where wife, having testified that she had supported herself for 2 years, failed to make a showing of necessity, the court did not abuse its discretion in not awarding attorney's fees. Knudson v. Knudson, 186 M 8, 606 P2d 130 (1980).

Evidence Not Required to Support Award of Nominal Fees: An award of $350 in attorney fees in a contested marital dissolution involving property division, child custody, and support is manifestly a nominal fee. As such, there is no requirement that the amount of the fee be supported by evidence. Bailey v. Bailey, 184 M 418, 603 P2d 259 (1979), citing Solie v. Solie, 172 M 132, 561 P2d 443 (1977). See also Levandowski v. Levandowski, 193 M 121, 630 P2d 239, 38 St. Rep. 1002 (1981).

Award of Attorney's Fees — Review — Substantial Evidence: A District Judge has discretion to award a reasonable amount for attorney's fees in a dissolution proceeding. Substantial evidence to support the amount awarded must be determined on review. An award of $2,000 for the appeal was not supported by substantial evidence since the briefs were short, oral argument was waived, and no novel issues were presented. Metcalf v. Metcalf, 183 M 266, 598 P2d 1140 (1979). See also Karr v. Karr, 192 M 388, 628 P2d 267, 38 St. Rep. 506 (1981).

Award of Attorney's Fees — Hearing Required: Court discretion controls the award of costs and attorney's fees to a spouse. However, a showing of reasonableness of attorney fees must be made by means of a hearing allowing for oral testimony, the introduction of exhibits, and an opportunity to cross-examine. Aanenson v. Aanenson, 183 M 229, 598 P2d 1120 (1979), following Green v. Green, 181 M 285, 593 P2d 446 (1979), and followed in In re Marriage of Davies, 266 M 466, 880 P2d 1368, 51 St. Rep. 929 (1994).

Attorney Fees — Not Included in Costs: There was substantial evidence to support the findings of the lower court in regard to award of attorney fees at the trial level. Furthermore, the wife was not entitled to attorney fees on appeal since they are not included in costs recoverable by the prevailing party on appeal. Allen v. Allen, 175 M 527, 575 P2d 74 (1978).

Hearing on Attorneys' Fees Unnecessary: Hearing on attorneys' fees was unnecessary because only a nominal fee was ordered paid. Solie v. Solie, 172 M 132, 561 P2d 443 (1977).

DISCRETION OF TRIAL COURT

Mother's Testimony of Financial Hardship to Defend Against Father's Last-Minute Rescinded Motion to Modify Parenting Plan — Award of Fees Proper: The father filed a motion to modify the parties' parenting plan to make him their daughter's primary caregiver. The mother opposed his request and asked the court to award her attorney fees. At the hearing, the father rescinded his request to modify the parenting plan and the District Court awarded the mother attorney fees. On appeal, the Supreme Court affirmed the District Court's award of attorney fees based on the mother's testimony that she had to sell a car and take out a loan to defend against the father's motion to modify the parenting plan. In re Weibert, 2015 MT 29, 378 Mont. 135, 343 P.3d 563.

No Error in Failing to Hold Hearing to Consider Factors in Award of Additional Attorney Fees: In a case in which the husband unsuccessfully sought to modify a maintenance agreement, the District Court awarded fees to the wife in the amount of $750. The wife contended that the court erred by failing to hold a hearing to consider all the factors in Swenson v. Janke, 274 M 354, 908 P2d 678 (1995), in determining attorney fees. However, the Supreme Court affirmed. There was no contract provision regarding fees at issue, so the District Court properly exercised its discretion after considering the resources of the parties. The Supreme Court also noted that after initially awarding the fees, the District Court added that if a hearing on costs and attorney fees was necessary, the parties were to advise the court, but the wife failed to request a hearing. Thus, the Supreme Court declined to hold the District Court in error for failing to hold a hearing or failing to consider the Swenson factors. In re Marriage of Olson, 2005 MT 57, 326 M 224, 108 P3d 493 (2005).

No Abuse of Discretion in Requiring That Each Party in Dissolution Pay Its Own Attorney Fees: The District Court ordered that each party to a dissolution pay its own attorney fees. The wife appealed, arguing that she satisfied the factors of necessity, reasonableness, and production of competent evidence to justify an award. The husband asserted that the wife did not present the required evidence. The Supreme Court was not persuaded by the wife's argument and held that, absent an abuse of discretion, the District Court did not err in requiring each party to pay its own attorney fees. In re Marriage of Swanson, 2004 MT 124, 321 M 250, 90 P3d 418 (2004), following In re Marriage of Harper, 1999 MT 321, 297 M 290, 994 P2d 1 (1999).

Court Discretion in Award of Attorney Fees in Marriage Dissolution: This section grants a District Court discretion to award attorney fees in a marriage dissolution action after considering the financial resources of both parties, and unless the court abuses its discretion, the award will not be disturbed. In a case in which both parties incurred substantial legal fees and neither had the income or resources to pay its own fees, much less those of the other party, the trial court did not abuse its discretion in failing to award attorney fees. In re Marriage of Lee, 282 M 410, 938 P2d 650, 54 St. Rep. 409 (1997), following In re Marriage of Walls, 278 M 413, 925 P2d 483, 53 St. Rep. 974 (1996). See also In re Marriage of Harper, 1999 MT 321, 297 M 290, 994 P2d 1, 56 St. Rep. 1280 (1999), and In re Marriage of Caras, 2012 MT 25, 364 Mont. 32, 270 P.3d 48.

Unequal Attorney Fees Incurred by Parties — Payment From Marital Estate Abuse of Discretion: Linda incurred less than $8,000 worth of attorney fees and Alan incurred over $11,000 worth of fees in the dissolution of their marriage. The District Court noted that the amounts incurred were "roughly equal" and therefore required that both party's fees be paid from the marital estate. The Supreme Court held that if the amounts were consolidated and then divided, each party would be required to pay $9,500 in fees, or an award of $1,500 to Alan. The Supreme Court noted that payment of each party's fees from the marital estate had been upheld in In re Marriage of Cole, 224 M 207, 729 P2d 1276 (1986), but in that case, the District Court specifically found that the wife was without means to pay her own fees. Because the District Court did not find that Alan was without means to pay all of his fees, as required by this section, the Supreme Court held that the District Court abused its discretion in allocating the fees to the marital estate. In re Marriage of Meeks, 276 M 237, 915 P2d 831, 53 St. Rep. 365 (1996).

Not Error to Award Wife Attorney Fees Despite Her Receiving $12,000 in Property Settlement: On appeal, the husband argued that the lower court erred in awarding the wife costs and attorney fees in light of the fact that she had received $12,000 as part of the property settlement. The Supreme Court held that the lower court had not abused its discretion in that it found that she did not have sufficient resources to pay and that the modified settlement gave the husband immediate access to $42,000 in his thrift plan. In re Marriage of Brownell, 263 M 78, 865 P2d 307, 50 St. Rep. 1714 (1993).

Trial Court to Consider Financial Resources of the Parties: Because the wife's petition to hold the husband in contempt of the dissolution decree was so unfounded as to constitute harassment, the trial court awarded attorney fees to the husband. The Supreme Court stated that 40-4-110 does not give trial court the authority to grant attorney fees without considering the financial resources of the parties. The court nevertheless upheld the award of attorney fees, stating that the trial court did not abuse its discretion under general powers of equity. In re Marriage of Hereford, 223 M 31, 723 P2d 960, 43 St. Rep. 1508 (1986).

Award of Attorney Fees Largely Discretionary: The award of attorney fees under this section is largely discretionary and will not be disturbed in the absence of an abuse of that discretion. In re Marriage of Swanson, 220 M 490, 716 P2d 219, 43 St. Rep. 551 (1986), followed in In re Marriage of Sullivan, 258 M 531, 853 P2d 1194, 50 St. Rep. 648 (1993), and In re Marriage of DeCosse, 282 M 212, 936 P2d 821, 54 St. Rep. 318 (1997). See also In re Marriage of Garner, 239 M 485, 781 P2d 1125, 46 St. Rep. 1852 (1989).

Frivolous Cross-Petition — Basis for Award of Fees and Costs: It was proper under this statute to award fees and costs to the petitioner in a dissolution action when the court found the respondent's cross-petition to be frivolous. In re Marriage of Youngs, 215 M 330, 698 P2d 404, 42 St. Rep. 405 (1985).

Award of Attorney Fees Not Mandatory: After dissolution of his marriage, husband petitioned for and was granted a reduction in his child support amount. Among the alleged errors raised by wife upon appeal was her contention that the trial court erred in failing to award her attorney fees and costs. The Supreme Court held that the trial court erred in finding husband's change of circumstances was permanent and remanded the cause for further proceedings. As to the question of attorney fees and costs, an award is not mandatory under this statute. As the cause was remanded for other reasons, the trial court, in its discretion, may determine whether wife is entitled to attorney fees in light of the further record in the case. In re Marriage of Carlson, 214 M 209, 693 P2d 496, 41 St. Rep. 2419 (1984), followed in In re Support of Rockman, 217 M 498, 705 P2d 590, 42 St. Rep. 1323 (1985), and In re Marriage of Jensen, 223 M 434, 727 P2d 512, 43 St. Rep. 1891 (1986).

Abuse of Discretion — Wife Not Entitled to Attorney Fees: The District Court abused its discretion in awarding attorney fees to the wife when the record indicated, among other things, that the husband's income equaled his expenses but the wife took home at least $250 a month more than she spent. In re Marriage of Vert, 210 M 24, 680 P2d 587, 41 St. Rep. 895 (1984).

Failure to Value Property as Affecting Award: Where the trial court failed to properly value and apportion the parties' property in a dissolution proceeding, it was probable that it failed to consider the financial resources of the parties before awarding attorney fees. Therefore, the Supreme Court vacated the award and left the determination of an award with the discretion of the trial court pending further proceedings. In re Marriage of McGill, 187 M 187, 609 P2d 278 (1980).

Discretion of Court to Award Fees: When the court was well aware of the parties' financial situation, it did not abuse its discretion in awarding reasonable attorney fees based on necessity. Bailey v. Bailey, 184 M 418, 603 P2d 259 (1979), citing Houtchens v. Houtchens, 181 M 70, 592 P2d 158 (1979).

Postjudgment Powers of Court: A District Court has power to award necessary maintenance, child support, and suit money after judgment in a marital dissolution case during the pendency of appeal. To hold otherwise would leave a hiatus in the remedial power of the court that could cause unmeasured hardship and distress. State ex rel. Kaasa v. District Court, 177 M 547, 582 P2d 772 (1978).

ATTORNEY FEES NOT AWARDED

Attorney Fees Denied — Lack of Evidence: The District Court did not abuse its discretion by denying a husband attorney fees from his dissolution proceeding, because the husband failed to present evidence that he needed help paying his attorney or evidence as to the reasonableness of the attorney fees. In re Marriage of Estes, 2017 MT 67, 387 Mont. 113, 391 P.3d 752.

Dissolution Agreement Controlling Over Statute — Entitlement to Attorney Fees Not Raised on Cross-Appeal: In a divorce proceeding, the husband and wife entered a dissolution agreement stating that each was entitled to half of the husband's pension and that each should receive a portion of the scheduled benefit payment once the payments began. The parties subsequently disagreed on how to determine their respective shares of each payment to reflect an equal division of the pension at the time of dissolution. The District Court ruled in favor of the wife; however, it did not award attorney fees as required under the dissolution agreement. On appeal, the Supreme Court held that the settlement agreement controlled over the statute and that the wife, as the prevailing party, was technically entitled to fees. However, the Supreme Court found that because the wife did not raise the issue in a cross-appeal, the court therefore could not consider whether she was entitled to attorney fees incurred in the District Court. The Supreme Court awarded fees to the wife for the costs of the appeal. In re Marriage of Cadena v. Fries, 2015 MT 90, 378 Mont. 409, 346 P.3d 347.

No Award of Attorney Fees to Litigate Conscionability of Settlement Agreement When Agreement Provides for Fees Only for Default or Enforcement: The wife appealed a settlement agreement on various grounds that the agreement was unconscionable. The husband prevailed on the claims and then sought attorney fees pursuant to the agreement, which provided for the prevailing party's attorney fees if either party defaulted or if one party was required to enforce the agreement. The District Court denied the husband's request for fees, and the husband appealed, but the Supreme Court affirmed. The settlement agreement language was intended to apply in an action requiring a party to comply with the agreement once it was adopted by the District Court, but did not apply in an action to determine the conscionability of the agreement. Despite the husband's characterization of the motion as one for enforcement, the wife could not have defaulted, as contemplated by the attorney fee provision, before the District Court resolved the dispute over whether the agreement was conscionable. In re Marriage of Gorton, 2008 MT 123, 342 M 537, 182 P3d 746 (2008).

Parent's Proposed Move Constituting Change in Circumstances as Matter of Law — Remand to Determine Whether Amendment in Best Interests of Children and Whether to Award Attorney Fees: After a mediated parenting plan provided for equal parenting and residential time for both parents who resided in the same town, the mother notified the court that she would be moving to another town 90 miles away. She proposed an amendment to the parenting plan that would give primary residential custody to her and allow the children to stay with the father every other weekend. The father opposed the mother's amendment and submitted his own proposed plan. After hearing the mother's proposal and before the father presented his case, the District Court held that insufficient evidence supported changing the parenting plan and subsequently rejected both proposed amendments. A guardian ad litem was appointed to secure recommendations to resolve the parenting problem, implement visitation, and initially establish workable guidelines and visitation schedules. The District Court again rejected the guardian's proposed changes, reasoning that the guardian's proposal would have resulted in a change of living arrangements but cited no substantial change in circumstances not considered by the court at the time of the previous order. The mother moved to adopt the guardian's recommendations, and the father responded and requested attorney fees and costs. The court denied the mother's motion and awarded attorney fees and costs to the father, and the mother appealed. The Supreme Court held that as a matter of law and based on the facts that arose since adoption of the original parenting plan, a change in the children's circumstances occurred and that the District Court erred in concluding otherwise. The case was remanded for the District Court's determination of whether an amendment to the parenting plan was in the children's best interests and ultimately whether and how the plan should be amended. The award of fees and costs to the father was vacated because the decision on remand would necessarily factor such an award into the subsequent decision. In re Marriage of Clay & Hagedorn, 2007 MT 228, 339 M 147, 168 P3d 665 (2007).

Denial of Claim for Attorney Fees Pursuant to Dissolution Agreement When Sought for First Time on Appeal: The father sought to modify a parenting plan, but the District Court found insufficient changed circumstances to warrant modification of the plan. The mother asserted that the petition for modification was vexatious harassment, and requested attorney fees pursuant to 40-4-219. The District Court disagreed and denied her request for attorney fees. The father subsequently appealed, but the mother again prevailed; except for purposes of the appeal, she requested fees under the terms of the dissolution agreement pursuant to 40-4-201. The Supreme Court noted that at no time did the mother petition the District Court for attorney fees pursuant to a provision in the agreement, as she did on appeal. The Supreme Court declined to consider the new legal theory raised for the first time on appeal, and denied the request for attorney fees. In re Marriage of Oehlke, 2002 MT 79, 309 M 254, 46 P3d 49 (2002).

Neither Party Better Able to Pay Attorney Fees:

Former wife was not in as strong a financial position as former husband, but neither was in a better position than the other to pay her attorney fees, and he had little discretionary income. Therefore, the District Court did not abuse its discretion in denying her attorney fees in her child support modification proceeding. In re Marriage of Dishon, 277 M 501, 922 P2d 1186, 53 St. Rep. 816 (1996).

Since neither party was better able to pay attorney fees than the other, each was properly held responsible for his or her own attorney fees. In re Marriage of Hall, 228 M 36, 740 P2d 684, 44 St. Rep. 1321 (1987).

Parties With Negligible Financial Resources and Husband With Deteriorating Health and Employment Prospects — Fees for Wife Refused: The District Court properly refused to order the husband to pay the wife's attorney fees in view of each party's well-documented negligible financial resources and the husband's overall poor and deteriorating health and employment prospects. In re Marriage of Bradshaw, 270 M 222, 891 P2d 506, 52 St. Rep. 154 (1995).

Failure to Request Attorney Fees in Original Petition for Modification as Precluding Issue on Appeal: A separation agreement incorporated into an original dissolution decree provided for the award of attorney fees for the successful party as a cost of suit. However, when attorney fees were never requested as a form of relief or raised in the pleadings in the original petition for modification, and thus never addressed by the trial court, consideration of the issue was precluded on appeal to the Supreme Court. In re Marriage of Hill, 265 M 52, 874 P2d 705, 51 St. Rep. 396 (1994), followed in In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995).

Each Party to Pay Own Attorney Fees: Husband and wife each asked the court to hold the other in contempt, and each alleged failure to pay the other under a settlement agreement. The court refused both contempt requests and directed each party to pay the other what was owed, offsetting husband's $3,250 debt against wife's $4,200 debt. The settlement agreement provided that the successful party in an enforcement action was entitled to an attorney fee award. Neither party was totally successful, thus the lower court properly held that each party should pay its own attorney fees. In re Marriage of Hahn, 263 M 315, 868 P2d 599, 51 St. Rep. 73 (1994), followed in In re Marriage of Pfennigs, 1999 MT 250, 296 M 242, 989 M 327, 56 St. Rep. 981 (1999). Marriage of Pfennigs was followed in In re Marriage of Winters, 2004 MT 82, 320 M 459, 87 P3d 1005 (2004).

Attorney Fee Provision in Separation Agreement — Fees Not Granted: More than 2 years after the dissolution order, Wise brought a motion to set aside the property settlement agreement drawn up by her attorney, contending that her husband had committed fraud against her and the court in that he told her that his work pension was not a marital asset. The agreement also contained a provision that if either party initiated an action to interpret or enforce the agreement, the successful party would be entitled to attorney fees. The Supreme Court held that fraud upon the court had not been committed but that the husband was not entitled to attorney fees because the action did not concern interpretation or enforcement of the agreement. Wise v. Nirider, 261 M 310, 862 P2d 1128, 50 St. Rep. 1334 (1993).

Sufficient Assets — No Demonstration of Inability to Pay Own Fees: Thomas and Dorothy were married in 1987 after signing a premarital agreement at Dorothy's request. Before they were married, Dorothy raised cattle on leased land. Later, as a condition of remaining married, Thomas insisted that Dorothy give up the leased land, which she did. Dorothy was subsequently forced to sell her cattle. The parties were then divorced. Dorothy claimed that the District Court erred in refusing to award her attorney fees and costs. The Supreme Court held that Dorothy had not demonstrated an inability to pay those fees and costs and, according to the District Court findings, had sufficient assets to pay her own fees. The Supreme Court therefore did not consider

Dorothy's arguments that the District Court had jurisdiction to award fees even without specific request to do so. In re Marriage of Stout, 261 M 10, 861 P2d 856, 50 St. Rep. 1119 (1993).

Grandparents Not Liable for Son's Share of Attorney Fees: In a dissolution action, the lower court appointed an attorney to represent the interests of the children. Subsequently, the children's grandparents attempted to intervene in the action and obtain custody. The lower court denied their motion. In its final order, the court ordered the grandparents to pay their son's share of the children's attorney fees on the basis that the son had "no intention of doing so". The Supreme Court held that there is no legal basis in this section, which was relied on by the lower court, to require the grandparents to pay their son's share. However, the Supreme Court refused to address whether the lower court could have required payment under 40-4-205 because the order was not based on that statute. In re Custody of R.R.K., R.D.K., & L.M.K., 260 M 191, 859 P2d 998, 50 St. Rep. 1002 (1993).

Litigation Prolonged by Both Parties — Fees Not Awarded: Although a premarital agreement provided that attorney fees be awarded to the party successfully defending the agreement, the District Court properly exercised its discretion in denying fees to both parties in light of the fact that litigation was unnecessarily prolonged by both parties. In re Marriage of Johnston & Turrin, 255 M 421, 843 P2d 760, 49 St. Rep. 1047 (1992).

No Prevailing Party — No Attorney Fees Awarded: Because each party in a marriage dissolution case "won" on two issues, there was no "prevailing party" and the trial court properly ordered each party to pay its own costs and attorney fees. In re Marriage of Hebert, 255 M 69, 840 P2d 584, 49 St. Rep. 902 (1992).

Failure to Cooperate and Accept Court Rulings: The District Court did not abuse its discretion in failing to award attorney fees to wife because she: (1) had failed to cooperate with husband's attempts to informally provide information; (2) sought numerous continuances and extensions; and (3) was unwilling to accept the rulings of the court. In re Marriage of Gallagher, 248 M 100, 809 P2d 579, 48 St. Rep. 346 (1991).

Future Earnings Relevant to Question of Awarding Attorney Fees: The Supreme Court ruled that the trial court did not abuse its discretion in refusing to award the wife attorney fees on the basis that upon graduation from law school, her income would substantially increase. In re Marriage of Owen, 244 M 306, 797 P2d 226, 47 St. Rep. 1634 (1990).

Error in Valuing Property and Awarding Temporary Maintenance — Attorney Fees to Be Considered on Remand: The District Court denied wife's request for attorney fees after concluding she had sufficient property, cash, and short-term assistance to pay the fees herself. However, because the trial court incorrectly valued the marital estate and erred in awarding temporary maintenance, the Supreme Court ordered a reexamination of the fee question on remand in light of a new property distribution and maintenance award. In re Marriage of Rudio & Harlan, 238 M 485, 778 P2d 410, 46 St. Rep. 1437 (1989).

Court-Appointed Counsel for Indigent Party in Civil Proceeding — No Requirement: There is no constitutional or statutory requirement that an indigent party be provided with court-appointed counsel in a civil proceeding. In re Adoption of K.L.J.K., 224 M 418, 730 P2d 1135, 43 St. Rep. 2297 (1986).

Attorney Fees Properly Denied: The husband should not be ordered to pay the wife's attorney fees on appeal. The parties were each ordered to pay their own attorney fees in the action before the trial court, and the husband made a valid legal argument on one of his issues. In re Marriage of Reich, 222 M 192, 720 P2d 286, 43 St. Rep. 1167 (1986).

Removal of Child From State — Frivolous Appeal: The mother, custodian of the couple's child, moved to North Carolina without informing the District Court as required by the divorce decree. The father brought suit for change of custody, which was denied. The mother contended his appeal was frivolous and sought attorney fees. The Supreme Court held that neither of the mother's contentions were proper, as she had forced the father to initiate the litigation by moving to North Carolina without first getting a change in the visitation privileges. In re Marriage of Winn, 190 M 73, 618 P2d 870, 37 St. Rep. 1734 (1980).

Attorney Fees Not Awarded — Parties to Bear Own Costs: It was not an abuse of discretion for the District Court to determine that each party should bear his own legal costs after it had considered the financial resources of both parties. In re Marriage of Owen, 187 M 214, 609 P2d 292 (1980). See also In re Marriage of Voelkel, 226 M 143, 734 P2d 217, 44 St. Rep. 538 (1987).

SHOWING OF NECESSITY

Same-Sex Long-Term Partners — Common-Law Marriage Established: The petitioner and the respondent were a same-sex couple who had been in a relationship for 2 decades, during which their children were born. After the respondent moved out of the family home, the petitioner filed a petition for dissolution seeking child support and maintenance. Over the respondent's objections that the relationship did not constitute a common-law marriage, the District Court ruled that the parties had a common-law marriage and awarded the petitioner child support and attorney fees. The respondent appealed, arguing that the District Court had erred in concluding that the parties had entered into a common-law marriage. The Supreme Court affirmed, finding that same-sex couples can enter into common-law marriages and that the petitioner had established the elements for a common-law marriage. In re J.K.N.A., 2019 MT 286, 398 Mont. 72, 454 P.3d 642.

Improper Award of Attorney Fees Absent Findings of Necessity: Following resolution of a contempt of court case related to insurance and the payment of medical costs for the parties' children, the District Court awarded attorney fees to the wife. However, the court neglected to consider the parties' financial resources, considered no evidence regarding the amount of the fees, and made no findings related to reasonableness of the fees. After finding that this section was the applicable statute rather than 40-5-824, which relates to expedited support enforcement and which this case did not address, the Supreme Court reversed the award because the District Court did not properly consider the necessity for the fees. In re Marriage of Crone, 2003 MT 238, 317 M 256, 77 P3d 167 (2003). See also In re Marriage of Pfeifer, 282 M 461, 938 P2d 684 (1997).

Remand for Consideration of Unresolved Status of Assignment of Interest in Family Home and Issue of Fees Related to Husband's Criminal Representation: The husband retained an attorney to represent him on criminal charges of marital abuse, and the husband assigned a one-half interest in the jointly owned family home as security for payment of the attorney fees. However, because of the parties' pending dissolution proceeding, a restraining order was in effect restricting the parties from encumbering or transferring any property except in the usual course of business or for the necessities of life. The District Court hearing the dissolution action failed to consider either the assignment or the fees incurred by the husband in the criminal action and held that each party was responsible for attorney fees related to the dissolution. The case was remanded, and the District Court was directed to determine the validity of the assignment of the husband's interest in the family home and whether the husband's criminal fees were payable from the marital estate. In re Petition of Fenzau, 2002 MT 197, 311 M 163, 54 P3d 43 (2002).

Appropriateness of Award of Attorney Fees — Three-Pronged Approach — Facts Supporting Finding of Necessity: When determining whether an award of attorney fees was appropriate pursuant to this section, the Supreme Court uses a three-pronged approach (see In re Marriage of Pfeifer, 282 M 461, 938 P2d 684 (1997)). An award of attorney fees must be based on necessity, reasonable, and based on competent evidence. A finding of necessity must be supported by factual findings, and facts that have been traditionally considered in determining necessity are: (1) the requesting party's inability to pay attorney fees; (2) the other party's ability to pay attorney fees; and (3) the relative financial positions of the parties. After examining the financial conditions of the parties in detail, the District Court awarded the wife her attorney fees and costs of $26,561.88. The husband appealed, arguing not that he couldn't afford to pay the fees and costs, but rather asserting that the court should have set forth in more detail its reasons why he should pay. The Supreme Court noted that although it would be better practice for a District Court to better delineate its factual reasons for awarding one party its fees, the District Court did not abuse its discretion in this case, having found that the husband's economic situation was much better than the wife's, his annual earnings were five times that of the wife's, and he had the ability to acquire substantial assets while the wife did not. In re Marriage of Schmieding, 2000 MT 237, 301 M 336, 9 P3d 52, 57 St. Rep. 983 (2000).

Award of Attorney Fees Improper Absent Evidence of Necessity: The District Court improperly awarded attorney fees and costs when it did not hear any evidence concerning the necessity for or reasonableness of the award. In re Marriage of Cox, 266 M 67, 878 P2d 903, 51 St. Rep. 672 (1994).

Wife's Necessity for Award of Attorney Fees: The Supreme Court found that the trial court was adequately apprised of the relative financial means of the parties and that sufficient evidence supported the court's finding of wife's necessity for the award of reasonable attorney fees. Houtchens v. Houtchens, 181 M 70, 592 P2d 158 (1979).

Necessity Shown: Respondent testified inter alia that she had approximately $12 in her bank account at the time of trial and was working as a cosmetic products saleslady with an income of $100 to $125 per month, which evidences that necessity was shown and that the District Court did not abuse its discretion by requiring appellant to assist in the payment of attorney fees.

Kaasa v. Kaasa, 181 M 18, 591 P2d 1110 (1979). See also Wilson v. Bean, 192 M 426, 628 P2d 287, 38 St. Rep. 751 (1981).

Showing of Necessity Required:

A showing of necessity is a condition precedent to exercise of the court's discretion to grant attorney's fees. Brown v. Brown, 179 M 417, 587 P2d 361 (1978). See also In re Marriage of Forsman, 229 M 411, 747 P2d 861, 44 St. Rep. 2093 (1987), In re Marriage of Welch/Phillips, 257 M 222, 848 P2d 500, 50 St. Rep. 240 (1993), In re Marriage of Smith, 264 M 306, 871 P2d 884, 51 St. Rep. 277 (1994), and In re Marriage of Gingerich/Stroop, 269 M 161, 887 P2d 714, 51 St. Rep. 1417 (1994).

A condition precedent to court exercising its discretion to grant attorney's fees is a showing of financial necessity; provision in decree awarding wife attorney's fees was stricken when wife failed to show necessity of award, and assets of marriage were several hundred thousand dollars. Whitman v. Whitman, 164 M 124, 519 P2d 966 (1974).

Law Review Articles

Attorney Fees as Necessaries of Life: Expanding a Domestic Violence Victim's Access to Safety and Justice, Zielinski, 60 Mont. L. Rev. 201 (1999).

Counsel Fees in Modification of Decree, Corontzos, 20 Mont. L. Rev. 248 (1959).

40-4-121. Temporary order for maintenance or support, temporary injunction, or temporary restraining order.

Commissioners' Note

Subsection (a) [(1)] permits motions for temporary maintenance and temporary support in three kinds of proceedings, (1) dissolution of marriage; (2) legal separation; and (3) independent proceedings for maintenance, support, or property disposition following an *ex parte* dissolution of the marriage granted in another, earlier proceeding. Motions for temporary custody are covered by Section 403 [40-4-213].

Subsection (b) [(2)] is intended to permit the court to restrain either spouse or a third party, including a bank or other institutional holder of property, from dealing with the property in the manner specified, or to take other action which might involve serious mental or physical harm to a party or to one of the children. It also is intended to authorize the court to prevent the removal of a child from its jurisdiction, and to grant any other injunctive relief necessary to proper judicial functioning under the Act. In some states, the local rules of practice may require that third parties be made parties to the proceeding in order to accomplish this goal.

Subsection (c) [(3)] authorizes a limited *ex parte* practice which permits the court, upon a showing that irreparable injury would otherwise result, to issue a temporary restraining order without notice to the other party. The order becomes effective upon service on the other party and will remain effective until discharged by the court. It is anticipated that an early hearing date will be set on an order to determine whether the temporary restraining order should be continued or made permanent so that the other party may be heard as soon as possible on the merits. A provision similar to subsections (b) and (c) appears in the California Family Law Act of 1969 (California Civil Code, section 4359, as amended, 1970).

Each state should insert its own time limit in subsection (d) [(4)], bearing in mind that the matter should be handled with dispatch and that the court may make an order shortening time on a proper showing.

Subsection (f) (1) [(6) (a)] is intended to make clear that the amount established for temporary support or maintenance will not prejudice the parties at later hearings held to determine the amount of permanent support or maintenance. If the parties and their attorneys are able to agree on amounts for temporary payments without having to worry that those amounts will establish a precedent of need or ability to pay at later hearings, much adversary maneuvering and its consequent result of suspicion and bitterness may be avoided.

Compiler's Comments

2021 Amendment: Chapter 131 in (2)(a) substituted current language regarding a temporary economic restraining order pursuant to 40-4-126 for "restraining a person from transferring, encumbering, concealing, or otherwise disposing of any property, except in the usual course of business or for the necessities of life, and if so restrained, requiring the person to notify the moving party of any proposed extraordinary expenditures made after the order is issued"; deleted former (2)(b) that read: "(b) restraining both parties from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability coverage held for the benefit of a party or a child of a party for whom support may be ordered"; deleted former (3) (see 2021 Session Law for former text); and made minor changes in style. Amendment effective October 1, 2021.

2013 Amendment: Chapter 88 in (5) extended period of temporary restraining order from 20 to 21 days; in (6) extended deadline for filing response from 20 to 21 days; and inserted (11) requiring that qualified domestic relations orders be sealed. Amendment effective October 1, 2013.

Applicability: Section 11, Ch. 88, L. 2013, provided: "[This act] applies to proceedings filed after [the effective date of this act]." Effective October 1, 2013.

2003 Amendment: Chapter 309 in (1) in second and eighth sentences near beginning deleted reference to subsection (12) of 40-5-201; in (6) inserted first sentence providing that a party against whom a temporary injunction is sought must be served with notice and a copy of the motion and is entitled to a hearing on the motion; inserted (7)(a) requiring the court to inform the parties that the injunction might contain limits on firearms rights or may subject them to laws that limit those rights; and made minor changes in style. Amendment effective October 1, 2003.

1997 Amendments: Chapter 255 inserted (2)(b) restraining both parties from disposing of certain insurance and other coverage held for the benefit of a party or a child of a party; inserted (3) establishing conditions of the temporary restraining order; and made minor changes in style.

Chapter 256 in (1), at end of first sentence, inserted "or a temporary family support order", inserted second and third sentences regarding separate designation of support and maintenance in the family support order, in fourth sentence, near beginning after "requested", inserted "a list of marital estate liabilities, a statement of sources of income of the parties and of a child of the marriage entitled to support, and, in the case of a motion for a temporary family support order, a proposal designating the party responsible for paying each liability", and inserted fifth through eighth sentences setting out provisions of the temporary family support order; in (2), near beginning of introductory clause after "maintenance", substituted "temporary support of a child, or a temporary family support order" for "or support"; in (8), near beginning after "maintenance", substituted "temporary child support, or temporary family support" for "or support"; in (9)(b), after "dismissed", inserted "and, in the case of a temporary family support order, upon entry of the decree of dissolution"; and made minor changes in style.

Temporary Order: Section 2, Ch. 484, L. 1997, provided: "A temporary order or temporary injunction issued under 40-4-121 before October 1, 1995, continues in full force and effect as provided in the order or injunction." Effective July 1, 1997.

Retroactive Applicability: Section 12, Ch. 484, L. 1997, provided: "[Section 2] applies retroactively to October 1, 1995."

1995 Amendment: Chapter 350 inserted (2)(g) regarding relief available under Title 40, chapter 15; deleted (3)(a)(i) that read: "(a)(i) alleging physical abuse, harm, or bodily injury against the petitioner by a family member or partner or the threat of physical abuse, harm, or bodily injury against the petitioner by a family member or partner that causes the petitioner to reasonably believe that the offender has the present ability to execute the threat"; deleted (3)(a)(ii) that read: "(ii) alleging a violation of 45-5-220"; at end of (3) deleted third sentence that read: "Persons who may request relief under this subsection include family members, partners, and persons alleging a violation of 45-5-220"; deleted former (7) that read: "(7) If the court determines, on the basis of a party's history of violence and the testimony presented at the hearing or on the basis of credible evidence that a party has violated 45-5-220, that the other party needs permanent protection or may otherwise suffer permanent injury or harm, the court may order that the injunction be effective permanently"; deleted former (8) that read: "(8) A permanent injunction may be issued by a district court with jurisdiction over the parties to a dissolution proceeding upon presentation of evidence of a party's history of violence showing that the other party may suffer permanent injury or harm if a permanent injunction is not issued. A permanent injunction may also be issued enjoining a party from stalking upon presentation of credible evidence that the party has violated 45-5-220 if the court determines that the stalked party needs permanent protection"; deleted former (9) that read: "(9) Except when the alleged conduct to be restrained is a violation of 45-5-220, restraining orders issued under this section may restrain the petitioner's actions only if the court finds that the petitioner, in addition to the respondent, has engaged in abusive or assaultive behavior as described by subsection (3)(a)"; in (8), after "injunction", substituted "entered pursuant to Title 40, chapter 15, or this section" for "or permanent injunction"; in (8)(a), at end, deleted "or order under Title 27, chapter 19, part 3, as appropriate"; deleted (13) that read: "(13) As used in this section, the following definitions apply:

(a) "Bodily injury" means physical pain, illness, or any impairment of physical condition and includes mental illness or impairment.

(b) "Family member" means mothers, fathers, children, brothers, sisters, and other past or present family members of a household. These relationships include relationships created by adoption and remarriage, including stepchildren, stepparents, and adoptive children and parents. These relationships continue regardless of the ages of the parties and whether the parties reside in the same household.

(c) "Partner" means spouses, former spouses, and persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex"; and made minor changes in style.

Severability: Section 31, Ch. 350, L. 1995, was a severability clause.

1993 Amendments: Chapter 292 in (2)(b), at end, inserted reference to offense of stalking; inserted (3)(a)(ii) concerning alleged violation of 45-5-220; in (3)(b), at end, inserted reference to persons alleging violation of 45-5-220; in (11)(c) inserted reference to 45-5-220; and made minor changes in style. Amendment effective April 9, 1993.

Chapter 425 in (2)(b), at end, substituted "family member" for "child"; inserted (2)(e) authorizing court to require counseling; in (3)(a)(i), in two places after "by a family", deleted "or household" and after "member" inserted "or partner"; in (3)(b), near beginning of second sentence before "injunction", substituted "temporary" for "preliminary" and at end inserted "as appropriate" and at end of last sentence substituted "family members, partners" for "spouses, former spouses, and persons cohabiting or who have cohabited with the other party within 1 year immediately preceding the filing of the petition"; inserted (6) requiring court to determine if cause exists to continue injunction; inserted (7) and (8) authorizing court to issue permanent injunction; inserted (9) concerning restraining of petitioner; in (11), at end, inserted "or permanent injunction"; deleted former (11)(a) that read: "does not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding"; in (11)(a), near beginning after "modified", deleted "before final decree" and at end inserted "or order under Title 27, chapter 19, part 3, as appropriate"; in (11)(b), after "court or", deleted "when a final decree is entered or" and after "petition" deleted "for dissolution or legal separation"; inserted (13) defining bodily injury, family member, and partner; and made minor changes in style.

1991 Amendment: In (3)(a), after "household member", inserted "or the threat of physical abuse, harm, or bodily injury against the petitioner by a family or household member that causes the petitioner to reasonably believe that the offender has the present ability to execute the threat".

1985 Amendment: In (3)(a), inserted "harm, or bodily injury" and substituted "family or household member" for "spouse"; in (3)(b), after "requesting", deleted "injunctive", and inserted last sentence listing persons who may request relief; in (4) inserted "for a period not to exceed 20 days"; in (7)(c), after "terminates", inserted "upon order of the court or" and made minor changes in phraseology; and inserted (7)(d) requiring notice that violation is criminal offense; and inserted (8) requiring withholding of notice of petitioner's new residence.

1981 Amendment: Inserted subsection (3) relating to preliminary injunction for physical abuse.

Preamble: The preamble to HB 405 (Ch. 180, L. 1981) provided: "WHEREAS, former Governor Judge appointed a task force to recommend ways in which spouse abuse could be stopped; and

WHEREAS, spouse abuse weakens the dignity and integrity of the family unit, and the state therefore has a substantial interest in aiding spouse abuse victims through the enforcement of state laws; and

WHEREAS, the task force recognized that the state's current laws on obtaining injunctions and restraining orders are not providing adequate protection to some spouse abuse victims and their families.

THEREFORE, it is the intent of this act to grant spouse abuse victims extraordinary relief in the form of preliminary injunctions and temporary restraining orders."

Source: Section 304, Uniform Marriage and Divorce Act.

Montana Changes: See 1981 and 1985 amendment notes.

Case Notes

Father's Income From Parent Properly Characterized as Gift Income — Future Payments Considered Gifts. In re Marriage of Miller, 2022 MT 110, 409 Mont. 29, 511 P.3d 307.

TRO in Dissolution Proceedings Never Served — Change of Beneficiary After Deadline for Service Expired — Change of Beneficiary Allowed: Four years before his death, the decedent filed a petition for dissolution of marriage and a temporary restraining order (TRO) was issued. Under the TRO, the decedent could not change the beneficiary of his IRA; however, he never had his spouse served with the TRO. One month before his death, the decedent amended the beneficiary of his IRA to be his children instead of his wife. The wife made a claim against the estate for her elective share of the IRA. The District Court granted summary judgment in favor of the estate, ruling that although the decedent violated the TRO, equity would not support voiding the change of the beneficiary. On appeal, the Supreme Court affirmed, but it disagreed with the District Court's reasoning. Instead, the Supreme Court held the decedent's failure to serve the dissolution papers on the wife within 3 years rendered the TRO ineffective. Therefore, the Supreme Court reasoned, nothing prohibited the decedent from amending his IRA beneficiary. In re Estate of Corrigan, 2014 MT 337, 377 Mont. 364, 341 P.3d 623.

Past Due Maintenance Proper Retroactive to Petition for Family Support: After separating, a wife filed for monthly interim maintenance. Although the court did not rule on the motion for temporary support, the parties entered into an informal agreement. After a year, the husband diminished the informal support, and at trial, the wife requested the difference retroactive to the month that the husband unilaterally diminished support. The husband argued that a local rule deemed the motion for temporary support to be denied after 45 days. The Supreme Court held that the District Court did not err in awarding the wife the past due maintenance because the court had statutory authority to award maintenance retroactive to the date of the motion at any time during the proceeding. In re Marriage of Crowley, 2014 MT 42, 374 Mont. 48, 318 P.3d 1031.

Change in Retirement Plan Beneficiary Covered by Temporary Restraining Order Pending Marriage Dissolution Proceedings — Attempted Change in Beneficiary Invalid: The petitioner was denied benefits under her deceased husband's Sheriffs' Retirement System (SRS) plan because he had dropped her as a beneficiary and added his minor children while marriage dissolution proceedings were pending. At the time the husband made the change, both parties were subject to a temporary restraining order (TRO) that, in part, prohibited either party from changing the beneficiaries of insurance or other coverage held for the benefit of a party. The husband made the change without the consent of the petitioner or the court, in violation of the TRO. The Supreme Court held that a TRO issued under 40-4-121 that restricts changes of beneficiaries of insurance or other coverage applies to a change of beneficiary under the SRS and that the husband's attempted change was therefore invalid as a violation of statute. Briese v. Mont. Pub. Employees' Retirement Bd., 2012 MT 192, 366 Mont. 148, 285 P.3d 550. See also Volk v. Goeser, 2016 MT 61, 382 Mont. 382, 367 P.3d 378.

Order Requiring Retroactive Maintenance Improper: The District Court ordered payment of maintenance retroactively to more than 3 years prior to commencement of the parties' dissolution action. The Supreme Court reversed. Under this section, temporary maintenance may be awarded retroactive to the time that a dissolution petition is filed, but there is no statutory authority that allows a maintenance award retroactive to the time prior to filing of a dissolution petition. In re Marriage of Rudolf, 2007 MT 178, 338 M 226, 164 P3d 907 (2007). See also In re Marriage of Lindeman, 140 SW 3d 266 (Mo. App. S.D. 2004). However, see In re Marriage of Crowley, 2014 MT 42, 374 Mont. 48, 318 P.3d 1031, holding that maintenance retroactive to a petition for family support was proper.

Dismissal, Without Hearing, of Order Supported by Allegations and Fears of Child Abuse: A mother obtained two temporary orders of protection from two different judges after her child complained about sexual and physical abuse by the father. The mother and father were separated. The first judge's dismissal of both orders without granting the mother an evidentiary hearing was a manifest abuse of discretion. The judge had twice ordered the father to obtain a mental health evaluation and a sexual offender evaluation in order to protect the child, and the father refused. He was rewarded by dismissal of the temporary protection orders. The dismissal was reversed, and the case was remanded for a hearing on the merits of the father's motion to vacate the orders. K.D.R.-M. v. R.E.M., 2004 MT 292, 323 M 340, 100 P3d 150 (2004).

Settlement Agreement Providing Mutual Release From Prior Claims — Temporary Maintenance Not Owing: During pending dissolution proceedings, the parties agreed to temporary maintenance and child support, but subsequently entered a separation agreement that released each party from past and current claims. Nevertheless, the District Court held that the husband was liable for predissolution maintenance. The Supreme Court disagreed. The language of the settlement agreement clearly released both parties from all causes of action, claims, rights, or demands whatsoever, which included the wife's claims for temporary maintenance, so the husband owed no predissolution maintenance. In re Marriage of Mease, 2004 MT 59, 320 M 229, 92 P3d 1148 (2004), distinguishing In re Marriage of Halverson, 230 M 226, 749 P2d 518 (1988), and In re Marriage of Spence, 257 M 188, 849 P2d 161 (1993).

Remand for Consideration of Unresolved Status of Assignment of Interest in Family Home and Issue of Fees Related to Husband's Criminal Representation: The husband retained an attorney to represent him on criminal charges of marital abuse, and the husband assigned a one-half interest in the jointly owned family home as security for payment of the attorney fees. However, because of the parties' pending dissolution proceeding, a restraining order was in effect restricting the parties from encumbering or transferring any property except in the usual course of business or for the necessities of life. The District Court hearing the dissolution action failed to consider either the assignment or the fees incurred by the husband in the criminal action and held that each party was responsible for attorney fees related to the dissolution. The case was remanded, and the District Court was directed to determine the validity of the assignment of the husband's interest in the family home and whether the husband's criminal fees were payable from the marital estate. In re Petition of Fenzau, 2002 MT 197, 311 M 163, 54 P3d 43 (2002).

Retroactive Revision of Temporary Child Support Order: When the parties separated, the District Court entered a temporary child support order directing the husband to pay $300 a month in spousal maintenance and $200 a month for each child in support. That temporary order was later modified to require the husband to pay a total of $800 a month in temporary maintenance and support. The final decree directed the husband to pay child support of $190 a month for each child, retroactive to the time of separation, and did not award any spousal maintenance. The wife alleged error in the retroactive modification of support, arguing that there was no change in circumstances that would allow a downward modification. The Supreme Court affirmed the modification, noting that the District Court was revising a temporary order, not modifying a final decree as specified in 40-4-208(1). It is clearly within the District Court's authority to make the maintenance and support awards retroactive (see In re Marriage of Wersland, 249 M 169, 814 P2d 991 (1991)), and the revision of the order did not constitute an abuse of discretion. In re Marriage of Stoneman, 2000 MT 274, 302 M 107, 14 P3d 12, 57 St. Rep. 1145 (2000).

Attempt to Contact Former Spouse Through Unauthorized Third Party — Order of Protection Violation: In 1993, a Missoula County District Court issued a permanent injunction, based on a stalking violation of 45-5-220, prohibiting Gillispie from contacting his former wife "by a third person, except by telephone or correspondence through her attorney of record". In 1997, Gillispie admitted contacting his former wife's mother in Missoula and was charged with and convicted of an order of protection violation pursuant to 45-5-626. Gillispie contended that the 1993 injunction was no longer in effect in 1997 because the 1997 version of 45-5-626 does not make criminal a violation of the permanent injunction imposed upon him in 1993. The Supreme Court disagreed. By broadening protections available to victims of partner and family assault in 1995 and clarifying the law in 1997, the Legislature did not intend to do away with any existing orders of protection already in place. The 1993 permanent order of protection remained in place in 1997, and Gillispie was properly charged and convicted when he admittedly violated the terms of the 1993 order. Missoula v. Gillispie, 1999 MT 268, 296 M 444, 989 P2d 401, 56 St. Rep. 1085 (1999).

Jurisdiction Over Municipal Court Protection Order: A Missoula County District Court issued a permanent injunction, based on a stalking violation of 45-5-220, prohibiting Gillispie from contacting his former wife "by a third person, except by telephone or correspondence through her attorney of record". Gillispie admitted contacting his former wife's mother in Missoula and was charged with and convicted in Municipal Court of an order of protection violation pursuant to 45-5-626. On appeal, Gillispie contended that the Municipal Court did not have jurisdiction over the offense. A Municipal Court has geographic jurisdiction over misdemeanors coextensive with the jurisdiction of Justices' Courts located in the same county. Although neither Gillispie nor the former wife was present in Missoula County at the time of the prohibited phone call, the former wife's mother received the call in Missoula County. Thus, the Municipal Court was vested with jurisdiction over the misdemeanor order of protection violation when the necessary result of Gillispie's third-party contact by telephone was committed within Missoula County. Missoula v. Gillispie, 1999 MT 268, 296 M 444, 989 P2d 401, 56 St. Rep. 1085 (1999).

Restraining Order Issued Without Request and for Indefinite Time Improper: The husband requested a restraining order against his wife in an ongoing custody and visitation dispute. The wife objected on procedural and substantive grounds but did not request a restraining order against her husband. Without notice or hearing, the District Court issued a restraining order against both the husband and wife pursuant to this section, requiring each party to stay 1,500 feet away from the other's residence and workplace, designating where the parties would transfer custody of the child for visitation purposes, establishing a telephone contact protocol and a visitation schedule, and directing that the order remain in effect until further order of the court. The restraining order violated subsections (4) through (7) of this section because it was: (1) not entered for a fixed period of time, not to exceed 1 year; (2) issued against the husband without a request from his wife; and (3) issued without proper findings, a hearing, or notice to either party. (See 2003 amendment.) In re Marriage of Christian, 1999 MT 189, 295 M 352, 983 P2d 966, 56 St. Rep. 738 (1999).

Justice's Court Continuance of TRO on Court's Own Initiative Invalid: The plain, unambiguous language of this section clearly provides that a temporary restraining order (TRO) is valid for only 20 days, absent a hearing and extension by the issuing court. Therefore, a charge of an August 27 violation of a TRO issued on August 4 should have been dismissed because there was no extension or hearing and the TRO thus expired after 20 days. The Justice's Court did not have jurisdiction under 40-4-123 to on its own initiative, based on defendant's petition for dissolution and request for a TRO against his wife, transmit the wife's TRO to the District Court and continue the wife's TRO pending District Court review of the wife's TRO. St. v. Asmundson, 283 M 141, 940 P2d 104, 54 St. Rep. 535 (1997).

Sworn Statement Concerning Mother's Threat Sufficient for Temporary Restraining Order: The sworn statement of the natural father that the mother had threatened to remove their children from the court's jurisdiction pending a determination of custody modification was sufficient grounds for issuing a temporary restraining order to prevent their removal. In re Marriage of Morazan, 237 M 294, 772 P2d 872, 46 St. Rep. 814 (1989).

Voluntary Maintenance Agreement — Findings of Need and Duration Not Required: Husband contended that, prior to awarding temporary maintenance, the District Court failed to make proper findings of need and duration required by this section and 40-4-203. However, the court was not required to make such findings since the parties voluntarily entered into a maintenance agreement. In re Marriage of Halverson, 230 M 226, 749 P2d 518, 45 St. Rep. 162 (1988).

Evidence Sufficient to Support Retroactive Maintenance Award — Rights Not Prejudiced by Award Made at Time of Dissolution: A temporary order of child support issued at the date of dissolution 2 years prior to final judgment did not prejudice the rights of the parties or the children adjudicated at the later hearings. It was clearly within the District Court's discretion, after hearing the matter of child support and maintenance, to make the award of maintenance retroactive to the date of dissolution. In re Marriage of Revious, 226 M 304, 735 P2d 301, 44 St. Rep. 674 (1987), followed in In re Marriage of Wersland, 249 M 169, 814 P2d 991, 48 St. Rep. 626 (1991), and In re Marriage of Spence, 257 M 188, 849 P2d 161, 50 St. Rep. 225 (1993).

Temporary Maintenance and Attorney Fees: The District Court did not abuse its discretion in denying the wife's motions for temporary maintenance and attorney fees pending trial or for temporary maintenance, attorney fees, and costs and payment of medical expenses pending appeal since the court found that she was able to pay by executing upon her share of the marital estate without jeopardizing her appeal. Oster v. Oster, 186 M 160, 606 P2d 1075 (1980), following Ferguson v. Town Pump, Inc. v. Diteman, 177 M 122, 580 P2d 915 (1978). Oster was overruled in part on other grounds by Green v. Gerber, 2013 MT 35, 369 Mont. 20, 303 P.3d 729.

No Responsive Pleading Required: Section 40-4-121 does not require a response but merely limits the time within which a response may be filed. This construction is required by the permissive terms of the provision and by reference to 40-4-103 and former Rule 7(b), M.R.Civ.P. (now superseded), regarding the form of motions. A motion is not a pleading and does not require responsive pleadings, hence the husband's failure to file a response under 40-4-121 did not render the motion an order. Houtchens v. Houtchens, 181 M 70, 592 P2d 158 (1979).

Show Cause Hearing Contemplated: The trial court erred by holding the husband in contempt of a show cause order which was in substance both an ex parte restraining order, which does not require a response, and notice of a motion for temporary support and maintenance and in requiring the husband to pay temporary support and maintenance due thereunder. Since the terms of the court order clearly contemplated a show cause hearing before temporary support and maintenance would be ordered, it was not a final interlocutory order in the absence of a show cause hearing. Houtchens v. Houtchens, 181 M 70, 592 P2d 158 (1979).

Temporary Child Support Reduced in Final Judgment: It was not error when the District Court gave no reason for reducing child support awarded in the final judgment from that awarded in the order pendente lite because the order pendente lite was made before the District Court heard testimony or considered the evidence and was not a determination of the merits. Brown v. Brown, 179 M 417, 587 P2d 361 (1978).

Postjudgment Powers of Court: A District Court has power to award necessary maintenance, child support, and suit money after judgment in a marital dissolution case during the pendency of appeal. To hold otherwise would leave a hiatus in the remedial power of the court that could cause unmeasured hardship and distress. State ex rel. Kaasa v. District Court, 177 M 547, 582 P2d 772 (1978).

Temporary Support Payments: On application for money judgment for delinquent temporary support payments, it was not error to order sum of $8,174 plus interest to be paid by defendant in 63 monthly installments of $150. Latus v. Latus, 163 M 315, 517 P2d 356 (1973).

Attorney General's Opinions

Allegations Necessary for Petition for Injunctive Relief: A petition for injunctive relief under subsection (3) of this section must allege physical abuse, harm, or bodily injury. (See 1995 amendment.) 43 A.G. Op. 50 (1989).

Law Review Articles

Montana's New Domestic Abuse Statutes: A New Response to an Old Problem, Women's Law Caucus, University of Montana, 47 Mont. L. Rev. 403 (1986), at pp. 412 through 418.

40-4-122. Forms — distribution — filing.

Compiler's Comments

1989 Amendment: In last two sentences inserted references to City Courts.

Law Review Articles

Montana's New Domestic Abuse Statutes: A New Response to an Old Problem, Women's Law Caucus, University of Montana, 47 Mont. L. Rev. 403 (1986), at pp. 412 through 418.

40-4-123. Jurisdiction and venue.

Compiler's Comments

1997 Amendment: Chapter 343 in (2), in first sentence near end after "marriage or for", substituted "parenting" for "child custody".

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

1995 Amendment: Chapter 350 in (1) and (3) changed "40-4-121(3)" to "40-4-121"; and made minor changes in style.

Severability: Section 31, Ch. 350, L. 1995, was a severability clause.

1989 Amendment: In (1) inserted reference to City Courts; and in (2), in first sentence, inserted reference to City Court Judge.

Case Notes

Beneficiary Change During Temporary Restraining Order Improper: A man improperly changed his life insurance beneficiary during the statutorily mandated restraining period of his dissolution proceedings, which prevented him from making any beneficiary changes. The man died 4 months after the divorce finalized, but because there were no exemptions in the statute allowing for a change from a wife to a sister, the Supreme Court determined the improper changes must be set aside and the designations returned to the status quo prior to the dissolution. Volk v. Goeser, 2016 MT 61, 382 Mont. 382, 367 P.3d 378.

Justice's Court Continuance of TRO on Court's Own Initiative Invalid: The plain, unambiguous language of 40-4-121 clearly provides that a temporary restraining order (TRO) is valid for only 20 days, absent a hearing and extension by the issuing court. Therefore, a charge of an August 27 violation of a TRO issued on August 4 should have been dismissed because there was no extension or hearing and the TRO thus expired after 20 days. The Justice's Court did not have jurisdiction under this section to on its own initiative, based on defendant's petition for dissolution and request for a TRO against his wife, transmit the wife's TRO to the District Court and continue the wife's TRO pending District Court review of the wife's TRO. St. v. Asmundson, 283 M 141, 940 P2d 104, 54 St. Rep. 535 (1997).

Law Review Articles

Montana's New Domestic Abuse Statutes: A New Response to an Old Problem, Women's Law Caucus, University of Montana, 47 Mont. L. Rev. 403 (1986), at pp. 412 through 418.

40-4-124. Review or removal — district court.

Compiler's Comments

1995 Amendment: Chapter 350 in (1), in two places, and in (2) changed "40-4-121(3)" to "40-4-121"; and made minor changes in style.

Severability: Section 31, Ch. 350, L. 1995, was a severability clause.

1989 Amendment: Inserted three references to City Court.

Law Review Articles

Montana's New Domestic Abuse Statutes: A New Response to an Old Problem, Women's Law Caucus, University of Montana, 47 Mont. L. Rev. 403 (1986), at pp. 412 through 418.

40-4-125. Registration of orders.

Compiler's Comments

2001 Amendment: Chapter 223 at end of (1) after "designated in the order" inserted requirement for entering order in databases within 24 hours after receipt; in (2) after "verification" inserted "and the database of the national crime information center of the United States department of justice"; and made minor changes in style. Amendment effective April 12, 2001.

Severability: Section 14, Ch. 223, L. 2001, was a severability clause.

1989 Amendment: In (1) inserted reference to City Court Judge.

Law Review Articles

Montana's New Domestic Abuse Statutes: A New Response to an Old Problem, Women's Law Caucus, University of Montana, 47 Mont. L. Rev. 403 (1986), at pp. 412 through 418.

40-4-126. Automatic economic restraining order.

Compiler's Comments

Effective Date: This section is effective October 1, 2021.

40-4-130. Summary dissolution — conditions necessary at commencement of proceedings.

Compiler's Comments

2015 Amendment: Chapter 48 in (5) increased threshold from $8,000 to $20,000; and in (6) increased threshold from $25,000 to $50,000. Amendment effective October 1, 2015.

1999 Amendment: Chapter 545 substituted language in (3) outlining when marriage may be dissolved by summary dissolution when wife is not pregnant and other conditions exist for former language that read: "There are no children from the relationship born before or during the marriage or adopted by the parties during the marriage, and the wife is not pregnant"; in (5) after "unpaid" inserted "unsecured", increased obligation amount from $4,000 to $8,000, and after "marriage" deleted "excluding the amount of any unpaid obligations with respect to a motor vehicle with a rated carrying load in persons and property of 1 ton or less"; in (6) before "assets" deleted "property" and after "assets" substituted "excluding secured obligations, is less than $25,000" for "excluding all encumbrances and motor vehicles with a rated carrying load in persons and property of 1 ton or less, is less than $13,000, and neither party has separate property assets in excess of $13,000, excluding all encumbrances and motor vehicles with a rated carrying load in persons and property of 1 ton or less"; and made minor changes in style. Amendment effective July 1, 1999.

Effective Date: Section 9, Ch. 795, L. 1991, provided: "[This act] is effective July 1, 1992."

Source: This section is based on California Civil Code, section 4550 (West 1983).

40-4-131. Joint petition — filing — form — contents.

Compiler's Comments

2019 Amendment: Chapter 180 in (2)(d) substituted "a party" for "the wife" and substituted "party's maiden or birth" for "wife's maiden". Amendment effective April 18, 2019.

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Effective Date: Section 9, Ch. 795, L. 1991, provided: "[This act] is effective July 1, 1992."

Source: This section is based on California Civil Code, section 4551 (West 1983).

Case Notes

No District Court Jurisdiction to Enter Marriage Dissolution in Favor of One Party Absent Service of Dissolution Petition and Summons on Other Party: On August 15, 2003, the parties entered a property settlement agreement dividing the marital estate, and the wife also signed a consent to entry of judgment agreeing to dissolution if the property settlement agreement was presented to the District Court for approval and made an integral part of the dissolution. The husband then filed a petition for dissolution and included the settlement agreement and the wife's consent to entry of judgment, but did not serve the wife with any of the filings. The District Court held a hearing without the wife being present, adopted the settlement agreement, and entered a decree of dissolution. The husband's counsel mailed a copy of the judgment to the wife, who then filed a motion under former Rule 60(b), M.R.Civ.P. (now superseded), to set aside the judgment, claiming that the decree was void because the husband failed to have a summons issued and to serve her with process. The motion was denied, but on appeal, the Supreme Court vacated the judgment. Dissolution proceedings are not exempt from rules regarding service of process, and if one party commences a dissolution proceeding, the other party must be served as provided in the Montana Rules of Civil Procedure. Further, a petition for dissolution must be signed under oath by both parties. The wife's execution of the documents prior to the filing of the case did not constitute a voluntary appearance in the action, nor does notice of a hearing substitute for service of summons. A District Court may obtain personal jurisdiction through strict compliance with the mandatory rules for service of process, and in this case, the wife's signing of documents prior to the filing of the dissolution petition did not confer jurisdiction on the court absent service of process. Thus, the District Court abused its discretion in failing to grant the wife's motion to set aside the judgment, and the case was remanded for further proceedings. In re Marriage of Zacher, 2004 MT 249, 323 M 54, 98 P3d 309 (2004), following Marriage of Blaskovich, 249 M 248, 815 P2d 581 (1991), and In re Marriage of Grounds/Coward, 271 M 350, 897 P2d 200 (1995).

40-4-132. Revocation of joint petition — termination of proceeding — notice — copy to other party.

Compiler's Comments

Effective Date: Section 9, Ch. 795, L. 1991, provided: "[This act] is effective July 1, 1992."
Source: This section is based on California Civil Code, section 4552 (West 1983).

40-4-133. Hearing and final judgment — entry — effect.

Compiler's Comments

Effective Date: Section 9, Ch. 795, L. 1991, provided: "[This act] is effective July 1, 1992."
Source: This section is based on California Civil Code, section 4553 (West 1983).

40-4-134. Final judgment as final adjudication of rights and obligations.

Compiler's Comments

Effective Date: Section 9, Ch. 795, L. 1991, provided: "[This act] is effective July 1, 1992."
Source: This section is based on California Civil Code, section 4554 (West 1983).

40-4-135. Actions to set aside final judgment.

Compiler's Comments

Effective Date: Section 9, Ch. 795, L. 1991, provided: "[This act] is effective July 1, 1992."
Source: This section is based on California Civil Code, section 4555 (West 1983).

Case Notes

Property Transferred to Deny Spousal Interest in Marital Estate — Inclusion as Distributable Property Proper: A husband and wife owed about $6,000 in back taxes on their property, which was in jeopardy of being sold at a tax sale. The couple was unable to obtain a loan because of a prior bankruptcy, so they arranged to transfer the property to the husband's mother, who then took out a loan to pay the taxes, using the property as collateral. When the couple later sought to dissolve their marriage, their petition made no mention of any real property acquired during the marriage. The husband testified at the hearing, but the wife did not attend, and dissolution was granted without addressing the wife's interest in the property. She moved to set aside the judgment pursuant to this section, and the District Court voided the deed transferring the property to the mother, issued a court deed naming the mother as grantor and the husband and wife as grantees to hold the property as tenants in common, and included the property in the marital estate. The mother contended that the property transfer more than 2 years before commencement of the dissolution was final against the husband and wife as grantors, citing 70-20-303, and that the property was thus not available as an asset of the couple and was improperly included in the marital estate. The Supreme Court affirmed, noting that the couple had submitted false proposed findings and conclusions when they made no mention of any real property acquired during the marriage, which had the effect of defrauding the court and denying the wife her interest in the marital property. Inclusion of the property in the marital estate was proper. In re Marriage of Bell, 2000 MT 88, 299 M 219, 998 P2d 1163, 57 St. Rep. 381 (2000).

40-4-136. Brochure to describe proceedings — availability — distribution — contents and form.

Compiler's Comments

2019 Amendment: Chapter 350 deleted former (2)(a)(iv) that read: "(iv) describe the nature of services of the conciliation court, if available"; and made minor changes in style. Amendment effective May 7, 2019.

Effective Date: Section 9, Ch. 795, L. 1991, provided: "[This act] is effective July 1, 1992."
Source: This section is based on California Civil Code, section 4556 (West 1983).

Part 2
Support, Custody, Visitation, and Related Provisions

Part Compiler's Comments

Section Not Codified: Section 48-341, R.C.M. 1947, an applicability clause, was not codified in the MCA. This section has not been repealed and is still valid law. Citation may be made to sec. 41, Ch. 536, L. 1975.

Part Administrative Rules

Title 37, chapter 62, ARM Child support services.

Part Case Notes

Military Father Stationed Around World — Summer Visitation Stipulated by Parenting Plan — Role of Guardian ad Litem Distinct from Role of Mediator: In a protracted dissolution proceeding involving a mother residing in Montana and a father residing in various military bases, the District Court issued an amended parenting plan that required the parents' teenage daughter to visit the father during the summer. The District Court also found the mother in contempt for not following the terms of the parenting plan. On appeal, the mother argued that the District Court erred because it had failed to consider the best interests of the teenage daughter, who wished to spend more time in Montana during the summers instead of with her father, and that it had wrongly found her in contempt and ordered attorney fees. The Supreme Court affirmed, holding that the District Court's findings were not clearly erroneous, that the original parenting plan's appointment of the child's guardian ad litem as a mediator was not consistent with the purposes of the impartial position, and that, because the District Court did not conduct a hearing on the contempt and attorney fee provisions, it was not proper for appellate review. In re Marriage of Brockington & Brown, 2017 MT 92, 387 Mont. 260, 400 P.3d 205. However, see In re Marriage of Weigand, 2021 MT 128, 404 Mont. 223, 486 P.3d 1272, holding that the dismissal of the appeal of contempt order, while not incorrect, was unnecessary under Rule 58(e), M.R.Civ.P. (Title 25, ch. 20).

Full Faith and Credit Afforded Out-of-State Renewable Child Support Judgment — Res Judicata Applicable: Article IV, sec. 1, U.S. Const., provides that full faith and credit be given in each state to the public acts, records, and judicial proceedings of every other state. As restated in Baker v. Gen. Motors Corp., 522 US 222, 139 L Ed 2d 580, 118 S Ct 657 (1998), a final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. When issues of jurisdiction have been determined by one court, the doctrine of res judicata precludes a second court from considering jurisdiction as long as the first court fully and fairly considered the issue, and that judgment, as to jurisdiction, is entitled to full faith and credit in the second court. In the present case, a Utah renewable child support judgment, in which the Utah court established jurisdiction of the parties, was entitled to full faith and credit in Montana, despite contentions by the husband that he no longer had minimum contacts with Utah after moving to Montana. The jurisdiction arguments raised before the Montana Supreme Court were identical to the arguments that were previously raised, fairly considered, and finally decided in Utah, precluding relitigation by the Montana court under res judicata. In re Child Support of Mason, 1998 MT 192, 290 M 253, 964 P2d 743, 55 St. Rep. 803 (1998), followed with regard to full faith and credit of a judgment by an out-of-state court following full and fair consideration of jurisdiction in Genuine Parts Co. v. Rascal's Auto Parts, Inc., 2008 MT 313, 346 M 56, 192 P3d 1153 (2008).

Purpose and Applicability of Federal Parental Kidnapping Prevention Act: The federal Parental Kidnapping Prevention Act of 1980 (28 U.S.C. 1738A), enacted by Congress to address the problems of interstate forum shopping and child snatching, established national standards under which jurisdictions could determine whether they had jurisdiction and what effect to give the decisions made by courts of other jurisdictions by requiring that full faith and credit be accorded to decisions of a jurisdiction if the court appropriately exercised jurisdiction under the federal standards. The Act's general purposes are to promote cooperation and the exchange of information between state courts, to facilitate the enforcement of custody decisions of sister states, and to discourage continuing interstate controversies over child custody. The Act does not apply in a case in which there is no other state competing for jurisdiction. In re Marriage of Erler, 261 M 65, 862 P2d 12, 50 St. Rep. 1195 (1993).

Primary Physical Custody Not Properly Before Court — No Implied Consent Found for Trial of Issue: Appellant filed a petition for custody of the parties' minor child, asking that she be given custody. Respondent counterpetitioned for split custody until the child was 5 years old, at which time respondent would be granted primary physical custody. During trial, respondent moved for an order granting immediate primary physical custody. Appellant moved for a stay or continuation to respond to the motion. The Supreme Court held that the issue of respondent's primary physical custody was not properly before the District Court because the issue had not been raised in the pleadings. Citing Trust Bank v. Darrah, 152 M 256, 448 P2d 734 (1968), the Supreme Court also held that there was no implied consent by appellant to try the issue raised by respondent's motion as appellant received no notice of the motion prior to trial. The issue was therefore not properly before the District Court. In re Custody of C.J.K., 258 M 525, 855 P2d 90, 50 St. Rep. 645 (1993).

Party's Proposed Findings — Substantial Evidence: In regard to the issues of custody, child support, and visitation, when the findings and conclusions are sufficiently comprehensive and pertinent to the issue to provide a basis for decision and are supported by substantial credible evidence, they will not be overturned merely on the grounds the court relied on proposed findings and conclusions submitted by counsel. In re Marriage of Alt, 218 M 327, 708 P2d 258, 42 St. Rep. 1621 (1985). See also In re Marriage of Callahan, 233 M 465, 762 P2d 205, 45 St. Rep. 1639 (1988).

Motion to Enforce Decree — Frivolous Claims on Appeal: On wife's motion for enforcement of divorce decree, husband agreed to arrearages arrived at by trial court after considerable evidence was taken on the matter. Husband's claim on appeal that the arrearages found by the trial court were not supported by the evidence was frivolous. There was ample evidence supporting the arrearages, and no abuse of discretion was found. In re Marriage of Baker, 198 M 371, 646 P2d 522, 39 St. Rep. 1031 (1982).

Challenge of Decree and Property Settlement After Six Years — Res Judicata: A property settlement and decree entered in 1974 cannot be set aside in 1980 on the grounds of unconscionability. The failure of the spouse to appeal the court's decree in 1974 has rendered the issue res judicata. Hadford v. Hadford, 194 M 518, 633 P2d 1181, 38 St. Rep. 1308 (1981).

No Abuse of Discretion Shown in Award of Custody and Support and in Property Disposition: Where, following a decree of divorce, the appellant's ex-wife was awarded custody of the minor son of the parties subject to the reasonable visitation rights of the appellant and was awarded $200 a month child support and certain property of the parties, appellant failed to show there was a clear abuse of discretion by the District Court, failed to overcome the presumption that the judgment of the District Court is correct, and failed to show there was a clear preponderance of the evidence against the District Court findings. Thompson v. Thompson, 193 M 127, 630 P2d 243, 38 St. Rep. 1022 (1981).

Husband's Income Poorly Documented — Reversible Error — Admonition to Attorneys: The District Court's findings were clearly erroneous in a child support determination based upon sketchy and unsubstantiated income information on husband and upon erroneous allocations of debt otherwise handled in the decree. The Supreme Court, in noting that hasty work by the attorneys contributed to this error, reiterated that it is the duty of counsel to be complete and careful in dissolution actions; pretrial conferences, cooperation between attorneys, and availability of underlying documents are important in achieving the fairest possible results in each case. In re Marriage of Benjamin, 189 M 158, 615 P2d 218, 37 St. Rep. 1412 (1980).

Continuity of Custody Decree: Where grandparents are seeking to modify a custody decree awarded to a natural parent, courts are bound to follow the law as set out in Easton v. Easton, 175 M 416, 574 P2d 989 (1978), and parallel cases indicating that 40-4-211 through 40-4-221 are designed to favor custodial continuity over the rights of the custodians. Thus here, custody remains with the father. In re Marriage of Korol, 188 M 351, 613 P2d 1016, 37 St. Rep. 1215 (1980).

Part Law Review Articles

Not the Cleavers Anymore: Third-Party Parental Interests in Minor Children and the Evolving American Family, Scott, 73 Mont. L. Rev. 97 (2012).

Child Custody and the Alcoholic Parent, Bradley, 46 Mont. L. Rev. 433 (1985).

Part Collateral References

Child Custody, Parenting Plans, Visitation, https://courts.mt.gov/Forms/ChildCustody.
Child Support, https://courts.mt.gov/Forms/ChildSupport.
Child Support, https://MontanaLawHelp.org.
Moving or Changing a Parenting Plan, https://MontanaLawHelp.org.

40-4-201. Separation agreement.

Commissioners' Note

An important aspect of the effort to reduce the adversary trappings of marital dissolution is the attempt, made by Section 306 [40-4-201] to encourage the parties to reach an amicable disposition of the financial and other incidents of their marriage. This section entirely reverses the older view that property settlement agreements are against public policy because they tend to promote divorce. Rather, when a marriage has broken down irretrievably, public policy will be served by allowing the parties to plan their future by agreeing upon a disposition of their property, their maintenance, and the support, custody, and visitation of their children.

Subsection (b) [(2)] undergirds the freedom allowed the parties by making clear that the terms of the agreement respecting maintenance and property disposition are binding upon the court unless those terms are found to be unconscionable. The standard of unconscionability is used in commercial law, where its meaning includes protection against onesidedness, oppression, or unfair surprise (see section 2-302, Uniform Commercial Code [30-2-302]), and in contract law, Scott v. U.S., 12 Wall (U.S.) 443 (1870) ("contract...unreasonable and unconscionable but not void for fraud"); Stiefler v. McCullough, 174 N.E. 823, 97 Ind.App. 123 (1931); Terre Haute Cooperage v. Branscome, 35 So.2d 537, 203 Miss. 493 (1948); Carter v. Boone County Trust Co., 92 S.W.2d 647, 338 Mo. 629 (1936). It has been used in cases respecting divorce settlements or awards. Bell v. Bell, 371 P.2d 773, 150 Colo. 174 (1962) ("this division of property is manifestly unfair, inequitable and unconscionable"). Hence the act does not introduce a novel standard unknown to the law. In the context of negotiations between spouses as to the financial incidents of their marriage, the standard includes protection against overreaching, concealment of assets, and sharp dealing not consistent with the obligations of marital partners to deal fairly with each other.

In order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties resulting from the agreement, and any other relevant evidence such as the conditions under which the agreement was made, including the knowledge of the other party. If the court finds the agreement not unconscionable, its terms respecting property division and maintenance may not be altered by the court at the hearing.

The terms of the agreement respecting support, custody, and visitation of children are not binding upon the court even if these terms are not unconscionable. The court should perform its duty to provide for the children by careful examination of the agreement as to these terms in light of the standards established by Section 309 [40-4-204] for support and by Part IV for custody and visitation.

Subsection (c) [(3)] envisages that, if the court finds the agreement unconscionable, it will afford the parties the opportunity to negotiate further. If they are unable to arrive at an agreement that is not unconscionable, the court, on motion of either party, may decide the issues of property disposition, support, and maintenance in light of the standards established in Sections 307 through 309 [40-4-202 to 40-4-204]. The court's power to make orders for the custody and visitation of the children is set forth in Part IV [Chapter 4, part 2].

Subsection (d) [(4)] permits the parties, in drawing the separation agreement, to choose whether its terms shall or shall not be set forth in the decree. In the former event, the provisions of subsection (e) [(5)], making these terms enforceable through the remedies available for the enforcement of a judgment, but retaining also the enforceability of them as contract terms, apply. This represents a reversal of the policy of the original 1970 Act, which required a choice between "merging" the agreement in the judgment and retaining its character as a contract. Strong representations as to the undesirability of such a choice, in the light of foreign doctrines as to the enforceability of judgments, as compared with contract terms, in this area of the law, made by persons and groups whose expertise entitled them to respect, led the Conference, in 1971, to change its former decision.

There still remains a place for agreements the terms of which are not set forth in the decree, if the parties prefer that it retain the status of a private contract, only. In this instance, the remedies for the enforcement of a judgment will not be available, but the court's determination, in the decree, that the terms are not unconscionable, under the ordinary rules of res adjudicata, will prevent a later successful claim of unconscionability. Such an agreement, unless its terms expressly so permit, will not be modifiable as to economic matters. Other subjects, relating to the children, by subsection (b) [(2)] do not bind the Court.

Subsection (f) [(6)] allows the parties to agree that their provisions as to maintenance and property division will not be modifiable or can be modified only in accordance with the terms of the agreement, even though those terms are included in the decree. If the court finds that these are not unconscionable, it may include them in its decree. The effect of including in the decree a provision precluding or limiting modification of the terms respecting maintenance or property division is to make the decree nonmodifiable or modifiable only in the limited way as to those terms. Subsection (f) [(6)] thus permits the parties to agree that their future arrangements may not be altered except in accord with their agreement. Such an agreement maximizes the advantages of careful future planning and eliminates uncertainties based on the fear of subsequent motions to increase or decrease the obligations of the parties. However, as stated in the subsection, this does not apply to provisions for the support, custody, or visitation of children.

Concerning the effect of a decree as a lien on the property of the spouse against whom it is rendered, the Conference took the position that the general laws of the state, as to judgment liens, would apply. However, in jurisdictions with special statutes respecting the liens created by decrees for support, maintenance, and the like, care should be taken in preparing the repealer section not to disturb provisions it is desired to retain.

Compiler's Comments

2013 Amendment: Chapter 88 inserted (8) requiring that qualified domestic relations orders be sealed. Amendment effective October 1, 2013.

Applicability: Section 11, Ch. 88, L. 2013, provided: "[This act] applies to proceedings filed after [the effective date of this act]." Effective October 1, 2013.

1997 Amendments — Composite Section: Chapter 326 at beginning of (2) and (6) inserted proviso; inserted (7) concerning disclosure of assets and liabilities; and made minor changes in style.

Chapter 343 in (1), at end of first sentence, substituted "parenting, and parental contact with their children" for "custody, and visitation of their children" and inserted second sentence concerning the inclusion of a parenting plan in a separation agreement; in (2), near middle after "support", substituted "parenting, and parental contact with children" for "custody, and visitation of children"; in (6), in first sentence near beginning after "support", substituted "parenting, or parental contact with the children" for "custody, or visitation of children"; and made minor changes in style.

Style changes in the chapters were slightly different. In each case, the codifier chose the more appropriate.

Applicability: Section 12, Ch. 326, L. 1997, provided: "[This act] applies to proceedings commenced on or after October 1, 1997."

Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Source: Section 306, Uniform Marriage and Divorce Act.

Case Notes

General 773
Conscionability 781

GENERAL

Property Settlement Agreement With Remainder Clause — District Court Finding That Annuity Not Disclosed to Wife During Dissolution Proceedings — Reversed and Husband Awarded Attorney Fees Pursuant to Agreement. In re Harms, 2022 MT 41, 408 Mont. 15, 504 P.3d 1108.

Provisions of Marital Property Settlement Agreement Enforceable as Contract Terms: A marital property settlement agreement indemnified the husband from all liability stemming from his former ownership in a business they had jointly operated. The agreement also provided for prevailing party attorney fees in the event of future litigation between the parties to enforce, modify, or interpret any portion of the agreement. The wife filed a third-party complaint against the husband in a separate action regarding the former business and did not prevail. The Supreme Court found that the standing master did not err in awarding the husband attorney fees pursuant to the agreement for his defense of the third-party complaint because the claims in the complaint could have appropriately been brought as part of an action to modify the agreement indemnifying the husband. In re Marriage of Fossen, 2019 MT 119, 395 Mont. 495, 443 P.3d 418.

Request for Modification of Property Agreement Properly Denied — No Duty for District Court to Determine Value of Assets When Parties Agree to Distribution: The parties divorced after 32 years of marriage. The parties stipulated to a property settlement agreement providing that the wife received the equity in the marital home, approximately $80,000, and the husband received his retirement income, $4,000 per month; that the agreement "may not be modified by any court"; and that the parties waived the exchange of final financial disclosures. Both parties were represented by counsel at the time the agreement was made. Nearly a year after the District Court approved the agreement, the wife filed a petition to modify the agreement, claiming that the District Court had failed to determine the value of the assets covered by the agreement. The District Court denied the petition, and the wife appealed to the Supreme Court. The Supreme Court affirmed, concluding that the wife had entered into the agreement with full knowledge of the relevant facts, that she had endorsed the agreement to the District Court, and that the District Court did not have an independent duty to determine the value of the assets under these circumstances. In re Marriage of Tanascu, 2014 MT 293, 377 Mont. 1, 338 P.3d 47, distinguished by In re Marriage of Simpson, 2018 MT 281, 393 Mont. 340, 430 P.3d 999, based on the fact that the parties' estimated net worth at the time of divorce was grossly exaggerated and most assets were completely lost with the 2008 economic decline.

Social Security Death Benefit Not to Be Offset Against Estate's Duty to Pay Child Support Under Parenting Plan: Hicks executed a parenting plan providing for his estate to pay child support in the event of his death, with no mention of Social Security payments. After Hicks died, his estate argued that the Social Security death benefit received by his children should be offset against the estate's duty to pay child support. The Supreme Court disagreed, noting that the parenting plan should be interpreted as a contract and that there was no provision in the plan providing for the offset. In re Estate of Hicks, 2011 MT 76, 360 Mont. 91, 252 P.3d 175.

Termination of Maintenance Upon Remarriage of Spouse Despite "No Modification" Clause in Separation Agreement: The husband petitioned for termination of maintenance payments to the wife when she remarried, despite the fact that the parties' separation agreement contained a provision that maintenance provisions were nonmodifiable. However, there was also no provision in the agreement that maintenance would continue if the wife remarried. The District Court granted the petition and terminated the husband's maintenance obligation, and the wife appealed, but the Supreme Court affirmed. If a separation agreement contains no express provision addressing termination of a maintenance obligation, under 40-4-208, remarriage of the party receiving maintenance terminates the maintenance obligation unless maintenance provisions are intended as part of the property division, which was not the case here. Thus, the husband's maintenance obligation terminated when the wife remarried. In re Marriage of Cortese, 2008 MT 28, 341 M 287, 176 P3d 1064 (2008), following Bertagnolli v. Bertagnolli, 185 M 1, 604 P2d 299 (1979), and distinguishing Bolstad v. Bolstad, 203 M 131, 660 P2d 95 (1983), and In re Marriage of Hahn, 263 M 315, 868 P2d 599 (1994).

Voluntary Agreement by Spouse to Pay Portion of Federal Disability Benefits as Part of Dissolution — No Contempt When Spouse Fails to Pay Federally Preempted Division of Benefits: As part of the equitable distribution of the marital estate, the husband agreed in the dissolution decree to pay the wife a portion of his federal veterans disability benefits. The husband made the payments for several years, but then stopped making the payments. The wife moved to hold the husband in contempt, but the District Court denied the motion based on In re Marriage of Strong, 2000 MT 178, 300 M 331, 8 P3d 763 (2000), in which it was held that federal law preempts the state from distributing Veterans Benefits Administration benefits as part of the marital estate. The Supreme Court affirmed. Even though the husband violated the terms of the decree by withholding payment of the wife's share of the disability benefits, federal law preempted the District Court from enforcing the decree in regard to division of those benefits, and thus the District Court did not err in refusing to hold the husband in contempt for failing to pay a portion of the benefits to the wife. A District Court may not order the division or allocation of any Veterans Benefits Administration benefits to satisfy any marital obligation, be it maintenance or division of the marital estate, regardless of whether the parties agreed to do so in a property settlement agreement. In re Marriage of Lutes, 2005 MT 242, 328 M 490, 121 P3d 561 (2005).

Ambiguous Settlement Agreement Language Regarding Maintenance Calculation — Gross Disposable Income Interpreted as Pretax Income: A settlement agreement provided that monthly maintenance payments be 15% of the husband's gross disposable income. In direct opposition to the husband's interpretation, the wife and her expert contended that the amount should be based on pretax rather than after-tax income, and the District Court agreed. The court found that the term gross disposable income was ambiguous because "gross" and "disposable" had mutually exclusive meanings in this context, so the court looked beyond the agreement language to the parties' intent. Because the term was ambiguous, the parties' proposed interpretations were equally proper, so under 28-3-306, the ambiguity was construed in the wife's favor because the maintenance provision was for her benefit. The court's allowance of testimony from the wife's expert was also within the court's discretion. In re Marriage of Mease, 2004 MT 59, 320 M 229, 92 P3d 1148 (2004).

Failure to Provide Documentation of Damages Precluding Damage Award: A settlement agreement provided that the wife would be sole owner of a house and be responsible for indebtedness on the property. The husband contended that he should have been credited for additional interest that he was charged on loans unrelated to the marriage because the wife defaulted on the mortgage after the final decree was entered and hurt the husband's credit rating. However, even though the wife breached the settlement agreement, the husband did not submit documentation to prove damages related to the loss of credit, and absent proof, the damage request was properly denied. In re Marriage of Mease, 2004 MT 59, 320 M 229, 92 P3d 1148 (2004).

Settlement Agreement Providing Attorney Fees to Successful Party — Proof of Amount and Reasonableness of Attorney Fees Required: A settlement agreement provided for reasonable attorney fees to the successful party. The wife was successful in an action regarding maintenance, and the District Court simply awarded her all her attorney fees without discussion. However, the general rule is that an award of attorney fees in a contract action requires introduction of proof from which a reasonable fee may be determined, even if the contract terms provide for payment of a fee. Thus, the District Court erred in awarding the wife all her attorney fees without assessing reasonableness, and the Supreme Court remanded for a proper determination of fees. In re Marriage of Mease, 2004 MT 59, 320 M 229, 92 P3d 1148 (2004).

Settlement Agreement Providing Mutual Release From Prior Claims — Temporary Maintenance Not Owing: During pending dissolution proceedings, the parties agreed to temporary maintenance and child support, but subsequently entered a separation agreement that released each party from past and current claims. Nevertheless, the District Court held that the husband was liable for predissolution maintenance. The Supreme Court disagreed. The language of the settlement agreement clearly released both parties from all causes of action, claims, rights, or demands whatsoever, which included the wife's claims for temporary maintenance, so the husband owed no predissolution maintenance. In re Marriage of Mease, 2004 MT 59, 320 M 229, 92 P3d 1148 (2004), distinguishing In re Marriage of Halverson, 230 M 226, 749 P2d 518 (1988), and In re Marriage of Spence, 257 M 188, 849 P2d 161 (1993).

Submission of Written Motions Regarding Enforceability of Oral Marital Separation Agreement Sufficient to Preserve Issue for Appeal: The parties' oral separation agreement was read into the record but not reduced to writing before the wife moved out of state. The wife moved the District Court to enforce the oral agreement, but because this section requires a written agreement for enforcement, the court declined and instead held a hearing on the merits. The wife claimed error in the refusal to enforce the oral agreement, but the husband contended that the issue was not preserved for appeal because the wife did not raise the issue at the hearing. The Supreme Court disagreed. The wife's written motions regarding enforceability and the District Court's refusal to enforce the oral agreement were sufficient to preserve the issue for appeal. In re Marriage of Killpack, 2004 MT 55, 320 M 186, 87 P3d 393 (2004).

Denial of Claim for Attorney Fees Pursuant to Dissolution Agreement When Sought for First Time on Appeal: The father sought to modify a parenting plan, but the District Court found insufficient changed circumstances to warrant modification of the plan. The mother asserted that the petition for modification was vexatious harassment, and requested attorney fees pursuant to 40-4-219. The District Court disagreed and denied her request for attorney fees. The father subsequently appealed, but the mother again prevailed; except for purposes of the appeal, she requested fees under the terms of the dissolution agreement pursuant to this section. The Supreme Court noted that at no time did the mother petition the District Court for attorney fees pursuant to a provision in the agreement, as she did on appeal. The Supreme Court declined to consider the new legal theory raised for the first time on appeal, and denied the request for attorney fees. In re Marriage of Oehlke, 2002 MT 79, 309 M 254, 46 P3d 49 (2002).

Allowance of Day-Care Expenses — Court Not Bound by Definition of "Day Care" in Property and Custody Agreement or in Administrative Rule — Anticipated Decrease in Support Not Binding on Court: At the time of Kimberly and Michael's divorce, they entered into a property settlement and custody agreement that provided that Michael would continue to pay a percentage of Kimberly's day-care expenses, defining "day care" as child care during a time when Kimberly was employed. After their divorce, Kimberly enrolled in college. Michael argued that the definition of "day care" as used in the agreement and as used in the child support guidelines, ARM 46.30.1525(1)(a) (now repealed), prohibited him from paying for a part of Kimberly's day-care expenses while she was a student and unemployed. The Supreme Court held that the District Court was not bound by the agreement and that the child support guidelines also prohibit the imputing of income to a party engaged in a plan of economic self-improvement, including education or retraining. The Supreme Court also reviewed Michael's argument that part of the agreement required a reduction in his support payments because of a change in employment and found that the language of the agreement contemplated his change in employment but only required that the support obligation be reviewed at that time. The Supreme Court noted that the agreement was reviewed and the District Court considered all the evidence before it, including the recommendations of the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) before increasing Michael's support obligation. For these reasons, the Supreme Court found that there was no abuse of discretion in the District Court's order. In re Marriage of Syverson, 281 M 1, 931 P2d 691, 54 St. Rep. 32 (1997).

Property Settlement Agreement Providing Child Support Not Binding on Court: When Kitty and Bernard divorced in 1983, they entered into a property settlement agreement that provided that neither would make child support payments to the other, although the three children of the parties were to live with Bernard. In 1987, the parties' oldest daughter went to live with Kitty, and in 1990, Bernard moved the District Court to modify the divorce decree and determine the child support obligations of both parties. Both parties argued the interpretation or misinterpretation of the agreement, but the Supreme Court found that property settlement agreements providing for child support, custody, or visitation are not binding upon the District Court, that the best interests of the child are paramount, and that a District Court does not, for that reason alone, commit error when the District Court disregards or modifies the child support provisions of a property settlement agreement. In re Marriage of Widhalm/Miller, 279 M 97, 926 P2d 748, 53 St. Rep. 1067 (1996). The rule that in the context of separation agreements made between spouses, parties cannot make binding agreements concerning the support, custody, or visitation of children was held to apply equally to postadoption agreements made between an adopted child's birth parents and adoptive parents in Groves v. Clark, 1999 MT 117, 294 M 417, 982 P2d 446, 56 St. Rep. 490 (1999).

Custody and Child Support Not Left to Contract:

The terms of a separation agreement providing for the support, custody, and visitation of children are not binding on the court. Further, the Uniform Child Support Guidelines must be used in all cases. In re Marriage of Franks, 275 M 66, 909 P2d 712, 53 St. Rep. 41 (1996).

In all dissolution matters relating to children, the controlling factor is the best interest of the children. While terms of a contract may be introduced as evidence in some instances, the custody and support of children are never left to contract between the parties. In re Marriage of Carlson, 214 M 209, 693 P2d 496, 41 St. Rep. 2419 (1984), followed in In re Marriage of Mitchell, 229 M 242, 746 P2d 598, 44 St. Rep. 1936 (1987), In re Marriage of Fesolowitz/Dechaine, 258 M 380, 852 P2d 658, 50 St. Rep. 575 (1993), In re Custody of J.M.D., 259 M 468, 857 P2d 708, 50 St. Rep. 884 (1993), In re Marriage of Syverson, 281 M 1, 931 P2d 691, 54 St. Rep. 32 (1997), and In re J.J.G., 1998 MT 28, 287 M 313, 954 P2d 1120, 55 St. Rep. 100 (1998).

Court Bound by Property Separation Agreement: A property separation agreement is binding on the trial court unless the agreement provides for the support, custody, or visitation of children or unless it is unconscionable. Absent those conditions, the court is required by law to abide by the maintenance agreement of the parties. The decision of whether to incorporate the separation agreement into the final decree is left to the parties. If the parties elect to have the terms incorporated into the final decree, the court has no discretion to engage in any sua sponte division of assets in the context of maintenance or property distribution, but rather must honor the parties' agreement if it is conscionable. In re Marriage of Stone, 274 M 331, 908 P2d 670, 52 St. Rep. 1256 (1995).

Property Settlement Agreement Ineffective as to Renunciation of Beneficiary's Right to IRA: Upon dissolution of her marriage to Glendon, Isabel agreed to a property settlement awarding Glendon sole ownership of an IRA in which she was named as beneficiary. Later, Glendon died without having removed Isabel as the named beneficiary of the IRA and Isabel filed a renunciation of her interest in the IRA. The District Court held that Isabel could not renounce her interest in the IRA because the property settlement agreement deprived her of her interest in the IRA. Therefore, the District Court ruled that the contingent beneficiaries were not entitled to the IRA. Citing Sowell v. Teachers' Retirement Sys., 214 M 200, 693 P2d 1222 (1984), and Eschler v. Eschler, 257 M 360, 849 P2d 196 (1993), the Supreme Court held that under the property settlement agreement, Isabel lost only her marital interest in the IRA but not her interest as a beneficiary. Her renunciation of her interest was therefore operative against her interest as a beneficiary, and Isabel's interest in the IRA as a beneficiary vested in the contingent beneficiaries. In re Estate of Bruce, 265 M 431, 877 P2d 999, 51 St. Rep. 576 (1994).

Settlement Agreement From Parties' First Divorce Not to Be Set Aside Sua Sponte by Trial Court: The parties entered into a property settlement agreement that was incorporated into their divorce decree in 1989. Seven months later, they remarried; their marriage was again dissolved in 1993. The lower court found that the parties had not performed or complied with the terms of the prior decree and that they were estopped from asserting any rights under the previous agreement. The Supreme Court held that the lower court had no jurisdiction to declare the agreement null and void because neither party had requested that the agreement be set aside and there had been no finding that the agreement was unconscionable. In re Marriage of Nordberg, 265 M 352, 877 P2d 987, 51 St. Rep. 531 (1994).

Reliance on Oral Property Settlement Agreement Improper — Written Agreement Required: This section clearly requires that a separation agreement be reduced to writing. The District Court erred, on remand of In re Marriage of Hayes, 256 M 266, 846 P2d 272 (1993), by relying on an oral property settlement agreement between the parties to the underlying dissolution. A transcript of oral stipulations concerning property is insufficient for a court to determine whether the agreement itself is unconscionable. In re Marriage of Hayes, 264 M 350, 871 P2d 913, 51 St. Rep. 333 (1994), following In re Marriage of Simms, 264 M 317, 871 P2d 899, 51 St. Rep. 306 (1994).

Costs and Attorney Fees in Challenge of Separation Agreement: A District Court decision that each party pay its own costs and attorney fees was reversed and the case was remanded for determination of costs and attorney fees to be awarded to husband in wife's unsuccessful action to interpret and modify a separation agreement that provided for costs and attorney fees for the successful party in an action to enforce, modify, or interpret the agreement. In re Marriage of Caras, 263 M 377, 868 P2d 615, 51 St. Rep. 98 (1994).

Settlement Agreement — No Necessity of Findings on Statutory Factors: To the extent that any language in In re Marriage of Caras, 254 M 169, 835 P2d 715 (1992), suggests that a District Court commits reversible error by failing to make findings pursuant to 40-4-202 in considering a separation agreement that distributes the marital property, the language is overruled. The factors in that section must be considered only when a District Court divides the marital estate in absence of an agreement. In this case, the parties reached an agreement. Therefore, a determination of the net worth of the marital estate was not required in determining the conscionability of the agreement. There were no professional appraisals, the parties and one of their attorneys gave numerous conflicting appraisals, and the agreement covered maintenance, distribution of property, and child support and medical care. The District Court did not abuse its discretion in holding the agreement conscionable. In re Marriage of Caras, 263 M 377, 868 P2d 615, 51 St. Rep. 98 (1994).

Each Party to Pay Own Attorney Fees: Husband and wife each asked the court to hold the other in contempt, and each alleged failure to pay the other under a settlement agreement. The court refused both contempt requests and directed each party to pay the other what was owed, offsetting husband's $3,250 debt against wife's $4,200 debt. The settlement agreement provided that the successful party in an enforcement action was entitled to an attorney fee award. Neither party was totally successful, thus the lower court properly held that each party should pay its own attorney fees. In re Marriage of Hahn, 263 M 315, 868 P2d 599, 51 St. Rep. 73 (1994), followed in In re Marriage of Pfennigs, 1999 MT 250, 296 M 242, 989 M 327, 56 St. Rep. 981 (1999). Marriage of Pfennigs was followed in In re Marriage of Winters, 2004 MT 82, 320 M 459, 87 P3d 1005 (2004).

Laches Inapplicable to Bar Suit to Enforce Divorce Settlement Payments Fifteen Months in Arrears: A divorce settlement agreement that wife sought to enforce was a contract. It was subject to an 8-year statute of limitations. Wife filed the suit 15 months after husband stopped making payments under the agreement. Husband failed to show the extraordinary circumstances requiring application of laches that is required to dismiss a suit filed within the limitations period. In re Marriage of Hahn, 263 M 315, 868 P2d 599, 51 St. Rep. 73 (1994).

Maintenance Payments That Divorce Agreement States Are a Property Settlement — No Termination by Remarriage: Wife's remarriage did not allow husband to stop payment of maintenance to her because the written settlement agreement stated that the payments were in the nature of a property settlement. In re Marriage of Hahn, 263 M 315, 868 P2d 599, 51 St. Rep. 73 (1994).

Mutual Release — Effect on Insurance Beneficiary: A mutual release in a property settlement agreement that does not mention insurance policies does not divest the former spouse of the right to the proceeds of the policies when the former spouse is retained as the named beneficiary. Eschler v. Eschler, 257 M 360, 849 P2d 196, 50 St. Rep. 308 (1993).

Failure to Reduce Agreement to Writing: It was error for the District Court to enter a dissolution decree based on a verbal agreement when the record did not contain a written separation agreement and did contain a directive from the court to counsel, after lengthy negotiations, to prepare the document. In re Marriage of Hayes, 256 M 266, 846 P2d 272, 50 St. Rep. 87 (1993), followed in In re Marriage of Simms, 264 M 317, 871 P2d 899, 51 St. Rep. 306 (1994), and In re Marriage of Killpack, 2004 MT 55, 320 M 186, 87 P3d 393 (2004).

Issues of Fact Arising From Separation Agreement — Summary Judgment Inappropriate: A separation agreement provided that the husband's partnership interests be liquidated and the proceeds be placed in trust for the payment of child support. When the interests had not been liquidated or child support paid in full 37 months after dissolution, the District Court granted summary judgment, holding husband responsible for $52,200 in support. Reversing and remanding, the Supreme Court found summary judgment inappropriate when issues of fact remained as to the value of the partnership, reasons for failure to liquidate, and husband's capacity to pay the support obligations. In re Marriage of Wilsey, 253 M 85, 831 P2d 590, 49 St. Rep. 406 (1992).

Improper Modification of Maintenance Awarded "for Life": The District Court modified a property settlement agreement, which provided that the wife receive $300 a month "as maintenance for life" in lieu of property for which she was to receive income, after husband unilaterally discontinued maintenance when wife began receiving social security payments. The maintenance agreement was a plain and unambiguous contract between the parties that was not subject to later interpretation or construction by a court. The agreement was drawn up by husband, a practicing attorney, who clearly understood the meaning of the term "for life". The District Court erred in modifying the agreement, absent a showing of substantial credible evidence that modification was warranted, without considering all necessary information in the original settlement agreement. In re Marriage of McKeon, 252 M 15, 826 P2d 537, 49 St. Rep. 127 (1992), followed in In re Marriage of Woodford, 254 M 501, 839 P2d 574, 49 St. Rep. 887 (1992).

Separation Agreement Not Addressed in Findings: The lower court awarded an automobile to the wife. The husband appealed, arguing that the parties had signed a separation agreement that stated that he was to receive the vehicle if the parties divorced. The Supreme Court remanded the case, stating that although the agreement may have been unconscionable, the lower court was obligated to address the issue in its findings. In re Marriage of Cannon, 242 M 230, 790 P2d 479, 47 St. Rep. 752 (1990).

In-Court Stipulation Not Binding as to Custody: At the beginning of the trial before the District Court, the parties stipulated to joint custody. After hearing the evidence, the lower court awarded sole custody to the wife. The Supreme Court affirmed, holding that the best interests of the children were the determining factor regardless of whether the parents had entered into a written contract or an in-court stipulation. In re Marriage of Mager, 241 M 78, 785 P2d 198, 47 St. Rep. 97 (1990), followed in In re Marriage of Fesolowitz/Dechaine, 258 M 380, 852 P2d 658, 50 St. Rep. 575 (1993), and In re Marriage of Widhalm/Miller, 279 M 97, 926 P2d 748, 53 St. Rep. 1067 (1996). The rule that in the context of separation agreements made between spouses, parties cannot make binding agreements concerning the support, custody, or visitation of children was held to apply equally to postadoption agreements made between an adopted child's birth parents and adoptive parents in Groves v. Clark, 1999 MT 117, 294 M 417, 982 P2d 446, 56 St. Rep. 490 (1999).

Agreement Stating It Could Not Be Modified Incorporated in Decree — Modification of Maintenance for Subsequent Unconscionability Denied: An agreed upon property settlement incorporated into a divorce decree provided that for 4½ years, while she was attending college and obtaining employment thereafter, husband would pay wife $250 a month maintenance and $2,000 a year to help pay for tuition and books. The agreement provided that it could not be modified by subsequent court order except for child custody, support, and visitation modifications or upon express written consent of the parties. It mutually released the parties from all claims and rights that either had against the other. The maintenance was an inseverable part of the property settlement agreement. Wife had given up rights to property in exchange for it. The court erred in modifying the agreement to deprive wife of the maintenance and tuition and books payments. Because the decree could not be modified, the issue of whether, as the lower court found, there was a change in circumstances so substantial and continuing as to make the maintenance provisions agreement unconscionable was moot. In re Marriage of Robertson, 237

M 406, 773 P2d 1213, 46 St. Rep. 904 (1989), followed in King v. King, 276 M 500, 917 P2d 434, 53 St. Rep. 489 (1996).

No Provision in Property Settlement for Attorney Fees — Fees Improperly Awarded: Where the parties to a dissolution proceeding agreed to a property settlement that did not provide for payment of attorney fees and the District Court later issued an order providing for the attorney fees to be paid by the husband if he did not comply with the agreement, the Supreme Court held that the District Court erred in issuing the order for the payment of fees by the husband. The property settlement agreement was approved by the District Court but never incorporated by reference into the decree and therefore has the status of a private contract, and the remedies for enforcement of a judgment are unavailable. Absent a statute or contractual provision, attorney fees are generally not recoverable, and since neither is involved here, there was no right to those fees. Lorge v. Lorge, 207 M 423, 675 P2d 115, 41 St. Rep. 50 (1984).

Order Conditionally Setting Aside Prior Decree Found to Be Abuse of Discretion: Where the District Court entered a decree in 1981 finding the property settlement agreement of the parties not unconscionable within the meaning of 40-4-201(2) and in 1983 issued an order stating that the property settlement agreement would be set aside if not complied with by the husband by a specific date, the Supreme Court found that the District Court erred in making the 1983 order. The 1981 decree and property settlement could, under the rationale of Hadford v. Hadford, 194 M 518, 633 P2d 1181, 38 St. Rep. 1308 (1981), be modified only if the conditions specified in former Rule 60(b), M.R.Civ.P. (now superseded), were found to exist. Because the court issued no findings of fact indicating conditions that justified the reopening of the 1981 decree, the court abused its discretion in making the 1983 order. Lorge v. Lorge, 207 M 423, 675 P2d 115, 41 St. Rep. 50 (1984).

Marital Separation Agreement Not Conveyance: A marital separation agreement is not a conveyance. A separation agreement incorporated into a divorce decree is enforceable only as a judgment. A judgment can be reopened if obtained through fraud but not for lack of fair consideration. It was error to annul a marital separation agreement under 31-2-311 (now repealed). Witbart v. Witbart, 204 M 446, 666 P2d 1217, 40 St. Rep. 994 (1983).

Unclean Hands Doctrine — Applicability: Where wife sought to avoid compliance with terms of decree of dissolution, arguing that husband's unclean hands prevented specific performance under 27-1-415, the court held that section is only applicable to contracts. It is not applicable to the enforcement of a settlement agreement incorporated into a decree of dissolution, which must be enforced as a judgment. The unclean hands doctrine is not a defense to enforcement of a judgment, especially when the defense is based on acts occurring before the entry of judgment, and the judgment has not been set aside. Lawrence v. Lawrence, 197 M 262, 642 P2d 1043, 39 St. Rep. 548 (1982).

Using Threat of Custody Dispute as Violation of Public Policy: Threat of a custody dispute in order to gain leverage in the property distribution is not violative of public policy such that the separation agreement and property settlement will be set aside. Lawrence v. Lawrence, 197 M 262, 642 P2d 1043, 39 St. Rep. 548 (1982).

Effect of Property Settlement Agreement on Life Insurance Beneficiary Designation: A husband designated his wife as primary beneficiary on a life insurance policy 1 month prior to their execution of a property settlement agreement. The property settlement agreement contained language ending the claims of one party against the other but did not specifically mention the life insurance policy. Since the nature and extent of the parties' consents to the property settlement agreement required a factual determination, the case was remanded. Soha v. West, 196 M 95, 637 P2d 1185, 38 St. Rep. 2153 (1981), distinguished in Sowell v. Teachers' Retirement System, 214 M 200, 693 P2d 1222, 41 St. Rep. 2413 (1984), and overruled in part in Eschler v. Eschler, 257 M 360, 849 P2d 196, 50 St. Rep. 308 (1993).

Challenge of Decree and Property Settlement After Six Years — Res Judicata: A property settlement and decree entered in 1974 cannot be set aside in 1980 on the grounds of unconscionability. The failure of the spouse to appeal the court's decree in 1974 has rendered the issue res judicata. Hadford v. Hadford, 194 M 518, 633 P2d 1181, 38 St. Rep. 1308 (1981).

Maintenance Modification Under Agreement Referring to Statute — Appropriateness of Employment Properly Determined: Where the parties to a previous dissolution action agreed that the wife would not have to seek employment as a condition of maintenance in order that she be able to care for their handicapped child and agreed to modification of maintenance upon a showing of those factors set out in 40-4-203, the District Court did not err in denying the husband's petition for modification where the husband proved only that his former wife was capable of working. The statute requires only that the District Court determine whether it is appropriate under the circumstances that she work. Based upon evidence that the child of the parties still needed special care at home, the District Court determined it was not appropriate. Tidball v. Tidball, 192 M 1, 625 P2d 1147, 38 St. Rep. 482 (1981).

Custody Agreement Interpreted as Contract — No Contempt Found Under Joint Custody Agreement: Where the plaintiff and defendant entered into an agreement for the joint custody of their three children and the agreement was incorporated into a decree divorcing the parties, the trial court committed reversible error in finding, upon a later petition by the plaintiff for modification of the divorce decree, that the decree granted custody of the children to the defendant and in holding the plaintiff in contempt for her custody of one of the children. Agreements for the dissolution of marriage are to be interpreted by the law of contracts, and the language of the agreement controls if it is clear and unambiguous. The plaintiff committed no contemptuous act by retaining custody of one child under a joint custody agreement. Quinn v. Quinn, 191 M 133, 622 P2d 230, 38 St. Rep. 93 (1981).

Necessity of Proper Findings and Conclusions — Incorporation of Property Settlement: An action for the dissolution of marriage was brought, and dissolution was granted. The parties entered into a property settlement a week before the decree of dissolution was entered. About 3 months later, one party brought a motion to incorporate the agreement in the court's final decree. The other party objected to the adoption of the visitation provisions. After a hearing, the District Court entered a supplemental decree of dissolution, incorporating all the terms of the property settlement agreement. On appeal, the appellant argued that the trial court erred in incorporating the property settlement without making specific findings of fact regarding the impact of the visitation provided for on the best interests of the child. The Supreme Court held that the purpose of the findings and conclusions required under the rules of civil procedure was to provide a foundation for the court's judgment. The record should include the essential and determining facts upon which the court rested its conclusions of law and without which the judgment would lack support. The finding of a fact and conclusion of law that the visitation provision in the property settlement agreement was in the best interest of the child failed to set forth the essential and determining facts upon which the court rested its conclusion. Without those factors, the Supreme Court was unable to determine the propriety of the determination. The case was remanded for the required factual findings. Jones v. Jones, 190 M 221, 620 P2d 850, 37 St. Rep. 1973 (1980).

Old Separation Agreement as Marital Property Settlement: An agreement that was entered into with separation in mind, that accomplished what was expected to happen as a result of separation, and that was intended to include a disposition of the marital assets was held to be a marital property settlement agreement in a dissolution proceeding held 8 years after the agreement was entered into and separation occurred. Tureman v. Tureman, 190 M 267, 620 P2d 1200, 37 St. Rep. 1922 (1980).

Marital Property — Separate Hearings: Marital property can be distributed in a hearing separate from a divorce decree without either hearing discussing the totality of the marital estate where as here, there is a mutual agreement in the form of a separation agreement as to its disposition. Persons must be able to separate amicably and divide their property without interference when such division is feasible. In re Marriage of Miller, 189 M 356, 616 P2d 313, 37 St. Rep. 1523 (1980).

Separation Agreement — Effect of Reconciliation: Attempts of two parties to reconcile their marriage in the time between execution of a separation agreement and a final decree for dissolution does not have any effect on the separation agreement. When the terms of an agreement have been executed and the agreement does not disclose overreaching by either party, the instrument is binding as to both parties in the absence of a new agreement. Section 40-4-201, specifically the portion which states that the terms of a separation agreement are binding upon the court, is controlling here. In re Marriage of Miller, 189 M 356, 616 P2d 313, 37 St. Rep. 1523 (1980).

Contractual Obligation for Support Incorporated in Decree — Not Subject to Modification: Husband, to avoid having his divorce contested and thereby besmirching his girlfriend's name, agreed, in a property settlement agreement incorporated into the divorce decree, to pay $500 per month for 10 years for support of his children and maintenance of their home. In husband's petition for modification of this amount, the District Court was correct in identifying the property settlement agreement as a contract supported by valid consideration that, in the absence of any showing that the welfare of the children was affected, could not be modified. Winters v. Winters, 188 M 43, 610 P2d 1165 (1980).

Terms Concerning Home as Child Support — Modification: A property settlement provided that the family home be sold after the second youngest child graduated from high school. The trial court modified this to allow the wife and the youngest child to remain in the home until that child graduated from high school. The home was an integral part of the child support provisions so long as the second child was still in high school. There is no reason why the availability of the home to the wife and third child should become any less important as a term of child support once the second child has graduated from high school. Consequently, the terms concerning the home were part of the child support provision and as such may be modified by further order. Phennicie v. Phennicie, 185 M 120, 604 P2d 787 (1979).

Determination of Whether a Provision Is for Maintenance or a Property Settlement: The court stated that it would "look past mere labels to the substance" of the agreement to make the determination. It found that a provision for the payment of a lump sum over a period of time to the wife or her beneficiary, although expressed in terms of "support and maintain", was a provision for the distribution of property rather than one for maintenance. Hopper v. Hopper, 183 M 543, 601 P2d 29 (1979), followed in King v. King, 276 M 500, 917 P2d 434, 53 St. Rep. 489 (1996).

Interpretation of Agreement: A court has no right to interpret an agreement as meaning something different from what the parties intended as expressed by the language they used. Fraunhofer v. Price, 182 M 7, 594 P2d 324 (1979).

Term "Property Settlement Agreement" as Not Conveying Estate: Agreement termed "property settlement" providing one-half the income from mineral rentals for wife's support not to exceed 20 years is alimony terminated on wife's death and not property right to be paid her estate. Jones v. Flasted, 169 M 60, 544 P2d 1231 (1976).

CONSCIONABILITY

Request for Modification of Property Settlement Agreement Properly Granted Despite Nonmodification Clause — Agreement Unconscionable Due to Extreme and Unanticipated Events: The parties divorced and entered a property settlement agreement, under which the husband retained the bulk of the marital assets and assumed responsibility for the marital debts and agreed to pay the wife a $10,000 monthly payment for life. The agreement contained a nonmodification clause and a provision that the prevailing party in any future dispute would be entitled to attorney fees. Subsequently, it became apparent that the stated value of the parties' combined assets had been vastly overstated. Additionally, much of the value of the assets was lost during the economic recession of 2008-2009. After some years, the husband fell behind on monthly payments and the wife filed a motion to hold the husband in contempt. The husband filed a countermotion to modify the agreement on the grounds that it had become unconscionable due to changed circumstances. The District Court ordered the husband to pay a lump sum to cover missed payments and also prospectively modified the property settlement agreement by terminating the $10,000 monthly payment. The Supreme Court found that the termination of the monthly payments was not an abuse of discretion despite the nonmodification provision. Although the Supreme Court noted that the statutory provisions addressing modification of maintenance payments in 40-4-208(2)(b)(i), modification of property disposition provisions in 40-4-208(3)(b), enforcement of separation agreements in 40-4-201(2), and nonmodification clauses in 40-4-201(6) appear to conflict when read separately, the Supreme Court relied on the fundamental rule in 1-2-101 that statutes should be interpreted as a whole, giving meaning to all, if possible. The Supreme Court found that when the statutes are read together it is apparent that the Legislature considered unconscionability as an appropriate reason to modify property settlement agreements in all cases. Beyond general principles of statutory interpretation, the court also noted that the inclusion of an attorney fee provision in the agreement anticipated potential future modification efforts by the parties. In re Marriage of Simpson, 2018 MT 281, 393 Mont. 340, 430 P.3d 999.

District Court May Not Modify Terms of Separation Agreement Unless Unconscionable: The maintenance provision at issue represented in essence the husband's purchase of the business in the event the separation agreement was converted to a dissolution decree. Thus, the maintenance provision was an inseverable part of the property settlement agreement. The agreement was not unconscionable because both parties assumed the risk of the agreement. The wife gave up the chance to reap the success of the business in exchange for maintenance. In re Marriage of Orr, 2017 MT 291, 389 Mont. 400, 410 P.3d 181.

Division of Pension Paid in Future Installments — Conscionable Valuation Methods and Factors Required: In a divorce proceeding, the husband and wife entered a dissolution agreement stating that each was entitled to half of the husband's pension and that each should receive a portion of the scheduled benefit payment once the payments began. The parties subsequently disagreed on how to determine their respective shares of each payment to reflect an equal division of the pension at the time of dissolution. The District Court rejected the husband's proposed valuation method. The Supreme Court held that although it has recognized two pension valuation methods, the lump sum method and the time rule method, it has not foreclosed the use of other valuation methods. Ultimately, the Supreme Court found that the husband's proposed method would divide only the vested value of the pension at the time of dissolution and would not equally divide the interest payable or potential postdissolution losses or gains. In re Marriage of Cadena v. Fries, 2015 MT 90, 378 Mont. 409, 346 P.3d 347.

Survivorship Annuity Not Considered Retirement Benefit — Modification of Settlement Agreement Improper Without Finding of Unconscionability: As part of a marriage dissolution, the written agreement mentioned retirement benefits but not survivorship annuities. The District Court ordered the husband to designate his former spouse as the beneficiary of his survivorship annuity. The Supreme Court reversed, holding that the terms of the dissolution agreement were enforceable as a contract and that the District Court erred when it modified the terms of the agreement without first making a finding of unconscionability. In re Marriage of Bushnell, 2014 MT 130, 375 Mont. 125, 328 P.3d 608.

Settlement Agreement Not Unconscionable: After entering into a settlement agreement that provided her with an up-front cash payment and a guaranteed income stream, the wife sought relief from the dissolution judgment on the basis that the settlement agreement was unconscionable and failed to disclose some of the husband's assets, but while the husband received more assets than the wife, he also accepted more risk, including the debt for all the marital property. In re Marriage of Anderson, 2013 MT 238, 371 Mont. 321, 307 P.3d 313.

Continued Obstruction of Property Settlement Agreement — Refusal to Comply with Court Order — Finding of Contempt Not Error — Award of Attorney Fees Proper: The divorcing parties entered into a property settlement agreement whereby the wife gave up her interest in the parties' two businesses in exchange for a promissory note and the right to request and receive financial information regarding the businesses. After the wife learned that the businesses were failing under the husband's control, the parties agreed that the wife would assume managerial and operational control of the businesses. The husband, however, obstructed the wife's ability to manage the businesses. Even after the District Court issued an order requiring the husband to cooperate with the wife and allow her access to the businesses' records, the husband sold business assets and had vendors pay him individually. Ultimately, the District Court found the husband in contempt and awarded the wife attorney fees. The husband appealed, arguing that the court erred by finding him in contempt and that the judge should have removed himself for bias against the husband. The Supreme Court affirmed, noting that an adverse ruling does not establish bias that would disqualify a judge, and that attorney fees were properly awarded as they were provided for in the property settlement agreement. In re Marriage of Cini, 2011 MT 295, 363 Mont. 1, 266 P.3d 1257.

Nature of Settlement Agreement and Review of Unconscionability Determination: When a District Court determines the unconscionability of a marital and property settlement agreement, it engages in discretionary action that cannot be accurately categorized as either a finding of fact or a conclusion of law. The determination is presumed to be correct and will not be disturbed on review absent an abuse of discretion. The agreement is a contract and must be construed under the law of contracts. If the language is clear, it controls the interpretation. In re Marriage of Rolf, 2000 MT 361, 303 M 349, 16 P3d 345, 57 St. Rep. 1536 (2000), followed in In re Estate of Hicks, 2011 MT 76, 360 Mont. 91, 252 P.3d 175.

Settlement Agreement Not Enforced Because of Economic Disparity Between Parties and Lack of Consent: A married couple signed a settlement agreement. A week later, the husband's petition for divorce prefaced his proposals as to distribution of property with the statement "If the parties are unable to reach an agreement as to division of property and indebtedness". The agreement provided that the husband would give the wife $10,000, the same amount that he had promised before the marriage to put in a bank account in her name to ensure that she would have funds to live on if the marriage fell apart. It was her third marriage, and she probably would not have considered the agreement final until she reviewed it with her attorney. The agreement ambiguously failed to state that it was either a temporary or a final agreement. Therefore, there was no meeting of the minds regarding final settlement terms. Moreover, the economic disparity between the two allowed him to take unfair advantage of her situation. The District Court did not err in failing to enforce the agreement. In re Marriage of Rolf, 2000 MT 361, 303 M 349, 16 P3d 345, 57 St. Rep. 1536 (2000).

Qualified Domestic Relations Order Authorized — Statutory Criteria Met: The husband developed health problems and began receiving short-term disability and supplemental pay from his employer. It was obvious that he would not be gainfully employed again, so he opted for early retirement benefits, resulting in cessation of his disability payments. The wife filed for legal separation, and the District Court issued a qualified domestic relations order (QDRO) to provide the wife with a portion of her husband's retirement benefits. The husband asserted that the court lacked authority to issue the QDRO because the parties did not stipulate to the entry of the order in writing or record a stipulation in open court. Pursuant to In re Marriage of Simms, 264 M 317, 871 P2d 899, 51 St. Rep. 306 (1994), a District Court may enforce a written agreement between the parties if the agreement is not unconscionable. Here, the agreement was apparently reduced to writing but no finding of conscionability was made. Nevertheless, a District Court may also enforce a QDRO if it applies the criteria in 40-4-202 governing the division of a marital estate and enters appropriate findings of fact and conclusions of law. The District Court found that distribution of the retirement benefits as set forth in the QDRO represented a fair and equitable distribution of the marital estate given the factors in 40-4-202 and made findings regarding those factors, including duration of the marriage, the wife's occupation, sources of income, employability, and needs. Accordingly, the court was authorized to enter the QDRO, and the Supreme Court affirmed. In re Marriage of Harkin, 2000 MT 105, 299 M 298, 999 P2d 969, 57 St. Rep. 422 (2000).

Later Finding of Unconscionability Proper Upon Failure to Make Initial Determination of Conscionability: Wife contended that a dissolution agreement was unconscionable as a matter of law because: (1) her understanding of English was limited; (2) both parties were initially represented by the same attorney; and (3) the agreement did not include a statement of the parties' incomes, property valuations, or child support calculations. Husband maintained that the trial court was estopped from finding unconscionability because of its initial finding that the agreement was not unconscionable. However, in this case, the District Judge did not make a specific inquiry into conscionability because the parties had reached a separation agreement. The Supreme Court held that when a District Court fails to make an initial investigation of conscionability of an agreement, it is not estopped from later finding that the agreement is unconscionable if the decree adopting the agreement is set aside pursuant to former Rule 60(b)(3), M.R.Civ.P. (now superseded). In re Marriage of Gudmundson, 1998 MT 54, 288 M 70, 955 P2d 648, 55 St. Rep. 226 (1998).

Conscionability of Inclusion of Veteran's Disability Payments in Maintenance Award — Approval by State Court of Maintenance Award in Any Amount: Parties entered into a maintenance agreement that was clearly intended to include husband's Veterans Administration disability payments within the maintenance award. The agreement provided that husband would pay wife one-half of his gross retirement benefits, including his veterans disability pay. The District Court did not err in authorizing the maintenance award, even though the payments potentially exceeded 50% of husband's disposable income. Although 10 U.S.C. 1408 states that the federal government will not garnish more than 50% of a service member's retirement pay, it does not prohibit a state court from approving a maintenance or custody award in any amount. The agreement constituted a voluntary contract between the parties that did not purport to assign the disability benefits to wife, and the District Court properly required husband to do what he had agreed to do. In re Marriage of Stone, 274 M 331, 908 P2d 670, 52 St. Rep. 1256 (1995). See In re Marriage of Lutes, 2005 MT 242, 328 M 490, 121 P3d 561 (2005), in which it was held that In re Marriage of Stone was expressly overruled by In re Marriage of Strong, 2000 MT 178, 300 M 331, 8 P3d 763 (2000), inasmuch as a District Court may not order the division or allocation of any Veterans Benefits Administration benefits to satisfy any marital obligation, be it maintenance or division of the marital estate, regardless of whether the parties agreed to do so in a property settlement agreement.

Unconscionable Support Agreement — Attribution of Monthly Payments as Support or Maintenance and Method of Determining Disposable Income: Ann and Ed entered into a property settlement agreement for the dissolution of their marriage. The agreement provided for Ann to have actual physical control of the parties' four children, for Ann to make payments to Ed for 1 year, and for Ann to make payments of one-half of her disposable income to Ed for 10 years. The District Court refused to enforce those portions of the agreement relating to child custody, child support, and maintenance. The Supreme Court held that the District Court did not abuse its discretion in refusing to enforce these parts of the agreement because the agreement did not indicate whether the monthly payments to Ed were child support or maintenance and did not specify how Ann's disposable income was to be determined. Because the parties did not submit a revised agreement, the District Court was free to make its own order with regard to maintenance. In re Marriage of Bukacek, 274 M 98, 907 P2d 931, 52 St. Rep. 1141 (1995).

Oral Stipulations and Written Agreements Used to Determine Conscionability in Property and Maintenance Awards — Not Binding for Custody, Visitation, and Support Matters: Husband and wife entered into an oral settlement agreement regarding custody, visitation, support, property, and maintenance but failed to reduce the agreement to writing as required by statute. Acknowledging the parties' failure to follow the statutory requirement to reduce the stipulations to writing, the District Court rejected the parties' on-record stipulations and agreements and disposed of all issues at trial. On appeal, the Supreme Court reversed, holding that the District Court erred by failing to consider the parties' on-record stipulations and agreements to the extent possible in applying the statutory criteria. Harmonizing the statutory requirements of this section with Miller, Mager, McLean/Fleury, and Hayes, the Supreme Court ruled that stipulations and agreements regarding property and maintenance are binding on a court only if written and found conscionable, while custody, visitation, and support must be decided by statutory criteria regardless of any oral stipulations or written agreements. In re Marriage of Simms, 264 M 317, 871 P2d 899, 51 St. Rep. 306 (1994), followed, as to parties' in-court stipulations, in In re Marriage of Schnell, 273 M 466, 905 P2d 144, 52 St. Rep. 1059 (1995). Simms also followed in In re Marriage of Bukacek, 274 M 98, 907 P2d 931, 52 St. Rep. 1141 (1995), and In re Marriage of Franks, 275 M 66, 909 P2d 712, 53 St. Rep. 41 (1996).

Failure to Address Conscionability of Separation Agreement When Converting to Dissolution Decree — Remand: It was reversible error warranting remand for the District Court to neglect to address the conscionability of a separation agreement when converting the agreement to a final decree of dissolution, especially in light of the circumstances and understanding of the parties. In re Marriage of Caras, 254 M 169, 835 P2d 715, 49 St. Rep. 684 (1992).

Stipulated Modification Limitation — Events Following Dissolution Not Justification for Reopening Judgment: The parties signed a property settlement agreement that included a modification limitation authorized under this section and that required the agreement of both parties for modification. Wife contended that several events substantially altered the valuation of the marital estate, making it necessary to reopen the agreement, including: (1) the forgiveness of a substantial debt owed to husband's parents, knowledge of which was allegedly withheld from wife during settlement negotiations; (2) gifts of stock interests made to husband by his parents after dissolution; (3) the diagnosis of cancer in wife's father and his pending divorce, which precluded his financial help to her; and (4) action by her former attorney for unpaid fees. The District Court did not find any of the changed circumstances to be substantial and continuing so as to make the terms of the agreement unconscionable, nor did the Supreme Court, which noted that the parties freely stipulated to the modification limitation and that although the changed conditions resulted in a predictably better financial condition for the husband, he could not be held responsible for the events. After-acquired property did not become part of the marital estate, and there was no evidence of fraud perpetrated by husband to deny wife her rightful share of the estate. In re Marriage of Hamilton, 254 M 31, 835 P2d 702, 49 St. Rep. 604 (1992), distinguishing In re Marriage of Madden, 211 M 237, 683 P2d 493 (1984), and In re Marriage of Dalley, 232 M 235, 756 P2d 1131 (1988).

Reopening of Dissolution Decree Without Finding of Unconscionability — Reversible Error: A dissolution decree found that although husband's military pension was not included in a separation agreement, it was included in the general terminology of the agreement. The District Court applied former Rule 60(b)(6), M.R.Civ.P. (now superseded), in granting wife's motion for reconsideration because wife had been advised by counsel that she had a vested interest in the pension and that mention of the pension was therefore not required. The District Court found that the lack of mention of the pension was intentional and did not constitute a waiver or relinquishment of the pension by wife. After reopening the decree, the court granted wife 50% of the pension and made further modifications in property disposition. On appeal, the Supreme Court applied subsection (3) of this section, which governs separation agreements, in stating that the standard that justifies reopening the judgment is unconscionability. As in Patzer v. Patzer, 243 M 34, 792 P2d 1101 (1990), absent facts or allegations by wife that the agreement was unconscionable, reopening the decree constituted reversible error. In re Marriage of Laskey, 252 M 369, 829 P2d 935, 49 St. Rep. 322 (1992).

Terms of Separation Agreement Precluding Modification of Maintenance: A separation agreement provided that maintenance payments were intended to be temporary and that wife would receive maintenance for 24 months or until her death or remarriage, whichever occurred first. Following satisfaction of the maintenance obligation in full, wife struggled financially and sought a modification based on changed circumstances that rendered the prior agreement unconscionable. By law, parties are free to preclude or limit any future modification of maintenance by the terms of the separation agreement. The District Court found that the limiting language in the agreement expressly prohibited any attempt to modify maintenance provisions in the original decree. Summary dismissal of the motion for modification was not improper. In re Marriage of Johnson, 252 M 258, 828 P2d 388, 49 St. Rep. 240 (1992), followed in In re Marriage of Pearson, 1998 MT 236, 291 M 101, 965 P2d 268, 55 St. Rep. 992 (1998).

Unconscionability Standard — Applies Only to Separation Agreements: In a divorce proceeding, the trial court stated that the wife's contribution in raising three children and running the family home was negligible and that therefore it was not unconscionable to give the husband 75% of the marital property. The Supreme Court reversed the decision, ruling that the standard of conscionability only applies to separation agreements and in divorce proceedings the property must be divided on an equitable basis. The court also ruled that the lower court had abused its discretion in finding that the wife's contribution was negligible. In re Marriage of Miller, 238 M 197, 777 P2d 319, 46 St. Rep. 1199 (1989).

Question of Full Disclosure in Property Settlement Agreement — Fraud and Misrepresentation Not Found: Wife appealed the lower court denial of her motion to set aside a property settlement agreement, contending that the court approved the settlement without knowing of certain assets which formed part of the marital estate. However, she overlooked the fact that even after the court became aware of the disputed items, it still found nothing on the face of the agreement which made it unconscionable. Ample evidence indicated that there was no fraud or misrepresentation. Denial of the motion to set aside was affirmed. In re Marriage of Gerleman, 228 M 158, 741 P2d 426, 44 St. Rep. 1421 (1987).

No Basis to Reopen Dissolution Decree: The appellant did not claim the existence of unconscionability, fraud, or any other inequitable situation that would give a court a legal basis upon which to reopen a dissolution decree. She attempted to enhance enforcement of the judgment that incorporated the parties' stipulations as to the property division by making a motion to modify. She was precluded by statutory time limits and by the fact that she had no legal basis to compel a court to reopen the judgment. Since no conditions existed that would justify reopening the judgment, the District Court was not required to enter findings of fact. Keirle v. Keirle, 210 M 214, 681 P2d 703, 41 St. Rep. 1016 (1984).

Agreement Unconscionable When Instigated to Get Wife's Property as Condition of Continuing Marriage: Petitioner appealed a judgment awarding approximately one-sixth of the marital property to him and the balance to the respondent wife. Petitioner contended that the trial court abused its discretion when it refused to divide the marital property 50-50 under an agreement executed between the parties. The Supreme Court held that the trial court properly refused to divide the property according to the agreement, stating that the result would be the same whether the agreement was a separation agreement or, as the husband contended, a postnuptial agreement. The evidence showed that in instigating the agreement the husband took advantage of his wife regarding her property as a condition to continuing the marriage, contrary to what is required of one in a confidential relationship. The agreement was unconscionable as a matter of law even though the trial court did not specifically find unconscionability. Myers v. Myers, 210 M 173, 682 P2d 718, 41 St. Rep. 990 (1984).

District Court Altering Property Settlement Agreement — No Finding of Unconscionability — Reversible Error: A real property description in a property settlement agreement was unambiguous, although cluttered and alleged by counsel for both parties to be confusing. Counsel signed an addendum to the agreement changing a property dividing line in the description, and the District Judge altered the property settlement description, substituting that in the addendum for that in the original agreement. Because a property settlement agreement entered into by the parties is binding on the court unless the court finds the agreement unconscionable and there was no such finding in this instance, it was reversible error for the court to alter the agreement. The addendum signed by counsel was irrelevant. Blankenship v. Blankenship, 210 M 31, 682 P2d 1354, 41 St. Rep. 901 (1984), followed in In re Marriage of Franks, 275 M 66, 909 P2d 712, 53 St. Rep. 41 (1996).

Enforceability of Nonmodification Clause: Parties filed a joint petition for dissolution of marriage in 1979. With their petition they filed a separation and property settlement agreement that included a provision requiring the husband to pay the wife $375 a month until she died or remarried. The agreement contained a nonmodification clause. The court found the agreement was not unconscionable and incorporated it into the decree. In 1982, the wife petitioned the District Court to order the husband to appear and show cause why he had not complied with the agreement. The husband cross-petitioned for an order terminating his maintenance obligation. The District Court granted the husband's petition. On appeal, the Supreme Court reversed and remanded, finding that under 40-4-201(6) the nonmodifiability clause was valid and enforceable regarding maintenance. In re Marriage of Bolstad, 203 M 131, 660 P2d 95, 40 St. Rep. 344 (1983).

Duress in Entering Property Settlement Agreement: Where appellant sought to set aside prior separation agreement and property settlement on grounds of duress, the court held the totality of circumstances in this case indicated any threat by respondent to seek custody rights of children or to impugn appellant's reputation because of adultery was not sufficient to constitute duress in entering the agreement. Lawrence v. Lawrence, 197 M 262, 642 P2d 1043, 39 St. Rep. 548 (1982).

Agreement Not Unconscionable: An agreement reached at the time of separation, whereby the husband paid the wife 50% of the net value of their assets and assumed the debts of the business, appeared fair on its face. Though the record reflects that the wife testified that she had been beaten, was in fear of further beatings, and was denied counsel, the court held that the record did not establish fraud, undue influence, duress, or unconscionability and therefore did not set aside the agreement. Tureman v. Tureman, 190 M 267, 620 P2d 1200, 37 St. Rep. 1922 (1980).

Conscionability of Divorce Settlement Agreement Not Same as Sufficiency — Finding of Conscionability Not Res Judicata on Completeness of Agreement: At the conclusion of a hearing on the enforcement of his divorce settlement agreement several months after his divorce, the former husband moved to amend the finding of deficiency of the settlement agreement or, in the alternative, to grant a new trial. The motion was denied and the former husband appealed. The District Court had found in its decree of legal separation that the settlement agreement executed by the parties and incorporated into the decree was conscionable and should be approved. The husband appealed that this finding was res judicata as to the issue of the marital agreement, thus barring any further requests by the wife. The Supreme Court found that the res judicata requirement of identity of issue was not met because there was sufficient dissimilarity between the issues in the two actions. The agreement disposed of the marital property but made no provision for any future support. The property disposition had no direct bearing on any contemporary agreement for obligations to be fulfilled in the near future. Res judicata, therefore, did not bar further action on any alleged agreements between the parties as to matters not involving the disposition of marital property. In re Marriage of Harris, 189 M 509, 616 P2d 1099, 37 St. Rep. 1696 (1980).

Jurisdiction to Determine Conscionability Following Decree — Res Judicata: The District Court had no jurisdiction to determine conscionability when its earlier decree of dissolution found the agreement to be not unconscionable and the parties, subject matter of the action, issues, and capacities of the parties were the same. The issue of conscionability was thus res judicata. Hopper v. Hopper, 183 M 543, 601 P2d 29 (1979). However, see In re Marriage of Blair, 271 M 196, 894 P2d 958, 52 St. Rep. 401 (1995).

Collateral References

Divorce, Dissolution, Legal Separation, Annulment, https://courts.mt.gov/Forms/end_marriage.

40-4-202. Division of property.

Commissioners' Note

Alternative A, which is the alternative recommended generally for adoption, proceeds upon the principle that all the property of the spouses, however acquired, should be regarded as assets of the married couple, available for distribution among them, upon consideration of the various factors enumerated in subsection (a) [(1)]. It will be noted that among these are health, vocational skills and employability of the respective spouses and these contributions to the acquisition of the assets, including allowance for the contribution thereto of the "homemaker's services to the family unit." This last is a new concept in Anglo-American law.

Subsection (b) [(2)] affords a way to safeguard the interests of the children against the possibility of the waste or dissipation of the assets allotted to a particular parent in consideration of being awarded the custody or support of a child or children.

Compiler's Comments

2013 Amendment: Chapter 88 inserted (6) requiring that qualified domestic relations orders be sealed; and made minor changes in style. Amendment effective October 1, 2013.

Applicability: Section 11, Ch. 88, L. 2013, provided: "[This act] applies to proceedings filed after [the effective date of this act]." Effective October 1, 2013.

1987 Amendment: In (1), in second sentence, deleted "antenuptial agreement of the parties" from list of factors court must consider; and inserted (5) providing that premarital agreements must be enforced as provided in Title 40, chapter 2, part 6.

1983 Amendment: Throughout (1), substituted references to division of property for references to disposition of property; inserted (3) regarding ownership of spouse's interest in property that vests prior to entry of decree; and inserted (4) stating effects of division of property.

Source of 1983 Amendment: The 1983 amendment to this section is based on a similar provision in Minnesota's version of the UMDA.

Source: Section 307, alternative A, Uniform Marriage and Divorce Act.

Montana Changes: The Montana act added language in subsection (1), contained in the fourth sentence, "In disposing of ...," along with subsection (1)(a) through (c). This language takes into account the provision of alternative B, Section 307, Uniform Marriage and Divorce Act. See also 1983 and 1987 amendment notes.

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GENERAL

District Court Erred by Discounting Value of Husband's Deferred Compensation Plan by Factoring in Future Tax Consequences — Account Was Not Liquidated — Taxable Event Inevitable But Not Concrete or Immediate — Numerous Unknown Factors, Including Value of Account on Liquidation, Tax Laws in Effect, and Liquidation Date. In re Marriage of Frank, 2022 MT 179, 410 Mont. 73, 517 P.3d 188.

Innocent Spouse Tax Determination Not Preclusive — Marital Dissolution Proceeding: Prior to their divorce, the husband and wife accumulated over $90,000 in delinquent tax liabilities owed on two properties. The wife then obtained a determination from the IRS and the Montana Department of Revenue that she was an "innocent spouse" and was, therefore, not liable to the agencies for any of the delinquent tax liability. At the dissolution proceeding, the wife acknowledged that she and her family benefited from the income that created the tax liability and that she was aware that she and her husband had incurred income tax debt during the marriage. However, the wife argued that, because she had been adjudicated an "innocent spouse," the tax liability should not be considered marital debt. The District Court disagreed, holding that the "innocent spouse" tax determinations had no preclusive effect in the dissolution proceeding, that a dissolution proceeding primarily relates to equitably apportioning marital debt regardless of how and when it was acquired, that the "innocent spouse" administrative determinations were not subject to judicial review and did not raise the same issues, and that issue preclusion therefore did not apply. The Supreme Court affirmed, holding that the District Court used its broad discretion to apportion the marital estate in a manner equitable to each party under the circumstances. Rose v. Rose, 2016 MT 7, 382 Mont. 88, 364 P.3d 1244.

Net Worth — Sufficient Findings: A husband and wife, married for 22 years before separating, acquired numerous properties and assets that were used for a farming operation. On appeal of the District Court's divorce decree, the husband argued that the court had failed to adequately consider ownership of equipment, cash that had been used to pay debts, and various outstanding loan obligations in determining the net worth of the marital estate. The Supreme Court agreed with the husband, stating that the District Court did not provide sufficient findings regarding these issues. In re Marriage of Richards, 2014 MT 213, 376 Mont. 188, 330 P.3d 1193.

Tax Consequences — Liabilities Immediately Taxable: A husband and wife, married for 22 years before separating, acquired numerous properties and assets that were used for a farming operation. The District Court awarded the wife equalization payments over a period of 15 years with accrued interest but did not specify what property could be liquidated to satisfy the payment. The Supreme Court held that, on remand, the District Court may specify whether a concrete or immediate tax liability would result from its distribution order. In re Marriage of Richards, 2014 MT 213, 376 Mont. 188, 330 P.3d 1193.

Award to Wife of More Than Amount Requested Without Prior Notice to Husband — Slight Abuse of Discretion: A husband and wife appeared pro se at the final dissolution hearing and the District Court, with no prior notice to the husband that the court might award the wife more than she requested, ordered the husband to pay her an additional $30,000. The husband obtained counsel and requested the judge set aside the final judgment. The court failed to rule on the motion and it was deemed denied. The Supreme Court reversed, stating that a District Court has the discretion to award more than petitioned for but the District Court should have given notice to the husband that more could be awarded so that the husband could have prepared a response to the issue of an increased award. The Supreme Court held that the final judgment should have been set aside pursuant to Rule 60(b)(1), M.R.Civ.P. (Title 25, ch. 20), due to surprise on the part of the husband. In re Marriage of Steyh, 2013 MT 175, 370 Mont. 494, 305 P.3d 50.

Voluntary Agreement by Spouse to Pay Portion of Federal Disability Benefits as Part of Dissolution — No Contempt When Spouse Fails to Pay Federally Preempted Division of Benefits: As part of the equitable distribution of the marital estate, the husband agreed in the dissolution decree to pay the wife a portion of his federal veterans disability benefits. The husband made the payments for several years, but then stopped making the payments. The wife moved to hold the husband in contempt, but the District Court denied the motion based on In re Marriage of Strong, 2000 MT 178, 300 M 331, 8 P3d 763 (2000), in which it was held that federal law preempts the state from distributing Veterans Benefits Administration benefits as part of the marital estate. The Supreme Court affirmed. Even though the husband violated the terms of the decree by withholding payment of the wife's share of the disability benefits, federal law preempted the District Court from enforcing the decree in regard to division of those benefits, and thus the District Court did not err in refusing to hold the husband in contempt for failing to pay a portion of the benefits to the wife. A District Court may not order the division or allocation of any Veterans Benefits Administration benefits to satisfy any marital obligation, be it maintenance or division of the marital estate, regardless of whether the parties agreed to do so in a property settlement agreement. In re Marriage of Lutes, 2005 MT 242, 328 M 490, 121 P3d 561 (2005).

Failure of Trial Court to Consider Tax Consequences Related to Sale of Marital Property Not Erroneous — Tax Liabilities Paid From Marital Estate: The District Court ordered the parties to sell various properties but did not calculate the specific tax consequences of the sale, although it did estimate the net sums to be received upon sale of the marital estate. Citing In re Marriage of Lee, 249 M 516, 816 P2d 1076 (1991) (quoting Beck v. Beck, 193 M 166, 631 P2d 282 (1981)), the wife contended that the court abused its discretion by failing to consider the tax consequences of the property sales. The Supreme Court distinguished Lee and Beck because the tax liabilities arising from the sale were to be paid from the marital estate prior to distribution, thus reducing both parties' portion of the estate, rather than being borne by one individual spouse. Because neither party offered evidence regarding the tax consequences, the District Court did not err by not considering the specific tax implications of the sale. In re Marriage of Hayes, 2002 MT 281, 312 M 440, 60 P3d 431 (2002).

Collateral Estoppel Applied to Preclude Reopening Settlement Agreement Regarding Disposition of Jointly Owned Marital Property — Property Interest Not Altered by Filing of Partition Action: When the husband and wife separated, they entered a property settlement agreement dividing all their real and personal property, agreeing that they would continue to jointly own their residence, with the right of survivorship. In the decree of dissolution, the District Court affirmed that the property settlement agreement was fair and equitable. Several years after the divorce, seeking to wrap up financial affairs with her former husband, the wife moved to partition the residence and obtain an equal division of the value of the property. At trial, the husband argued that the property settlement agreement was unfair and that the wife should be denied any recovery for her interest in the residence because it was purchased prior to the marriage and because she did not contribute to the marriage financially. The wife moved in limine to preclude the husband from reopening matters that should have been raised in the divorce proceedings. The court denied her motion, reasoning that the property was not divided in the divorce and that because the partition action was an action at equity, surrounding circumstances could be considered. The court found that the filing of the partition action severed the joint tenancy, and the husband was then allowed to introduce evidence regarding the marital equities. The court ultimately concluded that the wife's interest in the residence was not compensable because she had not contributed significantly to the acquisition or improvement of the property or contributed to the parties' assets during the marriage. The wife appealed. The Supreme Court found that res judicata and equitable estoppel barred relitigation of the fairness of the joint ownership issue, which was considered and approved in the decree of dissolution. Further, the mere filing of the partition action does not sever one's interest in property. Rather, the parties' respective interests remain intact until the judgment severing the tenancy is entered. The rebuttable presumption that underlies a joint tenancy in property is equal shares, and there was nothing in the evidence to rebut that presumption and no evidence of postdecree events that would justify a different result. The husband failed to carry the burden of rebutting the presumption of equal shares, and the Supreme Court remanded for a 50-50 partition of the value of the residence. Rausch v. Hogan, 2001 MT 123, 305 M 382, 28 P3d 460 (2001).

Order to Pay Dental Expenses First Claimed at Hearing and Not Supported by Record: An order that husband pay up to $3,000 for repair of wife's tooth was reversed because wife first raised the issue at the dissolution hearing, the issue was a personal injury claim and not a dissolution issue, the record did not support wife's claim that husband injured her tooth and that a doctor had made a repair estimate, and the record showed that husband objected to the findings and conclusion regarding the tooth. In re Marriage of Bradshaw, 270 M 222, 891 P2d 506, 52 St. Rep. 154 (1995).

Veteran's Disability Benefits Not to Be Included in Total of Marital Estate: The Supreme Court held that the District Court, relying on the U.S. Supreme Court's interpretation of the federal Uniformed Services Former Spouses' Protection Act in Mansell v. Mansell, 490 US 581 (1989), had properly excluded the husband's veteran's disability pay in calculating the total of the marital estate. In holding that Montana state courts may not include in a marital estate military retirement pay that has been waived in order to receive veteran's disability benefits, the state Supreme Court stated that it was partially overruling In re Marriage of Cooper, 243 M 175, 793 P2d 810 (1990). The state Supreme Court also indicated that the disability benefits could be considered when the lower courts were considering the potential future earning power of the parties in a dissolution action. In re Marriage of Murphy, 261 M 363, 862 P2d 1143, 50 St. Rep. 1360 (1993), followed in In re Marriage of Strong, 2000 MT 178, 300 M 331, 8 P3d 763, 57 St. Rep. 709 (2000).

Court to Order Division of Property in Lieu of Maintenance: James Dowd alleged that the District Court had erred in awarding his wife the bakery business. The Supreme Court held that 40-4-203 and this section, when read together, compel a District Court, when proper, to order a division of marital property, as opposed to an award of maintenance, to satisfy the financial need of the parties. In re Marriage of Dowd, 261 M 319, 862 P2d 1123, 50 St. Rep. 1341 (1993), distinguished on other grounds by In re Marriage of Crowley, 2014 MT 42, 374 Mont. 48, 318 P.3d 1031.

Distribution of Property Pursuant to Agreement Not Governed by Statutory Factors: Thomas and Dorothy were married in 1987 after signing a premarital agreement at Dorothy's request. Before they were married, Dorothy raised cattle on leased land. Later, as a condition of remaining married, Thomas insisted that Dorothy give up the leased land, which she did. Dorothy was subsequently forced to sell her cattle. The parties were then divorced. Dorothy claimed that the District Court erred in some of its findings pursuant to this section. The Supreme Court held that while that may be true, the Supreme Court would not address those alleged errors because the factors under this section are no longer to be considered and are irrelevant once a premarital agreement is found to be enforceable. The Supreme Court also held that the error of the District Court in considering the factors listed in this section was harmless because the District Court enforced the terms of the premarital agreement. In re Marriage of Stout, 261 M 10, 861 P2d 856, 50 St. Rep. 1119 (1993).

"Law of the Case" Doctrine:

Once a decision has been rendered by the Supreme Court on a particular issue between the parties, the decision is binding upon the courts and those parties and cannot be relitigated in a subsequent appeal. Implicit in this court's holding in a prior appeal in this case, that the District Court had sufficient grounds to modify the distribution of marital assets to allow the husband what he would have received if he had been paid child support payments, is agreement with the District Court's child support grant and valuation of the marital personal property. Therefore, the doctrine of the law of the case applies, and the wife could not have those matters addressed again in the present (second) appeal following remand after the first appeal. In re Marriage of Becker, 255 M 357, 842 P2d 332, 49 St. Rep. 983 (1992).

Supreme Court dismissed appeal on issue of partition of real property in marital dissolution proceeding addressed and decided in prior appeal of this case on ground that, where decision has been rendered by the court on a particular issue between the same parties in the same case, such decision is binding on the parties and the courts and cannot be relitigated in a subsequent appeal. In re Marriage of Gies, 218 M 433, 709 P2d 635, 42 St. Rep. 1715 (1985).

Balance Sheets Sufficient Disclosure: The wife alleged that the husband had not sufficiently disclosed all of his assets because he did not provide her with the books to his family's farming business. The Supreme Court ruled that his providing her with the balance sheets of the business was sufficient. In re Marriage of McFarland, 240 M 209, 783 P2d 409, 46 St. Rep. 2060 (1989).

Award of Trust Property in Dissolution Action: Items of personal property were placed in trust for the husband and children of the marriage, but the house and land were not made part of the trust, and there is no evidence that they were held in the resulting trust. The language of the trust agreement was unambiguous and clearly stated which property was placed in the trust. The District Court correctly held that the husband voluntarily gave up interest in the trust and that therefore the award of the trust property to the wife was proper. In re Marriage of Malquist, 234 M 419, 763 P2d 1116, 45 St. Rep. 2020 (1988).

Will Provisions — Improper Consideration of Waiver of Property Rights in Distribution of Marital Property: It was improper for the District Court to find that wife's signing of a release of claims to husband's property, as part of her will and contingent upon husband's death, constituted a waiver of property rights upon dissolution of marriage. In re Marriage of Dow, 230 M 416, 750 P2d 1064, 45 St. Rep. 317 (1988).

Title Not Controlling in Distribution of Assets — Joint Tenants: Title does not control the distribution of marital assets. Therefore, the lower court properly refused to base its decision on the fact that the parties held the property as joint tenants. In re Marriage of Fitzmorris, 229 M 96, 745 P2d 353, 44 St. Rep. 1809 (1987).

Question of Whether Court Improperly Referred to Marital Misconduct: Where the lower court referred to the husband's placement in Galen Hospital by the wife and the fact that the husband was not permitted to return to the family home or entitled to access to the parties' liquid assets, such references did not comprise improper comment on marital misconduct but rather helped explain the court's decision to order the sale of the family home and divide the proceeds equally in the interests of both parties. In re Marriage of Bultman, 228 M 136, 740 P2d 1145, 44 St. Rep. 1402 (1987).

Trust Property: In determining whether trust property is properly included in the marital estate, the trust agreement controls. The court must determine whether the trust is revocable or irrevocable, whether the trust is for the present or future benefit of the beneficiaries, and whether the intention to create the trust is clearly ascertainable. Where the record reveals little information from which the Supreme Court can establish the elements of trust, the case must be remanded for findings regarding the trust disposition. In re Marriage of Malquist, 227 M 413, 739 P2d 482, 44 St. Rep. 1193 (1987).

Attorney Fees as Liabilities of the Marital Estate: There was no clear abuse of discretion when the District Court found that the wife was unable to pay her attorney fees, so both husband's and wife's attorney fees were listed as liabilities to be paid out of the marital estate. The court then subtracted these and all other liabilities from the marital estate to find a net marital estate. Finally, the court awarded husband the marital estate but required him to pay all liabilities and to pay wife one-half the net marital estate. The effect was to have husband pay one-half of wife's attorney fees and vice versa. Because each party received one-half the net marital estate, each liability subtracted from the gross marital estate cost each party one-half the amount of each liability. In re Marriage of Cole, 224 M 207, 729 P2d 1276, 43 St. Rep. 2136 (1986).

Sale of Personal Property Awarded in Property Settlement — Left By Other Party — No Contempt: The Supreme Court determined that there was substantial credible evidence that sale of some tools by the former wife did not constitute noncompliance with the property settlement agreement after former husband came to the house and took all the tools he could find. Since he took all the tools he wanted, it was not contempt for wife to sell whatever remained. In re Marriage of Purkett, 222 M 225, 721 P2d 349, 43 St. Rep. 1217 (1986).

District Court Adoption of Party's Proposed Findings: The test applied by the Supreme Court to determine if the District Court's use of proposed findings of fact and conclusions of law was proper is whether the proposed findings are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence presented. In re Marriage of Benner, 219 M 188, 711 P2d 802, 42 St. Rep. 1943 (1985), followed, with regard to lack of evidence of valid loan agreement, in In re Marriage of Malquist, 227 M 413, 739 P2d 482 (1987), and in In re Marriage of Schmitz, 255 M 159, 841 P2d 496, 49 St. Rep. 919 (1992).

Defense Against Child Abuse Charges — Debt for Attorney Fee: The attorney fee incurred by the husband to defend himself against child abuse charges is not a "necessary" within the meaning of 40-2-106. Thus, in a subsequent dissolution action, the wife is not liable for this debt, although it was incurred during the couple's marriage, since only the husband contracted with the attorney. In re Marriage of White, 218 M 343, 708 P2d 267, 42 St. Rep. 1634 (1985), distinguished in Missoula YWCA v. Bard, 1999 MT 177, 295 M 260, 983 P2d 933, 56 St. Rep. 692 (1999).

Equal Liability for Payment of Loan: The lower court was within its discretion in ordering wife and husband to share equally in paying back a loan to them from his mother, because both signed a note on the loan and wife was legally obligated to pay on the note as well as husband. In re Marriage of Perry, 217 M 162, 704 P2d 41, 42 St. Rep. 1101 (1985).

Error to Refuse Intervention in Proceeding to Enforce Foreign Divorce Decree: An Oregon divorce decree awarded Montana property to the wife. Before the wife filed an action under 26-3-203 to enforce the foreign decree, husband conveyed the Montana property to Christiana, who later proposed to intervene in the instant action. The Supreme Court held that the District Court erroneously refused intervention. Insofar as the Oregon court attempted to directly transfer husband's Montana property to wife, its act was not effective in this state. The District Court erred in treating the foreign decree as a direct and self-executing transfer of Montana property. However, in an enforcement action in this state, the Oregon decree is an enforceable determination of the rights and equities of husband and wife with respect to the Montana real property in question. Gammon v. Christiana, Inc., 210 M 463, 684 P2d 1081, 41 St. Rep. 1161 (1984). For application of principle to effect of Montana divorce decree on out-of-state property, see In re Marriage of Bahm, 225 M 331, 732 P2d 846, 44 St. Rep. 279 (1987).

Workers' Compensation Benefits as Marital Assets — Error to Preclude as Matter of Law: The District Court found as a matter of law that workers' compensation benefits of the husband were not marital assets. The Supreme Court vacated the judgment, ordering an evidentiary hearing because it was unable to make an informed opinion from the record. At the hearing, findings should address the terms and purpose of the workers' compensation award. Blankenship v. Blankenship, 210 M 31, 682 P2d 1354, 41 St. Rep. 901 (1984).

Award of Maintenance After Equitable Division of Property: Sections 40-4-202 and 40-4-203 are to be read together. Thus, if the District Court has made an equitable distribution of property but then determines that the property was insufficient to provide for the spouse's financial needs, it may award maintenance. Such a determination must be made individually in each case, requiring the District Court to balance the considerations of both sections, supported by substantial evidence with appropriate findings to form an adequate basis for review. Hilt v. Hilt, 209 M 140, 679 P2d 783, 41 St. Rep. 604 (1984).

Interest Payable on Cash Award Property Settlement: Where the defendant husband in a divorce proceeding argued unsuccessfully that the parties had orally modified a property settlement agreement requiring a cash award to the wife, the Supreme Court awarded interest on the unpaid cash award from the date it was required to be paid under the dissolution decree until the time of actual payment. Under the rationale of Knudson v. Knudson, 191 M 204, 622 P2d 1025, 38 St. Rep. 154 (1981), once a person is liable for a money judgment resulting from a property settlement and payment is not made, the person entitled to the settlement is further entitled to a fair rate of interest. Gibson v. Gibson, 206 M 460, 671 P2d 629, 40 St. Rep. 1780 (1983).

Postdissolution Death of Spouse — Debts and Taxes Not Marital Debt Payable Before Property Distribution: Husband died after the effective date of the dissolution of the marriage. Wife was not responsible for the debts of and taxes on his estate, and it was error for trial court to include them as a marital debt that must be paid before distribution of the property. In re Marriage of Beck, 203 M 455, 661 P2d 1282, 40 St. Rep. 565 (1983).

Overly Extended Proceedings — Valuation of Property — Present Fair Market Values to Be Used: The parties were granted a decree of dissolution on May 17, 1978. The decree did not make a property disposition, but rather the District Court expressly reserved jurisdiction to make the disposition at a later date. A special master completed a report valuing stocks and oil and gas interests on January 31, 1981. On March 3, 1981, the property distribution hearing was held. The court made findings of facts and conclusions of law on June 22 and entered judgment on September 16, 1982. On appeal, the Supreme Court noted the time lapse of 34 months from the date of dissolution to the hearing on property distribution. The Supreme Court encouraged District Court to conclude all matters upon entry of a decree of dissolution. In unusual cases where it is not able to make the property distribution at the time, the District Court must make written findings that a postponement of the property disposition is in the best interest of the parties and must set either a time for a specific hearing date or a time period for final disposition. Present fair market values should be used for valuation although there may be more than one valuation point. There was abuse of discretion because there were substantial differences in the value of assets from the court's valuation dates to the time of the dispositional hearing. In re Marriage of Krause, 200 M 368, 654 P2d 963, 39 St. Rep. 1809 (1982).

Property Settlement Hearing — Delay a Denial of Justice: A husband filed for dissolution of his marriage on February 27, 1980. On January 28, 1981, the marriage was dissolved, with the property settlement hearing set for May 11, 1981. On the hearing date the husband's attorney failed to appear without court approval for his absence. To have continued the hearing to the next available date, 7 months later, would have been a denial of justice to the wife under Art. II, sec. 16, Mont. Const. Bolich v. Bolich, 199 M 45, 647 P2d 844, 39 St. Rep. 1197 (1982).

Discovery of Documents — Time Allowance: Husband failed to comply with court's order allowing shorter time for him to respond to interrogatories, and wife had complained of insufficient time to examine one of his tax returns, which contained information regarding a piece of property over which there was a dispute as to whether it should be included in the marital estate for property disposition purposes. Since the Supreme Court was returning the case to the District Court for reconsideration of the marital estate assets, the Supreme Court directed that wife be allowed to pursue examination of the disputed piece of property. Hill v. Hill, 197 M 451, 643 P2d 582, 39 St. Rep. 723 (1982).

FELA Settlement Funds Properly Considered in Amendment of Award of Permanent Maintenance: Where, following the injury of the defendant in a railroad accident, the District Court eliminated an award of permanent maintenance, the court did not abuse its discretion in reinstating the award based upon the defendant's receipt of money in settlement of a Federal Employers' Liability Act (FELA) claim for his injuries. The fact that the FELA funds cannot be awarded as a property settlement under federal law does not mean that the same money cannot be considered by the District Court in reevaluating its previous denial of permanent maintenance for the plaintiff. Heintzelman v. Heintzelman, 193 M 183, 631 P2d 290, 38 St. Rep. 1074 (1981).

Tax Consequences of Property Distribution to Be Considered by Court: When, in an action for divorce, the District Court failed to consider the tax consequences of the property distribution before entering its final judgment, the judgment was vacated and the cause remanded for further hearing. When a property distribution ordered by a court includes a taxable event precipitating a concrete and immediate tax liability, such tax liability should be considered by the District Court. But a District Court does not abuse its discretion by refusing to consider theoretical tax consequences when the court-ordered property distribution does not contemplate any taxable event that triggers present tax liability. Beck v. Beck, 193 M 166, 631 P2d 282, 38 St. Rep. 1054 (1981), followed in In re Marriage of Turbes, 234 M 152, 762 P2d 237, 45 St. Rep. 1805 (1988), In re Marriage of Lee, 249 M 516, 816 P2d 1076, 48 St. Rep. 816 (1991), and In re Marriage of DeBuff, 2002 MT 159, 310 M 382, 50 P3d 1070 (2002), and distinguished in In re Marriage of Taylor, 257 M 122, 848 P2d 478, 50 St. Rep. 186 (1993), In re Marriage of Hayes, 2002 MT 281, 312 M 440, 60 P3d 431 (2002), and In re Marriage of Richards, 2014 MT 213, 376 Mont. 188, 330 P.3d 1193.

Maintenance Versus Property Settlement — Termination on Remarriage — Intent of Court Decree: In a divorce decree, the language of the decree provided that payments to the wife were to be in lieu of a division of property and were to be for her support and maintenance. This language showed that the intent of the court was clearly that the payments were for support and maintenance, not a division of property, and could therefore be terminated upon the wife's remarriage. Bertagnolli v. Bertagnolli, 185 M 1, 604 P2d 299 (1979).

Second Appeal — "Law of the Case" Rule Applied: When the Supreme Court states a principle or rule of law necessary to the decision of a case, such pronouncement becomes the "law of the case" and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal. Here, a previous case involving the same parties established the "law of the case" for this appeal. The former husband was estopped, in the previous case, from challenging monthly payments to the former wife, having successfully availed himself of the benefits of the property settlement provisions of the marriage dissolution decree (the monthly payments having been held to be a part of the property settlement). Therefore, the denial of the former husband's second petition to terminate the payments is affirmed on the "law of the case" of his first petition. Englund v. Englund, 184 M 488, 603 P2d 1048, 36 St. Rep. 2211 (1979).

Property Disposition — Insufficient Evidence: Lack of a court reporter's record was not a fatal error. As substitute, a bystander's bill and exhibits admitted at trial disclosed insufficient credible evidence to support a property disposition because certain assets were not considered. Martinez v. Martinez, 175 M 280, 573 P2d 667 (1978).

Parties to Contract — Effect of Property Disposition: Because the obligations of a contract are limited to the contracting parties, plaintiff properly sued defendant for recovery on two retail installment contracts executed by defendant, even though the object of the contracts became part of a property disposition to defendant's wife in a divorce decree which transferred the indebtedness along with the subject property. Gambles v. Perdue, 175 M 112, 572 P2d 1241 (1977).

Applicability of Act: The Uniform Marriage and Divorce Act applied to a trial on property disposition held before the effective date of the Act because the court did not enter judgment until after the effective date. Morse v. Morse, 174 M 541, 571 P2d 1147 (1977).

"Property Settlement" Payments Mistakenly Labeled "Alimony" — Not Subject to Modification: District Court properly denied husband's motion to set aside alimony award payments on grounds they were void because divorce was granted to him. Husband was estopped after relying upon divorce decree to compel wife to transfer certain property to him to challenge validity of decree because what obviously was intended to be a part of the "property settlement" became mistakenly labeled "alimony". Englund v. Englund, 169 M 418, 547 P2d 841 (1976).

POWERS OF DISTRICT COURT

Wife Lived in Montana for More Than Ninety Days — Jurisdiction by District Court Over Dissolution Action: A husband and wife separated, and the wife moved from California to Montana. After living in Montana for 100 days, the wife filed a petition for dissolution. The Supreme Court confirmed that the District Court had broad discretion to divide the marital estate in a manner equitable to each party under the circumstances, including by dividing the anticipated proceeds from the husband's personal injury lawsuit. In re Marriage of Hardman, 2019 MT 152, 396 Mont. 238, 443 P.3d 1108.

Interim Support Agreement Not Followed by District Court — Denial of Maintenance — Substantial Evidence: During a divorce proceeding, the parties entered into an interim support agreement that specified child support. The issue of permanent support went to trial and the District Court eventually ordered a lower payment for child support than was in the agreement. The District Court also found that an award of maintenance was not appropriate. On appeal, the appellant argued that the District Court failed to consider the net worth of the marital estate before dividing the property, that it should have awarded certain premarital and postseparation property, that it should have awarded spousal maintenance, and that it lacked authority to modify the interim support agreement. The Supreme Court disagreed, finding that the District Court's findings were detailed and based upon substantial evidence. In re Marriage of Axelberg, 2015 MT 110, 378 Mont. 528, 347 P.3d 1225.

Abuse of Discretion to Not Rule on Party's Posttrial Motions Objecting to Standing Master's Report: A standing master issued a report containing findings of facts and conclusions of law and a proposed division of the parties' marital estate. The wife filed an objection to the report with the District Court in the form of a motion for reconsideration and a motion to amend. The District Court did not rule on her motions, concluding that the motions should be ruled on at the standing master's discretion. The standing master did not rule on the motions either, and the wife appealed the District Court's order approving the standing master's report. The Supreme Court reversed and remanded the matter to the District Court, holding that the District Court should have either ruled on the wife's motions or expressly asked the standing master to rule on them. In re Marriage of Patton, 2015 MT 7, 378 Mont. 22, 340 P.3d 1242.

Abuse of Discretion to Modify Findings of Standing Master Absent Objection to Master's Findings: A standing master determined that the wife was entitled to one-half of the husband's pension benefits. The husband did not object to the finding. The District Court disagreed with the finding and awarded the entire pension benefit to the husband, and the wife appealed. The Supreme Court reversed. Pursuant to this section, a District Court may modify only findings and conclusions to which a party has filed an objection. The District Court's modification of the standing master's finding that the wife should receive one-half the pension, absent objection, was an abuse of discretion. In re Marriage of McMichael, 2006 MT 237, 333 M 517, 143 P3d 439 (2006).

No Error in Adjudication of Marital Property Issues Without Hearing: The parties allocated the marital estate by stipulation prior to trial, with the exceptions of a requested equalization payment and a disputed deficiency debt. The District Court examined the final financial disclosure statements of the parties and held, without a hearing, that the husband was not liable for an equalization payment, but that he was liable for a $13,904 deficiency debt on a jointly owned vehicle, which had been repossessed and sold because monthly payments were not made. The husband claimed on appeal that he lacked notice of the District Court's intent to adjudicate the disputes and requested that assignment of the deficiency payment be remanded for a hearing. The Supreme Court affirmed. The District Court's findings were supported by substantial evidence in the record and were not clearly erroneous, and the court did not abuse its discretion by adjudicating the two outstanding marital property issues without a hearing. In re Marriage of Bee, 2002 MT 49, 309 M 34, 43 P3d 903 (2002).

Due Process Violated by Entry of Judgment After Scheduling Hearing Without Scheduling Hearing to Determine Amount of Judgment: The parties had divorced in 1987. At that time, the husband was required to pay a total of $50,000 to his wife within a 2-year period. The parties remarried within 5 months of the dissolution and divorced again in 1993. Upon first hearing their case, the Supreme Court remanded the matter and instructed the District Court to reinstate the judgment against the husband from the first divorce. The lower court held a telephone conference to consider scheduling matters and at that time asked the wife to submit the amount that she believed her husband owed her. Subsequently, the District Court entered a judgment against the husband. The Supreme Court held that the husband's due process rights had been violated because the judgment was a lien against his property and he was not allowed a hearing in which to present evidence as to the amount that he believed he owed. The Supreme Court also rejected the wife's argument that a hearing was not required and that the amount owed could be determined just by looking at the record. In so doing, the Supreme Court distinguished the case before it from Young v. Flathead County, 241 M 223, 786 P2d 658 (1990). In re Marriage of Nordberg, 271 M 328, 896 P2d 447, 52 St. Rep. 468 (1995), followed in In re Marriage of Pospisil, 2000 MT 132, 299 M 527, 1 P3d 364, 57 St. Rep. 547 (2000).

Trust Account Improperly Ordered: The District Court exceeded the authority granted in this section to set up a trust when the record did not establish that the trust was needed for the support, maintenance, education, and general welfare of the parties' minor child until he reached majority. In re Marriage of Smith, 264 M 306, 871 P2d 884, 51 St. Rep. 277 (1994).

Proper Methodology for Deciding Issue on Remand: On remand for further consideration of the valuation of marital real property, the Supreme Court did not require the District Court to use any particular methodology, and it was not error for the judge, who was not involved in the original proceedings, to conduct a hearing rather than base his decision on the record. In re Marriage of Becker, 255 M 357, 842 P2d 332, 49 St. Rep. 983 (1992).

Power of Court to Award Dependency Exemptions: The 1984 federal amendments to 26 U.S.C. 152(e), regarding exemptions for dependent children of divorced parents, did not divest state courts of jurisdiction to allocate the exemptions in a decree of dissolution. A state District Court may assign the exemptions if it finds that the allocation would serve the best interests of the children and the parties. However, a District Court's refusal to award the exemptions does not constitute an abuse of discretion. In re Marriage of Milesnick, 235 M 88, 765 P2d 751, 45 St. Rep. 2182 (1988), followed in In re Marriage of Foreman, 1999 MT 89, 294 M 181, 979 P2d 193, 56 St. Rep. 373 (1999). See also In re Parenting of P.H.R., 2021 MT 231, 405 Mont. 334, 495 P.3d 38.

Factors Necessary to Show Extrinsic Fraud in Property Disposition: Wife contended that husband's failure to fully inform her of family assets, his misrepresentations concerning certain debts and property, and his forging of her name on the couple's joint income tax return were sufficient factors to demonstrate extrinsic fraud. However, in order to demonstrate extrinsic fraud, it must be shown that there was a material misrepresentation or concealment of assets that prevented a party from fully trying the case and that other equities, such as laches or negligence, were not present. In re Marriage of Lyman, 233 M 283, 762 P2d 203, 45 St. Rep. 1491 (1988), overruled in part in In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995).

Power to Create Trust: Under this section, the District Court does not have the authority to establish a trust to support a child after his 18th birthday unless the child is incompetent, retarded, or otherwise unable to care for himself. The trust created by the District Court in this case would have been distributed to the child on his 18th birthday. Since the child is not retarded, incompetent, or disabled, the trust was contrary to this section. In re Marriage of Alt, 218 M 327, 708 P2d 258, 42 St. Rep. 1621 (1985).

Proper to Consider Entire Marital Estate on Remand: On remand for hearing and specific findings on the disposition of an inheritance received by the wife shortly before dissolution, the District Court properly reconsidered the prior valuation and distribution of the marital estate to the extent necessary to allow the court to inform itself of the total estate and the proper equitable apportionment of all assets, including the inheritance. In re Marriage of Morse, 217 M 339, 708 P2d 559, 42 St. Rep. 1235 (1985).

Error to Order Liquidation of Family Corporation in Marital Property Disposition Decree: The court agreed with husband's contention that the trial court erred in ordering contingent liquidation of a family corporation for the enforcement and security of the wife's property division if the husband failed to make installment payments as ordered. The corporation was not a party, and thus the court had no jurisdiction over its property. Section 35-1-921 (now repealed) does not include dissolution of a corporation for nonpayment of marital obligations by one of the corporation's stockholders. However, the court remanded the case, since the trial court does have power to secure a marital settlement by granting a security interest in stock or such further security arrangements necessary to enforce the decree. In re Marriage of Buxbaum, 214 M 1, 692 P2d 411, 41 St. Rep. 2243 (1984).

Distinction Between Modification and Clarification of Decree: A final dissolution decree was entered on March 3, 1983. Because of later disputes between the parties concerning the property settlement, the District Court held two hearings and then entered an order: (1) setting March 3, 1983, as the date of valuation for some corporate stock that was awarded to the wife; and (2) giving the wife the right to choose the stock. On appeal, the Supreme Court held that neither action by the District Court was a modification of the dissolution decree in violation of the Montana Rules of Civil Procedure, but rather each was a clarification of the decree. In re Marriage of Rohrich, 211 M 130, 683 P2d 1308, 41 St. Rep. 1261 (1984).

Ex Parte Maintenance Order Entered After Final Decree Upheld: It was proper for the District Court to award wife temporary maintenance ex parte even though the effect of the award was amendment of the dissolution decree without holding the hearing required by former Rule 52(b), M.R.Civ.P. (now superseded). The Supreme Court held that since the intent of the District Court's earlier order, i.e., that the wife be maintained pending final disposition of the matter, was not being carried out, it was within the District Court's discretion to grant the wife temporary maintenance. In re Marriage of Rohrich, 211 M 130, 683 P2d 1308, 41 St. Rep. 1261 (1984).

Conflict Between Divorce Decree and Insurance Policy — Terms of Property Agreement to Prevail: The deceased's children, beneficiaries of the deceased's life insurance policy under the terms of a prior divorce decree, brought an action against their stepmother to recover the proceeds of the policy, paid to her under policy provisions conflicting with the divorce decree. The District Court did not err in following the terms of the divorce decree and awarding the proceeds to the plaintiffs. The provisions of the divorce decree making the children the policy beneficiaries were merely a written incorporation of the deceased's offer to his former wife and to the court. This agreement created equitable rights of the plaintiffs in the policy and cannot be defeated by a subsequent attempt to change the named beneficiary in the policy. Herrig v. Herrig, 199 M 174, 648 P2d 758, 39 St. Rep. 1274 (1982).

Water Right as Marital Property — Division: In a marriage dissolution, the court divided a ranch into two parcels, giving one to each spouse. The water rights to the land were divided, and easements were provided to allow access to the divided parcels. The wife, whose parcel contained the well, argued that the District Court lacked the power to divide the existing water right and that the power to make such a division rests in the Water Judge alone. On appeal, the Supreme Court said that although the Water Judges have exclusive jurisdiction over the determination and interpretation of existing water rights, a District Judge has original jurisdiction to dissolution of marriage proceedings and is required by statute to divide and distribute all marital property involved, including any water rights. Jensen v. Jensen, 193 M 247, 631 P2d 700, 38 St. Rep. 1109 (1981).

Lump-Sum Award of Double to Wife Where Husband Has Greater Earning Capacity: A lump-sum award to the wife in a marriage dissolution of a proportion of the marital estate of 2 to 1 was not an abuse of discretion by the District Court where the husband did have a greater earning capacity, despite his unemployment at the time of dissolution and immediately prior to the dissolution. Section 40-4-202 requires the District Court to consider the opportunity of the parties for future acquisition of capital assets and income. "Opportunity" is a broad word that includes the capacity of the parties to earn future income. Karr v. Karr, 192 M 388, 628 P2d 267, 38 St. Rep. 506 (1981).

Lack of Findings on Marital Home Not Correctable by District Court After Time Limitations Expire: In a divorce settlement, the trial court findings contained no determination of the net worth of the parties, the net worth of the husband's medical practice, or the relative financial contributions of the two parties. The findings of fact also were inconclusive as to the value and disposition of the family home. Five months after the decree was entered, the husband petitioned for amendment, requesting award of the family home to him. Eleven months later the District Court found that it was the original intention of the court to distribute the home to the husband. The Supreme Court concluded that the District Court erred in its attempt to amend the decree. Under former Rule 60(a), M.R.Civ.P. (now superseded), clerical errors in judgments may be corrected at any time since correction does not alter substantive rights of the parties. Here the attempted change adversely affected the wife's substantive rights by depriving her of her interest in the family home, a major asset of the marriage. Such error is judicial in nature and could not be corrected by the District Court except by motion made within the time limitations of former Rules 50(b), 52(b), 59, or 60(b)(1), M.R.Civ.P. (now superseded). No such motion having been made, the error would have been correctable by appeal, which was never taken by either of the parties. The District Court therefore lacked jurisdiction to make the change effected by its entry of the amended findings and decree. The case was remanded. Thomas v. Thomas, 189 M 547, 617 P2d 133, 37 St. Rep. 1710 (1980).

Award of Money Remaining Unpaid Under Prior Court Order: The District Court did not err in awarding respondent money appellant had been obligated to pay under a previous court order. Respondent's remedy is not limited to the statutes relating to the collection of judgments on accrued obligations. It is proper for the District Court to determine how much was owed and to enter a judgment for that amount, thus avoiding duplication of proceedings. In re Marriage of Dahl, 188 M 128, 612 P2d 196 (1980).

Fraud in Property Settlement: Fraud upon the court is a species of extrinsic fraud that will afford equitable relief. Fraud upon the court and upon one of the parties to the property settlement agreement is within the scope of 40-4-208, justifying a reopening of the provisions of a divorce decree as to property disposition. Pilati v. Pilati, 181 M 182, 592 P2d 1374 (1979), overruled in part in In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995).

Equitable Powers: District Court has equitable powers to deal with the judgment of property rights between parties in a divorce action. In re Marriage of Blair, 178 M 220, 583 P2d 403 (1978).

Disposition in Annulment: Husband, having clearly requested District Court to use its equitable powers in annulment action to make disposition of property acquired in joint names of husband and wife before marriage, could not complain on appeal from disposition order that District Court had no right to do so. Houser v. Houser, 173 M 65, 566 P2d 73 (1977).

Property Division: Property division could not be decreed in same suit in which husband was denied divorce and wife was granted separate maintenance. Stapleton v. Stapleton, 158 M 96, 488 P2d 1144 (1971), following Decker v. Decker, 56 M 338, 185 P 168 (1919), and Boggs v. Boggs, 119 M 540, 177 P2d 869 (1947).

DISCRETION OF TRIAL COURT

General

Modification of Property Distribution Upheld Despite Lack of Notice: Although the District Court erred in modifying the distribution of property under a prior decree due to lack of notice to both parties and an opportunity to be heard, the Supreme Court affirmed the District Court's ruling because the party who lacked notice and in whose favor the District Court ruled was not prejudiced. In re Marriage of Stevens, 2011 MT 124, 360 Mont. 494, 255 P.3d 154.

When Consideration of Tax Liability Considered Abuse of Discretion: A District Court may abuse its discretion if it fails to consider a concrete and immediate tax liability when a property distribution order precipitates the tax liability. However, the court does not abuse its discretion when it does not consider tax liabilities that are not imminent taxable events. In re Marriage of Thorner & Davis, 2008 MT 270, 345 M 194, 190 P3d 1063 (2008).

When District Court Decision on Valuation and Allocation of Marital Property Considered Clearly Erroneous: The Supreme Court reviews decisions regarding the valuation and allocation of marital property to determine whether the District Court's findings are clearly erroneous. A finding is clearly erroneous when it is not supported by substantial evidence, if the District Court misapprehended the effect of the evidence, or if review of the record indicates that a mistake was committed. If the findings are not clearly erroneous, then the valuation and allocation of marital property are reviewed for an abuse of District Court discretion. In re Marriage of Baide, 2004 MT 260, 323 M 104, 99 P3d 178 (2004). See also In re Marriage of Kovarik, 1998 MT 33, 287 M 350, 954 P2d 1147 (1998).

District Court's Failure to Determine Net Worth of Marital Estate Not Improper: The District Court divided the marital estate of the parties without determining the net worth of the property. The Supreme Court ruled that the statute did not require such a determination. Rather, the test is whether the findings as a whole are sufficient to determine the net worth and to decide if the distribution was equitable. In re Marriage of Stephenson, 237 M 157, 772 P2d 846, 46 St. Rep. 700 (1989).

General District Court Discretion in Achieving Equitable Distribution: Generally, the District Court is vested with wide discretion in the performance of its duty to achieve an equitable distribution of property in dissolution proceedings. In valuing property, the court is not bound by the opinion of a particular party or expert; rather, the court remains free, in its discretion, to adopt any reasonable valuation of property that is supported by the record. In re Marriage of Luisi, 232 M 243, 756 P2d 456, 45 St. Rep. 1023 (1988), followed in In re Marriage of Johns, 238 M 256, 776 P2d 839, 46 St. Rep. 1249 (1989), In re Marriage of Becker, 244 M 469, 798 P2d 124, 47 St. Rep. 1729 (1990), In re Marriage of Scott, 246 M 10, 803 P2d 620, 47 St. Rep. 2237 (1990), In re Marriage of Dzivi, 247 M 165, 805 P2d 567, 48 St. Rep. 140 (1991), In re Marriage of Spence, 257 M 188, 849 P2d 161, 50 St. Rep. 225 (1993), In re Marriage of Rada, 263 M 402, 869 P2d 254, 51 St. Rep. 110 (1994), In re Marriage of Robinson, 269 M 293, 888 P2d 895, 51 St. Rep. 1243 (1994), and In re Marriage of Harper, 1999 MT 321, 297 M 290, 994 P2d 1, 56 St. Rep. 1280 (1999). See also In re Marriage of Zander, 262 M 215, 864 P2d 1225, 50 St. Rep, 1522 (1993), In re Marriage of McNellis, 267 M 492, 885 P2d 412, 51 St. Rep. 1125 (1994), In re Marriage of Foreman, 1999 MT 89, 294 M 181, 979 P2d 193, 56 St. Rep. 373 (1999), In re Marriage of Hanni, 2000 MT 59, 299 M 20, 997 P2d 760, 57 St. Rep. 279 (2000), In re Marriage of Chamberlin, 2011 MT 253, 362 Mont. 226, 262 P.3d 1097, and In re Marriage of Kostelnik, 2015 MT 283, 381 Mont. 182, 357 P.3d 912.

Amendment of Property Division: The trial court awarded the wife less than one-half of the marital estate after specifically finding that an equal division was appropriate. The issue of property division was remanded to the trial court to consider whether an amendment was appropriate. In re Marriage of Reich, 222 M 192, 720 P2d 286, 43 St. Rep. 1167 (1986).

Equal Liability for Payment of Loan: The lower court was within its discretion in ordering wife and husband to share equally in paying back a loan to them from his mother, because both signed a note on the loan and wife was legally obligated to pay on the note as well as husband. In re Marriage of Perry, 217 M 162, 704 P2d 41, 42 St. Rep. 1101 (1985).

Sale of House — House Large Part of Assets — Sale and Even Proceeds Division Upheld: The lower court was within its discretion in ordering the family house sold and the proceeds evenly divided. The house constituted a very large part of the total marital assets, husband would have substantially less than half the assets if he did not get his even share of the sale proceeds, and though wife wished to remain in the house because it was close to the children's school and the mortgage payment was low, she should be able to obtain adequate housing with her $17,750 share of the sale proceeds. In re Marriage of Perry, 217 M 162, 704 P2d 41, 42 St. Rep. 1101 (1985).

Consideration of Dissipation of Marital Assets Not Reliance on Marital Misconduct: In making a distribution of marital assets, the Supreme Court held that although there was considerable evidence relating to the use of assets by the husband, including waste, dissipation, and need for a wage assignment for payment of child support, such evidence was not considered by the District Court to be marital misconduct. Pursuant to this section, a court must consider dissipation of an estate by one party. Thus, such evidence was admissible, and there was sufficient evidence before the trial court to justify its division of marital assets. In re Marriage of Merry, 213 M 141, 689 P2d 1250, 41 St. Rep. 2009 (1984), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Consideration of Support of Stepchildren: In an appeal of a decree of dissolution of marriage, the husband claimed District Court error in that the court did not find that the wife made a negative contribution to the marriage because the wife and her two sons consumed three-fourths of the marital income while she contributed only one-third of that income. The Supreme Court affirmed, ruling that evidence presented by the husband did not rebut the presumption set forth in 40-6-217 that his support of the wife's sons was given as a parent. In re Marriage of Peterson, 211 M 118, 683 P2d 1304, 41 St. Rep. 1252 (1984).

Agreement Unconscionable When Instigated to Get Wife's Property as Condition of Continuing Marriage: Petitioner appealed a judgment awarding approximately one-sixth of the marital property to him and the balance to the respondent wife. Petitioner contended that the trial court abused its discretion when it refused to divide the marital property 50-50 under an agreement executed between the parties. The Supreme Court held that the trial court properly refused to divide the property according to the agreement, stating that the result would be the same whether the agreement was a separation agreement or, as the husband contended, a postnuptial agreement. The evidence showed that in instigating the agreement the husband took advantage of his wife regarding her property as a condition to continuing the marriage, contrary to what is required of one in a confidential relationship. The agreement was unconscionable as a matter of law even though the trial court did not specifically find unconscionability. Myers v. Myers, 210 M 173, 682 P2d 718, 41 St. Rep. 990 (1984).

Excessive Mortgage to Secure Payments Nullified: Attachment by the trial court of a mortgage to all of husband's property (value totaling $203,236) to secure court-imposed obligation to pay $9,000 to wife over 10 years as part of property division was reversed as unreasonable and inequitable. Hunter v. Hunter, 196 M 235, 639 P2d 489, 39 St. Rep. 59 (1982).

Closely Held Corporation — Stock Interest Unchanged: A major asset of the marriage was Stratford Farms, Inc. The District Judge concluded that it would be in the best interest of the estate if each spouse was awarded his/her existing shares of stock in the corporation. This conclusion was based on the serious tax consequences if she ordered the liquidation of the corporation and on testimony of two of three sons who owned stock in the corporation, both of whom said they could vote their stock without regard to the personal dispute between their parents. The District Judge did not abuse her discretion in treating the stock as she did. Stratford v. Stratford, 193 M 195, 631 P2d 296, 38 St. Rep. 1093 (1981), followed in In re Marriage of Youngs, 215 M 330, 698 P2d 404, 42 St. Rep. 405 (1985).

Attorney Fees — Related to Property Distribution: In an appeal from the modification of a decree issued upon dissolution of her marriage, the wife urged that the District Court erred in not awarding her attorney fees. She argued that the improper determination of net worth and improper distribution of property necessitated reversal of the fees decision. The Supreme Court felt it was best, in light of its decision to remand the case regarding the property issues, to vacate the order of the District Court regarding the attorney fees and leave it to the discretion of that court to modify the attorney fees order or not after rehearing. Tefft v. Tefft, 192 M 456, 628 P2d 1094, 38 St. Rep. 837 (1981).

Liability for Rental Value of Property Awarded to Spouse: Where, following dissolution of the parties' marriage, the husband continued to live in a house awarded to the wife, the trial court did not err in awarding the wife the reasonable rental value of the property. The fact that the wife took no steps notifying the husband that he would be liable for rental value is immaterial, as the husband knew or should have known he was occupying property that was not his. Because no abuse of discretion was shown, the trial court's determination as to the value of the property will not be disturbed on appeal. Knudson v. Knudson, 191 M 204, 622 P2d 1025, 38 St. Rep. 154 (1981).

Title to House in Joint Tenancy: In an action for dissolution, it was not an abuse of discretion for the District Court to order that the title to the house remain in joint tenancy with the right of survivorship. Vashler v. Vashler, 183 M 444, 600 P2d 208 (1979).

Contribution of Wife: The trial court did not abuse its discretion in rejecting the husband's contention that the marital property awarded the wife was excessive and did not accurately reflect her contribution because she did not have a farming and ranching background and that it was his labor and financing that increased the value of the property. Kaasa v. Kaasa, 181 M 18, 591 P2d 1110 (1979).

Review of Discretion: In determining whether District Court abused its discretion in rendering property division, question is whether District Court acted arbitrarily without employment of conscientious judgment or exceeded bounds of reason in view of all the circumstances. Zell v. Zell, 174 M 216, 570 P2d 33 (1977). See also In re Marriage of Gallinger & Weissman, 221 M 463, 719 P2d 777, 43 St. Rep. 976 (1986).

Discretion of Trial Court to Adjust Property Rights in Favor of Wife: Trial court did not abuse its discretion by awarding wife proportionately larger share of marital property to offset her increased obligations where husband was unable to contribute to support of minor children. Perkins v. Perkins, 168 M 78, 540 P2d 957 (1975).

Abuse of Discretion

Tax Consequences of Ranch Sale Not Considered — Inequitable Distribution: The petitioning wife and respondent husband worked and lived on a family ranch for approximately 35 years of marriage. During a dissolution proceeding, the total value of the ranch was valued at approximately $3.1 million, with the land valued at approximately $2.3 million. The parties had minimal personal assets. The standing master determined the husband's interest in the ranch to be $1,159,541 and the wife's interest to be $1,159,424. Following this determination, the standing master ordered the husband to pay the wife $1,159,483 for her interest in the ranch, with $50,000 to be paid within 60 days and the remainder within 24 months. Despite the husband's objections to the standing master's order, no consideration was given by the standing master or the District Court to the tax implications of selling the ranch to satisfy the judgment. On appeal, the Supreme Court held that the standing master erred as a matter of law by failing to consider the tax consequences of the likely result that the ranch would be sold to satisfy the judgment and that the District Court erred in adopting this conclusion, resulting in an inequitable distribution. In re Marriage of Broesder, 2017 MT 223, 388 Mont. 476, 402 P.3d 1193.

Failure of District Court to Properly Account for Unmarried Homemaker's Contribution to Marital Estate — Equitable Distribution: The husband and wife were in a relationship starting in 1991 but were officially married in 2008. The couple had three children. The wife provided primary care to the children while the husband worked at his family's ranch business. The wife petitioned to dissolve the marriage in 2011, while she was still caring for the children. The District Court determined that the net worth of the marital estate was $1,997,966 and awarded the wife approximately 6% with no award of maintenance. The wife appealed, arguing that the District Court inequitably apportioned the marital estate. The Supreme Court agreed with the wife, holding that the District Court did not properly account for the wife's homemaking contribution to the marital estate because she had no retirement funds, she would not qualify for future Social Security benefits, and her job prospects were limited or nonexistent. Richards v. Trusler, 2015 MT 314, 381 Mont. 357, 360 P.3d 1126.

Abuse of Discretion — Tax Consequences of Quick Ranch Sale or Equalization Payment Not Considered — Issue Preserved Through Posttrial Motion: The District Court abused its discretion by failing to consider the tax consequences of an order that required the husband to choose between selling a ranch or making an equalization payment to the wife within 120 days. Further, the husband did not waive his right to raise the tax consequences argument on appeal, given that the issue was raised in his posttrial motion after the 120-day deadline was imposed sua sponte by the District Court in its final decree. Given the District Court's short timeline for the equalization payment, the sale of the ranch was the only reasonable option to make the payment, which created a concrete and immediate tax event. In re Marriage of Clark, 2015 MT 263, 381 Mont. 50, 357 P.3d 314, distinguishing In re Marriage of Turbes, 234 Mont. 152, 762 P.2d 237 (1988), and In re Marriage of Taylor, 257 Mont. 122, 848 P.2d 478 (1993).

Proceeds of Class Action Settlement and Social Security Disability Payment Improperly Included in Marital Estate: In determining the marital estate, the District Court erred by including in the wife's share the proceeds of a class action settlement and a Social Security disability payment mistakenly received several years before the actual date of separation. Long before the parties actually separated, the money from the class action settlement was spent and the amount erroneously received from the Social Security administration was repaid. In re Baker, 2010 MT 124, 356 Mont. 363, 234 P.3d 70.

Separation Agreement Overlooked — Discretion Abused: The District Court acted unreasonably and arbitrarily in abuse of its discretion by: (1) concluding that the parties' separation agreement, which provided maintenance to the wife, was abandoned in absence of supporting evidence;

(2) distributing the marital estate 4 to 1 favoring the husband; (3) ordering the wife fully responsible for the family home payments and liable to the husband for his equity in the home upon default; and (4) not providing any maintenance to the wife to make these payments after finding that she was in need of maintenance. In re Marriage of Bowman, 226 M 99, 734 P2d 197, 44 St. Rep. 488 (1987).

Error to Award Portion of Estate Directly to Wife for Education of Adult Son: District Court erred in two respects in awarding 65% of the net marital estate to the wife in order to compensate wife for the expense she would incur in educating the parties' son. First, it was error to award a portion of the marital estate directly to the wife for education of the son instead of using a separate fund or trust. Second, it was error to consider the wife's educational expenses since, by doing so, the District Court effectively placed an improper obligation on the husband to support his son beyond majority. In re Marriage of Hurley, 222 M 287, 721 P2d 1279, 43 St. Rep. 1271 (1986), followed in In re Marriage of Heckler, 274 M 277, 908 P2d 208, 52 St. Rep. 1231 (1995).

Distribution of Corporate Asset — Election Ordered: Although there was a proper factual basis for distribution of a corporate asset to the wife, as a matter of law the trial court did not have the power to order the distribution of corporate property as the corporation was not a party to the dissolution action. The issue was remanded to allow the husband, who owned all shares of the corporation, to elect to accept distribution of the corporate asset to the wife or accept a property substitution equal in value to the value assigned the corporate asset. In re Marriage of Reich, 222 M 192, 720 P2d 286, 43 St. Rep. 1167 (1986), distinguished in In re Marriage of Martin, 265 M 95, 874 P2d 1219, 51 St. Rep. 443 (1994).

Financial Condition of Parties at Time of Marriage — Major Factor in Property Division: When the record indicated that the wife brought $425,618 into the marriage at its outset and the husband brought in $12,355, the award by the District Court was inadequate and an abuse of discretion. The Supreme Court held that the source of marital property is a major factor to be considered in dividing the property. In re Marriage of Summerfelt, 212 M 332, 688 P2d 8, 41 St. Rep. 1775 (1984).

Abuse of Discretion to Consider Factors Not Supported in Record: In a dissolution of marriage proceeding, husband and wife presented conflicting testimony on the total value of the marital estate, principally composed of a ranch. In its findings, the District Court applied factors not found in the record and arrived at a value that was different from that put forth by either the husband or wife. The Supreme Court reversed on this issue, holding that the District Court had abused its discretion by using factors not supported in the record to determine the value of the ranch. In re Marriage of Garst, 199 M 393, 649 P2d 450, 39 St. Rep. 1477 (1982).

Equal Division of Residence — Abuse of Discretion: After purchasing a residence, the house payments for the first 5 years were made from the husband's income while the wife cared for the children and the house. A 1971 dissolution decree provided for the wife and children to remain in the house, its disposition to be decided at a later time. The wife made all house payments for the next 10 years. In 1981 the District Court apportioned the parties' interest in the residence, ordering an equal division of the net proceeds upon its sale. This was a clear abuse of discretion because the contributions of the parties were not equal, nor were the parties' relative abilities to acquire property in the future. Torma v. Torma, 198 M 161, 645 P2d 395, 39 St. Rep. 839 (1982), distinguished in In re Marriage of Stoneman, 2000 MT 274, 302 M 107, 14 P3d 12, 57 St. Rep. 1145 (2000), in which equal division of proceeds from sale of the family home was proper because both parties retained an interest in the property by making one-half the mortgage payments until the home was sold. Stoneman was expressly overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202. See also In re Marriage of Lewis, 2020 MT 44, 399 Mont. 58, 458 P.3d 1009.

Prohibiting Sale of Residence Past Majority Age of Child — Abuse of Discretion: A 1971 dissolution decree apportioned only the personal property of the parties. In 1981, in a proceeding for modification of the decree, the District Court abused its discretion by ordering that the parties' residence not be sold until the youngest child finished college at the age of 22. This in effect amounted to child support past the age of majority when no express agreement or decree provision provided for such support. Torma v. Torma, 198 M 161, 645 P2d 395, 39 St. Rep. 839 (1982).

Use of Outdated Financial Statement: The court abused its discretion in dividing marital property estimated at a value of $63,714 in a manner resulting in the husband receiving only a

1975 truck and by making such award based on an outdated financial statement presented by the wife. Kramer v. Kramer, 177 M 61, 580 P2d 439 (1978).

Award Contrary to Finding: When the court, in a finding of fact, stated that the properties of the parties should be divided as equally as possible but proceeded to make a very disparate award, it clearly abused its discretion. Berthiaume v. Berthiaume, 173 M 421, 567 P2d 1388 (1977), distinguished in In re Marriage of Scoffield, 258 M 337, 852 P2d 664, 50 St. Rep. 560 (1993), and In re Marriage of Corey, 266 M 304, 880 P2d 824, 51 St. Rep. 859 (1994).

No Abuse of Discretion

Court Not Required to Adopt Proposed Finding of Either Party: Although the parties agreed at the dissolution hearing that the wife would reimburse the husband for survivor benefit plan payments, the District Court did not include that requirement in the final decree. The husband argued that failure to include the wife's reimbursement requirement was an abuse of discretion, but the Supreme Court disagreed. The District Court was not required to adopt the proposed finding or any other proposed finding submitted by the parties, nor did the court adopt all the proposed findings presented by either party, and the failure to adopt a particular proposed finding was not an abuse of discretion. In re Marriage of David, 2009 MT 422, 354 M 44, 221 P3d 1209 (2009).

No Abuse in Trial Court's Dismissal of Contempt Motion: Pursuant to a stipulation, the husband was to pay the wife $7,500 in a lump sum and $300 a month pending final disposition. The wife subsequently moved to hold the husband in contempt for failing to make the required $300 payments. The trial court dismissed the contempt motion, and the wife appealed, but the Supreme Court affirmed. Contempt is a discretionary tool of the trial court, and when the court has found no need to enforce compliance with its orders or that the actions of a party do not present a challenge to its dignity and authority, the Supreme Court will not reverse a contempt decision absent a blatant abuse of discretion. In this case, the wife actually received the money that was at issue in the contempt motion, so it was not a blatant abuse of discretion for the trial court to dismiss the motion. In re Marriage of Dirnberger, 2007 MT 84, 337 M 56, 154 P3d 1227 (2007). See also In re Marriage of Baer, 1998 MT 29, 287 M 322, 954 P2d 1125 (1998).

Cost Approach Versus Market Approach in Valuation of Marital Property — Court's Discretion to Accept Either: In reviewing the District Court's valuation of business property owned by Steve at the time of dissolution of his marriage, the Supreme Court held that the District Court did not err in relying upon the "market approach" to valuation of marital property used by Sherri's expert appraiser rather than the "cost approach" to valuation of that property used by Steve's expert appraiser. The Supreme Court pointed out that even though there may have been very few genuinely comparable sales by which to apply the market approach to valuation, the District Court found the appraisal by Sherri's appraiser to be the more reliable of the two appraisals and also found that the cost approach to valuation "appeared to be unrealistic". The Supreme Court cited In re Marriage of Meeks, 276 M 237, 915 P2d 831 (1996), for the proposition that a District Court is free to adopt any reasonable valuation of marital property that is supported by the record, as long as it is reasonable in light of the evidence submitted. In re Marriage of Helzer, 2004 MT 352, 324 M 371, 102 P3d 1263 (2004).

Moving Expenses Proper Given Exclusive Use of Property: The husband contended that the trial court abused its discretion in ordering him to pay the wife's expenses incurred in moving out of the marital home. However, the court did not abuse its broad discretion here, given that the husband testified at trial that he was willing to pay a reasonable amount to assist in the wife's move and that the husband was granted exclusive use of the property. In re Marriage of Clark, 2003 MT 168, 316 M 327, 71 P3d 1228 (2003).

Award of One-Half of Future Proceeds From Pending Lawsuit Following Abandonment of Consortium Claim Not Abuse of Discretion: The District Court awarded the wife one-half of any future proceeds that the husband might get from a pending lawsuit against the State Fund. The husband contended that the award was an abuse of discretion because the wife dissipated the marital estate by abandoning a loss of consortium claim associated with the State Fund suit, and because the husband remained responsible for the repayment of debts from a prior criminal lawsuit, even though he would receive only one-half of the possible proceeds from the pending suit. The husband cited no authority that failure to bring a lawsuit created a dissipation of the marital estate, nor did he have support for the claim that he owed attorney fees for the criminal case and that that debt was part of the marital estate, so the Supreme Court affirmed the award. In re Marriage of Hodge, 2003 MT 146, 316 M 194, 69 P3d 1192 (2003).

No Error in Adjudication of Marital Property Issues Without Hearing: The parties allocated the marital estate by stipulation prior to trial, with the exceptions of a requested equalization payment and a disputed deficiency debt. The District Court examined the final financial disclosure statements of the parties and held, without a hearing, that the husband was not liable for an equalization payment, but that he was liable for a $13,904 deficiency debt on a jointly owned vehicle, which had been repossessed and sold because monthly payments were not made. The husband claimed on appeal that he lacked notice of the District Court's intent to adjudicate the disputes and requested that assignment of the deficiency payment be remanded for a hearing. The Supreme Court affirmed. The District Court's findings were supported by substantial evidence in the record and were not clearly erroneous, and the court did not abuse its discretion by adjudicating the two outstanding marital property issues without a hearing. In re Marriage of Bee, 2002 MT 49, 309 M 34, 43 P3d 903 (2002).

Land Valuation Consistent With All Evidence — Remand for Errors in Inconsistent Application of Confusing Valuation Methodology: The District Court did not act arbitrarily or abuse its discretion in valuing two lots. The valuation was consistent with the testimony of both the husband and the wife and with the county's valuation and bills submitted for improvements. However, the court was directed to correct two omissions in the calculations in its oftentimes confusing valuation methodology, a methodology not consistently applied. In re Marriage of Hockaday, 237 M 413, 773 P2d 1217, 46 St. Rep. 910 (1989).

Power of Court to Award Dependency Exemptions: The 1984 federal amendments to 26 U.S.C. 152(e), regarding exemptions for dependent children of divorced parents, did not divest state courts of jurisdiction to allocate the exemptions in a decree of dissolution. A state District Court may assign the exemptions if it finds that the allocation would serve the best interests of the children and the parties. However, a District Court's refusal to award the exemptions does not constitute an abuse of discretion. In re Marriage of Milesnick, 235 M 88, 765 P2d 751, 45 St. Rep. 2182 (1988), followed in In re Marriage of Foreman, 1999 MT 89, 294 M 181, 979 P2d 193, 56 St. Rep. 373 (1999). See also In re Parenting of P.H.R., 2021 MT 231, 405 Mont. 334, 495 P.3d 38.

Award of Estate Property to Husband — Assumption of Marital Debts: It was proper for the District Court to award the marital estate property to the husband as long as he assumed full responsibility for the marital debts, which equaled the value of the property, to relieve the wife of responsibility for payment of estate obligations. There was a possibility of a deficiency judgment if the property were sold, and award to the husband was a reasonable alternative. In re Marriage of Hall, 228 M 36, 740 P2d 684, 44 St. Rep. 1321 (1987).

Evidence to Support Valuation of Ranch and Offset of Award: Following the dissolution of marriage proceeding, the District Court did not abuse its discretion when it considered the source of marital property as a major function in the division of ranch property or when it offset a prior maintenance award from the husband's property settlement. Citing In re Marriage of Summerfelt, 212 M 332, 688 P2d 8, 41 St. Rep. 1775 (1984), the court stated that the $520,000 grant to the husband, who at the time of his marriage into an established ranching family had little ranching experience and brought five head of cattle into the marriage, constituted an equitable settlement. Likewise, since the trial court awarded the husband $28,000 for living expenses, despite the fact that his bank accounts contained over $27,000, the Supreme Court ruled that the award should be offset against the property award. In re Marriage of Watson, 227 M 383, 739 P2d 951, 44 St. Rep. 1167 (1987).

Wife's Valuation More Credible: It was not an abuse of discretion for the trial court to find the wife's valuation of property more credible than the husband's and to impose a depreciation factor of .25 on the values to ensure against an inflated estimation. In re Marriage of Dunn, 226 M 394, 735 P2d 1117, 44 St. Rep. 749 (1987). See also In re Marriage of Hutchins, 2018 MT 275, 393 Mont. 283, 430 P.3d 502, holding that the District Court did not abuse its discretion in adopting the husband's valuation of an office suite rather than the wife's valuation because the District Court may assign any reasonable valuation of property supported by the record.

No Abuse of Discretion in Divorce Settlement:

District Court did not abuse its discretion when it substantially adopted wife's valuation of the marital estate. The court's conclusions were not arbitrary or unreasonable, and husband's own testimony supported wife's evaluation, the two differing by estimates of 10% or less on the total value and the value of wife's share. In re Marriage of Manus, 225 M 457, 733 P2d 1275, 44 St. Rep. 398 (1987).

Following dissolution of the marriage, husband and wife negotiated and signed a property settlement and child support agreement. The husband subsequently informed his attorney of his dissatisfaction with the agreement. The District Court allowed the amended agreement to be incorporated into the supplementary decree of dissolution. A year later the husband filed a motion to amend the judgment, alleging unconscionability. After a hearing to determine the parties' financial condition, the court held the agreement valid. On appeal, the Supreme Court affirmed, stating that the husband had knowingly entered into the agreement and was competently represented by counsel. Prior to the execution of the final decree, the agreement was twice revised. In re Marriage of Hangas, 223 M 343, 725 P2d 1205, 43 St. Rep. 1773 (1986).

Unequal Division When Wife Has Custody of Two Children: Parties married for 10 years were in their mid-thirties and had children aged 7 and 10 when they separated. He was in the construction business, and she had 2 years of college, training as a legal secretary, and experience as a keypunch operator and bookkeeper. Their major asset was the home, worth $67,000-$70,000, with $40,000 left to pay on it. They owed nearly $10,000 in other debts. The wife was granted physical custody of the children and the right to live in the home until the oldest child reached 18, at which time the home was to be sold and the equity evenly distributed. The husband was ordered to pay the mortgage and other debts, child support, health insurance for the children, and the wife's attorney fees. Of the parties' personal property, valued at $12,000, the husband was granted property worth approximately $2,000. There was no abuse of discretion in the apportionment of the marital estate. The husband argued the court made a wholesale adoption of the wife's estimates of the value of personal property, but the record showed no estimates offered by the husband. In re Marriage of Johnson, 225 M 404, 732 P2d 1345, 44 St. Rep. 353 (1987).

Nearly Equal Division of Assets and Income From Assets — Retirement Income Split 70/30 — Limited Duration Maintenance for Wife's Education: Upon dissolution of 35-year marriage, it was not abuse of discretion for the trial court to award approximately equal value of property and resultant income to each party, to split the husband's civil service retirement benefits, and to award $150 a month maintenance to the wife for a short period to help her while she returned to school. Maintenance, although diminishing the husband's income for a while, differed from an award of marital assets and was clearly permissible for the purpose of making wife self-supporting. The award of 30% of husband's retirement benefits was necessary because the wife's benefits at retirement would be small, since she had to forgo employment to care for her husband and family prior to his retirement. In re Marriage of Singer, 222 M 255, 721 P2d 755, 43 St. Rep. 1242 (1986).

Court Order That Husband Buy Wife's Stock in Ranch Not Abuse of Discretion: The court did not err in ordering husband to exercise option to purchase wife's stock for $117,000 by October 1, 1985, or execute and deliver to wife a promissory note for the principal sum of $117,000 at 8% interest over 30 years in annual payments of $10,300 and a final balloon payment. Husband argued that the judgment should be modified to provide for a lower annual payment without interest. The Supreme Court rejected his argument, finding the evidence sufficient to support the size of the annual payments. The court held that there was equitable apportionment of the marital assets. In re Marriage of Wessel, 220 M 326, 715 P2d 45, 43 St. Rep. 405 (1986). See also In re Marriage of Kovarik, 1998 MT 33, 287 M 350, 954 P2d 1147, 55 St. Rep. 117 (1998).

Land Bought With Wife's Premarital Money and Husband's Marital Income — Even Distribution of Proceeds of Sale: The lower court was within its discretion in equally dividing the proceeds of the sale of a piece of property, despite wife's claim that she used $5,000 from her premarital savings for its downpayment, because husband's income was used for the rest of the payments. In re Marriage of Perry, 217 M 162, 704 P2d 41, 42 St. Rep. 1101 (1985).

Equal Allocation of Ranch Debt — No Abuse of Discretion: The District Court did not err in making an equal allocation of ranch operating debt incurred prior to separation. Both husband and wife worked on the ranch and together incurred the ranch indebtedness. The debt is a marital debt, and the court may order it to be borne by both parties. In re Marriage of Staudt, 216 M 196, 700 P2d 175, 42 St. Rep. 740 (1985).

No Abuse of Discretion in Excluding Car Wash From Marital Estate: A District Court order divided the marital estate, disregarding a car wash, equally between the parties. The District Court concluded that husband's interest in car wash would be maintained by him in order to provide an opportunity for future income because his physical disability affected his ability to earn a living. The Supreme Court affirmed the District Court decision and held that trial judge properly considered the positions of the parties at the outset of the marriage, the contributions of each party to the marriage, each party's age, health, and occupation, as well as each party's future prospects. In re Marriage of Childers, 216 M 125, 700 P2d 594, 42 St. Rep. 692 (1985).

District Court to Consider All Factors: The District Court awarded nearly all of marital estate to wife in lieu of child support from husband, whose occupation was professional gambler. The trial court found that the best interests of the children would be served by allowing them to remain in the family home, that forced sale of the family home would divert and dissipate assets needed for support, and that the only reasonable means to protect and promote the best interests of the children were to award the home to the mother. Husband appealed on the division of property issue, and the Supreme Court found that the District Court had not abused its discretion. Issues of property and support are not totally irrelevant to each other or inextricably interwoven; the court properly considered all factors and made a decision based on the extent to which they were interrelated. In re Marriage of King, 216 M 92, 700 P2d 591, 42 St. Rep. 666 (1985).

Alleged Ambiguity and Indefiniteness in Method of Payment — No Abuse of Discretion: The Supreme Court upheld the method of payment ordered by the trial court where assets were to be divided equally by calculating a net value of marital assets, subtracting the amount for personal property and other marital assets awarded wife, with husband to pay wife's residual equity in the marital estate ($461,170.87) over 10 years with interest at 2% below the prime rate as used by local banks. The court rejected husband's assertion that such a method of payment violates public policy because of its indefiniteness and ambiguity as to when payments are due and the interest to be paid, noting that the trial court's order does not prevent husband from refinancing his obligation to acquire more satisfactory terms. In re Marriage of Ziegler, 215 M 208, 696 P2d 983, 42 St. Rep. 298 (1985).

Inclusion in Marital Estate of Husband's Earnings After Separation — Not Abuse of Discretion: The court distinguished Wagner v. Wagner, 208 M 369, 679 P2d 753 (1984), from the present case and held that the trial court did not abuse its discretion by including husband's earnings after separation since, unlike the facts in Wagner, the Loegerings did not embark upon totally divergent financial courses at the time of separation. Additionally, the parties in this case did not negotiate any settlement agreement at separation as in Tureman v. Tureman, 190 M 267, 620 P2d 1200 (1980). Any determination of the marital assets at the time of separation would clearly have been inequitable. In re Marriage of Loegering, 212 M 499, 689 P2d 260, 41 St. Rep. 1892 (1984). See also In re Marriage of Staudt, 216 M 196, 700 P2d 175, 42 St. Rep. 740 (1985).

No Abuse of Discretion in Apportioning Marital Assets for Failure to Address Each Item Separately: The Supreme Court found no abuse of discretion by the District Court in apportioning the marital assets. Division of the house on other than a 50-50 basis was not erroneous when a review of the record shows that the District Court conscientiously gave consideration to the elements set forth in In re Marriage of Jorgensen, 180 M 294, 590 P2d 606 (1979), and cases cited therein, even if the court failed to "articulate" each item separately within its findings and conclusions. Sell v. Sell, 193 M 88, 630 P2d 222, 38 St. Rep. 956 (1981), followed in In re Marriage of Bell, 220 M 123, 713 P2d 552, 43 St. Rep. 226 (1986).

Division of Property — Failure of Husband to Supply Financial Information: The District Court did not abuse its discretion in dividing property between the parties based on the information before it when the husband failed to supply financial information as ordered and then appealed the court's division of property. In re Marriage of Dahl, 188 M 128, 612 P2d 196 (1980).

Court's Optional Plan Allowing Husband to Purchase Wife's Share of Ranch Not an Abuse of Discretion: The court did not abuse its discretion in giving the husband an option to purchase his wife's interest in the family ranch over a period of 30 years at 7% interest. It was implicit in the court's judgment and there is sufficient evidence in the record to support the conclusion that the payment plan set up by the court was economically feasible for the husband to comply with. Jacobson v. Jacobson, 183 M 517, 600 P2d 1183 (1979).

Use of Conscientious Judgment: The court did not abuse its discretion in an award of support and maintenance to appellant or in the property disposition since the record failed to disclose an arbitrary exercise of discretion without employment of conscientious judgment. Jerome v. Jerome, 175 M 429, 574 P2d 997 (1978). See also In re Marriage of Gallinger & Weissman, 221 M 463, 719 P2d 777, 43 St. Rep. 976 (1986), and In re Marriage of J.J.C. & P.R.C., 227 M 264, 739 P2d 465, 44 St. Rep. 1068 (1987).

Sufficiency of Evidence, Findings

Sufficient Evidence to Support District Court Apportionment — No Abuse of Discretion: A wife appealed the amount and duration of her maintenance award. The Supreme Court noted that the wife would face barriers to securing employment and managing the assets she was awarded in the divorce in order to produce a return and that the wife made a "well-supported argument for entitlement to a higher maintenance award". Nevertheless, the Supreme Court upheld the District Court's award given that there was sufficient evidence to support its conclusion and nothing suggesting that the District Court acted arbitrarily or in clear error. In re Marriage of Frank, 2019 MT 130, 396 Mont. 123, 443 P.3d 527.

Award of Maintenance and Distribution of Assets to Wife Supported by Facts: The District Court did not err by awarding the wife maintenance and by including the husband's investment accounts in calculating the division of the marital estate. The standing master's findings regarding maintenance, which were adopted by the District Court, along with the District Court's own findings demonstrated that the District Court fully and carefully considered the relevant factors pursuant to 40-4-203, including the parties' ages, health conditions, duration of marriage, and standard of living enjoyed during the marriage, the assets of the parties, and the assets' equitable distribution between the parties. The findings of the standing master and the District Court regarding equitable distribution also considered all of the factors set forth in 40-4-202, and the allocation of approximately 30% of the marital estate to the wife was supported by the facts. In re Marriage of Hollamon, 2018 MT 37, 390 Mont. 320, 413 P.3d 460.

Sufficient Evidence to Support Findings and Order to Proceed With Divisive Reorganization: As a part of dividing the parties' substantial marital estate, the District Court ordered the husband to seek a divisive reorganization of his business pursuant to IRS rules. The husband's expert claimed that the reorganization would have severe detrimental tax consequences for the marital estate while the wife's expert testified that the reorganization would not have negative consequences. On appeal, the Supreme Court affirmed, ruling that the record supported the District Court's findings and its conclusions. In re Marriage of Edwards, 2015 MT 9, 378 Mont. 45, 340 P.3d 1237.

Failure to Submit Evidence on Appreciation — No Error in Equal Distribution of Appreciation on Investment Accounts: During trial on the issue of property disposition as part of a marital dissolution, a husband argued that he and not his wife should be credited with the appreciation in the value of his investments because the investments were traceable to an inheritance from his mother's estate. The Supreme Court held that the District Court did not err when it divided the appreciation equally between the parties because the husband had failed to submit substantial, credible evidence showing that the appreciation was traceable to the funds from his mother's estate. In re Marriage of Kessler, 2011 MT 54, 359 Mont. 419, 251 P.3d 147.

Trial Court Discretion in Discounting Stock and Considering Profit-Sharing Plan — No Fault Ascribed to Findings and Assignment of Debt: The wife claimed error in division of marital property because the trial court imposed a de facto stock discount on shares of the husband's corporation, failed to include the interest in the husband's profit-sharing plan, and interjected fault into a no-fault dissolution through consideration of the fact that the wife's management of the family casino had resulted in large debts to the marital estate. The Supreme Court affirmed on each issue. The trial court was within its discretion in setting the stock value within the range of evidence presented at trial, and in light of the considerable amount of debt ascribed to the husband, it was reasonable for the court to grant the husband his profit-sharing plan proceeds. As to the claim of fault, the financial findings that the wife took issue with were proper and aided the court in considering the equitable distribution of the property, so no fault was interjected through the court's consideration of the business debts. In re Marriage of Hanni, 2000 MT 59, 299 M 20, 997 P2d 760, 57 St. Rep. 279 (2000). See also In re Marriage of Maedje, 263 M 262, 868 P2d 580, 51 St. Rep. 47 (1994).

Convoluted Argument Not Supported by Record: James Dowd did not work in the family bakery and was not active in its management. He did not contribute any of his earnings to pay family debts. On appeal, Dowd alleged that the trial court erred in determining the net worth of the parties. The Supreme Court held that Dowd's argument that he should be credited with one-half of the marital debts paid by his wife from her earnings achieved by running the bakery was absurd and was not supported by the record or Montana law. In re Marriage of Dowd, 261 M 319, 862 P2d 1123, 50 St. Rep. 1341 (1993), distinguished on other grounds by In re Marriage of Crowley, 2014 MT 42, 374 Mont. 48, 318 P.3d 1031.

Extensive Findings — Negation of Appellant's Argument: James Dowd argued that the trial court failed to consider the factors required by this section when dividing the parties' property and failed to consider his contribution as the homemaker that allowed his wife to develop her bakery business. The Supreme Court set out facts in the record and held that the excerpted barrage of facts confirmed that the trial court had covered the gambit of factors required by state law and that the trial court had not abused its discretion when it did not rely on the husband's testimony to determine his contribution to the bakery as the homemaker. In re Marriage of Dowd, 261 M 319, 862 P2d 1123, 50 St. Rep. 1341 (1993), distinguished on other grounds by In re Marriage of Crowley, 2014 MT 42, 374 Mont. 48, 318 P.3d 1031.

Adoption of Proposed Findings — Test Met: Husband contended that the almost verbatim adoption of wife's proposed findings was error. The Supreme Court held that the findings met the ultimate test for adequacy. The District Court's findings of fact and conclusions of law were comprehensive and pertinent to issues presented. All findings were supported by sufficient evidence on record. In re Marriage of Hurley, 222 M 287, 721 P2d 1279, 43 St. Rep. 1271 (1986), followed in In re Marriage of Bolt, 259 M 54, 854 P2d 322, 50 St. Rep. 672 (1993), In re Marriage of Craib & Rhodes, 266 M 483, 880 P2d 1379, 51 St. Rep. 937 (1994), and In re Marriage of Crilly, 2005 MT 311, 329 M 479, 124 P3d 1151 (2005).

Equal Contributions to Marriage — Equitable Distribution of Property — No Abuse of Discretion: The District Court concluded that in spite of equal contributions to the marriage, it was equitable to award the wife less than 20% of the net marital estate. She argued that the findings of fact did not support the conclusion as to an equitable distribution. The Supreme Court found that the District Court adequately examined the statutory considerations outlined in 40-4-202(1), and in the absence of a showing of clear abuse of discretion, the District Court's division of the marital estate was affirmed. In re Marriage of Sirucek, 219 M 334, 712 P2d 769, 42 St. Rep. 2065 (1985). See also Loi v. Feeley, 2012 MT 91, 365 Mont. 7, 277 P.3d 1195.

Two-Thirds, One-Third Division Proper: Award of 67% of marital estate to husband and the rest to wife was not an abuse of discretion. There were extensive, detailed findings and conclusions, and equal division is not mandated. Snell v. Snell, 205 M 359, 668 P2d 238, 40 St. Rep. 1359 (1983).

Adoption of Proposed Findings — Test: Findings adopted practically verbatim from those proposed by one of the parties did not meet the tests that: (1) the court should not rely too heavily on findings and conclusions submitted by the winning party, and reliance is too heavy when the findings are used to the exclusion of a consideration of the facts and the exercise of the judge's own judgment; and (2) the ultimate test for adequacy of findings is whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and are supported by the evidence presented. In re Marriage of Wolfe, 202 M 454, 659 P2d 259, 40 St. Rep. 211 (1983).

Widely Conflicting Valuations — Statement of Reasons for Judge's Choice: Trial court adopted husband's proposed findings and conclusions including, without a statement of the court's reasons, husband's opinion that ranch awarded husband was worth $450,000. Husband's professional appraiser valued the ranch at $1,184,725 as a working ranch, and wife's professional appraiser valued it at $1,649,166 at its highest and best use. In view of the widely conflicting valuations, the trial court was required to give reasons for selecting one value over the others. In re Marriage of Wolfe, 202 M 454, 659 P2d 259, 40 St. Rep. 211 (1983).

No Findings as to Alleged Assets — Abuse of Discretion: In a property settlement proceeding, the petitioner submitted evidence of respondent's checking account balance, a growing wheat crop, and bank stock. The trial court did not include the items in its valuation of the marital estate and failed to give an explanation for so excluding. Although item-by-item findings are not required in a property settlement proceeding, the findings must be sufficiently adequate so as to allow for appellate review. The trial court abused its discretion. In re Marriage of Larson, 200 M 134, 649 P2d 1351, 39 St. Rep. 1628 (1982).

Appraisals Averaged — Failure to Set Forth Reasons Not Error: The District Court did not err in failing to set forth reasons for its valuation of a parcel of real property. It was clear from the evidence that the two varying appraisals were averaged. In re Marriage of Converse, 198 M 227, 645 P2d 413, 39 St. Rep. 887 (1982).

Sufficient Evidence to Sustain Property Award — Discretion of Court: Where the parties were married in Mexico but had never lived together, the appellant had never contributed to the support of the respondent, and the respondent had not contributed to the marital estate, there was sufficient evidence to sustain the property award under the totality of circumstances; the District Court has broad discretion to make property awards. Wilson v. Wilson, 186 M 290, 607 P2d 539 (1980).

Findings Not Based on Abuse of Discretion: Appellant asserts that the facts do not support the finding of the District Court. The record indicates that the District Court heard testimony and reviewed other evidence concerning the relevant factors set out in 40-4-202 and 40-4-203. The judgment of the District Court will not be altered unless a clear abuse of discretion is shown. No such abuse of discretion is found. Reese v. Reese, 185 M 52, 604 P2d 326 (1979).

Award Contrary to Finding: When the court, in a finding of fact, stated that the properties of the parties should be divided as equally as possible but proceeded to make a very disparate award, it clearly abused its discretion. Berthiaume v. Berthiaume, 173 M 421, 567 P2d 1388 (1977).

Equitable Jurisdiction

Improper Imposition of Constructive Trust on Marital Property as Lien for Payment of Dissolution Judgment — Trustees Not Parties to Action: The trial court imposed a constructive trust on preacquired property owned by the wife's children as a lien for payment by the wife of the amount owed to the husband as his part of the marital estate. However, imposition of the constructive trust was error because the children were nonparty trustees and thus could not be parties to the judgment. In re Marriage of Foster, 2004 MT 326, 324 M 114, 102 P3d 16 (2004), distinguishing Howard v. Dalio, 249 M 316, 815 P2d 1150 (1991). See also Warnack v. Coneen Family Trust, 266 M 203, 879 P2d 715 (1994), and Baltrusch v. Baltrusch, 2003 MT 357, 319 M 23, 83 P3d 256 (2003).

Restriction on Execution Lien — Within Equitable Power: As part of a dissolution proceeding, the District Court awarded two parcels of real property to the wife and ordered her to pay the husband designated amounts for his interest therein. Nine months after the dissolution, the husband moved for leave to execute on the property in order to satisfy the money judgment in his favor. The District Court found that a special execution, restricting levy and sale of the land for specified amounts, would further the intention of the original decree. The husband appealed, contending the District Court had abused its discretion by restricting the execution liens and limiting the right to enforce the money judgment. The Supreme Court held that the District Court had molded its decree to do equity to both parties. It was within the court's discretion to fashion a Writ of Execution in compliance with and designed to enforce its original order. Miller v. Miller, 206 M 515, 672 P2d 271, 40 St. Rep. 1819 (1983).

Enforcement of Property Division — Discretion of Trial Court: Wife cannot complain of minor arrangements which trial court judge may have decided differently when, after a hearing on exceptions to the findings of a special master to distribute marital property which should have been divided under a divorce decree decided 4 years earlier, both parties failed during that time to comply with the earlier judgment. In equitably straightening out the property division, the trial court judge (Holter, J.), who was commended for having the patience of Job (see James 5:11), may, under the decision of Zell v. Zell, 174 M 216, 570 P2d 33 (1977) (the second Zell case; the first is found at 172 M 496, 565 P2d 311 (1977)), exercise far-reaching discretion and his judgment will not be altered by the Supreme Court unless there is a clear abuse of discretion shown by arbitrary acts or by his exceeding the bounds of reason. Zell v. Zell, 188 M 265, 613 P2d 702 (1980).

Equitable Jurisdiction: The court was held to have the power to exercise its discretion in the division of property interests as a necessary incident of its equitable jurisdiction, and the judgment was upheld when an abuse of discretion was not shown. Roe v. Roe, 171 M 79, 556 P2d 1246 (1976).

Expert's Value

Substantial Credible Evidence Supported District Court's Decision to Adopt Valuation of Business Using Husband's Expert — Detailed Findings Summarized Extensive Testimony From Both Experts — Husband Contributed to Wife's Business — Scope of Work and Expertise of Husband's Expert Compared to Wife's Expert. In re Marriage of Frank, 2022 MT 179, 410 Mont. 73, 517 P.3d 188.

Valuation of Ranch Supported by Substantial Evidence — Husband's Admission That Ranch Was Worth More Than His Expert's Projection as Factor: The District Court properly weighed conflicting evidence while determining the credibility of witnesses when it valued a ranch at $2.45 million. Conflicting evidence included a valuation from the husband's expert of $1,172,513 and a valuation from the wife's expert of $2,667,940. The valuation was supported by substantial evidence, based on the price at which the parties sold portions of the ranch during dissolution proceedings, and based on the husband's admission that he would consider selling the ranch for $2.4 million. In re Marriage of Clark, 2015 MT 263, 381 Mont. 50, 357 P.3d 314.

Qualifications of Real Estate Experts — Differing Valuation: At a hearing concerning the valuation and division of property in the dissolution of Maureen and Joseph's marriage, an agricultural real estate broker testified for Maureen that the parties' ranch was worth $398,000 to $400,000, while a certified and licensed property appraiser testified for Joseph that the ranch was worth $182,500. Joseph contended that the District Court erred in accepting the value of the ranch as testified to by the real estate broker because the broker had no experience as a real property appraiser. Citing Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248 (1994), the Supreme Court held that whether an adequate foundation has been established for the admission of expert testimony is an issue largely within the discretion of the District

Court and that the District Court did not abuse its discretion when it relied upon the testimony of the real estate broker. The Supreme Court therefore affirmed the part of the District Court's order that valued the parties' ranch at $400,000. In re Marriage of Ortiz, 282 M 500, 938 P2d 1308, 54 St. Rep. 446 (1997).

Conflicting Valuation Testimony by Experts — Court's Findings Affirmed: Each party presented expert testimony regarding the value of a veterinary practice. One party set the value at $83,227, the other at $185,000. The trial court accepted the $83,227 appraisal, noting that the practice was a solo practice in an increasingly competitive market. The Supreme Court affirmed, citing In re Marriage of Milesnick, 235 M 88, 765 P2d 751 (1988), for its holding that when confronted with substantial though conflicting evidence, the court must use its factfinding power to determine which evidence is more credible and that unless there is a clear preponderance of the evidence against the court's valuation, its findings will not be disturbed on appeal. In re Marriage of Otto, 245 M 271, 800 P2d 706, 47 St. Rep. 2080 (1990).

Valuation of Insurance Business — Determination of Qualification of Expert Witness: The determination of the qualification of an expert witness is a matter of discretion for the trial court. Absent a showing of abuse of that discretion, the decision will not be disturbed. The District Court did not abuse its discretion when it found a certified public accountant qualified to testify as an expert witness on the value of goodwill of an insurance business in a dissolution hearing. In re Marriage of Arrotta, 244 M 508, 797 P2d 940, 47 St. Rep. 1775 (1990).

Court Discretion When Expert Testimony Conflicting: When conflicting expert testimony is given, the trier of fact has full discretion to give weight to the testimony as he sees fit. In re Marriage of Sessions, 231 M 437, 753 P2d 1306, 45 St. Rep. 744 (1988).

Life Estate Valuation Substantially Different From Expert's — No Reasons Given: It was error for the District Court to fail to give reasons why it assigned a specific value to a life estate when that value was substantially greater than an expert witness had set. In re Marriage of Summerfelt, 212 M 332, 688 P2d 8, 41 St. Rep. 1775 (1984).

Adoption of Layman's View of Value Over Expert's View: In distributing marital property pursuant to a divorce and adopting proposed values or setting its own values, the District Court is free in its discretion to adopt the recommendation of a party or a layman over that of an expert. In re Marriage of Goodmundson, 201 M 535, 655 P2d 509, 39 St. Rep. 2295 (1982), followed in Garst v. Garst, 206 M 89, 669 P2d 1063, 40 St. Rep. 1526 (1983).

Averaging Experts' Valuations: In valuing property to be distributed pursuant to a divorce, the court may average the values given by experts to arrive at an equitable solution. In re Marriage of Goodmundson, 201 M 535, 655 P2d 509, 39 St. Rep. 2295 (1982), followed in Garst v. Garst, 206 M 89, 669 P2d 1063, 40 St. Rep. 1526 (1983).

Property Disposition — Expert Testimony on Valuation: The District Court in a dissolution of marriage proceeding made a substantially equitable property disposition. The husband contended that the trial court erred in determining the per-acre value of the couple's ranch. Conflicting testimony was presented. The husband's expert presented a much higher figure based upon the possibility of subdividing the land. The District Court, as the trier of fact in the trial without a jury, accepted the valuation of the wife's expert. This is not reversible error. The trier of fact has the discretion to give whatever weight he sees fit to the testimony of an expert. Dickerson v. Dickerson, 188 M 492, 614 P2d 521 (1980), followed in In re Marriage of McCormack, 223 M 410, 726 P2d 319, 43 St. Rep. 1833 (1986), and In re Marriage of Voelkel, 226 M 143, 734 P2d 217, 44 St. Rep. 538 (1987).

Partition of Property

Property Properly Identified as Marital Asset With Accommodation for Investment by Third Party: The parties owned 80 acres of land, which the District Court identified as a marital asset. The husband contended that only 40 acres should have been identified as marital property because the property was an asset of an informal partnership between him and his father. The father had invested money in developing the property, and the partners planned to sell the property and split the profits. However, the deed to the property initially named husband and wife as joint owners. There was no documentation of any existing partnership involving the father, although there was evidence that the father had built a road and installed power and telephone facilities on the property. The District Court determined that the father's contributions were worth about $25,000, and that amount was deducted from the husband's portion of the marital property as debt. Thus, the property was correctly identified as a marital asset, adjusted for the father's contributions, and the District Court was affirmed. In re Marriage of Cameron, 2009 MT 302, 352 M 375, 217 P3d 78 (2009).

Principles of Equity Properly Applied in Distribution of Property of Unmarried Cohabitants: LeFeber and Johnson acquired property during their long-term, intimate, exclusive relationship. The parties cohabited, but neither party claimed a common-law marriage. When the parties separated, LeFeber requested that the District Court declare a constructive trust in LeFeber's favor and order Johnson to convey real property to LeFeber. The court denied the request but also denied Johnson's claim that all the property had been gifted to Johnson. Instead, the court held that each party had an equitable right as tenants in common and granted each party an undivided half interest. LeFeber appealed, but the Supreme Court affirmed. LeFeber was unable to show that a constructive trust existed because establishment of a constructive trust depends only on a showing that the titleholder would be unjustly enriched if permitted to retain the title, and LeFeber could show no unjust enrichment on Johnson's part, including that Johnson would benefit from a wrongful act or had engaged in misconduct or fault to recover. The District Court correctly determined that neither party owned the property in its entirety and that each party had an equitable right to the property as tenants in common. Thus, the District Court properly exercised its power to make compensatory adjustments and to fashion appropriate relief according to ordinary principles of equity. LeFeber v. Johnson, 2009 MT 188, 351 M 75, 209 P3d 254 (2009). See also Flood v. Kalinyaprak, 2004 MT 15, 319 M 280, 84 P3d 27 (2004), and Anderson v. Woodward, 2009 MT 144, 350 M 343, 207 P3d 329 (2009).

No Error in Failure to Enforce Property Forfeiture Provisions of Dissolution Decree: The wife argued that because the husband missed mortgage payments on real property, he should forfeit his interest in the property pursuant to a provision in the dissolution decree. The District Court declined to enforce the forfeiture provision and the wife appealed, but the Supreme Court affirmed. In fact, both parties missed required mortgage payments. The nature of the case changed dramatically since the dissolution decree was issued, and the court held that, as a matter of equity, it was not appropriate or fair to bind the parties to forfeiture provisions that no longer reflected the status of the case. In re Marriage of Stoneman & Drollinger, 2008 MT 448, 348 M 17, 199 P3d 232 (2008).

Tandem Consideration of Property Distribution and Maintenance Not Error: A District Court may consider both the distribution of the marital estate and the appropriateness of a spousal maintenance award at the same time. In re Marriage of Payer, 2005 MT 89, 326 M 459, 110 P3d 460 (2005). See also Hilt v. Hilt, 209 M 140, 679 P2d 783 (1984).

Party Estopped From Asserting That Property Placed in Trust Given Prior Denial of Interest in Property: When dividing the marital estate, the District Court found that the husband had gifted a parcel of property to the wife. Title to the property was never in the husband's name, but was always held by the husband's parents or by one of his previous wives. The husband asserted that the intent in transferring the property was to establish a trust for his benefit, with the wife as trustee. However, the husband was judicially estopped from the trust argument because he had repeatedly and unequivocally denied that he had any interest in the property in a prior lawsuit against him for past-due child support. Allowing the husband to reverse his position would have substantially altered the wife's share of the marital distribution after she helped support the husband and helped add to the value of the property. No person may take advantage of the person's own wrong, and a court of equity will not aid a person who has caused title to property to be transferred to another for the purpose of defrauding creditors. Cowan v. Cowan, 2004 MT 68, 320 M 332, 87 P3d 443 (2004), following Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 M 45, 36 P3d 408 (2001). See also Cowan v. Cowan, 2004 MT 97, 321 M 13, 89 P3d 6 (2004), in which adjudication of the husband's claim in Cowan, id., was held to have extinguished any derivative claim in the property that the husband's parents and sister may have had.

Discretion of Trial Court to Determine Value of Marital Estate — Valuation Affirmed Absent Clear Error: During trial, the parties submitted a list of items in the marital estate and attributed differing values to the items. The District Court considered the statutory requirements under this section, conscientiously weighed the evidence presented, and ascribed a value to the items. The husband appealed the valuation. The Supreme Court affirmed. The District Court has broad discretion in valuing the marital estate, and as long as the valuation is reasonable in light of the evidence, the Supreme Court will not disturb the valuation. Here, the valuations were within the range of values presented by the parties, and absent a showing of clear error, the District Court's decision to distribute the property equally was not disturbed. In re Marriage of Hedges, 2002 MT 204, 311 M 230, 53 P3d 1273 (2002).

All Things Considered — No Abuse of Discretion in Partition of Marital Estate: The trial court did not abuse its discretion or err in: (1) distributing a portion of the husband's retirement benefits to the wife; (2) holding the husband responsible for marital debts and liabilities attributable to him; (3) dividing personal property between the parties according to their agreed plan, which generally partitioned property according to the wife's proposal unless the property was not listed, in which case the husband's proposal was followed; (4) considering tax implications to both parties; (5) distributing interest in out-of-state real property to the wife according to the husband's recommendation; (6) granting the wife her entire retirement pension; and (7) awarding stock in the husband's jewelry business to the husband with an equalizing payment to the wife. In re Marriage of Harkin, 2000 MT 105, 299 M 298, 999 P2d 969, 57 St. Rep. 422 (2000).

Property Transferred to Deny Spousal Interest in Marital Estate — Inclusion as Distributable Property Proper: A husband and wife owed about $6,000 in back taxes on their property, which was in jeopardy of being sold at a tax sale. The couple was unable to obtain a loan because of a prior bankruptcy, so they arranged to transfer the property to the husband's mother, who then took out a loan to pay the taxes, using the property as collateral. When the couple later sought to dissolve their marriage, their petition made no mention of any real property acquired during the marriage. The husband testified at the hearing, but the wife did not attend, and dissolution was granted without addressing the wife's interest in the property. She moved to set aside the judgment pursuant to 40-4-135, and the District Court voided the deed transferring the property to the mother, issued a court deed naming the mother as grantor and the husband and wife as grantees to hold the property as tenants in common, and included the property in the marital estate. The mother contended that the property transfer more than 2 years before commencement of the dissolution was final against the husband and wife as grantors, citing 70-20-303, and that the property was thus not available as an asset of the couple and was improperly included in the marital estate. The Supreme Court affirmed, noting that the couple had submitted false proposed findings and conclusions when they made no mention of any real property acquired during the marriage, which had the effect of defrauding the court and denying the wife her interest in the marital property. Inclusion of the property in the marital estate was proper. In re Marriage of Bell, 2000 MT 88, 299 M 219, 998 P2d 1163, 57 St. Rep. 381 (2000).

Consideration of Contribution of Nonacquiring Spouse Required — Gifted Property Included at Court's Discretion — Absence of Significant Spousal Contribution: In evaluating whether preacquired or gifted property should be included in the marital estate, a District Court is required to consider the contributions of the nonacquiring spouse, including the nonmonetary contributions of a homemaker. When the nonmonetary contributions of a homemaker are found to have facilitated the maintenance of preacquired or gifted property, the court may include that property in the marital estate. However, in the absence of a significant contribution on the part of the nonacquiring spouse, the court is free to exclude gifted assets or property from the marital estate. In the present case, the court did not clearly err in finding an absence of a significant contribution by the wife to the increase of value of stock, as supported by substantial credible evidence, and the court properly applied this section in concluding that the value of the husband's gifted stock shares should not be included in the marital estate. In re Marriage of Harper, 1999 MT 321, 297 M 290, 994 P2d 1, 56 St. Rep. 1280 (1999), following In re Marriage of Luisi, 232 M 243, 756 P2d 456, 45 St. Rep. 1023 (1988), and In re Marriage of Engen, 1998 MT 153, 289 M 299, 961 P2d 738 (1998), and distinguishing In re Marriage of Davies, 266 M 466, 880 P2d 1368, 51 St. Rep. 929 (1994). See also In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Requirement for Removal of Personal Property From Parties' Residence Not Abuse of Discretion: A District Court has broad discretion in devising methods to accomplish an equitable distribution of marital property. Given the history of the issuance of several temporary restraining orders against husband during the course of dissolution proceedings and his refusal to comply with several pretrial and posttrial orders that necessitated the issuance of enforcement orders, the District Court was justified in ordering husband to retrieve his personal property from the parties' residence within 30 days of entry of the decree, in order to facilitate a quick, supervised exchange of property. In re Marriage of Zander, 262 M 215, 864 P2d 1225, 50 St. Rep. 1522 (1993).

Division of Property — Standard of Review: The Supreme Court specifically rejected phraseology for the standard of review regarding division of marital property, as stated in prior cases, and adopted the standard set out in In re Marriage of Watson, 227 M 383, 739 P2d 951, 44 St. Rep. 1167 (1987), that the District Court's judgment, when based on substantial credible evidence, will not be altered unless a clear abuse of discretion is shown. In re Marriage of Stewart, 232 M 40, 757 P2d 765, 45 St. Rep. 850 (1988), followed in In re Marriage of Johns, 238 M 256, 776 P2d 839, 46 St. Rep. 1249 (1989), In re Marriage of Bos, 238 M 267, 776 P2d 841, 46 St. Rep.

1258 (1989), In re Marriage of Deichl, 239 M 425, 781 P2d 254, 46 St. Rep. 1801 (1989), In re Marriage of Otto, 245 M 271, 800 P2d 706, 47 St. Rep. 2080 (1990), and in In re Marriage of Scott, 246 M 10, 803 P2d 620, 47 St. Rep. 2237 (1990). See also In re Marriage of Popp & Martin, 235 M 372, 767 P2d 871, 46 St. Rep. 64 (1989), and In re Marriage of Harkin, 2000 MT 105, 299 M 298, 999 P2d 969, 57 St. Rep. 422 (2000).

One Party Divides Property, Other Chooses Portion: An equal division of property generally will result when one party draws the line dividing the property and the other party makes the first choice between the parcels. In re Marriage of Hancock, 226 M 383, 736 P2d 101, 44 St. Rep. 740 (1987), followed in In re Marriage of Binsfield, 269 M 336, 888 P2d 889, 52 St. Rep. 16 (1995).

Discretion of Court to Order Sale of Marital Property to Facilitate Division:

In a dissolution proceeding, the wife argued that the District Court should have been required to order the sale of the ranch and division of the sale proceeds. She contended that the ranch was not an economic unit and that all of the factors which traditionally mitigate in favor of keeping the ranch intact had been eliminated. The Supreme Court concluded that the District Court did in fact consider these factors, as well as the other factors enumerated in 40-4-202, including the husband's desire to stay on the ranch and the fact that he had been a farmer and rancher all of his life. The Supreme Court ruled that although the District Court had the power to require sale of the ranch, had it chosen in its discretion to do so, it was not required to do so. The apportionment of the marital property was affirmed. In re Marriage of Sirucek, 219 M 334, 712 P2d 769, 42 St. Rep. 2065 (1985).

District Court has broad discretion in devising methods to accomplish an equitable division of property. Where District Court foresaw problems and required sale of property held jointly if husband and wife failed to reach agreement on its division otherwise, the court did not abuse its discretion. Kis v. Kis, 196 M 296, 639 P2d 1151, 39 St. Rep. 119 (1982).

Court order that farm be sold and proceeds divided was not an abuse of discretion as entire investment was in jeopardy because of delinquent taxes and mortgage, plus it would have been difficult for one person to manage farm. Turville v. Turville, 166 M 358, 533 P2d 962 (1975).

No Abuse of Discretion for Refusing to Order Property Partitioned: The trial court found that due to hard feelings and problems with visitation, the parties could not exist as neighbors and that partition of the property would have an adverse effect on the salability of the property. The trial court did not abuse its discretion since the findings were supported by the record. Gies v. Gies, 210 M 234, 681 P2d 1092, 41 St. Rep. 1028 (1984).

Prohibiting Sale of Residence Past Majority Age of Child — Abuse of Discretion: A 1971 dissolution decree apportioned only the personal property of the parties. In 1981, in a proceeding for modification of the decree, the District Court abused its discretion by ordering that the parties' residence not be sold until the youngest child finished college at the age of 22. This in effect amounted to child support past the age of majority when no express agreement or decree provision provided for such support. Torma v. Torma, 198 M 161, 645 P2d 395, 39 St. Rep. 839 (1982).

Appreciated Value of Property to Be Partitioned: Payments for support under a divorce decree were not shown to have been intended as returnable to the father in the form of an equity in the house after the children of the marriage were emancipated. The father was a cotenant in the property, however, and as such was entitled to a pro rata share of the property's appreciation in value. The children, who received their mother's interest in the form of a quitclaim deed, should be credited with payments in excess of their share expended by them after the divorce for principal and interest and taxes on the property. The father is not entitled to an offset against this credit for the reasonable rental value of the property during the period of time before the partition action was begun. It was an abuse of the District Court's discretion to deny the father a pro rata share in the increased value of the property. Lawrence v. Harvey, 186 M 314, 607 P2d 551 (1980).

When Partition Is Proper — Open Divorce Decree: An open divorce decree failed to make a final disposition of the family residence, which the husband and wife owned as joint tenants. The wife quitclaimed her interest to her children. The wife later died. The children and their father became tenants in common. The father sought the sale and partition of the property. A cotenant is entitled to partition as a matter of right, although it may be denied where it would be against public policy or legal or equitable principles. Here, where all the cotenants were of legal age, it was an abuse of discretion to deny partition. Lawrence v. Harvey, 186 M 314, 607 P2d 551 (1980).

STATUTORY MANDATES IN DISTRICT COURT FINDINGS

Test of Adequacy of Findings: A District Court need not separately articulate each factor set forth in this section as long as the findings are sufficient to allow nonspeculative review by the Supreme Court. The test for the adequacy of the findings of fact is whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and are supported by the evidence presented. In re Marriage of DeBuff, 2002 MT 159, 310 M 382, 50 P3d 1070 (2002). See also Jensen v. Jensen, 193 M 247, 631 P2d 700 (1981), and In re Marriage of Gerhart, 245 M 279, 800 P2d 698 (1990).

Statutory Guidelines Not Requisite Criteria to Be Individually Itemized: The Supreme Court declared that it did not wish to restrict the liberal discretionary power vested in the District Courts by requiring rigid adherence to technical forms of property distribution orders. It recognized that the trial court must evidence the basis of its ultimate conclusion in the findings of fact. However, the statutory guidelines in this section were not designed as requisite criteria to be individually itemized in every property distribution decree. From the confusing crossfire of conflicting evidence on the valuation of marital assets, the trial court issued 25 findings of fact in an effort to substantiate the basis upon which the subsequent conclusions of law were entered. The trial court's findings of fact and conclusions of law were sufficiently responsive to the statutory guidelines enacted in 40-4-202. In re Marriage of Ziegler, 215 M 208, 696 P2d 983, 42 St. Rep. 298 (1985), followed in In re Marriage of Mouat, 228 M 430, 743 P2d 602, 44 St. Rep. 1654 (1987). See also In re Marriage of Horton, 2004 MT 353, 324 M 382, 102 P3d 1276 (2004).

Grant to Wife of Exclusive Occupancy of Family Residence Supported by Findings: The court rejected husband's contention that the trial court granted wife exclusive occupancy of family residence without findings. In entering the decree in this case, the District Court made detailed findings of each parties' financial status. The court carefully weighed the parties' expenditures and past arrearages versus their projected income, following the policy established in Vert v. Vert, 188 M 358, 613 P2d 1020 (1980). In re Marriage of Hickey, 213 M 38, 689 P2d 1222, 41 St. Rep. 1931 (1984).

Agreement Unconscionable When Instigated to Get Wife's Property as Condition of Continuing Marriage: Petitioner appealed a judgment awarding approximately one-sixth of the marital property to him and the balance to the respondent wife. Petitioner contended that the trial court abused its discretion when it refused to divide the marital property 50-50 under an agreement executed between the parties. The Supreme Court held that the trial court properly refused to divide the property according to the agreement, stating that the result would be the same whether the agreement was a separation agreement or, as the husband contended, a postnuptial agreement. The evidence showed that in instigating the agreement the husband took advantage of his wife regarding her property as a condition to continuing the marriage, contrary to what is required of one in a confidential relationship. The agreement was unconscionable as a matter of law even though the trial court did not specifically find unconscionability. Myers v. Myers, 210 M 173, 682 P2d 718, 41 St. Rep. 990 (1984).

Care of Child During Pendency of Divorce Proceedings — Contribution to Marital Estate: Where the District Court divided the marital property of the parties by awarding 60% of the property to the husband and 40% to the wife but failed to explain the reasons for its award, the Supreme Court remanded the case for findings of fact. The Supreme Court also held that care of the parties' youngest child during the divorce proceedings was a significant contribution to the marital estate and required the District Court to reconsider its findings with regard to the wife's contribution to the estate. Popp v. Popp, 206 M 415, 671 P2d 24, 40 St. Rep. 1747 (1983). Valuation and distribution of marital estate were considered on later appeal in In re Marriage of Popp & Martin, 235 M 372, 767 P2d 871, 46 St. Rep. 64 (1989).

Needs of Retarded Adult Child: Trial court had and should have exercised jurisdiction to consider the needs of the parties' adult mentally retarded child, who resided with her mother, in distributing the marital property and should have entertained wife's request to have a trust established for the benefit of the child. Trial court was ordered to consider the child's needs on remand. In re Marriage of Wolfe, 202 M 454, 659 P2d 259, 40 St. Rep. 211 (1983).

Statutory Factors Considered and Referred to Sufficient — Findings as to Mineral Interest and Attorney Fees Required: In awarding child custody to the husband, the court included in its finding the factors outlined in 40-4-212. In ordering the husband to pay maintenance, the court applied the factors set forth in 40-4-203 and referred to them in its findings of fact. There is no clear abuse of discretion by the District Court on either of these issues, and therefore the findings are affirmed. The District Court did not, however, place a value on a mineral interest, and the findings do not explain this exclusion. The court also failed to substantiate why attorney fees were not awarded to the wife. The case is therefore remanded to make findings on the value of the mineral interest and to state reasons as to the grant or denial of the wife's attorney fees. Hammeren v. Hammeren, 201 M 443, 663 P2d 1152, 39 St. Rep. 2222 (1982).

Failure to Consider Homemaker Contributions and Future Financial Picture: The evidence did not show on appeal that the District Court considered the factors required by this section to be considered in apportioning the marital assets, and in particular did not show that the court considered the wife's contributions as homemaker or the apparent significant difference between the spouses in regard to future acquisition of capital assets and income. Thus, additional findings were required as a proper foundation for an equitable property distribution. The award of maintenance to the wife would be vacated as well as the property disposition. Upon redetermining the property distribution, the District Court should further consider the needs of both spouses and decide whether the wife lacked sufficient property to provide for her needs and whether she would be able to support herself. The husband in this case had a net worth of $194,809; the wife had a $10,000 equity in real estate she purchased for $42,000 and owned an interest in a Paris apartment on which the court had not placed a value; husband had a $28,000 a year 1979 income; and wife had an income of approximately $500 a month with little chance that it would increase significantly. In re Marriage of Lewis, 198 M 51, 643 P2d 604, 39 St. Rep. 759 (1982).

Disposition of Marital Assets — Failure to Consider Earning Potential: In an action for dissolution of marriage, the trial court erred in not applying its findings of fact concerning the future earning potential of both the husband and wife to the judgment it rendered requiring the wife to execute a mortgage on certain real property to the husband. The trial court found that the husband had a gross earning potential of $2,500 per month, that the wife had little earning potential but imposed a $14,161 mortgage on the wife. These factors, plus a significant difference in life expectancy of the parties, show that the trial court failed to consider the wife's inability to acquire property in the future. Smith v. Smith, 191 M 200, 622 P2d 1022, 38 St. Rep. 146 (1981). See also Tefft v. Tefft, 192 M 456, 628 P2d 1094, 38 St. Rep. 837 (1981).

Land Gifted to Husband as One Factor in Determining Contribution to Marital Property: Contrary to plaintiff/husband's claim in a property valuation dispute that he should be given credit for the value, exclusive of appreciation, of the land he received by gift from his grandmother, the acquisition of property by gift is only one factor to be considered in determining the respective contributions of both spouses under 40-4-202. Collett v. Collett, 190 M 500, 621 P2d 1093, 38 St. Rep. 36 (1981).

No Finding Ergo Reversal: The trial court failed to make findings establishing the net worth of the parties prior to dividing the marital property and divided it in an inequitable manner without regard to the husband's contributions and inheritance. These failures on the part of the District Court necessitated reversal with directions to ascertain the net worth of the parties in arriving at a proper division. Schultz v. Schultz, 188 M 363, 613 P2d 1022 (1980), proper findings and conclusions made and judgment affirmed, In re Marriage of Schultz, 203 M 473, 662 P2d 286, 40 St. Rep. 576 (1983), followed by Peterson v. Peterson, 195 M 157, 636 P2d 821, 38 St. Rep. 1723 (1981). See also In re Marriage of Peterson, 211 M 118, 683 P2d 1304, 41 St. Rep. 1252 (1984); In re Marriage of Gerhart, 245 M 279, 800 P2d 698, 47 St. Rep. 2106 (1990).

Evidentiary Basis Required: In entering a property disposition in a divorce, the trial court adopted the husband's proposed findings verbatim. The Supreme Court on appeal found that these findings were not supported by the evidence. The trial court is required to apply the factors set out in 40-4-202 to the evidence presented at trial and make its findings based on this evidence. That was not done here, and the case was remanded with instructions to obtain a proper evidentiary basis for whatever judgment the trial court reached. In re Marriage of Vert, 188 M 359, 613 P2d 1020 (1980). See also Beck v. Beck, 193 M 166, 631 P2d 282, 38 St. Rep. 1054 (1981).

Findings of Fact, Conclusions of Law — Consistent and Ascertainable Property Division Required: The trial court erred when it determined, as a conclusion of law without any written findings, that marital assets would be split 50/50 between the parties, yet the court in its findings and conclusions apparently proceeded to divide up certain enumerated properties other than on a 50/50 basis. In re Marriage of Gohner, 187 M 206, 609 P2d 288 (1980), followed in Popp v. Popp, 206 M 415, 671 P2d 24, 40 St. Rep. 1747 (1983).

Case Remanded — No Findings Made: The trial court awarded the wife one-half interest in the equity in a home acquired by the husband before he married his wife, without entering findings to support its conclusion. Judgment is vacated and remanded. Robinson v. Robinson, 186 M 312, 607 P2d 550 (1980), following In re Marriage of Johnson, 175 M 117, 572 P2d 902 (1977), and In re Marriage of Reilly, 176 M 239, 577 P2d 840 (1978).

Findings Required: Because the required findings in relation to the valuation of the marital estate are totally inadequate, the Supreme Court cannot review the case on the merits but remands it to the District Court. Hamilton v. Hamilton, 186 M 282, 607 P2d 102 (1980), distinguished in Lupo v. Lupo, 197 M 290, 642 P2d 1056, 39 St. Rep. 565 (1982). See also Tomaskie v. Tomaskie, 191 M 508, 625 P2d 536, 38 St. Rep. 416 (1981).

Review of Property Disposition: Applying the test in Kramer v. Kramer, 177 M 61, 580 P2d 439 (1978), the Supreme Court found no abuse of discretion in the District Court's division of the marital property since this section was followed as evidenced by the findings of fact. Oster v. Oster, 186 M 160, 606 P2d 1075 (1980), overruled in part on other grounds by Green v. Gerber, 2013 MT 35, 369 Mont. 20, 303 P.3d 729; Jacobson v. Jacobson, 183 M 517, 600 P2d 1183 (1979). See also Stratford v. Stratford, 193 M 195, 631 P2d 296, 38 St. Rep. 1093 (1981); Levandowski v. Levandowski, 193 M 121, 630 P2d 239, 38 St. Rep. 1002 (1981).

Item-by-Item Finding Unnecessary: The District Court did not err as a matter of law in its division of the marital property by not crediting respondent with funds allegedly not accounted for, since the District Court is in the best position to judge the weight and credibility of the witnesses, especially where there is a conflict of testimony, and it made a specific finding that unaccounted for funds were dissipated by expenditures for living expenses, although it did not make an item-by-item finding based on the factors in 40-4-202. Caprice v. Caprice, 178 M 455, 585 P2d 641 (1978), followed in In re Marriage of Bell, 220 M 123, 713 P2d 552, 43 St. Rep. 226 (1986).

Guidelines Not Ignored: The court did not abuse its discretion in awarding a lump-sum settlement and interest on any deferred payment. Interest payments could not be properly characterized as maintenance. Hebel v. Hebel, 176 M 339, 578 P2d 305 (1978).

Mandates Ignored — Effect: It was readily apparent from the District Court record that the trial court judge in his exercise of discretion over the property settlement abused his discretion when he ignored statutory mandates and refused to consider the needs of appellant for some financial assistance during the transition from housewife to a single person. Cromwell v. Cromwell, 174 M 356, 570 P2d 1129 (1977).

PROPERTY SETTLEMENT AGREEMENT

Motion to Amend Findings to Reflect Parties' Joint Property Settlement Agreement — Abuse of Discretion to Deny Motion: As part of the dissolution of their marriage, the parties entered into a property settlement agreement, which was attached to their court pleadings. Two years later, the parties learned that the District Court had failed to attach the property settlement agreement, which had given each an equal interest in the marital home. Instead, the court had awarded the home to the husband. The wife filed a motion to amend the District Court findings to award each of them an equal interest in the home, which the District Court denied. The wife then appealed to the Supreme Court, which reversed the District Court, ruling that it had erred by dividing the parties' property inconsistent with the parties' property settlement agreement and had abused its discretion in not allowing the wife to amend the findings to reflect their agreement. In re Marriage of Wagenman, 2016 MT 176, 384 Mont. 149, 376 P.3d 121.

Failure to Abide by Agreement Not to Assign Interest in Property — Forfeiture of Right to Use Marital Property: The parties entered into two divorce settlement agreements prohibiting the assignment of property that was part of the marital estate. Upon dissolution, the husband was awarded a car dealership and the wife was awarded the dealership property. Nevertheless, the husband transferred control, management, and profits of the dealership to a third party, in violation of the settlement agreements. By doing so, the husband forfeited his right to use the dealership property. The appropriate remedy was damages in an amount to compensate the wife for all detriment caused by the husband's action. Therefore, the District Court did not err in requiring that the husband pay the wife a reasonable amount of monthly rent for using the dealership property after the dealership was assigned to the third party. In re Marriage of Szafryk, 2010 MT 90, 356 Mont. 141, 232 P.3d 361.

Interest Charged on Money Owed to One Spouse by Another Not Unconscionable: As part of a settlement agreement, the husband agreed to pay one-fourth of a home equity loan, and if the wife paid off the loan, the husband was required either to pay the one-fourth portion in full or to make monthly payments to the wife, plus interest, until one-fourth was paid. After the wife paid off the loan, the husband contended that it was unconscionable to charge him interest on a loan that no longer existed. The District Court rejected the argument, and on appeal the Supreme Court affirmed, finding that it was not unconscionable to enforce provisions charging the husband interest on money owed to the wife. In re Marriage of D'Alton, 2009 MT 184, 351 M 51, 209 P3d 251 (2009).

Disparity Between Property Valuations — Settlement Agreement Not Unconscionable: The wife contended that a $60,000 disparity between her estimated value of a parcel of marital property and the husband's allegedly undisclosed appraisal of the parcel rendered the parties' property settlement agreement unconscionable. The District Court disagreed, and the Supreme Court affirmed. Given the wife's undisputed knowledge during settlement negotiations of the valuation of similar nearby property at an amount close to the husband's estimate, her argument that the agreement was unconscionable was specious. In re Marriage of Gorton, 2008 MT 123, 342 M 537, 182 P3d 746 (2008).

No Award of Attorney Fees to Litigate Conscionability of Settlement Agreement When Agreement Provides for Fees Only for Default or Enforcement: The wife appealed a settlement agreement on various grounds that the agreement was unconscionable. The husband prevailed on the claims and then sought attorney fees pursuant to the agreement, which provided for the prevailing party's attorney fees if either party defaulted or if one party was required to enforce the agreement. The District Court denied the husband's request for fees, and the husband appealed, but the Supreme Court affirmed. The settlement agreement language was intended to apply in an action requiring a party to comply with the agreement once it was adopted by the District Court, but did not apply in an action to determine the conscionability of the agreement. Despite the husband's characterization of the motion as one for enforcement, the wife could not have defaulted, as contemplated by the attorney fee provision, before the District Court resolved the dispute over whether the agreement was conscionable. In re Marriage of Gorton, 2008 MT 123, 342 M 537, 182 P3d 746 (2008).

Order That Spouse Maintain Insurance and Pay Medical Bills as Part of Property Agreement — Spouse Liable Absent Insurance Termination Date: As part of the parties' property settlement in 1990, the husband Glenn agreed to maintain insurance for his ex-wife through his employer and to pay any medical bills not covered by insurance. There was no termination date applied to Glenn's obligation. Pursuant to federal law, Glenn's employer was allowed to maintain insurance on the former spouse for only 3 years, and after that time, the insurance lapsed. In 1994, Glenn then stipulated that he would provide insurance under a new policy, but again no termination date was specified. Glenn eventually retired and continued to pay premiums for several months, but the new policy also lapsed, at which point the ex-wife filed a contempt petition requiring that Glenn pay her medical bills and provide insurance pursuant to the stipulation. Glenn sought a ruling that he was no longer required to pay, arguing that pursuant to the dissolution decree, his liability to provide insurance and pay uncovered medical bills should have ended when coverage could no longer be provided through his employer. The District Court determined that the issue was barred by res judicata and held for the ex-wife. Glenn appealed, but the Supreme Court affirmed. Glenn could, and perhaps should, have raised the issue relating to the duration of his obligation when he stipulated to providing insurance in 1994, but failed to do so. Instead, he entered a stipulation to continue to provide insurance coverage with no termination date, so Glenn was barred from raising the issue by the doctrine of res judicata. In re Marriage of Kolczak, 2004 MT 241, 322 M 520, 97 P3d 1091 (2004).

Collateral Estoppel Applied to Preclude Reopening Settlement Agreement Regarding Disposition of Jointly Owned Marital Property — Property Interest Not Altered by Filing of Partition Action: When the husband and wife separated, they entered a property settlement agreement dividing all their real and personal property, agreeing that they would continue to jointly own their residence, with the right of survivorship. In the decree of dissolution, the District Court affirmed that the property settlement agreement was fair and equitable. Several years after the divorce, seeking to wrap up financial affairs with her former husband, the wife moved to partition the residence and obtain an equal division of the value of the property. At trial, the husband argued that the property settlement agreement was unfair and that the wife should be denied any recovery for her interest in the residence because it was purchased prior to the marriage and because she did not contribute to the marriage financially. The wife moved in limine to preclude the husband from reopening matters that should have been raised in the divorce proceedings. The court denied her motion, reasoning that the property was not divided in the divorce and that because the partition action was an action at equity, surrounding circumstances could be considered. The court found that the filing of the partition action severed the joint tenancy, and the husband was then allowed to introduce evidence regarding the marital equities. The court ultimately concluded that the wife's interest in the residence was not compensable because she had not contributed significantly to the acquisition or improvement of the property or contributed to the parties' assets during the marriage. The wife appealed. The Supreme Court found that res judicata and equitable estoppel barred relitigation of the fairness of the joint ownership issue, which was considered and approved in the decree of dissolution. Further, the mere filing of the partition action does not sever one's interest in property. Rather, the parties' respective interests remain intact until the judgment severing the tenancy is entered. The rebuttable presumption that underlies a joint tenancy in property is equal shares, and there was nothing in the evidence to rebut that presumption and no evidence of postdecree events that would justify a different result. The husband failed to carry the burden of rebutting the presumption of equal shares, and the Supreme Court remanded for a 50-50 partition of the value of the residence. Rausch v. Hogan, 2001 MT 123, 305 M 382, 28 P3d 460 (2001).

Settlement Agreement Not Enforced Because of Economic Disparity Between Parties and Lack of Consent: A married couple signed a settlement agreement. A week later, the husband's petition for divorce prefaced his proposals as to distribution of property with the statement "If the parties are unable to reach an agreement as to division of property and indebtedness". The agreement provided that the husband would give the wife $10,000, the same amount that he had promised before the marriage to put in a bank account in her name to ensure that she would have funds to live on if the marriage fell apart. It was her third marriage, and she probably would not have considered the agreement final until she reviewed it with her attorney. The agreement ambiguously failed to state that it was either a temporary or a final agreement. Therefore, there was no meeting of the minds regarding final settlement terms. Moreover, the economic disparity between the two allowed him to take unfair advantage of her situation. The District Court did not err in failing to enforce the agreement. In re Marriage of Rolf, 2000 MT 361, 303 M 349, 16 P3d 345, 57 St. Rep. 1536 (2000).

Qualified Domestic Relations Order Authorized — Statutory Criteria Met: The husband developed health problems and began receiving short-term disability and supplemental pay from his employer. It was obvious that he would not be gainfully employed again, so he opted for early retirement benefits, resulting in cessation of his disability payments. The wife filed for legal separation, and the District Court issued a qualified domestic relations order (QDRO) to provide the wife with a portion of her husband's retirement benefits. The husband asserted that the court lacked authority to issue the QDRO because the parties did not stipulate to the entry of the order in writing or record a stipulation in open court. Pursuant to In re Marriage of Simms, 264 M 317, 871 P2d 899, 51 St. Rep. 306 (1994), a District Court may enforce a written agreement between the parties if the agreement is not unconscionable. Here, the agreement was apparently reduced to writing but no finding of conscionability was made. Nevertheless, a District Court may also enforce a QDRO if it applies the criteria in this section governing the division of a marital estate and enters appropriate findings of fact and conclusions of law. The District Court found that distribution of the retirement benefits as set forth in the QDRO represented a fair and equitable distribution of the marital estate given the factors in this section and made findings regarding those factors, including duration of the marriage, the wife's occupation, sources of income, employability, and needs. Accordingly, the court was authorized to enter the QDRO, and the Supreme Court affirmed. In re Marriage of Harkin, 2000 MT 105, 299 M 298, 999 P2d 969, 57 St. Rep. 422 (2000).

Interpretation of Latent Ambiguity in Marital Property Settlement Agreement — Wife Entitled to Value of Improvements to Real Property Made Between Time of Dissolution and Time of Sale: A property settlement agreement provided that the wife would receive the family home subject to the debt owed upon it (although no debt was owing) and that when she sold it, she would return one-half of the proceeds of the sale of the house to the husband. The wife's subsequent improvements to the home increased its value from $55,500 at the time of dissolution to $75,000 at the time of sale. The wife requested an interpretation of the settlement agreement to address the division of proceeds in light of her substantial improvements to the property, as well as her payment of all property taxes since the date of dissolution. The District Court concluded that the property settlement agreement created a latent ambiguity by failing to address what would happen to the expenditures of one party that were for neither maintenance nor repairs. The court concluded that the agreement contemplated that the wife would maintain the value of the home at the time of dissolution and divide that value when the house was sold and that the property taxes were an item of maintenance that the wife was responsible for pursuant to the agreement. The Supreme Court affirmed. In light of the latent ambiguity in the agreement, the District Court did not introduce an additional provision to the agreement that deprived the husband of his contractual rights, but merely interpreted the agreement to clarify what was meant by "one-half of the proceeds of the sale of the house" in the context of nonmaintenance expenditures.

Upon finding a latent ambiguity, the District Court properly admitted parol evidence to interpret the agreement and correctly allowed the wife to retain the proceeds from the sale of the house attributable to her expenditures for improvements beyond maintenance and repairs. In re Marriage of Holloway, 2000 MT 104, 299 M 291, 999 P2d 980, 57 St. Rep. 418 (2000).

Property Settlement Agreement Ineffective as to Renunciation of Beneficiary's Right to IRA: Upon dissolution of her marriage to Glendon, Isabel agreed to a property settlement awarding Glendon sole ownership of an IRA in which she was named as beneficiary. Later, Glendon died without having removed Isabel as the named beneficiary of the IRA and Isabel filed a renunciation of her interest in the IRA. The District Court held that Isabel could not renounce her interest in the IRA because the property settlement agreement deprived her of her interest in the IRA. Therefore, the District Court ruled that the contingent beneficiaries were not entitled to the IRA. Citing Sowell v. Teachers' Retirement Sys., 214 M 200, 693 P2d 1222 (1984), and Eschler v. Eschler, 257 M 360, 849 P2d 196 (1993), the Supreme Court held that under the property settlement agreement, Isabel lost only her marital interest in the IRA but not her interest as a beneficiary. Her renunciation of her interest was therefore operative against her interest as a beneficiary, and Isabel's interest in the IRA as a beneficiary vested in the contingent beneficiaries. In re Estate of Bruce, 265 M 431, 877 P2d 999, 51 St. Rep. 576 (1994).

Settlement Agreement — No Necessity of Findings on Statutory Factors: To the extent that any language in In re Marriage of Caras, 254 M 169, 835 P2d 715 (1992), suggests that a District Court commits reversible error by failing to make findings pursuant to this section in considering a separation agreement that distributes the marital property, the language is overruled. The factors in that section must be considered only when a District Court divides the marital estate in absence of an agreement. In this case, the parties reached an agreement. Therefore, a determination of the net worth of the marital estate was not required in determining the conscionability of the agreement. There were no professional appraisals, the parties and one of their attorneys gave numerous conflicting appraisals, and the agreement covered maintenance, distribution of property, and child support and medical care. The District Court did not abuse its discretion in holding the agreement conscionable. In re Marriage of Caras, 263 M 377, 868 P2d 615, 51 St. Rep. 98 (1994).

Marital Debt Including Medical Expenses of Step-Children: Husband appealed from a District Court order, claiming that the court erred in holding that an agreement to assume "all marital debts" in exchange for the court's denial of ex-wife's maintenance and attorney fees included the medical expenses incurred for step-children. The Supreme Court affirmed, holding that the husband's promise to assume "all marital debts" in exchange for denial of maintenance and attorney fees obligated the husband to pay all marital debts, even those incurred on behalf of the wife's children from a prior marriage. Marital debt may include all debt incurred by either party during the marriage. In re Marriage of Scoffield, 258 M 337, 852 P2d 664, 50 St. Rep. 560 (1993).

Wife as Partner in Real Estate Investments — Distribution of Property Sale Proceeds Proper: The District Court properly awarded wife her share of proceeds of the sale of real property when deeds and the property settlement agreement identified her as a partner in the jointly held property. In re Marriage of Sabo, 224 M 252, 730 P2d 1112, 43 St. Rep. 2175 (1986).

Effect of Property Settlement Agreement on Pension Beneficiary Designation: While married to his first wife, a husband became a member of the state Teachers' Retirement System. He designated in writing his first wife as beneficiary of the proceeds of the retirement account. That designation was never changed. When the couple divorced, they executed a property settlement agreement whereby each waived any right to the other's estate. The husband did not submit a change of beneficiary form after he remarried. Upon his death, his surviving widow brought the present action to recover proceeds contributed to the retirement system, a large portion of which was contributed during her marriage to the decedent. Pursuant to the provisions of 19-4-1001, which provides that the proceeds of the account may be paid only to the person nominated by a written designation or, in the absence of such nomination, to the decedent's estate, the proceeds were awarded to the first wife. The property settlement agreement executed by the husband and his first wife at the time of dissolution did not divest the first wife of her future interest in the retirement account. The statute concerning distribution of the pension proceeds controls this issue. Sowell v. Teachers' Retirement System, 214 M 200, 693 P2d 1222, 41 St. Rep. 2413 (1984), distinguished in In re Marriage of Butler, 243 M 521, 795 P2d 467, 47 St. Rep. 1376 (1990).

Child Support Paid Into Escrow and Returned to Satisfy Note — Substantial Evidence That Agreement Not Unconscionable: Under the terms of a property settlement agreement, the wife received the house and also executed a note for $6,600 payable to the husband at the rate of $300 a month. Since the husband's monthly child support payments were also $300, for several years, until the wife's note was paid, the husband paid $300 in child support to an escrow account each month and the bank then returned the $300 to the husband as the wife's payment on the note. On appeal, the wife claimed that this was an abandonment of the husband's obligation to support the children so the property settlement was unconscionable. The Supreme Court ruled that there was substantial evidence to support the District Court's conclusion that the agreement was not unconscionable. In re Marriage of Beitz, 211 M 111, 683 P2d 485, 41 St. Rep. 1247 (1984).

Agreement Unconscionable When Instigated to Get Wife's Property as Condition of Continuing Marriage: Petitioner appealed a judgment awarding approximately one-sixth of the marital property to him and the balance to the respondent wife. Petitioner contended that the trial court abused its discretion when it refused to divide the marital property 50-50 under an agreement executed between the parties. The Supreme Court held that the trial court properly refused to divide the property according to the agreement, stating that the result would be the same whether the agreement was a separation agreement or, as the husband contended, a postnuptial agreement. The evidence showed that in instigating the agreement the husband took advantage of his wife regarding her property as a condition to continuing the marriage, contrary to what is required of one in a confidential relationship. The agreement was unconscionable as a matter of law even though the trial court did not specifically find unconscionability. Myers v. Myers, 210 M 173, 682 P2d 718, 41 St. Rep. 990 (1984).

Attorney Fees Payable Under Property Settlement Agreement: Where a property settlement agreement between parties to a divorce proceeding required the court to award attorney fees to any party successfully bringing an action to enforce, modify, or interpret the agreement, the Supreme Court found under the rationale of In re Marriage of Bolstad, 203 M 131, 660 P2d 95, 40 St. Rep. 344 (1983), that the wife was the successful party in an action to collect a past-due cash award and remanded the case to the District Court for a determination of the amount of attorney fees to be awarded. Gibson v. Gibson, 206 M 460, 671 P2d 629, 40 St. Rep. 1780 (1983). The rationale of Bolstad was also applied in In re Marriages of Boyer & Overman, 261 M 179, 862 P2d 384, 50 St. Rep. 1277 (1993).

Oral Stipulation of Parties to Be Given Effect — Remand for Amendment of Findings and Judgment: Where counsel for the petitioner and respondent in a divorce proceeding agreed on the record to a distribution of certain property but the findings and judgment of the District Court made no reference to the stipulation, the case was remanded to the District Court for amendment of the findings and judgment to award the property in accordance with the agreement. Parenteau v. Parenteau, 204 M 239, 664 P2d 900, 40 St. Rep. 815 (1983).

Negotiated Agreement — Not Required to Be Reopened by Later Court Decision: At the time of their divorce, the parties entered a property agreement which was approved by the court and entered into the decree of dissolution. Appellant failed to perform as agreed, and respondent filed a petition seeking to have him held in contempt and requiring him to perform under the agreement. The District Court ordered appellant to perform the agreement. Appellant contends the court erred in refusing to set aside the property settlement agreement on the basis of McCarty v. McCarty, 453 US 210, 69 L Ed 2d 589, 101 S Ct 2728 (1981), excluding military pensions from marital estates. Appellant contends he entered the agreement in exchange for respondent relinquishing her claim to his military retirement, and the agreement was therefore unfair. The Supreme Court distinguished McCarty, saying appellant chose to settle the property distribution by contractual relations with respondent. He was not coerced into the agreement by the District Court, so there was no basis to overrule the District Court. In re Marriage of Grace, 198 M 97, 643 P2d 1188, 39 St. Rep. 791 (1982).

Property Distribution — Findings Required — Partial Agreement Inadequate: The parties were granted a dissolution of marriage in 1980. The husband appealed the property distribution as inequitable and done without considering the criteria set forth in 40-4-202. The husband received substantially less than the wife under the distribution. Unequal distributions will be upheld where there are good reasons for doing so and where the trial court has clearly identified those reasons. Here, the trial court found that the husband had agreed to assume the majority of the marital liabilities. That agreement was based on the husband's proposed settlement that he would assume all the marital liabilities in exchange for the wife's acceptance of the duty to support the children. It was error for the trial court to order the husband to assume the liabilities solely upon the finding that he had agreed to assume them. Slayton v. Slayton, 195 M 249, 635 P2d 1303, 38 St. Rep. 1824 (1981).

Separation Agreement Binding on Court: Where the trial court did not find the separation agreement unconscionable, the terms of the agreement were binding upon the court and the court did not err in not considering the factors set out in this section. The wife cannot claim in a dissolution proceeding held 8 years after the separation that she is entitled under this section to a share of the husband's estate accumulated subsequent to the separation but before dissolution. Tureman v. Tureman, 190 M 267, 620 P2d 1200, 37 St. Rep. 1922 (1980).

Particularity of Findings on Property Distribution — Not Necessarily Required if Directive Items Considered: On appeal relating to his divorce settlement agreement, the former husband contended that the trial court erred in making an "equitable" grant of personal property without making certain findings, such as the net worth of the marital estate. The Supreme Court reiterated an earlier holding that a District Court need not set forth its findings with particularity if there is substantial evidence that the court was aware of and considered the directive items of 40-4-202. The trial court held a hearing on all elements in a marital estate, and there was no substantial evidence that the court did not consider the whole estate in finding that the separation agreement was deficient. The existence of a valid agreement presumes that the net worth of the parties has been considered in their disposing of their property by the agreement. There was substantial evidence here that the net worth of the parties was established by the District Court and by the settlement agreement. In re Marriage of Harris, 189 M 509, 616 P2d 1099, 37 St. Rep. 1696 (1980).

Marital Property — Separate Hearings: Marital property can be distributed in a hearing separate from a divorce decree without either hearing discussing the totality of the marital estate where, as here, there is a mutual agreement in the form of a separation agreement as to its disposition. Persons must be able to separate amicably and divide their property without interference when such division is feasible. In re Marriage of Miller, 189 M 356, 616 P2d 313, 37 St. Rep. 1523 (1980).

Trust Contingency: The property settlement agreement between Molly and Keith Herrin contained a qualified assignment of stocks to Molly Herrin. The agreement said that if Keith Jr. died while there was any money or property in any trust, then the trust would cease and all property and income of the trust would revert to Keith Herrin and become his sole property. Keith Jr. died but no trust existed since a trust was to be established only if Molly died or remarried during Keith Jr.'s lifetime. Neither of these events occurred. The Supreme Court found that the stocks belonged to Molly after the death of Keith Jr. Herrin v. Herrin, 182 M 142, 595 P2d 1152 (1979).

Modification of Property Settlement Agreement: A property settlement agreement which provided for the execution of a quitclaim deed from the defendant to the plaintiff and the payment of indebtedness on the property by the defendant was a property settlement and not support, and the agreement could not be modified upon the motion of the defendant. Thompson v. Thompson, 170 M 447, 554 P2d 1111 (1976).

VALUATION OF MARITAL ESTATE

General

Imputed Annual Income Exceeding Husband's Current Income Proper — Imputed Income Based on Gifts From Husband's Mother Improper: In a 2015 divorce proceeding, the District Court imputed an annual earning capacity of $175,000 to the husband in awarding child support and maintenance. The determination was based on a 2011 statement by the husband that he could potentially earn $100,000 a year, on his work experience and qualifications in the financial industry, and on prior gifts from his mother to the marital estate of $75,000 a year. On appeal, the husband argued that he had not made $100,000 a year since before 2007, that his current income was substantially lower, and that the District Court erred by assuming he would receive $75,000 a year from his mother. The Supreme Court affirmed the District Court's finding of $100,000 a year based on the record. However, the Supreme Court reversed the District Court regarding the gifts of $75,000 a year from the husband's mother because there was no guarantee that he would continue to receive substantial gifts in the foreseeable future. In re Marriage of Paschen, 2015 MT 350, 382 Mont. 34, 363 P.3d 444. See also In re Marriage of Miller, 2022 MT 110, 409 Mont. 29, 511 P.3d 307.

Spontaneous Response to Judge's Question Regarding Value of Home — Not Judicial Admission — Error to Not Allow Evidence of Home Value: During a dissolution proceeding, the judge asked the husband, who was appearing pro se, to estimate the value of a home. Later, the District Court disallowed the husband from presenting evidence that the value of the home was less than he had previously guessed, concluding that his previous statement was a judicial admission. On appeal, the Supreme Court reversed and remanded, holding that the husband's statement regarding the value of the home was not a judicial admission and that the District Court erred by not allowing him to offer evidence of the home's value. In its conclusion, the Supreme Court emphasized that the husband was taken by surprise at the District Court's question regarding value and that his response was a guess. In re Marriage of Carle/Steyh, 2015 MT 193, 380 Mont. 48, 353 P.3d 488.

Third-Party Bank Account Properly Included in Valuation of Marital Estate: The District Court did not err in including in the valuation of the marital estate a bank account that did not exist during the parties' marriage and that was held solely in the name of a third party, the wife's boyfriend with whom she was living after separating from her husband, when the wife had a history of transferring funds to numerous accounts without the husband's knowledge or consent and had admitted that the third-party account consisted of funds that she had contributed. In re Marriage of Schmidt, 2014 MT 182, 375 Mont. 420, 329 P.3d 570.

Determination of Marital Estate on Date Earlier Than Date of Dissolution: Although a court should value a marital estate on the date of the dissolution, a court has discretion to use instead the earlier date of the parties' financial separation. In re Marriage of Tipton, 2010 MT 144, 357 Mont. 1, 239 P.3d 116. See also In re Marriage of Schwartz, 2013 MT 145, 370 Mont. 294, 308 P.3d 949, In re Marriage of Schmidt, 2014 MT 182, 375 Mont. 420, 329 P.3d 570, and In re Marriage of Hutchins, 2018 MT 275, 393 Mont. 283, 430 P.3d 502.

Value of Tribal Trust Land Improperly Included in Marital Estate: The District Court erred in including in the wife's share of the marital estate the value of tribal trust land upon which the parties' mobile home and garage were located. Neither the wife nor the husband held title to the tribal trust land, and the husband was not an enrolled member of the tribe. A state District Court cannot adjudicate Indian trust land by bringing it into state court for valuation prior to a division of proceeds. In re Baker, 2010 MT 124, 356 Mont. 363, 234 P.3d 70.

Exclusion of Business Interests: Lester and Sharon married in December 1972. The parties separated on and off between December 2005 and December 2006. Sharon filed a petition for dissolution of marriage on June 20, 2006. Sharon and her sister own a health consulting firm. The business bank account had a value of $32,000 at the time that Sharon filed her petition for dissolution. Lester argued that he helped support the business through the family vehicle by doing repairs on it. Sharon's interest in the business checking account was $16,000. Lester contends that he is entitled to $8,000 as his marital interest. Sharon counters that Lester failed to include her business as a marital asset in his declaration of disclosure. Lester included average monthly profits of $500 from his self-employed business. The court did not award Sharon half of Lester's annual profits. The court awarded the parties all property in their possession or in whose name it was titled. The business checking account was titled in the names of Sharon and her sister. A District Court abuses its discretion if it acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. The District Court did not abuse its discretion in awarding the parties the businesses that each operated. In re the Marriage of Howard, 2008 MT 351, 346 M 312, 195 P3d 812 (2008).

Treatment of Inheritance and Business Property: Lester and Sharon married in December 1972. The parties separated on and off between December 2005 and December 2006. Sharon filed a petition for dissolution of marriage on June 20, 2006. Lester argued that the District Court should not have included his inheritance in the marital estate. Section 40-4-202(1) allows the court to consider the contribution of a spouse in dividing property acquired by gift, bequest, devise, or descent. Spousal contribution includes the extent to which such contributions have facilitated the maintenance of the property. The parties purchased property by using $37,988 of Lester's inheritance as a down payment. The court properly excluded this payment amount from the marital estate. Lester claims nevertheless that he should receive an additional nonmarital contribution for the new well, septic system, and drain field. Lester testified that he transferred inheritance funds from an investment account to a joint checking account. Lester further testified that he made payments from the joint checking account. Sharon contended that the parties paid for these improvements from marital assets. The court found that Lester did not have any additional inheritance interest in this property beyond the $37,988 down payment. The parties contributed to the value of the Huckleberry property. Sharon paid a majority of the bills, while Lester did much of the improvement work. The District Court determined that the parties had contributed equally based on conflicting testimony of Lester and Sharon and the other evidence presented. The Supreme Court rejected Lester's claim that the District Court abused its discretion in distributing the marital estate by including portions of his inheritance. Lester also argued that the District Court abused its discretion in failing to include Sharon's condominium as marital property. Lester relied solely on his claim that Sharon allegedly told him that she was using some of the money from the refinancing of the house property for the down payment and the remodeling of her condominium. Sharon provided the court with records pertaining to the expenditures of the refinancing. Sharon's receipts and records satisfied the court that she had expended no marital assets on the condominium. The Supreme Court defers to the District Court's discretion in matters of evidence weight and credibility, particularly when the parties present conflicting evidence. In re the Marriage of Howard, 2008 MT 351, 346 M 312, 195 P3d 812 (2008).

Error in Trial Court's Failure to Consider Cash Payment Made Pending Final Disposition — Remand: Pursuant to a stipulation, the husband paid the wife $7,500 pending final disposition of the dissolution. The stipulation also provided that the District Court would make a final determination as to whether the amount was maintenance or property settlement. However, the court failed to address the $7,500 payment, so the Supreme Court remanded in order that the District Court address the payment pursuant to the terms of the stipulation. In re Marriage of Dirnberger, 2007 MT 84, 337 M 56, 154 P3d 1227 (2007), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39.

No Error in Averaging Percentage Rates to Determine Proportion of Home Value Attributable to Market Appreciation — The Seven Percent Solution: The wife's expert testified that the market appreciation rate on the family residence was between 6% and 8% during the preceding 4 years. The husband's expert also testified that the market rate fluctuated between 6% and 8%. In establishing a value for the marital estate, the District Court did not abuse its discretion by averaging the rate to 7% to arrive at an equitable solution. Absent testimony regarding compounding of the market appreciation rate, the court did not abuse its discretion by not compounding the market inflation rate in determining the value of the residence. In re Marriage of Dirnberger, 2007 MT 84, 337 M 56, 154 P3d 1227 (2007), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39.

No Error in Trial Court Failure to State Reasons for Adopting One Party's Valuations: The District Court adopted the wife's property valuations over the husband's proposed values, but the court did not state its reasons for adopting the valuations. On appeal, the husband contended that when there is a dispute over property values in a dissolution and the values are widely conflicting, a District Court is required to state its reasons for the values that it adopts. In this case, there were only relatively minor differences in values offered by the parties in relation to the total value of the estate, so the District Court was free to select any value within the range supported by the evidence. Additionally, the Supreme Court noted that when a party fails to introduce credible evidence of value, the District Court may use credible evidence of value submitted by the other party. Here, the husband listed the value of only 3 vehicles when in fact the parties owned more than 20 and misstated the value of one of the vehicles that he did list, so the District Court did not err in accepting the values submitted by the wife. In re Marriage of Crilly, 2005 MT 311, 329 M 479, 124 P3d 1151 (2005), following In re Marriage of Foreman, 1999 MT 89, 294 M 181, 979 P2d 193 (1999).

Improper Use of Two Methods of Property Valuation — Remand for Use of One Method of Real Estate Appraisal: In valuing the commercial property as part of a marital estate, the District Court awarded the property to the husband at a value of $280,000 as found by a realtor based on a comparable sales approach, then added another $130,000 to the value based on the income approach. On appeal, the Supreme Court held that combining two methods of valuation, essentially assigning two values to one property, was not supported by the record and constituted an abuse of discretion. On remand, the District Court was directed to revalue the property using one of the commonly accepted methods of real estate appraisal set out in Albright v. St., 281 M 196, 933 P2d 815 (1997). In re Marriage of Baide, 2004 MT 260, 323 M 104, 99 P3d 178 (2004).

Discretion of Trial Court to Determine Value of Marital Estate — Valuation Affirmed Absent Clear Error: During trial, the parties submitted a list of items in the marital estate and attributed differing values to the items. The District Court considered the statutory requirements under this section, conscientiously weighed the evidence presented, and ascribed a value to the items. The husband appealed the valuation. The Supreme Court affirmed. The District Court has broad discretion in valuing the marital estate, and as long as the valuation is reasonable in light of the evidence, the Supreme Court will not disturb the valuation. Here, the valuations were within the range of values presented by the parties, and absent a showing of clear error, the District Court's decision to distribute the property equally was not disturbed. In re Marriage of Hedges, 2002 MT 204, 311 M 230, 53 P3d 1273 (2002).

Failure of Appellant to Establish Error in Determining Marital Assets — Valuation Affirmed: The husband appealed the District Court's determination of marital assets, contending that the court failed to include several financial accounts in the marital estate. The appellant has the duty to establish error, and in this case, the husband failed to establish any evidence in the record to support the existence of the alleged accounts or evidence that the court improperly excluded certain rental income from the marital estate. No error having been established, the District Court's determination of the marital assets was affirmed. In re Marriage of Hochhalter, 2001 MT 268, 307 M 261, 37 P3d 665 (2001).

Parties Separated for Twelve of Twenty-Nine Years of Marriage — Marital Estate Valued as of Separation Date, Rather Than Dissolution Date: As a general rule, the value of a marital estate should be determined at or near the time of the dissolution. However, the unique circumstances of marital relationships can modify the generally accepted date for the valuation of assets. Here, the parties were separated several times during their marriage, living apart for over 12 years during the course of their 29-year marriage. After their final separation, the parties lived in different residences in different cities, maintained their own finances, filed separate tax returns, maintained their own retirement accounts, and did not contribute financially to each other. Thus, for all practical purposes, the marriage ended with the final separation, and the District Court did not err in valuing the marital estate as of the date of the parties' final separation in 1995, rather than the date of the actual dissolution in 2000. In re Marriage of Hochhalter, 2001 MT 268, 307 M 261, 37 P3d 665 (2001), followed in In re Marriage of Thorner & Davis, 2008 MT 270, 345 M 194, 190 P3d 1063 (2008). See also In re Marriage of Geror, 2000 MT 60, 299 M 33, 996 P2d 381 (2000), In re Marriage of David, 2009 MT 422, 354 M 44, 221 P3d 1209 (2009), and In re Marriage of Schwartz, 2013 MT 145, 370 Mont. 294, 308 P.3d 949.

Analysis Regarding Irretrievable Breakdown Distinct From Criteria for Division of Property — Property Valuation at Time of Separation Proper: The analysis regarding irretrievable breakdown of a marriage is distinct from the criteria for division of the property of the marital estate. Here, the wife contended that the District Court improperly valued the estate at the time of the parties' separation because the marriage was not irretrievably broken until she filed the petition for dissolution. However, the point in time of irretrievable breakdown does not determine when the court values the marital estate or how the court distributes marital property, but rather provides the necessary basis for dissolving the marriage. It is the point at which, for practical purposes, the marital relationship ended, not the point of irretrievable breakdown, that is relevant to the valuation of the marital estate. In the present case, following the date of separation, the parties lived at separate locations, maintained separate financial and retirement accounts, made separate financial decisions, did not jointly own property, and did not contribute either monetary or nonmonetary resources to each other for 9 years. The District Court did not err in using the separation date as the point of valuation of the marital estate, rather than the date on which the petition for dissolution was filed. In re Marriage of Geror, 2000 MT 60, 299 M 33, 996 P2d 381, 57 St. Rep. 285 (2000), following In re Marriage of Kraut, 215 M 170, 696 P2d 981, 42 St. Rep. 268 (1985).

Apportionment of Debts of Parties — Failure of Parties to Agree to Apportionment: As part of proceedings for dissolution of her marriage to Joseph, the District Court ordered that Maureen assume responsibility for payment of a $7,856 debt remaining on the purchase of her automobile and that Joseph assume responsibility for the payment of all his medical bills, amounting to $15,100. Joseph contended that the District Court erred because Maureen had agreed that her assumption of part of his medical bills was fair. The Supreme Court reviewed the District Court testimony and the petition for dissolution in which Maureen asserted that Joseph should assume the debts of his own medical bills and distinguishing In re marriage of Beck, 203 M 455, 661 P2d 1282 (1983), concluded that there was nothing in the record demonstrating that Maureen agreed to pay a portion of those bills. In re Marriage of Ortiz, 282 M 500, 938 P2d 1308, 54 St. Rep. 446 (1997).

Valuation of Parties' Assets at Different Times — No Abuse of Discretion: Generally a District Court must determine the net value of the marital estate at or near the time of dissolution, prior to dividing the property. In the present case, the court valued the assets given to the husband at the time of trial, but valued the assets given to the wife at the time of separation. Wife had several assets stolen from her car during the time that the parties were separated, and their loss was charged against the wife's share of the estate. Wife had also used $5,000 of her money to pay a retainer to her attorney prior to trial, and again the court found it to be an expense incurred on her behalf and valued the asset as if it were still in her possession. Under In re Marriage of Hurley, 222 M 287, 721 P2d 1279 (1986), dissipation of a party's assets can justify a court's selection of separate valuation dates for the estates of the respective parties. Such was the case here; thus, the use of different valuation dates was not an abuse of the court's discretion. In re Marriage of Walls, 278 M 413, 925 P2d 483, 53 St. Rep. 974 (1996).

Valuation of Farm Property — Adoption of Appraisal as Factual Issue Determined by District Court — "Clearly Erroneous" Standard Applicable: Upon the dissolution of Alan's and Linda's marriage, the District Court adopted the appraisal of Alan's expert witness, to the exclusion of the appraisal by Linda's expert. Linda raised numerous objections to the appraisal by Alan's expert. Citing Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 250 M 175, 819 P2d 158 (1991), the Supreme Court held that the valuation of property is a factual issue to be determined by the trial court and that when reviewing findings of fact on this subject, the Supreme Court is precluded from substituting its judgment for that of the trier of fact and may only set aside the findings of the trial court if they are clearly erroneous. The Supreme Court noted that the District Court set out specific reasons why the appraisal by Alan's expert was adopted and the appraisal by Linda's expert rejected. In re Marriage of Meeks, 276 M 237, 915 P2d 831, 53 St. Rep. 365 (1996), followed and the clearly erroneous standard applied in In re Marriage of Geror, 2000 MT 60, 299 M 33, 996 P2d 381, 57 St. Rep. 285 (2000), and followed, as to the application of the market approach versus the cost approach of appraisal of marital property and the District Court's reasons for the application of one appraisal method over the other, in In re Marriage of Helzer, 2004 MT 352, 324 M 371, 102 P3d 1263 (2004).

Refusal to Include Property Acquired After Termination of Marriage Upheld: After Helen filed a petition for dissolution of her marriage to Fred, there were numerous delays in the proceedings because of substitutions of counsel, continuances, attempts to compel discovery, and motions for sanctions. The trial was finally held approximately 4½ years after the petition was filed. Fred argued that the valuation of the marital estate should have included property and liabilities acquired after termination of the marriage relationship. Citing In re Marriage of Wagner, 208 M 369, 679 P2d 753 (1984), the Supreme Court held that because of the circumstances of the case, inherent delays, and accumulation of assets in the interim, it would be inequitable to include in the marital estate property and liabilities acquired after termination of the marriage relationship. In re Marriage of Rada, 263 M 402, 869 P2d 254, 51 St. Rep. 110 (1994).

Settlement Agreement — No Necessity of Findings on Statutory Factors: To the extent that any language in In re Marriage of Caras, 254 M 169, 835 P2d 715 (1992), suggests that a District Court commits reversible error by failing to make findings pursuant to this section in considering a separation agreement that distributes the marital property, the language is overruled. The factors in that section must be considered only when a District Court divides the marital estate in absence of an agreement. In this case, the parties reached an agreement. Therefore, a determination of the net worth of the marital estate was not required in determining the conscionability of the agreement. There were no professional appraisals, the parties and one of their attorneys gave numerous conflicting appraisals, and the agreement covered maintenance, distribution of property, and child support and medical care. The District Court did not abuse its discretion in holding the agreement conscionable. In re Marriage of Caras, 263 M 377, 868 P2d 615, 51 St. Rep. 98 (1994).

Damages for Husband's Fraud Assessed Equally Against Divided Property: Clarence and Marcia were divorced in a proceeding in which the District Court awarded the marital property (consisting of a farm) in nearly equal parts. In a separate action, Clarence had been found guilty of fraud for commingling property from his mother's estate with his own finances, to the detriment of his sisters, who obtained a judgment against him. The District Court awarded the damages for fraud equally out of each half of the farm awarded to Clarence and Marcia. Marcia argued that the award of damages against her part of the farm was an abuse of discretion by the District Court because she was being penalized for her former husband's fraud. The Supreme Court found no abuse of discretion because the District Court found that because of commingling, the addition of the stolen funds had increased the value of the entire marital estate. Therefore, the entire estate should be charged with the value of the funds. In re Marriage of Kimm, 260 M 479, 861 P2d 165, 50 St. Rep. 1146 (1993), followed in In re Marriage of Meeks, 276 M 237, 915 P2d 831, 53 St. Rep. 365 (1996).

Failure to Consider Personal Property and Child Support on Remand on Real Property Issue: Because the remanded divorce proceeding issue was whether the District Court abused its discretion in its valuation of the marital real property, it was not error for the District Court on remand to refuse testimony on personal property and computation of child support. In re Marriage of Becker, 255 M 357, 842 P2d 332, 49 St. Rep. 983 (1992).

Failure to Make Finding on Basis of Stipulation and Evidence — Remand Denied: Wife disputed the amount of debt found owing against the marital real property. The parties stipulated that the debt in June 1984 was $20,704. Wife's exhibit number 3 supported that stipulation. The

District Court concluded that the June 1984 debt was $21,078. The $374 discrepancy does not affect the conscionability of the property settlement and does not require a remand for further proceedings. In re Marriage of Becker, 255 M 357, 842 P2d 332, 49 St. Rep. 983 (1992).

Disability Benefits Properly Included in Marital Estate: Disability benefits, including workers' compensation permanent total disability payments, may be properly included in the marital estate because they clearly come within the definition in this section of property "however and whenever acquired". The provisions of 39-71-743 that prohibit attachment or assignment of workers' compensation benefit payments do not bar classification of workers' compensation awards as marital property. In re Marriage of Schmitz, 255 M 159, 841 P2d 496, 49 St. Rep. 919 (1992).

School Loan Taken After Separation but Before Dissolution as Marital Debt: Following separation, wife's employment was terminated through no fault of her own. In order to find other work, she took out a $4,000 student loan to pay for additional schooling. Although the marital estate generally should be valued at or near the time of dissolution, it was within the trial court's discretion to consider the loan as a marital debt in determining the net value of the estate. In re Marriage of Lopez, 255 M 238, 841 P2d 1122, 49 St. Rep. 890 (1992), followed in In re Marriage of Meeks, 276 M 237, 915 P2d 831, 53 St. Rep. 365 (1996).

Value of Partnership Interest in Building: Husband had a 25% interest in a partnership that owned a commercial building as its sole asset. The building was purchased for $231,000, with husband's initial investment share at $7,500. At the time of trial, the outstanding loan balance was $207,000. Although no evidence of fair market value was presented at trial, the partnership agreement provided that in the event of the death of a partner, the building would be valued at $275,000. The District Court did not err in adopting this figure, subtracting the outstanding loan balance, determining the partnership equity to be $68,000, and then valuing husband's 25% interest in the building at $17,000. In re Marriage of Lopez, 255 M 238, 841 P2d 1122, 49 St. Rep. 890 (1992).

Averaging of Expert Valuations Within Court's Discretion: Husband's expert valued husband's dental practice at $65,000, and wife's expert valued the practice at $200,000. The District Court found the first valuation too low because the expert failed to give sufficient consideration to the lack of competition in rural areas and to husband's recent increased income. The second valuation was considered too high because the expert based calculations on a study that used cities that were large by Montana standards and failed to consider the uniqueness of the practice being in four separate areas. The court averaged the values to arrive at a $133,000 value. It is within a court's discretion to average the values given by experts to arrive at an equitable distribution. In re Marriage of Sacry, 253 M 378, 833 P2d 1035, 49 St. Rep. 452 (1992).

Marital Property Disposed of During Separation Properly Excluded From Marital Estate: Various items of marital property were sold by the parties during the period that they were separated, and the District Court disregarded the value of the items in determining the worth of the marital estate. Given the fact that the sale proceeds were used to pay normal living expenses and marital debts, failure to include the proceeds in the marital estate was not an abuse of discretion. In re Marriage of Keedy, 249 M 47, 813 P2d 442, 48 St. Rep. 572 (1991).

Interest Not Allowable Until Amount Due Ascertained: The rule in this jurisdiction, as set out in Daly v. Swift & Co., 90 M 52, 300 P 265 (1931), is that interest is not allowable until the exact amount due is ascertained or is ascertainable. In re Marriage of Gerhart, 245 M 279, 800 P2d 698, 47 St. Rep. 2106 (1990).

House Not Part of Marital Estate Under Constructive Trust Theory: The wife argued that the family home, purchased by the husband's parents, should be included in the marital estate on the basis of a constructive trust. The Supreme Court held that although the husband and wife had chosen the house and made the arrangements for the purchase, the husband's parents had title to the home and had assumed the rights and responsibilities of ownership. Under the facts, a constructive trust did not exist. In re Marriage of Owen, 244 M 306, 797 P2d 226, 47 St. Rep. 1634 (1990).

Discounting Value of Partnership Interest: Wife contended that the District Court erred in valuing the marital estate by applying a 35% discount to husband's interest in a business partnership. While a partner may have management rights in a partnership, generally the partner may not transfer the management rights. This inability to transfer, regardless of the size of the partner's interest, decreases the merchantability of even a large partnership interest. The inalienability of the management rights made discounting appropriate in this case because the interest would be worth less in the hands of an assignee than in the hands of a partner.

In re Marriage of Novakovich, 240 M 249, 783 P2d 937, 46 St. Rep. 2099 (1989). See also In re Marriage of Cole, 234 M 352, 763 P2d 39, 45 St. Rep. 1965 (1988).

Title to Land Held by Husband's Mother — Wife Only Entitled to Husband's Limited Equity Under Contract for Deed: Husband's mother held title to a piece of land, and husband had only a limited equity by virtue of a few payments credited to him under a contract for deed. The court could only award wife husband's equity in the land, and it was error to award the entire value of the land. In re Marriage of Hockaday, 237 M 413, 773 P2d 1217, 46 St. Rep. 910 (1989).

District Court's Failure to Determine Net Worth of Marital Estate Not Improper: The District Court divided the marital estate of the parties without determining the net worth of the property. The Supreme Court ruled that the statute did not require such a determination. Rather, the test is whether the findings as a whole are sufficient to determine the net worth and to decide if the distribution was equitable. In re Marriage of Stephenson, 237 M 157, 772 P2d 846, 46 St. Rep. 700 (1989).

Adoption of Different Valuation Dates Not Error: Husband contended that the District Court erred by valuing a farming debt at a time different from the time at which it evaluated other assets and liabilities. While valuation of assets should generally be made at or near the time of the dissolution hearing, if a single valuation date would result in an inequitable distribution of property, the court may choose several different times for valuation. In re Marriage of Milesnick, 235 M 88, 765 P2d 751, 45 St. Rep. 2182 (1988).

Failure to Set Forth Total Value of Property — No Error: Both parties stipulated to a temporary distribution of personal property providing that all unlisted property be awarded to wife. In adopting the stipulation, the court implicitly adopted that provision. It was not necessary that the court set forth in its findings a statement of the total value of the personal property. In re Marriage of Purdy, 234 M 502, 764 P2d 857, 45 St. Rep. 2084 (1988).

Heavily Indebted Property With Profits-Use Limitation: A partnership loan agreement with a bank requiring all profits of the heavily indebted partnership to be applied to debt reduction did not change the character of the partnership from income-producing to income-consuming, and the partnership remained income-producing. In re Marriage of Cole, 234 M 352, 763 P2d 39, 45 St. Rep. 1965 (1988).

General District Court Discretion in Achieving Equitable Distribution: Generally, the District Court is vested with wide discretion in the performance of its duty to achieve an equitable distribution of property in dissolution proceedings. In valuing property, the court is not bound by the opinion of a particular party or expert; rather, the court remains free, in its discretion, to adopt any reasonable valuation of property that is supported by the record. In re Marriage of Luisi, 232 M 243, 756 P2d 456, 45 St. Rep. 1023 (1988), followed in In re Marriage of Johns, 238 M 256, 776 P2d 839, 46 St. Rep. 1249 (1989), In re Marriage of Becker, 244 M 469, 798 P2d 124, 47 St. Rep. 1729 (1990), In re Marriage of Scott, 246 M 10, 803 P2d 620, 47 St. Rep. 2237 (1990), and In re Marriage of Harper, 1999 MT 321, 297 M 290, 994 P2d 1, 56 St. Rep. 1280 (1999). See also In re Marriage of Bolt, 259 M 54, 854 P2d 322, 50 St. Rep. 672 (1993), In re Marriage of Zander, 262 M 215, 864 P2d 1225, 50 St. Rep. 1522 (1993), in In re Marriage of Rada, 263 M 402, 869 P2d 254, 51 St. Rep. 110 (1994), and In re Marriage of Kostelnik, 2015 MT 283, 381 Mont. 182, 357 P.3d 912.

Participation in Marital Debts — No Dissipation of Estate: During the last 2 years of marriage, husband borrowed $32,823 in small increments to pay household bills and meet costs of running his office. Although wife asserted she knew nothing about the loans, she freely accepted the benefits of the loans while the parties were together. She later claimed husband dissipated the marital estate. The District Court specifically looked at the nature of the loans, found no dissipation, and properly ordered wife to participate in the marital debts. In re Marriage of Stewart, 232 M 40, 757 P2d 765, 45 St. Rep. 850 (1988).

Property Transferred After Dissolution Filed — Proper as Part of Estate: It was not improper to include in the marital estate property the husband transferred to another party after the petition for dissolution was filed. In re Marriage of Sessions, 231 M 437, 753 P2d 1306, 45 St. Rep. 744 (1988).

Differing Valuations on Separation and Dissolution — No Abuse of Discretion: Although as a general rule the net worth of parties is to be determined at the time of dissolution, the District Court did not abuse its discretion in determining the value of husband's farming operation at the time of separation since wife did not participate in farming after separation. The court valued the land, farming equipment, and the remainder of the personal property at the time of dissolution. In re Marriage of Halverson, 230 M 226, 749 P2d 518, 45 St. Rep. 162 (1988).

Standard of Review of Distribution and Valuation of Marital Property: The standard for reviewing a District Court's division of marital property, articulated in In re Marriage of Hall, 228 M 36, 740 P2d 684, 44 St. Rep. 1321 (1987), is that the Supreme Court will reverse a District Court only upon a showing that the District Court has acted arbitrarily or has committed a clear abuse of discretion, resulting in either instance in substantial injustice. The same standard was applied to review of a District Court's valuation of marital property. In re Marriage of Anderson, 230 M 89, 748 P2d 469, 45 St. Rep. 40 (1988).

FELA Benefits Deposited in Joint Account as Part of Marital Estate: Husband injured in an industrial accident received monthly temporary total disability benefits through the Federal Employers' Liability Act (FELA). The benefits were deposited in the couple's joint checking and savings accounts. Once the benefits were commingled with other funds in the joint account, they became part of the marital estate, giving the wife an equal interest in and right to the FELA funds. In re Marriage of Jones, 229 M 128, 745 P2d 350, 44 St. Rep. 1834 (1987), followed in In re Marriage of Bos, 238 M 267, 776 P2d 841, 46 St. Rep. 1258 (1989).

No Interest of Nonacquiring Spouse in Property — No Property Value as Product of Marital Contribution: Nearly all the assets included in this marital estate originated from stock brought to the marriage by the wife. The assets lost value as a result of business ventures of both parties. The Supreme Court cited In re Marriage of Herron, 186 M 396, 608 P2d 97 (1980), in holding that the District Court can justifiably find that the nonacquiring spouse has no interest in the property when none of the value of the property is a product of contribution from the marital effort. In re Marriage of Fitzmorris, 229 M 96, 745 P2d 353, 44 St. Rep. 1809 (1987).

Division of Remaining Proceeds of First Dissolution Upon Second: Wife was awarded funds at the time of the first dissolution of marriage, which she deposited in an account. The parties remarried, and upon a second dissolution, the trial judge properly included the wife's proceeds remaining from the first dissolution in equally dividing the marital estate. In re Marriage of Reid, 226 M 116, 733 P2d 1302, 44 St. Rep. 500 (1987).

Value of Property Determined as of Dissolution Date Rather Than Separation Date: The District Court did not err in adopting values of marital property at the date of dissolution rather than as of the date of separation 3 years earlier. The Supreme Court found no evidence to conflict with the later values and adhered to the policy of using the dissolution date for valuation as it most clearly reflects the status of the property at the time of trial. In re Marriage of Hammill, 225 M 263, 732 P2d 403, 44 St. Rep. 220 (1987).

Failure to Make Finding on Basis of Valuation — Harmless Error: When faced with widely conflicting valuations, the District Court is required to give reasons for selecting one value over others. However, it was harmless error for the District Court to employ the basis for valuation proposed by the wife since it was more sound than the method suggested by the husband. In re Marriage of Hurley, 222 M 287, 721 P2d 1279, 43 St. Rep. 1271 (1986).

Goodwill of Professional Practice: It is not an abuse of the trial court's discretion to consider the goodwill associated with a spouse's medical practice in the valuation of the marital estate. In re Marriage of Swanson, 220 M 490, 716 P2d 219, 43 St. Rep. 551 (1986).

Exclusion of Wife's Interest in Ranch Gifted by Mother Not Abuse of Discretion: Husband contended that ranch property being gifted to wife by her mother for inheritance purposes should have been included in the marital estate. The District Court directly addressed the issue in its findings of fact and conclusions of law and excluded wife's one-half interest in the $360,000 parcel gifted under an annuity plan. The Supreme Court upheld the District Court's exclusion from the marital estate, noting that the gift was made for estate planning purposes and that husband did not contribute significantly to the property. In re Marriage of Wessel, 220 M 326, 715 P2d 45, 43 St. Rep. 405 (1986), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Apartments Purchased by Husband and His Parents — No Gift to Husband by Parents: Husband contended that his interest in property was a gift. However, the District Court found that apartment property was not a gift and was properly included in the marital estate even though the husband testified that he and his parents bought the property together, his parents paid the total downpayment, and he later paid them back one-half of the downpayment out of the property's profits. In re Marriage of Williams, 220 M 232, 714 P2d 548, 43 St. Rep. 319 (1986).

Court Use of Most Comprehensive Appraisal of Apartments — No Error: Lower court did not err in accepting apartment property appraisal offered by wife's expert, rather than appraisal of husband's expert. Appraisal of wife's expert was more comprehensive and reflected three different approaches to valuation. In re Marriage of Williams, 220 M 232, 714 P2d 548, 43 St. Rep. 319 (1986), followed in Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

Furnishings Counted Twice — No Error: It appeared that some household furnishings may have been counted twice in dividing the marital estate, but the Supreme Court will not attempt to review every element of a complex property distribution in the manner that an auditing accountant might. The court examines whether there is substantial evidence to support the property distribution. The overall apportionment and the complexities involved here led the court to affirm. In re Marriage of Williams, 220 M 232, 714 P2d 548, 43 St. Rep. 319 (1986).

Goodwill of Professional Anesthesiology Practice as Marital Asset: The Supreme Court upheld the District Court's determination that goodwill of husband's sole professional anesthesiology practice is a marital asset subject to property division in a dissolution of marriage. The Supreme Court adopted the analysis of the Washington Court in Matter of Marriage of Fleege, 588 P2d 1136 (1979), which indicated that while the goodwill of a professional practice may not be readily marketable and the determination of its exact value may be difficult, that element may nevertheless be found to exist in a given professional practice. The lower court did not err in assigning a value of $103,410 for going concern or goodwill value based on testimony of a CPA. In re Marriage of Hull, 219 M 480, 712 P2d 1317, 43 St. Rep. 107 (1986), cited in In re Marriage of McLean/Fleury, 257 M 55, 849 P2d 1012, 50 St. Rep. 35 (1993), and followed in In re Marriage of Stufft, 286 M 239, 950 P2d 1373, 54 St. Rep. 1391 (1997).

Mobile Home Affixed to Land of Husband's Father — Part of Marital Estate: The husband and wife purchased a mobile home and affixed it to lots in North Dakota owned by husband's father. The lots were ultimately transferred to the couple's minor children. Husband contended that, once affixed, the mobile home became the property of the father since he owned the lots. The court rejected the contention and held that it was correct for the District Court to include the mobile home as a part of the marital estate after deducting the value of the lots now owned by the minor children. In re Marriage of Wengeler, 219 M 452, 712 P2d 1336, 43 St. Rep. 86 (1986).

Appraisal of Timberland — Highest Use: The District Court adopted the appraisal submitted by the husband's appraiser, which established that the highest and best use of the timberland was as a part of a ranching operation and that the limited grazing available on the timberland justified a valuation from one-third to one-fourth that of open grazing land—a value of $80 an acre. The wife's appraisal showed a value of $183 an acre. The Supreme Court concluded that there was substantial evidence to support the husband's appraisal, affirming the District Court's valuation of the land. In re Marriage of Sirucek, 219 M 334, 712 P2d 769, 42 St. Rep. 2065 (1985).

No Award of Share of Appreciation or Equity Buildup: The District Court, in distributing the property of a marital estate, failed to award the wife any share in the appreciation or equity buildup of the ranch. The husband had a net worth of $110,000 at the time of marriage. At the time of dissolution, his ranch-related assets and gold and silver, less liabilities, totaled approximately $265,000, the increase being essentially the result of inflation and appreciation in land values. The wife pointed out that the District Court found she had made an equal contribution to the marriage yet failed to award her any percentage of the increased value of the ranch. Under 40-4-202, in dividing property acquired prior to marriage and the increased value of the property, the District Court must consider nonmonetary contributions of homemakers and the extent to which such contributions facilitated maintenance of the property; however, the right to share in particular property must be considered along with all of the other applicable factors enumerated in 40-4-202. The Supreme Court found that the District Court carefully considered all these factors in fashioning an equitable distribution. The wife failed to demonstrate that the District Court abused its discretion, and the apportionment of the ranch property to the husband was affirmed. In re Marriage of Sirucek, 219 M 334, 712 P2d 769, 42 St. Rep. 2065 (1985).

Valuation of Real Property and Retirement Benefits — Inconsistent Discount Rates: An economics expert used a 5.4% discount rate with regard to the present value of the wife's pension right based on a 30-year earnings average. He testified that at the time of the entry into the consideration of comparable sales in the area of the ranch, the sellers could have invested money safely at 12%, and that he considered that factor in adjusting the comparable sales. His testimony was not contradicted and was accepted by the District Court. On appeal, the wife contended that the court erred in adopting inconsistent discount rates for the ranch real property and her teacher's retirement pension. The Supreme Court held that the wife failed to present any evidence that the use of two different rates was in fact contradictory. There was no evidence to support a conclusion that a 12% rate could properly have been factored in the pension computation, nor was there any evidence that a 5.4% rate would have been appropriate so far as the land was concerned. The Supreme Court concluded that there was no demonstrable reason for the District

Court to require any identity of the discount rates; therefore, the District Court did not abuse its discretion in allowing the use of different discount rates. In re Marriage of Sirucek, 219 M 334, 712 P2d 769, 42 St. Rep. 2065 (1985).

No New Trial Merely Because Value Increases: Marital assets will appreciate and depreciate with the passage of time, and a new trial cannot be granted each time the value of an asset changes. In re Marriage of Staudt, 216 M 196, 700 P2d 175, 42 St. Rep. 740 (1985), followed in In re Marriage of Reich, 222 M 192, 720 P2d 286, 43 St. Rep. 1167 (1986).

Preservation of Family Ranch — Not Proper Consideration Upon Division: Montana's policy in favor of keeping a family farm or ranch intact upon dissolution is not a proper consideration when dividing marital property under this statute. The policy is only to be considered upon distribution of the marital property after it has been allocated. In re Marriage of Glass, 215 M 248, 697 P2d 96, 42 St. Rep. 328 (1985). See also In re Marriage of Staudt, 216 M 196, 700 P2d 175, 42 St. Rep. 740 (1985).

All Assets Considered in Making Equitable Distribution: On appeal, the husband contended that the trial court erred in not establishing a value of the entire marital assets as required by this section. He argued that the court's failure led to an inequitable distribution of assets. However, the Supreme Court held that it was not error for the trial court to distribute the marital assets in accordance with what the court believed to be an equitable distribution, rather than attempting to find the value of the assets. There was abundant evidence to establish that the court considered all of the marital assets with values in making its distribution. In re Marriage of Yadon, 216 M 59, 699 P2d 75, 42 St. Rep. 638 (1985).

Valuation at Time of Property Disposition Hearing Fifteen Months After Dissolution: In this unique and rare circumstance where, inter alia, there were no marital assets that fluctuated in value during the 15 months from dissolution to disposition of marital property, the Supreme Court held that the trial court's failure to value the marital estate at the time of dissolution, at most, constitutes harmless error. In re Marriage of Loegering, 212 M 499, 689 P2d 260, 41 St. Rep. 1892 (1984).

Granting Party Credits Against Equity of Parties in Real Property: The Supreme Court remanded to have the District Court calculate the husband's credit for payments made on real property obligation, giving consideration to fact that he was making those payments in return for being allowed to maintain his residence there. The wife was entitled to some credit for loss of reasonable rental value. Other credits made without substantiating findings were also remanded. Gies v. Gies, 210 M 234, 681 P2d 1092, 41 St. Rep. 1028 (1984).

No Error in Dividing Remaining Real Property Without Determining Value of Total Marital Estate: Although it is well settled that the District Court must determine and consider the net value of marital assets before dividing the estate, it was not error in this case to divide the marital real property without valuing the total marital estate. The remainder of the marital estate had already been divided by a prior dissolution decree and adopted settlement agreement. The parties had intended a separate real property disposition agreement, but they ultimately failed to agree. Gies v. Gies, 210 M 234, 681 P2d 1092, 41 St. Rep. 1028 (1984).

Workers' Compensation Benefits as Marital Assets — Error to Preclude as Matter of Law: The District Court found as a matter of law that workers' compensation benefits of the husband were not marital assets. The Supreme Court vacated the judgment, ordering an evidentiary hearing because it was unable to make an informed opinion from the record. At the hearing, findings should address the terms and purpose of the workers' compensation award. Blankenship v. Blankenship, 210 M 31, 682 P2d 1354, 41 St. Rep. 901 (1984).

Abuse of Discretion in Choice of Date of Valuation: This section does not mandate a specific time period within which marital assets should be accounted. Generally speaking, the logical time period is the duration of the marriage. This case is exceptional because between the date of the parties' separation in December 1980 and the October 1982 date used for valuation, the wife increased her net worth substantially and the husband decreased his net worth a great deal. Therefore, the Supreme Court ruled that the date of valuation of assets should have been the date of the parties' separation and that the District Court had abused its discretion by selecting a valuation date of October 1982. The Supreme Court reasoned that due to the unusual circumstances of this case, the District Court, through its choice of valuation date, had essentially rewarded the husband for encumbering the family ranch and penalized the wife for her ambitious efforts after the breakup of the marriage. Wagner v. Wagner, 208 M 369, 679 P2d 753, 41 St. Rep. 409 (1984), distinguished, where evidence preponderated against a finding that the marriage was irretrievably broken on the earlier date, in In re Marriage of Dalley, 232 M 235, 756 P2d 1131, 45 St. Rep 1017 (1988). See also In re Marriage of Swanson, 220 M 490, 716 P2d 219, 43 St. Rep. 551 (1986).

Spouse's Life Insurance Proceeds — Not Part of Marital Estate: Proceeds from life insurance policy on husband were not a cash asset of marital estate and would not properly be included in the property distribution upon a divorce. In re Marriage of Beck, 203 M 455, 661 P2d 1282, 40 St. Rep. 565 (1983).

Money Withdrawn From Joint Savings Account After Spouse Filed for Divorce: Money husband withdrew from savings account was properly found to be part of the marital property, as the account was owned jointly with his wife and the money was withdrawn immediately after his wife petitioned for divorce. In re Marriage of Goodmundson, 201 M 535, 655 P2d 509, 39 St. Rep. 2295 (1982).

Wife's Inheritance Spent for Family Purposes: Court distributing property pursuant to divorce properly failed to consider wife's inheritance when she had spent the whole of it on autos for herself and her daughter, carpet for the home, and a fence. In re Marriage of Goodmundson, 201 M 535, 655 P2d 509, 39 St. Rep. 2295 (1982).

Foregone Earnings as Monetary Contribution: In a dissolution proceeding the wife contended that the District Court had erred in considering the nonmonetary contributions of the husband. During the marriage, the husband was given the opportunity to take a decrease in earnings in return for the opportunity to participate in working oil and gas interests. The foregone earnings of the husband coupled with cash contributions of the wife resulted in the acquisition of oil and gas interests. The Supreme Court stated that while nonmonetary contributions are normally difficult to quantify, foregone earnings are easily and accurately measurable in dollars and cents, and it is difficult to conceive of them as anything but monetary. The District Court did not err in considering the foregone earnings as monetary contributions toward the purchase of the oil and gas interests. In re Marriage of Krause, 200 M 368, 654 P2d 963, 39 St. Rep. 1809 (1982).

Conveyance of Individual Property Before Petition Filed: In the fall of 1977, after suffering a stroke, the husband initiated real property conveyances to his children to insure their future security in the event of his death. On June 2, 1978, the wife left the family home, the husband being unaware of her intention to divorce him. On June 5, 1978, the conveyances were completed. On June 16, 1978, the wife filed a petition for dissolution. Because 40-2-202 allows a married person to transfer his property to another without consent of his spouse and because there was substantial evidence that the conveyances were not fraudulent, the property was not part of the marital estate. In re Marriage of Crabtree, 200 M 178, 651 P2d 29, 39 St. Rep. 1668 (1982).

Family Ranch Operation — Son's Interest Not Affected: A father and son operated various parcels of ranch property as one economic unit. The mother provided nonmonetary homemaker services. Title to the Davis parcel was in the father's and son's names. In a property settlement proceeding, the trial court included half the value of the Davis parcel in the marital estate. It did so properly, recognizing the nonmonetary contributions of both the son and mother in maintaining the family ranch and the statutory limitations of its power to affect property rights of only the mother and father. In re Marriage of Larson, 200 M 134, 649 P2d 1351, 39 St. Rep. 1628 (1982).

Current Property Value Determinative:

In a division of marital property, the trial court failed to value a residence and parcel of real property and used the value of the remaining assets as of the beginning of the marriage. By failing to value all the assets and to use the current value of the assets, the trial court acted arbitrarily. In re Marriage of Evert, 198 M 191, 645 P2d 417, 39 St. Rep. 860 (1982).

A court distributing property in accordance with this section should consider the current property value of all property acquired during the course of the marriage. Kruse v. Kruse, 179 M 79, 586 P2d 294 (1978).

Property Disposed of Between Petition and Trial: Under In re Marriage of Lippert, 192 M 222, 627 P2d 1206 (1981), (1) the worth of the marital estate must be determined at or near the time of dissolution; (2) the District Court may never award more than 100% of the marital estate; and (3) the power of a spouse to freely contract with others regarding marital property endures until lawfully moderated or terminated. In the present case, the District Court did not err in including within the marital estate $51,000, which was expended by the husband between the date of petition for dissolution and the date of trial, because the District Court, on the day the petition was filed, moderated the above-mentioned spousal power by enjoining the husband from disposing of property except for necessities or in the usual course of business. Hunter v. Hunter, 196 M 235, 639 P2d 489, 39 St. Rep. 59 (1982).

Spouse's Lost Investments Not in Marital Estate — Right to Contract With Others: A dissolution award that includes in the marital estate assets which the appellant invested and lost 1 year before the dissolution ignores fundamental legal principles of marital status and thus constitutes an abuse of discretion. Spouses possess mutual powers, obligations, and interests which endure until lawfully modified or terminated, and although appellant may have used poor judgment in his business transactions regarding the family assets, he possessed the power to freely contract with others regarding marital property. Lippert v. Lippert, 192 M 222, 627 P2d 1206, 38 St. Rep. 625 (1981).

Inclusion of Assets in Marital Estate Held Proper: The District Court's inclusion or exclusion of certain assets in the marital estate such as: (1) assets withdrawn by respondent husband 2 months before the dissolution was filed; (2) bonds held in the name of parents and children; (3) a retirement fund about which no evidence was adduced at trial; (4) residential property; and (5) personal property and a personal debt was supported by the facts and thus will not be disturbed on appeal. Karr v. Karr, 192 M 388, 628 P2d 267, 38 St. Rep. 506 (1981), followed with respect to the failure to include in the marital estate retirement benefits on which no evidence was adduced at trial in Holston v. Holston, 205 M 470, 668 P2d 1048, 40 St. Rep. 1435 (1983).

Abuse of Discretion in Valuing the Marital Estate — Lack of Testimony: In a marriage dissolution, the factors listed in 40-4-202 must be considered and referred to in the court's findings and conclusions and there must be competent evidence presented on the values of the property. Thus where the District Court's valuation of many of the marital assets amounts to "guesswork" primarily due to the attorney's failure to provide ample testimony for the District Court regarding values, the cause must be remanded to obtain competent evidence on the value of disputed items of marital property. Collett v. Collett, 190 M 500, 621 P2d 1093, 38 St. Rep. 36 (1981), distinguished in In re Marriage of Stoneman, 2000 MT 274, 302 M 107, 14 P3d 12, 57 St. Rep. 1145 (2000), in which the District Court properly exercised its discretion in dividing personal property based on the husband's written value estimates absent any estimate or offer of valuation by the wife.

Farm Operating Loan — Excludable in Determining Marital Estate: The trial court did not deduct the value of a farm operating loan from the value of the marital estate for the purpose of arriving at a property distribution. To deduct the loan would have required a decision as to whether or not to include any, a part, or all of the unquantified balance of the loan, and an estimation of the future proceeds of the farm. Depending on the accounting method used, the amount to be deducted could range from $13,500 to nothing. Excluding the value of the farm operating loan was reasonable under these circumstances. In re Marriage of Krum, 188 M 498, 614 P2d 525 (1980), followed in In re Marriage of Neal, 267 M 455, 884 P2d 789, 51 St. Rep. 1109 (1994).

Marital Assets Concealed — No Abuse of Discretion: Where appellant sued respondent for divorce and pending the divorce the respondent husband claimed to have sold an asset of the parties, consisting of a 1966 Chevrolet race car, but subsequent to the divorce decree the appellant discovered that the car had not been sold as the respondent claimed, it was not an abuse of discretion for the District Court to omit the value of the race car in determining the value of the marital estate. Fredericksen v. Fredericksen, 185 M 548, 605 P2d 1135 (1980).

Complete Disclosure Required for an Equitable Division of Marital Property: Testimony of wife which was vague, confusing, and conflicting regarding family money and business accounts was not sufficient basis for court's unequal division of property in her favor as there must be a complete disclosure by both parties of total value of their assets and resources in order for court to make an equitable division of property. Fautsch v. Fautsch, 166 M 98, 530 P2d 1172 (1975). See also Karr v. Karr, 192 M 388, 628 P2d 267, 38 St. Rep. 506 (1981).

Sufficiency of Evidence, Findings

Interim Support Agreement Not Followed by District Court — Denial of Maintenance — Substantial Evidence: During a divorce proceeding, the parties entered into an interim support agreement that specified child support. The issue of permanent support went to trial and the District Court eventually ordered a lower payment for child support than was in the agreement. The District Court also found that an award of maintenance was not appropriate. On appeal, the appellant argued that the District Court failed to consider the net worth of the marital estate before dividing the property, that it should have awarded certain premarital and postseparation property, that it should have awarded spousal maintenance, and that it lacked authority to modify the interim support agreement. The Supreme Court disagreed, finding that the District

Court's findings were detailed and based upon substantial evidence. In re Marriage of Axelberg, 2015 MT 110, 378 Mont. 528, 347 P.3d 1225.

Complex Properties and Assets — Every Element — Fair Distribution: A husband and wife, married for 22 years before separating, acquired numerous properties and assets that were used for a farming operation. Among other things, the District Court awarded the wife real properties along with the irrigation pipe and scrap equipment typically on those properties. On appeal, the husband argued that the court should assign a value to every asset, including the pipe and scrap equipment. The Supreme Court disagreed, stating that it would not attempt to review every element of a complex property distribution and that the allegations did not rise to clear error. In re Marriage of Richards, 2014 MT 213, 376 Mont. 188, 330 P.3d 1193.

Net Worth — Sufficient Findings: A husband and wife, married for 22 years before separating, acquired numerous properties and assets that were used for a farming operation. On appeal of the District Court's divorce decree, the husband argued that the court had failed to adequately consider ownership of equipment, cash that had been used to pay debts, and various outstanding loan obligations in determining the net worth of the marital estate. The Supreme Court agreed with the husband, stating that the District Court did not provide sufficient findings regarding these issues. In re Marriage of Richards, 2014 MT 213, 376 Mont. 188, 330 P.3d 1193.

Distribution of Marital Assets of Common-Law Marriage: After the District Court determined that a common-law marriage existed between the parties, the court dissolved the marriage and distributed the marital assets. The court calculated the amounts that each party had contributed to acquisition of personal property and found that the wife had contributed $13,000 more than the husband. That amount was then added to $121,775, which was determined to be one-half of the value of the personal property still in the husband's possession, and $134,775 was awarded to the wife. The amount awarded for the wife's share of the personal property was supported by substantial evidence, and the court's findings were not clearly erroneous and were thus affirmed on appeal. However, the issue of the wife's contribution to the appreciated value of the parties' real property was remanded for further calculation. In re Marriage of Swanner-Renner, 2009 MT 186, 351 M 62, 209 P3d 238 (2009).

Credible Evidence Regarding Value of Real and Business Property — Valuation of Marital Estate Affirmed: The District Court considered testimony concerning the value of the parties' real property from both parties' experts, local market value and the state's value, and the fact that the husband had encumbered the real property in a trust deed for which he was solely responsible. The court's valuation of the real property was not error. The court also correctly considered substantial credible evidence regarding the value of both parties' businesses, including testimony and a business valuation method suggested by the wife's expert. The court had adequate evidence to supports its conclusions, and the court's real and business property valuation was affirmed. Collins v. Collins, 2004 MT 365, 324 M 500, 104 P3d 1059 (2004).

Existence and Valuation of "Gift" of Construction Labor and Materials for Home — Commingling of Gift in Marital Property — Multiple Issues Raised: When Tammy and Robert were divorced, the District Court awarded them each a net distribution from the marital property of nearly $73,000. Excluded from that distribution was an $80,000 gift to Tammy of construction labor and material that was given to her by her father in the construction of a log home on property that the couple purchased in Sanders County. Tammy and Robert both valued the home at $200,000 at the time of their divorce. Robert challenged the reduction in the value of the marital property by the amount of the gift on multiple grounds and raised other issues as well on appeal. In response to Robert's arguments, the Supreme Court held that: (1) although there was conflicting evidence of the gift (Robert, for instance, claimed no knowledge of the gift until the divorce proceeding), there was sufficient evidence of the gift's existence for the District Court to base its findings and conclusions on; (2) unlike the situation in In re Marriage of Herron, 186 M 396, 608 P2d 97 (1980), there was no need to trace the gift because it was only a single gift, the value of which was embedded in the total value of the home, on which the parties agreed, and there was therefore nothing to "trace"; (3) citing In re Marriage of Engen, 1998 MT 153, 289 M 299, 961 P2d 738 (1998), there was no reason why, just because the gift was commingled with marital property, the gift could not be separated from the value of the house as a whole because commingling does not automatically preclude a gift from being considered as separate property; (4) the District Court's valuation of the gift was problematic because if the value of the home was $200,000 and construction costs were reasonably evidenced by the "construction cost breakdown" paper given by Robert to the parties' financing bank, then the value of the gift could not be $80,000, as alleged by Tammy and her father, so the Supreme Court must remand the case back to the District Court for more accurate findings as to the value of the gift and a redistribution of the property in accordance with the new findings; (5) although Robert claimed that the District Court ignored evidence of the value of his contribution to the home, a more accurate statement would be that the court failed to include specific findings on this issue, but the District Court did find that the value of each party's contribution was substantially equal, a finding that was supported by the evidence and was therefore sufficient, pursuant to In re Marriage of Mouat, 228 M 430, 743 P2d 602 (1987); (6) citing In re Marriage of Mease, 2004 MT 59, 320 M 229, 92 P3d 1148 (2004), it would not disturb the District Court's findings with regard to the valuation of Robert's guns and Tammy's equestrian tack because the District Court was in the best position to observe the witnesses testifying on the issue and judge their credibility; and (7) it would not disturb the District Court's findings with regard to the income of both parties because the District Court noted that the parties "did an incomplete and poor job of stating Income and Deductions". In re Marriage of Horton, 2004 MT 353, 324 M 382, 102 P3d 1276 (2004). Engen was overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Proper Valuation of Jewelry Business Based on Evidence in Record: A certified public accountant valued the husband's jewelry business at $195,000, the wife's proposed value was $684,632, and the husband's own estimates varied from $342,316 in 1999 to $159,043 in 2001 and $280,000 in 2002. The District Court set the value at $342,316, and the husband appealed. The record showed that the accountant had never valued a jewelry business and relied on comparative sales data that was 10 years old, rendering the estimate incredible. The wife's estimate of the fair market value was not supported by the evidence. Further, the husband himself supplied varying values for the business. The District Court's valuation was reasonable, supported by the record, and within the range of values presented by the parties, so the valuation was affirmed. In re Marriage of Baide, 2004 MT 260, 323 M 104, 99 P3d 178 (2004).

Marital Relocation Expenses Properly Excluded: The wife claimed to have spent about $300,000 in relocating her children from Wisconsin to Montana to facilitate the marriage. Despite the fact that no documentation was provided, the trial court allowed some expenses related to the husband's adoption of the wife's children from a former marriage, but disallowed unrelated, irrelevant expenses. The wife appealed, but the Supreme Court affirmed, absent any supporting evidence or legal authority to support the claim for relocation expenses. In re Marriage of Killpack, 2004 MT 55, 320 M 186, 87 P3d 393 (2004).

Marital Property Valuations Not Supported by Substantial Evidence: The District Court expressed concern at trial for the values contained in the husband's bank financial statement, but concluded after trial that the financial statement provided the most reliable source of valuation of the parties' assets. The court went on to value the husband's interest in a farming partnership in accordance with the financial statement, despite testimony from the only expert that the partnership value was significantly less. The court then disregarded both the financial statement and the expert's appraisal when valuing an apartment complex based on the wife's unsupported estimate. The court then went on to award the value of a vehicle to both parties at different values, impliedly finding the financial statement to be credible and unreliable at the same time. The Supreme Court concluded that the District Court's valuations were not supported by credible evidence and remanded for a revaluation. In re Marriage of Steinbeisser, 2002 MT 309, 313 M 74, 60 P3d 441 (2002).

Inability to Calculate Net Worth of Marital Estate Not Preclusive of Equitable Distribution: Because of the husband's deteriorating health, the District Court awarded the husband a disproportionate portion of the marital estate. To address the disproportionate distribution, the court ordered the immediate sale of various assets and provided that if the parties could not agree on a reasonable sales price for the assets, the court would set a price that would be reduced by 5% a month until the assets were sold. The wife contended that the court erred by not determining the exact net worth of the marital estate. The Supreme Court noted that until the marital properties were sold, it was impossible to determine the exact net worth of the estate, but held that the District Court's inability to calculate the exact net worth did not render its distribution of the estate inequitable. The District Court had estimated the amounts likely to be received from the sale of the assets. Nevertheless, the District Court's findings were sufficient to determine the net worth, given that the value of a portion of the estate was unknown and subject to market determination. In re Marriage of Hayes, 2002 MT 281, 312 M 440, 60 P3d 431 (2002), following In re Marriage of Harkin, 2000 MT 105, 299 M 298, 999 P2d 969 (2000).

Lack of Evidence of Unaccounted for Cash — Valuation of Marital Estate Not Clearly Erroneous: The wife contended that the trial court erred in its valuation of the marital estate by basing its findings on the parties' tax returns instead of on the disparity between income and expenses reflected in the husband's handwritten notes, which indicated a difference of $120,000 in cash that was allegedly unaccounted for. The District Court listened to all the evidence related to the claim, reviewed the relevant testimony from the trial, reviewed the handwritten notes, asked clarifying questions of counsel when confused, and ultimately decided that the claim was purely speculative, based on a lack of substantiating evidence. The Supreme Court affirmed. Although the handwritten notes did reflect that income exceeded expenses by about $120,000 in 1997, the notes did not directly correspond to the couple's gross income reflected on their 1997 tax returns, nor were they corroborated by any other evidence, such as bank records. Thus, the District Court's finding that the existence of the alleged money had not been proved was a reasonable interpretation of the evidence. In re Marriage of DeBuff, 2002 MT 159, 310 M 382, 50 P3d 1070 (2002).

Debt Owed to Trusts Chargeable Against Marital Estate: Of the total amount of debt attributable to the marital estate, the District Court attributed $631,000 borrowed from and repayable to two trusts of which husband was sole beneficiary. Wife contended that this was error because in repaying the trust, husband was essentially repaying himself, while husband presented evidence through his trust officer that his repayment obligations were genuine. Distinguishing In re Marriage of Schmitz, 255 M 159, 841 P2d 496 (1992), the Supreme Court held that competent evidence, not documentary evidence, of a loan agreement is required. Evidence by the trust officer that husband took out two promissory notes secured by mortgages on the homes purchased with the loan proceeds was sufficient to support the decision to include the $631,000 in loans as debt chargeable to the marital estate. In re Marriage of Pfeifer, 282 M 461, 938 P2d 684, 54 St. Rep. 432 (1997).

Failure to Identify Assets or Assign Values — Abuse of Discretion: It was an abuse of discretion in the evaluation of the marital estate for the District Court to fail to: (1) identify or describe the assets acquired during the marriage; (2) assign values to them; and (3) consider the contingent liabilities associated with those assets. In re Marriage of Smith, 264 M 306, 871 P2d 884, 51 St. Rep. 277 (1994).

Appreciation Calculated on Basis of Erroneous and Speculative Figures: Calculation of the appreciation of a piece of real estate was clearly erroneous and was vacated because the court based the starting value on the average of figures that were based on total speculation. In re Marriage of Maedje, 263 M 262, 868 P2d 580, 51 St. Rep. 47 (1994).

Fair Market Value of Real Estate Contract to Be Based Upon Evidence: The husband argued that the lower court erred in not discounting the value of a contract for deed in determining its present fair market value. The Supreme Court held that although the rule usually applied by the courts is that the present-day fair market value of a contract for deed rarely equals the principal balance, in this case the husband had presented no evidence on how much the devaluation should be. Therefore, it was not error to use the principal balance due on the contract. In re Marriage of Porter, 247 M 395, 807 P2d 192, 48 St. Rep. 247 (1991).

Husband's Attitude During Proceeding Taints Credibility: The husband argued that the lower court erred in finding that he had the ability to earn $20 an hour as an electrical draftsman. The Supreme Court held that the lower court was justified in discounting any testimony of the husband because his attitude during the trial tainted his credibility. In re Marriage of Porter, 247 M 395, 807 P2d 192, 48 St. Rep. 247 (1991).

Valuation of Home Based on Wife's Corroborated Testimony Rather Than Husband's Uncorroborated Testimony: The District Court based its valuation of a lot with the family home on it on wife's testimony, which the court found was generally more credible than husband's. Her testimony was supported by the County Treasurer. Husband offered no concrete evidence in support of his valuation. There was evidence of extensive improvements. The court's valuation was not arbitrary or an abuse of discretion. In re Marriage of Hockaday, 237 M 413, 773 P2d 1217, 46 St. Rep. 910 (1989). This standard of review was applied in In re Marriage of Ruff, 247 M 486, 807 P2d 1345, 48 St. Rep. 271 (1991).

Valuation of Estate Reversed — Lack of Supporting Evidence: The trial court's valuation of the marital estate was reversed for lack of supporting evidence. There was wide disparity between the parties' valuations and an apparent mathematical error by the trial court. The issue was remanded for findings that would reflect the basis of the net worth. In re Marriage of Anderson, 220 M 477, 717 P2d 11, 43 St. Rep. 541 (1986).

Abuse of Discretion — Four Substantial Injustices: The property settlement was set aside by the Supreme Court because the District Court abused its discretion in four major areas. First, the husband's values for property, while not adopted absolutely verbatim, were almost always accepted without explanation even though the record indicates some of his values were questionable. Second, as her share of the marital estate the wife received household goods with inflated values while the husband received income-producing property such as stocks and an annuity. Third, nonincome-producing property brought into the marriage 15 years ago was deducted from the division of property, resulting in an inequitable and unworkable property division. Fourth, various "credits"—payments on real property, withdrawals from checking accounts, and child support—appeared as distributions of property, but it was unclear what constituted a credit in this context. In re Marriage of Rolfe, 216 M 39, 699 P2d 79, 42 St. Rep. 623 (1985), followed in In re Marriage of Ryan, 222 M 188, 720 P2d 691, 43 St. Rep. 1163 (1986).

Found Value Higher Than Agreed Value — No Findings — Order to Change Value to That Agreed Upon: Trial court valued accounts and notes payable at $47,616, though the parties agreed they were worth $33,668. The court gave no explanation for its figure, and the Supreme Court ordered it to change the amount to that agreed to by the parties. In re Marriage of Beck, 203 M 455, 661 P2d 1282, 40 St. Rep. 565 (1983).

Projected Value of Current Growing Crop: The projected value that court distributing marital property upon divorce placed on 1981 growing crop was based on sufficient evidence. The evidence included the farm's tax returns for the past 4 years and the estimated expenses, acreage planted, and value of the crops. In re Marriage of Goodmundson, 201 M 535, 655 P2d 509, 39 St. Rep. 2295 (1982).

Improper to Include in Marital Estate Cattle Whose Brand Not Registered to Either Husband or Wife: In determining the size of the marital estate for the purpose of a division of property in a dissolution of marriage proceeding, the District Court included within the estate cattle whose brand was registered to the parties' adult children. The Supreme Court reversed because no evidence had been produced at trial to rebut the presumption that the person whose brand appeared on cattle was the owner of those cattle. Therefore, the court held that the cattle should not have been included in the marital estate since they were not owned by the husband or wife. In re Marriage of Schultz, 199 M 332, 649 P2d 1268, 39 St. Rep. 1435 (1982).

Indefinite Valuation Based on Parties' Opinion — Upheld: Evidence of the value of the major portion of marital estate, consisting of the family home and the family jewels, was indefinite, as appraisal figures were based mainly on the personal opinions of the parties, formed through informal inquiries and reliance on amounts of insurance coverage. Upon husband's claim on appeal that the District Court did not have sufficient competent evidence to properly evaluate the marital estate, the Supreme Court held that the trial court was not given the best evidence on which to base its valuations, but they would stand because there was nothing in the record to show they were clearly erroneous. Laster v. Laster, 197 M 470, 643 P2d 597, 39 St. Rep. 737 (1982).

Divided Purpose Land — Valuation of Each Plot Used for Each Purpose Required: District Court making property disposition upon dissolution of marriage found the fair market values of 1,200-acre and 2,956-acre tracts of farm-ranch land. The valuations were not supported by the evidence where the court did not break down the tracts between cropland, hay land, and grazing land and determine the number of acres and total value of each type of land. Hill v. Hill, 197 M 451, 643 P2d 582, 39 St. Rep. 723 (1982).

Dispute Over Particular Valuation

Equitable Apportionment — District Court Abused Discretion by Valuing Husband's Retirement Accounts and Other Assets on Separation Date — Couple Continued to Have Commingled Finances — Majority of Payments After Separation Based on Work That Husband Performed Before Separation — Substantially Inequitable Division of Marital Assets Resulted in Substantial Injustice. In re Marriage of Frank, 2022 MT 179, 410 Mont. 73, 517 P.3d 188.

Substantial Credible Evidence Supported District Court's Decision to Adopt Valuation of Business Using Husband's Expert — Detailed Findings Summarized Extensive Testimony From Both Experts — Husband Contributed to Wife's Business — Scope of Work and Expertise of Husband's Expert Compared to Wife's Expert. In re Marriage of Frank, 2022 MT 179, 410 Mont. 73, 517 P.3d 188.

Valuation of Ranch Supported by Substantial Evidence — Husband's Admission That Ranch Was Worth More Than His Expert's Projection as Factor: The District Court properly weighed conflicting evidence while determining the credibility of witnesses when it valued a ranch at $2.45 million. Conflicting evidence included a valuation from the husband's expert of $1,172,513 and a valuation from the wife's expert of $2,667,940. The valuation was supported by substantial evidence, based on the price at which the parties sold portions of the ranch during dissolution proceedings, and based on the husband's admission that he would consider selling the ranch for $2.4 million. In re Marriage of Clark, 2015 MT 263, 381 Mont. 50, 357 P.3d 314.

Antiques Inventory Considered Part of Marital Estate — Equitable Distribution to Contributing Spouse: Without explanation, the District Court determined that one-half of the inventory of an antiques business belonged to the husband, who did not become a business partner until about 4 months after the inventory was valued, but the court gave only 20% of the inventory to the previous common-law husband, who had contributed considerably to the business. The Supreme Court concluded that the valuation and distribution constituted an abuse of discretion and remanded for further consideration. Arnold v. Sullivan, 2010 MT 30, 355 Mont. 177, 226 P.3d 594.

Sufficient Evidence to Support Reasonable Rental Value of Parties' Property: Based on testimony from local real estate agents and from the husband himself and considering past rental history on the record, the District Court did not err in determining that the reasonable rental value of a three-bedroom home on 40 rural acres in the Bozeman area was $1,200 a month. In re Marriage of Stoneman & Drollinger, 2008 MT 448, 348 M 17, 199 P3d 232 (2008).

No Error in De Minimis Valuation of Destroyed Bed: The husband contended that the District Court erred by not allowing credit for the purchase value of a bed, which was destroyed by the wife, in valuing the marital estate. The court instead allowed only a de minimis value for the bed. The Supreme Court noted that valuation should be based on fair market value at the time of distribution. The bed was over 2 years old at the time of dissolution, and neither party presented evidence of its fair market value immediately prior to destruction. Because the husband did not establish clear error in the District Court's finding that the bed's value was de minimis, denial of the husband's request for credit based on the purchase value was affirmed. In re Marriage of Jackson, 2008 MT 25, 341 M 227, 177 P3d 474 (2008).

No Abuse of Discretion in Distributing Percentage of Value of Stock to Nonacquiring Spouse: A District Court may consider the extent to which a nonacquiring spouse's contributions facilitated the preservation and appreciation of the entire value of the marital resources, including a spouse's nonmonetary contributions as a homemaker. The court is to consider the statutory criteria and equitably apportion the marital assets particular to each case, and the court's discretionary judgments are entitled to a presumption of correctness. In this case, the findings were sufficient to support the rationale used in determining whether and how the nonacquiring wife contributed to preservation of farm stock, and the District Court did not abuse its discretion in distributing 20% of the stock to the wife. However, there was no basis for the Supreme Court to review whether the distribution of the remainder of the marital estate was equitable, so the case was remanded for a reasoned consideration of what constituted an equitable distribution of the portion of the marital estate that did not include the stock. In re Marriage of Bartsch, 2007 MT 136, 337 M 386, 162 P3d 72 (2007).

Cost Approach Versus Market Approach in Valuation of Marital Property — Court's Discretion to Accept Either: In reviewing the District Court's valuation of business property owned by Steve at the time of dissolution of his marriage, the Supreme Court held that the District Court did not err in relying upon the "market approach" to valuation of marital property used by Sherri's expert appraiser rather than the "cost approach" to valuation of that property used by Steve's expert appraiser. The Supreme Court pointed out that even though there may have been very few genuinely comparable sales by which to apply the market approach to valuation, the District Court found the appraisal by Sherri's appraiser to be the more reliable of the two appraisals and also found that the cost approach to valuation "appeared to be unrealistic". The Supreme Court cited In re Marriage of Meeks, 276 M 237, 915 P2d 831 (1996), for the proposition that a District Court is free to adopt any reasonable valuation of marital property that is supported by the record, as long as it is reasonable in light of the evidence submitted. In re Marriage of Helzer, 2004 MT 352, 324 M 371, 102 P3d 1263 (2004).

Proper Valuation of Shares of Farm Stock Based on Fair Market Value: The District Court found that shares of stock in the family farm had a value of $3.62 a share, based on the husband's testimony of the value. The husband appealed on grounds that the court had insufficient evidence to arrive at the figure and that the shares should have been valued at the present fair market value. The Supreme Court noted that the time for valuation cannot be tied to any single event in the dissolution process and that a valuation will be affirmed as long as it is reasonable in light of the evidence. The District Court accepted the husband's testimony that the value of the shares was based on the current fair market value, and the Supreme Court found that the valuation was both preferable and reasonable and affirmed the valuation. In re Marriage of Bartsch, 2004 MT 99, 321 M 28, 88 P3d 1263 (2004), following In re Marriage of Krause, 200 M 368, 654 P2d

963 (1982), and In re Marriage of Pospisil, 2000 MT 132, 299 M 527, 1 P3d 364 (2000). On remand for a determination of the wife's contributions and distribution of the marital estate, the husband contended that the District Court's findings were flawed because they ignored factors affecting the value of the stocks, even though the Supreme Court affirmed the valuation in the 2004 Bartsch decision. The court held that the findings were not flawed because of valuation issues because the value of the stocks was fixed in the 2004 decision and became the law of the case. In re Marriage of Bartsch, 2007 MT 136, 337 M 386, 162 P3d 72 (2007).

Spouse's Contribution Commingled With Parties' Joint Funds — Maintenance Award From Prior Marriage Mischaracterized as Premarital Asset: The District Court considered $22,000 received by the wife as maintenance from a previous marriage as a premarital asset contributed to the marital estate. The husband contended that the maintenance should be treated as income when computing the wife's financial contribution to the marital estate. Citing In re Marriage of Eklund, 236 M 77, 768 P2d 340 (1989), the Supreme Court noted that a portion of the marital estate may be set aside if it is traceable to one party or the other. However, in this case the parties commingled the maintenance funds with their other joint funds and treated the money as joint income, so it was erroneous to treat the $22,000 as a premarital asset. In re Marriage of Steinbeisser, 2002 MT 309, 313 M 74, 60 P3d 441 (2002), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Value of Life Raft Within Range of Values Presented — No Error: The husband objected to the District Court's valuation of a life raft at $100, which was the value assigned to the raft by the wife, while the husband gave the raft no value. A District Court is free to assign any value to an item of property that is within the range of values offered into evidence, and because $100 was clearly within the range of values presented, the court did not abuse its discretion in valuing the raft at $100. In re Marriage of Hochhalter, 2001 MT 268, 307 M 261, 37 P3d 665 (2001). See also In re Marriage of Lopez, 255 M 238, 841 P2d 1122 (1992).

Remand for Property Appraisal and Equitable Distribution of Marital Estate: In attempting to resolve the parties' disparate estimates of the valuation of the marital estate, the District Court made several findings regarding the wife's medical bills, equitable distribution of the couple's ranch operation, the value of the husband's home in town, a payment that the husband made to the wife for her interest in ranch property, and the value of the wife's retirement account and her home in town. The court noted that the parties had provided insufficient information to arrive at a value of the marital estate and suggested that the parties have the property appraised and divide the resulting value equally, noting that if the parties could not agree, the court would order the appraisal, charging each party with appraisal costs, and then divide the value of the estate equally. Rather than follow the court's advice, the husband instead appealed the court's findings. The Supreme Court found no error in the District Court findings. The parties chose to appeal without pursuing the trial court's suggestions, so the Supreme Court remanded so that the District Court could do what the parties were apparently incapable of doing themselves. In re Marriage of Gochanour, 2000 MT 156, 300 M 155, 4 P3d 643, 57 St. Rep. 619 (2000).

Qualifications of Real Estate Experts — Differing Valuation: At a hearing concerning the valuation and division of property in the dissolution of Maureen and Joseph's marriage, an agricultural real estate broker testified for Maureen that the parties' ranch was worth $398,000 to $400,000, while a certified and licensed property appraiser testified for Joseph that the ranch was worth $182,500. Joseph contended that the District Court erred in accepting the value of the ranch as testified to by the real estate broker because the broker had no experience as a real property appraiser. Citing Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248 (1994), the Supreme Court held that whether an adequate foundation has been established for the admission of expert testimony is an issue largely within the discretion of the District Court and that the District Court did not abuse its discretion when it relied upon the testimony of the real estate broker. The Supreme Court therefore affirmed the part of the District Court's order that valued the parties' ranch at $400,000. In re Marriage of Ortiz, 282 M 500, 938 P2d 1308, 54 St. Rep. 446 (1997).

Error in Attributing Higher Possessory Interest in Property Without Substantial Evidence: The parties stipulated that the value of wife's possessory interest in a house and acreage was $480,000, but the District Court valued wife's 11-year possessory interest at $552,000, resulting in a credit to her of a greater portion of the marital estate than if the property was awarded to her free of encumbrances. While a court's assignment of a different valuation is not in itself erroneous, it was reversible error in this case because the court reached the determination without a substantial evidentiary basis. In re Marriage of Pfeifer, 282 M 461 938 P2d 684, 54 St. Rep. 432 (1997). On remand, the District Court did not ignore the law of the case or exceed its jurisdiction when it revalued the wife's possessory interest in the home and land, adjusted the total value of the marital estate accordingly, and redistributed the estate to maintain the approximately equal distribution of property to each party that it originally had determined to be equitable. In re Marriage of Pfeifer, 1998 MT 228, 291 M 23, 965 P2d 895, 55 St. Rep. 953 (1998), distinguishing In re Marriage of Becker, 255 M 357, 842 P2d 332 (1992).

Presumption That Value of Stock in Shareholder's Agreement Is Real Value: A shareholder's agreement that predated the dissolution proceedings restricted husband from transferring stock for more than the price set forth in the agreement. If shareholders have employed an acceptable method of valuation and there is no evidence that the valuation was undertaken in bad faith or for the purpose of avoiding marital or debtor-creditor responsibilities, a presumption exists that the valuation of stock set forth in a shareholder's agreement is the real value of a shareholder's interest in a closely held corporation. In this case, it was reversible error for the trial court to adopt wife's valuation that did not consider the shareholder's agreement. In re Marriage of DeCosse, 282 M 212, 936 P2d 821, 54 St. Rep. 318 (1997), following Amodio v. Amodio, 509 NE 2d 936 (N.Y. 1987).

Valuation of Contract for Deed Not Supported by Record — Remand to District Court: Before Thomas and Debra were married, Thomas sold property in several states and used the proceeds to purchase a saloon in Missoula County. The saloon was sold on a contract for deed twice. After the first sale, the buyers defaulted. Thomas resold the saloon, and the buyers were still making payments at the time that Thomas and Debra divorced. The District Court awarded Debra a 40% interest in the remaining proceeds of the second sale of the saloon. The District Court awarded Thomas the $100,000 received in the first sale of the saloon, the $37,500 downpayment in the second sale, all payments on the second sale through May of 1995, and 60% of the remaining payments on the second sale. The District Court calculated the balance due on the second contract at $257,738.62 and the value of the remainder due on the second contract at $538,620. The value was determined multiplying the number of payments yet to be made times the amount of each payment. Thomas argued that the calculation was incorrect because it included a $25 a month escrow charge and also because the valuation included the total amount of interest to be paid under the contract and did not reflect present value. The Supreme Court found that the valuation of the balance due under the contract was not supported by the record and that double inclusion of other assets, as argued by Thomas, was unsupported by the record. The Supreme Court noted that correction of those errors would result in an adjustment to the values of the parts of the marital estate awarded to each party. The Supreme Court therefore remanded the case to the District Court for revaluation of the balance due under the contract. In re Marriage of O'Neil, 277 M 13, 917 P2d 916, 53 St. Rep. 522 (1996).

Valuation of Law Firm and Ranch Stock Not Supported by Evidence — Assignment of Debt Not Erroneous but Remanded: Upon the dissolution of the marriage of David and Mayla, the District Court apportioned the parties' property by valuing David's law practice at $75,000. David claimed that his law practice was worth $6,500, the value of the equipment. Mayla contended that the practice was worth more because of its average annual income and because of goodwill. The Supreme Court noted that the value placed on the business by Mayla was the amount borrowed by David and a former partner to purchase the interest of another former partner in the law firm and that these circumstances may not accurately represent the value of the law firm. The Supreme Court also noted that there was no evidence to support the figure of $75,000 assigned as the value of the law firm by the District Court and remanded for specific findings on that issue. The Supreme Court also noted that Mayla conceded that there was a problem with the valuation of David's ranch stock and remanded for a valuation of the stock. The Supreme Court also reviewed the District Court's assignment of the debts of the parties and found that no error was committed but, because the case was being remanded on other issues, directed the District Court to review its assignment of the parties' debts. In re Marriage of Stufft, 276 M 454, 916 P2d 767, 53 St. Rep. 467 (1996).

Valuation of Farm Property and Rebuttal of Expert Testimony — Refusal by District Court to Leave Record Open for Rebuttal Testimony Upheld: In a proceeding for the dissolution of their marriage, both Linda and Alan introduced expert testimony as to the value of Alan's farm. Claiming that she was surprised by the testimony of Alan's expert witness that the value of Alan's farm and a neighbor's farm were not comparable, Linda moved the District Court to leave the record open so that she could obtain the testimony of a neighbor on the value of his farm, which Linda alleged to be comparable to Alan's. The Supreme Court held that the District Court did not abuse its discretion in denying the motion. The Supreme Court noted that the District Court found that the neighbor could have been subpoenaed and that even if Linda was surprised by the testimony of Alan's expert, the testimony of the neighbor as to his willingness to pay a high price for his own farm absent certain improvements could not have proved that Alan's expert was incorrect in his testimony that the farms were not comparable for the purposes of valuation. The Supreme Court held that the testimony of an expert, whose opinion is based on fact, could not be adequately rebutted by the testimony of a layperson based upon a hypothetical that did not exist. In re Marriage of Meeks, 276 M 237, 915 P2d 831, 53 St. Rep. 365 (1996).

Discounting of Ranch Corporate Stock Held Reversible Error: Margaret and Mark were divorced after approximately 20 years of marriage. During their marriage, Mark was the general manager of two family ranches, organized as closely held corporations, in which he was a minority shareholder. All of Mark's shares were acquired by family gift or inheritance. Upon the divorce of the parties, the District Court discounted the value of Mark's stock in the two ranch corporations by 50%. Distinguishing In re Marriage of Jorgensen, 180 M 294, 590 P2d 606 (1979), the Supreme Court held that given the value of Mark's interest and position in the two ranching operations, there was no reason to discount his minority shares in either and that discounting was reversible error. In re Marriage of Davies, 266 M 466, 880 P2d 1368, 51 St. Rep. 929 (1994), distinguished in In re Marriage of Harper, 1999 MT 321, 297 M 290, 994 P2d 1, 56 St. Rep. 1280 (1999).

Value of Baseball Card Collection Affirmed: Both parties submitted widely varied estimates of the value of a baseball card collection, none of which were supported by independent evidence. The District Court's assignment of a value of $8,000 for the collection, absent clear error, was affirmed. In re Marriage of Newton, 255 M 463, 844 P2d 47, 49 St. Rep. 1068 (1992).

Disputed Valuation of Insurance Business Interest — Value of Goodwill: Wife's accountant capitalized the income generated by husband's insurance business over and above what would have been earned if husband were a salaried employee without the business. These excess earnings or discretionary cash, when capitalized using appropriate formulas, resulted in a valuation of goodwill in the business at $102,240. Husband's accountant used the same formula but estimated husband's salary without the business at a higher amount, resulting in a goodwill valuation of $37,039.60. The District Court held the value of goodwill to be $100,240, which was within the range of figures presented and therefore not clearly erroneous. In re Marriage of Lopez, 255 M 238, 841 P2d 1122, 49 St. Rep. 890 (1992).

Husband's Assumed Debt Not a Plus on Wife's Balance Sheet: The husband appealed the lower court's valuation of each party's share of the marital assets. The husband had been ordered to pay a home improvement loan on the house awarded to the wife, and he argued that the loan he was paying benefited the wife in the same amount and should have been reflected in her share of the marital assets. The Supreme Court ruled that even if the amount of the assumed loan had been added to the wife's assets, the distribution was still in favor of the husband and so the failure to include that amount on the wife's side of the ledger did not constitute error. In re Marriage of Cooper, 243 M 175, 793 P2d 810, 47 St. Rep. 1112 (1990).

Value of Irrigation Pipe — Inclusion as Marital Asset: It was not error for the District Court to independently value irrigation pipe and include it as personal property in the gross marital estate. In re Marriage of Popp & Martin, 235 M 372, 767 P2d 871, 46 St. Rep. 64 (1989).

Discount for Minority Stock Interest Proper: The District Court discounted the value of stock by 25% to take into account a couple's status as minority stockholders. Whether a discount is proper depends on the facts of the case, not on the method used to ascertain the value of the stock. A discount for a minority interest is appropriate when the minority shareholder has no ability to control salaries, dividends, profit distributions, and day-to-day corporate operations. In re Marriage of Milesnick, 235 M 88, 765 P2d 751, 45 St. Rep. 2182 (1988), followed in McCann Ranch, Inc. v. Quigley-McCann, 276 M 205, 915 P2d 239, 53 St. Rep. 349 (1996).

Value of Business Partnership — Retention of Income-Producing Potential: Husband testified that the value of a trucking partnership was $2,000—the value of a P.S.C. permit—because the only other business asset, a livestock truck, had been destroyed. However, the District Court did not err in assessing the value of the partnership at $10,000 after examining the partnership tax returns and potential leasing value of the permit. Because the partnership retained income-producing potential, it was reasonable for the court to assume a higher value than that attributed to it by the husband. In re Marriage of Milesnick, 235 M 88, 765 P2d 751, 45 St. Rep. 2182 (1988).

Error in Accepting Outdated Property Appraisal: In establishing the value of motel property for purposes of marital distribution, the District Court relied on a 1982 tax appraisal, rather than current appraisal testimony and market conditions, resulting in a difference of nearly $89,000. It was an abuse of discretion warranting remand for the court to accept an outdated appraisal. In re Marriage of Butler, 232 M 419, 756 P2d 1159, 45 St. Rep. 1160 (1988).

Valuation of Beef Reversed: Husband was required to deliver one free beef a year to wife as part of a property settlement. Upon failing to do so, the District Court found him indebted in an amount representing the reasonable value, plus interest, of one cut, wrapped, frozen, and delivered beef each year for 5 years. The court then used figures that purported to represent the cost of beef on the hoof to husband, not the value of butchered meat to the wife. Because the valuation appeared to charge wife for cutting and wrapping, the case was remanded for recalculation. In re Marriage of Kramer, 229 M 476, 747 P2d 865, 44 St. Rep. 2148 (1987).

Evidence of Partnership Value Not Clearly Erroneous: Husband's valuation of his business partnership was not credible and wife did not offer a specific valuation for it. The court heard and considered extensive evidence on this issue and accepted wife's valuation. Although the court did not have the best possible evidence to value the partnership, its determination will stand as it is not clearly erroneous. In re Marriage of Roullier, 229 M 348, 746 P2d 1081, 44 St. Rep. 2035 (1987).

Dispute Over Value of Home — Sale Warranted: Where the parties presented differing appraisal values for the family home and were not able to agree on a value, it was not error to order the home sold and proceeds divided as wife was entitled to an equitable share of this marital asset. In re Marriage of Rogers, 226 M 163, 734 P2d 677, 44 St. Rep. 556 (1987), followed in In re Marriage of McLean/Fleury, 257 M 371, 849 P2d 194, 50 St. Rep. 35 (1993).

No Abuse of Discretion in Using Separate Dates of Valuation: The District Court valued husband's estate as of date of separation and wife's estate as of date of dissolution. The Supreme Court rejected husband's allegation of error, noting that, pursuant to 40-4-202, the District Court relied on husband's dissipation of funds in reaching its conclusion that separate valuation dates were necessary to equitably apportion the parties' marital estate. In re Marriage of Hurley, 222 M 287, 721 P2d 1279, 43 St. Rep. 1271 (1986).

Conflicting Valuation Evidence — Court Must Indicate Basis for Choice: The wife presented testimony from a real estate broker about the value of rental property. The husband offered only his opinion of the value. The court accepted the husband's value without offering an explanation. When conflicting valuation evidence is presented the court must indicate the basis for its determination. In this case, the court abused its discretion by its failure to offer an explanation of why it chose the husband's valuation. In re Marriage of Rolfe, 216 M 39, 699 P2d 79, 42 St. Rep. 623 (1985), followed in In re Marriage of Bell, 220 M 123, 713 P2d 552, 43 St. Rep. 226 (1986).

Husband's Minority Corporation Stock — Not Discounted: This case is not like the federal cases cited by husband that have discounted minority stock values for estate tax purposes nor this court's approval of discounting minority stock in In re Marriage of Jorgensen, 180 M 294, 590 P2d 606 (1979). This is not a situation where minority stock should be discounted to determine its value. Discounting usually will apply when the market value of the stock is being estimated and there really is no market on which to rely. In this case, the value of the corporation was arrived at by the market value of the underlying assets. It would be inconsistent to discount the minority share of the value of the corporate assets in this case. In re Marriage of Buxbaum, 214 M 1, 692 P2d 411, 41 St. Rep. 2243 (1984), followed in In re Marriage of Taylor, 257 M 122, 848 P2d 478, 50 St. Rep. 186 (1993). However, see In re Marriage of Hanni, 2000 MT 59, 299 M 20, 997 P2d 760, 57 St. Rep. 279 (2000), in which the wife claimed that the District Court imposed an improper de facto stock discount on the shares of the husband's corporation and the Supreme Court affirmed, citing In re Marriage of Taylor, and held that because the District Court assigned a stock value within the range presented into evidence at trial, the valuation would not be disturbed.

Life Estate Valuation Substantially Different From Expert's — No Reasons Given: It was error for the District Court to fail to give reasons why it assigned a specific value to a life estate when that value was substantially greater than an expert witness had set. In re Marriage of Summerfelt, 212 M 332, 688 P2d 8, 41 St. Rep. 1775 (1984).

Value of Contract for Deed — Present Value Used, Not Unpaid Principal: A major asset of the marriage was a contract for deed for a ranch sold to children of the wife. The contract had an unpaid principal in the amount of $100,000, with interest payable annually and principal to be retired as the buyers were able to do so. The present-day value of a contract for deed rarely if ever equals the amount of the unpaid balance due on it; thus, in apportioning marital assets, the District Court abused its discretion when it accepted the principal amount due on the contract as a marital asset rather than its present-day value. In re Marriage of Summerfelt, 212 M 332, 688 P2d 8, 41 St. Rep. 1775 (1984), distinguished in In re Marriage of Scott, 246 M 10, 803 P2d 620, 47 St. Rep. 2237 (1990).

Duty of Court to Resolve Conflicts in Valuation of Personal Property — Method of Valuation: Where the appellant, husband in a divorce proceeding, argued on appeal that the District Court overvalued certain assets awarded to him, relying on an unsupported and allegedly biased estimation of values submitted by the respondent, the Supreme Court found that the record did not show a clear preponderance of evidence against those valuations. The record showed that the respondent relied upon valuations provided by other persons she showed the property to or discussed it with, and upon such testimony the District Court properly resolved the conflicting valuations of the property. Parenteau v. Parenteau, 204 M 239, 664 P2d 900, 40 St. Rep. 815 (1983). See also In re Marriage of Glass, 215 M 248, 697 P2d 96, 42 St. Rep. 328 (1985), cited in In re Marriage of Taylor, 257 M 122, 848 P2d 478, 50 St. Rep. 186 (1993).

Spouse's Mineral Interest — Value Dispute — Necessity of Findings: Since the value of mineral interests and whether they should have been valued were disputed by the parties, the trial court should have valued the interests as of the date of the dissolution of the marriage and was ordered to do so and to include the value in the parties' net worth. In re Marriage of Beck, 203 M 455, 661 P2d 1282, 40 St. Rep. 565 (1983).

Stock of Closely Held Corporation — Computation of Value: On second appeal from property disposition, wife claimed that during pendency of first appeal from the disposition husband sold his interest in closely held corporation for less than the fair market value. He sold it for $7,000. Wife claimed that less than 1 year later the corporation sold most of its property for an amount that would have brought husband $23,000 for his share in the corporation had he not sold his stock. The postdissolution sale was not relevant to the inquiry; the court was concerned only with the stock's value as of the date of dissolution of the marriage. Furthermore, although the value of the assets owned by a closely held corporation may be a factor in determining the stock's value, there are other factors. However, it was error for the lower court to omit any reference to the stock in the second property distribution, and court was ordered to make a finding as to the stock's value. In re Marriage of Beck, 203 M 455, 661 P2d 1282, 40 St. Rep. 565 (1983), followed in In re Marriage of Westland, 257 M 169, 848 P2d 492, 50 St. Rep. 216 (1993). Westland was distinguished in In re Marriage of Martin, 265 M 95, 874 P2d 1219, 51 St. Rep. 443 (1994).

Valuation of Tillable Land: Finding of court distributing property pursuant to a divorce that tillable land was worth $650 an acre was supported by record which showed that two local landowners testified to recent sales of similar land for more than $700 an acre, the wife testified she believed the land to be worth $700 an acre, and two appraisers valued the land at $600 and $625 an acre, with one of them stating that the range was from $621 to $743 an acre. In re Marriage of Goodmundson, 201 M 535, 655 P2d 509, 39 St. Rep. 2295 (1982).

Valuation of Closely Held Stock: The court established a value for stock in a closely held corporation by dividing the value of total assets less liabilities by the number of issued shares and arrived at a value of $1,009.72 per share. The court considered the book value of $158.37 per share as unrealistically low. The court also considered husband's estimate of $500 per share. The Supreme Court upheld the decision of the trial court, stating that the trial court did not act arbitrarily and that the method employed did not exceed the bounds of reason. In re Marriage of Burleigh, 200 M 1, 650 P2d 753, 39 St. Rep. 1538 (1982).

Hearsay Testimony as to Value of Animals: In a hearing to apportion marital assets, the wife testified as to the value of purebred dogs based on her experience as a kennel operator and on a letter from a person knowledgeable about such matters. The wife also testified as to the value of house plans, based on conversations with individuals in the construction business. It was not error to admit this testimony because: (1) pricing information received in part from others is not objectionable; (2) owners may testify as to the value of their animals; and (3) the testimony did not substantially affect the husband's rights. In re Marriage of Converse, 198 M 227, 645 P2d 413, 39 St. Rep. 887 (1982).

Property Disposition — Expert Testimony on Valuation: The District Court in a dissolution of marriage proceeding made a substantially equitable property disposition. The husband contended that the trial court erred in determining the per-acre value of the couple's ranch. Conflicting testimony was presented. The husband's expert presented a much higher figure based upon the possibility of subdividing the land. The District Court, as the trier of fact in the trial without a jury, accepted the valuation of the wife's expert. This is not reversible error. The trier of fact has the discretion to give whatever weight he sees fit to the testimony of an expert. Dickerson v. Dickerson, 188 M 492, 614 P2d 521 (1980), followed in In re Marriage of McCormack, 223 M 410, 726 P2d 319, 43 St. Rep. 1833 (1986).

Valuation of Stock: The trial court did not err in valuating certain stock held by the husband when it considered restrictive agreement between stockholders and discounted the value because of a minority interest. In re Marriage of Jorgensen, 180 M 294, 590 P2d 606 (1979), followed in In re Marriage of Davies, 266 M 466, 880 P2d 1368, 51 St. Rep. 929 (1994).

Conflicting Testimony: Where there was conflicting testimony as to valuation of household goods and unimproved lots, divorce court acted properly in resolving such conflicts by giving household goods to wife and lots to husband. Eschenburg v. Eschenburg, 171 M 247, 557 P2d 1014 (1976).

Future Acquisitions

Value of Expected Inheritance Not to Be Included in Marital Estate: A will is a revocable instrument that does not take effect until the death of its maker, so the potential recipient of an estate cannot know the extent of an interest in an estate prior to that time. Thus, the value of an expected inheritance is contingent, unascertainable, and may not be included in a marital estate. In re Marriage of Beadle, 1998 MT 225, 291 M 1, 968 P2d 698, 55 St. Rep. 943 (1998), overruling In re Marriage of Goodmundson, 201 M 535, 655 P2d 509 (1982).

Contingent Remainder in Trust Property — Intent of Testator Controlling: Alan's father died leaving a will establishing a trust for Alan's mother and leaving the corpus of the trust to Alan, his brother, and his sister. A clause in the will provided that no title in the trust would vest in any beneficiary until actual distribution of the trust property. When Alan's marriage was dissolved, his wife claimed that the District Court erred in excluding the trust from the marital estate. The Supreme Court held that Alan's interest could be classified as a vested remainder subject to divestment, but that the intent of the testator was controlling. The Supreme Court held that because Alan's father had included the spendthrift provision preventing vesting until distribution, the District Court was correct in excluding Alan's interest in the trust from the marital estate. In re Marriage of Meeks, 276 M 237, 915 P2d 831, 53 St. Rep. 365 (1996), followed in In re Marriage of Foreman, 1999 MT 89, 294 M 181, 979 P2d 193, 56 St. Rep. 373 (1999). See also In re Marriage of Beadle, 1998 MT 225, 291 M 1, 968 P2d 698, 55 St. Rep. 943 (1998).

No Vested Interest in Future Inheritance: Husband was the contingent remainderman in the inheritance of premarital property. Wife contended that it was error for the District Court to exclude the future inheritance as a marital asset when dividing the marital estate. Although a court must generally consider future acquisition of assets, in this case, husband did not have a vested interest in the inheritance and would not have an interest unless he survived his mother. Therefore, exclusion of the future inheritance as a marital asset was not error. In re Marriage of Weed, 254 M 162, 836 P2d 591, 49 St. Rep. 681 (1992). See also In re Marriage of Parker, 2013 MT 194, 371 Mont. 74, 305 P.3d 816, distinguishing In re Marriage of Foreman, 1999 MT 89, 294 Mont. 181, 979 P.2d 193.

Inclusion in Marital Estate of Husband's Remainder Interest in Father's Testamentary Trust — Value: The husband's remainder interest in his father's testamentary trust estate was properly included in the marital estate even though as a vested future interest it is subject to defeasance. The trial court did not err in assigning a current value to the remainder interest despite husband's contention that a more accurate value would be the discounted present value. The current value of the remainder interest is being used as collateral by the husband in arranging for corporate loans. The court realistically looked at the circumstances and used a proper value based on the underlying assets of the trust. In re Marriage of Buxbaum, 214 M 1, 692 P2d 411, 41 St. Rep. 2243 (1984).

Possible Future Mineral Royalties Increase — Not in Marital Estate: To the extent that an increase in mineral royalties due a party to a divorce is a mere possibility following dissolution of the marriage, they should not be valued and made part of the marital estate. In re Marriage of Beck, 203 M 455, 661 P2d 1282, 40 St. Rep. 565 (1983).

Expectation of Inheritance Properly Considered: Since a court distributing marital property upon a divorce must consider future acquisition of assets, husband's expectation of a sizeable inheritance is a valid consideration in the distribution. In re Marriage of Goodmundson, 201 M 535, 655 P2d 509, 39 St. Rep. 2295 (1982), followed in In re Marriage of Alt, 218 M 327, 708 P2d 258, 42 St. Rep. 1621 (1985), and overruled, to the extent that the value of an expected inheritance may be included in the marital estate, in In re Marriage of Beadle, 1998 MT 225, 291 M 1, 968 P2d 698, 55 St. Rep. 943 (1998).

Inherited Vested Future Remainder Interest — Included in Marital Estate: Husband in divorce proceeding had a vested remainder interest, received from his deceased father, in one-fourth of half of his parents' ranch, subject to a life estate granted his mother. Since husband's vested interest could be sold or otherwise alienated, transferred, or mortgaged by him, it had a present value and should be included in the marital estate for property distribution purposes. It was error for the District Court to fail to include it. Hill v. Hill, 197 M 451, 643 P2d 582, 39 St. Rep. 723 (1982), followed in In re Marriage of Foreman, 1999 MT 89, 294 M 181, 979 P2d 193, 56 St. Rep. 373 (1999).

Gifts

Imputed Annual Income Exceeding Husband's Current Income Proper — Imputed Income Based on Gifts From Husband's Mother Improper: In a 2015 divorce proceeding, the District Court imputed an annual earning capacity of $175,000 to the husband in awarding child support and maintenance. The determination was based on a 2011 statement by the husband that he could potentially earn $100,000 a year, on his work experience and qualifications in the financial industry, and on prior gifts from his mother to the marital estate of $75,000 a year. On appeal, the husband argued that he had not made $100,000 a year since before 2007, that his current income was substantially lower, and that the District Court erred by assuming he would receive $75,000 a year from his mother. The Supreme Court affirmed the District Court's finding of $100,000 a year based on the record. However, the Supreme Court reversed the District Court regarding the gifts of $75,000 a year from the husband's mother because there was no guarantee that he would continue to receive substantial gifts in the foreseeable future. In re Marriage of Paschen, 2015 MT 350, 382 Mont. 34, 363 P.3d 444. See also In re Marriage of Miller, 2022 MT 110, 409 Mont. 29, 511 P.3d 307.

Substantial Distribution of Gifted and Inherited Property to Wife: A husband and wife were married for 38 years prior to filing for dissolution. The District Court found that the majority of the parties' assets had been either gifts from the wife's family or purchased with money inherited by the wife. Accordingly, the District Court awarded the wife approximately three-quarters of the marital estate. On appeal, the Supreme Court upheld the award, finding that the District Court considered each of the statutory factors relating to gifted or inherited property. In re Marriage of Rintoul, 2014 MT 210, 376 Mont. 167, 330 P.3d 1203.

Existence and Valuation of "Gift" of Construction Labor and Materials for Home — Commingling of Gift in Marital Property — Multiple Issues Raised: When Tammy and Robert were divorced, the District Court awarded them each a net distribution from the marital property of nearly $73,000. Excluded from that distribution was an $80,000 gift to Tammy of construction labor and material that was given to her by her father in the construction of a log home on property that the couple purchased in Sanders County. Tammy and Robert both valued the home at $200,000 at the time of their divorce. Robert challenged the reduction in the value of the marital property by the amount of the gift on multiple grounds and raised other issues as well on appeal. In response to Robert's arguments, the Supreme Court held that: (1) although there was conflicting evidence of the gift (Robert, for instance, claimed no knowledge of the gift until the divorce proceeding), there was sufficient evidence of the gift's existence for the District Court to base its findings and conclusions on; (2) unlike the situation in In re Marriage of Herron, 186 M 396, 608 P2d 97 (1980), there was no need to trace the gift because it was only a single gift, the value of which was embedded in the total value of the home, on which the parties agreed, and there was therefore nothing to "trace"; (3) citing In re Marriage of Engen, 1998 MT 153, 289 M 299, 961 P2d 738 (1998), there was no reason why, just because the gift was commingled with marital property, the gift could not be separated from the value of the house as a whole because commingling does not automatically preclude a gift from being considered as separate property; (4) the District Court's valuation of the gift was problematic because if the value of the home was $200,000 and construction costs were reasonably evidenced by the "construction cost breakdown" paper given by Robert to the parties' financing bank, then the value of the gift could not be $80,000, as alleged by Tammy and her father, so the Supreme Court must remand the case back to the District Court for more accurate findings as to the value of the gift and a redistribution of the property in accordance with the new findings; (5) although Robert claimed that the District Court ignored evidence of the value of his contribution to the home, a more accurate statement would be that the court failed to include specific findings on this issue, but the District Court did find that the value of each party's contribution was substantially equal, a finding that was supported by the evidence and was therefore sufficient, pursuant to In re Marriage of Mouat, 228 M 430, 743 P2d 602 (1987); (6) citing In re Marriage of Mease, 2004 MT 59, 320 M 229, 92 P3d 1148 (2004), it would not disturb the District Court's findings with regard to the valuation of Robert's guns and Tammy's equestrian tack because the District Court was in the best position to observe the witnesses testifying on the issue and judge their credibility; and (7) it would not disturb the District Court's findings with regard to the income of both parties because the District Court noted that the parties "did an incomplete and poor job of stating Income and Deductions". In re

Marriage of Horton, 2004 MT 353, 324 M 382, 102 P3d 1276 (2004). Engen was overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Gift to Minor Child Properly Placed in Joint Trust Account: Husband's mother gifted the parties' child with $20,000 in the form of a check, naming father as custodian of the account. The District Court did not err in directing that the account be established with both father and mother as custodian, given the fact that there was joint custody of the child. In re Marriage of Smith, 264 M 306, 871 P2d 884, 51 St. Rep. 277 (1994).

Equity in Family Home Based on Gift: The District Court properly set aside equity in the family home in an amount of $60,000 to the husband upon a showing that the home was purchased with funds borrowed from the husband's parents and that each year for 3 years the parents gave the husband $20,000 in gift money accompanied by a letter noting that $20,000 of his debt had been relieved. In re Marriage of Eklund, 236 M 77, 768 P2d 340, 46 St. Rep. 194 (1989), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202, and followed in In re Marriage of Stufft, 286 M 239, 950 P2d 1373, 54 St. Rep. 1391 (1997).

Ranch Stock Gifted to Spouse From Parent — Not in Estate: The trial court properly exercised its discretion in not including in the marital estate to be divided upon divorce gifts of ranch stock to husband from his parents. Snell v. Snell, 205 M 359, 668 P2d 238, 40 St. Rep. 1359 (1983).

Premarriage Property and Gifts — Includable — Test: Property acquired before marriage and property acquired by gift may be considered as part of the marital assets when making an apportionment of property upon a divorce, but only after the court considers the contributions of the spouse who did not acquire such property. If those contributions, including the contributions of a homemaker, have facilitated maintenance of the property, the court in its discretion may include the property in the marital estate and divide it. In re Marriage of Lewis, 198 M 51, 643 P2d 604, 39 St. Rep. 759 (1982).

Property Obtained Before Marriage or After Separation

Inclusion of Husband's Interest in Business Property in Marital Estate Proper: Although the husband's initial interest in a family business was acquired prior to marriage, the District Court nevertheless divided the business interests between the parties. The husband appealed, but the Supreme Court affirmed. The business officially came into existence 6 months after the marriage, and a number of business properties were acquired after marriage. Even though the wife did not contribute directly to the business, her role as homemaker facilitated maintenance of the property by enabling the husband to concentrate on the business. Additionally, the wife had only a high school education, never worked outside the home, had few vocational skills, was not particularly employable, and had virtually no estate outside the marriage. Thus, the District Court did not abuse its broad discretion by including the business in the marital estate, particularly since the wife's share was granted in lieu of maintenance. In re Marriage of Williams, 2009 MT 282, 352 M 198, 217 P3d 67 (2009).

Value of Cows Acquired Prior to Marriage Properly Deducted From Marital Estate: The District Court found that seven cows were the separate property of the husband, having been acquired prior to the marriage, and deducted the value of the cows from the marital estate. On appeal, the wife contended that she had contributed to the maintenance and increase in value of the herd and that the cows should have been included in the estate. The Supreme Court held that the wife's contributions had been adequately considered and that there was sufficient evidence to support the trial court's findings, so the valuation was affirmed. In re Marriage of Swanson, 2004 MT 124, 321 M 250, 90 P3d 418 (2004).

Failure to Deduct Mortgage Debt in Granting Wife Premarital Value of Home She Owned on Marriage Date: The lower court wrongly determined that the value of a home that the wife owned on the marriage date was $15,000 and that upon divorce, the wife should be given the first $15,000 of value in the home after payment of the debt on it because on the date of marriage, there was a $10,000 mortgage on the home. The proper equity to give the wife was $5,000. In re Marriage of Hogstad, 275 M 489, 914 P2d 584, 53 St. Rep. 257 (1996), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Parties' Permanent Separation Prior to Vesting of Inheritance — Improper Inclusion in Marital Estate: When parties had permanently separated prior to vesting of husband's inheritance, it was improper for the District Court to include the inheritance in the marital estate and award wife $500,000 in cash from the inheritance. The fact that an acquiring spouse may receive an inheritance after separation but prior to dissolution does not, of itself, justify inclusion of the inheritance in the marital estate. What is key is that the District Court apply the factors in this section before including inheritance property in the marital estate. A court cannot distribute to the nonacquiring spouse property acquired prior to the marriage or by gift, bequest, devise, or descent when there is no evidence that the spouse made any contribution to those assets in any form. In re Marriage of Smith, 264 M 306, 871 P2d 884, 51 St. Rep. 277 (1994), overruling a contrary holding in In re Marriage of Isaak, 257 M 176, 848 P2d 1014 (1993). Smith was expressly overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Inclusion of Commingled Premarital Property in Marital Estate: The District Court included the value of certain premarital property in the marital estate when there had been no attempt during the marriage to segregate either the property or the funds from the sale of the property. The property was commingled with and became part of the marital estate and was properly included as such at trial. In re Marriage of Danelson, 253 M 310, 833 P2d 215, 49 St. Rep. 597 (1992).

Baseball Card Split Gums Up Dissolution — Inclusion of Baseball Card Collection as Part of Marital Estate — Credit for Value of Cards Brought Into Marriage: It was proper to include a baseball card collection in the marital estate because both parties contributed to the growth and maintenance of the collection, but it was erroneous to fail to credit husband with the undisputed value of the cards that he brought into the marriage. In re Marriage of Keedy, 249 M 47, 813 P2d 442, 48 St. Rep. 572 (1991).

One Party Not Responsible for Investment Decisions of Other Party After Separation: After the parties had separated but before the divorce, the husband disposed of some assets and encumbered others. The assets had been given to him in a partial property division agreement. He argued that the encumbrances on the assets should be considered by the court in valuing and dividing the parties' marital estate. The Supreme Court ruled that a party should not be held responsible for the investment decisions of the other once they were separated and that therefore the subsequent encumbrance of the husband's assets should not have been considered. In re Marriage of Gebhardt, 240 M 165, 783 P2d 400, 46 St. Rep. 2026 (1989).

Party Claiming Separate Property From Prior to Marriage Must Present Evidence of Value and Traceability: The trial court set aside a large portion of a married couple's property as the husband's separate property on the basis that it had been owned by the husband prior to the marriage and it could be traced to present property owned by the couple. The Supreme Court reversed the decision, ruling that the judge had abused his discretion because no evidence had been presented on the value of the property owned by the husband prior to marriage and no evidence respecting the property's traceability had been introduced. In re Marriage of Miller, 238 M 197, 777 P2d 319, 46 St. Rep. 1199 (1989). See also In re Marriage of Binsfield, 269 M 336, 888 P2d 889, 52 St. Rep. 16 (1995).

Marriage Not Irretrievably Broken — No Valuation at Time of Separation: Wife contended that under In re Marriage of Wagner, 208 M 369, 679 P2d 753, 41 St. Rep. 409 (1984), the District Court should have valued the marital property as of the time of separation. The Supreme Court distinguished Wagner after finding that the parties lived together and shared expenses until the wife filed a petition for dissolution. Because the evidence preponderated against a finding that the marriage was irretrievably broken at the time of separation, the Wagner rule did not apply. In re Marriage of Dalley, 232 M 235, 756 P2d 1131, 45 St. Rep. 1017 (1988).

Growth on Premarital Portion of Stocks and Appreciation on Premarital Portion of Real Estate: Appellant husband contended that the court erred in not figuring growth on premarital portion of stocks and appreciation on premarital portion of real estate as accruing to him since wife did not contribute to this growth. Appellant contended that the court erred in the property distribution in finding that wife's nonmonetary contribution offset any growth not due to her efforts, particularly where the court made no finding on alimony. The Supreme Court found no abuse of discretion. An equitable distribution does not mean an "equal" distribution of the marital estate. The court exercised conscientious reasonable judgment, given the individual circumstances, in dividing the marital estate. In re Marriage of Shelton, 219 M 456, 712 P2d 782, 43 St. Rep. 89 (1986).

Inclusion in Marital Estate of Husband's Earnings After Separation — Not Abuse of Discretion: The court distinguished Wagner v. Wagner, 208 M 369, 679 P2d 753 (1984), from the present case and held that the trial court did not abuse its discretion by including husband's earnings after separation since, unlike the facts in Wagner, the Loegerings did not embark upon totally divergent financial courses at the time of separation. Additionally, the parties in this case did not negotiate any settlement agreement at separation as in Tureman v. Tureman, 190 M 267, 620 P2d 1200 (1980). Any determination of the marital assets at the time of separation would clearly have been inequitable. In re Marriage of Loegering, 212 M 499, 689 P2d 260, 41 St. Rep. 1892 (1984).

Financial Condition of Parties at Time of Marriage — Major Factor in Property Division: When the record indicated that the wife brought $425,618 into the marriage at its outset and the husband brought in $12,355, the award by the District Court was inadequate and an abuse of discretion. The Supreme Court held that the source of marital property is a major factor to be considered in dividing the property. In re Marriage of Summerfelt, 212 M 332, 688 P2d 8, 41 St. Rep. 1775 (1984).

Land Bought Before Marriage — Deed Recorded After Marriage: Husband in divorce proceeding claimed all of the purchase price of a parcel of land should have been declared premarital property, stating that he thought his father had purchased the land prior to the marriage. The deed was not recorded until after the marriage. The court thus reasonably concluded that only the downpayment on the land was premarital property. In re Marriage of Goodmundson, 201 M 535, 655 P2d 509, 39 St. Rep. 2295 (1982).

Contribution of Wife as Homemaker — Effect on Husband's Prior Acquired Property: Ten percent of the purchase price of property owned by the husband remained to be paid when the parties were married. The balance was paid off during the marriage with jointly acquired funds, the property later being sold. In a property settlement proceeding, the trial court included in the marital estate only 10% of the balance owing on the property sale. Because the nonmonetary contributions of the wife as a homemaker facilitated the maintenance of the husband's prior acquired property, the trial court erred in its valuation of the marital estate. In re Marriage of Larson, 200 M 134, 649 P2d 1351, 39 St. Rep. 1628 (1982), distinguished in In re Marriage of Harper, 1999 MT 321, 297 M 290, 994 P2d 1, 56 St. Rep. 1280 (1999), also distinguishing In re Marriage of Taylor, 257 M 122, 848 P2d 478, 50 St. Rep. 186 (1993), and following In re Marriage of Engen, 1998 MT 153, 289 M 299, 961 P2d 738, 55 St. Rep. 595 (1998). See also In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Premarriage Property and Gifts — Includable — Test: Property acquired before marriage and property acquired by gift may be considered as part of the marital assets when making an apportionment of property upon a divorce, but only after the court considers the contributions of the spouse who did not acquire such property. If those contributions, including the contributions of a homemaker, have facilitated maintenance of the property, the court in its discretion may include the property in the marital estate and divide it. In re Marriage of Lewis, 198 M 51, 643 P2d 604, 39 St. Rep. 759 (1982).

Inheritance

No Spousal Contribution to Inheritance Trust — Spouse Not Entitled to Share in Trust Value — Trust to Be Excluded From Marital Estate: The District Court included the value of the husband's trust in the marital estate, and the husband appealed. The Supreme Court reversed. Although the wife contributed substantially to the marital assets and estate by raising the couple's children, performing homemaking activities, and contributing all her assets to the marital estate, her contributions did not facilitate the maintenance or enhance the value of the trust or have any impact on the value or distribution provisions of the trust. Thus, the wife was not entitled to an equitable share of the trust's preserved or appreciated value, and the trust should not have been included in the marital estate for distribution purposes. However, the husband's future trust income could be considered when distributing the existing marital estate in regard to the husband's opportunity for future acquisition of capital assets. In re Marriage of Harris, 2006 MT 63, 331 M 368, 132 P3d 502 (2006), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District

Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Exclusion of Inheritance From Marital Estate Not Absolute Rule: The husband purchased airplane hangars with inherited money, and upon dissolution of the marriage, the District Court included the inheritance in the marital estate. The husband appealed on grounds that the inheritance should not have been included, but the Supreme Court affirmed. Exclusion of inherited property from the marital estate is not an absolute rule. Under the circumstances here, the District Court considered the assets that both parties brought to the marriage, as well as the length of the marriage, and did not err in considering all assets as part of the marital estate. In re Marriage of Crilly, 2005 MT 311, 329 M 479, 124 P3d 1151 (2005), following In re Marriage of Foreman, 1999 MT 89, 294 M 181, 979 P2d 193 (1999).

Only Portion of Traceable Inheritance Properly Awarded to Acquiring Spouse Upon Dissolution: The wife received over $51,000 as an inheritance, and upon dissolution, the District Court awarded her the entire amount. Part of the inheritance was applied to a mortgage on the parties' property, part was used to purchase stock, and the remainder was commingled with the parties' joint funds. The husband contended that the wife was entitled to only the money that could be traced to ascertainable assets, and the Supreme Court agreed. Assets acquired by gift during a marriage are not part of the marital estate unless the spouse made contributions in the preservation or appreciation of the assets. When an inheritance is not traceable and both parties make contributions to the increased value, it is inequitable to award the value of the asset solely to the acquiring spouse upon dissolution. Thus, the balance of the inheritance that was commingled with other marital funds in a joint savings account was not traceable, and the District Court erred in awarding the wife the entire balance of the inheritance. In re Marriage of Steinbeisser, 2002 MT 309, 313 M 74, 60 P3d 441 (2002), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Inheritance Advance Properly Excluded in Equity From Marital Estate: As an estate planning device, a couple was able to purchase a home from the husband's mother valued at $131,000 for $50,000, representing an advance on the husband's inheritance of $81,000. In distributing the marital estate, the District Court subtracted the husband's inheritance advance, as well as the remaining debts on the residence, from the appraised value of the home and then divided the equity in the home and the marital debt equally, except for a credit to the husband for one-half the debts that he paid after separation. The wife claimed error in excluding the $81,000, arguing that the property was commingled with the marital property, that her contributions to the property were significant, and that the gift was to the two of them as a couple, not to the husband alone. Affirming, the Supreme Court found that the division of marital equity in the home was logical and that the husband was entitled to an exclusion from the marital estate in the amount that represented an advance on his inheritance, which was the $81,000 difference between the amount that the couple purchased the home for and the value of the home at the time of purchase. Because of the wife's significant contributions to the value of the home, she was entitled to one-half of any equity in the house that represented the amount paid for the house during the marriage, in addition to the appreciation that occurred during the marriage, but she was not entitled to the equity in the house that represented a gift from the husband's mother. Siefke v. Siefke, 2000 MT 281, 302 M 157, 13 P3d 937, 57 St. Rep. 1175 (2000), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Value of Expected Inheritance Not to Be Included in Marital Estate: A will is a revocable instrument that does not take effect until the death of its maker, so the potential recipient of an estate cannot know the extent of an interest in an estate prior to that time. Thus, the value of an expected inheritance is contingent, unascertainable, and may not be included in a marital estate. In re Marriage of Beadle, 1998 MT 225, 291 M 1, 968 P2d 698, 55 St. Rep. 943 (1998), overruling In re Marriage of Goodmundson, 201 M 535, 655 P2d 509 (1982).

Inability to Verify Claims as to Disposition of Inheritance Income: The District Court did not abuse its discretion in refusing to include wife's inherited funds in the marital estate given the fact that no proof was given to document wife's representations and that the court was unable to verify her claims as to the disposition of her inheritance. In re Marriage of Lee, 282 M 410, 938 P2d 650, 54 St. Rep. 409 (1997).

Commingling — Equal Division of Inherited Stocks: Clarence and Marcia were divorced a second time after having been remarried. Clarence allegedly received a substantial inheritance of stocks during the period of time in which he and Marcia were first divorced. Money from the sale of the stocks was commingled with other funds belonging to Clarence. Upon their second divorce, Clarence argued that Marcia should not receive any of the funds from the stocks. The Supreme Court held that the District Court did not abuse its discretion, in as much as the District Court found it was impossible to trace any of the funds to an inheritance because Clarence had so extensively commingled his assets. In re Marriage of Kimm, 260 M 479, 861 P2d 165, 50 St. Rep. 1146 (1993).

Transfer of Property Without Written Document Constituting Inheritance — Included in Marital Estate: Husband appealed from a District Court decision that distributed as part of the marital estate to the wife a home built for the couple by the husband's father, who had died without executing a written document transferring the property to the couple. The Supreme Court affirmed the lower court's decision, holding that without a writing signed by the father to effect the inter vivos transfer to the couple, the home was inherited by the husband through the father's will. The inherited property was properly included as part of the marital estate. In re Marriage of Isaak, 257 M 176, 848 P2d 1014, 50 St. Rep. 219 (1993), overruled, with regard to a District Court's ability to distribute inheritance property without strict application of the factors in this section, in In re Marriage of Smith, 264 M 306, 871 P2d 884, 51 St. Rep. 277 (1994). Smith was expressly overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Valuation of Equity in Home Partially Purchased With Husband's Inheritance: In valuing the parties' home, the court should have taken into account the extent to which the equity in the home was attributable to an inheritance of the husband. However, the court is only required to consider that. No definite rule can be established as to the result of the consideration, and each case must be decided on its own facts. In re Marriage of Dirnberger, 237 M 398, 773 P2d 330, 46 St. Rep. 898 (1989).

Husband's Inheritance Subject to Division by Court: In a dissolution proceeding, the husband argued that certain real property and securities he had inherited prior to the divorce were his separate property and were not subject to division because his wife had not participated in the enhancement of the securities and had not contributed to the maintenance of the real property. The Supreme Court upheld the lower court's division of the property, holding that the statute allowed a court to consider the nonmonetary contributions of the noninheriting spouse when dividing inherited property. In re Marriage of Stephenson, 237 M 157, 772 P2d 846, 46 St. Rep. 700 (1989).

No Division of Noncommingled Inheritance When Sole Control Maintained: Wife received a $110,000 inheritance on the eve of dissolution but did not disclose the amount to husband. She invested the inheritance separately and maintained sole control over the funds. The court assessed the inheritance within the context of assets acquired during the marriage and properly distributed the inheritance to the wife. In re Marriage of Stewart, 232 M 40, 757 P2d 765, 45 St. Rep. 850 (1988), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Expectation of Inheritance Properly Considered: Since a court distributing marital property upon a divorce must consider future acquisition of assets, husband's expectation of a sizeable inheritance is a valid consideration in the distribution. In re Marriage of Goodmundson, 201 M 535, 655 P2d 509, 39 St. Rep. 2295 (1982), followed in In re Marriage of Alt, 218 M 327, 708 P2d 258, 42 St. Rep. 1621 (1985), and overruled, to the extent that the value of an expected inheritance may be included in the marital estate, in In re Marriage of Beadle, 1998 MT 225, 291 M 1, 968 P2d 698, 55 St. Rep. 943 (1998).

Wife's Inheritance Spent for Family Purposes: Court distributing property pursuant to divorce properly failed to consider wife's inheritance when she had spent the whole of it on autos for herself and her daughter, carpet for the home, and a fence. In re Marriage of Goodmundson, 201 M 535, 655 P2d 509, 39 St. Rep. 2295 (1982).

Inherited Vested Future Remainder Interest — Included in Marital Estate: Husband in divorce proceeding had a vested remainder interest, received from his deceased father, in one-fourth of half of his parents' ranch, subject to a life estate granted his mother. Since husband's vested interest could be sold or otherwise alienated, transferred, or mortgaged by him, it had a present value and should be included in the marital estate for property distribution purposes. It was error for the District Court to fail to include it. Hill v. Hill, 197 M 451, 643 P2d 582, 39 St. Rep. 723 (1982).

Wife's Inheritance to Be Considered: The District Court complied with this section by considering the inheritance of the wife in making the property division. Kaasa v. Kaasa, 181 M 18, 591 P2d 1110 (1979).

Retirement Benefits

District Court Erred by Discounting Value of Husband's Deferred Compensation Plan by Factoring in Future Tax Consequences — Account Was Not Liquidated — Taxable Event Inevitable But Not Concrete or Immediate — Numerous Unknown Factors, Including Value of Account on Liquidation, Tax Laws in Effect, and Liquidation Date. In re Marriage of Frank, 2022 MT 179, 410 Mont. 73, 517 P.3d 188.

Equitable Apportionment — District Court Abused Discretion by Valuing Husband's Retirement Accounts and Other Assets on Separation Date — Couple Continued to Have Commingled Finances — Majority of Payments After Separation Based on Work That Husband Performed Before Separation — Substantially Inequitable Division of Marital Assets Resulted in Substantial Injustice. In re Marriage of Frank, 2022 MT 179, 410 Mont. 73, 517 P.3d 188.

Error to Divide Social Security Benefits — No Direct Offset Allowed — Economic Circumstance of Parties: The parties filed for dissolution of their long-term marriage. As a part of the distribution of the parties' property, the District Court ordered that the wife receive a portion of the husband's Social Security benefits. On appeal, both parties agreed that the District Court erred in awarding the wife a portion of the benefits. The Supreme Court reversed and remanded, holding that a District Court may not directly offset Social Security benefits under 42 U.S.C. 407(a). However, citing In re Marriage of Strong, 2000 MT 178, 300 Mont. 331, 8 P.3d 763, as guidance, the court found that Social Security benefits may be considered as an economic circumstance of the parties when the District Court is making an equitable distribution of the parties' property. In re Marriage of Smith, 2015 MT 256, 381 Mont. 1, 358 P.3d 171.

Division of Pension Paid in Future Installments — Conscionable Valuation Methods and Factors Required: In a divorce proceeding, the husband and wife entered a dissolution agreement stating that each was entitled to half of the husband's pension and that each should receive a portion of the scheduled benefit payment once the payments began. The parties subsequently disagreed on how to determine their respective shares of each payment to reflect an equal division of the pension at the time of dissolution. The District Court rejected the husband's proposed valuation method. The Supreme Court held that although it has recognized two pension valuation methods, the lump sum method and the time rule method, it has not foreclosed the use of other valuation methods. Ultimately, the Supreme Court found that the husband's proposed method would divide only the vested value of the pension at the time of dissolution and would not equally divide the interest payable or potential postdissolution losses or gains. In re Marriage of Cadena v. Fries, 2015 MT 90, 378 Mont. 409, 346 P.3d 347.

Time Rule Approach Preferred When Pension Account Not Easily Valued: In a dissolution proceeding, the District Court used the time rule method to value the husband's defined benefit retirement account. The husband appealed the District Court's division of property. On appeal, the Supreme Court emphasized that the District Court's application of the time rule to the retirement account was proper given that the value of the pension benefit was dependent on a number of unknown factors. The Court further noted that the time rule method is preferable to the present value method when the pension cannot be adequately valued or there are insufficient marital assets to offset the other spouse's portion of the pension. In re Parenting of C.W. and S.W., 2012 MT 212, 366 Mont. 278, 291 P.3d 1092. See also In re Marriage of Hutchins, 2018 MT 275, 393 Mont. 283, 430 P.3d 502, holding that the District Court did not abuse its discretion by applying the time rule method when pension benefit payments were already in progress.

Time Rule Method of Valuation Proper — Hybrid Approach Reversed and Remanded: The District Court's order dissolving the parties' marriage and distributing the marital property provided that of the husband's Public Employees' Retirement System (PERS) account, the wife was entitled to 50% of the "vested account balance. . .as of the date of separation. . . until the date of withdrawal." Both spouses appealed. The wife claimed that she should have been awarded half of the husband's PERS benefits that accrued during the marriage, under the time rule method. The husband argued that the present value method should be used, in which case the wife was entitled to half of the present value of his retirement benefits at the time of separation.

The difference in the two methods was hundreds of thousands of dollars. The Supreme Court concluded that the District Court's order was confusing and incorporated an improper hybrid of the two methods. Accordingly, the Supreme Court remanded the case with the instruction to use the time rule method because the husband was still contributing to the plan and therefore the benefit factors could not be applied until his retirement. In re Marriage of McGowan, 2011 MT 284, 362 Mont. 457, 269 P.3d 887. See also In re Marriage of Hutchins, 2018 MT 275, 393 Mont. 283, 430 P.3d 502, holding that the District Court did not abuse its discretion by applying the time rule method when pension benefit payments were already in progress.

Voluntary Agreement by Spouse to Pay Portion of Federal Disability Benefits as Part of Dissolution — No Contempt When Spouse Fails to Pay Federally Preempted Division of Benefits: As part of the equitable distribution of the marital estate, the husband agreed in the dissolution decree to pay the wife a portion of his federal veterans disability benefits. The husband made the payments for several years, but then stopped making the payments. The wife moved to hold the husband in contempt, but the District Court denied the motion based on In re Marriage of Strong, 2000 MT 178, 300 M 331, 8 P3d 763 (2000), in which it was held that federal law preempts the state from distributing Veterans Benefits Administration benefits as part of the marital estate. The Supreme Court affirmed. Even though the husband violated the terms of the decree by withholding payment of the wife's share of the disability benefits, federal law preempted the District Court from enforcing the decree in regard to division of those benefits, and thus the District Court did not err in refusing to hold the husband in contempt for failing to pay a portion of the benefits to the wife. A District Court may not order the division or allocation of any Veterans Benefits Administration benefits to satisfy any marital obligation, be it maintenance or division of the marital estate, regardless of whether the parties agreed to do so in a property settlement agreement. In re Marriage of Lutes, 2005 MT 242, 328 M 490, 121 P3d 561 (2005).

Improper Hybrid Approach for Determining Distribution of Pension and Annuity Benefits — Reversible Error: The Supreme Court has considered two methods for establishing values of pension plans: (1) the present value or lump-sum distribution method; and (2) the time rule or deferred distribution method. The present value method is generally preferred, but the District Court has broad discretion to apply either method. However, in this case, the District Court abused its discretion by mistakenly combining both methods, creating a hybrid approach not clearly supported by case law. The Supreme Court reversed and remanded so that the District Court could choose and apply the appropriate method. In re Marriage of Swanson, 2004 MT 124, 321 M 250, 90 P3d 418 (2004). However, see In re Parenting of C.W. and S.W., 2012 MT 212, 366 Mont. 278, 291 P.3d 1092, in which the Supreme Court noted that the time rule method is preferable when a pension cannot be adequately valued or there are insufficient marital assets to offset the other spouse's portion of the pension. See also In re Marriage of McGowan, 2011 MT 284, 362 Mont. 457, 269 P.3d 887.

Improper Deduction of Speculative Tax Rate From Value of Retirement Account: In distributing marital assets, the District Court calculated the value of seven retirement accounts and determined that the marital estate value of the accounts should be decreased by 22% to accommodate reasonable state and federal tax rates for ordinary income at the time of withdrawal. Noting that it will not substitute its judgment for that of the trial court on valuation issues absent an abuse of discretion, the Supreme Court determined that such an abuse occurred here when the trial court entertained a tax liability in valuing the retirement asset without forcing a sale of the asset to satisfy the distribution or finding that there was an imminent sale of the asset. It was unreasonable to consider a tax deduction when there were numerous unknown factors, such as the value of the account when it is eventually liquidated, tax laws in effect at the time of eventual liquidation, and the time when the accounts would eventually be sold. To apply a tax deduction to retirement accounts that may be liquidated some time in the future frustrates the goal of an equitable distribution of the marital estate. In re Marriage of Haberkern, 2004 MT 29, 319 M 393, 85 P3d 743 (2004), followed in In re Marriage of Thorner & Davis, 2008 MT 270, 345 M 194, 190 P3d 1063 (2008).

No Evidence That Spouse Gave Up Career for Marriage — Distribution of Disproportionate Share Improper: The District Court found that the wife was entitled to a disproportionate share of the marital estate in part because she abandoned a teaching career for the marriage and thus gave up the retirement benefits associated with the teaching career. However, the wife's testimony at trial indicated that she did not pursue work in education following graduation from college, and although she had done some substitute and full-time teaching during the marriage, her teaching certificate had expired, and she had no intention of returning to a teaching career. Thus, the evidence did not support a finding that the wife had abandoned a teaching career for the marriage, and the Supreme Court directed that on remand, distribution of the marital estate should not be based on that finding. In re Marriage of Steinbeisser, 2002 MT 309, 313 M 74, 60 P3d 441 (2002), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Veteran Disability Benefits Federally Protected From Inclusion in Marital Estate — Disability Benefits Considered in Award of Spousal or Child Support as Party's Ability to Earn Income: The District Court included a portion of the husband's Veterans Benefits Association (VA) disability benefits as part of the division of marital property. The Supreme Court held that under the antiattachment clause of 38 U.S.C. 5301, VA disability benefits are federally protected from inclusion in the marital estate. In enacting that section and the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408, Congress preempted state courts from including VA disability benefits in the marital estate because VA disability benefits are not considered "disposable retired pay" to be treated as marital property. An award of VA disability benefits upon dissolution amounts to a seizure of those benefits in violation of 38 U.S.C. 5301. To avoid damaging federal objectives, the property division dictates of this section must yield to the federal law. Consistent with both federal and state law, a District Court may consider VA disability benefits in the same way that it considers each party's ability to earn income after dissolution as an important factor in achieving an equitable property division, including consideration of the military disability retirement pay as a source of income in the award of spousal maintenance or child support, or generally as an economic circumstance of the parties justifying a disproportionate award of marital property to the nonretiree spouse. Thus, disability payments should not, either in form or substance, be treated as marital property subject to division upon dissolution. However, under Rose v. Rose, 481 US 619 (1987), a state court is free to consider postdissolution disability income and to order a disabled veteran to pay spousal support even when disability benefits would be used to make support payments. In re Marriage of Strong, 2000 MT 178, 300 M 331, 8 P3d 763, 57 St. Rep. 709 (2000), following Mansell v. Mansell, 490 US 581 (1989), and In re Marriage of Murphy, 261 M 363, 862 P2d 1143 (1993). See also McCarty v. McCarty, 453 US 210 (1981).

Provision for Equal Distribution of Retirement Benefits Not Ambiguous — Payable on Value of Benefits at Retirement, Not at Time of Property Settlement: A provision in the parties' settlement agreement granted the wife 50% of the husband's retirement benefits when he retired. The husband claimed that the provision was ambiguous because it was not clear whether the benefits should be valued as of the time he retired or when the agreement was settled. The Supreme Court found no ambiguity. The proceeds of the retirement benefits were to be split when the husband retired, including any accumulated value to the retirement fund, which was viewed as the husband's continuing contributions to the marital estate correlative to the wife's continuing contributions through her payment of the mortgage on the family home until it was sold at a future date and the proceeds also split equally. In re Marriage of Pfennigs, 1999 MT 250, 296 M 242, 989 P2d 327, 56 St. Rep. 981 (1999).

No Abuse of Discretion Found in Refusal to Amend Award of Personal Property — Findings and Conclusions, Decree, and Minute Order Held Consistent — Award Based Upon Stipulation of Current Cash Value of IRA Accounts Upheld: Soon after a decree was issued dissolving her marriage, Janet moved, pursuant to former Rule 59(g), M.R.Civ.P. (now superseded), to amend the judgment because it concerned the distribution of the parties' personal property. Janet claimed that the District Court should have awarded her the personal property listed on Exhibit "A" to her proposed findings of fact and conclusions of law. The District Court denied her motion. Janet argued before the Supreme Court that the decree of dissolution did not conform to the District Court's findings of fact and conclusions of law in that the District Court intended to award her the property listed on Exhibit "A" to her proposed findings and conclusions but that the property awarded was taken from a different exhibit and paragraph of her amended proposed findings and conclusions. The Supreme Court held that the District Court's distribution of the parties' property was clear and definite. The Supreme Court noted that the District Court had made a minute entry 10 days before Janet filed her motion to amend and that the minute order stated that certain items from Janet's Exhibit "A" were to be returned to her. The Supreme Court concluded that by using this language in the minute order, the District Court intended that certain items of Janet's property listed in her exhibit were to be returned to her and that the remainder was to remain with her ex-husband. In all material respects, the Supreme Court said, the findings and conclusions, decree, and minute order all conform with one another, and therefore, the District Court did not abuse its discretion in denying the motion to amend. The

Supreme Court also upheld the District Court's division of the parties' two IRA accounts, noting that the parties arrived at the value by adding the two together for a total of $64,445 and then subtracting 30% for taxes and a 10% penalty, leaving a net redemption value of $38,666, and then dividing that remainder in half. The District Court gave Janet's ex-husband the option of transferring ownership of one-half of the IRAs to Janet or paying Janet $19,333, one-half the net value of those accounts. The Supreme Court held that because Janet had stipulated to the present cash value of the IRAs, if her ex-husband chose to pay her one-half the current cash value of the accounts, she is receiving an equitable distribution. In re Marriage of Dorsey, 284 M 392, 945 P2d 430, 54 St. Rep. 934 (1997).

Accrued Vacation and Sick Leave Included in Valuation of Pension — Adjustment of "Rolfe" Formula: In 22 years at his job, Alan accrued over 1,900 hours of sick leave and vacation, which would extend his years of service upon his retirement. When Alan's marriage was dissolved, the District Court refused to include the value of those hours in the marital estate. Relying upon In re Marriage of Rolfe, 234 M 294, 766 P2d 223 (1988), the Supreme Court held that Alan's pension would be divided according to the "time rule formula" and that the accrued hours of sick leave and vacation would be added to the value of the pension and would not be valued separately. The Supreme Court also noted that the accrued hours should be added to both parts of the fraction used in the time rule formula, otherwise the fraction of the pension to be received by Alan's wife would be reduced. In re Marriage of Meeks, 276 M 237, 915 P2d 831, 53 St. Rep. 365 (1996).

Veteran's Disability Benefits Not to Be Included in Total of Marital Estate: The Supreme Court held that the District Court, relying on the U.S. Supreme Court's interpretation of the federal Uniformed Services Former Spouses' Protection Act in Mansell v. Mansell, 490 US 581 (1989), had properly excluded the husband's veteran's disability pay in calculating the total of the marital estate. In holding that Montana state courts may not include in a marital estate military retirement pay that has been waived in order to receive veteran's disability benefits, the state Supreme Court stated that it was partially overruling In re Marriage of Cooper, 243 M 175, 793 P2d 810 (1990). The state Supreme Court also indicated that the disability benefits could be considered when the lower courts were considering the potential future earning power of the parties in a dissolution action. In re Marriage of Murphy, 261 M 363, 862 P2d 1143, 50 St. Rep. 1360 (1993), followed in In re Marriage of Strong, 2000 MT 178, 300 M 331, 8 P3d 763, 57 St. Rep. 709 (2000). However, see In re Marriage of Blair, 271 M 196, 894 P2d 958, 52 St. Rep. 401 (1995) (special separation payments received by military member are subject to division as marital property).

Failure to Consider Future Risks Relative to Retirement Benefits — Abuse of Discretion: The test for determining the value of a retirement pension is present value; however, when there are substantial future risks involved in the calculation of the value, both parties should share in those risks. By requiring immediate payment of wife's total one-half interest based on the present-value methodology, wife did not share in the risk that the present-value amount might never be realized. As alternatives, the Supreme Court offered the following methods of distribution of retirement fund assets: (1) if wife desires a present lump-sum distribution, it should be based on the accrued contributions, with interest allowed by law as of the date the dissolution action was brought before the trial court; or (2) if wife wishes to share in the risk of future contingencies, she is entitled to her proportionate share of the future benefits at the time husband actually receives the benefits. In re Marriage of Keedy, 249 M 47, 813 P2d 442, 48 St. Rep. 572 (1991).

Arbitrary Valuation of Pension Plan — Abuse of Discretion: Husband did not contest wife's expert's methodology in valuing his pension plan, but merely expressed his opinion that the mortality table used by the expert did not apply because the hazardous nature of his work and the fact that he was a smoker meant he would not live as long as the expert calculated. The District Court abused its discretion in arbitrarily adopting husband's estimate of his pension plan value absent the use of any calculation whatsoever. In re Marriage of Rudio & Harlan, 238 M 485, 778 P2d 410, 46 St. Rep. 1437 (1989).

Valuation of Retirement Benefits:

Retirement benefits, which are a part of the marital estate, contain numerous contingencies. Usually, categorical formulas for determining benefits cannot be used. Generally, benefits are determined at their present value. In this case, it was proper for the court to divide the husband's years of service during the marriage by years of total service and multiply the resulting figure by one-half the monthly benefit after taxes. The court properly rejected the husband's contention that the pension should be valued as of the date of dissolution of the marriage and the payment suspended until his retirement. In re Marriage of Rolfe, 234 M 294, 766 P2d 223, 45 St. Rep.

1919 (1988), followed in In re Marriage of Truax, 271 M 122, 894 P2d 936, 52 St. Rep. 347 (1995), wherein the time rule in Rolfe, based on contingencies that affected the value of a party's pension after the marriage, was held equally applicable when the trial court had no reliable evidence with which to evaluate the pension at the beginning of the parties' marriage. Rolfe was also followed in In re Marriage of Meeks, 276 M 237, 915 P2d 831, 53 St. Rep. 365 (1996), In re Marriage of David, 2009 MT 422, 354 M 44, 221 P3d 1209 (2009), and Deschamps v. Deschamps, 2009 MT 431, 354 M 94, 223 P3d 324 (2009). See also In re Marriage of McGowan, 2011 MT 284, 362 Mont. 457, 269 P.3d 887, and In re Parenting of C.W. and S.W., 2012 MT 212, 366 Mont. 278, 291 P.3d 1092, in which the Supreme Court noted that the time rule method is preferable when a pension cannot be adequately valued or there are insufficient marital assets to offset the other spouse's portion of the pension.

In a dispute concerning valuation of retirement benefits as part of the marital estate, the wife argued that the only amount which should be included was the dollar amount in the pension fund at the time of the divorce. The Supreme Court, in Kis v. Kis, 196 M 296, 639 P2d 1151 (1982), held that the present value of the retirement benefits is the proper test. In this case, the testimony of an economics expert contained substantial evidence as to the present value of the pension interest and supported the District Court's valuation of the wife's pension. In re Marriage of Sirucek, 219 M 334, 712 P2d 769, 42 St. Rep. 2065 (1985), followed in In re Marriage of Pryor, 224 M 488, 731 P2d 895, 43 St. Rep. 2358 (1986).

Lower court's valuation of retirement benefits based on present value of equivalent annuity was proper, and fact that value used was contingent upon appellant reaching 55 years of age and serving 25 years did not render valuation void since appellant failed to offer evidence of the diminished present value of annuity because of such contingencies. Kis v. Kis, 196 M 296, 639 P2d 1151, 39 St. Rep. 119 (1982), distinguished in In re Marriage of Scott, 246 M 10, 803 P2d 620, 47 St. Rep. 2237 (1990).

Discrepancy in Pension Valuations — Affirmed Absent Injury: Despite a discrepancy between husband's schedule of pension values and values stated in his proposed findings, the court's valuation of the pensions was affirmed absent evidence of injury to the husband. In re Marriage of Sullivan, 229 M 23, 744 P2d 1240, 44 St. Rep. 1748 (1987).

Method of Payment of Retirement Benefits — Payment Plan Versus Lump Sum: The trial court ordered husband to pay wife $11,205 within 60 days as her share of husband's retirement account. Husband contended wife should receive her share only when he becomes eligible to receive his. The Supreme Court, noting that the uncontested asset list of the husband indicated no liquid assets that would enable him to make the lump-sum payment within 60 days, remanded with instructions to further examine husband's ability to pay the lump sum and to consider structuring a payment plan for the wife's interest in the retirement account. In re Marriage of Rogers, 226 M 163, 734 P2d 677, 44 St. Rep. 556 (1987).

Equal Marital Contribution but Unequal Pension Distribution: As part of the marital estate to which both parties have contributed equally, a retirement pension does not have to be distributed equally. The District Court has broad discretion to equitably apportion individual assets as long as the court considers the requirements of this section. In re Marriage of Bowman, 226 M 99, 734 P2d 197, 44 St. Rep. 488 (1987), distinguished in In re Marriage of Kessler, 2011 MT 54, 359 Mont. 419, 251 P.3d 147.

Retirement Funds — Tax Obligation: In placing a value on husband's retirement funds, the trial court did not err in refusing to consider husband's tax obligations on the funds as there was no evidence husband planned to liquidate those funds to pay his marital obligation. In re Marriage of Swanson, 220 M 490, 716 P2d 219, 43 St. Rep. 551 (1986).

Inclusion of Retirement Benefits in Marital Estate:

In distribution of marital property, it is well established in Montana that retirement benefits are classed as a part of the marital estate. In re Marriage of Rolfe, 216 M 39, 699 P2d 79, 42 St. Rep. 623 (1985). In the present case, the portion of the wife's teacher's retirement pension included by the District Court as a marital asset was the present value of the pension rights earned during the marriage. That value was established by the testimony of an economist. The wife failed to meet her burden of showing that such finding was clearly erroneous. The Supreme Court held that the District Court properly included the wife's retirement pension in the marital estate. In re Marriage of Sirucek, 219 M 334, 712 P2d 769, 42 St. Rep. 2065 (1985), followed in In re Marriage of Pryor, 224 M 488, 731 P2d 895, 43 St. Rep. 2358 (1986), and in In re Marriage of Butler, 243 M 521, 795 P2d 467, 47 St. Rep. 1376 (1990).

Where appellant contended Department of Fish, Wildlife, and Parks retirement benefits are not a marital asset based on statutory exemption in 19-8-805, court held that exemption did not extend to determinations of marital assets in dissolution proceedings and that such retirement benefits were a marital asset requiring apportionment. Kis v. Kis, 196 M 296, 639 P2d 1151, 39 St. Rep. 119 (1982), followed in In re Marriage of Bowman, 226 M 99, 734 P2d 197, 44 St. Rep. 488 (1987).

Valuation of Real Property and Retirement Benefits — Inconsistent Discount Rates: An economics expert used a 5.4% discount rate with regard to the present value of the wife's pension right based on a 30-year earnings average. He testified that at the time of the entry into the consideration of comparable sales in the area of the ranch, the sellers could have invested money safely at 12%, and that he considered that factor in adjusting the comparable sales. His testimony was not contradicted and was accepted by the District Court. On appeal, the wife contended that the court erred in adopting inconsistent discount rates for the ranch real property and her teacher's retirement pension. The Supreme Court held that the wife failed to present any evidence that the use of two different rates was in fact contradictory. There was no evidence to support a conclusion that a 12% rate could properly have been factored in the pension computation, nor was there any evidence that a 5.4% rate would have been appropriate so far as the land was concerned. The Supreme Court concluded that there was no demonstrable reason for the District Court to require any identity of the discount rates; therefore, the District Court did not abuse its discretion in allowing the use of different discount rates. In re Marriage of Sirucek, 219 M 334, 712 P2d 769, 42 St. Rep. 2065 (1985).

Valuation of Retirement Pension — Expert Testimony: The wife argued that the District Court improperly valued her retirement pension in determining the value of marital assets. The valuation was based on extensive testimony and evidence submitted by an economics professor, who testified as an expert for the husband. Unrebutted testimony indicated that the expert followed a standard procedure used in his profession for worklife and life expectancy estimates. The Supreme Court concluded that there was substantial evidence to support the expert's valuation, which was accepted by the District Court. In re Marriage of Sirucek, 219 M 334, 712 P2d 769, 42 St. Rep. 2056 (1985).

Military Retirement Benefits: The Supreme Court held that military retirement benefit pay is analogous to any pension fund and constitutes a marital asset. Pursuant to 40-2-202, which requires apportionment of all property and assets of parties to a dissolution, military retirement pay must be included for purposes of establishing the marital estate. Although the marriage spanned only three-fourths of husband's military service, an equal division of the retirement benefits evidenced no abuse of discretion by the trial judge. Kecskes v. Kecskes, 210 M 479, 683 P2d 478, 41 St. Rep. 1170 (1984).

Profit-Sharing Retirement Plan to Be Included in Marital Estate: Where the evidence introduced during a dissolution proceeding showed that a profit-sharing retirement plan offered by a bank employing the wife was offered as an incentive for the wife to remain in the employ of the bank, the District Court erred in holding that the vested portion of the plan money was only incidental to the wife's employment and therefore not to be included in the marital estate. The evidence showed that the plan is in the form of deferred compensation and should be treated in the same manner as retirement benefits. The Supreme Court quoted with approval the guidelines set forth in Rogers v. Rogers, 45 Or. App. 885, 609 P2d 877 (1980), for determining whether retirement benefits should be included as part of the marital estate and found that in the present case, the husband was entitled to one-half of the vested portion (60%) of the profit-sharing plan funds. Glasser v. Glasser, 206 M 77, 669 P2d 685, 40 St. Rep. 1518 (1983), followed in In re Marriage of Sirucek, 219 M 334, 712 P2d 769, 42 St. Rep. 2065 (1985), in the respect that the present value is the proper test for determination of a marital interest.

Retirement Benefits — Generally Includable Exclusions: Retirement benefits are generally part of the marital estate because the court, in apportioning the marital assets, must consider the opportunity of each party to acquire capital assets and income. Recent U.S. Supreme Court cases holding that pensions received from the armed forces or under the federal Railroad Retirement Act may not be included in the marital estate for property division purposes did not set up a classification discriminating against all other pensions in violation of the United States Constitution. Those cases merely construed federal statutes and discerned the intent of Congress in enacting those specific retirement plans. Laster v. Laster, 197 M 470, 643 P2d 597, 39 St. Rep. 737 (1982).

Valuation of Retirement Plan: The parties were married in 1953 and granted a dissolution in 1979. The major asset of the marital estate was the husband's retirement plan, which consisted of Conoco stock. The court used the market value of the retirement funds to arrive at the marital estate and awarded half to the wife. The husband contended that the trial court should have used the actual current value and considered the tax consequences of a liquidation in determining the marital estate. The Supreme Court found that the property distribution ordered included no presently taxable events and triggered no tax liability. The District Court did not abuse its discretion by refusing to consider the theoretical income tax consequences of a present liquidation of the stock, which was neither necessary nor probable, but merely conjectural. Gilbert v. Gilbert, 192 M 444, 628 P2d 1088, 38 St. Rep. 743 (1981).

Railroad Retirement Benefits Not Part of Marital Estate: Retirement benefits receivable under the federal Railroad Retirement Act, 45 U.S.C.A. § 231, are not part of the marital estate and may not be considered, either directly or indirectly, in a divorce decree which distributes the assets of the marriage. Knudson v. Knudson, 186 M 8, 606 P2d 130 (1980). (Decree upon remand not relitigation of matters previously settled, 191 M 204, 622 P2d 1025, 38 St. Rep. 154 (1981).)

Net Worth of Parties

Award of Property in Excess of Net Worth of Marital Estate — Remand: The District Court awarded the wife a $36,000 property equalization payment as part of the division of the marital estate, but the estate did not include any cash that could be distributed as an asset to satisfy the obligation. The court's power did not extend beyond the existent estate, and the court abused its discretion by awarding property in excess of the proved net worth of the estate, in effect awarding cash that did not exist. The Supreme Court remanded for further proceedings. In re Marriage of Dennison, 2006 MT 56, 331 M 315, 132 P3d 535 (2006), followed in In re Marriage of Harris, 2006 MT 63, 331 M 368, 132 P3d 502 (2006).

Failure to Discount Value of Corporation Not Abuse of Discretion: Husband and wife had equal interest in a family farming and ranching corporation. The District Court determined a net value for the corporation and then decided that husband would keep the property and pay wife one-half of the net value. Upon payment of the final installment, wife was to turn over her shares to husband. The court's refusal to discount the net value was proper in light of husband's intention to continue full control over the corporate affairs without selling or otherwise disposing of the corporation. This division of the estate was not an abuse of discretion because it allowed husband to keep intact the property and continue the ranching business while assuring that wife received her share of the monetary value of the asset. In re Marriage of Danelson, 253 M 310, 833 P2d 215, 49 St. Rep. 597 (1992).

Obligations Acquired From Former Marriage — Property Rights Not Implicated: Wife contended that the District Court erred in failing to deduct from husband's net worth at the time of their marriage his support, maintenance, and education obligations to his wife and children of a former marriage. If his obligations had been deducted, his net worth would have been in the negative and the increase in the parties' net worth during the marriage would have been substantially greater than the increase found by the court. However, because the husband's obligations did not implicate property rights, refusal to deduct the obligations from the husband's statement of net worth was not an abuse of discretion. In re Marriage of Gallagher, 248 M 100, 809 P2d 579, 48 St. Rep. 346 (1991), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Sufficient Foundation for Determination of Net Worth: Husband complained that of the trial court's 60-plus findings and conclusions, only 5 dealt with the parties' liability and that these few findings were inadequate to determine net worth and to equitably divide the marital estate. While not making an exhaustive list, the court did set forth the essential and determining facts from which it drew its conclusions, and the findings provided a sound foundation for the judgment. As noted in Stratford v. Stratford, 193 M 195, 631 P2d 296, 38 St. Rep. 1093 (1981), this foundation need not consist of a multitude of evidentiary facts as long as the findings of fact set forth a recordation of the essential and determining facts upon which the court rested its conclusions and without which the judgment would lack support. In re Marriage of Skinner, 240 M 299, 783 P2d 1350, 46 St. Rep. 2141 (1989).

Net Worth of Parties — Determination From Findings as a Whole:

Although determination of the net worth of the marital estate is a necessary prerequisite to an equitable apportionment of the estate, the court need not do so in one finding. It is sufficient if the findings as a whole allow for the determination of the parties' net worth. In re Marriage of Hockaday, 237 M 413, 773 P2d 1217, 46 St. Rep. 910 (1989).

A court's failure to precisely set forth net worth of the parties does not constitute abuse of discretion so long as the findings as a whole are sufficient to determine net worth. In re Marriage of LeProwse, 198 M 357, 646 P2d 526, 39 St. Rep. 1053 (1982).

Valuation of All Assets — Net Worth Finding: Apportionment of the marital estate must be predicated on a finding of net worth of the estate. An apportionment cannot be equitable without such a finding. The District Court must make complete findings of fact, including assets and liabilities, from which the estate's net worth can be established. If this is not done, the Supreme Court cannot on appeal determine if the estate was equitably divided. In this case, the court failed to make a specific finding as to liabilities, thus precluding a determination of net worth. This was an abuse of discretion. The court also failed to find the value of the personal property. The property division was vacated for these reasons, and the case was remanded. In re Marriage of Dirnberger, 237 M 398, 773 P2d 330, 46 St. Rep. 898 (1989), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202, followed in In re Marriage of Scott, 246 M 10, 803 P2d 620, 47 St. Rep. 2237 (1990), and distinguished in In re Marriage of Lewton, 2012 MT 114, 365 Mont. 152, 281 P.3d 181. See also In re Marriage of Rudolf, 2007 MT 178, 338 M 226, 164 P3d 907 (2007), and In re Marriage of Crowley, 2014 MT 42, 374 Mont. 48, 318 P.3d 1031.

Admissibility of Options Trading Account Financial Data Form in Determining Net Worth: In attempting to determine worth of the parties, the lower court noted a lack of verifiable information on the husband's financial situation, characterized by incomplete and incorrect answers about his financial affairs. Therefore, it was proper for the court to admit a copy of an options trading account financial data form, submitted by the wife, as an indication of husband's net worth. In re Marriage of Purdy, 234 M 502, 764 P2d 857, 45 St. Rep. 2084 (1988).

Valuation of All Assets — Net Worth Finding: In a dissolution proceeding, the District Court must place a value upon all of the assets within a marital estate and determine the net worth of the parties before distributing property within that estate, regardless of whether the parties entered into any stipulation concerning their marital property. Cook v. Cook, 188 M 472, 614 P2d 511 (1980).

Net Worth Determination Existing Through Cumulation of Other Findings: Although the District Court did not make a specific finding of fact as to the net worth of the marital property, there were findings as to the value of assets which had been divided prior to trial, the value of assets divided by the court following the trial, and the joint liabilities of the marriage. The cumulative effect of these findings is equivalent to a finding of the net worth of the parties at the time of the divorce. In re Marriage of Bosacker, 187 M 141, 609 P2d 253 (1980), followed by Hunter v. Hunter, 196 M 235, 639 P2d 489, 39 St. Rep. 59 (1982). See also Norine v. Norine, 210 M 477, 681 P2d 1096, 41 St. Rep. 1094 (1984); Nunnally v. Nunnally, 192 M 24, 625 P2d 1159, 38 St. Rep. 529 (1981); In re Marriage of Harris, 189 M 509, 616 P2d 1099, 37 St. Rep. 1696 (1980).

Determination of Net Worth Required — Maintenance: In the distribution of marital property upon dissolution, the District Court must make a determination of the true net worth of assets before an equitable division can be made. The District Court cannot properly determine that the parties lack sufficient property to provide for their needs and are unable to support themselves through appropriate employment (the basis for awarding maintenance) until the marital assets have been valued and equitably apportioned. The District Court must also determine if the property to be awarded is income-producing or income-consuming property. Herron v. Herron, 186 M 396, 608 P2d 97 (1980), proper findings and conclusions made and judgment affirmed in In re Marriage of Herron, 226 M 485, 736 P2d 487, 44 St. Rep. 823 (1987).

Determination of Net Worth — Abuse of Discretion: As part of a divorce decree the court made no finding concerning the net worth of the home of the parties but awarded it to the plaintiff until the children are emancipated or reach majority. The court is vested with wide discretion and where, as here, there is no evidence of abuse, its decision will not be reversed. Nor is it reversible error that no finding was made of the net worth of the home, as its value was not at issue. Reese v. Reese, 185 M 52, 604 P2d 326 (1979); In re the Marriage of Schwartz, 184 M 178, 602 P2d 175 (1979).

Determination of Net Worth — Consideration of Inheritance: To have a proper distribution of the marital property, the trial court must first determine the net worth of the parties at the time of their divorce. An inheritance received during the marriage is a marital asset. How the trial court should consider this asset must be decided in each case on its own facts. In this case, the court first determined that the inheritance was used to increase the value of the home and then deducted the amount of the inheritance from the value of the home before dividing the assets. This manner of considering the inheritance was in error. Reese v. Reese, 185 M 52, 604 P2d 326 (1979); Vivian v. Vivian, 178 M 341, 583 P2d 1072 (1978), followed in In re Marriage of Scott, 246 M 10, 803 P2d 620, 47 St. Rep. 2237 (1990).

Determination of Net Worth and Contribution: Before there may be a proper distribution of marital property in a divorce decree, the District Court must first determine the net worth of the parties at the time of their divorce and must permit full inquiry regarding financial contribution by the parties to the marriage. Herring v. Herring, 184 M 353, 602 P2d 1006 (1979).

Net Worth Determination — Unsecured Debts — Inheritance — Discretion: For a proper distribution of marital assets, the trial court must first determine the net worth of the parties at the time of their divorce, considering both the assets and liabilities of each of the parties. Broad discretion lies in the court, its judgment to be overturned only if a clear abuse of discretion is shown. Failure to consider $12,000 of unsecured debts and the liability therefor is such an abuse. The inheritance of a party during the marriage must be taken into consideration, but how it is to be considered is unclear and no specific finding on this item is required. Metcalf v. Metcalf, 183 M 266, 598 P2d 1140 (1979). See also In re Marriage of Stewart, 232 M 40, 757 P2d 765, 45 St. Rep. 850 (1988). Stewart was overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

EQUITABLE DISTRIBUTION OF MARITAL PROPERTY

General

Disability Retirement Benefits Not Divisible Marital Estate Assets: In a dissolution of marriage proceeding, the parties disagreed about whether the husband's Sheriffs' Retirement System disability benefits should be considered a divisible marital asset. The District Court determined that the income was a divisible marital asset, reasoning that the income was similar to a normal retirement benefit representing deferred compensation for work previously performed during the marriage, and it apportioned the income between the parties on a 50-50 basis. The Supreme Court reversed, finding that the disability retirement benefits were intended to replace future employment income that had been lost due to the disability. Because postdissolution earnings are not part of the marital assets, the Supreme Court found that this income had been improperly included by the District Court. The Supreme Court noted that the disability retirement benefits could be relevant in a determination of whether spousal maintenance was appropriate and directed the District Court to consider this factor on remand. In re Marriage of Elder & Mahlum, 2020 MT 91, 399 Mont. 532, 462 P.3d 209.

Choice of Equalization Payment or Sale of Ranch Proper: The District Court did not abuse its discretion by ordering the husband to make an equalization payment within 120 days or be forced to sell or transfer a ranch. The District Court properly considered the wife's medical issues and lack of employment, as well as the fact that the husband ceased temporary maintenance payments while the case was pending, allowed the ranch to go into foreclosure on two occasions, attempted a bankruptcy in recent years, and previously sold portions of the ranch to satisfy debt. In re Marriage of Clark, 2015 MT 263, 381 Mont. 50, 357 P.3d 314.

Credit Owed for Voluntary Postseparation Housing Payments: After the husband and wife separated in 2002, the District Court issued an order requiring the husband to pay the wife temporary support. In addition to this ordered support, the husband also voluntarily paid the costs of the wife's housing up until the dissolution decree was entered in 2012. The District Court did not credit the husband for amounts paid for the wife's housing. On appeal, the Supreme Court concluded that, as a matter of equitable distribution, the husband should have received a credit against his overall obligation to the wife for the postseparation housing payments he voluntarily made. In re Marriage of Schwartz, 2013 MT 145, 370 Mont. 294, 308 P.3d 949.

Equalization Payment Without Method of Payment Improper — Guidelines for Deferred Monetary Awards: The District Court erred in ordering that the husband pay the wife a $1.259 million equalization payment without providing guidance for the method of payment in the order. The husband's request for a deferred monetary award with a payment plan was justified. On remand, the District Court was directed to state a sum certain, provide for a certain and specific payment schedule over a reasonable period of time, secure the award, and include fair and reasonable interest on the award. In re Marriage of Schwartz, 2013 MT 145, 370 Mont. 294, 308 P.3d 949.

Property Quitclaimed to Husband as Part of Marital Estate: Since property may be considered part of the marital estate irrespective of whether the title is in the husband's or wife's name, the District Court did not err, but rather followed the directive of this section to equitably apportion property between the parties, when it considered the home, which was quitclaimed to the husband after separation and improved and sold by him, a part of the marital estate. In re Marriage of Alexander, 2011 MT 1, 359 Mont. 89, 246 P.3d 712.

Mathematical Error in Distribution of Proceeds From Sale of Parties' Home — Remand: Each party was to receive one-half of $18,000 in proceeds from the sale of the parties' home. Under the final decree, the wife received only $7,000 of her $9,000 share, so the Supreme Court remanded for correction of the mathematical error. In re Marriage of Olson, 2008 MT 232, 344 M 385, 194 P3d 619 (2008), following In re Marriage of Dahm, 2006 MT 230, 333 M 453, 143 P3d 432 (2006). Dahm was overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

No Authority for Proposition That Marital Assets Be Equitably Divided After Subtracting Related Marital Debts: The wife asserted but did not provide the required authority for the proposition that a court must equitably divide each marital asset after subtracting related marital debts rather than equitably distributing the entire marital estate. The Supreme Court found no abuse of discretion in the determination that certain real business property and related debts were marital and part of the husband's premarital assets and inheritance and should be allocated to the husband, with an equalization payment to the wife for her contributions to the marital home. The distribution of the marital estate was affirmed. In re Marriage of Markegard, 2006 MT 111, 332 M 187, 136 P3d 532 (2006), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Termination of Family Trusts Proper Given Disintegration of Family — Distribution of Trust Property to Parents Affirmed: During the marriage, the parents set up two irrevocable trusts, with the children as beneficiaries, and each parent received annual distributions from one trust. When the marriage disintegrated, the husband moved to reclassify the corpuses of the trusts as marital assets and to distribute the trust assets between husband and wife. The District Court agreed that the purposes of the family trusts, which were for estate planning tools and to avoid probate and inheritance taxes, were no longer viable, so the court dissolved the trusts and distributed the trust assets between husband and wife pending appeal. The Supreme Court applied 72-33-413 (now repealed) and affirmed. Continuation of the trusts would have substantially impaired the purposes of the trusts, given the limited existence of other marital assets and the children's limited contributions of labor toward the acquisition and development of the trust property. Both husband and wife could possibly have experienced extreme detriment if the trust assets were not distributed as marital property, and the District Court did not err in doing so. In re Marriage of Epperson, 2005 MT 46, 326 M 142, 107 P3d 1268 (2005).

Improper Assignment of Retirement Asset for Education of Child After Age of Majority: The District Court allocated one of the parties' seven retirement accounts to set up a trust fund dedicated to the educational expenses of the parties' child through the child's postsecondary education until the child reached age 25. The wife appealed, and the Supreme Court reversed. Absent a voluntary agreement between the parties, a District Court may not create a trust to support an independent, competent child after the parents' support obligation expires when the child reaches age 18. There was no voluntary agreement here, so the Supreme Court remanded for amendment of the findings to reflect that once the child reached the age of majority, remaining funds must be distributed to the parties according to the designated percentages. In re Marriage of Haberkern, 2004 MT 29, 319 M 393, 85 P3d 743 (2004). See also In re Marriage of Roullier, 229 M 348, 746 P2d 1081 (1987).

Signing of Prenuptial Agreement Under Duress — Requiring Spouse to Pay Maintenance and Immigration Legal Fees Legitimate Allocation of Marital Debt: A doctor brought a Russian woman and her son to Montana under a fiancee visa. As the visa was running out, the couple had to marry or return the woman and her son to Russia, so they signed a prenuptial agreement and married. The agreement kept their premarital property separate in case of dissolution and provided that if the marriage ended before the wife obtained a permanent visa, the doctor would pay reasonable transportation expenses for her and her son to return to Russia. Shortly thereafter, the doctor fell and suffered a traumatic head injury. When he got home about 5 months later, he discovered that the wife had moved out and that the court-appointed guardian had purchased a new car for her and was paying her expenses, so he filed for dissolution. The District Court held that the prenuptial agreement was not entered voluntarily by the wife, gave her the car, ordered maintenance for 20 months, and ordered the husband to pay the expenses of the wife's immigration attorney. On appeal, the Supreme Court found no abuse of discretion in the trial court's findings and affirmed. Under the unique circumstances of this case, the prenuptial agreement was invalid because the wife, under duress, signed an agreement that she did not understand in order to remain in this country. Maintenance was appropriate in order to put the wife in a self-sustaining position, given her limited job opportunities and understanding of English. Further, she would not have been able to obtain legal residency without the assistance of an immigration attorney, so requiring the husband to pay the immigration legal fees was a legitimate allocation of the marital debt. In re Marriage of Shirilla, 2004 MT 28, 319 M 385, 89 P3d 1 (2004).

No Reimbursement for Dissolution Expenses Paid From Commingled Marital Funds: The husband requested reimbursement for his out-of-pocket expenses incurred during the court-ordered sale of two of the parties' homes, but the District Court declined. On appeal, the Supreme Court found that the expenses were paid from commingled marital funds, and absent evidence of the amount of reimbursement to which the husband might be entitled, denial of reimbursement was proper. In re Marriage of Schmieding, 2003 MT 246, 317 M 320, 77 P3d 216 (2003).

Failure to Consider Spouse's Disability Income in Valuation of Marital Estate and Consideration of Maintenance Award — No Error: The husband was 44 years old and suffered from a terminal illness that substantially impaired the quality of his life and precluded him from performing any gainful activity. The District Court awarded the husband all of his disability income without including the income in the value of the marital estate or considering the income, amounting to $12,000 a month, in determining whether the wife was entitled to maintenance. The wife contended that failure to consider the disability income was erroneous in both instances. The Supreme Court disagreed. The District Court did consider the disability benefits in its distribution of the estate, if not in its valuation. Further, the distribution provided the wife with sufficient property and funds to provide for her reasonable needs, so maintenance was unnecessary. The marital estate was not necessarily divided equally, but it was divided equitably, and the District Court was affirmed. In re Marriage of Hayes, 2002 MT 281, 312 M 440, 60 P3d 431 (2002).

Consideration of Economic Effects of Marital Abuse Not Considered Interjection of Fault or Assignment of Blame in Distribution of Marital Estate: This section provides that the trial court shall equitably apportion marital property between the parties without regard to marital misconduct. However, the District Court in this case considered the wife's financial needs resulting from the husband's abuse during the marriage, which the husband contended was a violation of the statutory prohibition. The Supreme Court distinguished between awarding a larger portion of the marital estate in order to penalize marital misconduct and considering medical and financial consequences of marital abuse, such as medical expenses and a person's ability to work and earn an income, which is not an interjection of fault or assignment of blame that is contemplated by the statutory prohibition. Along with consideration of the duration of the marriage, the parties' assets and needs, their health, their occupations, the amount and sources of income and the opportunity of each for future acquisition of capital assets and income, and the apportionment of property to the wife in lieu of maintenance, the admission and consideration of evidence of the consequences of the marital abuse aided the District Court in fashioning an equitable distribution by giving consideration to the very real effects of the husband's abuse of his wife and making provisions for the wife's ongoing needs. Exclusion of the economic effects of the abuse would have precluded a truly equitable distribution of the marital estate, so the award of marital assets to help with the wife's future dental bills, probable surgery, physical therapy, prescriptions, and counseling was affirmed. In re Petition of Fenzau, 2002 MT 197, 311 M 163, 54 P3d 43 (2002). However, see In re Marriage of Patton, 2015 MT 7, 378 Mont. 22, 340 P.3d 1242, in which the Supreme Court ruled that the standing master did not abuse her discretion in excluding evidence of the husband's alleged abuse of his wife in her report.

Veteran Disability Benefits Federally Protected From Inclusion in Marital Estate — Disability Benefits Considered in Award of Spousal or Child Support as Party's Ability to Earn Income: The District Court included a portion of the husband's Veterans Benefits Association (VA) disability benefits as part of the division of marital property. The Supreme Court held that under the antiattachment clause of 38 U.S.C. 5301, VA disability benefits are federally protected from inclusion in the marital estate. In enacting that section and the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408, Congress preempted state courts from including VA disability benefits in the marital estate because VA disability benefits are not considered "disposable retired pay" to be treated as marital property. An award of VA disability benefits upon dissolution amounts to a seizure of those benefits in violation of 38 U.S.C. 5301. To avoid damaging federal objectives, the property division dictates of this section must yield to the federal law. Consistent with both federal and state law, a District Court may consider VA disability benefits in the same way that it considers each party's ability to earn income after dissolution as an important factor in achieving an equitable property division, including consideration of the military disability retirement pay as a source of income in the award of spousal maintenance or child support, or generally as an economic circumstance of the parties justifying a disproportionate award of marital property to the nonretiree spouse. Thus, disability payments should not, either in form or substance, be treated as marital property subject to division upon dissolution. However, under Rose v. Rose, 481 US 619 (1987), a state court is free to consider postdissolution disability income and to order a disabled veteran to pay spousal support even when disability benefits would be used to make support payments. In re Marriage of Strong, 2000 MT 178, 300 M 331, 8 P3d 763, 57 St. Rep. 709 (2000), following Mansell v. Mansell, 490 US 581 (1989), and In re Marriage of Murphy, 261 M 363, 862 P2d 1143 (1993). See also McCarty v. McCarty, 453 US 210 (1981).

Dissolution Decree Granting Ranch to Husband — Wife Not Entitled to Appreciation or Subject to Liability Accruing on Property — Judgment Interest Owing on Money Judgment: A dissolution decree entered in 1996 granted ranch property to the husband and a liquidated money judgment of $305,855 to the wife. When the remainder of the issues concerning the marital estate was finally addressed in 1999, the wife contended that the subsequent appreciation of the ranch marital assets must be accounted for in determining the final disposition of the 1996 decree. The Supreme Court held that the wife was not entitled either to appreciation or, conversely, to any liability that may have accrued on the property because the ranch was exclusively awarded to the husband. However, the wife was entitled to judgment interest on the money as a statutory right pursuant to 25-9-205. On remand, the Supreme Court applied the statutory 10% interest rate to the balance of the wife's money judgment that remained unpaid following entry of the decree, not including interest accruing during the pendency of the appeal. The Supreme Court refigured the dollar amount due the wife after adjusting the figure, which had been incorrectly offset by the District Court because of the wife's alleged receipt of livestock and sales and an interest debt allegedly due to the husband's mother under a "conspiratorial sham" designed to deprive the wife of her interest in the farm property and to directly benefit the husband. In re Marriage of Pospisil, 2000 MT 132, 299 M 527, 1 P3d 364, 57 St. Rep. 547 (2000).

No Showing of Prejudice in Scheduling Hearing on Marital Property Disposition on Fourteen Days' Notice Three Years After Decree of Dissolution: The parties' dissolution decree was entered in 1996, but by 1999, the parties' property still had not been distributed because of ongoing disputes over the marital assets. The 1996 decree was not in dispute, so the District Court set a hearing on 14 days' notice, identifying the issues that remained in contention. The wife objected to the hearing date, alleging that 14 days were insufficient to conduct the discovery necessary to fully prepare for the issues. The wife failed to brief the issues, but the husband timely filed a brief in response to the requests. The hearing took place as scheduled, and the next day the District Court issued an order implementing property division. The wife appealed, arguing that the short and insufficient time abridged her constitutional due process rights. Citing In re Marriage of Nordberg, 271 M 328, 896 P2d 447 (1995), the Supreme Court noted that if the wife could show that she was not afforded the opportunity to adequately present evidence, a new hearing would be a necessary remedy. However, the scheduling order did nothing more than restate the contents of an earlier order, and the only new legal issue of import required research but no further discovery. At the hearing, each party was allowed to offer documentary evidence, and to call expert witnesses, and to cross-examine witnesses. The wife could not show sufficient causally related prejudice as a result of the notice, and the Supreme Court found no due process violation in this case. In re Marriage of Pospisil, 2000 MT 132, 299 M 527, 1 P3d 364, 57 St. Rep. 547 (2000).

Condemnation Proceeds as Business Property: Husband's business was paid $7,500 by the state for the condemnation of 0.14 acres of the business's land to widen a highway, partly to compensate for the taking and partly allocated for site improvements. Rather than deposit the condemnation proceeds to the credit of the business, husband gave them to his father in partial payment for a motor home. Wife subsequently purchased the business as part of a dissolution proceeding and successfully argued that the condemnation proceeds should be returned to the business. In re Marriage of Griffin, 275 M 37, 909 P2d 707, 53 St. Rep. 28 (1996).

Order Allowing Husband to Delay Payment to Wife Not Error: The lower court awarded Ray the family home on the condition that he purchase his wife's one-half interest in the property. The order allowed Ray to delay payment to his wife for 2 years until he received funds from a balloon payment due him on property that he owned in California. The Supreme Court held that the lower court had arrived at an equitable division of the property and had not abused its discretion in allowing the husband to delay paying his wife so long as she earned interest on the amount owed her until time of payment. In re Marriage of Chew, 269 M 331, 888 P2d 428, 52 St. Rep. 13 (1995).

Open Court Stipulation to Cash Award in Addition to Property Settlement: Both parties agreed by stipulation in open court that, in compensation for giving up her right to contest how much of a loan was for ranch expenses and how much was for husband's personal expenses, wife would receive $6,000 in addition to any property. Husband contested the award on appeal. The Supreme Court found the stipulation terms to be clear and found no abuse of discretion in the award of the cash settlement according to the stipulation. In re Marriage of Jakkola, 267 M 450, 884 P2d 783, 51 St. Rep. 1117 (1994), distinguishing In re Marriage of Rogers, 226 M 163, 734 P2d 677 (1987). See also In re Marriage of Simms, 264 M 317, 871 P2d 899 (1994).

Living Expenses Pending Dissolution as Marital Liability: A temporary order declared that $500 a month that wife needed to borrow from her parents to cover monthly living expenses was considered a marital debt to be divided between the parties upon final division of the marital estate. When the final order was entered, the trial court held that the borrowed money was not expected to be repaid and that the debt was thus not included in the calculation of the value of the marital estate. However, absent evidence in the record that the money was intended as a gift, the monthly payment should have been considered a marital debt and the Supreme Court ordered entry of the original temporary order and inclusion of the debt in the calculation of the value of the estate. In re Marriage of Neal, 267 M 455, 884 P2d 789, 51 St. Rep. 1109 (1994).

Marital Misconduct Not to Be Considered in Apportionment of Marital Estate: Husband contended that the trial court abused its discretion when it did not credit his property settlement obligation with the amounts of money wife took from his share of the marital assets. The court denied husband's motion to reduce his obligation, commenting that he knew or should have known that wife had the company checkbook and a propensity to use the checkbook for matters unrelated to the business, which in essence implied that husband was at fault and that his actions condoned any alleged wrongdoing on the wife's part. Citing In re Marriage of Collett, 190 M 500, 621 P2d 1093 (1981), the Supreme Court held that this section makes it clear that a court is not to consider any marital misconduct in its disposition of marital assets and that apportionment of a marital estate is based on equitable principles. Whether parties are at fault should not affect the division of assets. The case was remanded to determine, without considering fault by either party, whether wife's appropriation of funds resulted in a disparity in the court's division of the estate and, if so, to make adjustments accordingly. In re Marriage of Griffin, 260 M 124, 860 P2d 78, 50 St. Rep. 945 (1993).

Question of Whether Wife's Purchase Offers for Marital Property Met Decree Provisions — Remand: An original dissolution decree allowed wife to exercise an option to purchase the family business, which she tried to do on three occasions by offering varying terms, all of which were denied by the trial court for general reasons. After examining the offers and the reasons for denial, the Supreme Court concluded that a question of fact remained as to whether the offers substantially varied the terms of the original decree. The case was remanded for resolution of the question, with directions that if the proposals complied with the terms of the option, it would be an abuse of discretion to deny wife's motions to exercise her option. In re Marriage of Griffin, 260 M 124, 860 P2d 78, 50 St. Rep. 945 (1993). On remand, the District Court calculated the option purchase price for the parties' business. Wife exercised the option and purchased the business but, on appeal, alleged mathematical and accounting errors in the court's calculations. In voluntarily complying with the District Court's order and exercising her option to purchase the business, wife waived any objection to the purchase price and was precluded from raising the issue on appeal. She was not eligible for indemnification from husband regarding two claims asserted against the business, having purchased the business liabilities as well as its assets. Further, husband's acceptance of the money and his subsequent transfer of his company stock to wife precluded him from raising the issue on cross-appeal of whether the District Court erred in granting wife a new purchase option. In re Marriage of Griffin, 275 M 37, 909 P2d 707, 53 St. Rep. 28 (1996).

No Error in Failing to Order Provision of Health Insurance: Wife contended that because of her age and gallbladder problems, the District Court should have ordered husband to provide her with health insurance through his place of employment. However, wife's receipt of $62,653 from sale of real property and $22,640 in personal property constituted a sufficient provision of assets to allow her to provide for her own health care. In re Marriage of Peetz, 252 M 448, 830 P2d 543, 49 St. Rep. 362 (1992), followed in In re Marriage of Westland, 257 M 169, 848 P2d 492, 50 St. Rep. 216 (1993).

Error in Prohibition of Discharge of Marital Indebtedness in Bankruptcy: Wife was charged with paying husband $22,500 as his share of a business. The decree further stated that this amount was a personal obligation of wife and was not dischargeable in bankruptcy. However, because the award was not for alimony, maintenance, or support, the only discharges expressly prohibited under 11 U.S.C. 523(a)(5) of the federal Bankruptcy Code, it was an infringement of wife's rights under federal law and an error for the District Court to prohibit discharge of the indebtedness in bankruptcy. The final decree was reversed and modified by striking the provision that the award was not dischargeable in bankruptcy. In re Marriage of Driscoll, 250 M 28, 817 P2d 702, 48 St. Rep. 884 (1991).

Theory of Resulting Trust Applied to Marital Property: At trial, husband presented testimony and title certificates indicating that a mobile home, automobile, and flatbed trailer belonged to his father and should not be included as marital property. The wife indicated that she and her husband treated the property as their own, made direct lease payments on the items, paid for licenses, taxes, and insurance on the items, and took income tax deductions on the property. Applying the theory of resulting trust, as set out in Eckart v. Hubbard, 184 M 320, 602 P2d 988 (1979), the Supreme Court held that the actions of the husband's father and of the husband and wife indicated that the father was holding the property in trust. The property was therefore properly considered part of the marital estate, and debts associated with the assets were properly included as marital debts. In re Marriage of Ruff, 247 M 486, 807 P2d 1345, 48 St. Rep. 271 (1991).

Absence of Support for Claims of Marital Debt — Findings Not Required: Husband claimed error in court failure to determine and assign marital debts. However, neither party submitted any proposed findings or conclusions on the debts. Absent support in the record for the claims, the court was not required to make findings or conclusions on them. In re Marriage of Purdy, 234 M 502, 764 P2d 857, 45 St. Rep. 2084 (1988).

Legal Description Necessary to Ensure Equitable Distribution: The District Court granted husband property described merely as "House in Chester". This constituted an inadequate description because legal descriptions of real property are necessary to ensure proper disbursement of property in dispute. In re Marriage of Butler, 232 M 419, 756 P2d 1159, 45 St. Rep. 1160 (1988).

Effect of Dissolution Proceedings on Spousal Authority to Conduct Independent Financial Transactions: The statutory authority of spouses to conduct independent financial transactions is not controlling on the distribution of marital property in dissolution proceedings. In re Marriage of Dalley, 232 M 235, 756 P2d 1131, 45 St. Rep. 1017 (1988).

Setting Over of Promissory Note as Equitable Distribution: Wife loaned husband $32,000 to pay federal taxes on $83,000 he withdrew from his retirement plan to pay living and business expenses. She insisted he sign a promissory note for the amount. The District Court properly held that enforceability of the $32,000 contract was subject to equitable distribution of the marital estate, noting that the wife received benefits from the $83,000 and that the loan helped relieve her joint tax liability. The court duly considered the note and correctly awarded the note to the husband. In re Marriage of Stewart, 232 M 40, 757 P2d 765, 45 St. Rep. 850 (1988).

Property Distribution or Maintenance Provision? — "Where's the Beef?": A decree of dissolution provided that husband deliver free of charge one beef a year to wife. He later discontinued delivery of beef, maintaining that the provision was in the nature of maintenance and terminated upon wife's remarriage. The District Court properly found that the beef was a division of property required to equalize a disproportionate division of the marital estate. In re Marriage of Kramer, 229 M 476, 747 P2d 865, 44 St. Rep. 2148 (1987).

Equity, Not Equality, as Guide in Division of Marital Estate: The husband contended that a property division was inequitable on its face because Montana law favors equal division of assets. This was a misstatement of the law. Equity, not equality, should guide the District Court's discretion in dividing the marital estate. In re Marriage of Fitzmorris, 229 M 96, 745 P2d 353, 44 St. Rep. 1809 (1987), followed in In re Marriage of Nordberg, 265 M 352, 877 P2d 987, 51 St. Rep. 531 (1994), and In re Marriage of Corey, 266 M 304, 880 P2d 824, 51 St. Rep. 859 (1994). See also In re Marriage of Jones, 229 M 128, 745 P2d 350, 44 St. Rep. 1834 (1987), In re Marriage of Wersland, 249 M 169, 814 P2d 991, 48 St. Rep. 626 (1991), In re Marriage of McNellis, 267 M 492, 885 P2d 412, 51 St. Rep. 1125 (1994), and In re Marriage of Payer, 2005 MT 89, 326 M 459, 110 P3d 460 (2005).

Title Not Controlling in Distribution of Assets — Joint Tenants: Title does not control the distribution of marital assets. Therefore, the lower court properly refused to base its decision on the fact that the parties held the property as joint tenants. In re Marriage of Fitzmorris, 229 M 96, 745 P2d 353, 44 St. Rep. 1809 (1987).

Parties Taking Turns Choosing Personal Property — No Abuse of Discretion: The trial court did not abuse its discretion in instructing the parties to take turns choosing personal property as an alternate method to the distribution already agreed to between the parties. If carried out, such method can result in an equitable division that is not unreasonable or arbitrary. In re Marriage of Bowman, 226 M 99, 734 P2d 197, 44 St. Rep. 488 (1987).

Restoration to Premarital Status Not Required: Although the husband brought more assets into the marriage, the District Court did not err when it required that the marital property be equitably apportioned between the parties. The court is not bound to restore the parties to their premarital status. In re Marriage of Shirilla, 225 M 106, 732 P2d 397, 44 St. Rep. 75 (1987). See also In re Marriage of Powell, 231 M 72, 750 P2d 1099, 45 St. Rep. 441 (1988).

Apportionment — Factors Considered: In apportioning marital property, 40-4-202 requires consideration of the "contributions of the other spouse to the marriage". In the present case, the trial court did not abuse its discretion in considering the value of property the husband brought to the marriage and an inheritance he received. The court also properly considered the wife's contributions to the success of the husband's cleaning business. In re Marriage of Martin, 218 M 36, 705 P2d 1114, 42 St. Rep. 1376 (1985).

Land Bought With Wife's Premarital Money and Husband's Marital Income — Even Distribution of Proceeds of Sale: The lower court was within its discretion in equally dividing the proceeds of the sale of a piece of property, despite wife's claim that she used $5,000 from her premarital savings for its downpayment, because husband's income was used for the rest of the payments. In re Marriage of Perry, 217 M 162, 704 P2d 41, 42 St. Rep. 1101 (1985).

Adoption of Husband's Proposed Disposition: A marital property disposition would not be set aside even though: (1) it was the one proposed by the husband; (2) an exact mathematical division was not made; or (3) both parties sought certain of the same items. Also, it was not error that one party received more property than the other. In re Marriage of Osteen, 215 M 436, 697 P2d 1358, 42 St. Rep. 522 (1985).

Preservation of Family Ranch — Not Proper Consideration Upon Division: Montana's policy in favor of keeping a family farm or ranch intact upon dissolution is not a proper consideration when dividing marital property under this statute. The policy is only to be considered upon distribution of the marital property after it has been allocated. In re Marriage of Glass, 215 M 248, 697 P2d 96, 42 St. Rep. 328 (1985). See also In re Marriage of Binsfield, 269 M 336, 888 P2d 889, 52 St. Rep. 16 (1995), and In re Marriage of Ortiz, 282 M 500, 938 P2d 1308, 54 St. Rep. 446 (1997).

Marriage of Short Duration — Return to Status Quo Not Required: The parties were married in August 1980, and a dissolution was entered in April 1984. Both parties brought property into the marriage and worked during the marriage. The husband contended that the property division was inequitable and that in a marriage of short duration, the parties should be placed in the position they would have been in if no marriage had occurred. On appeal, the Supreme Court pointed out that while it has recognized that a lower court must consider the origin of property acquired by one party prior to marriage, 40-4-204 clearly provides that such property is still a marital asset subject to division. There is no definite rule as to how the trial court is to consider the asset. Each case is decided on its own facts. As long as the trial court properly considers the statutory factors and divides the property equitably, its judgment will not be overturned unless the trial court's fact determinations are clearly erroneous. In re Marriage of Keepers, 213 M 350, 691 P2d 810, 41 St. Rep. 2163 (1984). See also In re Marriage of Staudt, 216 M 196, 700 P2d 175, 42 St. Rep. 740 (1985), In re Marriage of McCormack, 223 M 410, 726 P2d 319, 43 St. Rep. 1833 (1986), In re Marriage of Tonne, 226 M 1, 733 P2d 1280, 44 St. Rep. 411 (1987), and In re Marriage of Peetz, 252 M 448, 830 P2d 543, 49 St. Rep. 362 (1992).

Division of Equity in Family Home — Credit for Mortgage Payments — Deduction of Projected Sales Costs: When husband made payments of $300 a month to former wife from time of separation to court-ordered division of property 5 years later, with no agreement between the parties as to the purpose of the payments, wife was not entitled to use a portion of amount she had paid as mortgage payments as offset against husband's one-half interest in property. The Supreme Court affirmed the District Court decision on the grounds that the wife failed to show abuse of discretion by District Court, and distinguished the case of Lawrence v. Harvey, 186 M 314, 607 P2d 551 (1980), on fact that in Lawrence, the court-ordered payments were for child support.

Supreme Court also affirmed District Court judgment that husband's interest in the home equals the amount it would bring on the open market, which includes consideration of projected sales costs. In re Marriage of Blades, 212 M 379, 692 P2d 1215, 41 St. Rep. 1806 (1984).

Agreement Unconscionable When Instigated to Get Wife's Property as Condition of Continuing Marriage: Petitioner appealed a judgment awarding approximately one-sixth of the marital property to him and the balance to the respondent wife. Petitioner contended that the trial court abused its discretion when it refused to divide the marital property 50-50 under an agreement executed between the parties. The Supreme Court held that the trial court properly refused to divide the property according to the agreement, stating that the result would be the same whether the agreement was a separation agreement or, as the husband contended, a postnuptial agreement. The evidence showed that in instigating the agreement the husband took advantage of his wife regarding her property as a condition to continuing the marriage, contrary to what is required of one in a confidential relationship. The agreement was unconscionable as a matter of law even though the trial court did not specifically find unconscionability. Myers v. Myers, 210 M 173, 682 P2d 718, 41 St. Rep. 990 (1984).

Award of Maintenance After Equitable Division of Property: Sections 40-4-202 and 40-4-203 are to be read together. Thus, if the District Court has made an equitable distribution of property but then determines that the property was insufficient to provide for the spouse's financial needs, it may award maintenance. Such a determination must be made individually in each case, requiring the District Court to balance the considerations of both sections, supported by substantial evidence with appropriate findings to form an adequate basis for review. Hilt v. Hilt, 209 M 140, 679 P2d 783, 41 St. Rep. 604 (1984), followed in In re Marriage of Wash, 239 M 204, 779 P2d 526, 46 St. Rep. 1622 (1989).

Apportionment of Debts of Parties Previously Divorced From Each Other — Reimbursement for Loan Payments Properly Denied: Where the appellant and respondent were previously married and divorced from each other and the respondent wife brought to the parties' second marriage the family home, having purchased the appellant's equity in that home with a loan from the appellant under the terms of the first divorce decree, the District Court decreeing the second divorce did not abuse its discretion in denying the appellant's request for reimbursement of his prior loan payments. What the appellant requests is, in effect, recognition of his equity in the family home brought to the second marriage, but because the respondent contributed a significantly greater share of the property to the second marriage, the District Court was justified in denying that equity and awarding full equity in the home to the wife. Parenteau v. Parenteau, 204 M 239, 664 P2d 900, 40 St. Rep. 815 (1983).

Income Earned on Mineral Interest During Pendency of Action: Part of the marital estate in a dissolution of marriage proceeding consisted of minerals underlying a ranch. The District Court divided the mineral interests equally between husband and wife but did not make any provision for the profits earned on the lease of the mineral interests during the pendency of the action. The Supreme Court held that wife was entitled to an accounting for such profits. In re Marriage of Garst, 199 M 393, 649 P2d 450, 39 St. Rep. 1477 (1982).

Unrequested Unequal Distribution — Restricted Earning Capacity: Where wife was awarded 60% of the marital estate upon dissolution of marriage, husband appealed on grounds that both parties contributed equally to the estate and wife asked for no more than equal apportionment. Supreme Court affirmed, finding restricted earning capacity of wife justified the greater award. Lupo v. Lupo, 197 M 290, 642 P2d 1056, 39 St. Rep. 565 (1982). See also In re Marriage of Cranmore, 199 M 283, 649 P2d 1361, 39 St. Rep. 1361 (1982).

Unconscionability of Property Settlement: The court will look to all the facts surrounding the property settlement to determine if its provisions are unconscionable and not just the disparity in dollar value of property received. Here the disparity reflected the value of corporate shares, which the husband retained but which exposed him to risk of bankruptcy when corporation was ready to fail, and the court refused to find unconscionability. Lawrence v. Lawrence, 197 M 262, 642 P2d 1043, 39 St. Rep. 548 (1982).

Failure to Provide Coherent Distribution: The trial court failed to determine the net worth of the parties or to value the personal property of the parties distributed by the court. The Supreme Court on review was unable to determine any coherent plan for an equitable distribution of the parties' property. The wife also asserted that she was entitled to maintenance, contending that the trial court had made an erroneous finding as to her earning capacity. This, however, could not be determined until there had been an equitable distribution of property. Because of the failure to value the property or provide for an overall plan for distribution, the Supreme Court could not adequately review the findings and remanded the case for further proceedings. In re Marriage of McGill, 187 M 187, 609 P2d 278 (1980).

Contribution of Wife as Homemaker and Mother Valid Basis for Equal Division of Marital Property: The District Court, after reciting the substantial contributions of the husband in working the ranch and the wife as homemaker and mother, did not abuse its discretion by awarding each party one-half of the marital estate. The court followed the statutory mandate of 40-4-202 to consider the contribution of a spouse as homemaker and mother. Jacobson v. Jacobson, 183 M 517, 600 P2d 1183 (1979). See also In re Marriage of Glass, 215 M 248, 697 P2d 96, 42 St. Rep. 328 (1985).

Consideration of Support of Stepchildren in Divorce Proceeding: A stepparent who receives stepchildren into his family and supports them is presumed to do so as a parent. A parent is not bound to compensate the other parent for the voluntary support of his child without an agreement for compensation. Since no agreement was made, the husband's support of his stepchildren during the marriage could not properly be considered in the disposition of the marital estate. Schultz v. Schultz, 183 M 20, 597 P2d 1174 (1979).

Family Corporation: For a proper distribution of marital property the trial court in this case must consider at least these two factors: (1) the net worth of the parties at the time of divorce; and (2) the effect on control of a family corporation upon transfer of any shares of corporation stock during a property distribution. Grenfell v. Grenfell, 182 M 229, 596 P2d 205 (1979).

Use of Enumerated Factors: In a divorce proceeding the trial court must weigh the factors enumerated in 40-4-202 in assessing the value of the marital estate and must equitably apportion the assets. Downs v. Downs, 181 M 163, 592 P2d 938 (1979), followed in In re Marriage of Foreman, 1999 MT 89, 294 M 181, 979 P2d 193, 56 St. Rep. 373 (1999).

Orders as to Property: The court held that the wife, by virtue of her 14 years as mother, housewife, and part-time ranch hand, acquired a vested interest in the major marital asset, which was ranch property, regardless of its source and title. Brown v. Brown, 179 M 417, 587 P2d 361 (1978), distinguished in In re Marriage of Fitzmorris, 229 M 96, 745 P2d 353, 44 St. Rep. 1809 (1987), and in In re Marriage of Nordberg, 265 M 352, 877 P2d 987, 51 St. Rep. 531 (1994).

Property Disposition Required Before Maintenance Allowed: Since the property division statute and maintenance statute have a dual purpose, an award of maintenance is allowed only when a spouse has insufficient assets to cover living expenses and cannot have appropriate employment for reasons stated in the maintenance statute. Thus, maintenance needs can only be determined after there is an equitable division of the marital estate. Johnsrud v. Johnsrud, 181 M 544, 572 P2d 902 (1977), explained in Hilt v. Hilt, 209 M 140, 679 P2d 783, 41 St. Rep. 604 (1984) and followed in In re Marriage of Scott, 246 M 10, 803 P2d 620, 47 St. Rep. 2237 (1990).

Sufficiency of Evidence, Findings

Award of Maintenance and Distribution of Assets to Wife Supported by Facts: The District Court did not err by awarding the wife maintenance and by including the husband's investment accounts in calculating the division of the marital estate. The standing master's findings regarding maintenance, which were adopted by the District Court, along with the District Court's own findings demonstrated that the District Court fully and carefully considered the relevant factors pursuant to 40-4-203, including the parties' ages, health conditions, duration of marriage, and standard of living enjoyed during the marriage, the assets of the parties, and the assets' equitable distribution between the parties. The findings of the standing master and the District Court regarding equitable distribution also considered all of the factors set forth in 40-4-202, and the allocation of approximately 30% of the marital estate to the wife was supported by the facts. In re Marriage of Hollamon, 2018 MT 37, 390 Mont. 320, 413 P.3d 460.

Sanction for Discovery Abuse Warranted, But Distribution of Marital Estate Inequitable: As a sanction for the wife's discovery abuses during dissolution proceedings, the District Court granted the parties' property to the husband and required the wife to pay the debts associated with the property. The wife appealed. The Supreme Court concluded that even though discovery sanctions were appropriate, the property distribution was inequitable because facts underlying the distribution were not based on substantial evidence in the record. The case was remanded for reconsideration of appropriate sanctions and an equitable distribution of the marital estate. In re Marriage of Lundstrom & Scholz, 2009 MT 400, 353 M 436, 221 P3d 1178 (2009).

Money Owed by Spouse Properly Offset Against Child Support Obligations: The wife contended that the District Court did not equitably distribute the marital estate, including her child support obligations. The Supreme Court disagreed. The District Court made comprehensive findings regarding reasonable and equitable distribution of the marital estate, finding that the husband would owe the wife additional money to effect mathematical equality, and then offset that amount against the wife's initial child support obligations in order to allow her time to reenter the work force productively. The distribution was equitable, did not result in substantial injustice, and was thus affirmed. In re Marriage of Wilson, 2009 MT 203, 351 M 204, 210 P3d 170 (2009).

Unconscionable Property Settlement Agreement — Court Distribution of Property Affirmed: The wife agreed to a property settlement, but the District Court found the agreement unconscionable because: (1) the wife was unable to aid in its preparation; (2) the husband failed to disclose the value of his business; and (3) enforcement would have been inherently inequitable. Instead, the court considered the parties' ages, health, finances, assets and liabilities, education and training, employability, and the wife's contributions to the marriage. The court then apportioned 55% of the estate to the wife and 45% to the husband. Although the husband appealed on grounds that the court abused its discretion in attributing certain expenses to him, the Supreme Court found no abuse of discretion and affirmed. Collins v. Collins, 2004 MT 365, 324 M 500, 104 P3d 1059 (2004).

Existence and Valuation of "Gift" of Construction Labor and Materials for Home — Commingling of Gift in Marital Property — Multiple Issues Raised: When Tammy and Robert were divorced, the District Court awarded them each a net distribution from the marital property of nearly $73,000. Excluded from that distribution was an $80,000 gift to Tammy of construction labor and material that was given to her by her father in the construction of a log home on property that the couple purchased in Sanders County. Tammy and Robert both valued the home at $200,000 at the time of their divorce. Robert challenged the reduction in the value of the marital property by the amount of the gift on multiple grounds and raised other issues as well on appeal. In response to Robert's arguments, the Supreme Court held that: (1) although there was conflicting evidence of the gift (Robert, for instance, claimed no knowledge of the gift until the divorce proceeding), there was sufficient evidence of the gift's existence for the District Court to base its findings and conclusions on; (2) unlike the situation in In re Marriage of Herron, 186 M 396, 608 P2d 97 (1980), there was no need to trace the gift because it was only a single gift, the value of which was embedded in the total value of the home, on which the parties agreed, and there was therefore nothing to "trace"; (3) citing In re Marriage of Engen, 1998 MT 153, 289 M 299, 961 P2d 738 (1998), there was no reason why, just because the gift was commingled with marital property, the gift could not be separated from the value of the house as a whole because commingling does not automatically preclude a gift from being considered as separate property; (4) the District Court's valuation of the gift was problematic because if the value of the home was $200,000 and construction costs were reasonably evidenced by the "construction cost breakdown" paper given by Robert to the parties' financing bank, then the value of the gift could not be $80,000, as alleged by Tammy and her father, so the Supreme Court must remand the case back to the District Court for more accurate findings as to the value of the gift and a redistribution of the property in accordance with the new findings; (5) although Robert claimed that the District Court ignored evidence of the value of his contribution to the home, a more accurate statement would be that the court failed to include specific findings on this issue, but the District Court did find that the value of each party's contribution was substantially equal, a finding that was supported by the evidence and was therefore sufficient, pursuant to In re Marriage of Mouat, 228 M 430, 743 P2d 602 (1987); (6) citing In re Marriage of Mease, 2004 MT 59, 320 M 229, 92 P3d 1148 (2004), it would not disturb the District Court's findings with regard to the valuation of Robert's guns and Tammy's equestrian tack because the District Court was in the best position to observe the witnesses testifying on the issue and judge their credibility; and (7) it would not disturb the District Court's findings with regard to the income of both parties because the District Court noted that the parties "did an incomplete and poor job of stating Income and Deductions". In re Marriage of Horton, 2004 MT 353, 324 M 382, 102 P3d 1276 (2004). Engen was overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Evidence Sufficient to Support Reapportionment of Marital Estate Following Erroneous Double Counting of Property: In the course of the dissolution of Steve's marriage to Sherri, the District Court realized that it had erroneously double-counted the value of Steve's real property against the portion of the marital estate awarded to Steve, necessitating a revision of its previous findings. In making the revision, the District Court relied upon the testimony of the parties' experts and then itemized and revalued Steve's property, resulting in a change in Sherri's part of the marital estate from 57% of the estate and a cash payment of $75,000 to 59% and a payment of $55,000. The issue, as framed by the Supreme Court, citing In re Marriage of Haines, 2002 MT 182, 311 M 70, 53 P3d 378 (2002), was not whether the Supreme Court could reach a different conclusion based on the evidence but whether the District Court had sufficient evidence before it to find as it did. The Supreme Court concluded that the District Court did have sufficient evidence to support its decision and therefore properly revalued the estate after discovering its mistake. In re Marriage of Helzer, 2004 MT 352, 324 M 371, 102 P3d 1263 (2004).

Party Estopped From Asserting That Property Placed in Trust Given Prior Denial of Interest in Property: When dividing the marital estate, the District Court found that the husband had gifted a parcel of property to the wife. Title to the property was never in the husband's name, but was always held by the husband's parents or by one of his previous wives. The husband asserted that the intent in transferring the property was to establish a trust for his benefit, with the wife as trustee. However, the husband was judicially estopped from the trust argument because he had repeatedly and unequivocally denied that he had any interest in the property in a prior lawsuit against him for past-due child support. Allowing the husband to reverse his position would have substantially altered the wife's share of the marital distribution after she helped support the husband and helped add to the value of the property. No person may take advantage of the person's own wrong, and a court of equity will not aid a person who has caused title to property to be transferred to another for the purpose of defrauding creditors. Cowan v. Cowan, 2004 MT 68, 320 M 332, 87 P3d 443 (2004), following Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 M 45, 36 P3d 408 (2001). See also Cowan v. Cowan, 2004 MT 97, 321 M 13, 89 P3d 6 (2004), in which adjudication of the husband's claim in Cowan, id., was held to have extinguished any derivative claim in the property that the husband's parents and sister may have had.

Disparity in Parties' Health and Future Income Potential — Distribution Equitable: In distributing marital assets, the District Court may consider, among other things, the age, health, and opportunity of each spouse to acquire future capital assets and income. Here, a significant disparity existed as these factors applied to each spouse. The husband was 44 years old and suffered from a terminal illness that substantially impaired the quality of his life and precluded him from performing any gainful activity. The assets awarded to the husband were his sole means to accumulate wealth and to pay for medical treatment. The wife was in good health, was due to graduate from law school, and had the opportunity to earn future income. The District Court did not act arbitrarily or fail to employ conscientious judgment when it determined that an equitable distribution of the marital estate weighed in favor of the husband receiving his share of the estate first in time, while his health was at its best, and the wife receiving her share later on when sale of the marital properties was concluded and the marital debts were satisfied. In re Marriage of Hayes, 2002 MT 281, 312 M 440, 60 P3d 431 (2002).

Reversal of Award of Prior-Acquired Vehicle to Wife Who Did Not Contribute to Maintenance of Vehicle: The District Court abused its discretion when it awarded to the wife, upon dissolution of a 14-month marriage, a Ford Bronco that the husband bought before the marriage without a finding that the vehicle had appreciated in value during the marriage and that her contributions facilitated the maintenance of the vehicle or that the award served as an alternative to maintenance arrangements. In re Marriage of Rolf, 2000 MT 361, 303 M 349, 16 P3d 345, 57 St. Rep. 1536 (2000), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Reversal of $2,000 Award to Wife for Necklace She Said Husband Stole — Insufficient Evidence: The award of $2,000 to the wife for a missing necklace was reversed because the only evidence on the matter was the wife's testimony that "And I don't want to forget about the necklace that he stole from me. I want it back" and her statement that it was worth about $2,000. In re Marriage of Rolf, 2000 MT 361, 303 M 349, 16 P3d 345, 57 St. Rep. 1536 (2000).

Trial Court Discretion in Discounting Stock and Considering Profit-Sharing Plan — No Fault Ascribed to Findings and Assignment of Debt: The wife claimed error in division of marital property because the trial court imposed a de facto stock discount on shares of the husband's corporation, failed to include the interest in the husband's profit-sharing plan, and interjected fault into a no-fault dissolution through consideration of the fact that the wife's management of the family casino had resulted in large debts to the marital estate. The Supreme Court affirmed on each issue. The trial court was within its discretion in setting the stock value within the range of evidence presented at trial, and in light of the considerable amount of debt ascribed to the husband, it was reasonable for the court to grant the husband his profit-sharing plan proceeds. As to the claim of fault, the financial findings that the wife took issue with were proper and aided the court in considering the equitable distribution of the property, so no fault was interjected through the court's consideration of the business debts. In re Marriage of Hanni, 2000 MT 59, 299 M 20, 997 P2d 760, 57 St. Rep. 279 (2000). See also In re Marriage of Maedje, 263 M 262, 868 P2d 580, 51 St. Rep. 47 (1994).

Failure to Prove Value of Property Transfer — Court Discretion to Equitably Apportion Property: The husband transferred a portion of a Nebraska farm to his mother. When the property was valued for purposes of dissolution, the husband maintained that the District Court erred in failing to reduce the estate by the value of the transferred property. However, the husband offered no evidence other than his personal testimony to substantiate the value of the transfer. Parties to a dissolution have a duty to assist the trial court in acquiring information needed to determine an appropriate distribution of the marital estate. If a party fails to introduce credible evidence of the value of a piece of marital property, the court is free to use credible evidence of value submitted by the other party. Speculation, conjecture, inference, and guess do not constitute credible evidence, and a trial judge is not required to become an appraiser, accountant, computer, or all-around genius to appropriately decide the facts as established by the documentation at trial. Given the husband's failure of proof regarding the actual value of the alleged transfer, the trial court did not err in adopting the wife's expert's appraisal of the present value of the husband's remainder interest in granting the wife an equitable portion of the marital estate. In re Marriage of Foreman, 1999 MT 89, 294 M 181, 979 P2d 193, 56 St. Rep. 373 (1999). See also Downs v. Downs, 181 M 163, 592 P2d 938 (1979), In re Marriage of Powell, 231 M 72, 750 P2d 1099 (1988), In re Marriage of Maedje, 263 M 262, 868 P2d 580, 51 St. Rep. 47 (1994), and In re Marriage of Richards, 2014 MT 213, 376 Mont. 188, 330 P.3d 1193.

Valuation of Business Based on Insufficient Evidence: The lower court relied solely on the husband's expert in valuing a family monogramming business. The Supreme Court remanded the case on the basis that no evidence of net profits had been introduced and that the lower court had ignored the wife's request that the business be sold rather than awarded to her. In re Marriage of Miller, 239 M 12, 778 P2d 888, 46 St. Rep. 1471 (1989).

Corporation Valued at Worth of Marketable Products: A corporation formed to sell art prints was capitalized at $3,000, and enough prints had been sold at the time of trial to roughly recover that amount. The potential income from sales of the remaining prints was $40,240. Husband testified that the prints would not sell without a great expenditure of time and money but did not provide evidence of how much. The court did not abuse its discretion when it valued the parties' 50% share of the corporation at $20,000. In re Marriage of Hockaday, 237 M 413, 773 P2d 1217, 46 St. Rep. 910 (1989).

Conflicting Valuation Evidence — Court Must Indicate Basis for Choice: The wife presented testimony from a real estate broker about the value of rental property. The husband offered only his opinion of the value. The court accepted the husband's value without offering an explanation. When conflicting valuation evidence is presented the court must indicate the basis for its determination. In this case, the court abused its discretion by its failure to offer an explanation of why it chose the husband's valuation. In re Marriage of Rolfe, 216 M 39, 699 P2d 79, 42 St. Rep. 623 (1985), followed in In re Marriage of Bell, 220 M 123, 713 P2d 552, 43 St. Rep. 226 (1986).

Basis of Division of Property: When the defendant was evasive as to the nature and extent of assets, the record was unreliable as to the true net worth of the defendant at the time of the marriage and at the time of the divorce, and the court had insufficient basis to make an equitable division of property. Downs v. Downs, 170 M 150, 551 P2d 1025 (1976).

Discretion of Trial Court

No Abuse of Discretion in Granting Time for Sale or Refinance of Family Home to Avoid Foreclosure Against Party Not Awarded Home: The husband asserted that the District Court abused its discretion by awarding the family home to the wife, thereby leaving the husband financially exposed to foreclosure of the Veterans Administration (now Department of Veterans Affairs) loan used by the husband to finance the home. The Supreme Court disagreed. In awarding the home to the wife, the District Court ordered her to sell or refinance the home within 36 months so that the husband would not appear as an obligor on the mortgage, and if the wife failed to do so, the home was to be sold and the proceeds divided equally between the parties. The husband failed to show how granting this time period in which to sell or refinance the home was an abuse of discretion, and the District Court was affirmed. In re Marriage of Jackson, 2008 MT 25, 341 M 227, 177 P3d 474 (2008).

Equitable Distribution of Cash and Surrender Values of Life and Annuity Policies: The District Court awarded the wife a portion of the cash and surrender values of the husband's life insurance and annuity policies. The husband contended that because the policies were contracts based on his life expectancy, he had no cash or surrender value available to give to the wife. The Supreme

Court held that because the values were current or close to current values of the investments, they were properly treated as marital assets and that the District Court did not err in awarding the wife a portion of the cash and surrender values of the policies as part of the marital estate. In re Marriage of Bartsch, 2004 MT 99, 321 M 28, 88 P3d 1263 (2004).

Discretion of Trial Court to Apportion Marital Estate Given Lack of Evidence of Parties' Personal Property: The only evidence presented to the District Court concerning the parties' tangible personal property was a list prepared by the wife. At trial, the parties disagreed on the characterization of their personal property, so the court found it fair and equitable to divide the property equally, although it was virtually impossible to resolve disagreements as to how and when property was acquired, given the lack of receipts or other indicia of purchase. The court ultimately awarded $11,050 to the wife as her equitable share, and the husband appealed, but the Supreme Court declined to disturb the award or hold the District Court in error for failing to take into consideration evidence that was never presented. The District Court did not abuse its discretion in distributing the property equitably given what little evidence was presented. In re Marriage of Grende, 2004 MT 36, 320 M 38, 85 P3d 788 (2004), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Improper Calculation of Pretrial Expenditure of Home Sale Proceeds Not Reversible Error — Equitable Distribution Achieved: Following the parties' separation, the marital home was sold and the proceeds were placed in a money market account in the wife's name. In the ensuing months, the wife spent some of the proceeds from the account. When the District Court valued the marital estate for distribution, the account balance was divided equally between the parties, and the court added the amount spent by the wife to her distribution. However, the court miscalculated the amount of the wife's pretrial expenditures from the account, so the wife contended that she was entitled to a reconsideration of the overall property distribution. The Supreme Court disagreed. It was the clear intent of the District Court to distribute the marital estate on an equitable, if not equal, basis by increasing the value of the account and the marital assets by the amount that the wife spent and distributing that amount to her as part of her fair and equitable distribution. Thus, the miscalculation in the exact amount spent did not constitute reversible error. In re Marriage of Gerhart, 2003 MT 292, 318 M 94, 78 P3d 1219 (2003).

No Abuse of Discretion in Distribution Based on Parties' Future Employment and Financial Situations: Including potential future retirement income, the District Court distributed about 56% of the marital estate to the husband Harold and about 44% to the wife Susan. Susan appealed the distribution on grounds that the court abused its discretion by trying to forecast the parties' future employment and financial situations, contending that the court should instead have split the marital estate according to its present value. The Supreme Court disagreed. The District Court recognized that Harold was faced with mandatory retirement and had several health problems that affected his future career and earning potential, which would require that he immediately begin drawing on his portion of the marital estate as his primary income source, while Susan would be able to continue working, contributing to her deferred compensation plan and adding to the value of her retirement, with the result that her income in the immediate future would exceed that of Harold. Further, the District Court distributed a substantial portion of the parties' remaining investment accounts and real property to Susan. Thus, the District Court did not abuse its discretion in distributing the estate in the manner that it did. The judgment was affirmed. In re Marriage of Smith, 2003 MT 63, 314 M 421, 67 P3d 199 (2003).

Equitable Allocation of Debts and Personal Property Within Discretion of Trial Court: The wife took issue with the trial court's valuation and distribution of the marital estate, arguing that the court committed reversible error in the manner in which it allocated debts and personal property. She believed that she was entitled to a credit for equity from a home that she acquired prior to the marriage; however, the home was sold shortly after the marriage, and the proceeds were not kept separate, but rather used to pay various household expenses. She also disagreed with the court's determination that timber on the property should not have been valued separately from the property itself and with the court's allocation of debt. The Supreme Court noted that ultimately it is up to the trial court to make determinations regarding valuation and allocation of the various marital assets and debts and that the trial court has discretion to adopt any reasonable valuation that is supported by the record. Although the wife was not happy with the court's determinations, that did not make them reversible error. The valuation and distribution were supported in the record, and the Supreme Court declined to find that the trial court abused its discretion in its allocation of the parties' assets and debts. Siefke v. Siefke, 2000 MT 281, 302

M 167, 13 P3d 937, 57 St. Rep. 1175 (2000), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Requirement for Removal of Personal Property From Parties' Residence Not Abuse of Discretion: A District Court has broad discretion in devising methods to accomplish an equitable distribution of marital property. Given the history of the issuance of several temporary restraining orders against husband during the course of dissolution proceedings and his refusal to comply with several pretrial and posttrial orders that necessitated the issuance of enforcement orders, the District Court was justified in ordering husband to retrieve his personal property from the parties' residence within 30 days of entry of the decree, in order to facilitate a quick, supervised exchange of property. In re Marriage of Zander, 262 M 215, 864 P2d 1225, 50 St. Rep. 1522 (1993).

Court Discretion in Determining Whether Equal Division of Bank Account Occurred: The trial court included in the net marital estate $2,577.13 that husband had in a checking account. Husband testified that following separation, the parties equally divided certain assets and that the account funds represented his half, contending that either the amount should be deducted from the net assets or wife should be charged with an equal amount. Wife testified that the money was earned during the marriage and that she did not receive an equal amount. Although the evidence was conflicting on whether an equal division occurred, it was within the trial court's discretion, given the court's opportunity to observe and judge the credibility of the witnesses, to include the amount in the net marital estate. In re Marriage of Lopez, 255 M 238, 841 P2d 1122, 49 St. Rep. 890 (1992).

Proper Consideration of Statutory Factors and Evidence — Restoration of Net Worth Brought Into Marriage Not Abuse of Discretion: The District Court made extensive findings of fact after considering all relevant factors for the division of property as required by this section. It listed the relevant property owned by each party at the time of marriage, including values; listed the marital property as it existed at the time of separation, including values; and concluded that the most equitable way to divide the property was to restore to each party the net worth brought into the marriage, less the decrease in net worth since the marriage, which was divided equally between the parties. This method constituted an equitable division, and its use was not an abuse of discretion. In re Marriage of Vakoff, 252 M 56, 826 P2d 552, 49 St. Rep. 144 (1992).

Discretion of Court — Valuation of Insurance Business: The District Court is vested with broad discretion in distributing property in dissolution proceedings. When a certified public accountant's testimony as to the value of goodwill of husband's insurance business was proper and uncontradicted, the District Court properly exercised its discretion to achieve an equitable distribution of the marital estate. In re Marriage of Arrotta, 244 M 508, 797 P2d 940, 47 St. Rep. 1775 (1990).

Allowance of Interest Within Court Discretion: The allowance of interest on property settlement payments owing from the distribution of a marital estate is within the discretion of the District Court. In re Marriage of Garner, 239 M 485, 781 P2d 1125, 46 St. Rep. 1852 (1989), followed in In re Marriage of Lee, 249 M 516, 816 P2d 1076, 48 St. Rep. 816 (1991).

Equal Division of Stock Inheritance — Court Consideration of Each Party's Contribution: Wife argued that stock gifted to her by her family during the marriage should not have been equally divided because the husband did not add to its value during the marriage. Facts revealed that marital assets were commingled and held jointly and that all property, including the stock, was acquired during the 38-year marriage. Consideration of each party's contribution to the marital estate was a correct exercise of the court's discretion in dividing the property. In re Marriage of Bultman, 228 M 136, 740 P2d 1145, 44 St. Rep. 1402 (1987).

Parties' Potential Future Incomes Properly Considered: Under this section, the court properly considered the parties' potential future incomes, as well as insurance and IRA contributions, in making an equitable distribution of property. In re Marriage of Jones, 225 M 69, 731 P2d 903, 44 St. Rep. 49 (1987).

In-Kind Distribution of Corporate Shares Not Required if Inequitable: Simply because the option of making a distribution of stock in-kind is open to the trial court, such option is not mandatory. An in-kind distribution of closely held corporate shares is not required when it would not produce an equitable settlement between the parties, and a court may correctly present other methods of distribution of the estate. In re Marriage of Johnston, 223 M 383, 726 P2d 322, 43 St. Rep. 1808 (1986), followed in In re Marriage of Taylor, 257 M 122, 848 P2d 478, 50 St. Rep. 186 (1993).

Gifts Received During Marriage — Equity of Distribution Supported by Facts: During the marriage, the wife received a $1 million devise from her father's estate. In divorce proceedings, the District Court awarded the wife a much greater proportion of the marital estate than the husband received. The Supreme Court affirmed the award on the basis that the award was supported by the facts. There was credible evidence in the record that the wife's devise should be considered a gift to her and the property purchased with the devise should remain in her hands. There was evidence that the wife paid all the family's expenses after the devise and contributed to the purchase of a computer for her husband's law office. The equity of the distribution is supported by the facts. In re Marriage of Cruikshank, 222 M 152, 720 P2d 1191, 43 St. Rep. 1132 (1986).

Question of Title Not Controlling — No Abuse of Discretion: Wife appealed the property distribution, claiming that the District Court erred by failing to include as part of the marital estate a promissory note valued at $78,121, on which she was named as a tenant in common, and by awarding her less than a one-half interest in the family home, which was held by the parties as joint tenants. The Supreme Court affirmed the distribution and held that there was no clear abuse of discretion when: the parties had been married only a short time; the husband brought substantially all the assets to the marriage; and the wife had not contributed to maintenance of the family farm, the interest in which was represented by the promissory note. Montana's statutory scheme for disposition of marital property does not give controlling importance to the way in which title to the property is held. In re Marriage of Snyder, 220 M 262, 714 P2d 556, 43 St. Rep. 346 (1986).

Distribution of Tax Benefits and Liabilities: The distribution of tax deductions and liabilities is one factor among many that a court must consider upon dissolution of a marriage. When the court fairly balanced all the factors in distributing the property and awarding maintenance and child support, it was not an abuse of discretion to provide that for tax purposes the maintenance payments were income to the wife and deductible by the husband and that the husband could take the deductions for the minor children, who were put in the wife's custody for 7 months a year and in the husband's for the other 5. In re Marriage of Williams, 220 M 232, 714 P2d 548, 43 St. Rep. 319 (1986).

Equal Contributions to Marriage — Equitable Distribution of Property — No Abuse of Discretion: The District Court concluded that in spite of equal contributions to the marriage, it was equitable to award the wife less than 20% of the net marital estate. She argued that the findings of fact did not support the conclusion as to an equitable distribution. The Supreme Court found that the District Court adequately examined the statutory considerations outlined in 40-4-202(1), and in the absence of a showing of clear abuse of discretion, the District Court's division of the marital estate was affirmed. In re Marriage of Sirucek, 219 M 334, 712 P2d 769, 42 St. Rep. 2065 (1985).

No Award of Share of Appreciation or Equity Buildup: The District Court, in distributing the property of a marital estate, failed to award the wife any share in the appreciation or equity buildup of the ranch. The husband had a net worth of $110,000 at the time of marriage. At the time of dissolution, his ranch-related assets and gold and silver, less liabilities, totaled approximately $265,000, the increase being essentially the result of inflation and appreciation in land values. The wife pointed out that the District Court found she had made an equal contribution to the marriage yet failed to award her any percentage of the increased value of the ranch. Under 40-4-202, in dividing property acquired prior to marriage and the increased value of the property, the District Court must consider nonmonetary contributions of homemakers and the extent to which such contributions facilitated maintenance of the property; however, the right to share in particular property must be considered along with all of the other applicable factors enumerated in 40-4-202. The Supreme Court found that the District Court carefully considered all these factors in fashioning an equitable distribution. The wife failed to demonstrate that the District Court abused its discretion, and the apportionment of the ranch property to the husband was affirmed. In re Marriage of Sirucek, 219 M 334, 712 P2d 769, 42 St. Rep. 2065 (1985).

Sale of Ranch Not Required: In a dissolution proceeding, the wife argued that the District Court should have been required to order the sale of the ranch and division of the sale proceeds. She contended that the ranch was not an economic unit and that all of the factors which traditionally mitigate in favor of keeping the ranch intact had been eliminated. The Supreme Court concluded that the District Court did in fact consider these factors, as well as the other factors enumerated in 40-4-202, including the husband's desire to stay on the ranch and the fact that he had been a farmer and rancher all of his life. The Supreme Court ruled that although the District Court had the power to require sale of the ranch, had it chosen in its discretion to do so, it was not required to do so. The apportionment of the marital property was affirmed. In re Marriage of Sirucek, 219 M 334, 712 P2d 769, 42 St. Rep. 2065 (1985).

No Abuse of Discretion in Excluding Car Wash From Marital Estate: A District Court order divided the marital estate, disregarding a car wash, equally between the parties. The District Court concluded that husband's interest in car wash would be maintained by him in order to provide an opportunity for future income because his physical disability affected his ability to earn a living. The Supreme Court affirmed the District Court decision and held that trial judge properly considered the positions of the parties at the outset of the marriage, the contributions of each party to the marriage, each party's age, health, and occupation, as well as each party's future prospects. In re Marriage of Childers, 216 M 125, 700 P2d 594, 42 St. Rep. 692 (1985).

Abuse of Discretion — Four Substantial Injustices: The property settlement was set aside by the Supreme Court because the District Court abused its discretion in four major areas. First, the husband's values for property, while not adopted absolutely verbatim, were almost always accepted without explanation even though the record indicates some of his values were questionable. Second, as her share of the marital estate the wife received household goods with inflated values while the husband received income-producing property such as stocks and an annuity. Third, nonincome-producing property brought into the marriage 15 years ago was deducted from the division of property, resulting in an inequitable and unworkable property division. Fourth, various "credits"—payments on real property, withdrawals from checking accounts, and child support—appeared as distributions of property, but it was unclear what constituted a credit in this context. In re Marriage of Rolfe, 216 M 39, 699 P2d 79, 42 St. Rep. 623 (1985).

Discretion of Court to Divide Assets Unequally:

The District Court did not err in its determination that husband, a "parasitic freeloader" who had victimized wife for 10 years, was not entitled to an interest in the marital residence. The trial court found that wife had owned the property prior to the marriage and that husband had made no contribution to the value of the property. Turner v. Turner, 206 M 292, 670 P2d 568, 40 St. Rep. 1666 (1983).

The District Court awarded wife more than half of the marital estate as well as temporary maintenance for the purpose of returning to school and reinstating her teaching certificate. Husband appealed on the division of property issue, and the Supreme Court found that the District Court had not abused its discretion. The Supreme Court ruled that this section does not require that the trial court distribute assets equally between the parties but rather that the court consider the criteria set forth and make an equitable distribution. In re Marriage of Hecht, 199 M 363, 649 P2d 1257, 39 St. Rep. 1455 (1982).

The court's duty under this section is to consider the section's factors for apportionment of the marital estate and then equitably divide it. Though the court may make an equal division, such a division is not mandated. This section is flexible and vests a good deal of discretion in the court, and each case must be looked at individually and with an eye to its unique circumstances. In this case, wife was awarded 78% of the marital property (exclusive of husband's retirement benefits) and husband 22%. Wife was awarded one-third and husband two-thirds of husband's future retirement benefits in two vested and unmatured plans and one unvested plan. The court made extensive findings in support of that division, including that: (1) wife had for the past 3 years paid the mortgage on the family home; (2) marriage was lengthy (29 years); (3) wife had been devoted to the care of their disabled and now deceased child, quitting her job to give such care; and (4) she had a much smaller earning capacity than husband. The court used very conscientious judgment and did not abuse its discretion, and the division would not be overturned on appeal. Laster v. Laster, 197 M 470, 643 P2d 597, 39 St. Rep. 737 (1982). See also Wallace v. Wallace, 203 M 255, 661 P2d 455, 40 St. Rep. 430 (1983).

Where the wife made the house payments for 5 months prior to the dissolution proceedings and desired and had the ability to continue doing so, while the husband did not wish to work and did not desire the house, the court did not abuse its discretion in dividing the equity in the house two-thirds to the wife and one-third to the husband. Martens v. Martens, 196 M 71, 637 P2d 523, 38 St. Rep. 2135 (1981).

Although an equal division of property is desirable, a division that favors one party over another is acceptable if there is a reason. The emphasis placed on the parties' needs and relative financial situations indicates a careful exercise of the trial court's discretion in awarding the respondent approximately two-thirds of the marital estate, and the trial court's property division will not be disturbed absent a showing that it has abused its discretion. Bailey v. Bailey, 184 M

418, 603 P2d 259 (1979). See also Creon v. Creon, 195 M 254, 635 P2d 1308, 38 St. Rep. 1828 (1981), followed in In re Marriage of Kowis, 202 M 371, 658 P2d 1084, 40 St. Rep. 149 (1983).

Personal and Real Property Equally Apportioned — No Abuse of Discretion Shown: Where the parties to a divorce proceeding owned a residence, personal property, and other real property used as rental units by the parties, the District Court did not abuse its discretion in apportioning the marital property when it awarded the residence and a portion of the personal property, valued at $46,403, to the wife and the rental units and personal property, valued at $43,008, to the husband, and the wife was ordered to pay the husband $587.23. From these facts it appeared that the District Court had ordered a substantially equal division. Holston v. Holston, 205 M 470, 668 P2d 1048, 40 St. Rep. 1435 (1983).

Other Relevant Factors: The husband contended the District Court erred in distributing property, including property acquired prior to marriage. The Supreme Court held that marriage is not a business relationship. Equitable distribution of marital assets depends upon more than just each party's initial financial contribution to the relationship. Many other relevant factors are found in 40-4-202(1). The court gave consideration to the parties' occupations, amounts and sources of income, vocational skills, employability, estates, needs, and opportunities for future acquisition of capital assets and income. There was no abuse of discretion in distributing the marital estate. Vance v. Vance, 204 M 267, 664 P2d 907, 40 St. Rep. 836 (1983), as related to denial of mistrial based on failure to consider allegations of marital misconduct, followed in In re Marriage of Fitzmorris, 229 M 96, 745 P2d 353, 44 St. Rep. 1809 (1987). See also In re Marriage of Dalley, 232 M 235, 756 P2d 1131, 45 St. Rep. 1017 (1988).

Proper for Ill Husband to Receive Greater Portion of Marital Estate: A 41-year-old wife was in good health, regularly employed, and had excellent future employment opportunities. The 45-year-old husband was in poor health due to a stroke, was unemployed, and had a limited chance of future employment. It was not an abuse of discretion for the trial court to award the husband a greater portion of the marital estate. In re Marriage of Crabtree, 200 M 178, 651 P2d 29, 39 St. Rep. 1668 (1982).

Contributions of Spouse

Imputed Annual Income Exceeding Husband's Current Income Proper — Imputed Income Based on Gifts From Husband's Mother Improper: In a 2015 divorce proceeding, the District Court imputed an annual earning capacity of $175,000 to the husband in awarding child support and maintenance. The determination was based on a 2011 statement by the husband that he could potentially earn $100,000 a year, on his work experience and qualifications in the financial industry, and on prior gifts from his mother to the marital estate of $75,000 a year. On appeal, the husband argued that he had not made $100,000 a year since before 2007, that his current income was substantially lower, and that the District Court erred by assuming he would receive $75,000 a year from his mother. The Supreme Court affirmed the District Court's finding of $100,000 a year based on the record. However, the Supreme Court reversed the District Court regarding the gifts of $75,000 a year from the husband's mother because there was no guarantee that he would continue to receive substantial gifts in the foreseeable future. In re Marriage of Paschen, 2015 MT 350, 382 Mont. 34, 363 P.3d 444. See also In re Marriage of Miller, 2022 MT 110, 409 Mont. 29, 511 P.3d 307.

Wife's Contributions — Husband's Real Property Interest Prior to Marriage — Inclusion of Real Property in Marital Estate — Distribution Affirmed: A husband had an interest in real property prior to meeting his wife. During the course of the marriage, the parties acquired another piece of real property. The wife paid household expenses, while the husband continued to pay on the mortgages on the two properties. The parties then decided to move to Montana, which required the wife to give up her job, and they purchased a home in Montana. Shortly thereafter, the husband filed for divorce. The District Court included all three properties in the marital estate, concluding that even if the wife did not pay on them directly, her contributions for household expenses allowed the husband to make mortgage payments on the first two properties. The husband appealed the distribution to the Supreme Court. Citing its recent ruling in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270, P.3d 39, the Supreme Court reiterated that a court has discretion to examine the circumstances of each case where preacquired property is at issue. Given the wife's substantial contributions during the marriage, the Supreme Court affirmed the District Court's findings. In re Marriage of Tummarello, 2012 MT 18, 363 Mont. 387, 270 P.3d 28.

Preacquired, Gifted, and Inherited Property — No Automatic Exclusion From Marital Estate — Distribution of Parties' Assets to Be Equitable — Inconsistent Case Law Overruled: During the parties' marriage, the husband inherited over 100 acres of real property in the Flathead Lake area, including lakefront property. In its distribution of the parties' assets, the District Court included the husband's inherited real property. The husband appealed, claiming that because the wife had not contributed to the inherited property, it could not be considered a part of the marital estate. Recognizing that its jurisprudence regarding the distribution of preacquired, gifted, and inherited property in dissolutions had been inconsistent, the Supreme Court overruled all case law to the extent it required that preacquired, gifted, and inherited property be excluded from the distribution of the marital estate. A court has the discretion to award all of the parties' property, whether or not it is preacquired, gifted, or inherited property, as long as the distribution is equitable. In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, followed in In re Marriage of Caras, 2012 MT 25, 364 Mont. 32, 270 P.3d 48. See also In re Marriage of Tummarello, 2012 MT 18, 363 Mont. 387, 270 P.3d 28, and Loi v. Feeley, 2012 MT 91, 365 Mont. 7, 277 P.3d 1195.

Improper Award to Wife of All Equity in Marital Residence Given Husband's Monetary Contributions: A wife purchased a home and was the sole owner until dissolution proceedings began. The common-law husband lived in the residence for 10 years, and mortgage payments were made from the proceeds of the parties' antiques business, generated by the parties' mutual efforts. At trial, the husband claimed an equitable portion of the marital residence, but the trial court rejected the claim on grounds that the husband's efforts did not rise to the level necessary to share in the marital equity even though he did contribute to mortgage payments. On appeal, the Supreme Court reversed. Citing In re Marriage of Engen, 1998 MT 153, 289 Mont. 299, 961 P.2d 738, the court held that the nonacquiring spouse's contribution to the property's preservation, maintenance, or appreciation required the trial court to award the husband an equitable share of the value attributed to his efforts. The case was remanded for appropriate findings to determine the husband's contributions and proper distribution. Arnold v. Sullivan, 2010 MT 30, 355 Mont. 177, 226 P.3d 594.

Prenuptial Agreement Not Addressing Future Property Improvements — Distribution of Increased Value Between Parties Proper: The parties signed a prenuptial agreement that retained ownership of real property with the husband. Over the course of a 27-year marriage, the wife made considerable financial and physical contributions toward improving the property and increasing its value. Upon dissolution the husband contended that, according to the prenuptial agreement, the wife was not entitled to any property distribution. The District Court disagreed and recognized the wife's contributions to the property improvements and granted the wife one-half of the increased value of the property. The husband appealed, but the Supreme Court affirmed. The prenuptial agreement addressed the ownership of the property at the time of signing but was silent on distribution of any increased value of the property. There was substantial credible evidence in the record to support the District Court's interpretation of the prenuptial agreement and the equitable distribution of the increased property value between the parties. Deschamps v. Deschamps, 2009 MT 431, 354 M 94, 223 P3d 324 (2009). See also In re Marriage of Rolf, 2000 MT 361, 303 M 349, 16 P3d 345 (2000), and In re Marriage of Bartsch, 2007 MT 136, 337 M 386, 162 P3d 72 (2007).

No Spousal Contribution to Inheritance Trust — Spouse Not Entitled to Share in Trust Value — Trust to Be Excluded From Marital Estate: The District Court included the value of the husband's trust in the marital estate, and the husband appealed. The Supreme Court reversed. Although the wife contributed substantially to the marital assets and estate by raising the couple's children, performing homemaking activities, and contributing all her assets to the marital estate, her contributions did not facilitate the maintenance or enhance the value of the trust or have any impact on the value or distribution provisions of the trust. Thus, the wife was not entitled to an equitable share of the trust's preserved or appreciated value, and the trust should not have been included in the marital estate for distribution purposes. However, the husband's future trust income could be considered when distributing the existing marital estate in regard to the husband's opportunity for future acquisition of capital assets. In re Marriage of Harris, 2006 MT 63, 331 M 368, 132 P3d 502 (2006), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Award of Disproportionate Share of Marital Estate to Wife Supported by Substantial Evidence — No Maintenance Awarded: When Sherri and Steve divorced, the District Court awarded a disproportionate share in the marital estate to Sherri. Steve argued on appeal that Sherri did not seek maintenance or a disproportionate share of the marital estate, that Sherri entered the marriage with no job and virtually no assets, that she made no contribution to Steve's business while the two were married, that Sherri's business was capitalized by Steve, that Sherri had a sustainable income from that business of $25,000 annually, and that Sherri failed to contribute to or maintain assets that were acquired by Steve before the marriage. The Supreme Court said that maintenance was not an issue, that Sherri purchased and contributed to a tract of land used for Steve's business, that she contributed her services as a housewife and mother in maintaining Steve's property, and that the District Court presumably determined that Sherri worked for Steve's business for over 10 years. For these reasons, the Supreme Court held that the District Court's findings were supported by substantial evidence and were not clearly erroneous. In re Marriage of Helzer, 2004 MT 352, 324 M 371, 102 P3d 1263 (2004).

Spouse Entitled to Equitable Share of Marital Estate for Good Faith Effort to Improve Property: Prior to dissolution, the wife transferred prior-acquired real property to her children from a previous marriage. Because the husband's contributions were made after the marriage, there was no reason to award the husband any of the value of the property as it was prior to the marriage, so the District Court's award of one-half of the preacquired property to the husband was erroneous. However, the husband was entitled to an equitable share of the appreciated or preserved value of the marital estate from marriage to dissolution, and just because the wife no longer owned the property did not mean that the husband did not have a claim for his good faith efforts in improving that property. In re Marriage of Foster, 2004 MT 326, 324 M 114, 102 P3d 16 (2004), following In re Marriage of Herrera, 2004 MT 40, 320 M 71, 85 P3d 781 (2004), and followed in Kelly v. Thompson, 2009 MT 392, 353 M 361, 220 P3d 627 (2009). Herrera was overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Equal Distribution of Traceable Preacquired and Gifted Contributions Without Consideration of Spouse's Contribution Reversible Error: Most of the equity in the parties' residence was acquired through purchase with the husband's preacquired and gifted inheritance, yet the District Court divided the equity in the home equally on the basis that the property had been commingled with the parties' joint funds. Citing In re Marriage of Engen, 1998 MT 153, 289 M 299, 961 P2d 738 (1998), and Stoneman v. Drollinger, 2000 MT 274, 302 M 107, 14 P3d 12 (2000), the Supreme Court noted that a nonacquiring spouse is entitled to an equitable share of the appreciated or preserved value of inherited property that is attributable to that spouse's efforts, but that preacquired and gifted property need not be included in the estate if the nonacquiring spouse did not contribute to the property's appreciation or preservation. In this case, the court's equal distribution of the equity without consideration of the wife's contribution was reversible error. The District Court's conclusion that the husband's retirement account and a truck purchased with the husband's gifted funds should be included in the marital estate was also reversed because the wife contributed nothing to the appreciation or preservation of those items. Therefore, those assets were awarded to the husband. However, the District Court did not err in excluding the husband's fractional interest in an inherited family cabin from the marital estate because the wife made no significant contribution to the appreciation or preservation of the family property. In re Marriage of Herrera, 2004 MT 40, 320 M 71, 85 P3d 781 (2004). Engen, Stoneman, and Herrera were expressly overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

De Minimis Contributions by Spouse to Appreciation of Premarital Asset Precluding Share in Increased Value of Asset: The husband's ranch, acquired prior to the marriage, increased in value during the marriage. However, the appreciation of this premarital asset was due strictly to market and inflationary forces, rather than a product of the wife's monetary or nonmonetary contributions, which were minimal and infrequent. Nevertheless, the District Court awarded the wife $100,000 as her portion of the increased value of the ranch. The Supreme Court reversed, absent evidence that the wife's de minimis contributions facilitated the appreciation of the asset. In re Marriage of Grende, 2004 MT 36, 320 M 38, 85 P3d 788 (2004), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Consideration of Contribution of Nonacquiring Spouse Required — Gifted Property Included at Court's Discretion — Absence of Significant Spousal Contribution: In evaluating whether preacquired or gifted property should be included in the marital estate, a District Court is required to consider the contributions of the nonacquiring spouse, including the nonmonetary contributions of a homemaker. When the nonmonetary contributions of a homemaker are found to have facilitated the maintenance of preacquired or gifted property, the court may include that property in the marital estate. However, in the absence of a significant contribution on the part of the nonacquiring spouse, the court is free to exclude gifted assets or property from the marital estate. In the present case, the court did not clearly err in finding an absence of a significant contribution by the wife to the increase of value of stock, as supported by substantial credible evidence, and the court properly applied this section in concluding that the value of the husband's gifted stock shares should not be included in the marital estate. In re Marriage of Harper, 1999 MT 321, 297 M 290, 994 P2d 1, 56 St. Rep. 1280 (1999), following In re Marriage of Luisi, 232 M 243, 756 P2d 456, 45 St. Rep. 1023 (1988), and In re Marriage of Engen, 1998 MT 153, 289 M 299, 961 P2d 738 (1998), and distinguishing In re Marriage of Davies, 266 M 466, 880 P2d 1368, 51 St. Rep. 929 (1994). See also In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Inclusion of Entire Appraised Value of Residence in Marital Estate Rather Than Appreciation in Value Accrued During Marriage Not Error — Significant Contributions of Spouse: The District Court included the entire appraised value of the family residence in the marital estate, rather than the appreciation in value accrued during the marriage. The husband contended that the spouses should not share equally in the total value of the home because it came from his mother. The court found that the wife's contributions to the marriage were significant and did not err in concluding that her contributions facilitated the maintenance and preservation of the family residence, entitling her to an equitable share of the preserved value. In re Marriage of Davis, 1999 MT 218, 295 M 546, 986 P2d 408, 56 St. Rep. 856 (1999).

Findings Regarding Wife's Minor Contributions to Marital Estate as Homemaker Affirmed: In considering wife Sue's marital contributions, the District Court relied on substantial evidence in finding that Sue made only minor contributions to the parties' ranching operation; was not employed outside the home; and employed housekeepers, nannies, and ranch hands to assist with household and ranch duties; and that most of Sue's contribution to the maintenance of the marital estate consisted of spending her husband's money. In re Marriage of Pfeifer, 282 M 461, 938 P2d 684, 54 St. Rep. 432 (1997).

Distribution of Gift, Inheritance, and Premarital Property — Contributions of Nonacquiring Spouse to Be Considered — No Gender Bias: In distributing premarital property or its increased value or property acquired by gift or inheritance, the court must consider the contributions of the nonacquiring spouse. In this case, wife was the beneficiary of two trusts acquired prior to marriage. She was sole trustor and beneficiary of the trusts. Notwithstanding husband's contention that he was entitled to some benefit from the trusts as a result of his nonmonetary contributions of emotional support, child care, and homemaking skills, the District Court properly held that husband was not entitled to any of the trust assets because he failed to demonstrate that his actions in any way maintained or increased the value of the corpus of the trusts. None of husband's support efforts substantially aided in the accumulation or maintenance of the trust assets acquired prior to marriage. Further, husband's contention that he was treated differently by the court by virtue of his gender because he was a male engaged in the nontraditional role of homemaker and caretaker was unfounded. Had gender been reversed, given husband's lack of enhancement or maintenance of the premarital assets, the results would have been the same. In re Marriage of Smith, 270 M 263, 891 P2d 522, 52 St. Rep. 174 (1995), followed in In re Marriage of Griffin, 275 M 37, 909 P2d 707, 53 St. Rep. 28 (1996), and overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Five-Month Marriage — Wife's Right to Share in House for Which Husband Paid: The lower court's grant of a $6,000 equity share in a house valued at $64,000 was reversed because husband made the downpayment and the mortgage, tax, and insurance payments, wife did not substantially contribute to the value of the house monetarily or as a homemaker, and the parties separated 5 months after the wedding. In re Marriage of Bradshaw, 270 M 222, 891 P2d 506, 52 St. Rep. 154 (1995), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

General Contributions as Basis for Award of Half of Appreciation of Property Husband Brought to Marriage: Wife who, among other things, remodeled and painted buildings on the parties' various properties, performed daily housekeeping, and kept the marital financial records and who contributed in some fashion, though not significantly, to the maintenance and appreciation of two properties husband brought to the marriage was properly awarded one-half the value of the appreciation of the two properties. In re Marriage of Maedje, 263 M 262, 868 P2d 580, 51 St. Rep. 47 (1994), followed in In re Marriage of Davies, 266 M 466, 880 P2d 1368, 51 St. Rep. 929 (1994).

Temporary Maintenance in Lieu of Larger Portion of Marital Estate: The Supreme Court upheld the lower court's award of temporary maintenance in lieu of a larger portion of the marital estate in light of the wife's contributions as mother and homemaker and in consideration of each party's future earning capacity. In re Marriage of Tahija, 253 M 505, 833 P2d 1095, 49 St. Rep. 571 (1992).

Abuse of Discretion in Not Awarding Wife Greater Equity in Farm Business: Shortly after separation, the husband set up a solely owned corporation to manage his interest in his family's newly reorganized farm business. The Supreme Court held that the lower court abused its discretion in awarding the wife only $2,500 of the $31,600 in equity in her husband's corporation in light of her contributions during the marriage. In re Marriage of McFarland, 240 M 209, 783 P2d 409, 46 St. Rep. 2060 (1989).

Unconscionability Standard — Applies Only to Separation Agreements: In a divorce proceeding, the trial court stated that the wife's contribution in raising three children and running the family home was negligible and that therefore it was not unconscionable to give the husband 75% of the marital property. The Supreme Court reversed the decision, ruling that the standard of conscionability only applies to separation agreements and in divorce proceedings the property must be divided on an equitable basis. The court also ruled that the lower court had abused its discretion in finding that the wife's contribution was negligible. In re Marriage of Miller, 238 M 197, 777 P2d 319, 46 St. Rep. 1199 (1989), followed in In re Marriage of Davies, 266 M 466, 880 P2d 1368, 51 St. Rep. 929 (1994).

Equal Division of Military Pension — Wife's Contribution as Homemaker: The District Court did not err in equally dividing the present value of husband's military pension after finding wife had foregone employment and the attendant retirement benefits in order to raise the children and maintain the family home. Additionally, her contribution as homemaker helped husband acquire two college degrees and a significantly higher earning capacity than her own. In re Marriage of Luisi, 232 M 243, 756 P2d 456, 45 St. Rep. 1023 (1988).

Contribution of Wife as Homemaker and Mother Valid Basis for Equal Division of Marital Property: The District Court, after reciting the substantial contributions of the husband in working the ranch and the wife as homemaker and mother, did not abuse its discretion by awarding each party one-half of the marital estate. The court followed the statutory mandate of 40-4-202 to consider the contribution of a spouse as homemaker and mother. Jacobson v. Jacobson, 183 M 517, 600 P2d 1183 (1979), followed in In re Marriage of Davies, 266 M 466, 880 P2d 1368, 51 St. Rep. 929 (1994). See also In re Marriage of Glass, 215 M 248, 697 P2d 96, 42 St. Rep. 328 (1985), and In re Marriage of Kimm, 260 M 479, 861 P2d 165, 50 St. Rep. 1146 (1993).

Orders as to Property: The court held that the wife, by virtue of her 14 years as mother, housewife, and part-time ranch hand, acquired a vested interest in the major marital asset, which was ranch property, regardless of its source and title. Brown v. Brown, 179 M 417, 587 P2d 361 (1978), distinguished in In re Marriage of Fitzmorris, 229 M 96, 745 P2d 353, 44 St. Rep. 1809 (1987). See also In re Marriage of Tonne, 226 M 1, 733 P2d 1280, 44 St. Rep. 411 (1987).

Equal Division

Marital Estate — Equitable Does Not Mean Equal — Significant Premarital Assets Not Divided: Because the wife had brought substantial assets to the marriage to which the husband had made little contribution toward maintaining and because the District Court properly considered other relevant circumstances under this section, such as the needs and employability of the parties, the District Court did not abuse its discretion by excluding premarital assets from the marital estate or in apportioning the marital estate. In re Marriage of Estes, 2017 MT 67, 387 Mont. 113, 391 P.3d 752.

Innocent Spouse Tax Determination Not Preclusive — Marital Dissolution Proceeding: Prior to their divorce, the husband and wife accumulated over $90,000 in delinquent tax liabilities owed on two properties. The wife then obtained a determination from the IRS and the Montana Department of Revenue that she was an "innocent spouse" and was, therefore, not liable to the agencies for any of the delinquent tax liability. At the dissolution proceeding, the wife acknowledged that she and her family benefited from the income that created the tax liability and that she was aware that she and her husband had incurred income tax debt during the marriage. However, the wife argued that, because she had been adjudicated an "innocent spouse," the tax liability should not be considered marital debt. The District Court disagreed, holding that the "innocent spouse" tax determinations had no preclusive effect in the dissolution proceeding, that a dissolution proceeding primarily relates to equitably apportioning marital debt regardless of how and when it was acquired, that the "innocent spouse" administrative determinations were not subject to judicial review and did not raise the same issues, and that issue preclusion therefore did not apply. The Supreme Court affirmed, holding that the District Court used its broad discretion to apportion the marital estate in a manner equitable to each party under the circumstances. Rose v. Rose, 2016 MT 7, 382 Mont. 88, 364 P.3d 1244.

Distribution of Property of Same-Sex Couple Affirmed: One party of a same-sex partnership purchased real property and paid for the initial property improvements, and the other party contributed money and labor to complete construction of the house and improvements to the real property. The District Court properly exercised its great flexibility in fashioning a property distribution using ordinary principles of equity in granting each party an equitable share of the property. Kulstad v. Maniaci, 2009 MT 326, 352 M 513, 220 P3d 595 (2009). See also Flood v. Kalinyaprak, 2004 MT 15, 319 M 280, 84 P3d 27 (2004), Anderson v. Woodward, 2009 MT 144, 350 M 343, 207 P3d 329 (2009), and LeFeber v. Johnson, 2009 MT 188, 351 M 75, 209 P3d 254 (2009).

Difference of One-Third of One Percent in Total Value of Marital Estate Considered Equitable: A husband and wife agreed in their settlement to an equal distribution of the marital estate. The total value of the estate was $407,465.34, and the final distribution favored the wife by $1,223.67, so the husband appealed because the distribution was not equal. The unequal distribution amounted to about 1/3 of 1% of the total value, a shortfall to the husband of 1/6 of 1% of the total value. The Supreme Court considered the distribution to be sufficiently equal to meet the terms of the parties' agreement, and the distribution was affirmed. In re Marriage of Hochhalter, 2001 MT 268, 307 M 261, 37 P3d 665 (2001).

Trial Court Discretion in Discounting Stock and Considering Profit-Sharing Plan — No Fault Ascribed to Findings and Assignment of Debt: The wife claimed error in division of marital property because the trial court imposed a de facto stock discount on shares of the husband's corporation, failed to include the interest in the husband's profit-sharing plan, and interjected fault into a no-fault dissolution through consideration of the fact that the wife's management of the family casino had resulted in large debts to the marital estate. The Supreme Court affirmed on each issue. The trial court was within its discretion in setting the stock value within the range of evidence presented at trial, and in light of the considerable amount of debt ascribed to the husband, it was reasonable for the court to grant the husband his profit-sharing plan proceeds. As to the claim of fault, the financial findings that the wife took issue with were proper and aided the court in considering the equitable distribution of the property, so no fault was interjected through the court's consideration of the business debts. In re Marriage of Hanni, 2000 MT 59, 299 M 20, 997 P2d 760, 57 St. Rep. 279 (2000). See also In re Marriage of Maedje, 263 M 262, 868 P2d 580, 51 St. Rep. 47 (1994).

Error in Failure of District Court to Impose Constructive Trust When Unjust Enrichment Would Result: Steve's parents advanced his wife Julie and him money to purchase marital property, and even though the advance was repaid, the parents retained title to the property and paid taxes and insurance on it. When the question arose as to division of the marital estate, the District Court concluded that a constructive trust should not be imposed because there was no evidence of fraud or other wrongful acts to support such a remedy. Although a constructive trust may be imposed because the titleholder obtained title by fraud, accident, mistake, undue influence, violation of a trust, or other wrongful act, these factors are not necessarily a prerequisite to imposing a constructive trust pursuant to 72-33-219 (now repealed). A constructive trust may also be imposed in cases when a titleholder innocently obtained title to property but would be unjustly enriched if allowed to retain title. In light of the fact that the initial purchase price was repaid, that Steve paid for improvements on the property, and that the parties acted as though Steve and Julie owned the property, the parents would have been unjustly enriched if they retained title. The District Court erred in not imposing a constructive trust in favor of Steve and Julie. The District Court was instructed to impose an equitable duty on Steve's parents to convey the property to Steve and Julie and to fully apportion the full value of the property when distributing the marital estate. In re Marriage of Moss, 1999 MT 62, 293 M 500, 977 P2d 322, 56 St. Rep. 257 (1999).

Error in Finding Husband Had Only One-Half Interest in Property Purchased With Advance From Parents: Steve's parents advanced his wife Julie and him money to purchase marital property, and even though the advance was repaid, the parents retained title to the property and paid taxes and insurance on it. Testimony was conflicting as to who had interest in the property and in what amount. When the question arose as to division of the marital estate, the District Court concluded that Steve's parents had advanced the money for the purchase of an interest in the property and that because Steve had repaid his parents in cash, he had a one-half interest as well. Thus, the court included only one-half the value of the property in the value of the marital estate. However, testimony from Julie and her parents indicated that once the property was paid for, Steve and Julie intended to put the property in their names and build a home there. Reversing, the Supreme Court decided that there was insufficient evidence for the conclusion that Steve had only a one-half interest and that the District Court erred in not imposing a constructive trust on the property so that Steve's parents would not be unjustly enriched. The District Court was instructed to impose an equitable duty on Steve's parents to convey the property to Steve and Julie and to fully apportion the full value of the property when distributing the marital estate. In re Marriage of Moss, 1999 MT 62, 293 M 500, 977 P2d 322, 56 St. Rep. 257 (1999).

Income Disparity Balanced by Property Division: Wife contended that because of the disparity between incomes, she should have been awarded additional income-producing property in order to ensure that she could continue to enjoy the standard of living that she had while married. Noting that she had been awarded $335,465 in property, $400,000 in cash, $6,977 a month in child support, and a temporary possessory interest in a 160-acre ranch worth at least $480,000, the Supreme Court held that this award would enable her to maintain her standard of living and provide her with the opportunity to acquire income or assets in the future, meeting her needs when perhaps her own earning power would not. The property division brought the income disparity reasonably into balance and did not constitute error. In re Marriage of Pfeifer, 282 M 461, 938 P2d 684, 54 St. Rep. 432 (1997), distinguishing In re Marriage of Smith, 191 M 200, 622 P2d 1022 (1981).

Unequal Property Division Offset by Increased Maintenance Award: Wife contended that the division of property in an amount equaling 78% to the husband and 22% to the wife was in error under the rationale of In re Marriage of Berthiaume, 173 M 421, 567 P2d 1388 (1977), which held that it is a clear abuse of discretion for a trial court to find that marital property should be divided as equally as possible and then to grant one party the majority of the property without making any offset provision for the other party. Distinguishing In re Marriage of Berthiaume, the Supreme Court cited In re Marriage of Fitzmorris, 229 M 96, 745 P2d 353 (1987), for the proposition that an equitable division need not be an equal division and noted that the trial court did not abuse its discretion in this case because the difference in the values of the properties was made up by increasing the amount of maintenance awarded to wife. In re Marriage of Corey, 266 M 304, 880 P2d 824, 51 St. Rep. 859 (1994).

Eighty-Four Percent/Sixteen Percent Division Upheld as Equitable: Joseph Barker appealed the District Court's division of the marital estate that gave Kristeen Barker the family home and 45% of his future military pension, resulting in an 84% to 16% split of the net assets. The Supreme Court reviewed the findings of the lower court with respect to income potential, present expenses, and contributions to preserving the family home and determined that the District Court had not abused its discretion but had arrived at an equitable rather than equal division of the property. In re Marriage of Barker, 264 M 110, 870 P2d 86, 51 St. Rep. 176 (1994).

No Modification Because of Unexpected Drop in Cattle Price: Despite a court order to equally divide marital property, husband entered into an agreement to pay $4,600 for ex-wife's interest in cattle. When the actual sales price of the cattle resulted in husband receiving less than 50% of the proceeds, the husband, citing the original court order for equal division, requested the court to modify the allocation of proceeds. The Supreme Court affirmed the District Court's denial of modification, holding that the husband's agreement to buy the wife's interest satisfied the parties' obligation to equally divide the proceeds. The fact that the wife received more than 50% of the cattle's actual value was a result of the agreement and not the court's decree. In re Marriage of Scoffield, 258 M 337, 852 P2d 664, 50 St. Rep. 560 (1993).

Error to Award Husband One-Half of Proceeds of Sale of Home: When wife had $23,000 in equity in the home and had purchased her former husband's one-half interest in the home for $23,000, it was error for the court to award her second husband one-half interest in the proceeds of the sale of the home. The second husband may be entitled to a portion of the appreciation in value of the home if his contributions during the marriage contributed to the appreciation in the value of the home. In re Marriage of Rock, 257 M 476, 850 P2d 296, 50 St. Rep. 369 (1993).

Expected Inheritance: Basing a wife's future acquisition on an inheritance to be received upon the death of her father is highly speculative and inappropriate. The District Court did not err in failing to take into consideration the possible inheritance. Marriage of Johnston, 249 M 298, 815 P2d 1145, 48 St. Rep. 677 (1991).

Gifts From Wife's Father Property of Wife: During the course of the marriage, wife's father gave the couple numerous gifts, the value of which exceeded the net worth of the couple. The most significant gift was Bismarck Bottling stock. Upon dissolution, the District Court awarded wife the stock and half the appreciation in the investment account. The District Court awarded husband half of the appreciation in the investment account plus an additional amount in consideration of his contributions to that appreciation. The Supreme Court held that the District Court did not err in allocating the proceeds of the stock. Marriage of Johnston, 249 M 298, 815 P2d 1145, 48 St. Rep. 677 (1991).

Equal Division of Value of Home Proper: Husband contended that an equal division of the value of the family home, which required he pay wife $44,892, was inequitable because the marriage was of short duration, producing no children, and that wife did not contribute to the marital assets. There was no abuse of discretion by the court because evidence showed: (1) wife had receipts totaling nearly $7,000 and testified she contributed $10,000 toward the value of the home; (2) wife assisted in painting the interior of the home, selected draperies and carpeting, and did cooking, cleaning, housework, and laundry during the marriage; and (3) husband had the financial means to pay $44,892. In re Marriage of Mahaffey, 245 M 424, 801 P2d 1335, 47 St. Rep. 1172 (1990).

Desire to Keep Farm Intact Justifying Cash Award: The husband appealed the large cash award made to the wife as part of the property settlement. The Supreme Court affirmed the award on the basis that the parties wanted to keep the family farm intact and therefore it was awarded to the husband. Since the wife was receiving no income-producing property, the large cash award was necessary to achieve an equitable settlement. In re Marriage of Ernst, 243 M 114, 793 P2d 777, 47 St. Rep. 1034 (1990).

Equity, Not Equality, as Guide in Division of Marital Estate: The husband contended that a property division was inequitable on its face because Montana law favors equal division of assets. This was a misstatement of the law. Equity, not equality, should guide the District Court's discretion in dividing the marital estate. In re Marriage of Fitzmorris, 229 M 96, 745 P2d 353, 44 St. Rep. 1809 (1987), followed in In re Marriage of Scott, 254 M 81, 835 P2d 710, 49 St. Rep. 634 (1992), In re Marriage of Zander, 262 M 215, 864 P2d 1225, 50 St. Rep. 1522 (1993), and In re Marriage of Corey, 266 M 304, 880 P2d 824, 51 St. Rep. 859 (1994). See also In re Marriage of Jones, 229 M 128, 745 P2d 350, 44 St. Rep. 1834 (1987), In re Marriage of McNellis, 267 M 492, 885 P2d 412, 51 St. Rep. 1125 (1994), and In re Marriage of Payer, 2005 MT 89, 326 M 459, 110 P3d 460 (2005).

Factors Considered in Equal Division: The District Court did not err in dividing marital property on a 50-50 basis when the division was based on the nature of the assets, contributions of the parties, education and employment backgrounds and prospects of the parties, the health of the parties, and the needs of both parties as parents. In re Marriage of Hammill, 225 M 263, 732 P2d 403, 44 St. Rep. 220 (1987).

Equal Division of Assets Not Required: Although the District Court may equally divide the marital assets, such a distribution is not required by 40-4-202. Jacobson v. Jacobson, 183 M 517, 600 P2d 1183 (1979); Aanenson v. Aanenson, 183 M 229, 598 P2d 1120 (1979); In re Marriage of Eklund, 236 M 77, 768 P2d 340, 46 St. Rep. 194 (1989). See also In re Marriage of Owen, 187 M 214, 609 P2d 292 (1980).

Equal Contributions:

District Court, which concluded that parties made approximately equal contributions to accumulation of property, including family home, did not abuse its discretion in rendering judgment which effected equal property division based on equal contributions by each party. Zell v. Zell, 174 M 216, 570 P2d 33 (1977).

Divorce court did not abuse its discretion in effecting equal property division based upon equal contributions by each party. Eschenburg v. Eschenburg, 171 M 247, 557 P2d 1014 (1976).

Court's Power to Equally Divide Marital Property: Equal division of property accumulated during marriage was not unreasonable and was within court's power even though husband had made greater contributions during marriage and most of the property was held in his name. Cook v. Cook, 159 M 98, 495 P2d 591 (1972).

Prior-Acquired, Gifted, or Inherited Property

Wife's Contributions — Husband's Real Property Interest Prior to Marriage — Inclusion of Real Property in Marital Estate — Distribution Affirmed: A husband had an interest in real property prior to meeting his wife. During the course of the marriage, the parties acquired another piece of real property. The wife paid household expenses, while the husband continued to pay on the mortgages on the two properties. The parties then decided to move to Montana, which required the wife to give up her job, and they purchased a home in Montana. Shortly thereafter, the husband filed for divorce. The District Court included all three properties in the marital estate, concluding that even if the wife did not pay on them directly, her contributions for household expenses allowed the husband to make mortgage payments on the first two properties. The husband appealed the distribution to the Supreme Court. Citing its recent ruling in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270, P.3d 39, the Supreme Court reiterated that a court has discretion to examine the circumstances of each case where preacquired property is at issue. Given the wife's substantial contributions during the marriage, the Supreme Court affirmed the District Court's findings. In re Marriage of Tummarello, 2012 MT 18, 363 Mont. 387, 270 P.3d 28.

Preacquired, Gifted, and Inherited Property — No Automatic Exclusion From Marital Estate — Distribution of Parties' Assets to Be Equitable — Inconsistent Case Law Overruled: During the parties' marriage, the husband inherited over 100 acres of real property in the Flathead Lake area, including lakefront property. In its distribution of the parties' assets, the District Court included the husband's inherited real property. The husband appealed, claiming that because the wife had not contributed to the inherited property, it could not be considered a part of the marital estate. Recognizing that its jurisprudence regarding the distribution of preacquired, gifted, and inherited property in dissolutions had been inconsistent, the Supreme Court overruled all case law to the extent it required that preacquired, gifted, and inherited property be excluded from the distribution of the marital estate. A court has the discretion to award all of the parties' property, whether or not it is preacquired, gifted, or inherited property, as long as the distribution is equitable. In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, followed in In re Marriage of Caras, 2012 MT 25, 364 Mont. 32, 270 P.3d 48. See also In re Marriage of Tummarello, 2012 MT 18, 363 Mont. 387, 270 P.3d 28, and Loi v. Feeley, 2012 MT 91, 365 Mont. 7, 277 P.3d 1195.

Real Property Purchased Prior to Marriage by Wife From Husband Properly Excluded From Marital Estate: When a 7-acre property with home and a 77-acre property were titled solely in the wife's name, the wife paid all taxes on the property, and the husband failed to testify as to when he made improvements to the properties, the District Court's finding that the husband did not make a substantial contribution to the properties was not clearly erroneous. In re Marriage of Lundstrom and Scholz, 2010 MT 261, 358 Mont. 318, 245 P.3d 25.

Business and Net Proceeds of Home Considered Premarital Assets: The wife contended that the marital estate was improperly distributed because the District Court attributed the husband's business and the net proceeds of the parties' home, except for $23,179 contributed by the wife, to the husband. The Supreme Court affirmed the trial finding that the business and net proceeds of the home were part of the husband's premarital assets and inheritance and should be allocated to the husband and that an equalization payment of $36,583 should be made to the wife as her portion of the marital estate. In re Marriage of Markegard, 2006 MT 111, 332 M 187, 136 P3d 532 (2006), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Existence and Valuation of "Gift" of Construction Labor and Materials for Home — Commingling of Gift in Marital Property — Multiple Issues Raised: When Tammy and Robert were divorced, the District Court awarded them each a net distribution from the marital property of nearly $73,000. Excluded from that distribution was an $80,000 gift to Tammy of construction labor and material that was given to her by her father in the construction of a log home on property that the couple purchased in Sanders County. Tammy and Robert both valued the home at $200,000 at the time of their divorce. Robert challenged the reduction in the value of the marital property by the amount of the gift on multiple grounds and raised other issues as well on appeal. In response to Robert's arguments, the Supreme Court held that: (1) although there was conflicting evidence of the gift (Robert, for instance, claimed no knowledge of the gift until the divorce proceeding), there was sufficient evidence of the gift's existence for the District Court to base its findings and conclusions on; (2) unlike the situation in In re Marriage of Herron, 186 M 396, 608 P2d 97

(1980), there was no need to trace the gift because it was only a single gift, the value of which was embedded in the total value of the home, on which the parties agreed, and there was therefore nothing to "trace"; (3) citing In re Marriage of Engen, 1998 MT 153, 289 M 299, 961 P2d 738 (1998), there was no reason why, just because the gift was commingled with marital property, the gift could not be separated from the value of the house as a whole because commingling does not automatically preclude a gift from being considered as separate property; (4) the District Court's valuation of the gift was problematic because if the value of the home was $200,000 and construction costs were reasonably evidenced by the "construction cost breakdown" paper given by Robert to the parties' financing bank, then the value of the gift could not be $80,000, as alleged by Tammy and her father, so the Supreme Court must remand the case back to the District Court for more accurate findings as to the value of the gift and a redistribution of the property in accordance with the new findings; (5) although Robert claimed that the District Court ignored evidence of the value of his contribution to the home, a more accurate statement would be that the court failed to include specific findings on this issue, but the District Court did find that the value of each party's contribution was substantially equal, a finding that was supported by the evidence and was therefore sufficient, pursuant to In re Marriage of Mouat, 228 M 430, 743 P2d 602 (1987); (6) citing In re Marriage of Mease, 2004 MT 59, 320 M 229, 92 P3d 1148 (2004), it would not disturb the District Court's findings with regard to the valuation of Robert's guns and Tammy's equestrian tack because the District Court was in the best position to observe the witnesses testifying on the issue and judge their credibility; and (7) it would not disturb the District Court's findings with regard to the income of both parties because the District Court noted that the parties "did an incomplete and poor job of stating Income and Deductions". In re Marriage of Horton, 2004 MT 353, 324 M 382, 102 P3d 1276 (2004). Engen was overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Spouse Entitled to Equitable Share of Marital Estate for Good Faith Effort to Improve Property: Prior to dissolution, the wife transferred prior-acquired real property to her children from a previous marriage. Because the husband's contributions were made after the marriage, there was no reason to award the husband any of the value of the property as it was prior to the marriage, so the District Court's award of one-half of the preacquired property to the husband was erroneous. However, the husband was entitled to an equitable share of the appreciated or preserved value of the marital estate from marriage to dissolution, and just because the wife no longer owned the property did not mean that the husband did not have a claim for his good faith efforts in improving that property. In re Marriage of Foster, 2004 MT 326, 324 M 114, 102 P3d 16 (2004), following In re Marriage of Herrera, 2004 MT 40, 320 M 71, 85 P3d 781 (2004). Herrera was overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Consideration of Parties' Contributions From Prior-Acquired Property — Distribution Equitable: The parties both contributed their personal money and prior-acquired trust fund money to the marital estate, most of which went to building the family home. The wife contributed $53,000, and the husband contributed over $1 million. The District Court was apprised of the contributions, but rather than mechanically applying any rule, the court divided the property after considering the parties' contributions, their ages, previous marriages, occupations, sources of income, the short duration of the marriage, liabilities, and custodial provisions. The Supreme Court held that regardless of whether the funds used to build the home were previously acquired or gifted assets, the distribution was equitable, given that the parties spent large sums supporting their lifestyle and had overinvested in the home, the total investment of which was not recoverable because of the sale price. In re Marriage of Killpack, 2004 MT 55, 320 M 186, 87 P3d 393 (2004).

Equal Distribution of Traceable Preacquired and Gifted Contributions Without Consideration of Spouse's Contribution Reversible Error: Most of the equity in the parties' residence was acquired through purchase with the husband's preacquired and gifted inheritance, yet the District Court divided the equity in the home equally on the basis that the property had been commingled with the parties' joint funds. Citing In re Marriage of Engen, 1998 MT 153, 289 M 299, 961 P2d 738 (1998), and Stoneman v. Drollinger, 2000 MT 274, 302 M 107, 14 P3d 12 (2000), the Supreme Court noted that a nonacquiring spouse is entitled to an equitable share of the appreciated or preserved value of inherited property that is attributable to that spouse's efforts, but that preacquired and gifted property need not be included in the estate if the nonacquiring spouse did not contribute to the property's appreciation or preservation. In this case, the court's equal distribution of the equity without consideration of the wife's contribution was reversible error. The District Court's conclusion that the husband's retirement account and a truck purchased with the husband's gifted funds should be included in the marital estate was also reversed because the wife contributed nothing to the appreciation or preservation of those items. Therefore, those assets were awarded to the husband. However, the District Court did not err in excluding the husband's fractional interest in an inherited family cabin from the marital estate because the wife made no significant contribution to the appreciation or preservation of the family property. In re Marriage of Herrera, 2004 MT 40, 320 M 71, 85 P3d 781 (2004). Engen, Stoneman, and Herrera were expressly overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Limited Amount of Husband's Premarital Real Property Included in Estate Despite Wife's Contribution — No Error When Insurance Settlement Accommodated Wife's Contributions: The District Court held that existing real property on the husband's out-of-state farmland was largely part of the husband's premarital property, so only a very limited amount was included in the distribution of the marital estate. The wife appealed on grounds that she had contributed greatly to the value of the property, so more should have been included in the estate. The husband acknowledged the wife's contributions to the construction of a home on the farmland, but asserted that her contribution was destroyed when the home burned to the ground, essentially returning the land to its status prior to construction, and maintained that the insurance settlement from the fire now constituted her contribution to the estate in regard to the property. The husband also noted that both parties had converted the settlement money into retirement accounts and replacement property. The Supreme Court agreed with the husband. The wife may have contributed to the appreciation of the farmland with the improvements on it, but the insurance settlement accommodated her contributions, so the District Court did not abuse its discretion in excluding most of the farmland from the marital estate. In re Marriage of Haberkern, 2004 MT 29, 319 M 393, 85 P3d 743 (2004).

Premarital Farm Property Properly Excluded From Marital Estate: The District Court excluded some of the husband's premarital farm property from the marital estate. The wife contended that the exclusion was erroneous and appealed. In dividing marital property acquired prior to marriage, a District Court must consider a homemaker's nonmonetary contributions and the extent to which those contributions facilitated the maintenance of the property. In this case, the husband acquired the majority of the farm and ranch assets prior to the marriage and the wife brought no significant assets to the marriage. The wife worked full time outside the home for almost the entire marriage and maintained a separate bank account solely in her name, to which the husband had no access or input regarding how it was spent. Many of the family expenses were paid out of the farm account. The wife's involvement with the farm was minimal, and her income did not contribute significantly to preservation or maintenance of the farm and ranch operation. As set out in In re Marriage of Engen, 1998 MT 153, 289 M 299, 961 P2d 738 (1998), a District Court cannot distribute to a nonacquiring spouse property acquired before the marriage if there is no evidence that the spouse made any contribution to the assets in any form, so the distribution of the farm and ranch property to the husband was not clearly erroneous, and the distribution was affirmed. In re Marriage of Banka, 2003 MT 84, 315 M 97, 67 P3d 885 (2003), followed in In re Marriage of Dirnberger, 2007 MT 84, 337 M 56, 154 P3d 1227 (2007). Engen, Banka, and Dirnberger were overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Summary Award of Appreciated Value of Premarital Property Without Regard to Spouse's Respective Contribution Improper: The District Court computed the value of the husband's premarital property before the marriage and at separation and summarily awarded the wife two-thirds of the appreciation. Although the wife may have been entitled to some of the appreciation based on her contributions to the assets, absent any consideration of the wife's respective contribution to each of the assets, it was error to simply tabulate the appreciation and award the wife two-thirds of the value of the assets. In re Marriage of Steinbeisser, 2002 MT 309, 313 M 74, 60 P3d 441 (2002), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Failure to Contribute to Home That Did Not Appreciate in Value During Marriage: Although the wife contributed for 14 months as a homemaker to a home that the husband acquired shortly before the marriage, the evidence was that the house was worth less upon dissolution of the marriage than what the husband paid for it. In addition, it appeared that the total marital estate did not increase in value during the marriage. The District Court erred when it included the home in the marital estate and awarded a portion of the value of it to the wife without finding that it had appreciated in value during the marriage and that her contributions facilitated the maintenance of the home or served as an alternative to maintenance arrangements. In re Marriage of Rolf, 2000 MT 361, 303 M 349, 16 P3d 345, 57 St. Rep. 1536 (2000), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Inheritance Advance Properly Excluded in Equity From Marital Estate: As an estate planning device, a couple was able to purchase a home from the husband's mother valued at $131,000 for $50,000, representing an advance on the husband's inheritance of $81,000. In distributing the marital estate, the District Court subtracted the husband's inheritance advance, as well as the remaining debts on the residence, from the appraised value of the home and then divided the equity in the home and the marital debt equally, except for a credit to the husband for one-half the debts that he paid after separation. The wife claimed error in excluding the $81,000, arguing that the property was commingled with the marital property, that her contributions to the property were significant, and that the gift was to the two of them as a couple, not to the husband alone. Affirming, the Supreme Court found that the division of marital equity in the home was logical and that the husband was entitled to an exclusion from the marital estate in the amount that represented an advance on his inheritance, which was the $81,000 difference between the amount that the couple purchased the home for and the value of the home at the time of purchase. Because of the wife's significant contributions to the value of the home, she was entitled to one-half of any equity in the house that represented the amount paid for the house during the marriage, in addition to the appreciation that occurred during the marriage, but she was not entitled to the equity in the house that represented a gift from the husband's mother. Siefke v. Siefke, 2000 MT 281, 302 M 157, 13 P3d 937, 57 St. Rep. 1175 (2000), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

No Contribution by Wife to Husband's Inherited Property — Proper Designation as Nonmarital Property: The husband inherited farm property in Illinois, in which the wife claimed an interest upon dissolution of the marriage. The District Court held that the property was not part of the marital estate, and the Supreme Court agreed. A nonacquiring spouse is entitled to an equitable share of only the appreciated or preserved value of the inherited property that is attributable to that spouse's contributions. Here, neither spouse contributed to the appreciation or preservation of the property, worked on the farm, or made any sort of sacrifice that would increase or preserve the value of the property, which remained separate throughout the marriage. The wife was not entitled to the property simply by virtue of being the family homemaker without proof that she had somehow contributed to an appreciation in the value of the property during the marriage. The Illinois farm and the proceeds from its partial sale were traceable to the original inheritance and were properly treated as nonmarital property. In re Marriage of Stoneman, 2000 MT 274, 302 M 107, 14 P3d 12, 57 St. Rep. 1145 (2000). See also In re Marriage of Smith, 264 M 306, 871 P2d 884 (1994). Stoneman and Smith were expressly overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Consideration of Contribution of Nonacquiring Spouse Required — Gifted Property Included at Court's Discretion — Absence of Significant Spousal Contribution: In evaluating whether preacquired or gifted property should be included in the marital estate, a District Court is required to consider the contributions of the nonacquiring spouse, including the nonmonetary contributions of a homemaker. When the nonmonetary contributions of a homemaker are found to have facilitated the maintenance of preacquired or gifted property, the court may include that property in the marital estate. However, in the absence of a significant contribution on the part of the nonacquiring spouse, the court is free to exclude gifted assets or property from the marital estate. In the present case, the court did not clearly err in finding an absence of a significant contribution by the wife to the increase of value of stock, as supported by substantial credible evidence, and the court properly applied this section in concluding that the value of the husband's gifted stock shares should not be included in the marital estate. In re Marriage of Harper, 1999 MT 321, 297 M 290, 994 P2d 1, 56 St. Rep. 1280 (1999), following In re Marriage of Luisi, 232 M 243, 756 P2d 456, 45 St. Rep. 1023 (1988), and In re Marriage of Engen, 1998 MT 153, 289 M 299, 961 P2d 738 (1998), and distinguishing In re Marriage of Davies, 266 M 466, 880 P2d 1368, 51 St. Rep. 929 (1994). See also In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Entitlement to Equitable Share of Preserved Value of Property Based on Spouse's Indirect Contributions in Maintaining Property: The husband and wife enjoyed a very comfortable standard of living by using all their income for their needs and comforts with little or no income saved, intending to preserve the value of a Nebraska farm for retirement. The husband inherited the farm, and it was in his name. When dividing the marital estate, the husband contended that the wife was not entitled to a portion of the value of the farm because she did not contribute money for it. With respect to inherited property, a District Court must consider the contributions of the nonacquiring spouse to the marriage, including: (1) nonmonetary contributions of a homemaker; (2) the extent to which nonmonetary contributions facilitated the maintenance of the property; and (3) whether or not the property division serves as an alternative to maintenance arrangements. In the present case, although the wife did not contribute directly to the farm, the couple justified the assumption of high marital debts upon the fact that they intended to preserve the value of the husband's inheritance; therefore, in contributing as a homemaker and in allowing her earnings to be entirely dissipated in reliance upon her husband's inheritance, the wife indirectly facilitated the maintenance of the farm property and accordingly was entitled to an equitable share of its preserved value. In re Marriage of Foreman, 1999 MT 89, 294 M 181, 979 P2d 193, 56 St. Rep. 373 (1999), following Hill v. Hill, 197 M 451, 643 P2d 582, 39 St. Rep. 723 (1982), and distinguishing In re Marriage of Engen, 1998 MT 153, 961 P2d 738, 55 St. Rep. 595 (1998). See also In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Even Split of Account Both Contributed to — Refusal to Give Husband Full Value of His Contributions: Dennis brought $7,705 to the marriage and established a joint account from which the couple drew to pay bills and fund projects around the house. He also deposited $5,200 that he received during the marriage from disposition of a property interest that he acquired before the marriage. Martha deposited in the account money that she received from a previous employer's profit-sharing plan. They also deposited the proceeds of a home equity loan. Martha did most of the cooking and housework and payment of bills, thus contributing to maintenance of the account because such work would have otherwise been expenses of the marriage if done by someone else. The lower court did not abuse its discretion in evenly splitting the funds in the account upon dissolution of the marriage and in refusing to give Dennis the $7,705 originally in the account. In re Marriage of Hogstad, 275 M 489, 914 P2d 584, 53 St. Rep. 257 (1996), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Prior-Acquired Land That Spouse Did Not Contribute to Maintenance or Appreciation Of: Before marrying, Dennis acquired a property interest for $8,000. Upon dissolution of the marriage, the property had appreciated to $21,500 in value. Martha's contributions as a homemaker did not contribute to the maintenance and appreciation in value of the property. The District Court erred in giving Dennis $8,000 and one-half of the difference between $21,500 and $8,000 as his share of the value of the property. He should have been given the entire $21,500 value of the property. In re Marriage of Hogstad, 275 M 489, 914 P2d 584, 53 St. Rep. 257 (1996), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Prior-Acquired Assets Held Not Part of Marital Estate: Nordberg argued that the lower court erred in omitting his ex-wife's property from the marital estate. The Supreme Court held that those assets belonging to a spouse prior to a marriage or acquired by gift, bequest, devise, or descent during the marriage are not part of the marital estate unless the other spouse made contributions in the preservation or interest in the property. In re Marriage of Nordberg, 265 M 352, 877 P2d 987, 51 St. Rep. 531 (1994).

Lack of Spouse's Facilitation of Premarital Property as Precluding Proportionate Share of Estate: Wife objected to the amount she received in a dissolution proceeding based on percentage comparisons indicating a disproportionate property division. Husband brought substantially more property to the marriage, and wife's contribution to the maintenance of the property was minimal. A horseracing business was acquired with husband's premarital funds, but wife's efforts did not facilitate the business in light of the fact that the business lost about $231,000 during the marriage. Wife's award of a disproportionate share of the premarital property was therefore proper. In re Marriage of Scott, 254 M 81, 835 P2d 710, 49 St. Rep. 634 (1992).

Law Partnership Interest as Sole Property — Exclusion From Estate Proper: Husband acquired his interest in a law firm prior to marriage. Wife's nonmonetary contributions to the marriage did not facilitate the maintenance of the partnership asset. The District Court properly found that the partnership interest was husband's sole property and excluded the asset from the marital estate. In re Marriage of Gallagher, 248 M 100, 809 P2d 579, 48 St. Rep. 346 (1991), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Military Benefits From Prior Marriage Part of Marital Estate: In a dissolution case, the husband was awarded a military pension and disability pension that had accrued during a prior marriage. The Supreme Court held that the military benefits did constitute part of the marital assets of the second marriage. In re Marriage of Cooper, 243 M 175, 793 P2d 810, 47 St. Rep. 1112 (1990), partially overruled and clarified in In re Marriage of Murphy, 261 M 363, 862 P2d 1143, 50 St. Rep. 1360 (1993).

Property Acquired Prior to Marriage:

When a special master determined that in order to determine the value of each party's individual property it was necessary to consider joint assets and obligations acquired after engagement but before marriage, it was not error for the District Court to consider all the parties' mutual financial transactions and include premarital assets in the marital estate. Further, inclusion of premarital assets did not result in distribution of more than 100% of the marital estate. In re Marriage of Peterson, 238 M 470, 778 P2d 402, 46 St. Rep. 1424 (1989).

The District Court awarded equal shares in the equity of the family home to each party, although husband had owned the property prior to the marriage. Where wife had contributed to maintenance of the home and the home was mortgaged for the purpose of investing in joint business operations in which both spouses were involved, the division of equity in the property settlement was not reversible error. In re Marriage of Syljuberget, 234 M 178, 763 P2d 323, 45 St. Rep. 1825 (1988).

When property acquired by one party prior to marriage is subject to division in a dissolution proceeding, the District Court must consider the origin of the property, but the property acquired prior to marriage is still subject to division. Equitable apportionment does not require the parties be returned to their premarital status. In re Marriage of White, 218 M 343, 708 P2d 267, 42 St. Rep. 1634 (1985), followed in In re Marriage of Roullier, 229 M 348, 746 P2d 1081, 44 St. Rep. 2035 (1987), and In re Marriage of Walls, 278 M 413, 925 P2d 483, 53 St. Rep. 974 (1996).

District Court was not compelled in annulment action to order property acquired in joint names of husband and wife before marriage sold and proceeds divided equally between parties, but had right under evidence to find that husband had no ownership rights in property and to award property to wife on ground that husband's name was placed on deed only as security for downpayment loan made on property. Houser v. Houser, 173 M 65, 566 P2d 73 (1977).

Settlement Proceeds From Lawsuit Concerning Real Property in Community Property State Subject to Equitable Distribution: Prior to divorce, the husband and wife sued the husband's father over real estate located in California, resulting in a money judgment against the father. During the divorce proceeding, the husband argued that the real property, located in a community property state, had been gifted to him by his father and could not be considered part of the marital estate. The lower court's decision to divide the judgment proceeds equally was affirmed on appeal. The Supreme Court ruled that although Montana courts have no jurisdiction over real property located outside the state, the lawsuit in California had transformed the nature of the property to personal property over which Montana courts do have jurisdiction. In re Marriage of Grecian, 238 M 125, 777 P2d 283, 46 St. Rep. 1142 (1989).

Exclusion of Expected Inheritance: Husband claimed the District Court should have included the value of wife's expected inheritance in the marital estate. As held in Becker v. Becker, 218 M 229, 707 P2d 526, 42 St. Rep. 1541 (1985), property gifted during marriage may be excluded from the marital estate when an objecting spouse can claim no contribution to the property's value. Likewise, an expectation of property may be similarly excluded. In re Marriage of Dalley, 232 M 235, 756 P2d 1131, 45 St. Rep. 1017 (1988). Becker was overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Expectation of Inheritance: The court properly considered the husband's expectation of an inheritance in making an equitable division of the marital property. Under this section, the District Court must consider the future acquisition of assets in proceedings to divide property on dissolution of a marriage. The court might have erred if it had failed to consider the husband's expectation of an inheritance. In re Marriage of Alt, 218 M 327, 708 P2d 258, 42 St. Rep. 1621 (1985), followed in In re Marriage of Johns, 238 M 256, 776 P2d 839, 46 St. Rep. 1249 (1989), and in In re Marriage of Isaak, 257 M 176, 848 P2d 1014, 50 St. Rep. 219 (1993).

Wife's Gift Stock Excluded — Husband's Stock Acquired With Contribution of Wife Included in Estate: The wife's stock in a farm received during marriage as a gift from her parents was properly excluded from the marital estate because the husband made no contribution to gain or facilitate maintenance of it. However, the lower court properly included in the marital estate the value of stock acquired by husband in his father's business. The wife's nonmonetary contributions as a homemaker assisted husband in devoting time to employment that ultimately resulted in husband's stock acquisition. The husband's stock was a product of the marital effort. Becker v. Becker, 218 M 229, 707 P2d 526, 42 St. Rep. 1541 (1985). The rationale of excluding gift stock from the marital estate was applied even in a case where husband arguably contributed to increasing the value of the stock through his labor because he was salaried and there was no agreement that he would receive stock as compensation. In re Marriage of Barnard, 241 M 147, 785 P2d 1387, 47 St. Rep. 152 (1990). Becker was overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Land Bought With Wife's Premarital Money and Husband's Marital Income — Even Distribution of Proceeds of Sale: The lower court was within its discretion in equally dividing the proceeds of the sale of a piece of property, despite wife's claim that she used $5,000 from her premarital savings for its downpayment, because husband's income was used for the rest of the payments. In re Marriage of Perry, 217 M 162, 704 P2d 41, 42 St. Rep. 1101 (1985).

Distribution of Residence of Parties Based on "Tracing" of Trust Funds Acquired by Gift: Where the parties to a dissolution proceeding acquired a new residence and maintained that residence with funds obtained from a trust established by a gift of money to the wife from her father, the District Court did not err in awarding the new residence only to the wife, as there was sufficient evidence that the funds used were hers. Glasser v. Glasser, 206 M 77, 669 P2d 685, 40 St. Rep. 1518 (1983), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Other Relevant Factors: The husband contended the District Court erred in distributing property, including property acquired prior to marriage. The Supreme Court held that marriage is not a business relationship. Equitable distribution of marital assets depends upon more than just each party's initial financial contribution to the relationship. Many other relevant factors are found in 40-4-202(1). The court gave consideration to the parties' occupations, amounts and sources of income, vocational skills, employability, estates, needs, and opportunities for future acquisition of capital assets and income. There was no abuse of discretion in distributing the marital estate. Vance v. Vance, 204 M 267, 664 P2d 907, 40 St. Rep. 836 (1983), as related to denial of mistrial based on failure to consider allegations of marital misconduct, followed in In re Marriage of Fitzmorris, 229 M 96, 745 P2d 353, 44 St. Rep. 1809 (1987). See also In re Marriage of Dalley, 232 M 235, 756 P2d 1131, 45 St. Rep. 1017 (1988).

Property Brought to Marriage as Supporting Unequal Distribution of Property — Equity in Family Home: Where the appellant and respondent were twice married to and divorced from one another, and the respondent wife brought to the second marriage the family home from the first marriage, the District Court did not abuse its discretion in awarding the entire equity in the home to the respondent upon the second divorce. Of all of the factors considered by the District Court in the property division, the court correctly considered the contributions of the parties to be most important, other factors being substantially equal between the parties. Because the assets brought to the second marriage by the respondent, including the family home, were greater than those contributed by the appellant, the respondent's contribution during the marriage exceeded the appellant's. Parenteau v. Parenteau, 204 M 239, 664 P2d 900, 40 St. Rep. 815 (1983).

Previously Owned Real Property Subject to Distribution: Where real property owned by the husband prior to the marriage of the parties was transferred in joint tenancy to the wife during the marriage, the District Court did not err in refusing to set aside that transfer and to consider only the profits from the sale of the property as subject to distribution. Section 40-4-202 makes it clear that the disputed property is subject to equitable distribution upon dissolution of the marriage. Beck v. Beck, 193 M 166, 631 P2d 282, 38 St. Rep. 1054 (1981).

Award of Equal Interest in Property Purchased by Husband Before Marriage: Where both parties to a dissolution contributed to the maintenance of certain real property purchased by the husband prior to the marriage, and both were responsible for their separation which caused a dissipation of the marital estate, the District Court did not abuse its discretion in awarding the wife an equal interest in the real property. Schultz v. Schultz, 188 M 363, 613 P2d 1022 (1980), proper findings and conclusions made and judgment affirmed. In re Marriage of Schultz, 203 M 473, 662 P2d 286, 40 St. Rep. 576 (1983).

Distribution of Property Acquired by Gift: In making an equitable division of marital property upon dissolution, property acquired by gift must be traceable before the District Court is required to make specific findings regarding the property. If none of the value of the property is a product of contribution from the marital effort, the District Court can justifiably find that the nonacquiring spouse has no interest in the property. If, on the other hand, both parties to the marriage contribute to the maintenance and thus the appreciated value of the gift property, it is inequitable to award the nonacquiring spouse only a fraction of the value of the asset upon dissolution. Here, where the majority of the property was acquired from the wife's father, a 50/50 division of marital property was an abuse of discretion. Herron v. Herron, 186 M 396, 608 P2d 97 (1980), followed in In re Marriage of Luisi, 232 M 243, 756 P2d 456, 45 St. Rep. 1023 (1988), and In re Marriage of Engen, 1998 MT 153, 289 M 299, 961 P2d 738, 55 St. Rep. 595 (1998), and distinguished in In re Marriage of Dalley, 232 M 235, 756 P2d 1131, 45 St. Rep. 1017 (1988), and In re Marriage of Buxbaum, 214 M 1, 692 P2d 411, 41 St. Rep. 2243 (1984). See also In re Marriage of Anderson, 220 M 477, 717 P2d 11, 43 St. Rep. 541 (1986), In re Marriage of Harper, 1999 MT 321, 297 M 290, 994 P2d 1, 56 St. Rep. 1280 (1999), In re Marriage of Horton, 2004 MT 353, 324 M 382, 102 P3d 1276 (2004), and In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, in which the Supreme Court that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Prior-Acquired and Gifted Property — Disposition: The trial court found the wife had not contributed financially to property gifted to the husband during the marriage and property acquired by the husband prior to the marriage, and that her contribution as a homemaker had not facilitated maintenance of that property. Any increase in the value of the property was the result of inflation. Such findings were not clearly erroneous, unsupported by the evidence, or made arbitrarily without employment of conscientious judgment or in excess of the bounds of reason. Jacobson v. Jacobson, 183 M 517, 600 P2d 1183 (1979); In re Marriage of Jorgensen, 180 M 294, 590 P2d 606 (1979). Jorgensen was overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Equitable Division of Property — However Acquired: The lower court's disposition of marital property did not constitute an abuse of discretion in the form of an award to the wife of property with an aggregate value of $8,000 although the husband alleged that only $1,550 worth of property was acquired during marriage. This section calls for an equitable division of marital property by the court, regardless of however or whenever acquired or in whose name the property is held. Houtchens v. Houtchens, 181 M 70, 592 P2d 158 (1979), followed in In re Marriage of Schultz, 199 M 332, 649 P2d 1268, 39 St. Rep. 1435 (1982), and In re Marriage of Gauthier, 201 M 320, 654 P2d 517, 39 St. Rep. 2137 (1982).

Apportionment — Factors Considered: In apportionment of marital property, an inheritance of one of the parties is a factor to be considered as property "however and whenever acquired". Morse v. Morse, 174 M 541, 571 P2d 1147 (1977). See also In re Marriage of Alt, 218 M 327, 708 P2d 258, 42 St. Rep. 1621 (1985).

Pension Benefits

Division of Pension Paid in Future Installments — Conscionable Valuation Methods and Factors Required: In a divorce proceeding, the husband and wife entered a dissolution agreement stating that each was entitled to half of the husband's pension and that each should receive a portion of the scheduled benefit payment once the payments began. The parties subsequently disagreed on how to determine their respective shares of each payment to reflect an equal division of the pension at the time of dissolution. The District Court rejected the husband's proposed valuation method. The Supreme Court held that although it has recognized two pension valuation methods, the lump sum method and the time rule method, it has not foreclosed the use of other valuation methods. Ultimately, the Supreme Court found that the husband's proposed method would divide only the vested value of the pension at the time of dissolution and would not equally divide the interest payable or potential postdissolution losses or gains. In re Marriage of Cadena v. Fries, 2015 MT 90, 378 Mont. 409, 346 P.3d 347.

Time Rule Approach Preferred When Pension Account Not Easily Valued: In a dissolution proceeding, the District Court used the time rule method to value the husband's defined benefit retirement account. The husband appealed the District Court's division of property. On appeal, the Supreme Court emphasized that the District Court's application of the time rule to the retirement account was proper given that the value of the pension benefit was dependent on a number of unknown factors. The Court further noted that the time rule method is preferable to the present value method when the pension cannot be adequately valued or there are insufficient marital assets to offset the other spouse's portion of the pension. In re Parenting of C.W. and S.W., 2012 MT 212, 366 Mont. 278, 291 P.3d 1092. See also In re Marriage of Hutchins, 2018 MT 275, 393 Mont. 283, 430 P.3d 502, holding that the District Court did not abuse its discretion by applying the time rule method when pension benefit payments were already in progress.

Time Rule Method of Valuation Proper — Hybrid Approach Reversed and Remanded: The District Court's order dissolving the parties' marriage and distributing the marital property provided that of the husband's Public Employees' Retirement System (PERS) account, the wife was entitled to 50% of the "vested account balance. . .as of the date of separation. . . until the date of withdrawal." Both spouses appealed. The wife claimed that she should have been awarded half of the husband's PERS benefits that accrued during the marriage, under the time rule method. The husband argued that the present value method should be used, in which case the wife was entitled to half of the present value of his retirement benefits at the time of separation. The difference in the two methods was hundreds of thousands of dollars. The Supreme Court concluded that the District Court's order was confusing and incorporated an improper hybrid of the two methods. Accordingly, the Supreme Court remanded the case with the instruction to use the time rule method because the husband was still contributing to the plan and therefore the benefit factors could not be applied until his retirement. In re Marriage of McGowan, 2011 MT 284, 362 Mont. 457, 269 P.3d 887. See also In re Marriage of Hutchins, 2018 MT 275, 393 Mont. 283, 430 P.3d 502, holding that the District Court did not abuse its discretion by applying the time rule method when pension benefit payments were already in progress.

Improper Double Counting of Amount Withdrawn From Retirement Account Following Separation — Remand: The wife withdrew $67,706 from retirement accounts after the parties separated, and a short time later she bought a townhouse. The parties stipulated that the net amount withdrawn would be counted against whatever amount of marital property to which the wife was entitled upon dissolution. The District Court counted the $67,706 against the wife from the retirement fund and also counted against the wife in the property apportionment $80,324 in equity of the townhouse. On appeal, the wife contended that the District Court double-counted the proceeds of the retirement accounts. The Supreme Court agreed. The record indicated that the wife used the retirement proceeds as a down payment on the townhouse. Thus, the District Court properly counted the $80,324 in equity but improperly double-counted the retirement money when it also counted against the wife the $67,706 from the retirement funds. The case was remanded for a recalculation of the property apportionment. In re Marriage of Williams, 2009 MT 282, 352 M 198, 217 P3d 67 (2009).

Support and Loan Factors Applied in Equal Distribution of Marital Estate and Husband's Pension Benefit: The husband complained that the District Court equally divided the marital estate, including one-half of the husband's retirement pension benefits, without considering loans made to the couple by the husband's father. However, the award was affirmed. The District Court properly considered that the husband failed to provide support for living expenses after the initial separation, including child support, even though he was able to do so. There was also substantial evidence that the money provided by the husband's father was understood to be a gift, rather than a loan to be repaid. Thus, the distribution of one-half of the marital estate to the wife was not error. In re Marriage of Bock, 2005 MT 40, 326 M 123, 107 P3d 488 (2005), distinguishing In re Marriage of Stewart, 232 M 40, 757 P2d 765 (1988), and Siefke v. Siefke, 2000 MT 281, 302 M 167, 13 P3d 937 (2000).

Mailing to Attorney of Record and Party's Last-Known Address Considered Adequate Notice — Personal Service Not Required: After 11 years passed from the time that a dissolution decree was entered, the wife moved to obtain her share of the husband's retirement benefits as ordered in the decree. Notice of the action was sent to the husband's last attorney of record, who filed a motion to dismiss, and by mail to the husband's last-known address in Hawaii. The husband contended that personal service was required because so much time had passed since the decree and because the attorney-client relationship was stale. However, the husband cited no authorities for the argument that personal service was required because the passage of time concluded the attorney-client relationship or that service requirements were modified based upon the last date of activity in a case. The attorney was clearly acting as the husband's attorney, and the decree was intended to extend to the issue of retirement, which had only recently occurred. Thus, under former Rule 5(b), M.R.Civ.P. (now superseded), service was perfected and complete upon mailing a copy to the husband's last attorney of record and to the husband's last-known address. In re Marriage of Weber, 2004 MT 206, 322 M 324, 95 P3d 694 (2004).

Offset of Unpaid Retirement Benefits Proper Under Prior Family Law Order: The District Court ordered the husband to pay $734 a month from his retirement benefits, as ordered in a dissolution decree, and allowed the wife to offset her obligations to the husband when he became eligible to share in her retirement benefits to cover accrued payments of more than $10,000 owed by the husband. On appeal, the husband contended that he was exempt from this legal process under 19-2-1004 because 11 years had passed since the decree was issued, so the decree should no longer be considered a family law order under 19-2-907. The Supreme Court disagreed and affirmed. The husband cited no authority for the proposition that a family law order is no longer a family law order after 11 years. The District Court did not err in allowing the wife to collect accrued payments by setoff or otherwise. In re Marriage of Weber, 2004 MT 206, 322 M 324, 95 P3d 694 (2004).

Improper Hybrid Approach for Determining Distribution of Pension and Annuity Benefits — Reversible Error: The Supreme Court has considered two methods for establishing values of pension plans: (1) the present value or lump-sum distribution method; and (2) the time rule or deferred distribution method. The present value method is generally preferred, but the District Court has broad discretion to apply either method. However, in this case, the District Court abused its discretion by mistakenly combining both methods, creating a hybrid approach not clearly supported by case law. The Supreme Court reversed and remanded so that the District Court could choose and apply the appropriate method. In re Marriage of Swanson, 2004 MT 124, 321 M 250, 90 P3d 418 (2004). However, see In re Parenting of C.W. and S.W., 2012 MT 212, 366 Mont. 278, 291 P.3d 1092, in which the Supreme Court noted that the time rule method is preferable when a pension cannot be adequately valued or there are insufficient marital assets to offset the other spouse's portion of the pension. See also In re Marriage of McGowan, 2011 MT 284, 362 Mont. 457, 269 P.3d 887.

Marital Misconduct Not Factor in Equitable Distribution of Marital Assets — Portion of Husband's Retirement Funds Awarded to Wife Who Depleted Her Own Retirement in Restitution for Criminal Offense: The wife was convicted of embezzling nearly $25,000 from her employer and made restitution from her retirement account. The parties later sought a divorce, and the District Court awarded the wife one-fourth of her husband's retirement funds, plus child support and maintenance conditioned upon the wife's management of her personal finances according to the court's requirements. The husband appealed the pension distribution, citing 1-3-208 for the proposition that his wife's crime and consequent restitution resulted in dissipation of the marital assets and that she should not be allowed to take advantage of her own wrong. The Supreme Court declined to apply a general maxim of jurisprudence in light of the specific provisions of this section, which preclude consideration of marital misconduct as a factor in the equitable distribution of marital property. The record showed that the husband also contributed to dissipation of the estate. The trial court conducted a thorough analysis in equity of the required statutory factors in determining how to allocate the marital estate in toto. Its findings were not clearly erroneous and were thus affirmed. In re Marriage of Kotecki, 2000 MT 254, 301 M 460, 10 P3d 828, 57 St. Rep. 1043 (2000).

Veteran Disability Benefits Federally Protected From Inclusion in Marital Estate — Disability Benefits Considered in Award of Spousal or Child Support as Party's Ability to Earn Income: The

District Court included a portion of the husband's Veterans Benefits Association (VA) disability benefits as part of the division of marital property. The Supreme Court held that under the antiattachment clause of 38 U.S.C. 5301, VA disability benefits are federally protected from inclusion in the marital estate. In enacting that section and the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408, Congress preempted state courts from including VA disability benefits in the marital estate because VA disability benefits are not considered "disposable retired pay" to be treated as marital property. An award of VA disability benefits upon dissolution amounts to a seizure of those benefits in violation of 38 U.S.C. 5301. To avoid damaging federal objectives, the property division dictates of this section must yield to the federal law. Consistent with both federal and state law, a District Court may consider VA disability benefits in the same way that it considers each party's ability to earn income after dissolution as an important factor in achieving an equitable property division, including consideration of the military disability retirement pay as a source of income in the award of spousal maintenance or child support, or generally as an economic circumstance of the parties justifying a disproportionate award of marital property to the nonretiree spouse. Thus, disability payments should not, either in form or substance, be treated as marital property subject to division upon dissolution. However, under Rose v. Rose, 481 US 619 (1987), a state court is free to consider postdissolution disability income and to order a disabled veteran to pay spousal support even when disability benefits would be used to make support payments. In re Marriage of Strong, 2000 MT 178, 300 M 331, 8 P3d 763, 57 St. Rep. 709 (2000), following Mansell v. Mansell, 490 US 581 (1989), and In re Marriage of Murphy, 261 M 363, 862 P2d 1143 (1993). See also McCarty v. McCarty, 453 US 210 (1981).

Provision for Equal Distribution of Retirement Benefits Not Ambiguous — Payable on Value of Benefits at Retirement, Not at Time of Property Settlement: A provision in the parties' settlement agreement granted the wife 50% of the husband's retirement benefits when he retired. The husband claimed that the provision was ambiguous because it was not clear whether the benefits should be valued as of the time he retired or when the agreement was settled. The Supreme Court found no ambiguity. The proceeds of the retirement benefits were to be split when the husband retired, including any accumulated value to the retirement fund, which was viewed as the husband's continuing contributions to the marital estate correlative to the wife's continuing contributions through her payment of the mortgage on the family home until it was sold at a future date and the proceeds also split equally. In re Marriage of Pfennigs, 1999 MT 250, 296 M 242, 989 P2d 327, 56 St. Rep. 981 (1999).

Assignment of Unvested Pensions Improper: In distributing marital property, the trial court awarded husband two "optional" pension plans in which his interest was not vested. The trial court must finally equitably apportion property and assets belonging to either party or to both parties, however and whenever acquired and whether title is in the name of husband or wife, or both. The right to receive a pension may be included in and distributed as part of a marital estate, and the value of a pension is its present value. When substantial risk is involved in the calculation of the value of a pension, both parties should share those risks. In the present case, the wife did not submit evidence of the value of either of two unvested optional pensions, while the husband took the position at trial that the pensions had no value. The District Court incorrectly assigned all risks to the husband rather than considering the significant risks to both parties. Because the estimates of value assigned by the court had no support in the record, it was reversible error for the court to assign the unvested pensions to the husband as his part of the marital estate. In re Marriage of Blades, 269 M 198, 887 P2d 735, 51 St. Rep. 1538 (1994), following Kis v. Kis, 196 M 296, 639 P2d 1151 (1982), and In re Marriage of Keedy, 249 M 47, 813 P2d 442 (1991), and distinguishing In re Marriage of Laster, 197 M 470, 643 P2d 597 (1982).

Pension Benefits Properly Divided Based Upon Marital Circumstances and Present Value of Benefits: Upon dissolution of the marriage, the District Court used the services of an actuary to establish a present value for Charles' pension benefits from his employment with the IRS and awarded Priscilla 35% of the retirement benefits. The Supreme Court held that inasmuch as the District Court determined the value and the award based upon the estimates by an actuary and such considerations as the amount of the value earned while the parties were married, Priscilla's earning capacity, and the length of the marriage, substantial credible evidence supported the award made by the District Court. In re Marriage of Robinson, 269 M 293, 888 P2d 895, 51 St. Rep. 1243 (1994).

Improper Award to Wife of One Hundred Percent Interest in Husband's Pension: The marital estate consisted of two major assets: the family home and husband's pension. The trial court determined that an equitable distribution would be achieved by granting wife the home and husband the pension. However, because the wife was not likely to accumulate an adequate pension prior to her retirement, the court awarded her a 100% contingent annuity interest in the present value of the husband's pension in the event he predeceased her. By designating wife as the irrevocable recipient of the survivorship benefits, the pension value to husband was diminished because part of a pension's value is the ability to provide for others through the survivorship benefits. If husband predeceased wife prior to retirement, he would have essentially received nothing from the marital estate. This inequitable distribution constituted an abuse of discretion, warranting reversal. In re Marriage of Zander, 262 M 215, 864 P2d 1225, 50 St. Rep. 1522 (1993).

Teachers' Retirement System Benefits — Each Party Entitled to Own Account: The District Court did not err in finding that each party was entitled to his or her respective retirement account when the record supports the finding that the husband's account was larger than the wife's because he had worked longer than she did and that the difference in retirement accounts was readily explainable as being earned prior to marriage and after separation. In re Marriage of Selsor/Mossman, 256 M 260, 846 P2d 972, 50 St. Rep. 80 (1993).

Spouse Denied Portion of Military Pension Under Theory of Laches: Under the divorce decree, the husband paid his ex-wife maintenance for a period of 5 years. Immediately after the maintenance obligation expired, the ex-wife initiated an action, asking that she be given a portion of the husband's military pension. The Supreme Court held that the petitioner had waited on her rights for an unreasonable time and that in light of the fact that her ex-husband had never attempted to conceal the pension from her, she was barred from asserting a claim by the doctrine of laches. In re Marriage of Samson, 245 M 464, 802 P2d 1241, 47 St. Rep. 2209 (1990).

Equal Division of Military Pension — Wife's Contribution as Homemaker: The District Court did not err in equally dividing the present value of husband's military pension after finding wife had foregone employment and the attendant retirement benefits in order to raise the children and maintain the family home. Additionally, her contribution as homemaker helped husband acquire two college degrees and a significantly higher earning capacity than her own. In re Marriage of Luisi, 232 M 243, 756 P2d 456, 45 St. Rep. 1023 (1988).

Retirement Benefits — Substitution for Maintenance Upon Retirement: Wife was awarded 78% of the marital property, one-third of husband's future retirement benefits in three plans, two of which were vested but not matured and one of which was unvested and unmatured (husband was 51), and $350 a month maintenance, which would end upon retirement of husband. Substantial evidence supported the maintenance award, and it was thus not an abuse of discretion to substitute a part of the retirement benefits for the maintenance upon husband's retirement. Laster v. Laster, 197 M 470, 643 P2d 597, 39 St. Rep. 737 (1982). See also Wallace v. Wallace, 203 M 255, 661 P2d 455, 40 St. Rep. 430 (1983).

Military Retirement Pay Not Part of Marital Estate: The language of McCarty v. McCarty, 453 US 210, 69 L Ed 2d 589, 101 S Ct 2728 (1981), precluding a state court from dividing military retirement pay pursuant to state community property law, is broad enough to include noncommunity property states. Appellant's military retirement pay is to be excluded as an asset of the marital estate. McGill v. McGill, 196 M 40, 637 P2d 1182, 38 St. Rep. 2105 (1981). However, see In re Marriage of Blair, 271 M 196, 894 P2d 958, 52 St. Rep. 401 (1995)(special separation payments received by military member are subject to division as marital property).

Military Pension as Marital Property — Previous Ruling Requiring Remand: Where, following entry of the court's order dissolving the marriage of the appellant and respondent, who was eligible for retirement under a military pension plan, but before the parties filed their appellate briefs, the Supreme Court held in In re Marriage of Miller, 187 M 286, 609 P2d 1185 (1980), that a military pension is marital property to be considered as part of the marital estate, the appellant's case had to be remanded to the District Court for additional findings of fact. Because of the many factors that could be affected by inclusion of the pension in the marital estate, the Supreme Court should not fashion a formula for disposition of the pension until the District Court has done so. Ebert v. Ebert, 189 M 477, 616 P2d 379, 37 St. Rep. 1674 (1980).

Military Pension Vested Property Subject to Distribution in Property Division: The military pension of a party to a divorce resembles an ordinary private pension, and just as a private pension, it should be treated as a vested property right that can be distributed as a part of a court's property division. A military pension is distinguishable from a pension under the Railroad Retirement Act, which is subject to limitations on its distribution. Further, the heirs of the former spouse of the divorced party receiving the pension could inherit the spouse's share freely. In re Marriage of Miller, 187 M 286, 609 P2d 1185 (1980). See also Karr v. Karr, 192 M 388, 628 P2d 267, 38 St. Rep. 506 (1981). Impliedly overruled in McGill v. McGill, 196 M 40, 637 P2d 1182, 38 St. Rep. 2105 (1981).

Farm, Ranch Property

Tax Consequences of Ranch Sale Not Considered — Inequitable Distribution: The petitioning wife and respondent husband worked and lived on a family ranch for approximately 35 years of marriage. During a dissolution proceeding, the total value of the ranch was valued at approximately $3.1 million, with the land valued at approximately $2.3 million. The parties had minimal personal assets. The standing master determined the husband's interest in the ranch to be $1,159,541 and the wife's interest to be $1,159,424. Following this determination, the standing master ordered the husband to pay the wife $1,159,483 for her interest in the ranch, with $50,000 to be paid within 60 days and the remainder within 24 months. Despite the husband's objections to the standing master's order, no consideration was given by the standing master or the District Court to the tax implications of selling the ranch to satisfy the judgment. On appeal, the Supreme Court held that the standing master erred as a matter of law by failing to consider the tax consequences of the likely result that the ranch would be sold to satisfy the judgment and that the District Court erred in adopting this conclusion, resulting in an inequitable distribution. In re Marriage of Broesder, 2017 MT 223, 388 Mont. 476, 402 P.3d 1193.

Policy of Keeping Family Ranch Intact Not to Be Used to Deprive Spouse of Equitable Share of Marital Estate: Upon the dissolution of Maureen and Joseph's marriage, the District Court ordered the sale of the parties' ranch. Joseph contended that the District Court erred when it ordered the sale, citing the state's policy to keep a family farm intact when a court distributes marital property. Citing In re Marriage of Tonne, 226 M 1, 733 P2d 1280 (1987), the Supreme Court held that the state's policy cannot be used to deprive a spouse of the spouse's equitable share in marital estate. In re Marriage of Ortiz, 282 M 500, 938 P2d 1308, 54 St. Rep. 446 (1997).

Improper Award of CRP Payments: It was an abuse of discretion for the trial court to award wife 25% of a Conservation Reserve Program (CRP) payment when she had not participated in the management of the family farming corporation for several years or participated in efforts to secure the payment and the CRP payment was traditionally earmarked to pay certain corporate debts. In re Marriage of Danelson, 253 M 310, 833 P2d 215, 49 St. Rep. 597 (1992).

Income Insufficient to Allow Ranch Purchase — Order for Sale of Property Proper: The District Court did not err in ordering the wife to purchase ranch property within 15 days of dissolution of the marriage. The parties were to sell the property if the wife failed to make the purchase. The evidence showed that the wife's horse breeding business and rental income could not generate sufficient income to allow her to pay the husband's share of the marital estate. In re Marriage of Peetz, 252 M 448, 830 P2d 543, 49 St. Rep. 362 (1992), followed in In re Marriage of Kimm, 260 M 479, 861 P2d 165, 50 St. Rep. 1146 (1993).

One Party Divides Property, Other Chooses Portion: An equal division of property generally will result when one party draws the line dividing the property and the other party makes the first choice between the parcels. In re Marriage of Hancock, 226 M 383, 736 P2d 101, 44 St. Rep. 740 (1987), followed in In re Marriage of Binsfield, 269 M 336, 888 P2d 889, 52 St. Rep. 16 (1995).

Remand of Order to Sell Ranch — Modification to Allow Time Extension or Buyout: Where on one hand the District Court acted within its discretion, based on its findings, when it ordered sale of the family ranch, but on the other hand the worst economic times in 50 years had crippled the market for ranches to the point where immediate forced sale would deprive the parties of the value the ranch would possess in a market closer to historical norms, the Supreme Court remanded with the suggestion that the decree be modified to allow 36 months for sale or, alternatively, that a structured buyout be allowed, similar to the one in In re Marriage of Gomke, 192 M 169, 627 P2d 395, 38 St. Rep. 578 (1981). In re Marriage of Tonne, 226 M 1, 733 P2d 1280, 44 St. Rep. 411 (1987), followed in In re Marriage of Meeks, 276 M 237, 915 P2d 831, 53 St. Rep. 365 (1996).

Preservation of Family Ranch — Not Proper Consideration Upon Division: Montana's policy in favor of keeping a family farm or ranch intact upon dissolution is not a proper consideration when dividing marital property under this statute. The policy is only to be considered upon distribution of the marital property after it has been allocated. In re Marriage of Glass, 215 M 248, 697 P2d 96, 42 St. Rep. 328 (1985), followed in In re Marriage of Meeks, 276 M 237, 915 P2d 831, 53 St. Rep. 365 (1996). See also In re Marriage of Binsfield, 269 M 336, 888 P2d 889, 52 St. Rep. 16 (1995), and In re Marriage of Ortiz, 282 M 500, 938 P2d 1308, 54 St. Rep. 446 (1997).

Unnecessary Forced Sale of Ranch When Spouse Dead — Partition Ordered: Although it has long been the Supreme Court's policy to avoid splitting up ranches in property dispositions, that policy cannot be used to avoid a party's right to an equitable distribution of marital property. Husband and wife owned ranch as joint tenants. Husband died during first appeal of the property disposition. The case was remanded, and the trial court made a second disposition ordering forced sale of the ranch to satisfy marital debts. The ranch had been the wife's home for 17 years. She opposed the sale and wished to live on it and raise her quarter horses. The Supreme Court could see no reason to force the sale of the entire ranch. The record showed that it could easily have been partitioned to give wife the buildings and about 70 acres, selling the rest. The trial court was ordered to modify the decree to allow wife to keep that part of the ranch upon which she made her home. In re Marriage of Beck, 203 M 455, 661 P2d 1282, 40 St. Rep. 565 (1983).

Family Farm — Installment Payments for Spouse's Share: Petitioner and respondent were divorced. In the decree dissolving the marriage, the trial judge divided the major asset, the family farm, with 55% to go to the husband and 45% to the wife. The farm had been in the husband's family since 1917. The husband was to pay the wife's share in four equal annual installments. The wife contends that the farm should have been sold so that she would have the opportunity of sharing in any gain realized on the property. She also contends that the settlement scheme is unfair because it allows the husband to retain income-producing property while she receives only cash. The dissolution decree was consistent with the policy of keeping a farm or ranch intact and operating as a unit upon dissolution whenever there is a reasonable means of providing a wife her equitable share of the property short of selling the land. The value of the estate is a question of fact for the District Court, and there was no showing that the valuation was "clearly erroneous". Giving the wife a lien on the property until the payments are made adequately protects her interests. Gomke v. Gomke, 192 M 169, 627 P2d 395, 38 St. Rep. 578 (1981), followed in In re Marriage of Bell, 220 M 123, 713 P2d 552, 43 St. Rep. 226 (1986).

Ranch Property — Division or Forced Sale: While it is a policy to avoid splitting up a ranch or forcing its sale, that policy cannot be used to avoid a party's right to an equitable distribution of marital property. Thus, the District Court did not abuse its discretion in giving each party a 6-month option to buy each other's share of the ranch or otherwise leaving it up to the parties to reach their own terms on a purchase. In re Marriage of Owen, 187 M 214, 609 P2d 292 (1980).

Attachment and Large Contribution to Farm as Justifying 60/40 Property Division: There was no abuse of discretion where trial court awarded only 40% of the value of the marital assets to wife and 60% to husband when the major asset of the marriage, a farm, was acquired by the husband through exceptionally hard work, the wife did not care for farming, and the husband requested the trial court to keep the farm intact. Knudson v. Knudson, 186 M 8, 606 P2d 130 (1980).

Party's Right to an Equitable Share Not to Be Overridden By Policy to Keep Farm or Ranch Intact: In making an equitable distribution of marital property, it is a premise in this state that a ranch or farm should be kept intact and operated as a unit. That policy, however, may not be used to override a party's right to an equitable share. Jacobson v. Jacobson, 183 M 517, 600 P2d 1183 (1979).

Parties' Premarital Cohabitation or Relationship

Failure of District Court to Properly Account for Unmarried Homemaker's Contribution to Marital Estate — Equitable Distribution: The husband and wife were in a relationship starting in 1991 but were officially married in 2008. The couple had three children. The wife provided primary care to the children while the husband worked at his family's ranch business. The wife petitioned to dissolve the marriage in 2011, while she was still caring for the children. The District Court determined that the net worth of the marital estate was $1,997,966 and awarded the wife approximately 6% with no award of maintenance. The wife appealed, arguing that the District Court inequitably apportioned the marital estate. The Supreme Court agreed with the wife, holding that the District Court did not properly account for the wife's homemaking contribution to the marital estate because she had no retirement funds, she would not qualify for future Social Security benefits, and her job prospects were limited or nonexistent. Richards v. Trusler, 2015 MT 314, 381 Mont. 357, 360 P.3d 1126.

Proper Consideration of Premarital Cohabitation in Distribution of Marital Estate: The husband contended that because the couple were not married at the time that the wife made substantial improvements to what was to become the marital estate, her efforts should not have been considered in the distribution of the marital estate. However, as in In re Marriage of Rolf, 2000 MT 361, 303 M 349, 16 P3d 345 (2000), it would have been inequitable to disregard the couple's premarital cohabitation when considering the wife's contributions to the estate. The property increased in value during both the premarital cohabitation and the marriage, so it was not error to consider the wife's contributions during the entire period and to award her one-half of the net proceeds from the sale of the property. In re Marriage of Clark, 2003 MT 168, 316 M 327, 71 P3d 1228 (2003), followed in Kelly v. Thompson, 2009 MT 392, 353 M 361, 220 P3d 627 (2009). See also In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Proper to Consider Two and One-Half-Year Premarital Relationship: The District Court did not err in considering the parties' 2½-year premarital relationship and cohabitation in apportioning the marital estate. It was necessary for the court to consider the parties' premarital history to aid in determining which party brought which assets into the marriage. In re Marriage of Rolf, 2000 MT 361, 303 M 349, 16 P3d 345, 57 St. Rep. 1536 (2000), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

REVIEW OF PROPERTY DISPOSITION

District Court's Adoption of Husband's Proposed Findings and Conclusions Not Per Se Error — Supreme Court Generally Discourages Adoption of Party's Proposed Findings and Conclusions Verbatim — Remedy of New Trial Limited in Cases Tried by Court Without Jury — Exceptions of Irregularity in Proceedings or Abuse of Discretion Not Present — Both Parties Had Fair Trial. In re Marriage of Frank, 2022 MT 179, 410 Mont. 73, 517 P.3d 188.

On Remand, Trial Not Necessary for Division of Property and Recalculation of Child Support: In Williams I (In re Marriage of Williams, 2009 MT 282, 352 Mont. 198, 217 P.3d 67), the Supreme Court remanded to the District Court a recalculation of child support and reapportionment of the estate. The Supreme Court held that the District Court properly found that a new trial was unnecessary to determine the issues, could recalculate the father's child support obligation pursuant to the child support guidelines, and had sufficient information before it to determine the wife's equal share of the value of the husband's business. In re Marriage of Williams, 2011 MT 63, 360 Mont. 46, 250 P.3d 850.

Disagreement Over Sale of Marital Property to Third Party Following Dissolution — Issue Not Moot When Remedy Available: Following dissolution, the husband sold a parcel of real property that was granted to him as part of the marital estate. The wife contended that the husband failed to disclose the true value of the parcel and had been unjustly enriched, which rendered the dissolution agreement unconscionable. The husband asserted that because the property had already been sold to a third party without the wife moving to stay the proceedings or posting a supersedeas bond, the wife's issue was moot because no effective relief could be granted. The Supreme Court disagreed. If it was determined that the agreement was unconscionable or invalid, the Supreme Court could remand to the District Court to fashion a remedy that could involve payment from the sale proceeds or other adjustments. Because effective relief was available, the wife's issue was not moot. In re Marriage of Gorton, 2008 MT 123, 342 M 537, 182 P3d 746 (2008).

Motion for Posttrial Relief Untimely — Posttrial Motion to Correct Clerical Mistakes Proper — Motion for Posttrial Relief Not Substitute for Appeal: Following notice of entry of judgment in a marriage dissolution trial, the husband had 10 days to file a motion under former Rule 59, M.R.Civ.P. (now superseded), but missed the deadline by 2 days, so the motion was properly ruled untimely. The husband had 30 days to file a notice of appeal, but the untimely motion under former Rule 59 did not toll the time for appeal, and that time also expired. The decree became final, subject only to the husband's motion for relief under the various provisions of former Rule 60, M.R.Civ.P. (now superseded). The District Court erred in not applying former Rule 60(a), M.R.Civ.P., to correct clerical mistakes in the findings of facts. However, a motion under former Rule 60 may not be used as a substitute for appeal, so the husband's motion under former Rule 60 essentially seeking to set aside the decree based on insufficient evidence was properly denied. In re Marriage of Schoenthal, 2005 MT 24, 326 M 15, 106 P3d 1162 (2005).

Order to Pay $195,000 Property Settlement Within Six Months Remanded: The District Court ordered the husband to pay a property settlement of $195,080.13 to the wife within 6 months of the date of the final decree. The husband appealed on grounds that the order was unreasonable and impossible to perform. The Supreme Court found that the husband's assertion was justified and remanded with directions that the District Court permit the husband a reasonable amount of time in which to pay the settlement. In re Marriage of Baide, 2004 MT 260, 323 M 104, 99 P3d 178 (2004).

Property Transferred to Deny Spousal Interest in Marital Estate — Inclusion as Distributable Property Proper: A husband and wife owed about $6,000 in back taxes on their property, which was in jeopardy of being sold at a tax sale. The couple was unable to obtain a loan because of a prior bankruptcy, so they arranged to transfer the property to the husband's mother, who then took out a loan to pay the taxes, using the property as collateral. When the couple later sought to dissolve their marriage, their petition made no mention of any real property acquired during the marriage. The husband testified at the hearing, but the wife did not attend, and dissolution was granted without addressing the wife's interest in the property. She moved to set aside the judgment pursuant to 40-4-135, and the District Court voided the deed transferring the property to the mother, issued a court deed naming the mother as grantor and the husband and wife as grantees to hold the property as tenants in common, and included the property in the marital estate. The mother contended that the property transfer more than 2 years before commencement of the dissolution was final against the husband and wife as grantors, citing 70-20-303, and that the property was thus not available as an asset of the couple and was improperly included in the marital estate. The Supreme Court affirmed, noting that the couple had submitted false proposed findings and conclusions when they made no mention of any real property acquired during the marriage, which had the effect of defrauding the court and denying the wife her interest in the marital property. Inclusion of the property in the marital estate was proper. In re Marriage of Bell, 2000 MT 88, 299 M 219, 998 P2d 1163, 57 St. Rep. 381 (2000).

District Court to Resolve Conflicting Testimony: The parties disagreed on who should receive a set of dishes, and the trial court awarded them to the wife. The Supreme Court held that the trial court is in the best position to resolve conflicting testimony, and it would not substitute its judgment for the findings of the District Court, which were based to a large extent on the credibility of the witnesses. In re Marriage of Engen, 1998 MT 153, 289 M 299, 961 P2d 738, 55 St. Rep. 595 (1998), distinguished in In re Marriage of Foreman, 1999 MT 89, 294 M 181, 979 P2d 193, 56 St. Rep. 373 (1999), followed in In re Marriage of Davis, 1999 MT 218, 295 M 546, 986 P2d 408, 56 St. Rep. 856 (1999), In re Marriage of Hayes, 2002 MT 281, 312 M 440, 60 P3d 431 (2002), Cowan v. Cowan, 2004 MT 68, 320 M 332, 87 P3d 443 (2004), and In re Marriage of Horton, 2004 MT 353, 324 M 382, 102 P3d 1276 (2004), and overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Division of Property — Standard of Review:

The Supreme Court standard for reviewing factual findings of a District Court relating to the division of marital property, as set out in In re Marriage of Danelson, 253 M 310, 833 P2d 215 (1992), is whether the trial court's findings are clearly erroneous. In re Marriage of Miller, 260 M 15, 858 P2d 338, 50 St. Rep. 912 (1993). See also In re Marriage of Rada, 263 M 402, 869 P2d 254, 51 St. Rep. 110 (1994), and In re Marriage of DeWitt, 273 M 513, 905 P2d 1084, 52 St. Rep. 1089 (1995).

The standard of review in regard to the factual findings of the District Court relating to the division of marital property, as set out in In re Marriage of Sacry, 253 M 378, 833 P2d 1035, 49 St. Rep. 452 (1992), is whether the findings are clearly erroneous. The Supreme Court is not bound by the District Court's conclusions and is free to reach its own conclusions. The basis for simply determining whether the lower court's conclusions are correct is that there is no discretion in determining a question of law; the lower court either correctly or incorrectly applies the law. However, discretionary judgments made by the trial court are presumed to be correct and will not be disturbed absent an abuse of discretion by the trial court. In re Marriage of Danelson, 253 M 310, 833 P2d 215, 49 St. Rep. 597 (1992), followed in In re Marriage of Scott, 254 M 81, 835 P2d 710, 49 St. Rep. 634 (1992), In re Marriage of Johnston & Turrin, 255 M 421, 843 P2d 760, 49 St. Rep. 1047 (1992), In re Marriage of Newton, 255 M 463, 844 P2d 47, 49 St. Rep. 1068 (1992), In re Marriage of Rada, 263 M 402, 869 P2d 254, 51 St. Rep. 110 (1994), In re Marriage of McNellis, 267 M 492, 885 P2d 412, 51 St. Rep. 1125 (1994), In re Marriage of Griffin, 275 M 37, 909 P2d 707, 53 St. Rep. 28 (1996), In re Marriage of Foreman, 1999 MT 89, 294 M 181, 979 P2d 193, 56 St. Rep. 373 (1999), and In re Marriage of Hanni, 2000 MT 59, 299 M 20, 997 P2d 760, 57 St. Rep. 279 (2000). See also In re Marriage of Foster, 2004 MT 326, 324 M 114, 102 P3d 16 (2004).

The Supreme Court specifically rejected phraseology for the standard of review regarding division of marital property, as stated in prior cases, and adopted the standard set out in In re Marriage of Watson, 227 M 383, 739 P2d 951, 44 St. Rep. 1167 (1987), that the District Court's judgment, when based on substantial credible evidence, will not be altered unless a clear abuse of discretion is shown. In re Marriage of Stewart, 232 M 40, 757 P2d 765, 45 St. Rep. 850 (1988), followed in In re Marriage of Johns, 238 M 256, 776 P2d 839, 46 St. Rep. 1249 (1989), In re Marriage of Bos, 238 M 267, 776 P2d 841, 46 St. Rep. 1258 (1989), In re Marriage of Deichl, 239 M 425, 781 P2d 254, 46 St. Rep. 1801 (1989), In re Marriage of Barnard, 241 M 147, 785 P2d 1387, 47 St. Rep. 152 (1990), In re Marriage of Otto, 245 M 271, 800 P2d 706, 47 St. Rep. 2080 (1990), In re Marriage of Scott, 246 M 10, 803 P2d 620, 47 St. Rep. 2237 (1990), and in In re Marriage of

Rada, 263 M 402, 869 P2d 254, 51 St. Rep. 110 (1994). See also In re Marriage of Zander, 262 M 215, 864 P2d 1225, 50 St. Rep. 1522 (1993).

In reviewing a District Court's determination, the Supreme Court generally gives deference to the District Court's discretion and will reverse only if the findings are clearly erroneous in light of the evidence in the record. A presumption exists in favor of the judgment, and the lower court will be reversed only if appellant demonstrates that there was a clear abuse of discretion or an error in the findings. The standard of review for abuse of discretion is whether the lower court acted arbitrarily without conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. In re Marriage of Johnson, 225 M 404, 732 P2d 1345, 44 St. Rep. 353 (1987). See also In re Marriage of Davis, 1999 MT 218, 295 M 546, 986 P2d 408, 56 St. Rep. 856 (1999), Collins v. Collins, 2004 MT 365, 324 M 500, 104 P3d 1059 (2004), and In re Marriage of Dirnberger, 2007 MT 84, 337 M 56, 154 P3d 1227 (2007).

The following test is applicable in reviewing a lower court judgment in a dissolution: "Did the District Court in the exercise of its discretion act arbitrarily without employment of conscientious judgment or exceed the bounds of reason resulting in substantial injustice?" In re Marriage of Edwards, 215 M 512, 699 P2d 67, 42 St. Rep. 593 (1985), followed in In re Marriage of Shelton, 219 M 456, 712 P2d 782, 43 St. Rep. 89 (1986). See also In re Marriage of Hundtoft, 225 M 242, 731 P2d 401, 44 St. Rep. 204 (1987).

The standard of review in disputes over a District Court's division of marital property is whether in the exercise of its discretion the court acted arbitrarily, unreasonably, or without regard to recognized principles resulting in substantial injustice. In re Marriage of Vert, 210 M 24, 680 P2d 587, 41 St. Rep. 895 (1984); Balsam v. Balsam, 180 M 129, 589 P2d 652 (1979), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202. See also In re Marriage of Gallinger & Weissman, 221 M 463, 719 P2d 777, 43 St. Rep. 976 (1986), and In re Marriage of Peetz, 252 M 448, 830 P2d 543, 49 St. Rep. 362 (1992).

"Law of the Case" Doctrine:

Once a decision has been rendered by the Supreme Court on a particular issue between the parties, the decision is binding upon the courts and those parties and cannot be relitigated in a subsequent appeal. Implicit in this court's holding in a prior appeal in this case, that the District Court had sufficient grounds to modify the distribution of marital assets to allow the husband what he would have received if he had been paid child support payments, is agreement with the District Court's child support grant and valuation of the marital personal property. Therefore, the doctrine of the law of the case applies, and the wife could not have those matters addressed again in the present (second) appeal following remand after the first appeal. In re Marriage of Becker, 255 M 357, 842 P2d 332, 49 St. Rep. 983 (1992).

Supreme Court dismissed appeal on issue of partition of real property in marital dissolution proceeding addressed and decided in prior appeal of this case on ground that, where decision has been rendered by the court on a particular issue between the same parties in the same case, such decision is binding on the parties and the courts and cannot be relitigated in a subsequent appeal. In re Marriage of Gies, 218 M 433, 709 P2d 635, 42 St. Rep. 1715 (1985).

Dissolution Award in Excess of the Marital Estate:

While affirming the decision in Lippert (see note below), the Supreme Court found that when a couple's premarital assets were properly included in the marital estate, the lower court did not distribute more than 100% of the marital estate. In re Marriage of Peterson, 238 M 470, 778 P2d 402, 46 St. Rep. 1424 (1989).

In an action for dissolution of marriage, the District Court exceeded its authority under 40-4-202 by awarding the respondent property in excess of the proven net worth of the estate. The District Court may never award more than 100% of the marital estate. Lippert v. Lippert, 192 M 222, 627 P2d 1206, 38 St. Rep. 625 (1981).

Death of Spouse Before Final Disposition — Distribution as Severance of Joint Tenancy: Wife contended that: (1) because husband died before final resolution of property division, her right of survivorship remained; and (2) the District Court erred in refusing to recognize that the property was held in joint tenancy and should therefore have given the wife the property upon husband's death. On review, the Supreme Court found that a lower court order distributing the property in question to the husband effectively severed the joint tenancy. In re Marriage of Butler, 232 M 419, 756 P2d 1159, 45 St. Rep. 1160 (1988).

Factors for Consideration — Review of Disproportionate Distribution: A seemingly disproportionate distribution of marital property, with or without an award of maintenance, must be considered in light of the overall property distribution, the requirements of this section and 40-4-203, and whether there is substantial credible evidence to support the District Court's division. In re Marriage of Bowman, 226 M 99, 734 P2d 197, 44 St. Rep. 488 (1987).

Wife as Partner in Real Estate Investments — Distribution of Property Sale Proceeds Proper: The District Court properly awarded wife her share of proceeds of the sale of real property when deeds and the property settlement agreement identified her as a partner in the jointly held property. In re Marriage of Sabo, 224 M 252, 730 P2d 1112, 43 St. Rep. 2175 (1986).

Wife's Appeal Held Meritorious — Remand for Redetermination of Maintenance and Attorney Fees: Since wife's appeal had merit, husband's assertion that it did not and his request for damages were denied where, among other things, the court was sympathetic to a claim but did not agree with it, a request for a redetermination of the maintenance award was granted, and a request for attorney fees was remanded for a determination. In re Marriage of Perry, 217 M 162, 704 P2d 41, 42 St. Rep. 1101 (1985).

Failure to Disclose Debts — Extrinsic Fraud: A couple's failure to disclose certain debts in their property settlement agreement misled the trial court as to the actual financial status of the marital estate. This failure to disclose was extrinsic fraud. It misled the court to a false judgment that wrongfully insulated the couple's property from creditors. Extrinsic fraud justifies invoking the inherent equitable power of a court to reopen and set aside a judgment. Relief from a judgment obtained by extrinsic fraud may be granted on motion in the original action or in a separate suit in equity. In re Marriage of Witbart, 216 M 178, 701 P2d 339, 42 St. Rep. 725 (1985), overruled in part in In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995).

Independent Action to Set Marital Property Disposition Aside — Failure of Fraud and Notice Claims: Wife seeking to have court set aside that part of decree of dissolution of marriage that distributed the marital property elected not to file a timely motion for relief under former Rule 60(b), M.R.Civ.P. (now superseded), and instead elected to file an independent action for relief as allowed by the last part of former Rule 60(b). Her action was properly dismissed insofar as it sought relief on grounds of mistake, inadvertence, excusable neglect, and fraud on herself, which could be the basis for relief only under a timely motion under former Rule 60(b). Her independent action claim of no actual personal notification of the divorce proceeding must fail, since she signed the response to the petition (though perhaps not completely sober at the time), indicating actual personal notice. An independent action is not a remedy for inadvertence or oversight by the party losing the original action. Her independent action claim grounded in fraud on the court must fail because she failed to plead with particularity all the elements of the fraud. Her mere suspicion of fraud was not sufficient to sustain her action. The postnuptial agreement she signed some 3 years before her husband filed for a divorce proceeding at which she was not represented by an attorney must stand, since she signed a response to the petition that affirmed the fairness and terms of the agreement and did not appear at the final hearing at which the court approved the agreement with a change favoring her. In re Marriage of Hoyt, 215 M 449, 698 P2d 418, 42 St. Rep. 532 (1985).

Preservation of Family Ranch — Not Proper Consideration Upon Division: Montana's policy in favor of keeping a family farm or ranch intact upon dissolution is not a proper consideration when dividing marital property under this statute. The policy is only to be considered upon distribution of the marital property after it has been allocated. In re Marriage of Glass, 215 M 248, 697 P2d 96, 42 St. Rep. 328 (1985).

Affirmation of Judgment Concerning Family Ranch: In a divorce proceeding involving the valuation and award of the ranch of the parties, the District Court did not err in requiring the sale of the ranch only as a last resort. The Supreme Court, however, vacated the remainder of the judgment on other grounds. Popp v. Popp, 206 M 415, 671 P2d 24, 40 St. Rep. 1747 (1983). Valuation and distribution of marital estate were considered on later appeal in In re Marriage of Popp & Martin, 235 M 372, 767 P2d 871, 46 St. Rep. 64 (1989).

Difference Between Time of Valuation of Assets and Debts — Undervaluation of Crops — Clear Error Found: The District Court committed reversible error when it valued the crops on the parties' ranch at one time and valued the debts of the parties at another. The valuation of the crops in February, rather than at harvesttime, was reversible error in itself, as it eliminated a significant asset from the gross marital estate. The error was compounded by valuing the debts at a later time, which meant that the wife was not allowed to share in the profits of the ranch accrued since the date of the parties' separation but she was charged with a portion of the parties' debts accruing during the same time. This was fundamentally unfair and resulted in clear error. Popp v. Popp, 206 M 415, 671 P2d 24, 40 St. Rep. 1747 (1983). Valuation and distribution of marital estate were considered on later appeal in In re Marriage of Popp & Martin, 235 M 372, 767 P2d 871, 46 St. Rep. 64 (1989).

Order for Sale of Ranch Property to Pay Wife's Share Upheld: Where the District Court ordered that the parties' ranch be sold and the proceeds divided between the wife and husband in a dissolution proceeding if the husband could not raise enough capital within 90 days to buy the wife's interest, the Supreme Court held that the District Court did not err in making the order despite the policy of Montana courts to keep a family ranch intact in such circumstances. The order of the District Court shows that it tried to follow that policy by giving the husband time to secure the necessary money to buy out his wife but that given the value of the ranch, the success of the husband was unlikely. The District Court's order was equitable and fair, and the Supreme Court could not say the District Court abused its discretion under the circumstances. Garst v. Garst, 206 M 89, 669 P2d 1063, 40 St. Rep. 1526 (1983).

Failure to Find Property Subject to Distribution — Conflicting Findings Requiring Remand: Where the District Court found, in a dissolution proceeding, that a coin collection was acquired by the wife's wages during the marriage and therefore constituted property subject to division and awarded the collection to the wife but failed to include the collection in a list of property subject to division, the Supreme Court remanded the case to the District Court for amendment of the findings in a manner consistent with the Supreme Court opinion. Glasser v. Glasser, 206 M 77, 669 P2d 685, 40 St. Rep. 1518 (1983).

Residence Gifted to Wife and Maintained By Husband — Award to Wife Upheld: Where the wife's father gave the wife a house, it was not error for the District Court to award the house to the wife in a dissolution proceeding despite the fact that the husband had performed maintenance on the house and it had increased in value over the course of the marriage. The husband did not present sufficient contrary evidence to the record for the findings of the District Court to be reversed. Glasser v. Glasser, 206 M 77, 669 P2d 685, 40 St. Rep. 1518 (1983), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Inequitably Small Award to Wife With No Maintenance and Retarded Child: The parties were married for 30 years, wife was 64 and retired, and husband was 59 and a property manager and carpenter with most of his income coming from rentals on property he owned and managed. They owned a California house, a Missoula house, and a ranch. Husband lived in the Missoula house, and wife lived in the California house. Their children were all over 21, though one lived with wife as the child was mentally retarded and could not be left alone for more than 3 hours. Trial court awarded wife all property held in her name and in her possession, subject to all debts, except that the $16,500 mortgage on her California house was made husband's obligation. Husband was apparently awarded everything else, including the ranch, which the parties' appraisers valued at $1,184,725 and $1,649,166. No provision was made for the mentally retarded child, and no maintenance was awarded. The property division was inequitable, and the case was remanded for reconsideration in light of this section, the cases construing it, and the marital property's value at the time of dissolution of the marriage. In re Marriage of Wolfe, 202 M 454, 659 P2d 259, 40 St. Rep. 211 (1983), followed in Vance v. Vance, 204 M 267, 664 P2d 907, 40 St. Rep. 836 (1983).

Distribution in Kind Not Required: The trial court found that the wife's share of the marital estate was $247,320, with $25,000 paid at the time of the judgment and 20 annual installments of $11,116. The court also granted the wife a security interest in shares of closely held stock owned by the husband. The husband argued that the court should have made a distribution of stock in kind rather than giving the wife annual payments. The Supreme Court found no error in failing to distribute the property in kind. In addition, the court approved the granting of a security interest for the wife's protection. In re Marriage of Burleigh, 200 M 1, 650 P2d 753, 39 St. Rep. 1538 (1982).

Discretion Not Abused — Valuation Generally: No abuse of discretion could be found in findings that carefully set forth the fair market value, outstanding obligations, and net value of each marital asset, developed the reasoning for accepting husband's appraisals and estimates over those of wife, and were fully supported by the record. In re Marriage of LeProwse, 198 M 357, 646 P2d 526, 39 St. Rep. 1053 (1982), followed in In re Marriage of Ereth, 232 M 493, 757 P2d 1312, 45 St. Rep. 1223 (1988). See also In re Petition of Fenzau, 2002 MT 197, 311 M 163, 54 P3d 43 (2002).

Arbitrary, Nonconscientious, Unreasonableness Test: The rule governing review of a District Court division of marital property upon divorce is whether the District Court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason in view of the circumstances. Hill v. Hill, 197 M 451, 643 P2d 582, 39 St. Rep. 723 (1982), followed in Laster v. Laster, 197 M 470, 643 P2d 597, 39 St. Rep. 737 (1982), followed in In re Marriage of White, 218 M 343, 708 P2d 267, 42 St. Rep. 1634 (1985); In re Marriage of Keating, 212 M 462, 689 P2d 249, 41 St. Rep. 1865 (1984).

Inherited Vested Future Remainder Interest — Determination of Vesting: Husband involved in divorce and property disposition proceeding had inherited from his father a one-fourth remainder interest in one-half of the family ranch, subject to mother's life estate. Husband's interest was described in the decree of distribution of his father's estate as not being subject to divestment. The nature of the interest could not be changed by a collateral attack in which husband claimed his father's will required a different decree of distribution and made his remainder interest subject to divestment in the event he died before his mother. District Court's property disposition finding that the interest was a vested interest subject to divestment was not supported by the evidence. Hill v. Hill, 197 M 451, 643 P2d 582, 39 St. Rep. 723 (1982).

Land Held With Third Party — Equitable Interest: Husband in divorce proceeding had, during marriage, purchased with his brother a tract of land, and it was recorded in the names of husband and brother as tenants in common. Husband and brother each ranched and farmed other tracts of land. Testimony showed that the record owners of the various pieces of land owned by the two brothers and other family members, and ranched and farmed by the two brothers, were not always the equitable owners. For example, their mother and sisters had interests which were sometimes put up as security for loans with which the brothers purchased more land. Husband was the legal one-half owner of the tract he and his brother held as tenants in common, but the husband apparently considered himself the owner of the entire property; his brother apparently had nothing to do with it and was helping to pay for it in exchange for husband's interest in another tract of land. The District Court's finding that husband's interest in the tract he and his brother purchased was a one-half equitable interest was supported by substantial credible evidence, did not appear to be arbitrary or beyond reason, and was sustained. Hill v. Hill, 197 M 451, 643 P2d 582, 39 St. Rep. 723 (1982).

Duress in Entering Property Settlement Agreement: Where appellant sought to set aside prior separation agreement and property settlement on grounds of duress, the court held the totality of circumstances in this case indicated any threat by respondent to seek custody rights of children or to impugn appellant's reputation because of adultery was not sufficient to constitute duress in entering the agreement. Lawrence v. Lawrence, 197 M 262, 642 P2d 1043, 39 St. Rep. 548 (1982).

Using Threat of Custody Dispute as Violation of Public Policy: Threat of a custody dispute in order to gain leverage in the property distribution is not violative of public policy such that the separation agreement and property settlement will be set aside. Lawrence v. Lawrence, 197 M 262, 642 P2d 1043, 39 St. Rep. 548 (1982).

Division of Property — Effect of Tax Liens Created After Dissolution: When the parties were divorced in 1974 and support and property settlement matters were deferred, the division of property giving certain property encumbered by federal and state tax liens to the appellant was not unfair since the liens represented appellant's delinquent federal and state income obligations primarily for years after the marriage of the parties was dissolved. In re Marriage of Dahl, 188 M 128, 612 P2d 196 (1980).

Admission of Irrelevant Evidence: In a trial for a decree of divorce in which the only issue was the disposition of the family home, the District Court admitted evidence concerning bank deposits and checks. As the evidence admitted had nothing to do with the issue at trial, it cannot serve as a basis for error; no error exists for appeal unless a substantial right of the objecting party has been affected. In re Marriage of Schwartz, 184 M 178, 602 P2d 175 (1979).

Review of Apportionment: The apportionment made by the District Court will not be disturbed on review unless there has been a clear abuse of discretion as manifested by a substantially inequitable division of the marital assets resulting in substantial injustice. Green v. Green, 181 M 285, 593 P2d 446 (1979).

Reflection of Net Worth Required: If the Supreme Court cannot determine from the findings and conclusions whether the District Court weighed each element delineated in this section in dividing the property, the cause must be remanded for a redetermination of the disposition of the parties' marital estate. If the District Court's findings and conclusions do not reflect the net worth of the parties' marital assets at the time of the divorce, the Supreme Court on appeal cannot determine if the property was equitably divided. Robertson v. Robertson, 180 M 226, 590 P2d 113 (1978).

Abuse of Discretion Required: The standard for reviewing the property division in a dissolution decreed by a District Court is that the apportionment made by the District Court will not be disturbed on review unless there has been a clear abuse of discretion as manifested by a substantially inequitable division of the marital assets resulting in substantial injustice. Brown v. Brown, 179 M 417, 587 P2d 361 (1978), followed in In re Marriage of Larson, 234 M 400, 763 P2d 1109, 45 St. Rep. 2003 (1988).

Law Review Articles

Treatment of a Professional Degree of License in a Marital Dissolution, Nelson, 47 Mont. L. Rev. 450 (1986).

Equitable Power of Divorce Courts to Adjust Property Rights, Alexander, 21 Mont. L. Rev. 230 (1960).

40-4-203. Maintenance.

Commissioners' Note

Section 308(a) [40-4-203(1)] authorizes the court to order maintenance to either spouse in three kinds of proceedings: (1) dissolution of marriage; (2) legal separation; and (3) independent proceedings for maintenance following an earlier proceeding for dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse and thus could not affect maintenance [see comment to Section 302(a) [40-4-104(1)]]. In all three kinds of proceedings the court may award maintenance only if both findings listed in (1)[(a)] and (2)[(b)] are made. The dual intention of this section and Section 307 [40-4-202] is to encourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance. Only if the available property is insufficient for the purpose and if the spouse who seeks maintenance is unable to secure employment appropriate to his skills and interests or is occupied with child care may an award of maintenance be ordered.

Assuming that an award of maintenance is appropriate under subsection 308(a) [40-4-203(1)], the standards for setting the amount of the award are set forth in subsection 308(b) [40-4-203(2)]. Here, as in Section 307 [40-4-202], the court is expressly admonished not to consider the misconduct of a spouse during the marriage. Instead, the court should consider the factors relevant to the issue of maintenance, including those listed in subdivisions (1)-(6) [(a)-(f)].

Compiler's Comments

2013 Amendment: Chapter 88 inserted (3) requiring that qualified domestic relations orders be sealed. Amendment effective October 1, 2013.

Applicability: Section 11, Ch. 88, L. 2013, provided: "[This act] applies to proceedings filed after [the effective date of this act]." Effective October 1, 2013.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Source: Section 308, Uniform Marriage and Divorce Act.

Case Notes

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REQUIRED FINDINGS

Lack of Findings to Support Maintenance Award — Remanded for Consideration of Relevant Factors: The parties filed for dissolution of their long-term marriage. As a part of the distribution of the parties' property, the District Court awarded the wife maintenance. The husband appealed to the Supreme Court, which agreed that the District Court had erred in determining the maintenance award because it had not made findings to support the wife's monthly expenses and whether the husband could meet his own expenses. The Supreme Court remanded for the District Court to make findings after considering the relevant factors under 40-4-203. In re Marriage of Smith, 2015 MT 256, 381 Mont. 1, 358 P.3d 171.

Award of Lifetime Maintenance Unsupported by Findings — Remand: The District Court found that the wife was unable to support herself and maintain her lifestyle through her employment and granted the wife a monthly maintenance award for the duration of her life or until she remarried. However, the court failed to make any finding as to whether the wife lacked sufficient property to provide for her reasonable needs, so the award was vacated for lack of statutorily required findings. The court also failed to make findings regarding the husband's ability to fund the maintenance award long term, so the case was remanded for further findings. In re Marriage of Jackson, 2008 MT 25, 341 M 227, 177 P3d 474 (2008).

Consideration of Statutory Factors, Not Specific Findings, Required: Although a District Court must consider each of the factors listed in this section in awarding maintenance, the court need not make specific findings of fact regarding each factor as long as the Supreme Court can determine that each factor was actually considered. In re Marriage of Payer, 2005 MT 89, 326 M 459, 110 P3d 460 (2005), following In re Marriage of Grende, 2004 MT 36, 320 M 38, 85 P3d 788 (2004). See also In re Marriage of Rudolf, 2007 MT 178, 338 M 226, 164 P3d 907 (2007).

Marital Debt and Assets Considered — Ability to Work Precluding Maintenance Award: During the marriage, the wife worked 10-hour days, 5 to 7 days a week; following the couple's separation, the wife chose to work only part-time and lived beyond her means, despite her accounting degree. The District Court correctly found that the wife was not entitled to maintenance because she did not meet the requirements of subsection (1)(b) of this section, inasmuch as she was capable of supporting herself through appropriate employment. In re Marriage of Hanni, 2000 MT 59, 299 M 20, 997 P2d 760, 57 St. Rep. 279 (2000).

Failure to Consider Future Share of Retirement Benefits Not Error: The parties stipulated to a division of husband's employer-sponsored future retirement benefits. Husband contended that it was error not to consider wife's retirement share in determining whether she had sufficient property to provide for her reasonable needs. However, the retirement benefit to be received by the wife in the future was totally irrelevant to her present ability to provide for her needs because it was property she did not currently have and thus could not contribute to her living expenses. In re Marriage of Doolittle, 265 M 168, 875 P2d 331, 51 St. Rep. 450 (1994).

Adopting One Party's Proposed Findings of Fact and Conclusions of Law Not Necessarily Error: Joseph Barker argued that the lower court's adoption of his wife's proposed findings of fact and conclusions of law in awarding maintenance was error based upon In re Marriage of Kukes, 258 M 324, 852 P2d 655 (1993). The Supreme Court ruled that the case before it was distinguishable because the District Court did not adopt the findings and conclusions "wholesale" but demonstrated that it had exercised independent judgment in making its decisions. In re Marriage of Barker, 264 M 110, 870 P2d 86, 51 St. Rep. 176 (1994).

Evidence of Self-Support and Sufficient Income-Producing Property — Maintenance Not Warranted: When the record showed that wife was able to provide for her reasonable needs through earned income and property obtained in the dissolution, an award of maintenance was not warranted. In re Marriage of Overturf, 253 M 321, 833 P2d 213, 49 St. Rep. 613 (1992), followed in In re Marriage of Scott, 254 M 81, 835 P2d 710, 49 St. Rep. 634 (1992). See also In re Marriage of Caras, 2012 MT 25, 364 Mont. 32, 270 P.3d 48.

Contradictory Findings Not Supporting Maintenance Award: The lower court's findings were contradictory as to whether permanent maintenance was justified. The case was remanded to District Court for reconsideration after making new findings complying with statutory requirements. In re Marriage of Hughes, 236 M 427, 770 P2d 499, 46 St. Rep. 482 (1989).

Lack of Specific Findings — Findings and Evidence Sufficient: Although the court did not make specific findings on each element of this section, the findings it did make showed it considered the proper factors, and those findings and the award of maintenance were based on substantial credible evidence. In re Marriage of Cole, 234 M 352, 763 P2d 39, 45 St. Rep. 1965 (1988), followed in In re Marriage of Dorville, 254 M 111, 836 P2d 588, 49 St. Rep. 658 (1992), In re Marriage of Corey, 266 M 304, 880 P2d 824, 51 St. Rep. 859 (1994), In re Marriage of Chew, 269 M 331, 888 P2d 428, 52 St. Rep. 13 (1995), and In re Marriage of Hanni, 2000 MT 59, 299 M 20, 997 P2d 760, 57 St. Rep. 279 (2000).

Maintenance Appropriate — Standard of Living and Ability to Pay: An award of maintenance is appropriate when a spouse is unable to achieve a similar standard of living after dissolution and when the other spouse is able to meet his or her own needs as well as pay maintenance. In re Marriage of Luisi, 232 M 243, 756 P2d 456, 45 St. Rep. 1023 (1988), followed in In re Marriage of Eide, 250 M 490, 821 P2d 1036, 48 St. Rep. 1054 (1991), and in In re Marriage of Silverman, 259 M 337, 856 P2d 533, 50 St. Rep. 823 (1993). See also In re Marriage of Harper, 1999 MT 321, 297 M 290, 994 P2d 1, 56 St. Rep. 1280 (1999).

Voluntary Maintenance Agreement — Findings of Need and Duration Not Required: Husband contended that, prior to awarding temporary maintenance, the District Court failed to make proper findings of need and duration required by 40-4-121 and this section. However, the court was not required to make such findings since the parties voluntarily entered into a maintenance agreement. In re Marriage of Halverson, 230 M 226, 749 P2d 518, 45 St. Rep. 162 (1988).

Specific Findings of Nature of Properties Owned by Maintenance-Seeking Spouse Required — Investment Ability as Valid Consideration: In determining whether maintenance is proper, for future clarity and ease of appellate review, the Supreme Court requires a specific finding regarding the nature of properties owned by the maintenance-seeking spouse. That spouse's ability to invest his or her assets is a valid consideration. In re Marriage of Tow, 229 M 483, 748 P2d 440, 44 St. Rep. 2154 (1987).

Final Custody Plan and Maintenance Schedule Required: Where the District Court on one hand stated that the sale of the family home "should be retained as an available option" and on the other hand set terms of a 30-day buy-out or sale period, the case was remanded for determination of a final custody plan and maintenance schedule, since resolution of custody and maintenance hinged on sale of the home. In re Marriage of Ensign, 227 M 357, 739 P2d 479, 44 St. Rep. 1146 (1987).

Factors for Consideration — Review of Disproportionate Distribution: A seemingly disproportionate distribution of marital property, with or without an award of maintenance, must be considered in light of the overall property distribution, the requirements of 40-4-202 and this section, and whether there is substantial credible evidence to support the District Court's division. In re Marriage of Bowman, 226 M 99, 734 P2d 197, 44 St. Rep. 488 (1987).

Award of Maintenance After Marriage of Short Duration — Expenses Incurred After Separation: Husband appealed from a judgment awarding wife maintenance when parties separated less than a year after marriage. He contended that no maintenance was required because the wife chose to purchase things she could not afford after the parties separated and that the requirements of 40-4-203 were not followed in awarding maintenance to the wife. The Supreme Court disagreed, noting that the District Court Judge specifically recognized the appropriate standards for awarding maintenance, including the fact that the wife lacked sufficient property to provide for her reasonable means and that she was unable to support herself through appropriate employment, as well as the fact that the husband had the financial resources to pay maintenance and still meet his own needs. The District Court judgment was affirmed. In re Marriage of Forney, 221 M 63, 716 P2d 635, 43 St. Rep. 637 (1986). See also In re Marriage of Lundvall, 241 M 172, 786 P2d 10, 47 St. Rep. 173 (1990), and In re Marriage of Harris, 252 M 291, 828 P2d 1365, 49 St. Rep. 255 (1992).

Factors Considered in Maintenance and Support Awards:

An award of maintenance under this section must be made in accordance with the factors this section sets forth. Laster v. Laster, 197 M 470, 643 P2d 597, 39 St. Rep. 737 (1982). See also In re Marriage of Crowley, 2014 MT 42, 374 Mont. 48, 318 P.3d 1031.

When a District Court is required to make an award of maintenance and support in a dissolution proceeding, it must consider the items and factors set out in 40-4-203 and 40-4-204. Grenfell v. Grenfell, 182 M 229, 596 P2d 205 (1979).

"Sufficient Property" for Spouse's Needs — Income-Producing Property: With respect to this section's requirement that maintenance cannot be awarded unless the spouse who will receive it lacks sufficient property to provide for that spouse's needs, the term "sufficient property" means income-producing, not income-consuming, property. Laster v. Laster, 197 M 470, 643 P2d 597, 39 St. Rep. 737 (1982).

Net Worth of Marital Estate to Be Determined: The true net worth of the marital estate must be accurately determined in accordance with the requirements of 40-4-202 before the issues of equitable apportionment, maintenance, and child support can be resolved. Peterson v. Peterson, 195 M 157, 636 P2d 821, 38 St. Rep. 1723 (1981).

Determination of Net Worth Required — Maintenance: In the distribution of marital property upon dissolution, the District Court must make a determination of the true net worth of assets before an equitable division can be made. The District Court cannot properly determine that the parties lack sufficient property to provide for their needs and are unable to support themselves through appropriate employment (the basis for awarding maintenance) until the marital assets have been valued and equitably apportioned. The District Court must also determine if the property to be awarded is income-producing or income-consuming property. Herron v. Herron, 186 M 396, 608 P2d 97 (1980), proper findings and conclusions made and judgment affirmed in In re Marriage of Herron, 226 M 485, 736 P2d 487, 44 St. Rep. 823 (1987). See also In re Marriage of Hanni, 2000 MT 59, 299 M 20, 997 P2d 760, 57 St. Rep. 279 (2000).

Factual Determinations Imperative:

Maintenance payments require an affirmative showing as a condition precedent to their award. The existence or lack of this condition precedent is to be shown by a recordation of the essential and determining facts upon which the court rested its conclusions of law and without which the judgment lacks support. Schultz v. Schultz, 183 M 20, 597 P2d 1174 (1979). See also Collett v. Collett, 190 M 500, 621 P2d 1093, 38 St. Rep. 36 (1981).

The pertinent factors in 40-4-203 and 40-4-204, with findings of fact to support them, should be set out in the District Court's decision. Otherwise the appellate court has nothing upon which to base its review. Moreover, under 40-4-208 the District Court can grant modification or termination of maintenance and support only if there is a showing of circumstances making the payments unconscionable, which compels proper findings and conclusions. Capener v. Capener, 177 M 437, 582 P2d 326 (1978). See also Park v. Park, 190 M 183, 619 P2d 1200, 37 St. Rep. 1874 (1980).

Construction — Standard of Living During Marriage: The appropriate construction of the language of subsections (1)(a) and (1)(b) of this section is whether the spouse seeking maintenance lacks sufficient property and is unable to support herself through appropriate employment according to the standard of living established during the marriage. Madson v. Madson, 180 M 220, 590 P2d 110 (1978). See also Bowman v. Bowman, 194 M 233, 633 P2d 1198, 38 St. Rep. 1515 (1981); In re Marriage of Goodman, 222 M 446, 723 P2d 219, 43 St. Rep. 1410 (1986); In re Marriage of Luisi, 232 M 243, 756 P2d 456, 45 St. Rep. 1023 (1988); In re Marriage of Skinner, 240 M 299, 783 P2d 1350, 46 St. Rep. 2141 (1989); In re Marriage of Dunn, 285 M 95, 809 P2d 571, 48 St. Rep. 341 (1991), In re Marriage of Van Atta, 252 M 310, 829 P2d 3, 49 St. Rep. 264 (1992), In re Marriage of Dorville, 254 M 111, 836 P2d 588, 49 St. Rep. 658 (1992), distinguishing Dunn, In re Marriage of Lozon, 256 M 59, 843 P2d 793, 49 St. Rep. 1135 (1992), and In re Marriage of Silverman, 259 M 337, 856 P2d 533, 50 St. Rep. 823 (1993). Dunn was cited in In re Marriage of Bross, 256 M 174, 845 P2d 728, 50 St. Rep. 13 (1993).

Findings of Fact and Conclusions of Law to Agree: Where finding of fact in dissolution of marriage proceeding stated that wife had need for $200 per month for maintenance and in conclusion court allowed $250 per month for maintenance, discrepancy between finding and conclusion could be cured by allowing trial court to amend one or other figure to agree with actual decision on maintenance. Caprice v. Caprice, 178 M 455, 585 P2d 641 (1978).

Mandates Ignored — Effect: It was readily apparent from the District Court record that the trial court judge in his exercise of discretion over the property settlement abused his discretion when he ignored statutory mandates and refused to consider the needs of appellant for some financial assistance during the transition from housewife to a single person. Cromwell v. Cromwell, 174 M 356, 570 P2d 1129 (1977).

EVIDENCE TO SUPPORT FINDINGS

Imputed Annual Income Exceeding Husband's Current Income Proper — Imputed Income Based on Gifts From Husband's Mother Improper: In a 2015 divorce proceeding, the District Court imputed an annual earning capacity of $175,000 to the husband in awarding child support and maintenance. The determination was based on a 2011 statement by the husband that he could potentially earn $100,000 a year, on his work experience and qualifications in the financial industry, and on prior gifts from his mother to the marital estate of $75,000 a year. On appeal, the husband argued that he had not made $100,000 a year since before 2007, that his current income was substantially lower, and that the District Court erred by assuming he would receive $75,000 a year from his mother. The Supreme Court affirmed the District Court's finding of $100,000 a year based on the record. However, the Supreme Court reversed the District Court regarding the gifts of $75,000 a year from the husband's mother because there was no guarantee that he would continue to receive substantial gifts in the foreseeable future. In re Marriage of Paschen, 2015 MT 350, 382 Mont. 34, 363 P.3d 444. See also In re Marriage of Miller, 2022 MT 110, 409 Mont. 29, 511 P.3d 307.

Wife Unable to Support Herself Through Appropriate Employment — Maintenance Award Proper: The wife's portion of the marital estate was $4,081.50, which was clearly insufficient to provide for her reasonable needs. Additionally, the wife was unable to support herself through appropriate employment. The husband did not establish error in the District Court's award of $500 a month in maintenance for 3 years even though the marriage lasted only 4 years, and the award was affirmed on appeal. In re Marriage of Graham, 2008 MT 435, 347 M 483, 199 P3d 211 (2008).

Maintenance Award Proper — Remand for Consideration of Property Distribution and Maintenance Together: The District Court found that based on the duration of the marriage, the standard of living established during the marriage, the wife's inability to sustain that standard of living and the husband's ability to do so, and the disparity between the debts owed by each party, an award of maintenance to the wife was warranted. The Supreme Court agreed that maintenance was proper, but remanded for a redistribution of marital assets because the District Court included an improper equalization payment, awarding property that exceeded the net worth of the marital estate. Because the distribution of property and maintenance must be considered together, the maintenance award was also remanded for reconsideration in light of the recalculated property distribution. In re Marriage of Harris, 2006 MT 63, 331 M 368, 132 P3d 502 (2006). See also In re Marriage of Rolf, 2003 MT 194, 316 M 517, 75 P3d 770 (2003). Harris and Rolf were overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Tandem Consideration of Property Distribution and Maintenance Not Error: A District Court may consider both the distribution of the marital estate and the appropriateness of a spousal maintenance award at the same time. In re Marriage of Payer, 2005 MT 89, 326 M 459, 110 P3d 460 (2005). See also Hilt v. Hilt, 209 M 140, 679 P2d 783 (1984).

No Consideration of Marital Fault in Maintenance Award — Ample Evidence to Support Supplemental Maintenance Award: The District Court awarded the wife $2,000 a month in maintenance for 24 months, plus a supplemental award of $39,000 because the monthly award would not allow her to meet the deficiency between her predissolution and postdissolution wages, improve her standard of living to a level resembling that which she enjoyed during the marriage, or afford a residence without additional help. The husband appealed the maintenance award, asserting that the language used by the District Court in awarding maintenance was indicative of the court's consideration of marital misconduct and that the award of supplemental maintenance based on the appreciated marital estate was erroneous. However, the supplemental award was not based on fault, but rather reflected the District Court's difficulty of accurately determining the value of the husband's portion of the marital estate because of his systematic nondisclosure. The District Court's valuation of the marital estate based on appreciated value was supported by appropriate findings of fact that were in turn amply supported in the record. The District Court's award of monthly and supplemental maintenance was affirmed. In re Marriage of Rolf, 2004 MT 276, 323 M 216, 99 P3d 217 (2004).

Maintenance Factors Properly Considered — Temporary Maintenance Proper: The District Court awarded the wife $500 a month in temporary maintenance, and the husband appealed, arguing that the court misapprehended the evidence. The Supreme Court found that the District Court had properly considered the factors in this section, including the wife's financial resources, her lack of sufficient property to independently provide for her needs, her inability to support herself through appropriate employment given her past work experience and current and future earning capability, and the standard of living established during the marriage. The temporary maintenance award was affirmed. In re Marriage of Swanson, 2004 MT 124, 321 M 250, 90 P3d 418 (2004).

Sufficient Payment of Temporary Maintenance to Preclude Ongoing Maintenance Award: The District Court concluded that $67,875.25 that the wife had received in maintenance under a temporary support order was sufficient to allow her to get a job to sustain herself and declined to award the wife ongoing maintenance. On appeal, the Supreme Court agreed. The wife had sufficient property to provide for her reasonable needs, including a trust fund and property valued at over $400,000 in Wisconsin, a master's degree in clinical psychology with the ability to earn a doctorate degree upon completion of her dissertation, and the ability to earn $75 a day as a substitute teacher upon completion of the necessary paperwork. Denial of further maintenance was affirmed. In re Marriage of Killpack, 2004 MT 55, 320 M 186, 87 P3d 393 (2004).

Signing of Prenuptial Agreement Under Duress — Requiring Spouse to Pay Maintenance and Immigration Legal Fees Legitimate Allocation of Marital Debt: A doctor brought a Russian woman and her son to Montana under a fiancee visa. As the visa was running out, the couple had to marry or return the woman and her son to Russia, so they signed a prenuptial agreement and married. The agreement kept their premarital property separate in case of dissolution and provided that if the marriage ended before the wife obtained a permanent visa, the doctor would pay reasonable transportation expenses for her and her son to return to Russia. Shortly thereafter, the doctor fell and suffered a traumatic head injury. When he got home about 5 months later, he discovered that the wife had moved out and that the court-appointed guardian had purchased a new car for her and was paying her expenses, so he filed for dissolution. The District Court held that the prenuptial agreement was not entered voluntarily by the wife, gave her the car, ordered maintenance for 20 months, and ordered the husband to pay the expenses of the wife's immigration attorney. On appeal, the Supreme Court found no abuse of discretion in the trial court's findings and affirmed.

Under the unique circumstances of this case, the prenuptial agreement was invalid because the wife, under duress, signed an agreement that she did not understand in order to remain in this country. Maintenance was appropriate in order to put the wife in a self-sustaining position, given her limited job opportunities and understanding of English. Further, she would not have been able to obtain legal residency without the assistance of an immigration attorney, so requiring the husband to pay the immigration legal fees was a legitimate allocation of the marital debt. In re Marriage of Shirilla, 2004 MT 28, 319 M 385, 89 P3d 1 (2004).

Award of Unpaid Maintenance Proper Under Clear Terms of Dissolution: A dissolution decree provided that the wife receive maintenance until she was deceased or remarried or until she received one-half of the proceeds from the sale of two homes and a business. She received proceeds from the sale of the two homes in April, after which no further maintenance was forthcoming. Proceeds from the sale of the business were not received until October. Under the plain language of the dissolution, the District Court properly found that the wife was entitled to maintenance from April to October. In re Marriage of Schmieding, 2003 MT 246, 317 M 320, 77 P3d 216 (2003).

Consideration of Maintenance Award on Remand for Reconsideration of Property Distribution Proper — Substantial Evidence to Support Maintenance Award: In In re Marriage of Rolf, 2000 MT 361, 303 M 349, 16 P3d 345 (2000), the Supreme Court remanded for further determinations regarding the value and distribution of the marital estate. On remand, the District Court awarded the wife a smaller portion of the marital estate, plus maintenance. The husband appealed, claiming that the trial court abused its jurisdiction by addressing maintenance, an issue outside the scope of the remand. The Supreme Court noted that the original District Court Judge found that a maintenance award was inappropriate in view of the property allocation, so maintenance was a factor in the original decision. Therefore, it was appropriate on remand for the District Court to revisit both the property distribution issue and the maintenance question, and the court did not exceed its jurisdiction in doing so. Further, there was substantial evidence to support a maintenance award because the wife was unable to support herself and was without sufficient property to provide for her reasonable means. The maintenance award was affirmed. In re Marriage of Rolf, 2003 MT 194, 316 M 517, 75 P3d 770 (2003).

Income of Husband More Than Wife — Denial of Maintenance Award Proper: The District Court distributed about 56% of the marital estate to the husband Harold and about 44% to the wife Susan. Susan's request for maintenance was denied, and Susan appealed, but the Supreme Court affirmed. Harold was faced with mandatory retirement and had several health problems that affected his future career and earning potential, which would require that he immediately begin drawing on his portion of the marital estate as his primary income source, while Susan would be able to continue working, contributing to her deferred compensation plan and adding to the value of her retirement, with the result that Susan's income in the immediate future would exceed that of Harold. The fact that Harold earned more preretirement income did not alone require a maintenance award. Susan was granted sufficient property to provide for her needs and was able to support herself through employment, so it was not an abuse of discretion when the District Court denied the maintenance award. In re Marriage of Smith, 2003 MT 63, 314 M 421, 67 P3d 199 (2003), followed in In re Marriage of Dirnberger, 2007 MT 84, 337 M 56, 154 P3d 1227 (2007).

Failure to Consider Spouse's Disability Income in Valuation of Marital Estate and Consideration of Maintenance Award — No Error: The husband was 44 years old and suffered from a terminal illness that substantially impaired the quality of his life and precluded him from performing any gainful activity. The District Court awarded the husband all of his disability income without including the income in the value of the marital estate or considering the income, amounting to $12,000 a month, in determining whether the wife was entitled to maintenance. The wife contended that failure to consider the disability income was erroneous in both instances. The Supreme Court disagreed. The District Court did consider the disability benefits in its distribution of the estate, if not in its valuation. Further, the distribution provided the wife with sufficient property and funds to provide for her reasonable needs, so maintenance was unnecessary. The marital estate was not necessarily divided equally, but it was divided equitably, and the District Court was affirmed. In re Marriage of Hayes, 2002 MT 281, 312 M 440, 60 P3d 431 (2002).

Petitioner Receiving Majority of Marital Estate — Temporary Maintenance Award Proper: The wife received the bulk of the marital estate, including the equity in the family home and her husband's retirement account, and left the marriage with no debt. Nevertheless, the wife's employment was insufficient to meet her needs in light of the parties' standard of living during the marriage, so the wife was awarded $1,500 a month maintenance for 4 years to enable her to acquire sufficient job training and increase her standard of living to become self-sufficient.

The wife appealed, contending that the maintenance award should have been permanent. Citing In re Marriage of Herman, 245 M 451, 802 P2d 623 (1990), the Supreme Court noted that District Courts face a considerable task in determining a maintenance award and that, in the final analysis, it is not a question of whether the Supreme Court could be persuaded to reach a different conclusion after considering the same evidence, but rather whether the District Court had adequate evidence to support its conclusions. Here, the District Court properly considered each of the factors in this section, and substantial evidence supported the court's conclusions. Given the distribution of the marital estate, as well as the wife's relatively young age, good health, work history, and skills and abilities, the temporary maintenance award was not clearly erroneous. In re Marriage of Haines, 2002 MT 182, 311 M 70, 53 P3d 378 (2002), distinguishing Bowman v. Bowman, 194 M 233, 633 P2d 1198 (1981), and followed in In re Marriage of Payer, 2005 MT 89, 326 M 459, 110 P3d 460 (2005). Haines was followed, as to the issue was whether the District Court had sufficient evidence before it to support its ruling, in In re Marriage of Helzer, 2004 MT 352, 324 M 371, 102 P3d 1263 (2004).

Use of Imputed Income to Determine Spousal Maintenance When Parent Voluntarily Unemployed or Underemployed: The District Court set spousal maintenance for the mother at $500 a month until she finished her education. The father did not dispute that the mother lacked sufficient property to meet her financial needs, but argued that the court did not consider his ability to meet his own needs while providing maintenance, asserting that the maintenance award should be based on his actual income rather than on his imputed income. The Supreme Court noted that the father was voluntarily underemployed, but had the ability to increase his income in the near future, based on his own testimony and the testimony of his expert witness. The imputation of an additional $45,000 in income to the father was supported by substantial evidence, and at the imputed income level, he would have $4,478 in discretionary monthly income after paying child support, child care, maintenance, and the children's insurance. Therefore, the District Court did not err in setting maintenance at $500 a month for the time that the mother was a full-time student. In re Marriage of Bee, 2002 MT 49, 309 M 34, 43 P3d 903 (2002).

Increase of Maintenance Upon Cessation of Child Support Obligation Not Considered Modification: The District Court concluded that the wife was entitled to maintenance of $750 a month until the husband's child support obligation ceased, at which time the maintenance would increase to $1,250 a month for a total maintenance period of 8 years. The husband asserted that it was error to connect the maintenance award to child support and provide an automatic increase because the future increase was a modification of the maintenance award that required notice and findings of changed circumstances pursuant to 40-4-208. However, the husband did not offer a single case in which a maintenance award was reversed because the trial court considered child support in reaching its conclusion. Further, the award of increasing maintenance payments was one of the terms of the dissolution decree, not a subsequent modification of the terms of the decree that required notice and a showing of changed circumstances, so the award was affirmed. In re Marriage of Harkin, 2000 MT 105, 299 M 298, 999 P2d 969, 57 St. Rep. 422 (2000).

Trust Income Properly Considered in Award of Maintenance: Despite the fact that the husband later resigned as cotrustee of a revocable trust, at the time of trial, he was still acting as cotrustee and was entitled to receive $1,000 a month in compensation. The District Court did not abuse its discretion in finding that he earned $1,000 a month in income as trustee and, following examination of the parties' assets, in awarding the wife $1,000 a month in maintenance. In re Marriage of Beadle, 1998 MT 225, 291 M 1, 968 P2d 698, 55 St. Rep. 943 (1998).

Property Award of Sufficient Income-Producing Property — Maintenance Award Unjustified: Wife complained that the District Court erred in not awarding her maintenance because she was not awarded sufficient income-producing property. Noting that she had been awarded $335,465 in property, including 7 horses, 10 Charolois cattle, 2 Longhorn cattle, 2 pairs of ostriches, horse trailers, irrigation line, and cleaning equipment and a temporary possessory interest in a 160-acre ranch worth at least $480,000 for which she was not responsible to pay taxes, mortgage, or insurance; $400,000 in cash; and $6,977 a month in child support, the court properly concluded that maintenance was not warranted because the property award would provide her with sufficient income-producing property, allow her to support herself through the employment of her choosing, and enable her to enjoy a standard of living similar to the standard that she enjoyed while married. In re Marriage of Pfeifer, 282 M 461, 938 P2d 684, 54 St. Rep. 432 (1997).

Ability to Support Oneself Through Appropriate Employment — Maintenance Unwarranted: Wife contended that the District Court erred in finding that she was able to support herself and that maintenance was therefore not warranted. On review, the Supreme Court affirmed, noting that: (1) wife was relatively young and healthy; (2) husband was retired and unable to meet his own expenses because of a monthly loan payment of $5,000; and (3) wife had secured work as a waitress and should be able to support herself through appropriate employment and meet her monthly expenses without an award of maintenance. In re Marriage of Walls, 278 M 413, 925 P2d 483, 53 St. Rep. 974 (1996). See also In re Marriage of Estes, 2017 MT 67, 387 Mont. 113, 391 P.3d 752.

Husband argued that, even though he did not request maintenance, the trial court was required to consider an award of maintenance. However, maintenance was properly not awarded upon a showing that husband could support himself, given the following facts: (1) he was 43 years old and in good health; (2) he had two college degrees, both obtained before the marriage; (3) he had been self-supporting before the marriage, working as a corporate vice president, and was well-respected in the industry in which he had worked; and (4) he was presently employed as a clerk earning about $18,000 a year. In re Marriage of Smith, 270 M 263, 891 P2d 522, 52 St. Rep. 174 (1995).

Maintenance for Wife With Monthly Income $582 Short of Monthly Expenses When Husband's Monthly Income $1,133 Above Monthly Expenses: Wife was entitled to maintenance because her net income was $881 a month and her living expenses were $1,463 a month. The evidence supported the finding that she lacked sufficient property to provide for her needs and was unable to support herself through employment. She testified that her retail sales employer did not allow employees to have another job working for a competitor and that it would be difficult to coordinate the hours of a second job in another field. Retraining or additional education would raise the prospect of a large student loan debt and entering the job market at over 50 years of age. Her standard of living had diminished since the separation. Husband, whose monthly income exceeded monthly expenses by $1,133, was properly ordered to pay $500 a month maintenance. Ellis v. Ellis, 277 M 494, 922 P2d 1176, 53 St. Rep. 801 (1996).

Five-Month Marriage to Husband With Poorer Financial and Employment Prospects and Deteriorating Health — Maintenance for Wife Refused: The lower court properly determined that maintenance for the wife was inappropriate. The wife was young and able-bodied, had a job, was able to support herself, had much brighter educational and economic prospects than her husband, and had been married to him for only 5 months. The husband's left arm was paralyzed, his left side was impaired, and his condition was expected to deteriorate. He had a learning disability, had trouble communicating, and could work only at manual labor jobs. In re Marriage of Bradshaw, 270 M 222, 891 P2d 506, 52 St. Rep. 154 (1995).

Award of Maintenance After Marriage of Short Duration: A maintenance award of $800 a month for 18 months following a marriage of less than 1 year was proper when wife, awarded $1,000 to compensate her for basic household items she disposed of prior to and during the marriage, did not receive sufficient income-producing property to support herself and could not obtain appropriate employment to support herself because of lack of training and sufficient education. In re Marriage of Eschenbacher & Crepeau, 253 M 139, 831 P2d 1353, 49 St. Rep. 393 (1992).

Distortion of Actual Income by Adjustments — Maintenance Award Proper: Husband asserted that he could not make $800-a-month maintenance payments when his annual expenses, including maintenance, would be $29,950.92, but his income was only $22,219. However, the maintenance award was proper in light of the District Court's findings that husband had adjusted his gross annual income downward to reflect depreciation and payments on certain nonincome-producing properties and that without these deductions, his actual annual income was closer to $30,000. In re Marriage of Harris, 252 M 291, 828 P2d 1365, 49 St. Rep. 255 (1992).

Permanent Disability as Evidence of Need for Maintenance: An award of maintenance was proper based on evidence that a 54-year-old woman with an artificial bladder, who was classified as totally disabled by the Social Security Administration and was characterized by her own testimony as unemployable, could not work. In re Marriage of Harris, 252 M 291, 828 P2d 1365, 49 St. Rep. 255 (1992).

Additional Income From Profit Sharing as Allowing Spouse to Meet Personal Needs While Paying Maintenance: Husband contended that his monthly income from salary of $1,500 and monthly expenses of $1,768.45 made a maintenance award of $450 a month to wife erroneous. The Supreme Court affirmed the award after noting that the husband's additional income from an annual profit sharing check in an amount approximately equal to his salary would enable him to provide for his own needs while also paying maintenance. In re Marriage of Newton, 255 M 463, 844 P2d 47, 49 St. Rep. 1068 (1992), following In re Marriage of Jacobson, 255 M 394, 825 P2d 561, 49 St. Rep. 92 (1992).

Maintenance Appropriate: Wife's poor health and husband's ability to earn income and manage assets satisfy the statutory conditions for maintenance award. In re Marriage of Dzivi, 247 M 165, 805 P2d 567, 48 St. Rep. 140 (1991).

No Permanent Maintenance Awarded for Forfeiture of Professional Advancement: The wife argued that she should be awarded permanent maintenance because she had forfeited 20 years of advancement as a teacher by working in the home. The Supreme Court held that the Special Master had taken special care to consider the wife's nonmonetary contributions when computing the maintenance award, and the court found no abuse of discretion. In re Marriage of Herman, 245 M 451, 802 P2d 623, 47 St. Rep. 2196 (1990).

Owner of Failed Pizza Business Entitled to Maintenance: The Supreme Court affirmed the award of maintenance to the wife on the basis that for most of the marriage, she had run the household, she had no specific job skills, and her only attempt at outside employment, a pizza business, failed. In re Marriage of Sullivan, 243 M 292, 794 P2d 687, 47 St. Rep. 1231 (1990).

Psychotherapy for Paranoid Wife Appropriate Expense: The husband appealed a maintenance award to the wife that included an amount to pay for her psychotherapy. The Supreme Court ruled that there was substantial evidence proving that the wife suffered from a paranoid mental disorder that if not treated would impair her ability to find employment. The court also found that there was ample evidence for the lower court to find that physical abuse by the husband was causative of the wife's psychological problems. In re Marriage of Ernst, 243 M 114, 793 P2d 777, 47 St. Rep. 1034 (1990).

Maintenance Awarded Despite Short Duration of Marriage: In a divorce action, the husband argued that the lower court erred in awarding the wife maintenance due to the short duration of the marriage. The Supreme Court ruled that the lower court had considered all the factors, of which duration was one, and did not err in making the award. In re Marriage of Cannon, 242 M 230, 790 P2d 479, 47 St. Rep. 752 (1990).

Insistence on Receiving Income-Consuming Property — Denial of Maintenance Proper: During entirety of dissolution proceedings, husband sought to sell a Flathead Lake cabin, which required monthly payments of $1,500, to reduce the drain on the family cash. Wife resisted all attempts to sell it and insisted it be awarded to her as part of the marital estate. Following dissolution, wife sought maintenance because she had not been awarded sufficient income-producing property to provide for her reasonable needs. The District Court did not err in failing to order maintenance payments that were not necessitated by wife's reasonable needs but rather through her voluntary decision to choose a piece of income-consuming property. In re Marriage of Garner, 239 M 485, 781 P2d 1125, 46 St. Rep. 1852 (1989).

Property Settlement and Employment Opportunities Adequate to Supply Reasonable Needs: The District Court properly denied an award of maintenance in light of evidence showing that a payment of $3,000 a month for 2½ years as part of a property settlement, coupled with excellent employment opportunities available as a result of attendance at a prestigious law school, was adequate to supply a spouse's reasonable needs. In re Marriage of Garner, 239 M 485, 781 P2d 1125, 46 St. Rep. 1852 (1989).

Consideration of Shared Expenses in Determining Maintenance: The District Court did not err in increasing the amount of available income for maintenance when evidence showed that husband was sharing expenses with a close friend he employed at $12.50 an hour. In re Marriage of Penning, 238 M 75, 776 P2d 1214, 46 St. Rep. 1103 (1989).

Employability and Medical Factors Properly Considered: A maintenance award was proper where wife's medical problems precluded employment while husband was healthy, engaged in stock option trading, and planned to resume his career as a real estate agent. In re Marriage of Purdy, 234 M 502, 764 P2d 857, 45 St. Rep. 2084 (1988).

Spousal Ability for Self-Support — Award of Income-Producing Property and Portion of Marital Estate — Maintenance Properly Refused: The District Court awarded wife a substantial portion of the marital estate, including income-producing property and her business. The court also found she was able to support herself through appropriate employment. Wife's claim for maintenance failed to meet the statutory requirements. In re Marriage of Anderson, 230 M 89, 748 P2d 469, 45 St. Rep. 40 (1988).

Prerequisites for Award of Maintenance Met: District Court findings of wife's limited resources (nonincome-producing family home only), limited educational background (high school education), and length of marriage (22 years) were sufficient to warrant a maintenance award under this section. In re Marriage of Sullivan, 229 M 23, 744 P2d 1240, 44 St. Rep. 1748 (1987).

No Evidence of Inability to Support Self — Maintenance Denied: Because wife failed to prove inability to support herself, she failed to prove herself entitled to maintenance. In re Marriage of Hall, 228 M 36, 740 P2d 684, 44 St. Rep. 1321 (1987).

Evidence Sufficient to Support Retroactive Maintenance Award — Rights Not Prejudiced by Award Made at Time of Dissolution: A temporary order of child support issued at the date of dissolution 2 years prior to final judgment did not prejudice the rights of the parties or the children adjudicated at the later hearings. It was clearly within the District Court's discretion, after hearing the matter of child support and maintenance, to make the award of maintenance retroactive to the date of dissolution. In re Marriage of Revious, 226 M 304, 735 P2d 301, 44 St. Rep. 674 (1987), followed in In re Marriage of Spence, 257 M 188, 849 P2d 161, 50 St. Rep. 225 (1993).

Retraining Needs and Children's Needs — Maintenance Justified: Wife's need for retraining in order to enter the job market and the needs of the children relating to care and education, when coupled with a lack of sufficient property and incapability of self-support, were sufficient to warrant a $300 a month maintenance award for 5 years. In re Marriage of Manus, 225 M 457, 733 P2d 1275, 44 St. Rep. 398 (1987).

Duration of Maintenance Too Brief — Wife's Immediate Earning Prospects Questionable: The District Court relied too heavily on the husband's assertion that the wife could earn $17,000 a year as an elementary school teacher in awarding maintenance for only 1 year. The wife was 46 years old, did not hold a current teaching certificate, and had not worked as a teacher for the last 16 years. The husband worked throughout the marriage and made $2,000 a month. Awarding maintenance for 1 year did not meet the criteria of this section. It ignored the time necessary to find employment, the standard of living of the marriage, the duration of the marriage, the age and physical condition of the wife, and the husband's ability to meet his needs. In re Marriage of Rolfe, 216 M 39, 699 P2d 79, 42 St. Rep. 623 (1985).

Distinctions Based on Duration of Marriage and Employability of Spouse: The court did not abuse its discretion in setting its maintenance award since the wife was able to work and contribute to her own maintenance. This case is to be distinguished from those in which there were marriages of long standing, and the circumstances were such that the wife was not able to go out and successfully compete in the job market. In re Marriage of Loegering, 212 M 499, 689 P2d 260, 41 St. Rep. 1892 (1984); In re Marriage of Jorgensen, 180 M 294, 590 P2d 606 (1979). See also Bowman v. Bowman, 194 M 233, 633 P2d 1198, 38 St. Rep. 1515 (1981).

Working Wife Given House and $52,000: It was not an abuse of discretion to deny maintenance to wife who had been employed for the past 25 years, had $530 a month take-home pay, and received from the marital estate a house, $8,000 in stock, and $44,000, $24,000 of which would be paid in installments of $400 a month. Snell v. Snell, 205 M 359, 668 P2d 238, 40 St. Rep. 1359 (1983).

Disparity in Income and Health Justifying Maintenance: Husband and wife were married for 19 years. During the marriage wife was a homemaker, took care of the parties' two children, and did not work outside the home. One child has now reached adulthood. Both children live with the wife. The wife has no vocational skills and is not in good health. She earns $3.50 an hour. Husband earns $1,980.42, net, a month on his regular job and earns extra money selling health care products. He is in good health, and his job is secure. The District Court ordered that the husband pay maintenance, child support, and the wife's attorney fees. Husband appealed the maintenance and attorney fees awards. The Supreme Court ruled that in view of the evidence presented on the parties' relative financial situations, the award of maintenance was not clearly erroneous. The Supreme Court further ruled that for similar reasons, the District Court did not abuse its discretion in awarding attorney fees to the wife. Carr v. Carr, 205 M 269, 667 P2d 425, 40 St. Rep. 1263 (1983).

Wife Caring for Retarded Adult Child: In determining maintenance issue, trial court must give consideration to wife's need for maintenance in light of the property division, her age and health, and the condition of mentally retarded child over 21 who resided with her, as child was incapable of staying alone for more than 3 hours at a time. In re Marriage of Wolfe, 202 M 454, 659 P2d 259, 40 St. Rep. 211 (1983).

Failure to Consider Homemaker Contributions and Future Financial Picture: The evidence did not show on appeal that the District Court considered the factors required by 40-4-202 to be considered in apportioning the marital assets, and in particular did not show that the court considered the wife's contributions as homemaker or the apparent significant difference between the spouses in regard to future acquisition of capital assets and income. Thus, additional findings were required as a proper foundation for an equitable property distribution. The award of maintenance to the wife would be vacated as well as the property disposition. Upon redetermining the property distribution, the District Court should further consider the needs of both spouses and decide whether the wife lacked sufficient property to provide for her needs and whether she would be able to support herself. The husband in this case had a net worth of $194,809; the wife had a $10,000 equity in real estate she purchased for $42,000 and owned an interest in a Paris apartment on which the court had not placed a value; husband had a $28,000 a year 1979 income; and wife had an income of approximately $500 a month with little chance that it would increase significantly. In re Marriage of Lewis, 189 M 51, 643 P2d 604, 39 St. Rep. 759 (1982).

Voluntary Departure From Employment Insufficient Basis for Relief From Maintenance Award: Where the marriage of the parties was previously dissolved and the wife awarded maintenance without being required to seek employment in order that she be able to care for a handicapped child at home, the husband was not denied his right of review of the maintenance award by his former wife's voluntary action of leaving her job, thereby making continuation of maintenance necessary. The evidence that the respondent left her job voluntarily was introduced, but the findings and testimony indicate that the trial court found other factors to be determinative in the decision to continue the maintenance payments. The voluntary departure alone does not require a finding that the wife was no longer entitled to maintenance. Tidball v. Tidball, 192 M 1, 625 P2d 1147, 38 St. Rep. 482 (1981).

Maintenance Ordered Following Purchase of Marital Property — No Error Found: In an action for dissolution of marriage in which the defendant was awarded all the property of the parties and was ordered to make 96 monthly property settlement payments of $305.35 each to the plaintiff who showed living expenses of $400 per month and a net salary of $464.98, the trial court did not err in also awarding the plaintiff $100 per month maintenance payments to commence after the termination of all property settlement payments. After the plaintiff's equity in the marital property has been purchased by the defendant's payments, the plaintiff's net worth will have been reduced by the value of her share of the marital property while the defendant's has been correspondingly increased. If the plaintiff were forced to invade the property settlement payments, she would then be forced to consume her marital property while the defendant was able to make an investment. Given these circumstances, there was nothing prejudicial to the defendant in the trial court's award of maintenance. Sundstrom v. Sundstrom, 191 M 371, 624 P2d 1000, 38 St. Rep. 395 (1981).

Findings — Supported by Substantial and Creditable Evidence: The trial court did not abuse its discretion in awarding the wife $200 per month maintenance. Even though the trial court did not go so far as to draw up a monthly budget of wife's reasonable needs, it did make the appropriate findings required by this section supported by substantial and creditable evidence of the status of both parties. In re Marriage of Vivian, 188 M 259, 613 P2d 699 (1980).

Maintenance Denied — Evidence of Self-Support and Income Property: The trial court correctly denied maintenance to wife because she had been employed and self-supporting for 2 years prior to the divorce and because she had been awarded cash by way of annual installment payments and other income properties. Knudson v. Knudson, 186 M 8, 606 P2d 130 (1980).

Award of Maintenance — Consideration of Overtime Pay: The Supreme Court upheld an award of maintenance for 3 years to the wife in an action for dissolution. The wife was not capable of earning more than the minimum wage because of lack of education and training. She had custody of a 9-year-old child, and the husband had an average monthly net income of $1,300. The District Court properly considered overtime pay in determining the husband's income potential. Vashler v. Vashler, 183 M 444, 600 P2d 208 (1979).

Maintenance Related Only to Needs of Spouse Seeking It — Discretion of Court: An award of maintenance is related only to the needs of the spouse seeking maintenance, and the wide discretion of the court in determining maintenance is not to be disturbed unless clearly erroneous. When findings that a wife lacked sufficient property to provide for her reasonable needs and was unable to support herself were supported by the record, the court's award of maintenance to her met the test. Aanenson v. Aanenson, 183 M 229, 598 P2d 1120 (1979), followed in In re Marriage of Skinner, 240 M 299, 783 P2d 1350, 46 St. Rep. 2141 (1989), and in In re Marriage of Eide, 250 M 490, 821 P2d 1036, 48 St. Rep. 1054 (1991).

Both Parties Capable of Working: The court held that since both parties were capable of working no maintenance was required. Jermunson v. Jermunson, 181 M 97, 592 P2d 491 (1979).

Alimony Provision in Property Settlement: Where wife accepted alimony in lieu of distribution of other property, alimony provision of property settlement agreement as incorporated in divorce decree was intended to act as inseverable contractual provision and could not be stricken from decree, despite claimed unconstitutionality of alimony statute. Taylor v. Taylor, 167 M 164, 537 P2d 483 (1975).

Error in Not Considering Wife's Qualifications for Alimony: Trial court's finding that wife should leave marriage with nothing, leaving her at large in community without means of support due to her lack of marketable skills and physical disabilities, because she had brought no assets into marriage was erroneous where for 14 years wife had contributed to marriage by helping on family farm, by aiding husband in building of an addition to farm home, and by performance of domestic duties. Stenberg v. Stenberg, 161 M 164, 505 P2d 110 (1973).

REVIEW OF MAINTENANCE AWARD

No Clear Error in Maintenance Award: In the situation of a marital estate in excess of $10 million accumulated during a 25-year marriage that provided a very good standard of living, the court is required to consider basic monthly expenses and reasonable needs in determining the maintenance award. The spouse is entitled to enjoy a standard of living consistent with that enjoyed by the former spouse, not merely a minimum standard to meet bare expenses. In re Marriage of Lewis, 2020 MT 44, 399 Mont. 58, 458 P.3d 1009.

Sufficient Evidence to Support District Court Apportionment — No Abuse of Discretion: A wife appealed the amount and duration of her maintenance award. The Supreme Court noted that the wife would face barriers to securing employment and managing the assets she was awarded in the divorce in order to produce a return and that the wife made a "well-supported argument for entitlement to a higher maintenance award". Nevertheless, the Supreme Court upheld the District Court's award given that there was sufficient evidence to support its conclusion and nothing suggesting that the District Court acted arbitrarily or in clear error. In re Marriage of Frank, 2019 MT 130, 396 Mont. 123, 443 P.3d 527.

Award of Maintenance and Distribution of Assets to Wife Supported by Facts: The District Court did not err by awarding the wife maintenance and by including the husband's investment accounts in calculating the division of the marital estate. The standing master's findings regarding maintenance, which were adopted by the District Court, along with the District Court's own findings demonstrated that the District Court fully and carefully considered the relevant factors pursuant to 40-4-203, including the parties' ages, health conditions, duration of marriage, and standard of living enjoyed during the marriage, the assets of the parties, and the assets' equitable distribution between the parties. The findings of the standing master and the District Court regarding equitable distribution also considered all of the factors set forth in 40-4-202, and the allocation of approximately 30% of the marital estate to the wife was supported by the facts. In re Marriage of Hollamon, 2018 MT 37, 390 Mont. 320, 413 P.3d 460.

Imputed Annual Income Exceeding Husband's Current Income Proper — Imputed Income Based on Gifts From Husband's Mother Improper: In a 2015 divorce proceeding, the District Court imputed an annual earning capacity of $175,000 to the husband in awarding child support and maintenance. The determination was based on a 2011 statement by the husband that he could potentially earn $100,000 a year, on his work experience and qualifications in the financial industry, and on prior gifts from his mother to the marital estate of $75,000 a year. On appeal, the husband argued that he had not made $100,000 a year since before 2007, that his current income was substantially lower, and that the District Court erred by assuming he would receive $75,000 a year from his mother. The Supreme Court affirmed the District Court's finding of $100,000 a year based on the record. However, the Supreme Court reversed the District Court regarding the gifts of $75,000 a year from the husband's mother because there was no guarantee that he would continue to receive substantial gifts in the foreseeable future. In re Marriage of Paschen, 2015 MT 350, 382 Mont. 34, 363 P.3d 444. See also In re Marriage of Miller, 2022 MT 110, 409 Mont. 29, 511 P.3d 307.

Payment of Medical Debt Instead of Maintenance — Standing Master Erred Given Wife's Medical Condition and Contributions During Marriage: A standing master issued a report dividing the parties' marital estate. Instead of awarding the wife maintenance as she had requested, the standing master ordered the husband to pay a small portion of the wife's medical debts. Over the wife's objections, the District Court approved the report. On appeal, the wife argued that the standing master and the District Court erred in not awarding her maintenance given her medical condition and her nonmonetary contributions to the marital estate. The Supreme Court agreed, concluding that the husband's payment of her medical debt did not help the wife meet her financial needs. The Supreme Court reversed and remanded the matter to the District Court, ruling that the standing master erred in denying the wife maintenance given the circumstances. In re Marriage of Patton, 2015 MT 7, 378 Mont. 22, 340 P.3d 1242.

Property Award and Equalization Payment Properly Characterized as Nonincome-Producing Property for Maintenance Purposes: The District Court granted real property and a property equalization payment to the wife in a dissolution proceeding and then identified the property and payment as nonincome-producing property for purposes of establishing the amount of a maintenance award. The husband appealed on grounds that the equalization payment was income-producing because it gave the wife the immediate ability to pay daily expenses and to invest the money. The husband also contended that the real property was income-producing because it was readily convertible to cash. The Supreme Court disagreed. A District Court may grant maintenance only if the spouse seeking maintenance lacks sufficient income-producing property to provide for reasonable needs and is unable to achieve self-support through employment. In this case, it was unclear from the record whether the equalization payment was readily available within the marital estate, so the payment could not be predictably identified as income-producing. The real property was not cash, and this section demanded an analysis of whether the property itself was sufficient for the wife, not whether she was able to sell it. In this context, the real property was properly categorized as nonincome-producing, and the District Court was affirmed. In re Marriage of Cameron, 2009 MT 302, 352 M 375, 217 P3d 78 (2009).

Substantial Change in Parties' Financial Circumstances Warranting Termination of Maintenance Obligation: Although maintenance is generally not favored, it is appropriate when a spouse has insufficient assets to cover living expenses and cannot reasonably earn a sufficient amount to maintain an appropriate standard of living. Once maintenance is awarded, a maintenance order may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms of the award unconscionable. In this case, the husband moved to terminate maintenance and the motion was granted. The wife appealed, but the Supreme Court affirmed. The parties' financial circumstances had changed significantly since dissolution. In the original decree, the property distribution was intended to be approximately equal. At that time, real property distributed to the wife was valued at $225,960, but the wife later sold the property, netting approximately $556,000 or about $330,000 more than the assigned value. The husband sold his interest in the property for an approximate net of $350,000. Additionally, the husband's income had decreased by about $1,000 a month through no fault of his own. The nature of the wife's property interest also changed from nonincome-producing to income-producing. At the time of dissolution, the wife's income-producing property was valued at $105,000, but at the time of the modification hearing, the wife had accumulated $556,000 in income-producing property and could earn sufficient interest to more than pay her living expenses. Thus, the husband's maintenance obligation of $1,000 a month was rendered unconscionable by the change in the parties' financial circumstances, and the District Court did not err in terminating the husband's maintenance obligation. In re Marriage of Crilly, 2009 MT 187, 351 M 71, 209 P3d 249 (2009).

Spouse's Social Security Payment Only Income — Lack of Income-Producing Property and Employability — Maintenance Award Affirmed: The District Court awarded the wife $1,000 a month in maintenance after finding that: (1) her sole income was her Social Security benefits; (2) she had not been awarded any income-producing property; (3) health problems made her virtually unemployable; and (4) the parties would have relatively equal monthly incomes if maintenance was paid. The findings were supported by substantial credible evidence and not clearly erroneous, and the Supreme Court affirmed. In re Marriage of Crilly, 2005 MT 311, 329 M 479, 124 P3d 1151 (2005).

Wife's Sufficient Assets and Ability for Self-Support — Maintenance Award Properly Denied: The parties had extremely limited marital assets, and the District Court granted the greater share to the wife but declined her request for maintenance. On appeal, the Supreme Court affirmed. With the greater share of marital property, the wife had sufficient assets to provide for her reasonable needs. Despite her limited education, her severe and judgmental attitude, and the fact that she had never worked outside the home, she was nonetheless physically able to support herself through appropriate employment, so maintenance was not warranted. In re Marriage of Epperson, 2005 MT 46, 326 M 142, 107 P3d 1268 (2005).

Monthly Maintenance Payments Treated as Separate Installments — All Elements of Maintenance Claim Not in Existence on Date of Judgment — Statute of Limitations Inapplicable: A dissolution decree on October 23, 1987, granted the wife monthly spousal maintenance payments of $3,500 a month for 10 years. The ex-husband made the first several payments, but paid no maintenance after August 1, 1988. In 2001, the ex-wife filed an action to renew the judgment. The ex-husband contended that the judgment was barred by the 10-year statute of limitations in 27-2-201. The District Court reasoned that because all elements of the ex-wife's maintenance claim existed on October 23, 1987, the statute of limitations applied, and summary judgment was granted to the ex-husband. On appeal, the Supreme Court reversed, holding that when a judgment award requires monthly payments rather than a lump sum, each payment is to be treated as a separate installment for purposes of applying the statute of limitations. The court likened delinquent monthly maintenance payments to monthly child support arrearages that are due within the statute of limitations. Thus, the claim did not accrue until all elements of the claim or cause existed or occurred, so any claim for the ex-husband's nonpayment of maintenance could not have accrued until each individual payment was due. The ex-wife's claim for delinquent monthly maintenance payments was not time-barred. Fulton v. Fulton, 2004 MT 240, 322 M 516, 97 P3d 573 (2004), distinguishing Cummings v. Lockwood, 327 P2d 1012 (Ariz. 1958). See also In re Marriage of Hooper & Crittendon, 247 M 322, 806 P2d 541 (1991).

Home Providing Both Housing and Potential Income — Failure to Show Inability for Self-Support — No Maintenance Award: The wife argued that the District Court improperly failed to provide her a cash maintenance award because she was unable to meet her needs and those of the children without one. However, this section requires a showing that a spouse requesting maintenance both lacks sufficient property to provide for needs and is unable to support oneself. In this case, the wife failed to show that she could not support herself. The husband was required to pay child support, plus one-half the mortgage payments on the family home to which the wife had exclusive use. The wife also testified that the property would allow her to expand her horse boarding business and rent an apartment attached to the house, providing additional potential income. The decision not to award additional maintenance was not clearly erroneous and was affirmed on review. In re Marriage of Stoneman, 2000 MT 274, 302 M 107, 14 P3d 12, 57 St. Rep. 1145 (2000), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

Evidence of Parties' Relative Financial Condition Unsupportive of Maintenance — Award Vacated: An award of maintenance must be based on substantial evidence presented by the parties and clearly identified and articulated by the court. In the present case, wife presented evidence of need, but the award of maintenance was not consistent with the evidence of husband's financial condition, nor did it take into account wife's bank account balance or monthly medical premiums that she received through her employment. The award was vacated on remand for a recalculation based on the evidence. In re Marriage of Stufft, 286 M 239, 950 P2d 1373, 54 St. Rep. 1391 (1997).

Award of $100 Annually for Five Years Affirmed: Despite wife's contention that the District Court erred in awarding her maintenance of $100 a year for 5 years, the Supreme Court affirmed the award, noting that in its findings of fact, the District Court had considered the party's property assets, employment opportunities, earning capacity, and marital debt and that the findings were not clearly erroneous. Wife retained the option to seek a modification upon a showing of changed circumstances so substantial and continuing as to make the terms of the decree unconscionable. In re Marriage of Lee, 282 M 410, 938 P2d 650, 54 St. Rep. 409 (1997).

Lack of Evidence of Income From Law Practice and Availability of Employment — Case Remanded for Findings: In its order dissolving the marriage of David and Mayla, the District Court found that David had an income of $35,000 a year from his law practice and $50,000 a year from his position as family farm manager. The District Court awarded Mayla $2,000 a month as maintenance for 2 years or until she became employed by the school district of her new residence, whichever came first. David claimed that he was not capable of paying the $2,000 a month. The Supreme Court found that there was no evidence to support the law practice income attributed to David by the District Court. Additionally, the Supreme Court noted that David claimed that he had resigned as farm manager and that although under In re Marriage of Chiovaro, 247 M 185, 805 P2d 575 (1991), a court may impute income to a party if past employment remains available to the party, there was no evidence in the record showing that the position as farm manager remained available to David. The Supreme Court therefore remanded the case to the District Court to make findings consistent with the order. The Supreme Court also noted that in making those findings, the District Court should, in accordance with subsection (2)(a) of this section, consider the award of child support. In re Marriage of Stufft, 276 M 454, 916 P2d 767, 53 St. Rep. 467 (1996).

Issue of Maintenance Remanded to District Court When Apportionment of Marital Property Also Remanded: In the decree of dissolution of Margaret and Mark's marriage, the District Court set out a schedule for payment of maintenance by Mark and also refused to award certain shares of ranch corporate stock to Margaret. The Supreme Court reversed the property distribution determined by the District Court and remanded the case to the District Court for further proceedings. Because an award of maintenance must consider the amount of marital property apportioned between the parties, the Supreme Court also remanded the case to the District Court for a further determination of maintenance in light of the further apportionment of marital property. In re Marriage of Davies, 266 M 466, 880 P2d 1368, 51 St. Rep. 929 (1994).

Failure to Make Complete Findings Regarding Ability to Make Maintenance Payments — Remand: The District Court ordered husband to pay $150 a month in maintenance for 2 years but did not consider his visitation travel expenses; amounts owed to attorneys, expert witnesses, and counselors; or the reasonable cost of housing when considering his monthly expenses and needs. The award was vacated and remanded for further findings as to whether, after consideration of these expenses and a reasonable allowance for repayment of debts, the husband had the financial ability to meet his needs and still pay maintenance. In re Marriage of D.F.D. & D.G.D., 261 M 186, 862 P2d 368, 50 St. Rep. 1280 (1993).

Permanent Lifetime Maintenance: A court may award permanent lifetime maintenance if the facts necessitate it. In re Marriage of Burris, 258 M 265, 852 P2d 616, 50 St. Rep. 525 (1993).

Incarceration Not Sufficient Grounds to Retroactively Modify Maintenance Award: The husband argued that the lower court should have retroactively modified its maintenance award because his incarceration changed his circumstances. The Supreme Court held that the amount of the award was based on the wife's needs and that the husband had sufficient liquid assets to cover the maintenance payments regardless of the fact that he was incarcerated. In re Marriage of Olsen, 257 M 208, 848 P2d 1026, 50 St. Rep. 234 (1993).

Remand for Consideration of Possible Maintenance Award: Wife's workers' compensation permanent total disability payments were scheduled to cease after 10 years, leaving her potentially unable to support herself, and she had spent the bulk of her cash distribution on postseparation living expenses and legal fees in litigating the divorce. Because the case was remanded for a redetermination of the valuation of marital property, the Supreme Court also directed a reconsideration of whether a maintenance award was appropriate under the circumstances. In re Marriage of Schmitz, 255 M 159, 841 P2d 496, 49 St. Rep. 919 (1992).

Standard of Review on Appeal:

In determining whether a maintenance award was clearly erroneous, the Supreme Court applied the test set out in Interstate Prod. Credit Ass'n v. DeSaye, 250 M 320, 820 P2d 1285, 48 St. Rep. 986 (1991): (1) the Supreme Court will review the record to determine whether findings are supported by substantial evidence; (2) if findings are supported by substantial evidence, the Supreme Court will determine whether the trial court has misapprehended the effect of the evidence; and (3) if substantial evidence exists and the effect of the evidence has not been misapprehended, the Supreme Court may still find that a finding is clearly erroneous when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed. In re Marriage of Eschenbacher & Crepeau, 253 M 139, 831 P2d 1353, 49 St. Rep. 393 (1992), followed in In re Marriage of Dorville, 254 M 111, 836 P2d 388, 49 St. Rep. 658 (1992), In re Marriage of Sacry, 253 M 378, 833 P2d 1035, 49 St. Rep. 452 (1992), In re Marriage of Weed, 254 M 162, 836 P2d 591, 49 St. Rep. 861 (1992), In re Marriage of McLean/Fleury, 257 M 55, 849 P2d 1012, 50 St. Rep. 35 (1993). See also In re Marriage of Dirnberger, 2007 MT 84, 337 M 56, 154 P3d 1227 (2007).

If there is no clear abuse of discretion resulting in substantial injustice, the award made by the District Court will not be disturbed. In re Marriage of Deichl, 239 M 425, 781 P2d 254, 46 St. Rep. 1801 (1989); In re Marriage of Loegering, 212 M 499, 689 P2d 260, 41 St. Rep. 1892 (1984); Grenfell v. Grenfell, 182 M 229, 596 P2d 205 (1979), following Brown v. Brown, 179 M 417, 587 P2d 361 (1978). See also Levandowski v. Levandowski, 193 M 121, 630 P2d 239, 38 St. Rep. 1002 (1981).

The trial court did not abuse its discretion in the award of support and maintenance to appellant or in the property disposition since the record failed to disclose an arbitrary exercise of discretion without employment of conscientious judgment. In re Marriage of Wash, 239 M 204, 779 P2d 526, 46 St. Rep. 1622 (1989); In re Marriage of Loegering, 212 M 499, 689 P2d 260, 41 St. Rep. 1892 (1984); Jerome v. Jerome, 175 M 429, 574 P2d 997 (1978). See also Tidball v. Tidball, 192 M 1, 625 P2d 1147, 38 St. Rep. 482 (1981).

The following test is applicable in reviewing a lower court judgment in a dissolution: "Did the District Court in the exercise of its discretion act arbitrarily without employment of conscientious judgment or exceed the bounds of reason resulting in substantial injustice?" In re Marriage of Edwards, 215 M 512, 699 P2d 67, 42 St. Rep. 593 (1985).

Improper Modification of Maintenance Awarded "for Life": The District Court modified a property settlement agreement, which provided that the wife receive $300 a month "as maintenance for life" in lieu of property for which she was to receive income, after husband unilaterally discontinued maintenance when wife began receiving social security payments. The maintenance agreement was a plain and unambiguous contract between the parties that was not subject to later interpretation or construction by a court. The agreement was drawn up by husband, a practicing attorney, who clearly understood the meaning of the term "for life". The District Court erred in modifying the agreement, absent a showing of substantial credible evidence that modification was warranted, without considering all necessary information in the original settlement agreement. In re Marriage of McKeon, 252 M 15, 826 P2d 537, 49 St. Rep. 127 (1992), followed in In re Marriage of Woodford, 254 M 501, 839 P2d 574, 49 St. Rep. 887 (1992).

Failure to Consider Statutory Factors and Nature of Assets in Setting Temporary Maintenance Award: An award of $100 a week temporary maintenance was unjustified in light of wife's financial resources, education, employment skills, age, physical and emotional condition, duration of the marriage, standard of living established during the marriage, and husband's ability to provide maintenance in an amount that was fair and just. The Supreme Court remanded after finding that the factors of this section were not considered, the marital estate was not properly valued, and there was no consideration of the nature of the majority of assets awarded to wife. In re Marriage of Rudio & Harlan, 238 M 485, 778 P2d 410, 46 St. Rep. 1437 (1989).

Award of Maintenance to Able-Bodied Spouse Upheld: In a dissolution proceeding, the husband argued that an award of a $750-a-month maintenance for not less than 5 years to his wife was not justified because she was in good health and physically capable of working. The maintenance award was upheld on the basis that maintenance is proper when the requesting party is physically capable of working but needs training for employment. In re Marriage of Stephenson, 237 M 157, 772 P2d 846, 46 St. Rep. 700 (1989).

Judge's Discretion to Award Maintenance When Not Specifically Requested: A court's discretion to award relief to which a party is entitled, even if it is not requested, under former Rule 54(c), M.R.Civ.P. (now superseded), is subject in dissolution proceedings to established statutory dissolution guidelines. Under this section, a court is required to make specific findings regarding maintenance. The findings are subject to review. In re Marriage of Hughes, 236 M 427, 770 P2d 499, 46 St. Rep. 482 (1989), followed in In re Marriage of Haney, 267 M 107, 882 P2d 497, 51 St. Rep. 981 (1994).

Consent to Modification by Court: The parties executed a separation agreement containing a maintenance clause calling for monthly payments from husband to wife. The agreement was incorporated in the dissolution decree. In a subsequent action to enforce the clause, the District Court concluded that the parties intended the monthly payments to be a property division and ordered respondent husband to draft a promissory note secured by a mortgage lien payable to his wife. The Supreme Court held that the District Court could not, in its own discretion, remove the maintenance provision and recalculate the parties' property distribution. However, by reason of the consent of the parties, the court was given power to make a modification in the terms of the agreement, but under these circumstances, it was not appropriate to use a real estate mortgage. In re Marriage of Nelson, 235 M 227, 766 P2d 873, 45 St. Rep. 2340 (1988).

Current Employability of Elderly Wife: The Supreme Court remanded for clarification a decision that a 66-year-old wife was currently employable. In re Marriage of Dow, 230 M 416, 750 P2d 1064, 45 St. Rep. 317 (1988).

Impossibility of Maintenance Payments: Husband's annual income was $20,422.50, but expenses were $1,680.25 a month or $20,163 annually. This left him a surplus of $259.50 a year. It was found to be impossible for him to make maintenance payments of $925 a month, and it appeared wife would have husband sell his only current source of income, rental payments from his farm, in order to support her. The case was remanded for a redetermination of maintenance. In re Marriage of Tow, 229 M 483, 748 P2d 440, 44 St. Rep. 2154 (1987).

Antenuptial Agreement Maintenance Provision Improper: It was error for the District Court to honor a provision in an antenuptial Contract that disallowed consideration of each party's property owned prior to the marriage for purposes of determining maintenance and property disposition because such a provision conflicts with the inherent public policy expressed in this section. In re Marriage of Feisthamel, 227 M 321, 739 P2d 474, 44 St. Rep. 1117 (1987).

Separation Agreement Overlooked — Discretion Abused: The District Court acted unreasonably and arbitrarily in abuse of its discretion by: (1) concluding that the parties' separation agreement, which provided maintenance to the wife, was abandoned in absence of supporting evidence; (2) distributing the marital estate 4 to 1 favoring the husband; (3) ordering the wife fully responsible for the family home payments and liable to the husband for his equity in the home upon default; and (4) not providing any maintenance to the wife to make these payments after finding that she was in need of maintenance. In re Marriage of Bowman, 226 M 99, 734 P2d 197, 44 St. Rep. 488 (1987).

Designation of Living Expense Payments as Maintenance: The District Court did not err in designating monthly sums paid to wife to help with living expenses as maintenance rather than as prepayment of her share of the marital estate when her trial testimony showed she met the standards for maintenance set out in this section. In re Marriage of Pryor, 224 M 488, 731 P2d 895, 43 St. Rep. 2358 (1986).

Maintenance and Child Support Order Remanded — Insufficient Evidence of Ability to Meet Personal and Spouse's Needs: The Supreme Court remanded an order requiring husband to pay $200 a month support for each of three children, to pay all medical, optical, dental, and drug bills incurred by the children but not covered by insurance, and to pay $300 a month maintenance to wife. The court found no evidence that: (1) the trial court applied the formula set out in In re Marriage of Carlson, 214 M 209, 693 P2d 496, 41 St. Rep. 2419 (1984), in awarding child support; and (2) the wife's age or physical or emotional condition prevented her from seeking employment to meet her needs independently. The court further noted that father's financial obligations very nearly exceeded his financial resources and that after meeting his marriage-related debts, support, and maintenance obligations, he was not left with enough to meet his own personal needs. In re Marriage of Keel, 223 M 305, 726 P2d 812, 43 St. Rep. 1742 (1986).

Scope of Review — Relevant Statutory Factors Considered: The scope of Supreme Court review of a maintenance award is determining whether the District Court properly considered the statutory factors set out in this section and whether there is substantial evidence to support the findings. The District Court is not required to draw up a monthly budget of reasonable expenses. In re Marriage of Cannon, 223 M 42, 723 P2d 951, 43 St. Rep. 1517 (1986), followed in In re Marriage of Peetz, 252 M 448, 830 P2d 543, 49 St. Rep. 362 (1992).

Interest on Future Maintenance: Maintenance does not accrue until is becomes due, and an award of future maintenance does not warrant interest on the maintenance. In re Marriage of Williams, 220 M 232, 714 P2d 548, 43 St. Rep. 319 (1986).

Lost Career Maintenance Award — Forgone Wages and Retirement Benefits: The parties were married in 1963, and in that year the wife received a bachelor's degree in Art. She currently holds a provisional teaching certificate. After marriage, she remained at home to care for the children and home. The husband was given $396,294 of the marital estate, and the wife was given $202,890. She was also given 4 years of $800-a-month maintenance and 4 years of school costs at $1,353 a year. The court found that she sustained career losses of $76,313 in retirement benefits and $86,284 in salary and awarded her those amounts as additional maintenance, to be paid one-tenth a year starting 4 years after the date of the dissolution decree, without interest. The court found that in view of the lost career award it was equitable to award almost twice as much property to the husband as to the wife. The Supreme Court upheld the career loss award. In re Marriage of Williams, 220 M 232, 714 P2d 548, 43 St. Rep. 319 (1986).

One Year of Maintenance Insufficient for Wife Who Had Not Worked for Ten Years: Wife had a B.S. degree, had been a pediatric microchemistry lab worker for 11 years prior to the marriage, did not work during the marriage, and had not worked for 10 years. She started working upon separation and was making about $175 and $300 a month teaching piano lessons and selling skin care products, respectively. The husband was a self-employed electrician with a varying income of about $25,000 a year. There was evidence that the wife would need additional schooling to return to her lab work, that it would be very difficult for wife to work 40 hours a week teaching piano or selling cosmetics, and that she and the children were struggling financially while the husband was not. It was error to award her only the 1 year's maintenance of $7,440 husband had paid during the separation, because it was not enough for her to become financially independent. The case was remanded for a new maintenance determination. In re Marriage of Perry, 217 M 162, 704 P2d 41, 42 St. Rep. 1101 (1985).

Wife's Appeal Held Meritorious — Remand for Redetermination of Maintenance and Attorney Fees: Since wife's appeal had merit, husband's assertion that it did not and his request for damages were denied where, among other things, the court was sympathetic to a claim but did not agree with it, a request for a redetermination of the maintenance award was granted, and a request for attorney fees was remanded for a determination. In re Marriage of Perry, 217 M 162, 704 P2d 41, 42 St. Rep. 1101 (1985).

Maintenance Awarded — Former Wife Not Required to Sell House and Get Job Training: It was not error for the District Court to order appellant to pay permanent maintenance to his former wife even though she was awarded the family residence and was not disabled. The evidence indicated that due to her limited work history and education, respondent was not capable of fully supporting herself. The Supreme Court refused to require respondent to sell her house and get job training. In re Marriage of Edwards, 215 M 512, 699 P2d 67, 42 St. Rep. 593 (1985).

Factors Indicating Maintenance: The parties were married in 1965, and a dissolution was entered in 1984. As part of the decree, the wife was awarded $250 a month maintenance, which was to increase to $500 a month upon the youngest child's reaching majority. The husband contended that the award of maintenance was improper and that maintenance may be granted only if the spouse seeking maintenance lacks sufficient property to provide for her needs and is unable to support herself through appropriate employment. On appeal, the Supreme Court held that the District Court was correct in awarding maintenance. At the time of the dissolution after 19 years of marriage, the wife had only a year's experience as a real estate salesperson and it was impossible to determine her probable income without further experience. After the sale of the residence, she would incur a rental expense. The court held that considering the duration of the marriage, the short period of employment experience, and the husband's ability to pay, the requirements of 40-4-203 were met in that the wife did not have sufficient property to provide for her needs, nor was there adequate proof of her ability to support herself. In re Marriage of Schenck, 213 M 310, 692 P2d 6, 41 St. Rep. 2137 (1984), followed in In re Marriage of Jones, 225 M 69, 731 P2d 903, 44 St. Rep. 49 (1987). See also In re Marriage of Roullier, 229 M 348, 746 P2d 1081, 44 St. Rep. 2035 (1987).

Award of Maintenance After Equitable Division of Property: Sections 40-4-202 and 40-4-203 are to be read together. Thus, if the District Court has made an equitable distribution of property but then determines that the property was insufficient to provide for the spouse's financial needs, it may award maintenance. Such a determination must be made individually in each case, requiring the District Court to balance the considerations of both sections, supported by substantial evidence with appropriate findings to form an adequate basis for review. Hilt v. Hilt, 209 M 140, 679 P2d 783, 41 St. Rep. 604 (1984).

Maintenance Award — Findings Sufficiently Specific Where Appellant of Little Help and Lacks Credibility: The parties were married to each other twice. Following the second dissolution, the wife was awarded maintenance until remarriage, death, or passage of 10 years. The District Court found that the property distributed to wife was income-consuming as opposed to income-producing property. The wife was facing a monthly deficit situation. The husband, through financial wheeling and dealing, had previously taken considerable amounts from the estate of the wife. The husband failed to substantiate his financial position, and his credibility was questionable. The Supreme Court found that the trial court had done its best to make statutory findings with no help from the husband. The wife's current standard of living was considerably lower than during the marriage. The award of maintenance was proper and was supportable based on the facts and the weight given to the witness' credibility. Thompson v. Thompson, 208 M 156, 676 P2d 223, 41 St. Rep. 237 (1984).

Award of "Adjustment Allowance" Upheld: In a dissolution proceeding, the wife was awarded an "adjustment allowance" of $150 a month for 2 years, to be paid by her husband. The husband appealed, arguing that the District Court abused its discretion by making an award not provided for by law and by not substantiating the reasons for the award. The Supreme Court affirmed the award, holding that the District Court properly evaluated the factors set forth in the statute and that regardless of the name attached to the award, it was an award of separate maintenance. In re Marriage of Chapin, 202 M 153, 655 P2d 991, 39 St. Rep. 2392 (1982).

Statutory Factors Considered and Referred to Sufficient — Findings as to Mineral Interest and Attorney Fees Required: In awarding child custody to the husband, the court included in its finding the factors outlined in 40-4-212. In ordering the husband to pay maintenance, the court applied the factors set forth in 40-4-203 and referred to them in its findings of fact. There is no clear abuse of discretion by the District Court on either of these issues, and therefore the findings are affirmed. The District Court did not, however, place a value on a mineral interest, and the findings do not explain this exclusion. The court also failed to substantiate why attorney fees were not awarded to the wife. The case is therefore remanded to make findings on the value of the mineral interest and to state reasons as to the grant or denial of the wife's attorney fees. Hammeren v. Hammeren, 201 M 443, 663 P2d 1152, 39 St. Rep. 2222 (1982).

Agreement Basing Payments on Taxable Income of Payor Unconscionable: Four years after entry of a decree of dissolution of marriage, wife moved the District Court to hold husband in contempt for failure to comply with the property settlement agreement that had been incorporated in the dissolution decree and to increase monthly maintenance payments. The agreement provided that husband pay wife $750 a month or 13% of his annual income. The amount of the monthly payment was to be adjusted annually, based on husband's taxable income for the previous calendar year. The District Court refused to hold husband in contempt and denied wife's modification motion, holding that the evidence presented did not indicate that circumstances had changed so much as to render the agreement unconscionable within the meaning of 40-4-208. The District Court interpreted the words "taxable income" to mean taxable income within the meaning of the Internal Revenue Code, except that husband would not be permitted to subtract the amount of his maintenance payments in calculating his taxable income. This interpretation ensured that wife would receive larger payments in the future. The Supreme Court affirmed the District Court on the contempt issue but reversed on the maintenance issue, ruling that the agreement was unconscionable as a matter of law because husband could adjust his deductible expenses in such a way as to reduce the total amount of his taxable income and ultimately the amount of wife's monthly maintenance payments. In re Marriage of Rowen, 199 M 315, 649 P2d 1259, 39 St. Rep. 1423 (1982).

Drawing Account for Maintenance — Permissible Uses: Wife in divorce proceeding was granted a four-plex, the income to be used to fulfill husband's maintenance and support obligations amounting to $1,000 a month. The husband was to maintain a $1,000 bank account in wife's name upon which wife could draw to the extent that the four-plex did not provide income of $1,000 a month. The account was not established until several months after dissolution of the marriage, and wife drew upon it to cover child support owed by husband for the period between the dissolution and the establishment of the account. Husband then closed the account on the basis of an agreement that he could do so if wife withdrew money from it for any purpose other than to make up the difference should the four-plex not provide a $1,000 income in any given month. On wife's motion for enforcement of the divorce decree, trial court properly directed the husband to reestablish the account, as husband had an obligation to care for the children, as provided in the divorce decree, during the period between the decree date and the opening of the account. In re Marriage of Baker, 198 M 371, 646 P2d 522, 39 St. Rep. 1031 (1982).

Spendable Income Determination — Salary Deductions: District Court improperly calculated husband's spendable income when it took account of federal taxes deducted from his salary but did not take account of other deductions, such as state taxes, retirement payments, insurance payments, and union dues. However, the error was harmless and did not require remand because his spendable income was determined in order to decide how much maintenance he could pay, and he could pay the amount awarded when his other income was taken into consideration. Laster v. Laster, 197 M 470, 643 P2d 597, 39 St. Rep. 737 (1982), followed in In re Marriage of Korpela, 219 M 150, 710 P2d 1359, 42 St. Rep. 1912 (1985).

Denial of Maintenance Rendering Spouse Ward of State: If the effect of not awarding a spouse maintenance in a divorce proceeding would be to make that spouse a ward of the state, maintenance should be awarded if possible. In re Marriage of D.C. v. M.C., 195 M 505, 636 P2d 857, 38 St. Rep. 2027 (1981). See also In re Marriage of Novak, 2014 MT 62, 374 Mont. 182, 320 P.3d 459, remanding a case for proper evaluation of the criteria for awarding maintenance when the District Court denied maintenance to a spouse who suffered a serious head injury before the dissolution.

Maintenance Required for Incompetent Wife: Portions of divorce decree were remanded for a new disposition that included a reasonable amount of maintenance and would meet the reasonable needs of the wife where wife was seriously mentally ill, had poor prospects for recovery, was unemployable due to her illness, was in the bottom 10% of the population intellectually, and would become a ward of the state if dependent upon the trust income, and husband had a gross income slightly higher than $20,000 a year. In re Marriage of D.C. v. M.C., 195 M 505, 636 P2d 857, 38 St. Rep. 2027 (1981).

FELA Settlement Funds Properly Considered in Amendment of Award of Permanent Maintenance: Where, following the injury of the defendant in a railroad accident, the District Court eliminated an award of permanent maintenance, the court did not abuse its discretion in reinstating the award based upon the defendant's receipt of money in settlement of a Federal Employers' Liability Act (FELA) claim for his injuries. The fact that the FELA funds cannot be awarded as a property settlement under federal law does not mean that the same money cannot be considered by the District Court in reevaluating its previous denial of permanent maintenance for the plaintiff. Heintzelman v. Heintzelman, 193 M 183, 631 P2d 290, 38 St. Rep. 1074 (1981).

Failure to Provide Coherent Distribution: The trial court failed to determine the net worth of the parties or to value the personal property of the parties distributed by the court. The Supreme Court on review was unable to determine any coherent plan for an equitable distribution of the parties' property. The wife also asserted that she was entitled to maintenance, contending that the trial court had made an erroneous finding as to her earning capacity. This, however, could not be determined until there had been an equitable distribution of property. Because of the failure to value the property or to provide for an overall plan for distribution, the Supreme Court could not adequately review the findings and remanded the case for further proceedings. In re Marriage of McGill, 187 M 187, 609 P2d 278 (1980).

Maintenance Versus Property Settlement — Termination on Remarriage — Intent of Court Decree: In a divorce decree, the language of the decree provided that payments to the wife were to be in lieu of a division of property and were to be for her support and maintenance. This language showed that the intent of the court was clearly that the payments were for support and maintenance, not a division of property, and could therefore be terminated upon wife's remarriage. Bertagnolli v. Bertagnolli, 185 M 1, 604 P2d 299 (1979), followed in In re Marriage of Rowen, 199 M 315, 649 P2d 1259, 39 St. Rep. 1423 (1982).

Reduction of Award: In order to defray substantial debts incurred after separation by a party who later had received a maintenance and support award, the District Court apparently had considered the debt and reduced the award accordingly. This action was upheld as being within the court's discretion, but a property settlement which was computed considering the same debt again could not stand because it effectively penalized the debtor a second time. Grenfell v. Grenfell, 182 M 229, 596 P2d 205 (1979).

Insufficiency of Maintenance Award: In light of the trial court's finding of (1) petitioner's needs for support in addition to her own earnings, (2) the standard of living during her marriage, which included anticipated secure retirement, and (3) respondent's ability to provide continuing support to his former wife, the Supreme Court ordered the decree to be modified so as to provide continued maintenance to petitioner as well as increase the amount of maintenance. In re Marriage of Cromwell, 180 M 40, 588 P2d 1010 (1979). See also In re Marriage of Rolfe, 216 M 39, 699 P2d 79, 42 St. Rep. 623 (1985).

Maintenance to Be Determined After Division of Marital Estate: The needs of the spouse as to maintenance and the reasonableness of such an award can only be properly determined after there has been an equitable division of the marital estate. Vivian v. Vivian, 178 M 341, 583 P2d 1072 (1978).

MISCELLANEOUS

Father's Income From Parent Properly Characterized as Gift Income — Future Payments Considered Gifts. In re Marriage of Miller, 2022 MT 110, 409 Mont. 29, 511 P.3d 307.

Disability Retirement Benefits Not Divisible Marital Estate Assets: In a dissolution of marriage proceeding, the parties disagreed about whether the husband's Sheriffs' Retirement System disability benefits should be considered a divisible marital asset. The District Court determined that the income was a divisible marital asset, reasoning that the income was similar to a normal retirement benefit representing deferred compensation for work previously performed during the marriage, and it apportioned the income between the parties on a 50-50 basis. The Supreme Court reversed, finding that the disability retirement benefits were intended to replace future employment income that had been lost due to the disability. Because postdissolution earnings are not part of the marital assets, the Supreme Court found that this income had been improperly included by the District Court. The Supreme Court noted that the disability retirement benefits could be relevant in a determination of whether spousal maintenance was appropriate and directed the District Court to consider this factor on remand. In re Marriage of Elder & Mahlum, 2020 MT 91, 399 Mont. 532, 462 P.3d 209.

Interim Support Agreement Not Followed by District Court — Denial of Maintenance — Substantial Evidence: During a divorce proceeding, the parties entered into an interim support agreement that specified child support. The issue of permanent support went to trial and the District Court eventually ordered a lower payment for child support than was in the agreement. The District Court also found that an award of maintenance was not appropriate. On appeal, the appellant argued that the District Court failed to consider the net worth of the marital estate before dividing the property, that it should have awarded certain premarital and postseparation property, that it should have awarded spousal maintenance, and that it lacked authority to modify the interim support agreement. The Supreme Court disagreed, finding that the District Court's findings were detailed and based upon substantial evidence. In re Marriage of Axelberg, 2015 MT 110, 378 Mont. 528, 347 P.3d 1225.

Duration of Maintenance Based on Duration of Marriage Improper: The District Court ordered maintenance payments equivalent to the length of the marriage. Although the length of a marriage may be considered in order to equitably fix an amount of time necessary for a spouse to achieve a position in which the spouse should reasonably be able to be self-supporting, the length of a marriage is not the overriding factor precluding consideration of other factors and is not payback for time spent in a bad marriage. The Supreme Court remanded for further consideration of statutory factors in determining the duration of maintenance payments. In re Marriage of Rudolf, 2007 MT 178, 338 M 226, 164 P3d 907 (2007).

Order Requiring Retroactive Maintenance Improper: The District Court ordered payment of maintenance retroactively to more than 3 years prior to commencement of the parties' dissolution action. The Supreme Court reversed. Under 40-4-121, temporary maintenance may be awarded retroactive to the time that a dissolution petition is filed, but there is no statutory authority that allows a maintenance award retroactive to the time prior to filing of a dissolution petition. In re Marriage of Rudolf, 2007 MT 178, 338 M 226, 164 P3d 907 (2007). See also In re Marriage of Lindeman, 140 SW 3d 266 (Mo. App. S.D. 2004).

Voluntary Agreement by Spouse to Pay Portion of Federal Disability Benefits as Part of Dissolution — No Contempt When Spouse Fails to Pay Federally Preempted Division of Benefits: As part of the equitable distribution of the marital estate, the husband agreed in the dissolution decree to pay the wife a portion of his federal veterans disability benefits. The husband made the payments for several years, but then stopped making the payments. The wife moved to hold the husband in contempt, but the District Court denied the motion based on In re Marriage of Strong, 2000 MT 178, 300 M 331, 8 P3d 763 (2000), in which it was held that federal law preempts the state from distributing Veterans Benefits Administration benefits as part of the marital estate. The Supreme Court affirmed. Even though the husband violated the terms of the decree by withholding payment of the wife's share of the disability benefits, federal law preempted the District Court from enforcing the decree in regard to division of those benefits, and thus the District Court did not err in refusing to hold the husband in contempt for failing to pay a portion of the benefits to the wife. A District Court may not order the division or allocation of any Veterans Benefits Administration benefits to satisfy any marital obligation, be it maintenance or division of the marital estate, regardless of whether the parties agreed to do so in a property settlement agreement. In re Marriage of Lutes, 2005 MT 242, 328 M 490, 121 P3d 561 (2005).

Depreciations or Deductions Not to Be Categorically Deducted as Expense or Treated as Income — Case-by-Case Basis Consideration: The husband contended that the District Court improperly added business deductions and back taxes to his income when calculating the wife's maintenance. The Supreme Court adopted the reasoning from several jurisdictions that depreciation or deductions should not be deducted categorically as an expense or treated as income in all instances, but rather that the extent of inclusion should depend on the particular circumstances of each case. Here, the District Court did not err in determining the husband's income for maintenance calculation purposes when it adjusted the husband's income in order to provide him sufficient cash flow to maintain his business and meet his maintenance obligations and spread the depreciation of his business property over the useful life of the property, rather than depreciating a substantial part in the first and only year. Given the husband's greater ability to produce income and acquire assets, the District Court's decision to include the husband's business deductions in calculating the maintenance award was supported by the record and affirmed. In re Marriage of Payer, 2005 MT 89, 326 M 459, 110 P3d 460 (2005).

Ambiguous Settlement Agreement Language Regarding Maintenance Calculation — Gross Disposable Income Interpreted as Pretax Income: A settlement agreement provided that monthly maintenance payments be 15% of the husband's gross disposable income. In direct opposition to the husband's interpretation, the wife and her expert contended that the amount should be based on pretax rather than after-tax income, and the District Court agreed. The court found that the term gross disposable income was ambiguous because "gross" and "disposable" had mutually exclusive meanings in this context, so the court looked beyond the agreement language to the parties' intent. Because the term was ambiguous, the parties' proposed interpretations were equally proper, so under 28-3-306, the ambiguity was construed in the wife's favor because the maintenance provision was for her benefit. The court's allowance of testimony from the wife's expert was also within the court's discretion. In re Marriage of Mease, 2004 MT 59, 320 M 229, 92 P3d 1148 (2004).

Veteran Disability Benefits Federally Protected From Inclusion in Marital Estate — Disability Benefits Considered in Award of Spousal or Child Support as Party's Ability to Earn Income: The District Court included a portion of the husband's Veterans Benefits Association (VA) disability benefits as part of the division of marital property. The Supreme Court held that under the antiattachment clause of 38 U.S.C. 5301, VA disability benefits are federally protected from inclusion in the marital estate. In enacting that section and the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408, Congress preempted state courts from including VA disability benefits in the marital estate because VA disability benefits are not considered "disposable retired pay" to be treated as marital property. An award of VA disability benefits upon dissolution amounts to a seizure of those benefits in violation of 38 U.S.C. 5301. To avoid damaging federal objectives, the property division dictates of 40-4-202 must yield to the federal law. Consistent with both federal and state law, a District Court may consider VA disability benefits in the same way that it considers each party's ability to earn income after dissolution as an important factor in achieving an equitable property division, including consideration of the military disability retirement pay as a source of income in the award of spousal maintenance or child support, or generally as an economic circumstance of the parties justifying a disproportionate award of marital property to the nonretiree spouse. Thus, disability payments should not, either in form or substance, be treated as marital property subject to division upon dissolution. However, under Rose v. Rose, 481 US 619 (1987), a state court is free to consider postdissolution disability income and to order a disabled veteran to pay spousal support even when disability benefits would be used to make support payments. In re Marriage of Strong, 2000 MT 178, 300 M 331, 8 P3d 763, 57 St. Rep. 709 (2000), following Mansell v. Mansell, 490 US 581 (1989), and In re Marriage of Murphy, 261 M 363, 862 P2d 1143 (1993). See also McCarty v. McCarty, 453 US 210 (1981).

Lump-Sum Maintenance Award Based on Concerns for Husband's Health Affirmed: The trial court concluded that the wife was entitled to a lump-sum maintenance award because of significant concerns about the security of future maintenance payments because of the husband's poor health and inability to sustain gainful employment. The husband contended on appeal that the lump-sum award was erroneous. The trial court's concerns were well founded, despite the husband's contention that his health was improving, so the Supreme Court affirmed the lump-sum award. In re Marriage of Harkin, 2000 MT 105, 299 M 298, 999 P2d 969, 57 St. Rep. 422 (2000).

Facts Regarding Spousal Maintenance Known Nearly Twenty-One Months Before Trial — Leave to Amend Properly Denied: Within one month before trial, a wife sought to amend her petition for dissolution of marriage to include a claim for spousal support. The trial court denied the motion as untimely, and the case went to trial as scheduled. The wife appealed on grounds that the court abused its discretion by not freely giving leave to amend the petition. However, the issue of maintenance was not previously part of the case, which had been pending for more than 2 years. The wife's claim was based on facts known to her nearly 21 months earlier, yet she did not raise the issue until the eve of trial. She offered no reason for the delay in filing the motion, nor did she do anything pretrial to bring her maintenance claim to the attention of the court or opposing counsel. To expect the husband to proceed to trial on the maintenance issue without adequate discovery or preparation would have been patently unfair and prejudicial, and the court properly denied the motion to amend. Stundal v. Stundal, 2000 MT 21, 298 M 141, 995 P2d 420, 57 St. Rep. 108 (2000), following Peuse v. Malkuch, 275 M 221, 911 P2d 1153, 53 St. Rep. 135 (1996).

Modification of Temporary Maintenance Order — Pending Motion: Lisa maintained that Shawn's motion to modify temporary maintenance was previously denied and that it was improper for the District Court to modify maintenance when no motion was before the court. A review of the record showed that Shawn had initially moved to modify temporary maintenance, and the hearing was continued. At a contempt hearing some months later, Shawn explained why he had not paid temporary maintenance and moved for a hearing on his outstanding motion to modify. A hearing on that motion was held about 1 month later. Thus, when the court ruled on Shawn's motion, it was ruling on a still-pending motion, and the modification was not in error. In re Marriage of Lee, 282 M 410, 938 P2d 650, 54 St. Rep. 409 (1997).

Award of Lump-Sum Maintenance Award Proper: Although Montana law does not make any specific provision for the award of lump-sum maintenance payments, neither does it specifically prohibit such an award. If possible, the District Court should retain its power to modify the alimony provision either way. While it may provide greater flexibility to the court in terms of future modifications of a maintenance decree to award periodic versus lump-sum maintenance, there is no basis on which to prohibit a lump-sum award if it meets the statutory criteria and best meets the recipient's needs under the particular facts of the case at issue. In re Marriage of Schara, 266 M 76, 878 P2d 908, 51 St. Rep. 676 (1994).

Sua Sponte Maintenance Award Upheld: Colleen and Daniel were married in 1983 and divorced approximately 10 years later. During the pendency of the dissolution, Daniel made no maintenance payments to Colleen, even though she was a student and had no income of her own. On its own motion, the District Court awarded Colleen retroactive temporary maintenance of $4,200 plus one-half of the parties' 1991 income tax refund. The Supreme Court upheld the award, ruling that the District Court properly exercised its discretion in making the award. In re Marriage of Strizic, 263 M 193, 867 P2d 386, 51 St. Rep. 11 (1994).

Error in Awarding Indefinite Maintenance: The trial court granted wife maintenance during the time necessary to complete a nursing degree, estimated by her to be 2 to 5 years, but the court placed no time limitation on the award. Thus, the decree could result in a maintenance obligation for an indefinite period of time. The Supreme Court favors providing the person obligated to pay maintenance as much certainty as possible regarding the amount and duration of the obligation. Therefore, the case was remanded for hearing to determine a reasonable limitation on the duration of the maintenance award. In re Marriage of Zander, 262 M 215, 864 P2d 1225, 50 St. Rep. 1522 (1993), followed in In re Marriage of Simms, 264 M 317, 871 P2d 899, 51 St. Rep. 306 (1994), and distinguished in In re Marriage of Doolittle, 265 M 168, 875 P2d 331, 51 St. Rep. 450 (1994).

Medical Insurance as Form of Maintenance — Time Limitation Required: The trial court required husband to continue wife's medical insurance for an indefinite period of time. The requirement that husband pay medical insurance is another form of maintenance. The Supreme Court favors providing the person obligated to pay maintenance as much certainty as possible regarding the amount and duration of the obligation. Therefore, the case was remanded for hearing to determine the duration of husband's obligation to pay for wife's insurance, consistent with the duration of his obligation to pay other maintenance. In re Marriage of Zander, 262 M 215, 864 P2d 1225, 50 St. Rep. 1522 (1993).

Court to Order Division of Property in Lieu of Maintenance: James Dowd alleged that the District Court had erred in awarding his wife the bakery business. The Supreme Court held that 40-4-202 and this section, when read together, compel a District Court, when proper, to order a division of marital property, as opposed to an award of maintenance, to satisfy the financial need of the parties. In re Marriage of Dowd, 261 M 319, 862 P2d 1123, 50 St. Rep. 1341 (1993).

Union Disability Payments: Union disability payments are subject to meeting maintenance payments and are subject to a qualified domestic relations order to enforce the payments. In re Marriage of Boharski, 257 M 71, 847 P2d 709, 50 St. Rep. 161 (1993).

Judgment Lien Against Husband's Property Not Supportive of Execution Against Interests of Second Wife and Children — Property Subject to Prior Judgments Only: Following dissolution of his marriage, Ken Jones purchased real property in 1986. In May 1987, he executed a homestead declaration on the property pursuant to 70-32-105. In July 1987, he conveyed the property by quitclaim deed, with one-half interest to himself and one-half to his second wife and their two daughters in equal shares. In January 1988, his second wife also filed a declaration of homestead. Also in 1988, Ken declared bankruptcy. As a result of that filing, a dissolution decree property settlement provision that he pay certain sums to his first wife Rita was redesignated as a maintenance obligation. Ken appealed that order, and while the appeal was pending, Ken and his second wife conveyed the real property to Poindexter. Rita executed upon one-half of the sale proceeds, which Poindexter had withheld to satisfy Ken's past-due maintenance and support, but $2,113.53 remained due on the underlying judgment. Rita moved for an order of sale of the property so that she could recover the remaining maintenance plus her attorney fees. The District Court determined that Ken's homestead exemption was abandoned when he sold the property to Poindexter and that because Rita's judgment liens had never been removed or extinguished, the liens attached and encumbered the property at the time the homestead exemption was abandoned and thus the property was conveyed to Poindexter subject to the liens and the execution order. The Supreme Court disagreed and reversed because: (1) Rita had already executed on Ken's half of the sale proceeds and further execution would be against the interests of the second wife and daughters and was therefore unsupported; and (2) the maintenance payments became due and judgments were entered after Ken sold the property. Under 70-21-306, a purchaser takes property subject only to prior judgments; therefore, execution was inappropriate on the property for judgments entered after Poindexter's purchase. In re Marriage of Jones v. Poindexter, 253 M 408, 833 P2d 1044, 49 St. Rep. 501 (1992).

Maintenance Award for Psychotherapy and Education Not Too Indefinite: The husband appealed the lower court's award of maintenance to the wife for psychotherapy and education on the basis that the award was not for an amount certain. The Supreme Court stated that it was impossible for the lower court to know the exact costs of the items for which it had made the award but that the court had placed time limits on the award, thus eliminating much of the uncertainty concerning the husband's liability. In re Marriage of Ernst, 243 M 114, 793 P2d 777, 47 St. Rep. 1034 (1990).

Original Obligations Not Extinguished by New Obligations: The respondent argued that the trial court should have modified his support obligation because he had remarried since the divorce and had a new family to support. The Supreme Court affirmed the decision, stating that the lower court had taken into consideration the respondent's remarriage but had properly found that the respondent's obligation to his first wife and children was not extinguished by his second marriage. In re Marriage of Jones, 242 M 119, 788 P2d 1351, 47 St. Rep. 595 (1990).

Marital Misconduct — Not to Be Considered: Marital misconduct is not a factor to be considered in setting maintenance. In re Marriage of Barnard, 241 M 147, 785 P2d 1387, 47 St. Rep. 152 (1990).

Improper Consideration of Maintenance as Marital Asset: The District Court erred in considering a total of $4,000 in maintenance payments to be a marital asset assignable to the wife. The effect of the order was to charge wife the full amount of maintenance payments made to her under a temporary maintenance order issued in connection with the marital dissolution. In re Marriage of Lundvall, 241 M 172, 786 P2d 10, 47 St. Rep. 173 (1990), distinguished in In re Marriage of Gerhart, 245 M 279, 800 P2d 698, 47 St. Rep. 2106 (1990).

Ability to Pay Maintenance Not Determining Factor: A person's ability to pay maintenance and to meet his own needs is an element that should be given great weight in deciding whether that person should be ordered to pay maintenance, but it is not the deciding factor. In re Marriage of Cole, 234 M 352, 763 P2d 39, 45 St. Rep. 1965 (1988), followed in In re Marriage of Jacobson, 251 M 394, 825 P2d 561, 49 St. Rep. 92 (1992), and in In re Marriage of Tahija, 253 M 505, 833 P2d 1095, 49 St. Rep. 571 (1992).

Heavily Indebted Property With Profits-Use Limitation: A partnership loan agreement with a bank requiring all profits of the heavily indebted partnership to be applied to debt reduction did not change the character of the partnership from income-producing to income-consuming, and the partnership remained income-producing. In re Marriage of Cole, 234 M 352, 763 P2d 39, 45 St. Rep. 1965 (1988).

Maintenance Supplements Property Division — Whether Property Is Income-Producing: Maintenance supplements the property division. If after an equitable division of the marital assets one party lacks sufficient property to fulfill its reasonable financial needs, maintenance may be appropriate. In determining whether a spouse has sufficient property, a court should consider whether that spouse has received income-producing or income-consuming assets. The lower court properly awarded maintenance when wife was unable to support herself in a manner that would approximate the standard of living established during the marriage without the aid of maintenance. In re Marriage of Cole, 234 M 352, 763 P2d 39, 45 St. Rep. 1965 (1988), followed in In re Marriage of Greenlee, 249 M 521, 816 P2d 1073, 48 St. Rep. 818 (1991), and in In re Marriage of Jacobson, 251 M 394, 825 P2d 561, 49 St. Rep. 92 (1992).

Credit for Voluntary Predissolution Maintenance Payments: The trial court did not err in finding maintenance totaling $19,010 was due to wife and then giving husband credit for his voluntary predissolution payments of $29,475. In re Marriage of Voelkel, 226 M 143, 734 P2d 217, 44 St. Rep. 538 (1987).

Short-Term Maintenance for Education — Retired Husband — Retirement Income: Upon dissolution of 35-year marriage, it was not abuse of discretion for the trial court to award approximately equal value of property and resultant income to each party, to split the husband's civil service retirement benefits, and to award $150 a month maintenance to wife for a short period to help her while she returned to school. Maintenance, although diminishing husband's income for a while, differed from an award of marital assets and was clearly permissible for the purpose of making wife self-supporting. In re Marriage of Singer, 222 M 255, 721 P2d 755, 43 St. Rep. 1242 (1986).

Defining Past Payments as Maintenance: District Court's order that certain payments by husband to wife during the past year be treated as maintenance and deductible by the husband for tax purposes was not an abuse of discretion. In re Marriage of Williams, 220 M 232, 714 P2d 548, 43 St. Rep. 319 (1986).

Wife's Appeal Held Meritorious — Remand for Redetermination of Maintenance and Attorney Fees: Since wife's appeal had merit, husband's assertion that it did not and his request for damages were denied where, among other things, the court was sympathetic to a claim but did not agree with it, a request for a redetermination of the maintenance award was granted, and a request for attorney fees was remanded for a determination. In re Marriage of Perry, 217 M 162, 704 P2d 41, 42 St. Rep. 1101 (1985).

Statute Inapplicable in Modification Proceeding: This section is not applicable in a proceeding to modify the terms of a dissolution decree when it is not the first opportunity that one spouse has had to litigate the question of maintenance. In re Marriage of Rush, 215 M 498, 699 P2d 65, 42 St. Rep. 581 (1985).

Ex Parte Maintenance Order Entered After Final Decree Upheld: It was proper for the District Court to award wife temporary maintenance ex parte even though the effect of the award was amendment of the dissolution decree without holding the hearing required by former Rule 52(b), M.R.Civ.P. (now superseded). The Supreme Court held that since the intent of the District Court's earlier order, i.e., that the wife be maintained pending final disposition of the matter, was not being carried out, it was within the District Court's discretion to grant the wife temporary maintenance. In re Marriage of Rohrich, 211 M 130, 683 P2d 1308, 41 St. Rep. 1261 (1984).

Maintenance Permissible While Attaining Skills: The parties' 7-year marriage was dissolved. The marriage's liabilities exceeded assets. The court gave the husband his semitruck with which to continue earning a living. The wife had no job skills but wanted to become a beautician. The court found that giving the husband most of the assets along with their liabilities was proper but that the wife could not be turned out to fend for herself. In this case it was proper to award the wife maintenance for 40 months while she attended beauty college. Peckenpaugh v. Peckenpaugh, 201 M 314, 655 P2d 144, 39 St. Rep. 2132 (1982).

Future Financial Status — Use of Fiancee's Income in Determining: The income of husband's fiancee could be used to determine husband's future financial status and his ability to pay maintenance. Laster v. Laster, 197 M 470, 643 P2d 597, 39 St. Rep. 737 (1982).

Earnings Exempt From Execution on Unpaid Alimony Judgment: Section 25-13-614, exempting earnings of a judgment debtor from execution, does not differentiate between different types of judgments, plainly provides an exemption of earnings against execution regardless of the nature of the underlying claim, and the Supreme Court cannot insert an exception for delinquent alimony payment judgments. Earnings are exempt from execution on a judgment for unpaid alimony, and though an alimony claim is not strictly a debt, when reduced to judgment it becomes merged in the judgment, loses its underlying character, and the judgment creates a debt the same as any other money judgment. White v. White, 195 M 470, 636 P2d 844, 38 St. Rep. 2041 (1981) (case of first impression).

Gift to Children — No Effect on Duty to Support Wife: There is nothing in the law that transmutes a spouse's generosity toward the support of children past the age of minority into an obligation which relieves the spouse of a potential duty to provide maintenance to the other spouse upon dissolution of the marriage. In re Marriage of D.C. v. M.C., 195 M 505, 636 P2d 857, 38 St. Rep. 2027 (1981).

Interest on Delinquent Support Payments: When the marital dissolution decree is silent as to interest, interest is automatically collectible by the judgment creditor spouse on past due payments for support money or maintenance the same as any other money judgment under 25-9-205. Williams v. Budke, 186 M 70, 606 P2d 515 (1980), followed in In re Marriage of Winters, 2004 MT 82, 320 M 459, 87 P3d 1005 (2004), and In re Marriage of Steab, 2013 MT 124, 370 Mont. 125, 300 P.3d 1168.

Guidelines Not Ignored — Lump-Sum Settlement: The trial court did not abuse its discretion in awarding a lump-sum settlement and interest on any deferred payment. Interest payments could not be properly characterized as maintenance. Hebel v. Hebel, 176 M 339, 578 P2d 305 (1978).

Property Disposition Required Before Maintenance Allowed: Since the property division statute and maintenance statute have a dual purpose, an award of maintenance is allowed only when a spouse has insufficient assets to cover living expenses and cannot have appropriate employment for reasons stated in the maintenance statute. Thus, maintenance needs can only be determined after there is an equitable division of the marital estate. Johnsrud v. Johnsrud, 175 M 117, 572 P2d 902 (1977).

Wife Entitled to Reimbursement: Trial court properly allowed wife reimbursement for her cash outlay, from her separate property, that directly benefited her husband and his children by a former marriage, as early cases holding a housewife is not entitled to reimbursement or damages in a divorce action are clearly anachronistic in view of modern approach to domestic relations litigation which this court has recognized and which Montana's Legislature has followed by adopting the Uniform Marriage and Divorce Act. Rogers v. Rogers, 169 M 403, 548 P2d 141 (1976).

"Property Settlement" Payments Mistakenly Labeled "Alimony" Not Subject to Modification: District Court properly denied husband's motion to set aside alimony award payments on grounds

they were void because divorce was granted to him. Husband was estopped after relying upon divorce decree to compel wife to transfer certain property to him to challenge validity of decree because what obviously was intended to be part of the "property settlement" became mistakenly labeled "alimony". Englund v. Englund, 169 M 418, 547 P2d 841 (1976).

Divorce Granted to Husband: Although divorce was granted to husband, where District Court had made finding that both parties were entitled to a divorce, the court had jurisdiction to make alimony award for wife and also had jurisdiction to increase award. Clontz v. Clontz, 166 M 206, 531 P2d 1003 (1975).

Estoppel From Terminating Alimony: Where divorce had been granted to the husband but both parties were at fault, court had jurisdiction to make award of alimony to wife; and since husband had accepted the benefits of the divorce he was estopped from seeking relief from its burdens, which had been agreed to by him in writing at the time of the divorce. Clontz v. Clontz, 166 M 206, 531 P2d 1003 (1975).

Survival of Support Obligation: District Court may make support obligation a continuing one that survives the father's death and is enforceable against his estate. Hornung v. Estate of Lagerquist, 155 M 412, 473 P2d 541 (1970).

Law Review Articles

Support and Maintenance, Townsend, 37 Mont. L. Rev. 125 (1976).

Support and Maintenance, Muckelston, 31 Mont. L. Rev. 110 (1969).

Decree, a Judgment so as to Create an Automatic Lien for Alimony, Brown, 14 Mont. L. Rev. 141 (1953).

Temporary Alimony in Suit for Divorce, Hennessey, 5 Mont. L. Rev. 71 (1944).

Enforcement of Foreign Decrees for Alimony, Scott, 4 Mont. L. Rev. 77 (1943).

40-4-204. Child support — orders to address health insurance — withholding of child support.

Commissioners' Note

This section does not set forth the conditions under which a parent owes a duty of support to a child. Principles affecting duties of support occur elsewhere in the Act, as well as in the other statutes or the common law of the State. Rather, the intent is merely to indicate the factors which a court should consider in setting the amount of support to be paid by either the mother or the father or both. [See 1989 amendment note.] The provision authorizing an order requiring either or both parents to pay child support permits the court to order the custodial parent to contribute to the child's support as well, or to insure that property or payment set aside to the custodial parent for child support are used for that purpose. "Child" includes any child recognized by the laws of the state as "living" or "in being", and, also, a child by adoption. The Section authorizes the issue of child support to be raised in independent proceedings for dissolution of marriage or legal separation.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 506, L. 2023. Amendment effective October 1, 2023.

2013 Amendment: Chapter 88 in (6)(b) in first sentence after "Social Security Act" inserted "to the parties, and to each party's counsel of record" and inserted second sentence concerning providing information on case registry and vital statistics reporting form; inserted (10) requiring that qualified domestic relations orders be sealed; and made minor changes in style. Amendment effective October 1, 2013.

Applicability: Section 11, Ch. 88, L. 2013, provided: "[This act] applies to proceedings filed after [the effective date of this act]." Effective October 1, 2013.

2005 Amendment: Chapter 564 in (7) near end after "40-5-273" substituted "40-5-277, and" for "and 40-5-276 through"; and made minor changes in style. Amendment effective July 1, 2005.

2001 Amendment: Chapter 542 substituted (7) concerning statutes governing modification or adjustment of a judgment or order establishing a child support order for former text that read: "(7) Each district court judgment, decree, or order establishing a final child support obligation under this part and each modification of a final order for child support must contain a statement that the order is subject to review and modification by the department of public health and human services upon the request of the department or a party under 40-5-271 through 40-5-273 when the department is providing services under Title IV-D of the Social Security Act for the enforcement of the order." Amendment effective July 1, 2001.

1999 Purported Amendment: Although sec. 4, Ch. 545, L. 1999, purported to amend this section, the final version of the text remained unamended.

1997 Amendments — Composite Section: Chapter 343 at end of (2)(b) substituted "parents" for "custodial parent"; deleted former (2)(e) that read: "the financial resources and needs of the noncustodial parent"; in (2)(g) substituted "parenting plan" for "custody arrangement"; in (8)(a), at end after "support", substituted "obligation to be paid, without need for further court order" for "to be paid"; substituted (8)(a)(i) through (8)(a)(iv) pertaining to the person or entity that a court order, judgment, or decree requires child support to be paid for former (8)(a)(i) through (8)(a)(iv) that read: "(i) the legal custodian of the minor child;

(ii) (A) any other person, organization, or agency having legal physical custody of the minor child under a legal assignment of rights; or

(B) the court for the benefit of the minor child;

(iii) any other person or agency designated as caretaker of the minor child by agreement of the legal custodian; or

(iv) any assignee or other person, organization, or agency authorized to receive or collect child support"; and made minor changes in style.

Chapter 552 inserted (3)(d) providing that obligations under this section are subject to the registration and processing provisions of chapter 5, part 9; inserted (5)(d) providing that the support order for an obligor exempt from income withholding for support must include a requirement that if the case is receiving Title IV-D services, support payments must be paid through the department as provided in 40-5-909; in (6) substituted provision that each court order establishing paternity or modifying child support must include a requirement that the parties promptly file with the court and keep up-to-date certain information identifying the parties and health insurance coverage, requiring the court to keep the information confidential, except for giving it to the Department for Title IV-D purposes, and requiring the court order to provide that in a subsequent child support enforcement proceeding, notice and service by mail are permissible under certain conditions for former subsection that read: "For the purposes of income withholding under subsection (5), each district court judgment, decree, or order that establishes or modifies a child support obligation must include a provision requiring the parent obligated to pay support to inform the court and, if the department of public health and human services is providing services under Title IV-D of the Social Security Act for the enforcement of the judgment, decree, or order, the department, of the following:

(a) the name and address of the parent's current employer;

(b) whether the parent has access to health insurance through an employer or other group; and

(c) if insurance coverage is available, the health insurance policy information"; clarified the meaning of (8)(a) regarding to whom payment of child support obligations must be made (voided by Ch. 343 amendment); inserted (8)(b) requiring payment to be made through the Department if the Department is providing Title IV-D services; inserted (9) providing that an order establishing or modifying support must require that a parent or guardian who is the obligee and is also obligated to support the child under 41-3-406, 41-5-403 (renumbered 41-5-1304), or 41-5-523 (renumbered 41-5-1512) assign to the Department all rights the parent or guardian may have to child support that are not otherwise assigned under 53-2-613; and made minor changes in style. Amendment effective July 1, 1997.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Contingent Termination — Request for Federal Exemptions: Section 104, Ch. 552, L. 1997, contained the following contingent termination provisions and order that the Department of Public Health and Human Services seek federal exemptions:

"(1) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 93] [50-15-403];

(e) [section 95] [61-5-107];

(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that the federal government has granted this state an exemption from one of the following provisions, the provision terminates on the date the exemption takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 93] [50-15-403, certification filed April 24, 1998];

(e) [section 95] [61-5-107];

(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(5) (a) The department of public health and human services shall do everything reasonably within its power to obtain, as soon as possible, federal government exemptions from the provisions listed in subsection (4).

(b) Because section 395(c) of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) allows a grace period for states to amend their constitutions in order to comply with PRWORA and because the Montana legislature believes that the section of PRWORA prohibiting a jury trial in a paternity proceeding violates Article II, section 26, of the Montana constitution and is therefore rejected, the department of public health and human services shall seek a federal government exemption from the jury trial prohibition in PRWORA as the first exemption it seeks under subsection (5)(a). [This exemption was received on December 8, 1997.]

(6) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate July 1, 1999.

(7) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement."

1995 Amendments: Chapter 60 in (3)(b), at end of first sentence, deleted "that the application of the standards and guidelines is unjust to the child or a party or is inappropriate in that particular case"; in (5)(c) inserted second sentence allowing retention of excess support if the excess is the result of annualized withholding; and made minor changes in style.

Chapter 504 in (4), after "Each", inserted "temporary or final", after "establishing a" deleted "final", and after "include a" substituted "medical support order as provided for in Title 40, chapter 5, part 8" for "provision addressing health insurance coverage in the following cases:

(a) If either party has available through an employer or other organization health insurance coverage for the child or children for which the premium is partially or entirely paid by the employer or organization, the judgment, decree, or order may contain a provision requiring that coverage for the child or children be continued or obtained.

(b) In the event that health insurance required in a child support judgment, decree, or order becomes unavailable to the party who is to provide it, through loss or change of employment or otherwise, that party must, in the absence of an agreement to the contrary, obtain comparable insurance or request that the court modify the requirement.

(c) All temporary child support orders must contain a provision requiring the party who has health insurance in effect for the child or children of the parties to continue the insurance coverage pending final disposition of the case.

(d) The parties may by written agreement provide for the health care coverage required by this section, subject to the approval of the court.

(e) Unless otherwise provided in the decree, the health care coverage required by this section is in addition to and not in substitution, in whole or in part, for the child support obligation"; deleted former (7) that read: "(7) If the department of social and rehabilitation services is providing or later provides support enforcement services under Title IV-D of the Social Security Act, each district court order or modification of an order must contain a statement providing that the noncustodial parent, without further order of the court, is required to obtain and maintain health insurance coverage as provided in 40-5-208. Failure to include a warning statement in the judgment or order does not preclude the imposition of sanctions under 40-5-208"; adjusted subsection references; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 throughout section substituted "department of public health and human services" for "department of social and rehabilitation services"; and at beginning of (5)(c) deleted "After October 1, 1993". Amendment effective July 1, 1995.

Severability: Section 18, Ch. 60, L. 1995, was a severability clause.

Section 33, Ch. 504, L. 1995, was a severability clause.

Preamble: The preamble attached to Ch. 504, L. 1995, provided: "WHEREAS, it is appropriate to draft a bill specifically to present proposed program improvements for medical support enforcement in a single, comprehensive bill that promotes the needs of legislative energy, efficiency, and economy by limiting the number of possible bills and by reducing the need for hearings and readings on those bills; and

WHEREAS, parents should be held responsible for providing medical care for their children, whether or not the parents voluntarily do so."

1995 Statement of Intent: The statement of intent attached to Ch. 504, L. 1995, provided: "A statement of intent is required for this bill because it grants rulemaking authority to the department of social and rehabilitation services to adopt rules for expedited procedures."

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendments: Chapter 294 in (3)(a), near middle, inserted second and third sentences requiring use of guidelines in all cases and allowing use of verified representation of defaulting parent's income and in fourth sentence inserted first clause concerning presumption of adequate and reasonable support; in (2)(b), near beginning, substituted "finds that the guideline amount is unjust or inappropriate in a particular case" for "does not apply these standards and guidelines to determine child support" and inserted last two sentences concerning agreement on support amount and statement of ordinary support amount when varied; and made minor changes in style. Amendment effective April 9, 1993.

Chapter 631 inserted (5)(c) allowing withholding on a weekly or biweekly basis; inserted (9) requiring a provision that support be paid to the child's caretaker or other agency authorized to receive or collect support; and made minor changes in style.

1991 Amendments: Chapter 266 inserted (8) requiring statement relating to review and modification of orders by Department.

Chapter 635 deleted former (5) that read: "(5) (a) Except as provided in subsection (5)(b), each district court judgment, decree, or order establishing a child support obligation under this title, whether temporary or final, and each modification of an existing child support order must:

(i) provide that the amount of child support must be withheld from the obligor's income and paid to the department pursuant to procedures established by the department under Title 40, chapter 5, part 4; and

(ii) include the obligor's social security number and the name and address of the obligor's employer and of any other payor of income to the obligor.

(b) Income is not subject to automatic withholding if:

(i) the obligee or obligor demonstrates and the court finds that there is good cause not to require automatic income withholding; or

(ii) the obligee and obligor agree in writing to an alternative arrangement regarding the payment of child support that provides sufficient security to ensure compliance with their agreement. The security is in addition to the child support obligation.

(c) When a judgment, decree, or order for child support is entered or modified and automatic income withholding is ordered, an obligee who is not a recipient of public assistance shall apply for the support enforcement services of the department pursuant to Title IV-D of the Social Security Act for the collection of support through automatic income withholding under Title 40, chapter 5, part 4. The department shall accept the application. Pending an application, the department shall immediately implement automatic income withholding and hold any amounts collected in trust for the obligee until the obligee makes application.

(d) When automatic income withholding is ordered under subsection (5)(a), the clerk of court shall immediately forward a copy of the order to the department.

(e) If an obligor is not subject to income withholding or is exempted from income withholding, the district court judgment or order must include a warning statement that if the obligor is delinquent in the payment of support, the obligor's income may be subject to income withholding procedures under Title 40, chapter 5, part 3 or 4. Failure to include a warning statement in a judgment or order does not preclude the use of withholding procedures"; inserted (5) providing for enforcement of support obligation by immediate or delinquency income withholding and a warning to an obligor exempt from immediate withholding; and inserted (6) requiring court to require an obligated parent to provide certain information. Amendment effective April 24, 1991.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

1989 Amendments: Chapter 550 in (2)(f) substituted "provided in Title 53, chapter 4, part 2" for "as defined in 53-2-702". Amendment was voided by sec. 30, Ch. 702, L. 1989, so it has not been codified.

Chapter 702 in (1), after "court", substituted "shall" for "may"; at beginning of (2) inserted "The court shall consider"; in (2)(d) substituted "educational and medical needs" for "educational needs"; in (2)(f) inserted "the age of the child" and deleted "for the purposes of determining a minimum amount for support, the amount received by children under the AFDC program, as defined in 53-2-702"; inserted (2)(g) relating to cost of day care; inserted (2)(h) relating to custody arrangements; inserted (2)(i) relating to needs of other persons a parent is obligated to support; inserted (3)(a) requiring application of standards and guidelines; inserted (3)(b) relating to findings required for nonapplication of standards and guidelines; inserted (5)(a) requiring automatic income withholding; inserted (5)(b) relating to circumstances when income is not subject to automatic withholding; inserted (5)(c) requiring application for and immediate implementation of automatic income withholding; inserted (5)(d) relating to sending of court order to the Department; in (5)(e) substituted "If an obligor is not subject to income withholding or is exempted from income withholding, the district court judgment or order" for "Each district court judgment or order establishing a child support obligation under this title, whether temporary or final, and each modification of an existing order for child support entered after October 1, 1985"; inserted (6) relating to a warning statement concerning required health insurance coverage; and made minor changes in form and phraseology.

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

Guidelines for Determining Child Support: On January 13, 1987, the Supreme Court adopted A Uniform District Court Rule on Child Support Guidelines proposed by the Montana Child Support Advisory Council as the result of a study prompted by the 1984 enactment of 42 U.S.C. 667. The federal statute required establishment of guidelines by each state as a condition for having the state plan approved for participation in Public Health and Welfare programs of the federal government. The guidelines may be found in the State Reporter, Vol. 44, pp. 828-842 (1987). See also 1989 amendment that provides the court shall apply the guidelines in determining the child support obligation.*1985 Amendment — Subsection Enactments:* Chapter 727, L. 1985, inserted (2) requiring court to state reasons for not ordering child support.

Section 1, Ch. 434, L. 1985, was enacted as a separate section but is codified in this section as subsection (3) for convenience. Subsection (3) requires inclusion of a provision addressing health insurance coverage in certain cases.

Section 1, Ch. 651, L. 1985, was enacted as a separate section but is codified in this section as subsection (4) for convenience. Subsection (4) requires that each judgment or order establishing a child support obligation include a warning concerning the consequences of delinquency.

1983 Amendment: Inserted (6) relating to AFDC amount.

Source: Section 309, Uniform Marriage and Divorce Act.

Montana Changes: See 1983, 1985, and 1989 amendment notes.

Case Notes

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GENERAL

Father's Income From Parent Properly Characterized as Gift Income — Future Payments Considered Gifts. In re Marriage of Miller, 2022 MT 110, 409 Mont. 29, 511 P.3d 307.

Imputed Annual Income Exceeding Husband's Current Income Proper — Imputed Income Based on Gifts From Husband's Mother Improper: In a 2015 divorce proceeding, the District Court imputed an annual earning capacity of $175,000 to the husband in awarding child support and maintenance. The determination was based on a 2011 statement by the husband that he could potentially earn $100,000 a year, on his work experience and qualifications in the financial industry, and on prior gifts from his mother to the marital estate of $75,000 a year. On appeal, the husband argued that he had not made $100,000 a year since before 2007, that his current income was substantially lower, and that the District Court erred by assuming he would receive $75,000 a year from his mother. The Supreme Court affirmed the District Court's finding of $100,000 a year based on the record. However, the Supreme Court reversed the District Court regarding the gifts of $75,000 a year from the husband's mother because there was no guarantee that he would continue to receive substantial gifts in the foreseeable future. In re Marriage of Paschen, 2015 MT 350, 382 Mont. 34, 363 P.3d 444. See also In re Marriage of Miller, 2022 MT 110, 409 Mont. 29, 511 P.3d 307.

Parent's Duty to Support Incapacitated Adult Child: A father appealed the District Court's determination that 40-6-214 required him to support his incapacitated adult twin sons, arguing that his obligation to provide child support terminated when the twins graduated from high school or when they turned 19 years old. The Supreme Court affirmed, concluding that 40-6-214 imposes a duty on the father to support the twins to the extent of his ability. The father's duty ran directly to the twins, not to the mother under the marital dissolution decree, and was properly enforced under the guardianship statutes. In re Guardianships of M.A.S. & C.M.S., 2011 MT 313, 363 Mont. 96, 266 P.3d 1267.

Time and Prejudice Elements of Laches — Liability for Payment of Child's Medical Expenses Under Dissolution Decree: After a lapse of 6 years, the mother filed to require the father to pay for medical treatment and consultant fees as contemplated in the parties' dissolution decree. The father contended that payment was precluded by laches because of the substantial delay in filing the motion. The Supreme Court noted that laches is not simply a matter of elapsed time; it is also a question of the inequity of permitting a claim to be enforced. For laches to apply, there must be both a showing of lack of diligence by the party against whom laches is asserted and prejudice to the party asserting the defense, requiring case-by-case analysis. Here, the father knew that the child received medical treatment, how much it cost, that the services were not covered by insurance, and that he was obligated to pay a portion of the bill. Thus, the father was not prejudiced by the 6-year delay, so laches did not apply. However, the father was not aware that the consultant bill existed and never had a chance to submit the bill to insurance or pay the bill, so he was prejudiced by the 6-year delay in advising him of that additional bill, and the claim for the consultant bill was therefore barred by laches. In re Marriage of Deist, 2003 MT 263, 317 M 427, 77 P3d 525 (2003).

Parent Ordered to Pay One-Half Day-Care Expenses Despite Other Parent's Credit for All Day-Care Expenses — Abuse of Discretion: The parents shared equal custody, and the father paid $245 a month in child support. The final parenting plan gave the mother credit for all day-care expenses in the calculation of child support, yet ordered the father to pay for child care expenses during the time that the children were with him. The father moved to reconsider the parenting plan and to recalculate child support to reflect the day-care discrepancy, but the motions were denied. Without providing findings, the District Court found that the father failed to present a sufficient reason to prompt recalculation of support. Noting that a presumption in favor of the trial court's determination of support will not be overturned unless the court abused its discretion, the Supreme Court held that in this case, the trial court abused its discretion by: (1) failing to provide findings that the court properly considered the required criteria when determining support; (2) finding that the father failed to present a sufficient reason to prompt recalculation of support; and (3) failing to employ conscientious judgment in refusing to rectify the inconsistency concerning the payment of day-care costs. The case was reversed and remanded for further proceedings. In re Marriage of Buhl, 2002 MT 224, 311 M 375, 56 P3d 317 (2002).

Claim of Children as Dependents for Tax Purposes — Assumptions of Parties and Recommendation of State Agency — District Court Reversed: Although the child support and property settlement agreement entered into between Michael and Kimberly at the time of their divorce provided that the parties would share the tax deductions for the children, the calculations for child support payments provided to the District Court by the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) and upon which the District Court relied to order an increase in Michael's support obligation assumed that the tax deductions would belong to Michael. The Supreme Court held that because of these factors, because there was apparently no dispute on this point between the parties, and because the District Court's order on this matter was cursory and without explanation, the Supreme Court reversed the District Court and remanded so that the District Court could revise its order to allow Michael to claim all of the children as dependents for tax purposes. In re Marriage of Syverson, 281 M 1, 931 P2d 691, 54 St. Rep. 32 (1997).

Social Security Benefits as Credit Toward Child Support Obligation — Not Considered Retroactive Modification — Durbin Overruled: A credit may be granted to a parent for Social Security benefits received prior to a motion to modify as a credit against the noncustodial parent's child support obligation, but the credit does not constitute a retroactive modification of the original support order. The credit merely changes the source of the support payments. In re Marriage of Cowan, 279 M 491, 928 P2d 214, 53 St. Rep. 1250 (1996), overruling contrary holdings in In re Marriage of Durbin, 251 M 51, 823 P2d 243 (1991), and In re Marriage of Malquist, 266 M 447, 880 P2d 1357 (1994).

Installment Payments of Property Settlement Not Required to Be Used as Child Support: When Kitty and Bernard divorced in 1987, they agreed that no child support payments would be made by either party. Bernard also agreed that he would make $70,000 in property settlement payments by making three annual payments of $10,000 each and eight annual payments of $5,000 each. Bernard later moved the District Court to determine Kitty's child support obligation and asked the District Court to require that some of the property settlement payments be used for child support. The Supreme Court held that the installment payments were made by Bernard as a method of paying his $70,000 property settlement obligation and that there was no rule requiring that those payments or any part of them be used by Kitty for the support of the children. The Supreme Court noted that just as Bernard is entitled to decide how to use his property resulting from the property settlement agreement, so Kitty in entitled to use her property any way she sees fit. In re Marriage of Widhalm/Miller, 279 M 97, 926 P2d 748, 53 St. Rep. 1067 (1996).

Clear and Convincing Evidence Required in Deviating From Support Guidelines: The District Court concluded that application of the Uniform Child Support Guidelines was inappropriate in this case but gave no written specific findings in support of that conclusion. The guidelines must be used in all cases; thus, the court erred in deviating from the guidelines without producing clear and convincing evidence justifying the failure to use the guidelines. The case was remanded for a determination of support due from each parent, based on the guidelines. In re Marriage of Brandon, 271 M 149, 894 P2d 951, 52 St. Rep. 381 (1995). See also In re Marriage of Stufft, 276 M 454, 916 P2d 767, 53 St. Rep. 467 (1996), In re Marriage of Kovarik, 1998 MT 33, 287 M 350, 954 P2d 1147, 55 St. Rep. 117 (1998), and In re Marriage of Noble, 2005 MT 113, 327 M 95, 112 P3d 267 (2005).

Waiver of Back Child Support — Court Retains Discretion Under Guidelines — Constitutional Challenge Raised for First Time on Appeal Not Considered: Following remand from the Supreme Court, the District Court recalculated a child support award but did not order the father to pay any back child support. When the District Court was presented with abundant evidence on the proper amount of past child support due under child support guidelines and the amount of additional back support (none) was within the range of the evidence presented, the District Court did not err in waiving past child support. When the mother's argument that child support statutes discriminate between legitimate and illegitimate children was raised for the first time on appeal, the Supreme Court did not consider argument. In re Paternity of W.L., 270 M 484, 893 P2d 332, 52 St. Rep. 301 (1995).

Refusal of Request That Child Be Named as Beneficiary of Husband's Annuity: The disposition of the husband's estate and payment of child support from that estate were not issues in a dissolution proceeding, and the Supreme Court would not consider them on appeal because there was no actual case or controversy. The wife had argued that the trial court should have ordered the husband's mother to be replaced by the couple's child as the surviving beneficiary of the husband's annuity because the husband's wife and mother did not get along and the replacement would avoid potential future litigation. In re Marriage of Bradshaw, 270 M 222, 891 P2d 506, 52 St. Rep. 154 (1995).

Award of Attorney Fees Based Upon Property Settlement Agreement Upheld: Debra and Kenneth were divorced, settling their differences in support, maintenance, and property division by signing an agreement addressing all issues. The agreement also provided that if one of the parties had to pay a debt of the other, the paying party could recoup the payment with interest and fees. Later, Debra sought reimbursement for debts that belonged to Kenneth but that were not disclosed at the time of the divorce. The Supreme Court held that attorney fees were properly payable under the language of the agreement. The fact that there was no clear winner in the proceedings and that there was no showing by Debra that she was without resources to pay her own fees was irrelevant because the award of fees was pursuant to the agreement and not pursuant to statute. In re Marriage of Craib & Rhodes, 266 M 483, 880 P2d 1379, 51 St. Rep. 937 (1994).

No Error in Refusal to Admit Evidence of Circumstances of Dissolution for Purposes of Interpreting Property Settlement Agreement: Debra and Kenneth were divorced, settling their differences in support, maintenance, and property division by signing an agreement addressing all issues. Later, Kenneth sought to introduce evidence of the circumstances of the dissolution to show that the agreement unfairly divided the marital property. The District Court refused to allow the evidence, ruling that the agreement "speaks for itself". The Supreme Court noted that it would not overrule District Court rulings on admissibility of evidence absent an abuse of discretion. The Supreme Court interpreted the District Court action as ruling that the evidence was irrelevant and noted that irrelevant evidence is inadmissible. In re Marriage of Craib & Rhodes, 266 M 483, 880 P2d 1379, 51 St. Rep. 937 (1994).

Application of Wrong Support Guidelines Irrelevant When Court Finds No Grounds for Modification: Janet Barnard sought an increase in child support on the basis that her ex-husband's income had greatly increased. The District Court stated that it would use the support guidelines in effect when the motion was filed. The lower court subsequently ruled that there was no showing that the current amount of support was insufficient and that increased income alone was not grounds for modification. The Supreme Court held that the lower court should have used the guidelines in effect at the time that it rendered its decision, but the error was harmless since the District Court had properly found that no grounds existed for modifying the amount of support. In re Marriage of Barnard, 264 M 103, 870 P2d 91, 51 St. Rep. 173 (1994). For a discussion of the correct standard of review, see In re Marriage of Kovash, 270 M 517, 893 P2d 860, 52 St. Rep. 280 (1995).

Proper Determination of Income Attributed to Assets: Pedersen initiated a suit against Nordahl to establish that he was the father of her unborn twins and to obtain child support. Nordahl argued that the funds in his logging account, personal banking account, and retirement accounts were derived solely from his 1992 income and that therefore the inclusion of those accounts in the "income attributed to assets" calculation resulted in a double counting of income. The Supreme Court held that pursuant to ARM 46.30.1514 (now repealed), income attributed to assets is the amount of interest that would be earned if the nonperforming assets were liquidated and the proceeds invested and that was the amount that the lower court had added to Nordahl's gross income. Therefore, no double counting of his 1992 income had occurred. In re Paternity of Pedersen v. Nordahl, 261 M 284, 862 P2d 411, 50 St. Rep. 1338 (1993).

Proper Average of Income and Refusal to Subtract Deductions From Gross Income in Determining Child Support: Pedersen initiated a suit against Nordahl to establish that he was the father of her unborn twins and to obtain child support. Nordahl argued that the lower court erred in determining the amount of support because it took the average of his income over a 2-year period and failed to subtract certain deductions from the amount of gross income. The Supreme Court held that Nordahl had not objected to the income averaging during trial and could not raise the issue on appeal and also held that the lower court had the option of subtracting certain deductions from gross income but was not required to do so. In re Paternity of Pedersen v. Nordahl, 261 M 284, 862 P2d 411, 50 St. Rep. 1338 (1993).

Payment of Proportionate Share of Child Care Expenses Required: Apportionment of expenses for child care is specifically authorized by the child support guidelines. It was not error for the District Court to provide for payment by the husband of a proportionate share of child care expenses incurred subsequent to the parties' separation and prior to the date of the final decree. In re Marriage of D.F.D. & D.G.D., 261 M 186, 862 P2d 368, 50 St. Rep. 1280 (1993).

Debtor's Child Support Obligation Fixed by Stipulation Governing Past-Due Amounts: After Gordon and Annette dissolved their marriage, they entered into a stipulation in which Gordon agreed to pay an amount in past-due child support. Later, after the District Court ordered a modification in child support, Gordon claimed that the court should have made the modification retroactive to 1988, when he first made a motion to modify the original child support order. The Supreme Court held that the District Court did not err in refusing to make the modification retroactive. The amount of the payments during the time disputed by Gordon are governed by the 1989 stipulation. The District Court was bound by the terms of that stipulation as the terms were not contrary to law, court rule, or public policy. In re Marriage of Sullivan, 258 M 531, 853 P2d 1194, 50 St. Rep. 648 (1993), followed in In re Marriage of Hill, 265 M 52, 874 P2d 705, 51 St. Rep. 396 (1994).

Placement of Child Support in Escrow Pending Modification of Support Order as Contempt of Court — Limited Review of Contempt Order: After Gordon and Annette dissolved their marriage, Gordon made a motion to modify the order for child support payments. Pending judicial action on that motion, he placed the arrearages in escrow with the Clerk of the District Court. The Supreme Court held that the District Court order holding him in contempt for failure to pay the arrearages directly to Annette could be reviewed by the Supreme Court for limited purposes and that the facts supported the District Court's finding of contempt. In re Marriage of Sullivan, 258 M 531, 853 P2d 1194, 50 St. Rep. 648 (1993).

Not Error to Fail to Award Support When Issue Not Before Court: The wife alleged that the lower court erred in not awarding her child support when it gave her custody of her children. The Supreme Court held that the lower court was not wrong in failing to award support because at no time during the hearing did the mother request support. Therefore, the issue was not before the lower court. In re Marriage of Welch/Phillips, 257 M 222, 848 P2d 500, 50 St. Rep. 240 (1993).

Written Order Required Awarding Back Child Support on Basis of Sole Rather Than Split Custody: The District Court orally agreed to award back child support on the basis of sole custody rather than split custody as provided in the decree. The court should have entered a written order awarding back child support covering the period of sole custody. In re Marriage of Johnston & Turrin, 255 M 421, 843 P2d 760, 49 St. Rep. 1047 (1992).

Business Deductions Not Relied Upon in Determining Support: The respondent introduced his tax returns, arguing that the business deductions appearing on the returns should also be relied on by the court in determining his disposable income. The Supreme Court ruled that the returns were only one item the lower court could rely on in determining support and were not controlling. In re Marriage of Sullivan, 243 M 292, 794 P2d 687, 47 St. Rep. 1231 (1990).

Case Continued by Mutual Agreement — Support Payments Current — Request for Retroactive Payments Denied: The District Court did not err in denying wife's request for retroactive child support after finding that: (1) the case had been continued on mutual agreement of the parties for over 2 years; (2) husband had always paid support that was ordered by the court; and (3) it would place a substantial unfair burden on husband to require retroactive payment of support. In re Marriage of Smith, 242 M 495, 791 P2d 1373, 47 St. Rep. 925 (1990).

Credit Against Support Arrearage — No Oral Promise by Custodial Parent: The divorce decree required the father to pay for all medical costs of the minor children that were not covered by his medical insurance. In an action for back support, the father argued that he should be allowed an offset for medical costs he had paid on the basis that his ex-wife had agreed to reimburse him for those costs. The Supreme Court affirmed the lower court's finding that there was no substantial evidence of the existence of an express or implied agreement between the parties that the mother was to reimburse the father for medical expenses that were his obligation under the decree. In re Marriage of Wroot, 240 M 409, 784 P2d 904, 46 St. Rep. 2237 (1989).

Irrevocable Trust Not Marital Asset From Which Court Could Order Payment of Certain Support Items: In a divorce action, the husband had set up an irrevocable trust for his children prior to the divorce, using primarily inheritance funds. The lower court ordered that certain medical expenses of the parties' children be paid with trust fund money. The Supreme Court ruled that the trust was not a marital asset and that the trial court had no power to dispose of the trust funds. In re Marriage of Gebhardt, 240 M 165, 783 P2d 400, 46 St. Rep. 2026 (1989).

General Jurisdictional Rules for Divorce, Custody, and Child Support: A divorce action is generally in rem as to the status of the parties and in personam as to other matters. Thus, the lower court did not need in personam jurisdiction to grant dissolution to wife living in Montana when husband was in Tennessee. The court could grant the wife custody of the children living in Montana, but not of the child living in Tennessee with his father, since 40-4-211 specifically granted jurisdiction to determine custody of children living in Montana. The court was without jurisdiction to award child support because the court did not have in personam jurisdiction over the father under former Rule 4, M.R.Civ.P. (now superseded). In re Marriage of Appleton, 234 M 345, 763 P2d 658, 45 St. Rep. 1959 (1988).

Plaintiff's Understandable Failure to Plead Pertinent Facts — No Constructive Fraud: Wife pleaded a 1965 marriage and did not mention husband's 1972 Tennessee divorce obtained while he was living in that state and his wife was living in Texas, and she did not plead a common-law marriage or mention that her husband lived in Tennessee. However, husband did not inform wife of the Tennessee divorce until almost 8 years after it occurred, when she told him she was going to sue for a Montana divorce, and it was understandable she might not believe him. When wife filed, she knew of no address for husband other than his most recent (Montana) address. She filed on August 1, and he was found and served in Tennessee on August 11. In addition, the two had lived together and held themselves out as husband and wife in Texas and Montana; therefore, a common-law marriage existed. Wife's divorce and the child support decree were not based on extrinsic, constructive fraud by wife. A court hearing a divorce action sits in equity. Given husband's acts of deceit and wife's good faith in pleading, the Supreme Court saw no reason to grant husband equitable relief by voiding wife's decree. In re Marriage of Appleton, 234 M 345, 763 P2d 658, 45 St. Rep. 1959 (1988).

Support Denied Husband Whose Income Was More Than Twice Wife's: It was proper for the lower court to refuse husband's request for child support. Wife's monthly expenses exceeded her income by $200 a month. Husband's income was more than twice wife's income. He earned $28,484 a year as a professor and could make money during 2 months each summer. Wife had minimal ability to acquire future assets. The children's needs could be met without support payments by wife, and their living standard would not be reduced. In re Marriage of Rolfe, 234 M 294, 766 P2d 223, 45 St. Rep. 1919 (1988).

Factors in Noncustodial Parent's Ability to Pay Support: Factors to be considered when deciding whether a noncustodial parent is able to contribute to the support of a minor child include: (1) the parent's ability to earn an income; (2) the parent's willingness to earn an income and support his child; (3) availability of jobs; and (4) the parent's use of his funds to provide himself only with the bare necessities of life prior to providing support for his child. The factors apply as well to consideration of a modification of support. In re Marriage of Callahan, 233 M 465, 762 P2d 205, 45 St. Rep. 1639 (1988), following In re Adoption of K.L.J.K., 224 M 418, 730 P2d 1135, 43 St. Rep. 2297 (1986).

Findings of Need for Support and Ability to Pay: Findings that the children lived primarily with their mother, who earned $800 a month in seasonal employment and worked as a waitress in other months, and that the father collected $2,300 a month in federal veterans benefits and social security disability payments represented substantial credible evidence of the children's need for support and the father's ability to pay it. In re Marriage of West, 233 M 47, 758 P2d 282, 45 St. Rep. 1281 (1988).

Failure to Consider Factors Involved in Carlson Calculations: The District Court held that it was precluded from applying the Carlson formula because neither party offered evidence of the child's total needs. Although the Carlson formula has been termed a "guideline", the factors it involves must be considered, and failure to do so constituted reversible error. In re Marriage of Saylor, 232 M 294, 756 P2d 1149, 45 St. Rep. 1062 (1988).

Use of Net Rather Than Gross Income in Applying Carlson Formula: The District Court used gross rather than net income as a factor in the Carlson formula for figuring child support. The Supreme Court held that the amounts used should be net amounts; however, since the figures finally established were substantially less than what the formula could have obliged the parties to pay, there was no error. In re Marriage of Revious, 226 M 304, 735 P2d 301, 44 St. Rep. 674 (1987).

Ordering Husband to Pay Mortgage and Including Amount Equal to Part of Mortgage in Child Support: It was clearly erroneous, resulting in substantial injustice and requiring remand for further findings, for the court, in determining child support, to include an amount equal to two-thirds of the total monthly mortgage payments and to in addition order the husband to make the mortgage payments. The court ordered that the wife possess the house and that it be sold when the youngest child reached 18, with the equity equally divided. The result would be a windfall to the wife upon sale of the house. In addition, the husband was not left with financial resources sufficient to meet his needs. In re Marriage of Johnson, 225 M 404, 732 P2d 1345, 44 St. Rep. 353 (1987).

No Abuse of Discretion in Divorce Settlement: Following dissolution of the marriage, husband and wife negotiated and signed a property settlement and child support agreement. The husband subsequently informed his attorney of his dissatisfaction with the agreement. The District Court allowed the amended agreement to be incorporated into the supplementary decree of dissolution. A year later the husband filed a motion to amend the judgment, alleging unconscionability. After a hearing to determine the parties' financial condition, the court held the agreement valid. On appeal, the Supreme Court affirmed, stating that the husband had knowingly entered into the agreement and was competently represented by counsel. Prior to the execution of the final decree, the agreement was twice revised. In re Marriage of Hangas, 223 M 343, 725 P2d 1205, 43 St. Rep. 1773 (1986).

Child Support Not Court Ordered — Obligation Not Relieved: In an action brought by the Department of Revenue (now Department of Public Health and Human Services) pursuant to 40-5-221 and 53-4-248 to recoup funds paid by the state to support a father's two children, summary judgment for the Department was upheld. Although the trial court's prior dissolution and custody decree did not provide for support payments, a parent's legal and moral obligation to support his children was not relieved, nor was his obligation relieved by laches. St. v. Hubbard, 222 M 156, 720 P2d 1177, 43 St. Rep. 1135 (1986), followed in In re Marriage of Becker, 244 M 469, 798 P2d 124, 47 St. Rep. 1729 (1990).

Child Support Obligation Not Dischargeable in Bankruptcy: The Bankruptcy Code, 11 U.S.C. 523(a)(5), specifically excludes child support obligations from debts that can be discharged in bankruptcy. State ex rel. Austin v. Austin, 221 M 488, 719 P2d 429, 43 St. Rep. 998 (1986).

Retroactive to Separation:

Once the issue of child support is before the trial court, pursuant to the parties' pleadings, the court has jurisdiction to award retroactive child support from the time of separation and is not limited to the child support prayed for or agreed to by the parties. In re Marriage of Di Pasquale, 220 M 497, 716 P2d 223, 43 St. Rep. 557 (1986), followed in In re Marriage of Barnard, 241 M 147, 785 P2d 1387, 47 St. Rep. 152 (1990). See also In re Marriage of Saylor, 232 M 294, 756 P2d 1149, 45 St. Rep. 1062 (1988), In re Marriage of Welch, 273 M 497, 905 P2d 132, 52 St. Rep. 1081 (1995), and In re Marriage of Franks, 275 M 66, 909 P2d 712, 53 St. Rep. 41 (1996).

Where the wife had no complaints as to the adequacy of the child support agreement during the 8-year separation, the court did not err in failing to increase it retroactively from the time of separation. Tureman v. Tureman, 190 M 267, 620 P2d 1200, 37 St. Rep. 1922 (1980).

Management of Children's Accounts: District Court did not abuse its discretion when it allowed husband to manage financial accounts of the children that were to be kept separate from accounts of the husband and wife. In re Marriage of Williams, 220 M 232, 714 P2d 548, 43 St. Rep. 319 (1986).

Splitting Children's Education Costs: Provision that husband, who was to pay the children's education costs as they became due, could deduct half of the cost from maintenance or support payments was not an abuse of discretion. In re Marriage of Williams, 220 M 232, 714 P2d 548, 43 St. Rep. 319 (1986).

Splitting Children's Medical Costs: Provision that each parent bear half the uninsured medical costs of the children, who were to be covered by a medical and dental plan selected and paid for by the husband, was not an abuse of discretion. In re Marriage of Williams, 220 M 232, 714 P2d 548, 43 St. Rep. 319 (1986).

Nonpayment of Child Support as Contempt: A noncustodial parent should not be held in contempt for nonpayment of child support when payments are made directly to the custodial parent and when the location of the custodial parent is concealed. However, when nonpayment occurred both before and after the period of concealment, contempt is proper. In re Marriage of Robbins, 219 M 130, 711 P2d 1347, 42 St. Rep. 1897 (1985).

Payment of Child Support Not Absolved by Temporary Concealment of Custodial Parent: The obligation of a noncustodial parent to pay child support is not absolved by temporary concealment of the custodial parent when nonpayment of child support occurred both before and after the period of concealment. In re Marriage of Robbins, 219 M 130, 711 P2d 1347, 42 St. Rep. 1897 (1985).

District Court to Consider All Factors: The District Court awarded nearly all of marital estate to wife in lieu of child support from husband, whose occupation was professional gambler. The trial court found that the best interests of the children would be served by allowing them to remain in the family home, that forced sale of the family home would divert and dissipate assets needed for support, and that the only reasonable means to protect and promote the best interests of the children were to award the home to the mother. Husband appealed on the division of property issue, and the Supreme Court found that the District Court had not abused its discretion. Issues of property and support are not totally irrelevant to each other or inextricably interwoven; the court properly considered all factors and made a decision based on the extent to which they were interrelated. In re Marriage of King, 216 M 92, 700 P2d 591, 42 St. Rep. 666 (1985).

Assignment of Support — Not to Preclude Action for Arrearage: In order to receive public assistance from the state of Washington, wife assigned all of her unpaid child support to the Washington Department of Social and Health Services (WDSHS). During the term of assignment, WDSHS agreed with husband to a reduction in support and a compromise of the arrearage. The husband argued that WDSHS has the statutory authority to compromise support arrearages assigned to it and that because the wife acquiesced in WDSHS's actions, she was bound by the compromise made with that agency. The court held that the wife's interest in the accrued support payments could be assigned, and the State could step into the shoes of the wife. The statute allowing WDSHS to compromise support arrearages only pertains to arrears owed the state and does not pertain to arrears owed a parent. Entering into an assignment of support in order to receive welfare does not in any way affect the judgment of a court as contained in a decree. The wife could sue to recover any arrearages under the Montana decree, notwithstanding the agreement between the husband and WDSHS. The wife could proceed on her own right while allowing WDSHS the right of subrogation against a recovery by her. In re Marriage of Good, 213 M 269, 691 P2d 1337, 41 St. Rep. 2109 (1984).

Credit Against Support Arrearage — Oral Promise by Custodial Parent: Father and custodial mother agreed between themselves that the father would pay certain of the children's medical and dental bills and that in return the mother would give him credit against his child support obligation. The father made the payments. The mother contended the dissolution decree could not be modified by agreement to reduce or cancel past due and unpaid child support. On appeal, the court found no violation of the spirit and purpose of the support order by allowing the father credit for medical payments, particularly where the mother asked him to make them. The court found no modification of the decree, only a streamlining of the process, whereby the father paid the bills directly rather than going through the wife as an intermediary. In re Marriage of Good, 213 M 269, 691 P2d 1337, 41 St. Rep. 2109 (1984).

No Credit for Child Support During Summer Visitation: The trial court erroneously credited the husband with child support payments made during summer visitation. The issue was resolved by the unambiguous terms of the adopted settlement agreement. Gies v. Gies, 210 M 234, 681 P2d 1092, 41 St. Rep. 1028 (1984).

No Basis to Reopen Dissolution Decree: The appellant did not claim the existence of unconscionability, fraud, or any other inequitable situation that would give a court a legal basis upon which to reopen a dissolution decree. She attempted to enhance enforcement of the judgment that incorporated the parties' stipulations as to the property division by making a motion to modify. She was precluded by statutory time limits and by the fact that she had no legal basis to compel a court to reopen the judgment. Since no conditions existed that would justify reopening the judgment, the District Court was not required to enter findings of fact. Keirle v. Keirle, 210 M 214, 681 P2d 703, 41 St. Rep. 1016 (1984).

Use of Maintenance From Drawing Account for Child Support: Wife in divorce proceeding was granted a four-plex, the income to be used to fulfill husband's maintenance and support obligations amounting to $1,000 a month. The husband was to maintain a $1,000 bank account in wife's name upon which wife could draw to the extent that the four-plex did not provide income of $1,000 a month. The account was not established until several months after dissolution of the marriage, and wife drew upon it to cover child support owed by husband for the period between the dissolution and the establishment of the account. Husband then closed the account on the basis of an agreement that he could do so if wife withdrew money from it for any purpose other than to make up the difference should the four-plex not provide a $1,000 income in any given month. On wife's motion for enforcement of the divorce decree, trial court properly directed the husband to reestablish the account, as husband had an obligation to care for the children, as provided in the divorce decree, during the period between the decree date and the opening of the account. In re Marriage of Baker, 198 M 371, 646 P2d 522, 39 St. Rep. 1031 (1982).

Child Support for Adult or Emancipated Children — Express Agreement or Decree Required: A noncustodial father decreased his child support payments by one-half when one of his two children joined the Navy at the age of 17. In a contempt proceeding instituted by the custodial mother 2 years later, the District Court improperly directed the father to pay the balance of payments owing, and to continue the payments until the second child was 22 years of age if she attended college. Child support payments need not be made for adult or emancipated children unless the parents agree in writing or the dissolution decree expressly so provides. Torma v. Torma, 198 M 161, 645 P2d 395, 39 St. Rep. 839 (1982).

Interest on Delinquent Support Payments:
A noncustodial father decreased his child support payments by one-half when one of his two children joined the Navy at the age of 17. The District Court properly required the continuation of the entire monthly payment until the second child attained majority but improperly failed to order interest on the child support arrearage. Interest is automatically collectible by the judgment creditor spouse on past due support payments, absent contrary provision in a dissolution decree. Torma v. Torma, 198 M 161, 645 P2d 395, 39 St. Rep. 839 (1982), followed in In re Marriage of Callahan, 233 M 465, 762 P2d 205, 45 St. Rep. 1639 (1988).

When the marital dissolution decree is silent as to interest, interest is automatically collectible by the judgment creditor spouse on past due payments for support money or maintenance the same as any other money judgment under 25-9-205. Williams v. Budke, 186 M 70, 606 P2d 515 (1980), followed in In re Marriage of Winters, 2004 MT 82, 320 M 459, 87 P3d 1005 (2004).

Undivided Monthly Sum for Two Children — Effect of Emancipation of One Child: Pursuant to a dissolution decree, a noncustodial father was "ordered to pay for the support of the two minor children in the sum of $125.00 per month . . .". Upon the emancipation of one of the children, the father was not entitled to unilaterally reduce the payments by one-half. It became his burden to make such a showing as would entitle him to be relieved of all or a part of such obligation. Torma v. Torma, 198 M 161, 645 P2d 395, 39 St. Rep. 839 (1982).

Visitation and Obligation to Support — Interest on Unpaid Support: The Supreme Court rejected respondent's contention that he had no obligation to support his child under a divorce decree unless and until he exercised his right of visitation. The lower court incorrectly applied the rule in this case. Visitation has no bearing whatsoever upon the father's legal and moral obligation to support his child. Similarly, the father could not claim laches to avoid support payments owing over an 8-year period. Furthermore, on the basis of Williams v. Budke, 186 M 70, 606 P2d 515 (1980), appellant is entitled to receive interest on the past-due payments. Fitzgerald v. Fitzgerald, 190 M 66, 618 P2d 867, 37 St. Rep. 1350 (1980), followed in In re Marriage of Robbins, 219 M 130, 711 P2d 1347, 42 St. Rep. 1897 (1985), and, with regard to inapplicability of laches and equitable estoppel to recovery of child support arrears, in In re Marriage of Petranek, 255 M 458, 843 P2d 784, 49 St. Rep. 1107 (1992).

Support of Disabled Adult Child: It is public policy in Montana to require parents to care for children who are suffering from disability and unable to care for themselves if the parents are able to do so. Thus, the court did not err in ordering child support payments paid to the wife, who was caring for a disabled adult child. Maberry v. Maberry, 183 M 219, 598 P2d 115 (1979).

Impermissible Deduction of Temporary Custodial Expenses: It is improper for the husband to deduct expenses such as babysitting costs that he incurs while the child is in his temporary custody from those payments that are to be made to the wife for child support unless the court provides otherwise. In re Marriage of Jorgensen, 180 M 294, 590 P2d 606 (1979).

Oversight in Omitting Provision for Support: Failure of the court to make provision in the decree for the support of the minor children was an obvious oversight and required correction. Berthiaume v. Berthiaume, 173 M 421, 567 P2d 1388 (1977).

Survival of Child Support Obligations When Provided for in Father's Will: Father's obligation to make child support payments required by divorce decree survived his death and was enforceable against his estate where decree without exemption or qualification required him to pay during child's minority, mother had released father and his estate from all claims except child support, and father's will evidenced recognition of his continuing child support obligation during child's minority as provided in decree, even after his death. Hornung v. Estate of Lagerquist, 155 M 412, 473 P2d 541 (1970).

STATUTORY FACTORS

Parent-Child Relationship Thwarted — Equitable Estoppel Precluding Payment of Child Support: When Stiles and his wife separated, he was given responsibility for the care of his newborn son. Because Stiles was in the military at the time, he asked his sister, Cynthia, if she would care for the child for a short time while he fulfilled his duties in the Navy. Cynthia agreed, but immediately sought legal custody of the child, and physical custody of the child was ultimately granted to her by a California court. She often did not comply with court orders resulting from her custody efforts, including orders to allow Stiles visitation with the child. Stiles initially offered to pay for the child's care, but Cynthia refused any money, saying it was not needed. Nevertheless, Stiles did provide ongoing health insurance for the child. Over a decade later, Cynthia applied for and was granted public assistance, assigning any right to child support to the state. The Child Support Enforcement Division established Stiles's support obligation at $511 a month. Stiles asked Cynthia to sign a waiver of this obligation, but she refused. Stiles petitioned for judicial review, and the District Court remanded to an administrative law judge to make findings regarding Stiles's claim that Cynthia had waived her right to receive child support or that she was equitably estopped from asserting or assigning those rights. The administrative law judge found that the requisite elements of waiver and estoppel were present, and the District Court upheld the findings, holding that because Cynthia had no right to child support, she could not convey to the state rights greater than those to which she was entitled. The state appealed, asserting that the court erred when it held that estoppel and waiver applied to relieve Stiles of the obligation to provide support. The Supreme Court concluded that all six elements of equitable estoppel were met and that Cynthia had no right to receive child support from Stiles either retroactively or prospectively. Cynthia waived her right to support through her language and conduct. Nothing in the record indicated that the child's needs were not being met, and the court declined to order additional support. Although a parent is still responsible for support even in cases of voluntary relinquishment of parental rights, Stiles's relinquishment was involuntary. The court declined to hold Stiles to normal parental responsibilities under these unique circumstances, given that the child's best interests were being served, Stiles provided health insurance for the child at all times, and Stiles was thwarted by Cynthia in his attempts to have a parent-child relationship and was not attempting to exploit narrow legal technicalities to avoid undisputed court-ordered support obligations awarded at the time of dissolution. Stiles v. Dept. of Public Health and Human Services, 2000 MT 257, 301 M 482, 10 P3d 819, 57 St. Rep. 1054 (2000), distinguishing Fitzgerald v. Fitzgerald, 190 M 66, 618 P2d 867 (1980), In re Marriage of Neiss, 228 M 479, 743 P2d 1022 (1987), and In re Support of Krug, 231 M 78, 751 P2d 171 (1988).

District Court Required to Apply Guidelines or to Present Reasons for Deviation: The District Court did not order the father to pay any child support because he was only seasonally employed. The Supreme Court remanded the case, directing the lower court to apply the guidelines as required by law or to establish by clear and convincing evidence any justification for deviating from the guidelines. In re Marriage of DeWitt, 273 M 513, 905 P2d 1084, 52 St. Rep. 1089 (1995).

Judicial Oversight in Failure to Provide for Health Insurance for Children — Remand: The record and father's respondent's brief clearly indicated that the parties intended that father continue to carry the minor children on his employee health insurance policy. It was judicial oversight, warranting remand, for the District Court to fail to include in the decree a provision regarding the children's health insurance. (See 1995 amendment.) In re Marriage of Corey, 266 M 304, 880 P2d 824, 51 St. Rep. 859 (1994).

Support Obligations to Be Set Based on Guidelines in Effect at Time Court Makes Decision: The lower court ordered the husband to pay a weekly sum for day care as a supplement to child support. The District Court relied on rules in effect when it first ordered support in 1991. In 1992, child support guidelines were amended to combine child care costs with child support. The Supreme Court held that the lower court must use the law in effect at the time that it modified the support rather than the law in effect when it entered its original order. In re Marriage of Anderson, 260 M 246, 859 P2d 451, 50 St. Rep. 1028 (1993), followed in In re Marriage of Craib & Rhodes, 266 M 483, 880 P2d 1379, 51 St. Rep. 937 (1994).

Lack of Findings That Court Considered Guidelines or Had Evidentiary Basis for Support Award — Remand: The District Court abused its discretion by establishing a child support award without setting forth an evidentiary basis demonstrating that the statutory criteria were properly considered. The case was remanded with instructions that the trial court consider the guidelines and factors listed in this section and enter findings of fact that support the award. In re Marriage of Griffin, 260 M 124, 860 P2d 78, 50 St. Rep. 945 (1993), followed in In re Marriage of Cowan, 279 M 491 928 P2d 214, 53 St. Rep. 1250 (1996). On remand, the District Court referred the determination and calculation of child support to a support guidelines specialist, who neglected to include amounts that were listed on the business's financial statement as shareholder loans in husband's income calculations. The Supreme Court remanded again for a determination of child support due when all of husband's income, including the shareholder loans and materials taken from the business by the husband, was included in the support calculations. In re Marriage of Griffin, 275 M 37, 909 P2d 707, 53 St. Rep. 28 (1996).

Health Insurance Obligation Not Discharged by Unemployment: Father appealed from a District Court decision requiring him to provide health insurance for his minor child while unemployed. The Supreme Court affirmed the lower court decision, holding that a parent can be required to provide health insurance coverage even if the coverage is not available or paid for partially or totally by an employer. (See 1995 amendment.) In re Marriage of Isaak, 257 M 176, 848 P2d 1014, 50 St. Rep. 219 (1993).

Personal Injury Award to Be Considered by Court in Determining Parent's Financial Resources — Uniform Child Support Guidelines Found Inappropriate Under Statutory Exception: When the parties were divorced, the District Court awarded joint custody, awarded primary physical custody to the mother, awarded the mother and father one tax deduction apiece for the children, and required the father to pay the mother child support of $150 per month per child. Later the same year, the father lost his eyesight in a work-related accident and eventually received a lump-sum settlement of $373,557, monthly payments of $3,788 for 30 years, disability insurance payments, and social security benefits. When the mother began receiving social security benefits of $174 per month per child as a result of the accident, the father stopped paying child support. The District Court denied both parties' motions for modification of the child support decree, holding that the money received by the father was compensation for his blindness and could not be used to determine his income for calculating his child support obligation. The Supreme Court reversed and remanded, holding that while it would be inappropriate to consider all of the personal injury award as income under the uniform child support guidelines, the District Court should have considered part of the award as income, after subtracting the father's medical expenses. In re Marriage of Durbin, 251 M 51, 823 P2d 243, 48 St. Rep. 1142 (1991), overruled, inasmuch as a credit may be granted to a parent for Social Security benefits received prior to a motion to modify as a credit against the noncustodial parent's child support obligation without constituting a retroactive modification of the original support order, in In re Marriage of Cowan, 279 M 491, 928 P2d 214, 53 St. Rep. 1250 (1996). For a discussion of the correct standard of review, see In re Marriage of Kovash, 270 M 517, 893 P2d 860, 52 St. Rep. 280 (1995).

Effective Date of 1989 Automatic Withholding Statute: The enabling legislation of the 1989 amendments to 40-4-204 provided that the implementation of the automatic withholding of child support payments with regard to modifications of existing child support agreements applied to child support orders and modifications of child support orders issued after September 30, 1989. Therefore, the effective date of the 1989 amendments to this section, which is specifically excluded under 40-5-411(1)(a), is October 1, 1989. In re Marriage of Hall, 244 M 428, 798 P2d 117, 47 St. Rep. 1705 (1990).

Split Custody — Support Paid for One Child But Not Another: Father argued that the District Court abused its discretion in ordering him to pay $300 a month support for the child in the mother's physical custody but not requiring the mother to pay any support for the child in his physical custody. The Supreme Court affirmed the award after finding the lower court considered the parties' abilities to pay and the needs of the children, satisfying the statutory requirements of this section. In re Marriage of Arbuckle, 243 M 10, 792 P2d 1123, 47 St. Rep. 1150 (1990).

Factual Determinations Imperative:

In a dispositional hearing held by the Youth Court under 41-3-406 (renumbered 41-3-438) in which the court removed the child from her abusive mother's care and placed her in the care of her natural father, the court erroneously awarded child support to the father because there was insufficient evidence to support a finding of child support. The court failed to consider the factors in this section and the Carlson formula, except to note that the father had just started a new business and the mother was employed as a receptionist. In re C.C., 237 M 246, 772 P2d 857, 46 St. Rep. 773 (1989).

In a divorce proceeding, the court heard no evidence on the financial resources of the parties' children, their standard of living, or wife's standard of living, yet decreed a sum for child support, half to be paid by each spouse and wife's half to come from her share of the marital estate. The court's failure to consider the necessary factors resulted in a child support decision not supported by the evidence and constituting an abuse of discretion. On remand the matter was to be reconsidered with proper testimony and an equitable solution. Hill v. Hill, 197 M 451, 643 P2d 582, 39 St. Rep. 723 (1982).

The pertinent factors in 40-4-203 and 40-4-204, with findings of fact to support them, should be set out in the District Court's decision. Otherwise the appellate court has nothing upon which to base its review. Moreover, under 40-4-208 the District Court can grant modification or termination of maintenance and support only if there is a showing of circumstances making the payments unconscionable, which compels proper findings and conclusions. Capener v. Capener, 177 M 437, 582 P2d 326 (1978). See also In re Marriage of Benjamin, 189 M 158, 615 P2d 218, 37 St. Rep. 1412 (1980), Park v. Park, 190 M 183, 619 P2d 1200, 37 St. Rep. 1874 (1980), and In re Marriage of Smith, 264 M 306, 871 P2d 884, 51 St. Rep. 277 (1994).

Child Support as Restitution and Condition of Probation: Child support violations were noted in the presentence investigation. Defendant should have known that they might be considered by the court, so there was no due process violation. The District Court properly ordered payment of child support as a form of restitution and rehabilitation and as a legitimate condition of parole. St. v. Shaver, 233 M 438, 760 P2d 1230, 45 St. Rep. 1617 (1988).

Failure to State Reasons for Not Ordering Child Support — No Inclusion of Applicable Terms of Original Decree — Remand: Although respondent claimed that child support provisions were covered by an original decree and remained in effect, the Supreme Court had vacated the original decree and remanded the case; therefore, 40-4-204(2) was applicable at the time of the second decree. Failure by the District Court to include reasons for not ordering child support and to include applicable terms from the original decree in the final decree was error warranting remand. In re Marriage of Kuzara, 224 M 124, 728 P2d 786, 43 St. Rep. 2068 (1986).

Prohibiting Sale of Residence Past Majority Age of Child — Abuse of Discretion: A 1971 dissolution decree apportioned only the personal property of the parties. In 1981, in a proceeding for modification of the decree, the District Court abused its discretion by ordering that the parties' residence not be sold until the youngest child finished college at the age of 22. This in effect amounted to child support past the age of majority when no express agreement or decree provision provided for such support. Torma v. Torma, 198 M 161, 645 P2d 395, 39 St. Rep. 839 (1982).

Net Worth of Marital Estate to Be Determined: The true net worth of the marital estate must be accurately determined in accordance with the requirements of 40-4-202 before the issues of equitable apportionment, maintenance, and child support can be resolved. Peterson v. Peterson, 195 M 157, 636 P2d 821, 38 St. Rep. 1723 (1981).

Child's Social Security Payments Considered in Determining Child Support Payments: In modifying a decree of dissolution, the District Court allowed the father to apply social security benefits received by him on behalf of a minor child toward his support obligation for her. Citing the factors to be considered in determining child support in 40-4-204, including the financial resources and need of the child and the noncustodial parent's ability to pay, the Supreme Court could not say that the District Court abused its discretion. The order of support was affirmed. Tefft v. Tefft, 192 M 456, 628 P2d 1094, 38 St. Rep. 837 (1981).

Factors Considered in Maintenance and Support Awards: When a District Court is required to make an award of maintenance and support in a dissolution proceeding, it must consider the items and factors set out in 40-4-203 and 40-4-204. Grenfell v. Grenfell, 182 M 229, 596 P2d 205 (1979). See also In re Marriage of Smith, 242 M 495, 791 P2d 1373, 47 St. Rep. 925 (1990); Slayton v. Slayton, 195 M 249, 635 P2d 1303, 38 St. Rep. 1824 (1981); Tomaskie v. Tomaskie, 191 M 508, 625 P2d 536, 38 St. Rep. 416 (1981).

Evidence of Ability to Pay: Imposing an obligation to pay child support without any evidence of an ability to pay is unwarranted. Olson v. Olson, 175 M 444, 574 P2d 1004 (1978).

Discretion of Trial Court to Adjust Property Rights in Favor of Wife: Trial court did not abuse its discretion by awarding wife proportionately larger share of marital property to offset her increased obligations where husband was unable to contribute to support of minor children. Perkins v. Perkins, 168 M 78, 540 P2d 957 (1975).

COMPUTATION OF CHILD SUPPORT AMOUNT

Presumption Created by Child Support Guidelines Rebutted — Evidence That Child's Needs Have Been and Will Continue to Be Met — Imputed Income of Wife — Equal Parenting Time — Husband Paid Medical — Guidelines Unjust to Husband and Windfall to Wife — District Court's Factual Findings Regarding Child Support Sufficiently Supported by Record. In re Marriage of Frank, 2022 MT 179, 410 Mont. 73, 517 P.3d 188.

Child Support Reduction Proper — Budgetary Shortfall From Significant Illness of Another Child: The District Court did not err by ordering a reduction in the support obligation of the respondent father for the parties' child. The District Court found that the respondent's son from a current marriage had a significant illness that contributed to a budgetary shortfall such that the respondent's income could not meet his household expenses while also paying the support obligation determined by Child Support Enforcement Division (CSED), and that the respondent had to borrow money to meet monthly expenses. The District Court also found that, with budgeting and appropriate adjustment of monthly expenses, the respondent would be able to pay $200 a month in child support, as opposed to $679 a month. Sufficient evidence was presented to support the District Court's findings and to demonstrate that the CSED-determined obligation would be unjust to any of the parties or that it was inappropriate in that particular case. Myrick v. Skolrud, 2016 MT 341, 386 Mont. 39, 386 P.3d 934.

Findings by Court Different From Those Relied on by Administrative Law Judge — Improper Adoption of Support Amount Without Testimony at Merits Hearing: While the marriage dissolution was pending, the wife asked the Child Support Enforcement Division to set child support. The Division gathered information regarding the parties' income, and the Administrative Law Judge (ALJ) set an amount. At the merits hearing, the District Court did not allow the husband to testify about seeking modification of the ALJ's order. The District Court adopted the ALJ's amount even though a number of facts in its findings of facts differed from those relied on by the ALJ in calculating support. The husband appealed the support amount, arguing that the District Court had abused its discretion. The Supreme Court concluded that the District Court had erred in not letting the husband testify and remanded the matter to reconsider child support. In re Marriage of Pesanti, 2014 MT 324, 377 Mont. 256, 342 P.3d 679.

Computing Income Based on Average of Income for Previous 3 Years — Calculation Upheld: In computing the father's income for purposes of calculating child support, the District Court used his average income over the last 3 years. The father appealed the calculation and argued that the District Court had erred in using a 3-year average since his income had dropped significantly in the last year. However, the Supreme Court noted that the father had also represented to the District Court that his earning potential remained high and therefore concluded that the District Court had not abused its discretion in using a 3-year average income. In re Marriage of Anderson, 2014 MT 111, 374 Mont. 526, 323 P.3d 895.

Salary Determination for Unusual Work Period — 7 Days at Work and 7 Days Off: In determining income under an administrative rule implementing the uniform child support guidelines under 40-5-209, the District Court was correct in determining that the salary of a person who worked 12 hours a day for 7 days and then had 7 days off was equivalent to 80 regular and 4 overtime hours in each 2-week period even though for pay purposes the person was paid overtime for all hours over 40 worked in the first week. In re Marriage of Stevens, 2011 MT 106, 360 Mont. 344, 253 P.3d 877.

Adding Federal Earned Income Credits to Imputed Income — Error: The District Court, in determining the amount of support to be paid by a mother, imputed income to her based on what she could earn as a full-time waitress and also added what she would receive from federal earned income credits. The Supreme Court held that the lower court properly imputed income based on potential earnings but was in error in adding in the federal earned income credits. In re Parenting of N.S., 2011 MT 98, 360 Mont. 288, 253 P.3d 863.

Calculation of Child Support According to Child Support Guidelines: The Supreme Court reversed the District Court's decision to exclude a husband's business income because the income did not "add to the standard of living" of the children. A child support obligation must be calculated according to the uniform child support guidelines and must include all actual and imputed income that fairly reflects a parent's resources available for child support. In re Marriage of Williams, 2011 MT 63, 360 Mont. 46, 250 P.3d 850.

No Error Found in Imputation of Income, Determination of Travel Expenses, Application of Long-Distance Parenting Adjustment, Determination of Medical Expenses, and Failure to Award Retroactive Child Support: The parties were married in Las Vegas but separated after 6 months when the wife returned to Great Falls and the husband began work in a mine in Australia. In reviewing the award of child support by the District Court, the Supreme Court held that the District Court did not abuse its discretion in imputing income to the husband pursuant to ARM 37.62.108(3), determining the husband's travel expenses, and determining the husband's long-distance parenting adjustment pursuant to ARM 37.62.130(4). The Supreme Court also held that the District Court did not err in failing to consider the cost of medical insurance or unreimbursed medical expenses in its calculation of child support or in refusing to order retroactive child support payments. In re Marriage of Perina, 2011 MT 41, 359 Mont. 296, 249 P.3d 67.

Failure to Consider Taxable Income From Closely Held Corporation — Remand: The District Court decided not to include the husband's taxable income from a closely held corporation as child support income because the corporation did not have to pay out money to the husband, but could instead use the money for other purposes such as paying down the corporation's debt or reinvesting in the corporation. The court then tied any future decision by the corporation to pay out dividend income to a corresponding increase in the husband's child support obligation. However, the Supreme Court concluded that this method provided a substantial incentive to spend corporate income on anything other than dividends. The case was remanded with instructions to use the husband's tax returns, the corporation's financial statements, and any other relevant information to objectively determine the husband's income for child support purposes. In re Marriage of Williams, 2009 MT 282, 352 M 198, 217 P3d 67 (2009). See also In re Marriage of Gray, 242 M 69, 788 P2d 909 (1990), and Albrecht v. Albrecht, 2002 MT 227, 311 M 412, 56 P3d 339 (2002).

Lack of Record of Spouse's Imputed Income — Remand for Recalculation of Support Amount: The only reference in the record regarding the mother's income was the father's testimony that the mother told him she could earn $52,000 a year as a nurse. There was no examination of the fact that the mother had not worked for nearly a decade and would not have current nursing skills and no evidence as to what nurses with 2-year degrees actually earn in Montana. Therefore, absent sufficient supporting evidence for the mother's imputed income, the case was remanded for a recalculation of her child support obligations based on a reasonable imputation of income as required in In re Marriage of Gebhardt, 240 M 165, 783 P2d 400, 46 St. Rep. 2026 (1989). In re Marriage of Wilson, 2009 MT 203, 351 M 204, 210 P3d 170 (2009).

No Evidence of Changed Circumstances or Increased Need — Modification of Support Unwarranted: Modification of child support requires a finding of substantial and continuing changed circumstances that make the terms of the original support award unconscionable. Here, the original decree temporarily set support at $2,500 a month, to be revised when the father obtained new employment. When a new job was obtained, the mother sought to increase the support amount to $3,723, pursuant to the support guidelines and the father's new income, and sought to have the new amount applied retroactively to the date of the beginning of the new employment. The District Court increased the amount to $2,990, holding that that amount was reasonable and that even the original award of $2,500 a month more than met the needs of the children according to figures provided by the mother, and the court declined to apply the new amount retroactively. The mother appealed. Referring to the original agreement to revise support when the father gained new employment, the Supreme Court held that the agreement did not allow a revised amount to be so large as to be unjust, but that the statutes and support guidelines were still applicable in determining whether a variance should be granted. Without specific evidence of changed economic circumstances or actual increased need, a change in a party's income is not sufficient to warrant modification or to support a conclusion of a substantial change in circumstances. The revised amount was affirmed absent a showing of actual increased need, and it was within the discretion of the District Court to refuse to order retroactive support, so the revised support order was affirmed. In re Marriage of Midence, 2006 MT 294, 334 M 388, 147 P3d 227 (2006).

Failure to Include Parent's Imputed Income in Child Support Calculation — Remand: Although child support obligations are calculated according to uniform guidelines as required in 40-5-209, income may include imputed income in order to fairly reflect a parent's income available for child support, and a District Court should impute income when a parent is voluntarily unemployed or underemployed. In the present case, the mother was employed part-time and testified that she could obtain full-time employment and earn significantly more income if she wished, but the District Court erroneously failed to impute any income to the mother. By failing to account for the mother's voluntary underemployment when calculating child support, the District Court abused its discretion, and the Supreme Court remanded for further calculations. In re Marriage of Dennison, 2006 MT 56, 331 M 315, 132 P3d 535 (2006).

Fluctuating and Imputed Income as Basis for Abuse of Discretion: In the course of the dissolution of Steve's marriage to Sherri, Steve's expert testified that Steve was able to make more than $40,000 from his business in only 3 of the most recent 10 years and that his business could not sustain an annual salary of $46,000 for him. Sherri's expert testified that he imputed an unreported annual income to Steve of $15,000, including $5,000 from the sale of scrap metal, in addition to actual income. However, when questioned in court, Sherri's expert admitted that he could not get enough information from the parties to do anything more than guess at the amount of imputed income. Citing In re Marriage of Banka, 2003 MT 84, 315 M 97, 67 P3d 885 (2003), the Supreme Court found that based upon the testimony of the parties' experts, the District Court had abused its discretion in finding that Steve's income was to be calculated at $51,000 annually, including $5,000 from the sale of scrap metal, for the purposes of child support payments. The Supreme Court reversed the findings of the District Court and remanded the case for further findings as to Steve's sustainable income. In re Marriage of Helzer, 2004 MT 352, 324 M 371, 102 P3d 1263 (2004).

Sanction of Nondisclosing Party by Disallowing Evidentiary Hearing to Discuss Evidence That Should Have Been Covered in Disclosure: The parties in a child support dispute were ordered to disclose pertinent information to a court-appointed child support expert. The father repeatedly refused to provide necessary corporate income information and to cooperate with the expert. Dissatisfied with recommendations by the expert based on information that was provided, the father moved for an evidentiary hearing. The mother objected on grounds that the father should not be allowed to present additional evidence at a hearing after failing to provide the information to the expert. The District Court agreed and denied the motion for a hearing. On appeal, the Supreme Court affirmed. Under the clear language of 40-5-255, the District Court may enter an order preventing a noncomplying party from presenting evidence at a hearing as a sanction for failing to fully disclose relevant financial information when ordered by the court. Stewart v. Rogers, 2004 MT 138, 321 M 387, 92 P3d 615 (2004).

Three-Year Income Average Properly Applied Absent Requested Documented Information: The parties in a child support dispute were ordered to disclose pertinent financial information to a court-appointed child support expert. The father repeatedly refused to provide necessary corporate income information, so the expert averaged the father's income using the 3-year average for self-employed individuals as set forth in Albrecht v. Albrecht, 2002 MT 227, 311 M 412, 56 P3d 339 (2002). The father appealed on grounds that the trial court did not attribute to him a realistic or sustainable income figure. The Supreme Court affirmed the use of the 3-year average in this case. Because the father failed to submit alternative calculations accompanied by supporting documentation, relying instead on unsubstantiated claims of income, use of the 3-year average was appropriate. Stewart v. Rogers, 2004 MT 138, 321 M 387, 92 P3d 615 (2004).

No Error in Failure to Compute Child Support Obligation: The District Court failed to compute a child support obligation for the husband on behalf of the parties' minor child, and the wife appealed. The Supreme Court noted that it will not overturn a District Court's support determination absent an abuse of discretion and that the District Court must state its reasons if no support is ordered. Here, the District Court found that: (1) neither party would be able to earn significant wages from employment, but both would be able to generate income from property assets allocated to them, so the parties should share equally in supporting their son; (2) each party should pay for the child's usual and recurring expenses while in that party's care; (3) extracurricular expenses should be equally shared; (4) the husband should continue to provide health insurance for the child; and (5) the parties should share health care costs not covered by insurance. The wife failed to show how the District Court's findings were not supported by fact or to identify how the effect of the evidence was misapprehended, and the failure to compute a child support obligation was affirmed. In re Marriage of Haberkern, 2004 MT 29, 319 M 393, 85 P3d 743 (2004).

Affirmation of Calculation of Farm Income for Child Support Purposes — Increase of Net Worth Because of Market Forces: The wife's expert witness calculated the husband's income as a self-employed farmer by averaging the annual increase in the parties' assets over the term of their marriage, factoring in their standard of living, adding the husband's stated income, deducting the wife's financial contribution, and arriving at an amount showing a significant increase in the husband's net worth. The wife claimed that this amount should be used in calculating the husband's child support obligation. The District Court found no evidence that the husband was using income otherwise available for child support to acquire wealth or reduce debt other than in the ordinary course of business and that most if not all of any increase in the husband's net worth was due to market conditions. The Supreme Court affirmed, declining to attribute income to assets that are used to produce income. In re Marriage of Banka, 2003 MT 84, 315 M 97, 67 P3d 885 (2003).

Calculation of Income of Self-Employed Parent Based on Three-Year Average — Guidelines to Be Applied Absent Evidence of Injustice: The wife's expert recommended setting the husband's child support obligation based on what the husband earned during a single year as a self-employed contractor. The District Court accepted the recommendation and set support at $2,412 a month. The husband appealed, and the Supreme Court reversed. A District Court must follow the child support guidelines unless clear and convincing evidence is produced demonstrating that application of the guidelines is unjust to the child or to any of the parties or is inappropriate in that particular case. Although not mandated, instructions for completing the worksheet provide that determination of the income of a self-employed parent usually requires an average of at least 3 years of the net income from Schedule C of that parent's income tax returns, and the Supreme Court has indicated a strong preference for income averaging. Income should be annualized to avoid the possibility of skewed application of the guidelines based on temporary or seasonal conditions. In this case, there was no evidence that applying the 3-year average of net earning from Schedule C would result in injustice, and the District Court erred in setting support based on a single year's income. Albrecht v. Albrecht, 2002 MT 227, 311 M 412, 56 P3d 339 (2002), distinguishing In re Marriage of Jacobson, 251 M 394, 825 P2d 561 (1992), and In re Marriage of Nash, 254 M 231, 836 P2d 598 (1992). See also In re Marriage of Anderson, 2014 MT 111, 374 Mont. 526, 323 P.3d 895.

Disallowance of Business Expenses Based on Difference Between Expenses for Tax Purposes and Expenses for Support Purposes: In calculating support, the District Court rejected certain business expenses claimed by the husband in his tax returns because they were not legitimate. The court found substantial commingling of personal and business expenses and concluded that business expenses for tax purposes were not necessarily permitted for child support purposes. The Supreme Court agreed. The categories and types of expenses permitted by the tax code and the child support guidelines are similar, but a District Court is not required to accept expenses at face value simply because they were claimed on tax returns. Rather, the court has broad discretion to determine whether a parent's claimed business expenses are reasonable for calculating child support. With the exception of two documented expenses directly related to the husband's business, the District Court did not err in disallowing the husband's claimed expenses when calculating support. Albrecht v. Albrecht, 2002 MT 227, 311 M 412, 56 P3d 339 (2002).

Error in Attributing Future Income From Unsold Spec Home: The husband built and sold several spec homes over the years, and the District Court used the income from the sale of the homes in calculating the husband's income for support purposes, including income from the projected sale of a home in Bozeman that was not on the market. The husband's income was fairly represented by homes that had been sold during the preceding 5 years, and it was error for the District Court to use income projection in attributing profit to the husband from a home that had not been sold. Albrecht v. Albrecht, 2002 MT 227, 311 M 412, 56 P3d 339 (2002).

No Error in Rejection of Income Tax Returns as Evidence of Income of Self-Employed Parent: The husband submitted his income tax returns as evidence of his income for 1999. The wife's expert extensively reviewed the husband's records, completely reconstructing the husband's income, and testified that the husband's records were unreliable for support calculation purposes because of the aggressive manner in which expenses were deducted and the commingling of personal and business expenses. The District Court agreed and accepted the expert's calculations. The husband appealed, but the Supreme Court affirmed. Income tax returns are one form of income verification, but they are not the only form. Under ARM 37.62.108(2), other forms may include pay stubs, employer statements, and profit and loss statements. The income with which a court is concerned for child support purposes is disposable income, rather than taxable income. The expert's calculations more accurately reflected the husband's disposable income and the District Court did not err in concluding that the expert's review resulted in a more reliable estimate of the husband's income than the submitted tax returns. Albrecht v. Albrecht, 2002 MT 227, 311 M 412, 56 P3d 339 (2002). See also In re Marriage of Sullivan, 243 M 292, 794 P2d 687 (1990), In re Marriage of Wersland, 249 M 169, 814 P2d 991 (1991), and In re Marriage of Everett, 2012 MT 8, 363 Mont. 296, 268 P.3d 507.

Wife's Involvement in Auditing Husband's Business Records — Discretion of Trial Court to Accept Reliability of Audit: During the marriage, the wife conducted the bookkeeping for the husband's contracting operations and was familiar with his business records. When determining the husband's income for child support purposes, the wife assisted her expert in auditing the husband's records, but all her work was reviewed by the expert. The husband contended that the District Court erred in relying on the expert's testimony because of alleged bias in allowing the wife to aid in reviewing the records and expense determinations. The Supreme Court disagreed. In nonjury trials, the credibility of witnesses and the weight given to their testimony and evidence are left to the discretion of the trial court. Here, the trial court did not err when it found that the audit conducted by the expert was reliable in spite of the fact that the wife was involved in the review of the records. Albrecht v. Albrecht, 2002 MT 227, 311 M 412, 56 P3d 339 (2002).

Parent Ordered to Pay One-Half Day-Care Expenses Despite Other Parent's Credit for All Day-Care Expenses — Abuse of Discretion: The parents shared equal custody, and the father paid $245 a month in child support. The final parenting plan gave the mother credit for all day-care expenses in the calculation of child support, yet ordered the father to pay for child care expenses during the time that the children were with him. The father moved to reconsider the parenting plan and to recalculate child support to reflect the day-care discrepancy, but the motions were denied. Without providing findings, the District Court found that the father failed to present a sufficient reason to prompt recalculation of support. Noting that a presumption in favor of the trial court's determination of support will not be overturned unless the court abused its discretion, the Supreme Court held that in this case, the trial court abused its discretion by: (1) failing to provide findings that the court properly considered the required criteria when determining support; (2) finding that the father failed to present a sufficient reason to prompt recalculation of support; and (3) failing to employ conscientious judgment in refusing to rectify the inconsistency concerning the payment of day-care costs. The case was reversed and remanded for further proceedings. In re Marriage of Buhl, 2002 MT 224, 311 M 375, 56 P3d 317 (2002).

Remand of Final Parenting Plan — Recalculation of Child Support Appropriate: Because a final parenting plan was not supported by substantial evidence, it was reversed and remanded for adoption of a parenting plan that allowed the child to spend approximately equal time with both parents. On remand, the District Court was directed to recalculate monthly child support obligations based on the terms of the new final parenting plan, considering the parties' current financial circumstances in its calculations. In re Marriage of Hedges, 2002 MT 204, 311 M 230, 53 P3d 1273 (2002).

Child Support Calculated on Imputed Income Proper Absent Financial Records: At a hearing on temporary custody and child support, respondent's attorney appeared by telephone and informed the District Court that respondent's financial records were unavailable at that time. The court thus determined temporary support by imputing income to respondent based on his job as a truck driver, calculating child support at $294 a month. Respondent subsequently failed to file any financial affidavits or tax returns establishing that his income was other than the imputed amount, and respondent and his attorney failed to appear at the trial on the merits to refute the amount of imputed income. Petitioner testified at trial that to the best of her knowledge, there had been no changes in the parties' income since the temporary hearing, so the District Court calculated the final child support amount at $294, based on respondent's imputed income. There was no evidence of record that respondent's income was other than the imputed amount, so the Supreme Court affirmed the child support calculation based on imputed income. In re Marriage of Fishbaugh, 2002 MT 175, 310 M 519, 52 P3d 395 (2002).

Lack of Direction in Support Guidelines Regarding Which Parent to Be Credited for Care of Child When Child in Day Care — Abuse of Discretion Standard Applied: Under ARM 37.62.138 (now repealed), if a child spends more than 110 days a year with both parents, the child support obligation will be adjusted. However, the rule offers no direction as to how the majority of the day is calculated when children spend part of that day not under the explicit control of either parent, such as when the child is in school or day care. Absent clear guidance on how to allocate the majority of a 24-hour calendar day, the Supreme Court will review a District Court's determination of which parent gets credit for certain hours of a day by applying the abuse of discretion standard. Here, the District Court concluded that the father was not entitled to credit for the days that he had the children for less than 12 hours of a calendar day, and the Supreme Court affirmed based on the conclusion that the finding was not a clear abuse of discretion. In re Marriage of Kummer & Heinert, 2002 MT 168, 310 M 470, 51 P3d 513 (2002).

Former Administrative Rule Allowing Variance in Child Support for Housing Considered Discretionary: Prior to 1998, the Department of Public Health and Human Services had an administrative rule in place that allowed a District Court to grant a variance to the child support guidelines in cases in which the custodial parent and child occupied the former family home free of cost or at substantially reduced cost. Here, the father purchased a home for the mother and child, yet the District Court declined to apply the variance, and charged the father with the full child support amount when the support obligation was established in 2000. The father appealed on grounds that the District Court miscalculated the child support amount by not considering the housing variance. The Supreme Court affirmed. The variance allowed by the former administrative rule was not mandatory, but rather applied on a case-by-case basis in the discretion of the District Court. Further, the variance was not in effect in 2000 when this case was finally settled. The District Court properly applied the law in effect at the time, and the Supreme Court found no clear and convincing evidence mandating a different result, and no reason to deviate from the 2000 guidelines. In re Marriage of Albinger, 2002 MT 104, 309 M 437, 47 P3d 820 (2002).

Effect of Parent's Voluntary Unemployment on Child Support Calculations — Imputed Income Based on Ability to Earn: When the parties separated, the father voluntarily quit his $90,000 a year job and became a music consultant. At the time of trial, the father had an income of $30,000 a year. He hoped to find a job in Seattle that paid an additional $45,000 a year, but had not yet secured that position. Nevertheless, the trial court imputed to him an annual income of $75,000 for purposes of establishing child support payments. The father appealed, contending that imputation of an additional $45,000 in income was an abuse of discretion. The Supreme Court reiterated the principle that when a parent is voluntarily unemployed or underemployed, a court may impute income based on the parent's capacity and ability to earn, while also recognizing the right to attempt to improve the parent's financial position, even if doing so results in a temporary decrease in present income. A trial court's findings must realistically reflect what the parent is capable of earning, using actual earnings as a guideline. The record supported the conclusion that the father voluntarily left his $90,000 a year job and voluntarily remained unemployed for 5 months after the parties separated. Prospects for earning additional income at or above the level imputed by the court were supported by the father's own testimony and by his expert witness, based on prevailing wages and opportunities in the Seattle area. The father's decision to relocate may have resulted in a short-term reduction of income, but substantial evidence demonstrated his potential to earn the additional $45,000 a year based on his experience and qualifications. The trial court did not abuse its discretion in imputing the additional income for purposes of calculating child support. In re Marriage of Bee, 2002 MT 49, 309 M 34, 43 P3d 903 (2002). See also In re Marriage of Carter-Scanlon, 2014 MT 97, 374 Mont. 434, 322 P.3d 1033, holding that imputation of income is appropriate when a parent fails to produce sufficient proof of income.

Consideration of Health Insurance Premiums in Calculation of Child Support — Failure to Object at Trial Level: On appeal, the wife objected to the District Court's calculations of child support, arguing that the calculation included a credit for health insurance premiums paid by the husband. At a posttrial hearing, the husband requested this credit, and the wife did not object as long as documentation was provided to confirm what portions of the insurance were for the children. That documentation was provided and taken into account in the child support calculations. The wife waived her right to appeal the issue when she did not object in District Court, and the Supreme Court declined to address the theory raised for the first time on appeal. Siefke v. Siefke, 2000 MT 281, 302 M 167, 13 P3d 937, 57 St. Rep. 1175 (2000).

Variance From Guidelines to Account for Costs Related to Long-Distance Visitation: A court is allowed to grant a variance from child support guidelines to account for the financial condition of a parent and the costs related to long-distance visitation. Here, father presented evidence of the long-distance visitation expenses and his present debt, but the court failed to take those factors into consideration when calculating child support. The Supreme Court directed the District Court to consider the factors as part of its recalculation of child support after remand. In re Marriage of Stufft, 286 M 239, 950 P2d 1373, 54 St. Rep. 1391 (1997).

College Student Grant Considered — Inclusion of Gross Income From Part-Time Construction Self-Employment: On appeal of the District Court's child support order, Michael argued that a Pell grant made to his ex-wife for her college tuition should have been included in the computation of her income, that his ex-wife did not fall within the "protection" of an administrative rule excluding the grant from the computation because the rule required a "plan of economic self-improvement", and that an average income from his part-time self-employment at construction jobs should not have been included in the computation. The Supreme Court held that ARM 46.30.1513(2)(e) (now repealed) required inclusion of a grant in the calculation of income only if it was made for the purpose of "living expenses" and because the grant was for tuition, it was properly excluded. As to the "plan" of self-improvement, the Supreme Court held that the rule did not require that Kimberly have a blueprint or actual written plan governing her college education and that whatever "plan" the rule required was fulfilled because the District Court found that Kimberly did not go to college to avoid her child support obligations. Citing In re Pedersen, 261 M 284, 862 P2d 411 (1993), and ARM 46.30.1508 (now repealed), the Supreme Court also held that the District Court properly included the gross income rather than an average income from Michael's part-time self-employment as a contractor. In re Marriage of Syverson, 281 M 1, 931 P2d 691, 54 St. Rep. 32 (1997).

Determination by Lower Court of Imputed Income Based on Potential Earnings Upheld: The District Court imputed wages of $12,000 a year to the mother on the basis that she testified that there was nothing preventing her from working a 40-hour week as a waitress. The Supreme Court held that the lower court had correctly applied the guideline in ARM 46.30.1513 (now repealed) when it imputed the mother's wages based on her employment potential, work history, and the earnings level in the community. In re Paternity & Custody of T.J.H., 278 M 74, 923 P2d 1070, 53 St. Rep. 789 (1996).

Husband's Bonus Included in Calculation of Child Support: The father argued that the lower court had correctly applied the guideline in ARM 46.30.1508 (now repealed) by not adding his bonus to his gross income when determining child support. The Supreme Court reversed the lower court on the basis that the bonus was not overtime or from a second job and therefore could not be presumed to be for the support of his second family. In re Paternity & Custody of T.J.H., 278 M 74, 923 P2d 1070, 53 St. Rep. 789 (1996).

Lower Court Correct in Considering Children of Second Marriage in Determining Child Support: The mother argued that the lower court should not have considered her ex-husband's children from his second marriage in determining his support obligation because her petition was not for an increase in support but rather that the District Court redetermine support. The Supreme Court held that the lower court had correctly applied the guideline in ARM 46.30.1520 (now repealed) because although the petition was not labeled a petition to increase support, in reality the mother was seeking a child support increase from an existing order. In re Paternity & Custody of T.J.H., 278 M 74, 923 P2d 1070, 53 St. Rep. 789 (1996).

Visitation Travel Expense Child Support Variance Based Solely on Claim for It and Judicial Notice of Distance to Be Traveled: In Carrie's child support modification proceeding, it was an abuse of discretion to grant a $73 a month Las Vegas to Sidney, Montana, travel expense variance from the child support guidelines for visitation based solely on Trevor's claim of an entitlement to a variance and the court's judicial notice of the distance between the two places. Trevor presented no factual details to support his request, he did not appear at the hearing, and his attorney presented no evidence as to visitation costs or of how often visitation would occur. In re Marriage of Dishon, 277 M 501, 922 P2d 1186, 53 St. Rep. 816 (1996).

Child Support Payment Credit for Cost of Child's Health Insurance — Failure to Purchase Insurance: The District Court properly refused to give the husband a credit against his monthly child support payment for the cost of premiums for health insurance that the court ordered the husband to maintain on the child. The husband had failed to insure the child, and the wife insured the child at her own expense. In re Marriage of Hogstad, 275 M 489, 914 P2d 584, 53 St. Rep. 257 (1996), followed in In re Marriage of Perina, 2011 MT 41, 359 Mont. 296, 249 P.3d 67.

Deviation From Support Guidelines to Be Supported by Findings of Trial Court: The father appealed a child support order on the basis that the District Court had not used Uniform Child Support Guidelines and had given no reason for the deviation. The Supreme Court held that the lower court had abused its discretion because its order did not consider the guidelines or state its reasons for not applying the guidelines. In re Marriage of Schnell, 273 M 466, 905 P2d 144, 52 St. Rep. 1059 (1995), following In re Marriage of Griffin, 260 M 124, 860 P2d 78 (1993), and In re Marriage of Brandon, 271 M 149, 894 P2d 951, 52 St. Rep. 381 (1995).

Child Support of $539 a Month Reversed When Other Expenses Were Over $1,347 a Month and Income Was $1,200 a Month: A monthly $539 child support payment was reversed and remanded for recalculation because husband (who was unemployed, was partially paralyzed, had a learning disability, and was qualified only for labor jobs) had expenses of $1,347 a month, not counting child support and court-ordered counseling, had a truck in need of $2,400 in repairs, and had an income of $1,200 a month from an annuity. In re Marriage of Bradshaw, 270 M 222, 891 P2d 506, 52 St. Rep. 154 (1995).

Reimbursed Employment Expenses Not Deducted From Gross Income for Child Support Calculation Purposes: In calculating child support using child support guidelines, the District Court properly refused to deduct reimbursed employment expenses from gross income of payor, which an administrative rule stated could not be deducted. In re Marriage of Murphy, 268 M 1, 885 P2d 440, 51 St. Rep. 1198 (1994).

Reduction in Support Amount Proper When Children in Custody of Nonprimary Custodian: It was not error for the District Court, after setting the level of support based on the applicable statutory factors and guidelines, to reduce father's child support payments by one-half during months that father had custody of the children for at least 25 days. In re Marriage of Corey, 266 M 304, 880 P2d 824, 51 St. Rep. 859 (1994).

Stipulation to Three-Year Income Average — Administrative Guideline Inapplicable: During a prehearing conference with the presiding judge, the parties stipulated to respective child support obligations calculated in accordance with the support guidelines, using an agreed-upon 3-year income average. When the stipulation was reduced to writing, wife refused to sign it, contending that the 3-year average was incorrect and a violation of ARM 46.30.1507(5) (now repealed), which does not allow a court to base a support determination on a stipulation that varies from the guidelines. However, the stipulation involved in this case was not the type encompassed in the rule because the parties' stipulation was not an agreement to vary from the guidelines, thus the rule did not apply. Once the parties entered into the stipulation in good faith, it was proper for the trial court to refuse to allow wife to unilaterally change facts upon which the stipulation was based because the hearing had proceeded in reliance on that agreement. In re Marriage of Hill, 265 M 52, 874 P2d 705, 51 St. Rep. 396 (1994).

Improper Deduction of Retirement Contribution: Under ARM 46.30.1516 (now repealed), contributions toward Internal Revenue Service-approved retirement plans, whether voluntary or mandatory, are deductible from gross income up to the actual amount contributed or 6.5% of gross income, whichever is less. However, in this case, the court erred in allowing a reduction of $1,800 for wife's retirement contribution because there was no evidence that the money was placed in an approved retirement plan. In re Marriage of Hunt, 264 M 159, 870 P2d 720, 51 St. Rep. 209 (1994).

Use of Husband's Business Receipts Minus Business Expenses to Decide Earning Capacity When Neither Party Can Adequately Testify as to His Income: Child support of $252 a month based on a $20,000-a-year earning capacity was properly computed when the court could not accurately determine husband's income from his or his wife's testimony and therefore based his earning capacity on business receipts of $78,000 and business expenses of $58,000 during the prior year. In re Marriage of Rager, 263 M 361, 868 P2d 625, 51 St. Rep. 91 (1994).

Amount of Child Support for Child Care Costs for Unborn Twins Proper: Pedersen initiated a suit against Nordahl to establish that he was the father of her unborn twins and to obtain child support. Nordahl argued that the lower court's valuation of child care costs was speculative. The Supreme Court ruled that ARM 46.30.1525 (now repealed) allowed the lower court to estimate the cost of child care when receipted expenses were not available, as was the case with unborn children. In re Paternity of Pedersen v. Nordahl, 261 M 284, 862 P2d 411, 50 St. Rep. 1338 (1993).

Income Based on Lump-Sum Workers' Compensation Settlement Not Properly Calculated: Gordon and Annette dissolved their marriage in 1985 and, in 1989, stipulated that Gordon's child support obligations would become an attachment on any lump-sum workers' compensation settlement for a previous injury. In 1989, Gordon received a $14,900 impairment award, and in 1990, Gordon received a $50,000 lump-sum settlement. The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) calculated Gordon's child support payments at $72 per month, based upon a 2-year average income of $32,450. The Supreme Court held that the District Court abused its discretion in setting payments based upon the 2-year average, as there was no basis for presuming that Gordon's income would be $32,450 per year after 1990. The Supreme Court held that the support payment should be based upon the amount actually received in 1990 and that a second calculation would be necessary for child support due beginning in 1991. In re Marriage of Sullivan, 258 M 531, 853 P2d 1194, 50 St. Rep. 648 (1993).

Not Error to Determine Support Amount Based Upon Preincarceration Income: The father argued that the lower court should have averaged his salary from the year before he was incarcerated with his income the first year of his incarceration to determine the amount of child support he should pay. The Supreme Court expanded its decision in Mooney v. Brennan, 257 M 197, 848 P2d 1020, 50 St. Rep. 229 (1993), to include the original setting of child support amounts. The Supreme Court held that it was not error to use only preincarceration income to determine the original award of child support. In re Marriage of Olsen, 257 M 208, 848 P2d 1026, 50 St. Rep. 234 (1993), followed, with regard to the court's ability to impute income based on the parent's capacity or ability to earn income, in In re Marriage of Hunt, 264 M 159, 870 P2d 720, 51 St. Rep. 209 (1994).

Discretion to Deviate From Support Guidelines: The District Court has considerable discretion to deviate from the SRS (now Department of Public Health and Human Services) child support guidelines if it finds by clear and convincing evidence that application of the standards and guidelines is unjust to the child or any of the parties or is inappropriate to a particular case. If the court decides to apply an older version of the guidelines, it must state its reasons for finding that the amended SRS (now Department of Public Health and Human Services) guidelines are not applicable. In re Marriage of Johnston & Turrin, 255 M 421, 843 P2d 760, 49 St. Rep. 1047 (1992), followed in In re Paternity of W.L., 259 M 187, 855 P2d 521, 50 St. Rep. 751 (1993). For the decision on remand, see In re Paternity of W.L., 270 M 484, 893 P2d 332, 52 St. Rep. 301 (1995).

Award of Retroactive Child Support Affirmed Based on Substantial Evidence: The District Court did not err in awarding child support retroactive to the date of separation when the award was based on substantial evidence, despite father's contention that a retroactive award was prejudicial because the court did not consider: (1) the high cost of living in Alaska where the father lived; (2) the father's alleged inability to meet his financial needs; (3) the disparity in the property settlement; and (4) the fact that the father must also pay health insurance, visitation costs, and child support. In re Marriage of Nash, 254 M 231, 836 P2d 598, 49 St. Rep. 747 (1992).

Failure to Impute Yearly Minimum Wage as Abuse of Discretion: When both parties were unemployed but capable of minimum wage employment, it was an abuse of discretion for the trial court to impute a minimum wage income to one party but not to the other in calculating child support. In re Marriage of Weed, 254 M 162, 836 P2d 591, 49 St. Rep. 681 (1992).

Failure to Prorate Child's Medical Expenses as Abuse of Discretion: The District Court did not make any finding regarding a child's medical condition or probable future extraordinary medical expenses when it directed the parties to share equally in the child's health expenses. Under the child support guidelines, extraordinary medical expenses should be prorated between the parties and added to supplement the support obligation. Determining the amount to be paid can be accomplished by adding a monthly average of past expenses if future costs are comparable. Failure to consider future extraordinary medical expenses constituted an abuse of discretion. (See 1995 amendment.) In re Marriage of Weed, 254 M 162, 836 P2d 591, 49 St. Rep. 681 (1992).

Use of 26.1 Percentage for Income Over $39,500 — No Abuse of Discretion: It was not an abuse of discretion for the District Court to apply the 26.1 percentage of parental income, as stated in the child support guideline tables, to an income over $39,500 when the court properly considered the financial situation of the parties and the needs of the children. In re Marriage of Sacry, 253 M 378, 833 P2d 1035, 49 St. Rep. 452 (1992), followed in In re Marriage of Wackler, 258 M 12, 850 P2d 963, 50 St. Rep. 406 (1993), wherein it was clarified that the Uniform Child Support Guidelines do not establish a cap on child support on incomes exceeding $39,500, but instead provide the District Court with greater flexibility in setting support payments when parental income exceeds that amount.

Personal Injury Award to Be Considered by Court in Determining Parent's Financial Resources — Uniform Child Support Guidelines Found Inappropriate Under Statutory Exception: When the parties were divorced, the District Court awarded joint custody, awarded primary physical custody to the mother, awarded the mother and father one tax deduction apiece for the children, and required the father to pay the mother child support of $150 per month per child. Later the same year, the father lost his eyesight in a work-related accident and eventually received a lump-sum settlement of $373,557, monthly payments of $3,788 for 30 years, disability insurance payments, and social security benefits. When the mother began receiving social security benefits of $174 per month per child as a result of the accident, the father stopped paying child support. The District Court denied both parties' motions for modification of the child support decree, holding that the money received by the father was compensation for his blindness and could not be used to determine his income for calculating his child support obligation. The Supreme Court reversed and remanded, holding that while it would be inappropriate to consider all of the personal injury award as income under the uniform child support guidelines, the District Court should have considered part of the award as income, after subtracting the father's medical expenses. In re Marriage of Durbin, 251 M 51, 823 P2d 243, 48 St. Rep. 1142 (1991). For a discussion of the correct standard of review, see In re Marriage of Kovash, 270 M 517, 893 P2d 860, 52 St. Rep. 280 (1995).

Adjustment in Support Based on Disparity Between Dollar Values in Different Locales: Wife contended District Court error in permitting husband an excessive deduction for the cost of living in Alaska. While the child support guidelines do not address cost-of-living adjustments, when there is substantial disparity between the value of the dollar in different locales, the court may in equity need to make appropriate adjustments; therefore consideration of that factor is not in itself an abuse of discretion. In re Marriage of Fronk v. Wilson, 250 M 291, 819 P2d 1275, 48 St. Rep. 936 (1991). See also In re Marriage of Mitchell, 229 M 242, 746 P2d 598 (1987).

Admissibility of ACCRA Index in Child Support Calculations: The American Chamber of Commerce Researchers Association (ACCRA) Cost of Living Index is a public record admissible under Rule 803(8), M.R.Ev. (Title 26, ch. 10), for use in calculating cost-of-living differences that affect the amount of a child support obligation. Use of the ACCRA index by the District Court in adjusting for the cost of living in Alaska did not constitute reversible error. In re Marriage of Fronk v. Wilson, 250 M 291, 819 P2d 1275, 48 St. Rep. 936 (1991).

Court Discretion in Use of Tax Returns or Payroll Checks in Calculating Disposable Income: Child support guidelines require income to be calculated on the basis of disposable income. It is within the discretion of the trial court to determine whether tax returns or payroll checks most accurately reflect disposable income. In re Marriage of Fronk v. Wilson, 250 M 291, 819 P2d 1275, 48 St. Rep. 936 (1991).

Available Income Properly Imputed for Track Coach Fees: Appellant contended it was error to impute $1,186 to him for track coaching fees, arguing that the fees should not have been added to his income at all because he was trying to get out of his contractual coaching obligation with his employer. However, it was a proper exercise of the court's discretion to impute the track coach income to appellant because it was available to him. In re Marriage of Chiovaro, 247 M 185, 805

P2d 575, 48 St. Rep. 156 (1991), followed in In re Marriage of Stufft, 276 M 454, 916 P2d 767, 53 St. Rep. 467 (1996).

Deduction of Business Expenses — Court Discretion: It is within the discretion of the trial court to determine whether business expense deductions are reasonable for purposes of calculating child support. In re Marriage of Chiovaro, 247 M 185, 805 P2d 575, 48 St. Rep. 156 (1991).

Failure to Deduct Retirement Payments Not Abuse of Discretion: Although the trial court could have deducted $1,868 that went into appellant's mandatory retirement plan, in light of the fact that appellant did not provide income tax returns in a timely manner as ordered prior to the hearing, failure to deduct the retirement payments was not an abuse of discretion. In re Marriage of Chiovaro, 247 M 185, 805 P2d 575, 48 St. Rep. 156 (1991).

Insurance Value Properly Included in Gross Income: Appellant received health and dental insurance as a job benefit and did not have to pay extra for the benefit. The District Court valued the insurance at $100 a month and included the value as part of appellant's income. Appellant contended that this was error because the benefit did not add to his disposable income and because the value was not established by expert testimony. Under terms of the dissolution decree, appellant was required to provide insurance for the children. Because this was a benefit appellant would otherwise have had to provide, it constitutes gross income and was properly included as such in the child support calculations. Failure to object at trial to the imputed value of the insurance negated the argument on appeal that expert valuation was required. In re Marriage of Chiovaro, 247 M 185, 805 P2d 575, 48 St. Rep. 156 (1991).

Request for Retroactive Increase in Support — Subsequent Children Properly Considered: Mother contended the District Court abused its discretion in considering father's two children by remarriage when it did not apply Part 13 of the support guidelines, which states that a parent's prior support obligations have absolute precedence over the needs of a new family, when determining the amount of increase in support based on a petition for a retroactive increase. However, the court properly found that common sense and equity demanded the consideration of two subsequent children whom father must also support. A court is not bound to apply the guidelines if the application would have an unjust result to the parties or siblings. In re Marriage of Hall, 244 M 428, 798 P2d 117, 47 St. Rep. 1705 (1990).

Cost-of-Living Increase Properly Denied: Wife contended the District Court erred in failing to consider her request for an annual $50-a-month increase in child support based on increases in the cost of living. The record clearly showed that the court did consider the request but rejected it. Denial of the cost-of-living increase was not an abuse of discretion, considering wife's potential earning capacity, her substantial equity in the family home, the award to her of $9,209 in escrow payments in each of 5 years, and an increase from $400 to $726.55 a month in child support. In re Marriage of Smith, 242 M 495, 791 P2d 1373, 47 St. Rep. 925 (1990).

Deduction of Business Expenses — Appellant's Acquiescence in Expert Testimony Regarding Deductibility: Wife contended that in calculating child support, the District Court incorrectly allowed deductions for husband's dues and publications, auto expenses, attorney fees, accounting fees, and deductions for business investments, even though these items were not listed as allowable deductions under the child support guidelines. However, wife's own expert testified under cross-examination that the deductions were legitimate business expenses when applying the guidelines. In affirming the lower court, the Supreme Court restated the rule that on appeal, the District Court will not be put in error for a ruling or procedure in which appellant acquiesced or participated or to which appellant made no objection. In re Marriage of Smith, 242 M 495, 791 P2d 1373, 47 St. Rep. 925 (1990), followed in In re Marriage of Fesolowitz/Dechaine, 258 M 380, 852 P2d 658, 50 St. Rep. 575 (1993).

Housing Provided by Employer as Constituting Income: The Supreme Court ruled that the lower court erred in failing to consider housing provided to the respondent by his employer as income for purposes of calculating support as required by the Uniform District Court Rule on Child Support Guidelines. In re Marriage of Gray, 242 M 69, 788 P2d 909, 47 St. Rep. 552 (1990).

Unsold Wheat Not Excluded From Support Calculations: The appellant argued that the lower court erred in excluding unsold wheat owned by the respondent in calculating the parties' support obligations. The Supreme Court agreed, holding that under the Uniform District Court Rule on Child Support Guidelines, the wheat was not an income-producing asset but was the fruit of the respondent's labor and therefore income. In re Marriage of Gray, 242 M 69, 788 P2d 909, 47 St. Rep. 552 (1990).

Guidelines Not Followed — Abuse of Discretion: In its findings, the lower court indicated that the $400 a month child support was adequate under the guidelines. The Supreme Court reversed, stating that the lower court abused its discretion because the guidelines called for support in excess of $700 a month. In re Marriage of McFarland, 240 M 209, 783 P2d 409, 46 St. Rep. 2060 (1989).

Support Amount to Realistically Reflect What Parents Capable of Earning: The trial court set the child support amount based on statements of the father that if he had stayed in California, his salary probably would have doubled in the years before the divorce and on the fact that the wife's earnings as an x-ray technician 19 years previously had not exceeded $3,000 a year. The Supreme Court set aside the award and remanded the case to the lower court with instructions that the court had to look at what each party could realistically earn in light of conditions in the local economy. In re Marriage of Gebhardt, 240 M 165, 783 P2d 400, 46 St. Rep. 2026 (1989).

Failure to Consider Child's Standard of Living if No Divorce — Support Modified: In a divorce proceeding, the husband had received $1,750,000 in inheritance installments with another installment likely. The Supreme Court ruled that the lower court had abused its discretion in awarding only $1,200 a month child support because it had not considered the lifestyle the child would have had if there had been no divorce and the child had continued to live with his father. The statutory guidelines called for $4,500 a month, and the wife had asked for $3,357. The Supreme Court remanded the case with instructions that the child support be set at $3,357 a month. In re Marriage of Hoffmaster, 239 M 84, 780 P2d 177, 46 St. Rep. 1531 (1989).

Failure of Court to Apply Child Support Guidelines Not Grounds for Appeal: In a divorce proceeding, the husband appealed the award of child support on the basis that the lower court had not followed the Child Support Guidelines. The Supreme Court affirmed the decision, stating that when it adopted the guidelines, it specifically provided that the guidelines were not binding on the courts and did so in order to prevent appeals based upon a failure to follow them. In re Marriage of Grecian, 238 M 125, 777 P2d 283, 46 St. Rep. 1142 (1989).

Computation of Legitimate Business Expenses — No Abuse of Discretion: Husband claimed that the trial court erred in calculating child support by: (1) reducing from $12.50 to $5 an hour the amount deductible as employment expenses paid to husband's close friend for performing semiskilled labor; (2) including workers' compensation benefits as income in determining his ability to make support payments; and (3) misapplying the child support guidelines by failing to subtract the proper amount of his business expenses from his gross income to arrive at his net income. The Supreme Court noted that the guidelines mandate that only legitimate business expenses are deductible and that there was some controversy over the proper amount of legitimate expenses. Given the nonbinding nature of the guidelines on a judge's calculations, there was no reversible error based on improper use of the guidelines in determining deductible business expenses. In re Marriage of Penning, 238 M 75, 776 P2d 1214, 46 St. Rep. 1103 (1989).

Guidelines Clarified — Minimum Support Per Child Per Month: While the child support guidelines suggest that no support can be set at less than $50 per month, the Supreme Court clarified that the amount should be $50 per month per child. In re Marriage of Callahan, 233 M 465, 762 P2d 205, 45 St. Rep. 1639 (1988).

Failure to Consider Children's Standard of Living and Parent's Financial Resources and Needs — Support Modified: Wife was awarded $700 a month child support rather than the $900 a month she requested. The lower court failed to consider both the standard of living enjoyed by the children prior to dissolution and the noncustodial parent's financial resources. The $700 award was less than required under the Carlson formula. The Supreme Court remanded with instructions to grant $900 a month support. In re Marriage of Anderson, 230 M 89, 748 P2d 469, 45 St. Rep. 40 (1988).

Income Tax Amounts Alone Improper to Determine Child Support Award: Following dissolution of marriage, husband appealed, arguing that the trial court miscalculated wife's income and improperly applied the Uniform District Court Rule on Child Support Guidelines (44 St. Rep. 828). In remanding to the trial court for a redetermination of husband's and wife's income and a more equitable application of the Guidelines, the Supreme Court held that, in analyzing income, the disposable income of the parents rather than the amounts stated on income tax returns alone is to be considered in calculating child support. In re Marriage of Mitchell, 229 M 242, 746 P2d 598, 44 St. Rep. 1936 (1987), followed in In re Marriage of Wersland, 249 M 169, 814 P2d 991, 48 St. Rep. 626 (1991). See also In re Marriage of Graveley, 244 M 137, 796 P2d 585, 47 St. Rep. 1497 (1990). However, see In re Marriage of Nash, 254 M 231, 836 P2d 598, 49 St. Rep. 747 (1992), in which case the calculation of child support based on tax returns was found not to be an abuse of discretion when the calculation was found to be reasonable and supported by substantial credible evidence.

Amount of Award:

Award of $250 per month child support for each of two children was proper where court found: (1) husband had salary in excess of $38,000 a year; (2) the expenses of the husband and his girlfriend were less than $1,000 a month; (3) mother worked part-time as a waitress at $3.50 an hour and had no other suitable employment as a result of her physical and emotional conditions requiring medical care; and (4) mother had expenses in excess of $1,704 a month. In re Marriage of Manus, 225 M 457, 733 P2d 1275, 44 St. Rep. 398 (1987).

In a marriage dissolution proceeding, the trial judge did not abuse his discretion in awarding $890-a-month child support and $300 toward the child's education fund as the award was clearly supported by the evidence. The father who was required to pay the amounts earned in excess of $100,000 a year; the child had special needs as he experiences neurological difficulties, learning disabilities, and motor control problems. In re Marriage of Swanson, 220 M 490, 716 P2d 219, 43 St. Rep. 551 (1986).

In dissolution of marriage proceeding, there was substantial credible evidence to support trial judge's award of child support in sum of $175 per month for each of two minor children, plus their medical, dental, and hospital costs and expenses, and alimony in the sum of $150 per month for 5 months, with one-half of house payments made by husband to be counted as alimony. In re Marriage of Barron, 177 M 161, 580 P2d 936 (1978).

In marriage dissolution proceeding, award of only $100 per month for support of child, whose custody was awarded to wife, was not against the clear preponderance of the evidence. In re Marriage of Reilly, 176 M 239, 577 P2d 840 (1978).

Public Assistance Amount Not Requirement: In determining the amount of child support, there is no requirement that children's needs be set at the total of AFDC, food stamps, and Medicaid amounts. Isaacs v. Isaacs, 224 M 218, 728 P2d 1345, 43 St. Rep. 2145 (1986).

Formula for Computing Child Support: The algebraic formula suggested by the Supreme Court in Carlson v. Carlson, 214 M 209, 693 P2d 496, 41 St. Rep. 2419 (1984), in the computation of a child support award is only a suggested guideline. (See 1989 amendment notes.) In re Marriage of Di Pasquale, 220 M 467, 716 P2d 223, 43 St. Rep. 557 (1986). See also Isaacs v. Isaacs, 224 M 218, 728 P2d 1345, 43 St. Rep. 2145 (1986), In re Marriage of Ensign, 227 M 357, 739 P2d 479, 44 St. Rep. 1146 (1987), and In re Marriage of Roullier, 229 M 348, 746 P2d 1081, 44 St. Rep. 2035 (1987).

Algebraic Formula to Compute Child Support: After dissolution of his marriage, husband sought and received a reduction in his child support amount based primarily on the fact he was unemployed at the time he petitioned for a reduction. The Supreme Court held that the trial court erred in not considering all the requisite factors in child support modification, including whether the husband is capable of working. As a guideline to computing support, the Supreme Court offered an algebraic formula. The theory of the formula is that the financial needs of the child should be paid by both parents in proportion to their earning capacity. (In 1987 the Supreme Court adopted the Uniform District Court Rule on Child Support Guidelines, 44 St. Rep. 828. The Guidelines were a suggested procedure for the determination of child support. See 1989 amendment that provides the court shall apply the Guidelines in determining the child support obligation.) In re Marriage of Carlson, 214 M 209, 693 P2d 496, 41 St. Rep. 2419 (1984). See also In re Marriage of Mitchell, 229 M 242, 746 P2d 598, 44 St. Rep. 1936 (1987).

REVIEW OF AWARD

Imputed Annual Income Exceeding Husband's Current Income Proper — Imputed Income Based on Gifts From Husband's Mother Improper: In a 2015 divorce proceeding, the District Court imputed an annual earning capacity of $175,000 to the husband in awarding child support and maintenance. The determination was based on a 2011 statement by the husband that he could potentially earn $100,000 a year, on his work experience and qualifications in the financial industry, and on prior gifts from his mother to the marital estate of $75,000 a year. On appeal, the husband argued that he had not made $100,000 a year since before 2007, that his current income was substantially lower, and that the District Court erred by assuming he would receive $75,000 a year from his mother. The Supreme Court affirmed the District Court's finding of $100,000 a year based on the record. However, the Supreme Court reversed the District Court regarding the gifts of $75,000 a year from the husband's mother because there was no guarantee that he would continue to receive substantial gifts in the foreseeable future. In re Marriage of Paschen, 2015 MT 350, 382 Mont. 34, 363 P.3d 444. See also In re Marriage of Miller, 2022 MT 110, 409 Mont. 29, 511 P.3d 307.

Incarceration Not Sufficient Grounds to Retroactively Modify Maintenance Award: The husband argued that the lower court should have retroactively modified its maintenance award because his incarceration changed his circumstances. The Supreme Court held that the amount of the award was based on the wife's needs and that the husband had sufficient liquid assets to cover the maintenance payments regardless of the fact that he was incarcerated. In re Marriage of Olsen, 257 M 208, 848 P2d 1026, 50 St. Rep. 234 (1993).

"Law of the Case" Doctrine: Once a decision has been rendered by the Supreme Court on a particular issue between the parties, the decision is binding upon the courts and those parties and cannot be relitigated in a subsequent appeal. Implicit in this court's holding in a prior appeal in this case, that the District Court had sufficient grounds to modify the distribution of marital assets to allow the husband what he would have received if he had been paid child support payments, is agreement with the District Court's child support grant and valuation of the marital personal property. Therefore, the doctrine of the law of the case applies, and the wife could not have those matters addressed again in the present (second) appeal following remand after the first appeal. In re Marriage of Becker, 255 M 357, 842 P2d 332, 49 St. Rep. 983 (1992).

Standard of Review:

If there is no clear abuse of discretion resulting in substantial injustice, the award made by the District Court will not be disturbed. In re Marriage of Jacobson, 251 M 394, 825 P2d 561, 49 St. Rep. 92 (1992); In re Marriage of Alt, 218 M 327, 708 P2d 258, 42 St. Rep. 1621 (1985); Grenfell v. Grenfell, 182 M 229, 596 P2d 205 (1979), following Brown v. Brown, 179 M 417, 587 P2d 361 (1978); followed in In re Marriage of Gallinger & Weissman, 221 M 463, 719 P2d 777, 43 St. Rep. 976 (1986), In re Marriage of Tonne, 226 M 1, 733 P2d 1280, 44 St. Rep. 411 (1987), In re Marriage of Dunn, 226 M 394, 735 P2d 1117, 44 St. Rep. 749 (1987), and In re Marriage of Houtchens, 233 M 266, 760 P2d 71, 45 St. Rep. 1476 (1988).

In reviewing a District Court's determination, the Supreme Court generally gives deference to the District Court's discretion and will reverse only if the findings are clearly erroneous in light of the evidence in the record. A presumption exists in favor of the judgment, and the lower court will be reversed only if appellant demonstrates that there was a clear abuse of discretion or an error in the findings. The standard of review for abuse of discretion is whether the lower court acted arbitrarily without conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. In re Marriage of Johnson, 225 M 404, 732 P2d 1345, 44 St. Rep. 353 (1987). See also In re Marriage of Clingingsmith, 254 M 399, 838 P2d 417, 49 St. Rep. 794 (1992).

A child support amount cannot be set or reviewed without a determination of the needs of the children. Isaacs v. Isaacs, 224 M 218, 728 P2d 1345, 43 St. Rep. 2145 (1986).

The court did not abuse its discretion in the award of support and maintenance to appellant or in the property disposition since the record failed to disclose an arbitrary exercise of discretion without employment of conscientious judgment. Jerome v. Jerome, 175 M 429, 574 P2d 997 (1978).

The task of the reviewing court is to examine the final child support award to determine whether an abuse of discretion has occurred, thus requiring reversal. Brown v. Brown, 179 M 417, 587 P2d 361 (1978), followed in In re Marriage of Benner, 219 M 188, 711 P2d 802, 42 St. Rep. 1943 (1985), and In re Marriage of Larson, 234 M 400, 763 P2d 1109, 45 St. Rep. 2003 (1988).

Child Support Award for Disabled Child Sufficient: The wife argued that the Special Master erred in awarding only $570 a month for child support of the couple's learning disabled child. She also contended that she should have been awarded an additional $200 a month custodial fee. The Supreme Court held that there was sufficient evidence to support the amount set by the Special Master, which evidence had also been reviewed by the lower court. In re Marriage of Herman, 245 M 451, 802 P2d 623, 47 St. Rep. 2196 (1990).

Deduction of Business Expenses — Appellant's Acquiescence in Expert Testimony Regarding Deductibility: Wife contended that in calculating child support, the District Court incorrectly allowed deductions for husband's dues and publications, auto expenses, attorney fees, accounting fees, and deductions for business investments, even though these items were not listed as allowable deductions under the child support guidelines. However, wife's own expert testified under cross-examination that the deductions were legitimate business expenses when applying the guidelines. In affirming the lower court, the Supreme Court restated the rule that on appeal, the District Court will not be put in error for a ruling or procedure in which appellant acquiesced or participated or to which appellant made no objection. In re Marriage of Smith, 242 M 495, 791 P2d 1373, 47 St. Rep. 925 (1990), followed, with regard to appellant's failure to request that a hearing be vacated, in In re Marriage of Miller, 260 M 15, 858 P2d 338, 50 St. Rep. 912 (1993), and in In re Marriage of Nordberg, 265 M 352, 877 P2d 987, 51 St. Rep. 531 (1994).

Issues Not Objected to at Trial: The respondent did not object to the lower court's failure to value certain personal property of the petitioner in dividing the parties' marital estate and determining support. The Supreme Court held that it would not review issues raised for the first time on appeal. In re Marriage of Mager, 241 M 78, 785 P2d 198, 47 St. Rep. 97 (1990).

Failure to Consider Factors Involved in Carlson Calculations: The District Court held that it was precluded from applying the Carlson formula because neither party offered evidence of the child's total needs. Although the Carlson formula has been termed a "guideline", the factors it involves must be considered, and failure to do so constituted reversible error. In re Marriage of Saylor, 232 M 294, 756 P2d 1149, 45 St. Rep. 1062 (1988).

Maintenance and Child Support Order Remanded — Insufficient Evidence of Ability to Meet Personal and Spouse's Needs: The Supreme Court remanded an order requiring husband to pay $200 a month support for each of three children, to pay all medical, optical, dental, and drug bills incurred by the children but not covered by insurance, and to pay $300 a month maintenance to wife. The court found no evidence that: (1) the trial court applied the formula set out in In re Marriage of Carlson, 214 M 209, 693 P2d 496, 41 St. Rep. 2419 (1984), in awarding child support; and (2) the wife's age or physical or emotional condition prevented her from seeking employment to meet her needs independently. The court further noted that father's financial obligations very nearly exceeded his financial resources and that after meeting his marriage-related debts, support, and maintenance obligations, he was not left with enough to meet his own personal needs. In re Marriage of Keel, 223 M 305, 726 P2d 812, 43 St. Rep. 1742 (1986).

Providing Support Out of Marital Assets — Findings Not to Be Arbitrary: In a dissolution proceeding, the District Court awarded the husband $9,576 equity in the family home and ordered that such amount be credited against his child support obligation at the rate of $200 a month until the equity was exhausted. The court did not credit the husband's equity with an interest rate or consider giving the husband consideration in the event the property appreciates in value before his equity is satisfied. On appeal the Supreme Court found this plan to be arbitrary, reversed this holding, and remanded the case for specific findings under 40-4-204, concerning the husband's ability to contribute to the children's support and to equitably deal with the husband's interest in his equity in the home. In re Marriage of Vinner, 201 M 344, 654 P2d 526, 39 St. Rep. 2154 (1982).

Support Deducted From Noncustodial Parent's Share of Marital Estate — Retroactive to Separation: The noncustodial parent was directed to pay $125 a month for each child from the time of the separation until the two children reached the age of 18. Because the noncustodial parent's income exceeded her expenses by only $50 a month, the total child support award was deducted from her share of the marital assets. This was a permissible method of payment, and it was permissible to award support retroactively. In re Marriage of Crabtree, 200 M 178, 651 P2d 29, 39 St. Rep. 1668 (1982).

Support Arrearages: In applying for a contempt citation, a mother filed an affidavit alleging the father's failure to provide the beef required by the decree. The father's attorney countered by asking for custody of two of the children. No affidavit was filed by the father. For that reason the order granting modification of custody was set aside even though the issue was not raised on appeal. The trial court was also ordered to enter an order compelling the father to comply with the accrued beef support obligations. The trial court had no right to excuse support arrearages. In addition, due to errors of counsel, they were urged not to charge their clients for future services rendered in proceedings relating to these matters. Knowlton v. Knowlton, 193 M 448, 632 P2d 336, 38 St. Rep. 1304 (1981).

Speculative Conditions Not to Be Basis for Support Modification: The trial court based its order increasing the amount of child support on the fact that the husband's social security disability benefits had increased 14% and that the benefits were sure to increase in the future. The trial court cannot base child support upon such speculative conditions. Duffey v. Duffey, 193 M 241, 631 P2d 697, 38 St. Rep. 1105 (1981).

Husband's Income Poorly Documented — Reversible Error — Admonition to Attorneys: The District Court's findings were clearly erroneous in a child support determination based upon sketchy and unsubstantiated income information on husband and upon erroneous allocations of debt otherwise handled in the decree. The Supreme Court, in noting that hasty work by the attorneys contributed to this error, reiterated that it is the duty of counsel to be complete and careful in dissolution actions; pretrial conferences, cooperation between attorneys, and availability of underlying documents are important in achieving the fairest possible results in each case. In re Marriage of Benjamin, 189 M 158, 615 P2d 218, 37 St. Rep. 1412 (1980).

Reduction of Award: In order to defray substantial debts incurred after separation by a party who later had received a maintenance and support award, the District Court apparently had considered the debt and reduced the award accordingly. This action was upheld as being within the court's discretion, but a property settlement which was computed considering the same debt again could not stand because it effectively penalized the debtor a second time. Grenfell v. Grenfell, 182 M 229, 596 P2d 205 (1979).

PAYMENTS OUTSIDE DECREE

Reimbursement to Grandparent Who Paid Insurance and Health Costs: Father was obligated by decree to provide health insurance for his children but did not do so. It was not error for the District Court to order reimbursement to a grandparent who purchased insurance and paid medical bills on behalf of the children during the time of father's obligation. In re Marriage of Barber, 252 M 458, 830 P2d 97, 49 St. Rep. 367 (1992).

Consistent Monthly Payments Not Good Cause to Preclude Automatic Withholding: Father asserted that his consistent payment of monthly child support payments following oral modification constituted good cause not to require automatic withholding. However, automatic withholding was found appropriate when the amount of payments was disputed by the parties and was not determined by the trial court. In re Marriage of Hall, 244 M 428, 798 P2d 117, 47 St. Rep. 1705 (1990).

Parent With Residential Custody Pursuant to Mutual Modification — Child Support: As a corollary to the holding in In re Marriage of Sabo, 224 M 252, 730 P2d 1112, 43 St. Rep. 2175 (1986), that wife was not entitled to child support after she gave residential custody of the children to husband, the parent who takes residential custody of children pursuant to a mutual modification of custody provision is entitled to child support. Parents are responsible for the support of their offspring. In re Marriage of Ryan, 239 M 100, 778 P2d 1389, 46 St. Rep. 1543 (1989).

Providing Articles of Clothing or In-Kind Payments — Support Obligation Not Satisfied: A parent's obligation to contribute to the financial support of a child is not satisfied by provision of articles of clothing or other in-kind payments. In re Adoption of K.L.J.K., 224 M 418, 730 P2d 1135, 43 St. Rep. 2297 (1986), affirming In re Adoption of S.L.R., 196 M 411, 640 P2d 886 (1982).

Payments Made Directly to Children: The obligation to pay child support is not discharged by payment to the children themselves when the support order directs that payment be made to the children's mother. State of Oregon ex rel. Worden v. Drinkwalter, 216 M 9, 700 P2d 150, 42 St. Rep. 599 (1985), followed in Willoughby v. Loomis, 264 M 44, 869 P2d 271, 51 St. Rep. 138 (1994).

Credit Against Support Arrearage — Oral Promise by Custodial Parent: Father and custodial mother agreed between themselves that the father would pay certain of the children's medical and dental bills and that in return the mother would give him credit against his child support obligation. The father made the payments. The mother contended the dissolution decree could not be modified by agreement to reduce or cancel past due and unpaid child support. On appeal, the court found no violation of the spirit and purpose of the support order by allowing the father credit for medical payments, particularly where the mother asked him to make them. The court found no modification of the decree, only a streamlining of the process, whereby the father paid the bills directly rather than going through the wife as an intermediary. In re Marriage of Good, 213 M 269, 691 P2d 1337, 41 St. Rep. 2109 (1984).

Gift to Children — No Effect on Duty to Support Wife: There is nothing in the law that transmutes a spouse's generosity toward the support of children past the age of minority into an obligation which relieves the spouse of a potential duty to provide maintenance to the other spouse upon dissolution of the marriage. In re Marriage of D.C. v. M.C., 195 M 505, 636 P2d 857, 38 St. Rep. 2027 (1981).

Payments in Excess of Decree — Gifts: The marriage of the parties was dissolved in 1973. The wife brought suit to collect $15,000 in satisfaction of delinquent payments for support and maintenance for the years 1976, 1977, and 1978. The husband contended that certain sums paid in excess of the decree, amounting to $15,546.11, should be offset against the payments. The husband voluntarily increased support payments and paid for the wife's psychiatric care under an oral agreement. Letters from the husband and his attorney stated that the payments were voluntary and intended as gifts to the children. The trial court held that the excess payments were gifts and that the husband was liable for the back payments. The husband contended that the payments were not gifts because they were not voluntary. He claimed that constant harassing, phone calls, and threats to withhold visitation rights were responsible for the extra payments. The Supreme Court held that while these factors no doubt had an effect, they did not overcome the substantial evidence that the payments were intended as gifts, and the husband was not entitled to offset them against the amount owed under the decree. Delaney v. Delaney, 195 M 259, 635 P2d 1306, 38 St. Rep. 1832 (1981).

Offset Against Child Support Obligation: Hadford argued that $1,000 given to his daughter on her 18th birthday, allowing his son to keep the proceeds of the sale of a snowmobile, and overpayments of maintenance to his spouse should be used to offset his obligation to pay child support. The court rejected this argument, saying that the $1,000 was surely intended as a gift and the overpayment to his spouse was a dispute between him and his spouse and did not relieve him of his obligation to pay child support. Failure to tell his son that the proceeds of the sale of the snowmobile were to be used for support precludes him from claiming the proceeds as offset. Hadford v. Hadford, 194 M 518, 633 P2d 1181, 38 St. Rep. 1308 (1981).

Payments Made Directly on Behalf of Children Not Substantial Compliance With Support Order: The District Court erred in crediting money spent directly on behalf of the children against delinquent child support payments. The manner in which child support is to be used is left to the discretion of the custodial parent. Crediting money spent directly on behalf of the children would allow the noncustodial parent to substitute his judgment for that of the custodial parent and is not in substantial compliance with a support order. Williams v. Budke, 186 M 70, 606 P2d 515 (1980), followed in Willoughby v. Loomis, 264 M 44, 869 P2d 271, 51 St. Rep. 138 (1994).

Restitution of Child Support Overpayments: There can be no restitution where it was just that the payment should have been made and where, as between the parties, it would be inequitable to require any repayment. Here, however, restitution of overpayments of child support cannot be considered inequitable as between the parties, since the defendant has apparently received more child support money than the divorce decree considered adequate, there is no allegation that the amounts decreed were inadequate, and the defendant has never attempted to modify the decree to increase the child support payments. Hereford v. Hereford, 183 M 104, 598 P2d 600 (1979).

Delinquency in Support Payments: Contributions of a father by way of clothing, supplies, and home repairs enhance the welfare of the children but are in addition to the amount to be paid for support. Weber v. Weber, 176 M 144, 576 P2d 1102 (1978).

Mortgage Payments as Substitute for Child Support Payments: Where husband had made regular mortgage payments of $183 per month instead of decreed child support payments of $200 per month for 5 years it was not error for trial court to grant husband's petition for order establishing satisfaction of divorce decree as decree ordered immediate sale of homestead, and to obligate husband to pay both child support and house payments would read into the divorce decree an onerous burden plainly never contemplated. Stripping away form to get at substance, the main purpose of the divorce decree, financial protection of the wife and children, has been satisfied. Haaby v. Haaby, 165 M 475, 529 P2d 1387 (1974).

Attorney General's Opinions

Fee for Filing Petition for Contested Amendment of Parenting Plan Not Applicable to Petition to Modify Child Support: Modification of child support pursuant to 40-4-208 is a separate procedure that does not necessarily entail amendment of a parenting plan pursuant to 40-4-219. Therefore, for filing purposes, a petition to modify child support is not considered a petition for amendment of a parenting plan, and it is inappropriate for a Clerk of Court to collect the $120 statutory fee for filing a petition for a contested amendment of a parenting plan under 25-1-201(1)(a) upon the filing of a petition to modify child support in an existing cause. 47 A.G. Op. 14 (1998).

Law Review Articles

Support and Maintenance, Townsend, 37 Mont. L. Rev. 125 (1976).

Support and Maintenance, Muckelston, 31 Mont. L. Rev. 110 (1969).

40-4-205. Guardian ad litem.

Commissioners' Note

This section authorizes the court to appoint an attorney to represent a minor or dependent child in a proceeding for the dissolution of marriage, legal separation, or any other proceeding which involves the child's support, custody, or visitation. The attorney is not a guardian ad litem for the child, but an advocate whose role is to represent the child's interests. The section intentionally does not authorize the child or his attorney to be heard on the issue of whether the marriage of his parent or parents has broken down irretrievably. The appointment may be made by the court on motion of either parent or by the court on its own motion. It is expected that the authority given the court by this section will be exercised primarily in contested cases, but rare or unusual circumstances may make the appointment appropriate in formally uncontested matters.

Compiler's Comments

2013 Amendment: Chapter 88 inserted (5) requiring that guardian ad litem's report be mailed prior to hearing. Amendment effective October 1, 2013.

Applicability: Section 11, Ch. 88, L. 2013, provided: "[This act] applies to proceedings filed after [the effective date of this act]." Effective October 1, 2013.

1997 Amendment: Chapter 343 in (1), at end of first sentence, and at end of (2)(a), (2)(c), and (2)(d) substituted "parenting, and parental contact" for "custody, and visitation"; and at end of (3) substituted "caretakers" for "custodians".

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

1995 Amendments: Chapter 394 in (1), in first sentence, substituted "guardian ad litem" for "attorney" and inserted second sentence that read: "The guardian ad litem may be an attorney"; inserted (2) concerning the general duties of a guardian ad litem; inserted (3) concerning a guardian ad litem's access to various records; in (4), after "child's", substituted "guardian ad litem" for "attorney"; and made minor changes in style. Amendment effective April 12, 1995.

Chapter 546 substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 434 in second sentence inserted "or the department of family services or any of its staff"; and made minor changes in style. Amendment effective April 21, 1993.

Source: Section 310, Uniform Marriage and Divorce Act.

Montana Changes: The Montana act provides for a waiver of costs while the Uniform Act provides for costs to be borne by an appropriate agency. Montana also does not authorize payment of "disbursements" on behalf of the child by the attorney, but only costs and fees. By omitting the word "or" between "minor" and "dependent child", all Montana language seems to mean representation only for those persons under the age of majority who are not emancipated.

Case Notes

Military Father Stationed Around World — Summer Visitation Stipulated by Parenting Plan — Role of Guardian ad Litem Distinct from Role of Mediator: In a protracted dissolution proceeding involving a mother residing in Montana and a father residing in various military bases, the District Court issued an amended parenting plan that required the parents' teenage daughter to visit the father during the summer. The District Court also found the mother in contempt for not following the terms of the parenting plan. On appeal, the mother argued that the District Court erred because it had failed to consider the best interests of the teenage daughter, who wished to spend more time in Montana during the summers instead of with her father, and that it had wrongly found her in contempt and ordered attorney fees. The Supreme Court affirmed, holding that the District Court's findings were not clearly erroneous, that the original parenting plan's appointment of the child's guardian ad litem as a mediator was not consistent with the purposes of the impartial position, and that, because the District Court did not conduct a hearing on the contempt and attorney fee provisions, it was not proper for appellate review. In re Marriage of Brockington & Brown, 2017 MT 92, 387 Mont. 260, 400 P.3d 205. However, see In re Marriage of Weigand, 2021 MT 128, 404 Mont. 223, 486 P.3d 1272, holding that the dismissal of the appeal of contempt order, while not incorrect, was unnecessary under Rule 58(e), M.R.Civ.P. (Title 25, ch. 20).

Appointment of Guardian Ad Litem for Minor's Claims Against Father Upheld — Best Interests of Children to Include Insurance Claims: The father of three minor children was involved in a motor vehicle accident that killed the mother. The father was charged with vehicular homicide while under the influence; however, the charge was eventually dismissed. The father owned a motor vehicle insurance policy, which proposed to pay the policy limits of $300,000 to the children. During this process, an attorney appointed to represent the minor children with respect to the insurance settlement indicated that the children may have additional claims against the father's business insurance policy. Ultimately, over the father's objection, the District Court appointed a guardian ad litem for the children and an attorney to pursue any legal claims in the best interests of the children. On appeal, the Supreme Court found that the appointment for the purpose of pursuing insurance claims was appropriate and that it was in the best interests of the children despite being against the father's business insurance policy. In re Conservatorship of J.S., 2015 MT 335, 381 Mont. 462, 362 P.3d 76.

Quasi-Judicial Immunity for Guardian Ad Litem to Collect Debt From Party: A court-ordered guardian ad litem attempted to enforce collection of a debt owed by the plaintiff for services provided as ordered by the court. The plaintiff then sued the defendant, the guardian ad litem, for violating the Montana Consumer Protection Act. The District Court granted the defendant summary judgment, holding that the defendant was entitled to quasi-judicial immunity from the consumer protection claim under 2-9-112. On appeal, the Supreme Court affirmed the ruling, holding that the defendant was acting within the scope of her duties as guardian ad litem when she sought to collect the debt for services rendered. Amour v. Collection Professionals, Inc., 2015 MT 150, 379 Mont. 344, 350 P.3d 71.

Modification of Parenting Plan Based on Recommendations of Guardian Ad Litem — Hearing Required: The father challenged the District Court's order that modified a parenting plan based on the recommendations of a guardian ad litem without holding a hearing. The father argued that the modification effectively terminated his parental rights without permitting him the opportunity to cross-examine the guardian ad litem about her recommendations. On appeal, the Supreme Court agreed that the father should be allowed to cross-examine the guardian ad litem and remanded the matter for a hearing. Wendlandt v. Johnson, 2012 MT 90, 365 Mont. 1, 277 P.3d 1208.

Guardian Ad Litem's Revised Parenting Plan Recommendations — Adoption by Court Without Hearing Reversed — Recommendations Hearsay: A guardian ad litem (GAL) was appointed to represent the parties' children. While the GAL initially supported equal parenting and the parties had agreed with the GAL's recommendation, the GAL subsequently submitted written recommendations that the father be the primary parent. The District Court, without holding a hearing on the revised recommendations, adopted them, and the mother appealed. The mother argued that the District Court had erred in relying on the GAL's recommendations, which, she contended, constituted inadmissible hearsay. Moreover, she argued that the District Court's failure to hold a hearing on the revised recommendations violated her due process rights. The Supreme Court agreed that the recommendations were hearsay and that the District Court's failure to allow the mother to cross-examine the GAL had violated her due process rights. Accordingly, the Supreme Court reversed and remanded the matter to the District Court for a hearing. Puccinelli v. Puccinelli, 2012 MT 46, 364 Mont. 235, 272 P.3d 117, distinguished in In re Marriage of Schmidt, 2014 MT 182, 375 Mont. 420, 329 P.3d 570.

Nonreversible Error in Not Allowing Attorney Serving as Guardian Ad Litem to Testify at Final Custody Hearing — Parent's Substantial Rights Not Affected: At a final custody hearing, the District Court refused to allow the testimony and cross-examination of an attorney who was acting as a guardian ad litem because attorneys are not normally allowed to testify under the Montana Rules of Professional Conduct for attorneys. The mother appealed on grounds that it was a denial of due process to give a guardian ad litem authority to investigate and report to the court and then prevent the guardian's testimony based on the Rules of Professional Conduct and that cross-examination was necessary to ensure that the children's best interests were protected. The Supreme Court held that when an attorney is appointed as a guardian ad litem, the guardian ad litem is not to act as an attorney unless directed to do so by the appointing court. Rather, the guardian ad litem is required to fulfill the statutory role to objectively aid the court in decisions regarding a child's best interests, which includes the duty to testify and be cross-examined if the guardian ad litem gives evidence concerning an investigation. Thus, the District Court in this case erred in not allowing the testimony of the guardian ad litem. However, the error did not require reversal because it was not so significant as to materially prejudice the mother, who was given numerous meaningful opportunities to examine the guardian ad litem during the 1 ½ years of proceedings and to question the guardian ad litem's assertions and credibility. Jacobsen v. Thomas, 2004 MT 273, 323 M 183, 100 P3d 106 (2004), distinguished in Puccinelli v. Puccinelli, 2012 MT 46, 364 Mont. 235, 272 P.3d 117.

Power of Nonexpert Guardian Ad Litem to Conduct Assessment and Investigation in Protecting Rights of Child: At contempt proceedings brought by the father to enforce a stipulated parenting plan, the District Court appointed a guardian ad litem in order to protect the rights of the children. The guardian ad litem conducted an assessment and investigation and recommended that the father be the primary residential parent. The mother objected to the report on grounds that the guardian ad litem exceeded statutory authority by submitting recommendations. The Supreme Court disagreed. The District Court clearly intended the guardian ad litem to fulfill the general statutory duties and to carry out the court's requests regarding a proposed move by the parties to

North Carolina. Further, the guardian ad litem had authority to conduct an investigation under both 40-4-215 and this section, so the court did not err in accepting the guardian's report, even though the guardian was not an expert. There is no general requirement that a guardian ad litem be an expert, only that the guardian ad litem not have a conflict of interest with the best interests of the children. Jacobsen v. Thomas, 2004 MT 273, 323 M 183, 100 P3d 106 (2004). See also In re Custody of Krause, 2001 MT 37, 304 M 202, 19 P3d 811 (2001).

Failure to Appoint Guardian Ad Litem in Light of Parent's Abusive Behavior Within Trial Court's Discretion: The trial court revised a parenting plan in a manner that significantly restricted the father's parenting rights. The father contended that it was error for the court to fail to appoint a guardian ad litem for the child because of the importance of the decision and because both parents requested one. The Supreme Court noted that appointment of a guardian ad litem is not mandatory and lies within the discretion of the trial court. Here, the trial court properly exercised its discretion after considering the request but stating that it was unwilling to place anyone else in danger of the father's threatening and abusive behavior. In re Custody of Arneson-Nelson, 2001 MT 242, 307 M 60, 36 P3d 874 (2001).

Lay Person May Be Guardian Ad Litem in Child Custody Proceeding: Generally, in a child custody proceeding, the court may appoint as a guardian ad litem for the child any person who does not have interests adverse to those of the child. The Supreme Court rejected the father's claim that the lower court should not have appointed a lay person, who the father likened to an expert witness and claimed was unqualified and had no known or disclosed experience or qualifications. In re Custody of Krause, 2001 MT 37, 304 M 202, 19 P3d 811 (2001).

Prior Hearing on Guardian Ad Litem Appointment Not Shown to Be Required by Due Process: The father did not provide an argument, authority, or any showing that the court's appointment of a guardian ad litem in a child custody proceeding without providing the father a prior hearing on the appointment in some way deprived him of a fundamental liberty interest in the custody of his child. The Supreme Court rejected his claim that the lack of a hearing violated his due process rights. In re Custody of Krause, 2001 MT 37, 304 M 202, 19 P3d 811 (2001).

Appointment of Attorney for Children Not Necessary — Children's Position Adequately Developed: In a change of custody proceeding, mother's motion that the court appoint an attorney for the children was not ruled on and the court did not state why an appointment was not made. The Supreme Court carefully reviewed the record to determine if an attorney was required for the children. The court found substantial expert and other evidence, largely uncontradicted, that stepfather subjected the children to ritual satanic sexual abuse, that the boy had expressed suicidal wishes, that the father and his subsequent wife were better suited to have custody, that the children were progressing well in the father's custody and had not progressed well in the mother's custody, and that the mother behaved erratically toward the children and sometimes acted contrary to the children's best interests. The Supreme Court found that the lower court did not err in failing to appoint an attorney for the children because the issues as to their best interests were well-developed. The court also expressly overruled the holding in In re Gullette, 173 M 132, 566 P2d 396 (1977), that in a contested guardianship proceeding in which custody is in serious dispute, the court must appoint independent counsel for the child or make a finding stating why the appointment was not necessary. (See 1995 amendment.) McDowell v. McDowell, 263 M 252, 868 P2d 1250, 51 St. Rep. 42 (1994).

Grandparents Not Liable for Son's Share of Attorney Fees: In a dissolution action, the lower court appointed an attorney to represent the interests of the children. Subsequently, the children's grandparents attempted to intervene in the action and obtain custody. The lower court denied their motion. In its final order, the court ordered the grandparents to pay their son's share of the children's attorney fees on the basis that the son had "no intention of doing so". The Supreme Court held that there is no legal basis in 40-4-110, which was relied on by the lower court, to require the grandparents to pay their son's share. However, the Supreme Court refused to address whether the lower court could have required payment under this section because the order was not based on that statute. In re Custody of R.R.K., R.D.K., & L.M.K., 260 M 191, 859 P2d 998, 50 St. Rep. 1002 (1993).

Appointment of Attorney for Children Not Mandatory: This section provides that appointment of an attorney to represent the interests of minor children is permissive rather than mandatory. (See 1995 amendment.) In re Marriage of Merriman, 247 M 491, 807 P2d 1351, 48 St. Rep. 275 (1991), followed in In re Marriage of Johnston & Turrin, 255 M 421, 843 P2d 760, 49 St. Rep. 1047 (1992).

Custody Proceedings — Court-Appointed Attorney for Child — Service Required: While the appointment of an attorney to represent children in custody matters is discretionary with the court under this section, once an attorney has been appointed, it is required that he or she be served with all orders, pleadings, motions, notices, and other papers pertinent to the action. Further, the attorney must actively represent the children and be given an opportunity to present all evidence concerning the best interests of the children. (See 1995 amendment.) In re Marriage of Hammill, 225 M 263, 732 P2d 403, 44 St. Rep. 220 (1987).

Appointment of Attorney Not Required: When the sole concern of the trial court was whether jurisdiction in this custody proceeding should be in this state or another, the court committed no error in not appointing an attorney for the children. Section 40-4-205 applies to substantive issues, not to the question of jurisdiction. In re Marriage of Brown, 218 M 14, 706 P2d 116, 42 St. Rep. 1360 (1985).

No Conflict of Interest: There was no conflict of interest for an attorney appointed to represent the child in a proceeding for modification of custody when the attorney occupied an office that had formerly been shared by the attorney representing the father and the judge presiding over the case (before he became a judge). In re Marriage of Stout, 216 M 342, 701 P2d 729, 42 St. Rep. 856 (1985).

Role of Attorney Appointed to Represent Child in Custody Dispute: An attorney appointed to represent a child in a custody dispute is bound to represent the child's best interests, not the child's wishes. Although the child's wishes deserve the serious attention of the attorney, the attorney's role is to advocate what is in the best interests of the child. In re Marriage of Rolfe, 216 M 39, 699 P2d 79, 42 St. Rep. 623 (1985), followed in In re Custody of J.M.D., 259 M 468, 857 P2d 708, 50 St. Rep. 884 (1993).

When Attorney Must Be Appointed: The appointment of counsel is only necessary when the child needs an advocate to represent his position as to the issues in dispute or to ensure the development of an adequately complete record concerning the best interests of the child. (See 1995 amendment.) Milanovich v. Milanovich, 200 M 83, 655 P2d 959, 39 St. Rep. 1554 (1982).

Abuse of Discretion in Awarding Custody: The court abused its discretion in awarding custody of children to the mother by ignoring the desires of the children, excluding a report of investigation by the welfare department, and in hearing the child custody issue without the presence of the children's attorney. The court should make a specific finding, stating the wishes of the children as to their custodian, and, if the court determines that the children's wishes are not being followed, the court should state in its findings the reason it has chosen not to follow their wishes. Kramer v. Kramer, 177 M 61, 580 P2d 439 (1978).

When Finding on Appointment of Counsel Required: Only in cases heard and decided after Gullette, 173 M 132, 566 P2d 396 (1977) (overruled in McDowell v. McDowell, 263 M 252, 868 P2d 1250, 51 St. Rep. 42 (1994)), is a finding on the appointment of counsel for a minor child required. Further, appointment of counsel is only necessary when the child needs an advocate to represent his position as to the issues in dispute or to ensure the development of an adequately complete record concerning his best interests. (See 1995 amendment.) In re Inquiry into J.J.S., Youth in Need of Care, 176 M 202, 577 P2d 378 (1978). See also Bartmess v. Bartmess, 193 M 200, 631 P2d 299, 38 St. Rep. 1097 (1981).

Objections First Raised on Appeal: The issue of failure to appoint counsel for a dependent minor child lacked merit because it was not raised at trial. Easton v. Easton, 175 M 416, 574 P2d 989 (1978), followed in In re Marriage of Ulland, 251 M 160, 823 P2d 864, 48 St. Rep. 1159 (1991).

Court Instructed to Appoint Counsel: To protect the interests of the minor children upon rehearing of a change of custody petition, the District Court was instructed to appoint independent counsel for the minor children. Schiele v. Sager, 174 M 533, 571 P2d 1142 (1977).

40-4-206. Payment of maintenance or support to court — handling fee of clerk.

Commissioners' Note

This section establishes a procedure for payment of support or maintenance orders through a court officer and for enforcement by the appropriate prosecuting attorney. The section is modeled on similar provisions in North Dakota, Wisconsin, and other states and is intended to make use of the state's remedy of civil contempt as an effective device for the enforcement of support and maintenance.

Compiler's Comments

1997 Amendment: Chapter 552 in (1), at beginning, inserted exception clause; in (2), in first sentence, inserted "of payments received by the clerk"; inserted (4) providing that when the Department is providing Title IV-D services or when income withholding is in effect for an order issued or modified after October 1, 1998, support must be paid through the Department; and made minor changes in style. Amendment effective July 1, 1997.

1985 Amendment: In (2) inserted second through fourth sentences relating to handling fee.

Source: Section 311(a), (b), and (c), Uniform Marriage and Divorce Act.

Montana Changes: Subsections (d), (e), and (f) of the proposed Act, have been omitted in Montana's version of the Act. See 1985 amendment note.

40-4-207. Assignments.

Commissioners' Note

This section is modeled on similar provisions in Wisconsin and California and provides an additional method of assuring that obligations for support and maintenance will be met when due. The Section goes beyond existing law in authorizing an assignment of trust income as well as periodic earnings. In states which permit spendthrift trusts, for purposes of support and maintenance, to be attacked, this section will also apply to spendthrift trusts. Each state should insert in the bracket the sum it deems sufficient to meet the cost to the payor of deducting the sums due from each payment. The validity of the obligation imposed on the payor of funds is clearly supported by analogy to garnishment, and to cases such as Day-Brite Lighting, Inc. v. Missouri, 72 S.Ct. 405, 342 U.S. 421, 96 L.Ed. 469 (1952).

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Source: Section 312, Uniform Marriage and Divorce Act.

Case Notes

Wage Garnishment for Past Maintenance Payments Allowed — Execution Required Prior to Garnishment: Although 25-13-614 allows for garnishment from wages for maintenance obligations, execution on either a judgment or an order is required before a salary can be garnished for past due amounts. In re Marriage of Mease, 2004 MT 59, 320 M 229, 92 P3d 1148 (2004), following White v. White, 195 M 470, 636 P2d 844 (1981).

Wage Assignment Order Withdrawn — Agreement to Pay College Expenses Unenforceable Support Obligation: In a divorce settlement agreement, the husband and wife agreed to share equally the cost of their children's education. However, the final decree, which incorporated the settlement agreement, placed responsibility of child support solely with the husband. When the wife failed to contribute any educational expenses, the husband sought and received from the District Court an order assigning the wife's wages to satisfy the husband's judgment. On appeal, the Supreme Court reversed, ruling that despite any other agreement, the final decree placed all child support responsibilities with the husband. The wife's agreement to pay college expenses created nothing more than a contractual obligation enforceable in the same manner as other contractual obligations. In re Marriage of Heckler, 274 M 277, 908 P2d 208, 52 St. Rep. 1231 (1995).

Failure to Pay Child Support in Past: It was proper for the District Court to order the minor child's father to make an assignment of his monthly wages when the father had a history of failing to pay child support for an earlier marriage. In re Marriage of Benner, 219 M 188, 711 P2d 802, 42 St. Rep. 1943 (1985).

Attorney General's Opinions

Commencement Filing Fee Not Chargeable for Certain Postdissolution Proceedings: The Attorney General relied on the holding in In re Marriage of Billings, 189 M 520, 616 P2d 1104 (1980), in finding that a District Court Clerk may not charge a commencement filing fee for postdissolution of marriage action that is brought under the same cause number as the marital dissolution proceeding and that remains under the continuing jurisdiction of the District Court. 43 A.G. Op. 72 (1990).

40-4-208. Modification and termination of provisions for maintenance, support, and property disposition.

Commissioners' Note

Subsection (a) [(1)] makes each installment under an order for periodic support or maintenance final and non-modifiable when it falls due. The accrued installments cannot be modified retroactively, and future installments can be modified only as to those falling due after a motion for modification has been filed. The purpose of thus making each installment final and non-modifiable when it becomes due is to give each past due installment the status of a final judgment entitled to full faith and credit in other states pursuant to the decisions of the Supreme Court in Lynde v. Lynde, 21 S.Ct. 555, 181 U.S. 183, 45 L.Ed. 810 (1901); Sistare v. Sistare, 30 S.Ct. 682, 218 U.S. 1, 54 L.Ed. 905, 28 LRANS 1068, 20 Ann.Cas. 261 (1910); Barber v. Barber, 65 S.Ct. 137, 323 U.S. 77, 89 L.Ed. 82, 157 A.L.R. 163 (1944); and Griffin v. Griffin, 66 S.Ct. 556, 327 U.S. 220, 90 L.Ed. 635 (1945). The Supreme Court has not yet held that future installments are entitled to full faith and credit, but at least one state court has done so [Light v. Light, 147 N.E.2d 34, 12 Ill.2d 502 (1958)] and another state has extended voluntary recognition to future installments [Worthley v. Worthley, 283 P.2d 19, 44 Cal.2d 465 (1955)]. See the comment to Section 306(d) [40-4-201(4)] with respect to international enforcement.

Except where the decree, incorporating the agreement of the parties, provides to the contrary [see Section 306(f) [40-4-201(6)]], future installments may be modified, but the person seeking modification must show that circumstances have changed since the date of the original order so that the order is unconscionable at the time the motion is made and will continue to be unconscionable unless modified. This strict standard is intended to discourage repeated or insubstantial motions for modification. In accordance with presently existing law, the provisions of the decree respecting property disposition may not be altered unless the judgment itself can be reopened for fraud or otherwise under the laws of the state. There is no intention to change this law. If the judgment was rendered by another state, normal full faith and credit law would allow it to be reopened in the forum state if it can be reopened under the laws of the rendering state.

Subsection (b) authorizes the parties to agree in writing or the court to provide in the decree that maintenance will continue beyond the death of the obligor or the remarriage of the obligee. In the absence of such an agreement or provision in the decree, this section sets the termination date for the obligation to pay future maintenance.

Subsection (c) [(3)] is designed to permit the parties to agree in writing or the court to provide in the decree that the obligation of each parent to support the child will extend beyond the child's emancipation and to permit parents, on occasion of a legal separation or dissolution of marriage, to agree that the child support provisions of the decree will terminate upon the death of a parent who has provided for the child in his will. In the absence of such an agreement or provision in the decree, this section terminates the obligation of a parent to support a child, only upon the child's emancipation. The parent's death does not terminate the child's right to support, and the court may make an appropriate order establishing the obligation of the deceased parent's estate to the child. Section 316(c) [40-4-208(3)], read in connection with Section 309 [40-4-204], authorizes a support order against the estate of a parent who had received property for the child's support if that property was not actually used for the child's support or did not accrue to the child's benefit by [virtue] of the parent's death.

To avoid indefinite delay in the settlement of estates, there may be modification or commutation to a lump sum payment "to the extent just and appropriate in the circumstances." Any person interested, including a creditor or an attorney for the child (Section 310 [40-4-205]), may move the court for the appropriate order.

Compiler's Comments

2019 Amendment: Chapter 368 in (5) at beginning inserted exception clause; inserted (6) regarding continuing child support obligations for an individual with a disability who is financially dependent on the custodial parent; and made minor changes in style. Amendment effective July 1, 2019.

1997 Amendment: Chapter 326 at beginning of (2)(a), (2)(b), and last sentence of (2)(b)(iii) inserted exception clause; and inserted (6) concerning modification for nondisclosure.

Applicability: Section 12, Ch. 326, L. 1997, provided: "[This act] applies to proceedings commenced on or after October 1, 1997."

1995 Amendments: Chapter 504 inserted (2)(c) concerning modification of a child support order due to nonexistence or violation of a medical support order. Amendment effective July 1, 1995.

Chapter 546 in (2)(b)(iii), in two places, substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Preamble: The preamble attached to Ch. 504, L. 1995, provided: "WHEREAS, it is appropriate to draft a bill specifically to present proposed program improvements for medical support enforcement in a single, comprehensive bill that promotes the needs of legislative energy, efficiency, and economy by limiting the number of possible bills and by reducing the need for hearings and readings on those bills; and

WHEREAS, parents should be held responsible for providing medical care for their children, whether or not the parents voluntarily do so."

1995 Statement of Intent: The statement of intent attached to Ch. 504, L. 1995, provided: "A statement of intent is required for this bill because it grants rulemaking authority to the department of social and rehabilitation services to adopt rules for expedited procedures."

Severability: Section 33, Ch. 504, L. 1995, was a severability clause.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: In (5), at beginning, deleted "Unless otherwise agreed in writing or expressly provided in the decree" and in first sentence, after "emancipation of the child", inserted language concerning emancipation upon graduating from high school or reaching 19 years of age; and made minor changes in style. Amendment effective April 4, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 342, L. 1991, provided: "A statement of intent is not required for this bill because it does not grant rulemaking authority. However, a committee may by a two-thirds vote agree to attach a statement of intent to a bill not requiring one. The legislature finds that it would be unconscionable to have child support terminate prior to the graduation of a child from high school if the child is still living at home with the other parent, is still in need of support, and there has been no change in living circumstances prior to high school graduation."

Applicability: Section 2, Ch. 342, L. 1991, provided: "[Section 1] [40-4-208] applies to all decrees containing provisions for child support issued on or after [the effective date of this act] [effective April 4, 1991]."

1989 Amendments: Chapter 549 inserted (2)(b)(iii) relating to Department of Revenue applications and support modifications.

Chapter 702 in (2)(b)(iii) substituted "department of social and rehabilitation services" for "department of revenue". Amendment effective July 1, 1989.

1987 Amendment: Near end of (1), after "subsequent to", inserted "actual notice to the parties of".

Source: Section 316, Uniform Marriage and Divorce Act.

Montana Changes: The Montana version adds subsection (2)(b) and (3)(b), providing for modification upon written consent of the parties, and changes the language of subsection (1) without affecting the substance. See also 1987 and 1989 amendment notes.

Case Notes

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MAINTENANCE

Father's Income From Parent Properly Characterized as Gift Income — Future Payments Considered Gifts. In re Marriage of Miller, 2022 MT 110, 409 Mont. 29, 511 P.3d 307.

Right Conferred by Modification Provision — Right to Request Unconscionability Analysis, Not Right to Automatic Modification: The settlement agreement in a dissolution proceeding provided for a monthly maintenance payment to the wife plus a percentage of any income received by the husband in excess of his current income. The provision was agreed to be nonmodifiable, except that if the husband's base wage dropped by 10% or more, he retained the right to seek modification of the maintenance obligation. After the husband's employment was terminated, he petitioned the District Court to reduce his maintenance obligation to zero, which the District Court denied. On appeal, the Supreme Court affirmed, finding that the agreement had not become unconscionable because the husband failed to demonstrate that he could not afford the maintenance payment and he had a highly valued skill set in a strong national economy. In re Marriage of Toenjes, 2018 MT 189, 392 Mont. 230, 422 P.3d 1215.

District Court May Not Modify Terms of Separation Agreement Unless Unconscionable: The maintenance provision at issue represented in essence the husband's purchase of the business in the event the separation agreement was converted to a dissolution decree. Thus, the maintenance provision was an inseverable part of the property settlement agreement. The agreement was not unconscionable because both parties assumed the risk of the agreement. The wife gave up the chance to reap the success of the business in exchange for maintenance. In re Marriage of Orr, 2017 MT 291, 389 Mont. 400, 410 P.3d 181.

Court Conditions for Termination of Maintenance — Modification Still Available Under Statute: The parties filed for dissolution of their long-term marriage. As part of the distribution of the parties' property, the District Court awarded the wife maintenance and further ordered certain conditions for termination of maintenance. On appeal, the husband argued that the District Court's conditions for termination barred him from seeking modification under 40-4-208. The Supreme Court disagreed and clarified that the husband could seek modification of the maintenance under 40-4-208 and was not restricted by the conditions set by the District Court, which the Supreme Court held were legally permissible. In re Marriage of Smith, 2015 MT 256, 381 Mont. 1, 358 P.3d 171.

Lack of Findings to Support Maintenance Award — Remanded for Consideration of Relevant Factors: The parties filed for dissolution of their long-term marriage. As a part of the distribution of the parties' property, the District Court awarded the wife maintenance. The husband appealed to the Supreme Court, which agreed that the District Court had erred in determining the maintenance award because it had not made findings to support the wife's monthly expenses and whether the husband could meet his own expenses. The Supreme Court remanded for the District Court to make findings after considering the relevant factors under 40-4-203. In re Marriage of Smith, 2015 MT 256, 381 Mont. 1, 358 P.3d 171.

Termination of Maintenance Upon Remarriage of Spouse Despite "No Modification" Clause in Separation Agreement: The husband petitioned for termination of maintenance payments to the wife when she remarried, despite the fact that the parties' separation agreement contained a provision that maintenance provisions were nonmodifiable. However, there was also no provision in the agreement that maintenance would continue if the wife remarried. The District Court granted the petition and terminated the husband's maintenance obligation, and the wife appealed, but the Supreme Court affirmed. If a separation agreement contains no express provision addressing termination of a maintenance obligation, under 40-4-208, remarriage of the party receiving maintenance terminates the maintenance obligation unless maintenance provisions are intended as part of the property division, which was not the case here. Thus, the husband's maintenance obligation terminated when the wife remarried. In re Marriage of Cortese, 2008 MT 28, 341 M 287, 176 P3d 1064 (2008), following Bertagnolli v. Bertagnolli, 185 M 1, 604 P2d 299 (1979), and distinguishing Bolstad v. Bolstad, 203 M 131, 660 P2d 95 (1983), and In re Marriage of Hahn, 263 M 315, 868 P2d 599 (1994). See also In re Marriage of Wolf, 2011 MT 192, 361 Mont. 324, 258 P.3d 995.

Parties' Removal of Cohabitation Condition From Maintenance Provisions of Divorce Decree — Subsequent Cohabitation Insufficient to Warrant Modification of Maintenance Award: When the parties dissolved their marriage, they initially included maintenance provisions for the wife that would terminate upon the wife's death, marriage, or cohabitation, but before the decree was finalized, the word cohabitation was crossed out and both parties initialed the change, thus eliminating cohabitation as an event that would terminate maintenance. The wife subsequently began cohabiting with another man, and the husband sought to modify the maintenance agreement. The District Court declined to reopen the agreement, and on appeal, the Supreme Court affirmed. The maintenance provisions were clear and unambiguous, and the husband failed to meet the burden of proving a change in circumstances that rendered the original agreement unconscionable. In re Marriage of Olson, 2005 MT 57, 326 M 224, 108 P3d 493 (2005).

Failure of District Court to Follow Statutory Requirements — Modification of Maintenance Award Improper: The wife moved for a maintenance modification and presented evidence that she was short $2,438.78 a month to cover her expenses, forcing her to liquidate some of the marital assets received during the dissolution. The District Court found that she and the children were indeed short $2,010 a month and ordered that amount in future maintenance, but made no other findings or conclusions regarding the requirements of this section. The husband appealed. The Supreme Court noted that in modifying a maintenance award, under In re Marriage of Jarussi, 1998 MT 272, 291 M 371, 968 P2d 720 (1998), changed circumstances and unconscionability are distinct factors that must be independently addressed and held that the failure to make findings regarding changed circumstances so substantial and continuing as to render the original terms of the support order unconscionable, as required by subsection (2)(b)(i) of this section, constituted reversible error. In re Marriage of Schmieding, 2003 MT 246, 317 M 320, 77 P3d 216 (2003).

Failure to Meet Unconscionability Test — Request to Terminate Maintenance Properly Denied: Husband requested termination of $300-a-month maintenance payments because wife had become employed full time and could afford to care for herself. However, nothing husband presented to the court showed that circumstances had changed so substantially from the time of the original decree as to make the terms of the original agreement unconscionable. Denial of the motion to terminate maintenance was proper. In re Marriage of Brandon, 271 M 149, 894 P2d 951, 52 St. Rep. 381 (1995).

Order Terminating Maintenance Based on Cohabitation Vacated: The lower court issued an order containing a provision that maintenance paid by the husband would terminate upon the wife cohabiting with another individual for a period of more than 6 months. The Supreme Court held that maintenance will not terminate automatically upon the cohabitation of one of the parties absent a showing of changed circumstances. In re Marriage of Chew, 269 M 331, 888 P2d 428, 52 St. Rep. 13 (1995).

Social Security Payment to Daughter Not Credited to Medical Bill Arrearages — Only Prospective Credit to Be Given: After Dale and Sandy's marriage was dissolved, their minor child Sara received a lump-sum Social Security payment because of Dale's disability. Dale then moved for modification of the dissolution decree, asking that he be relieved of his obligation, resulting from the original decree, to pay Sara's medical bills. The District Court relieved Dale of one-half of his responsibility incurred after notice of his motion and did not credit the Social Security payment toward arrearages. Citing In re Marriage of Durbin, 251 M 51, 823 P2d 243 (1991), the Supreme Court held that under subsection (1) of this section, Dale's obligation could be modified only prospectively from the date that Dale gave notice of his motion to modify; therefore, the Social Security payments could not be credited toward arrearages. (See 1995 amendment.) In re Marriage of Malquist, 266 M 447, 880 P2d 1357, 51 St. Rep. 914 (1994).

Payment of Lump-Sum Maintenance Award Required Despite Remarriage of Recipient: When presented with the question of whether payment of a lump-sum maintenance award in gross or in installments is required upon remarriage of the recipient, absent any provision for defeasance in the decree, the Supreme Court cited Kishner v. Kishner, 562 P2d 493 (Nev. 1977), in holding that the recipient's right to receive the entire lump-sum maintenance award vested on entry of the decree and that it must be paid in accordance with the terms of the decree regardless of the recipient's remarriage. In re Marriage of Schara, 266 M 76, 878 P2d 908, 51 St. Rep. 676 (1994).

Maintenance Payments That Divorce Agreement States Are a Property Settlement — No Termination by Remarriage: Wife's remarriage did not allow husband to stop payment of maintenance to her because the written settlement agreement stated that the payments were in the nature of a property settlement. In re Marriage of Hahn, 263 M 315, 868 P2d 599, 51 St. Rep. 73 (1994).

Property Settlement Payments Improperly Characterized as Maintenance: After the parties' divorce, the husband, Arthur, was given an opportunity to retire early from the railroad. He contacted his ex-wife, Shirley, and the parties modified the divorce settlement to allow him to take early retirement. On appeal, she argued that the lower court had characterized the modified property settlements as maintenance that would be taxable to her, as opposed to property settlement payments that would not be taxable. Shirley also argued that since the lower court had wrongly characterized the payments as maintenance, it had incorrectly ruled on her request for permanent maintenance. The Supreme Court held that the agreement modified support payments and the lower court had mischaracterized the payments but also held that there was sufficient evidence to support a finding that Shirley's circumstances had not changed since the original decree and therefore no grounds existed to award permanent maintenance. In re Marriage of Brownell, 263 M 78, 865 P2d 307, 50 St. Rep. 1714 (1993).

Continuance of $250 a Month Maintenance Awarded in 1974 Upheld: The District Court properly ruled that $250 a month maintenance originally awarded in 1974 should be continued. Wife was in bad health, was of advanced age, was unemployed, had $13,000 in savings and a 1975 Chevrolet, was owed $17,000 by her sons, and was in essentially the same position as she was in 1974 when the divorce occurred. Husband received a retirement check in the amount of $1,400 a month, which would have been higher had he not withdrawn $17,000 from his retirement account; owned real property worth $135,000; received a federal conservation reserve program payment of $7,800 on one piece of property in 1989 and $469 a month from trailer rental in 1989; and had $4,500 in a credit union, about $15,000 in stocks, a $5,158 IRA, and a $3,352 interest in a corporation. In re Marriage of Burris, 258 M 265, 852 P2d 616, 50 St. Rep. 525 (1993).

Terms of Separation Agreement Precluding Modification of Maintenance: A separation agreement provided that maintenance payments were intended to be temporary and that wife would receive maintenance for 24 months or until her death or remarriage, whichever occurred first. Following satisfaction of the maintenance obligation in full, wife struggled financially and sought a modification based on changed circumstances that rendered the prior agreement unconscionable. By law, parties are free to preclude or limit any future modification of maintenance by the terms of the separation agreement. The District Court found that the limiting language in the agreement expressly prohibited any attempt to modify maintenance provisions in the original decree. Summary dismissal of the motion for modification was not improper. In re Marriage of Johnson, 252 M 258, 828 P2d 388, 49 St. Rep. 240 (1992), followed in In re Marriage of Pearson, 1998 MT 236, 291 M 101, 965 P2d 268, 55 St. Rep. 992 (1998).

Evidence of Quasi-Marital Relationship — Maintenance Due: Husband presented evidence that wife lived with another man in a "quasi-marital" relationship. However, both the parties' support agreement and the guidelines of this section provided that maintenance would cease upon remarriage, which had not occurred. Therefore, the trial court was correct in retaining support obligations. In re Marriage of Bourque, 241 M 38, 785 P2d 699, 47 St. Rep. 64 (1990), followed in In re Marriage of Bross, 256 M 174, 845 P2d 728, 50 St. Rep. 13 (1993), and In re Marriage of Brown, 283 M 269, 940 P2d 122, 54 St. Rep. 594 (1997), but ruling that cohabitation may be a factor in determining if a change in circumstances has occurred.

Agreement Stating It Could Not Be Modified Incorporated in Decree — Modification of Maintenance for Subsequent Unconscionability Denied: An agreed upon property settlement incorporated into a divorce decree provided that for 4½ years, while she was attending college and obtaining employment thereafter, husband would pay wife $250 a month maintenance and $2,000 a year to help pay for tuition and books. The agreement provided that it could not be modified by subsequent court order except for child custody, support, and visitation modifications or upon express written consent of the parties. It mutually released the parties from all claims and rights that either had against the other. The maintenance was an inseverable part of the property settlement agreement. Wife had given up rights to property in exchange for it. The court erred in modifying the agreement to deprive wife of the maintenance and tuition and books payments. Because the decree could not be modified, the issue of whether, as the lower court found, there was a change in circumstances so substantial and continuing as to make the maintenance provisions agreement unconscionable was moot. In re Marriage of Robertson, 237 M 406, 773 P2d 1213, 46 St. Rep. 904 (1989), followed in King v. King, 276 M 500, 917 P2d 434, 53 St. Rep. 489 (1996).

Consent to Modification by Court: The parties executed a separation agreement containing a maintenance clause calling for monthly payments from husband to wife. The agreement was incorporated in the dissolution decree. In a subsequent action to enforce the clause, the District Court concluded that the parties intended the monthly payments to be a property division and ordered respondent husband to draft a promissory note secured by a mortgage lien payable to his wife. The Supreme Court held that the District Court could not, in its own discretion, remove the maintenance provision and recalculate the parties' property distribution. However, by reason of the consent of the parties, the court was given power to make a modification in the terms of the agreement, but under these circumstances, it was not appropriate to use a real estate mortgage. In re Marriage of Nelson, 235 M 227, 766 P2d 873, 45 St. Rep. 2340 (1988).

Petition Entered Three Years After Prior Modification — Timeliness: Wife petitioned the District Court to enter a new modification of a property settlement agreement more than 3 years after a prior modification. Husband contended that the petition was not timely. The Supreme Court found this argument unpersuasive because both the original and modified agreements spoke to maintenance and both explicitly provided for certain levels of child support. Thus, they were not subject to the 2-year limitation of subsection (2)(a), but rather were subject to modification at any time upon a showing of substantial and continuing change of circumstances. In re Marriage of Hagemo, 230 M 255, 749 P2d 1079, 45 St. Rep. 183 (1988).

Failure to Modify Maintenance Obligation: Prior to a show cause hearing, parties stipulated that husband would pay $600 a month maintenance until the marital property was divided and distributed. About 6 months later, parties entered into a farm partnership agreement wherein they agreed to equally divide farm profits and losses and to provide husband with wages of $500 a month. The agreement did not mention the previous stipulation or address the maintenance issue. Subsequent to entering the partnership agreement, husband discontinued maintenance payments. Husband was later found to be bound by the stipulation upon failing to provide evidence of the parties' intent to terminate maintenance and by failing to modify his maintenance obligation pursuant to this section. In re Marriage of Halverson, 230 M 226, 749 P2d 518, 45 St. Rep. 162 (1988).

Continuing Court Jurisdiction Regarding Maintenance, Support, Property Disposition, and Child Custody — New Judge: Since under Montana law a court has continuing jurisdiction in matters of maintenance, support, property disposition, and child custody, a newly appointed judge may make findings in a case he or she has not heard, may need to hear new evidence, and

is entitled to rely on the record established in the case. In re Marriage of Ensign, 227 M 357, 739 P2d 479, 44 St. Rep. 1146 (1987).

No Maintenance Provision in Decree — No Modification After Two Years: A petition for modification with respect to maintenance must be considered by the District Court if it is filed within 2 years of the date the decree is rendered, regardless of whether the decree contains provisions for maintenance or whether maintenance payments currently are being paid. If 2 years have expired since the dissolution decree was rendered, modification is still possible when the decree contains a provision relating to maintenance. When maintenance payments currently are mandated under the decree, a modification petition must be considered by the District Court. In the present case, the decree proposed for modification did not contain a provision for maintenance and cannot be modified because nearly 6 years have elapsed since entry of the decree. In re Marriage of Cooper, 216 M 34, 699 P2d 1044, 42 St. Rep. 619 (1985), distinguished in In re Marriage of Hagemo, 230 M 255, 749 P2d 1079, 45 St. Rep. 183 (1988), and In re Marriage of Eickmeyer, 271 M 272, 895 P2d 623, 52 St. Rep. 437 (1995), and followed, with regard to a District Court's obligation to entertain a motion to modify its prior decision regarding maintenance as being defined by statute and not by the decree for which modification is sought, in In re Marriage of DeCosse, 282 M 212, 936 P2d 821, 54 St. Rep. 318 (1997). See also In re Marriage of Smith, 260 M 533, 861 P2d 189, 50 St. Rep. 1307 (1993).

No Increase — Former Spouse Capable of Higher Payments — No Showing of Substantial Change in Circumstances: The fact that appellant's former husband was capable of paying more maintenance than had been awarded in the original dissolution decree was not sufficient to justify modification of the decree under this section in the absence of any evidence of a substantial change in circumstances. In re Marriage of Rush, 215 M 498, 699 P2d 65, 42 St. Rep. 581 (1985), distinguished in In re Marriage of Eickmeyer, 271 M 272, 895 P2d 623, 52 St. Rep. 437 (1995).

Modification of Maintenance Permissible When No Clear Relationship Between Maintenance Provisions and Property Distribution Provisions: Absent a clear and undisputed interrelationship between a dissolution decree's property distribution and "maintenance" provisions, modification of such provisions is permissible upon a proper showing of changed circumstances and unconscionability. Shultz v. Shultz, 205 M 212, 666 P2d 1242, 40 St. Rep. 1223 (1983).

Failure to Properly Adduce Financial Condition at Time of Original Decree: The District Court failed to adduce substantial credible evidence in support of its finding that maintenance payments owed by defendant husband pursuant to a divorce decree should be modified due to a material change in his economic circumstances since the entry of petitioner's and respondent's divorce decree. No evidence was presented regarding defendant's financial position at the time of the original decree, thus it was impossible to determine whether the defendant's ability to pay substantially changed from the time of dissolution to the time of petition for modification. Furthermore, no evidence was presented that the changed economic circumstances would continue. Nyquist v. Nyquist, 193 M 288, 631 P2d 721, 38 St. Rep. 1198 (1981).

FELA Settlement Funds Properly Considered in Amendment of Award of Permanent Maintenance: Where, following the injury of the defendant in a railroad accident, the District Court eliminated an award of permanent maintenance, the court did not abuse its discretion in reinstating the award based upon the defendant's receipt of money in settlement of a Federal Employers' Liability Act (FELA) claim for his injuries. The fact that the FELA funds cannot be awarded as a property settlement under federal law does not mean that the same money cannot be considered by the District Court in reevaluating its previous denial of permanent maintenance for the plaintiff. Heintzelman v. Heintzelman, 193 M 183, 631 P2d 290, 38 St. Rep. 1074 (1981).

Maintenance Modification Under Agreement Referring to Statute — Appropriateness of Employment Properly Determined: Where the parties to a previous dissolution action agreed that the wife would not have to seek employment as a condition of maintenance in order that she be able to care for their handicapped child and agreed to modification of maintenance upon a showing of those factors set out in 40-4-203, the District Court did not err in denying the husband's petition for modification where the husband proved only that his former wife was capable of working. The statute requires only that the District Court determine whether it is appropriate under the circumstances that she work. Based upon evidence that the child of the parties still needed special care at home, the District Court determined it was not appropriate. Tidball v. Tidball, 192 M 1, 625 P2d 1147, 38 St. Rep. 482 (1981).

Failure to Consider Pending Federal Employers' Liability Act Claim — Appeal Moot: When husband had petitioned District Court for modification eliminating maintenance provision based on changed circumstances, wife's appeal from the modification on the grounds that the District Court should have considered the husband's pending Federal Employers' Liability Act claim was rendered moot by settlement of the claim after the appeal had been filed. Heintzelman v. Heintzelman, 187 M 220, 609 P2d 295 (1980).

Maintenance Versus Property Settlement — Termination on Remarriage — Intent of Court Decree: In a divorce decree, the language of the decree provided that payments to the wife were to be in lieu of a division of property and were to be for her support and maintenance. This language showed that the intent of the court was clearly that the payments were for support and maintenance, not a division of property, and could therefore be terminated upon the wife's remarriage. Bertagnolli v. Bertagnolli, 185 M 1, 604 P2d 299 (1979).

Reduction of Award: In order to defray substantial debts incurred after separation by a party who later had received a maintenance and support award, the District Court apparently had considered the debt and reduced the award accordingly. This action was upheld as being within the court's discretion, but a property settlement which was computed considering the same debt again could not stand because it effectively penalized the debtor a second time. Grenfell v. Grenfell, 182 M 229, 596 P2d 205 (1979).

Current Accrual of Payments Unnecessary: This statute does not require that there be maintenance or support payments accruing at the time of or after the motion for modification. The fact that a person is not currently receiving payments under the original decision does not necessarily preclude him from ever receiving an additional award of maintenance. Fraunhofer v. Price, 182 M 7, 594 P2d 324 (1979), followed in In re Marriage of Hagemo, 230 M 255, 749 P2d 1079, 45 St. Rep. 183 (1988).

Findings of Fact Required:

A District Court must make findings of fact whenever it modifies a prior award of maintenance on the basis of "changed circumstances so substantial and continuing as to make the terms unconscionable". Kronovich v. Kronovich, 179 M 335, 588 P2d 510 (1978).

The pertinent factors in 40-4-203 and 40-4-204, with findings of fact to support them, should be set out in the District Court's decision. Otherwise the appellate court has nothing upon which to base its review. Moreover, under 40-4-208 the District Court can grant modification or termination of maintenance and support only if there is a showing of circumstances making the payments unconscionable, which compels proper findings and conclusions. Capener v. Capener, 177 M 437, 582 P2d 326 (1978).

Postjudgment Powers of Court: A District Court has power to award necessary maintenance, child support, and suit money after judgment in a marital dissolution case during the pendency of appeal. To hold otherwise would leave a hiatus in the remedial power of the court that could cause unmeasured hardship and distress. State ex rel. Kaasa v. District Court, 177 M 547, 582 P2d 772 (1978).

Estoppel to Challenge Decree: Where husband had taken affirmative action to enforce the provisions of the divorce decree, he was estopped to challenge the validity of the award of "alimony" to his former wife. Englund v. Englund, 169 M 418, 547 P2d 841 (1976).

Change in Income Supports Reduction of Award: Although there was no abuse of discretion in original award of $500 per month alimony and child support, where husband's later earnings made it impossible for him to pay such amount, court properly reduced award to $250 per month. Grant v. Grant, 166 M 229, 531 P2d 1007 (1975).

Retroactive Modification of Alimony Payments: Section 21-139, R.C.M. 1947 (since repealed), was sufficiently broad to permit court to order modification of alimony payments effective as of date of application therefor as opposed to date of order. Movius v. Movius, 163 M 463, 517 P2d 884 (1974).

Only Future Alimony Payments to Be Modified: Trial court acted properly in ordering husband, who had stopped paying alimony because of alleged changes in financial standing, to pay back alimony in full, as modification of alimony applies only to future installments. Porter v. Porter, 155 M 451, 473 P2d 538 (1970).

SUPPORT

General

Motion to Amend Parenting Plan, Modify Support — Failure to Provide Facts to Change in Circumstances or Offer Proposed Amended Plan — Dismissal of Motion Without Hearing Proper: The father filed a motion to amend the parties' parenting plan and to modify the amount of child support he paid. The mother opposed the motion, arguing that the father had failed to show a substantial change in circumstances to support an amended plan or a modification to child support. Without a hearing, the District Court denied the father's motion to modify and the father appealed. The Supreme Court affirmed, noting that the father had failed to file a proposed amendment to the parenting plan and that the District Court was not required to hold a hearing to allow him to cure his failure to raise facts that should have been provided in his initial pleadings. In re Marriage of Brown, 2016 MT 299, 385 Mont. 369, 384 P.3d 476.

Child Support Modification — Unconscionability Not Found: The father moved to modify his child support. He alleged that he was disabled, required surgery, and was not making as much money as when the child support was calculated. The District Court denied the motion, concluding that while there was a change in the father's circumstances, it did not find the condition so substantial and continuing as to make the payment unconscionable. The District Court cited the father's recent participation in a ski joring competition and ownership interests in a subdivision in the denial. On appeal, the Supreme Court affirmed, holding that there is no set definition of unconscionability, that the determination is made on a case-by-case basis, and that the District Court correctly relied on evidence to support its determination. In re Marriage of Carter-Scanlon, 2016 MT 190, 384 Mont. 273, 378 P.3d 1157.

No Written Agreement Concerning Termination Date of Child Support — Estoppel Not to Apply: The defendant father appealed the District Court's decision to grant back child support. The father had ceased paying child support when his daughter turned 18 in November 2006. In 2012, the plaintiff mother filed for back child support for the period between the daughter's 18th birthday and July 2007, when the daughter graduated from high school. The dissolution decree did not provide for a specific termination date. The District Court held that under 40-4-208(5), absent any written agreement in the dissolution decree, the termination date for child support was the date of the daughter's graduation from high school. In affirming, the Supreme Court held that 40-4-208(5) controls in the absence of a written agreement and that neither laches nor estoppel applies to recovery of child support arrears for the protection of children. In light of this ruling the Supreme Court overruled In re Marriage of Shorten, 1998 MT 267, 291 Mont. 317, 967 P.2d 797, to the extent that Shorten allows for the application of general principles of estoppel to claims for unpaid child support in the absence of an agreement between the parties to accept a modification of the child support obligation. In re Marriage of v. Pfeifer, 2013 MT 129, 370 Mont. 158, 301 P.3d 821.

Parent's Duty to Support Incapacitated Adult Child: A father appealed the District Court's determination that 40-6-214 required him to support his incapacitated adult twin sons, arguing that his obligation to provide child support terminated when the twins graduated from high school or when they turned 19 years old. The Supreme Court affirmed, concluding that 40-6-214 imposes a duty on the father to support the twins to the extent of his ability. The father's duty ran directly to the twins, not to the mother under the marital dissolution decree, and was properly enforced under the guardianship statutes. In re Guardianships of M.A.S. & C.M.S., 2011 MT 313, 363 Mont. 96, 266 P.3d 1267.

No Abuse of Discretion in Award of Retroactive Child Support: When a decree references a child support obligation but does not list a specific amount and the District Court later orders retroactive child support, the child support order is not a modification but relates back to the decree. Thus, 40-4-208, relating to modification of a decree, does not apply. In re Marriage of Brinley, 2010 MT 260, 358 Mont. 314, 244 P.3d 339.

Sanction of Nondisclosing Party by Disallowing Evidentiary Hearing to Discuss Evidence That Should Have Been Covered in Disclosure: The parties in a child support dispute were ordered to disclose pertinent information to a court-appointed child support expert. The father repeatedly refused to provide necessary corporate income information and to cooperate with the expert. Dissatisfied with recommendations by the expert based on information that was provided, the father moved for an evidentiary hearing. The mother objected on grounds that the father should not be allowed to present additional evidence at a hearing after failing to provide the information to the expert. The District Court agreed and denied the motion for a hearing. On appeal, the Supreme Court affirmed. Under the clear language of 40-5-255, the District Court may enter an order preventing a noncomplying party from presenting evidence at a hearing as a sanction for failing to fully disclose relevant financial information when ordered by the court. Stewart v. Rogers, 2004 MT 138, 321 M 387, 92 P3d 615 (2004).

Increase of Maintenance Upon Cessation of Child Support Obligation Not Considered Modification: The District Court concluded that the wife was entitled to maintenance of $750 a month until the husband's child support obligation ceased, at which time the maintenance would increase to $1,250 a month for a total maintenance period of 8 years. The husband asserted that it was error to connect the maintenance award to child support and provide an automatic increase because the future increase was a modification of the maintenance award that required notice and findings of changed circumstances pursuant to this section. However, the husband did not offer a single case in which a maintenance award was reversed because the trial court considered child support in reaching its conclusion. Further, the award of increasing maintenance payments was one of the terms of the dissolution decree, not a subsequent modification of the terms of the decree that required notice and a showing of changed circumstances, so the award was affirmed. In re Marriage of Harkin, 2000 MT 105, 299 M 298, 999 P2d 969, 57 St. Rep. 422 (2000).

Equitable Action — Type of Fraud for Which Relief May Be Granted: A father was assessed back child support but claimed that he was entitled to a new trial on the issue because at the hearing, the mother had represented that the children had lived with her the entire time, when in fact, the children lived with their father for a period, which he claimed was fraud upon the court, entitling him to relief. Citing Brown v. Jensen, 231 M 340, 753 P2d 870, 45 St. Rep. 665 (1988), the Supreme Court noted that the type of fraud for which relief may be granted in an independent equitable action is extrinsic or collateral, rather than intrinsic fraud. Extrinsic fraud is an intentional act by the prevailing party that prevents the unsuccessful party from having a fair submission of the controversy. False or fraudulent representations, concealments, and perjured testimony by a party during court proceedings constitute only intrinsic fraud and do not rise to the level of fraud upon the court. In this case, the father presented testimony at the hearing rebutting the mother's representation of the living arrangements. Thus, the court was aware of the father's contention, so it could not be claimed that the mother acted fraudulently or that her representations were misleading or relied upon by the father to his prejudice. The father failed to demonstrate that the mother committed extrinsic or intrinsic fraud upon the court, and his motion for relief was properly denied. In re Marriage of Hopper, 1999 MT 310, 297 M 225, 991 P2d 960, 56 St. Rep. 1247 (1999). See also In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995), and In re Estate of Cooney, 2019 MT 293, 398 Mont. 166, 454 P.3d 1190.

Failure to Pursue Retroactive Child Support Motion — Retroactive Application Within Discretion of District Court: The District Court retroactively increased child support payments to January 1997 based on an agreement between the parties, but the wife contended that the increase should have been retroactive to November 1995 when she filed the motion to modify. However, the wife neglected to prosecute the motion until December 1996, even though it was within her power to pursue the motion diligently. The fact that she failed to do so, even in light of purportedly dire financial straits, could not be blamed on the court or constitute a basis for determining an abuse of court discretion, nor was the husband's ability to pay increased support retroactive to an earlier date considered relevant. The District Court's retroactive increase to 1997 was within its discretion. In re Marriage of Pfennigs, 1999 MT 250, 296 M 242, 989 P2d 327, 56 St. Rep. 981 (1999).

Social Security Benefits as Credit Toward Child Support Obligation — Not Considered Retroactive Modification — Durbin Overruled: A credit may be granted to a parent for Social Security benefits received prior to a motion to modify as a credit against the noncustodial parent's child support obligation, but the credit does not constitute a retroactive modification of the original support order. The credit merely changes the source of the support payments. In re Marriage of Cowan, 279 M 491, 928 P2d 214, 53 St. Rep. 1250 (1996), overruling contrary holdings in In re Marriage of Durbin, 251 M 51, 823 P2d 243 (1991), and In re Marriage of Malquist, 266 M 447, 880 P2d 1357 (1994).

Modification of Child Support Installments Accruing After Actual Notice — Statute to Be Strictly Construed — No Basis for Application of Exception: When Kitty and Bernard divorced in 1983, they entered into a property settlement agreement that provided that neither would make child support payments to the other, although the three children of the parties were to live with Bernard. In 1987, the parties' oldest daughter went to live with Kitty, and in 1990, Bernard moved the District Court to modify the divorce decree and determine the child support obligations of both parties. The District Court found that Kitty had an obligation to make child support payments beginning in 1986. The Supreme Court held that the District Court erred because this section provides only for prospective and not retroactive modification of the previous District Court order. Citing In re Marriage of Jensen, 223 M 434, 727 P2d 512 (1986), the Supreme Court noted that it has carved out an equitable exception for modifications by oral agreement of the parties, but that that exception did not apply in this case, and that the District Court gave no rationale for its determination of a retroactive child support obligation. In re Marriage of Widhalm/Miller, 279 M 97, 926 P2d 748, 53 St. Rep. 1067 (1996).

Modification of Support — Stipulation Between Parties Not Binding on Court — Credit for Children's Health Insurance Premiums — Effective Date of Modification — Calculation of Gross Income: In a case for modification of child support obligations, the father appealed a District Court order allowing assessed arrearages, including uncovered medical expenses, to be collected by the

CSED. The court was not bound by a stipulation of the parties as to the amount of arrearages. The court should include the amount expended on the children's insurance coverage in the determination of the parties' child support obligations. A court may modify a decree regarding child support only as to installments accruing after the parties have been provided actual notice of the motion for modification. The court did not err in determining the mother's gross income when it held that the mother did not leave a federal job to escape support responsibilities. (See 1995 amendment.) In re Marriage of Kovash, 270 M 517, 893 P2d 860, 52 St. Rep. 280 (1995).

Reimbursed Employment Expenses Not Deducted From Gross Income for Child Support Calculation Purposes: In calculating child support using child support guidelines, the District Court properly refused to deduct reimbursed employment expenses from gross income of payor, which an administrative rule stated could not be deducted. In re Marriage of Murphy, 268 M 1, 885 P2d 440, 51 St. Rep. 1198 (1994).

Finding of Changed Circumstances Prerequisite to Determining Unconscionability: Clyatt argued that the lower court erred when it made a finding as to the lack of changed circumstances but did not make a finding as to the unconscionability of requiring him to continue unmodified support payments when he had voluntarily decreased his earnings. The Supreme Court held that a finding of changed circumstances must be made before a court may examine the issue of unconscionability. In re Marriage of Clyatt, 267 M 119, 882 P2d 503, 51 St. Rep. 997 (1994), following In re Marriage of Barnard, 264 M 103, 870 P2d 91, 51 St. Rep. 173 (1994), and followed in In re Marriage of Pearson, 1998 MT 236, 291 M 101, 965 P2d 268, 55 St. Rep. 992 (1998). See also In re Marriage of Brown, 283 M 269, 940 P2d 122, 54 St. Rep. 594 (1997), and In re Marriage of Jarussi, 1998 MT 272, 291 M 371, 968 P2d 720, 55 St. Rep. 1124 (1998).

Evidence Necessary to Support Variance in Living Expenses: George and Laurel were divorced in 1979. In 1989, George was ordered to increase his child support payments from $100 to $375 a month. In 1992, Laurel petitioned the District Court to increase George's child support payments to $683.48, and after two hearings, the District Court increased the payments to $616.62 a month. George contends that the District Court erred in ignoring claims he made for variances allowed by ARM 46.30.1543 (now repealed). Citing Marriage of Mitchell, 229 M 242, 746 P2d 598 (1987), the Supreme Court held that a party alleging that a variance in living expenses is due must submit competent evidence to prove that the amount of support should be reduced. Here, notwithstanding that two hearings were held, there was nothing in the file to support a change except the affidavits from George and Laurel. The District Court relied upon the information in George's affidavit to set the amount of support. There was therefore no abuse of discretion by the District Court. In re Marriage of Platt, 267 M 38, 881 P2d 634, 51 St. Rep. 926 (1994).

Social Security Payment to Daughter Not Credited to Medical Bill Arrearages — Only Prospective Credit to Be Given: After Dale and Sandy's marriage was dissolved, their minor child Sara received a lump-sum Social Security payment because of Dale's disability. Dale then moved for modification of the dissolution decree, asking that he be relieved of his obligation, resulting from the original decree, to pay Sara's medical bills. The District Court relieved Dale of one-half of his responsibility incurred after notice of his motion and did not credit the Social Security payment toward arrearages. Citing In re Marriage of Durbin, 251 M 51, 823 P2d 243 (1991), the Supreme Court held that under subsection (1) of this section, Dale's obligation could be modified only prospectively from the date that Dale gave notice of his motion to modify; therefore, the Social Security payments could not be credited toward arrearages. (See 1995 amendment.) In re Marriage of Malquist, 266 M 447, 880 P2d 1357, 51 St. Rep. 914 (1994), overruled, inasmuch as a credit may be granted to a parent for Social Security benefits received prior to a motion to modify as a credit against the noncustodial parent's child support obligation without constituting a retroactive modification of the original support order, in In re Marriage of Cowan, 279 M 491, 928 P2d 214, 53 St. Rep. 1250 (1996).

Refusal to Grant Retroactive Support Based on Inapplicable Stipulation — Remand: It was an abuse of District Court discretion to refuse to modify child support retroactive to the date the petition for modification was filed when the decision was based on a prior stipulation between the parties that did not cover payments possibly owing during a period of time not addressed by the stipulation. The case was remanded for a finding of whether support was owing based on the custodial arrangements that existed at the various times subsequent to the petition. In re Marriage of Hill, 265 M 52, 874 P2d 705, 51 St. Rep. 396 (1994).

Application of Wrong Support Guidelines Irrelevant When Court Finds No Grounds for Modification: Janet Barnard sought an increase in child support on the basis that her ex-husband's income had greatly increased. The District Court stated that it would use the support guidelines in effect when the motion was filed. The lower court subsequently ruled that there was no showing that the current amount of support was insufficient and that increased income alone was not grounds for modification. The Supreme Court held that the lower court should have used the guidelines in effect at the time that it rendered its decision, but the error was harmless since the District Court had properly found that no grounds existed for modifying the amount of support. In re Marriage of Barnard, 264 M 103, 870 P2d 91, 51 St. Rep. 173 (1994). For a discussion of the correct standard of review, see In re Marriage of Kovash, 270 M 517, 893 P2d 860, 52 St. Rep. 280 (1995).

Failure to Provide Child Support for College Education — Continuing Jurisdiction Under Uniform Parentage Act: Mother contended that the District Court erred in failing to order father to pay child support for the child's college education, maintaining that the court could not later modify support to extend beyond the child's emancipation because it was not provided in an original decree. However, the case was brought under the Uniform Parentage Act; therefore, 40-6-118 rather than this section applies. Under 40-6-118, the court retains jurisdiction to modify its initial support order to provide for the child's educational needs, and failure to do so as part of the initial order was not error. In re Paternity of W.L., 259 M 187, 855 P2d 521, 50 St. Rep. 751 (1993), distinguishing Torma v. Torma, 198 M 161, 645 P2d 395 (1982). For the decision on remand, see In re Paternity of W.L., 270 M 484, 893 P2d 332, 52 St. Rep. 301 (1995).

No Evidence of Modification of Original Decree — No Modification of Support Obligation: Absent evidence that either party ever sought modification of the original divorce decree by motion under this section or that the original order was ever modified by court order, the original support obligation was considered unmodified and enforceable. In re Marriage of Petranek, 255 M 458, 843 P2d 784, 49 St. Rep. 1107 (1992).

Failure to Apportion Support Upon Emancipation of Child — No Abuse of Discretion: Parent maintained District Court error in failing to apportion support between two minor children when one of them reached the age of majority and in not allowing termination of support without having to go through the expense of a motion, but cited no authority for that proposition. Absent a provision in the decree as to when support terminates, this section sets out the proper procedure for petitioning for modification of support. The court did not abuse its discretion in failing to apportion child support. In re Marriage of Sacry, 253 M 378, 833 P2d 1035, 49 St. Rep. 452 (1992).

Social Security Payment to Children to Be Credited Toward Child Support Obligation Accruing After Notice for Modification: When the parties were divorced, the District Court awarded joint custody, awarded primary physical custody to the mother, awarded the mother and father one tax deduction apiece for the children, and required the father to pay child support of $150 per month per child. Later the same year, the father lost his eyesight in a work-related accident and eventually received a lump-sum settlement of $373,557, monthly payments of $3,788 for 30 years, disability insurance payments, and social security benefits. When the mother began receiving social security benefits of $174 per month per child as a result of the accident, the father stopped paying child support. The District Court denied both parties' motions for modification of the child support decree. The Supreme Court held that the social security payments were to be credited toward the father's child support obligation only from the time the mother received notice of the motion for modification of the child support decree. To this extent, the Supreme Court overruled Tefft v. Tefft, 192 M 456, 628 P2d 1094 (1981), and In re Marriage of Gallant, 241 M 363, 786 P2d 1193 (1990). In re Marriage of Durbin, 251 M 51, 823 P2d 243, 48 St. Rep. 1142 (1991), followed in In re Marriage of Malquist, 266 M 447, 880 P2d 1357, 51 St. Rep. 914 (1994), and overruled, inasmuch as a credit may be granted to a parent for Social Security benefits received prior to a motion to modify as a credit against the noncustodial parent's child support obligation without constituting a retroactive modification of the original support order, in In re Marriage of Cowan, 279 M 491, 928 P2d 214, 53 St. Rep. 1250 (1996). For a discussion of the correct standard of review, see In re Marriage of Kovash, 270 M 517, 893 P2d 860, 52 St. Rep. 280 (1995).

Support After Graduation or Emancipation as Exception: Any provision for child support following the child's emancipation or graduation from high school is the exception, not the norm. In re Marriage of Fronk v. Wilson, 250 M 291, 819 P2d 1275, 48 St. Rep. 936 (1991).

No Mutual Agreement to Modify Support: The husband argued that the lower court should have reduced his support obligation retroactively. He stated that it was his impression that if he stayed away from the children, he would owe no support. The Supreme Court held that there was insufficient evidence to show that the parties had mutually agreed to reduce the support obligation. In re Marriage of Crittendon, 247 M 322, 806 P2d 541, 48 St. Rep. 218 (1991).

Statute of Limitations to Run From Date Each Support Payment Due: In a case of first impression, the Supreme Court adopted the rule that each monthly support obligation constitutes a judgment and that the 10-year statute of limitations for judgments begins to run the month the payment becomes due. In re Marriage of Crittendon, 247 M 322, 806 P2d 541, 48 St. Rep. 218 (1991), followed in Willoughby v. Loomis, 264 M 44, 869 P2d 271, 51 St. Rep. 138 (1994), Emery v. St., 286 M 376, 950 P2d 764, 54 St. Rep. 1454 (1997), and Momsen v. Momsen, 2006 MT 233, 333 M 463, 143 P3d 450 (2006).

Applicability of Uniform Guidelines to Support Payable "Monthly": A modified support order provided that payments be made "for each full month that the children are in the custody of the Respondent". Petitioner argued that the "full month" restriction was unworkable and unsupported by the Uniform Child Support Guidelines because the children could stay with one parent for 29 days but not receive support because that would not constitute a full month. The Supreme Court found literal interpretation of the order unnecessary because under the guidelines, payments are determined monthly or "per month". No guidelines exist for prorating payments when a child lives with one parent for less than a full month. In re Marriage of Ferguson, 246 M 344, 805 P2d 1334, 47 St. Rep. 2142 (1990).

Support Continuing Past Emancipation: The mother obtained a default divorce decree ordering the father to pay child support until the child reached age 22 if the child was enrolled full time in education following high school. The father argued that the support obligation ended upon his daughter's marriage. The Supreme Court held that the decree specified that the obligation extended past the age of majority if the child was enrolled in school and that without express language, the obligation was not terminated by the child's emancipation. In re Marriage of Hewitt, 242 M 389, 791 P2d 444, 47 St. Rep. 822 (1990).

Obtaining Social Security Benefits Not Compliance With Support Obligation: The father argued that his obtaining social security benefits for the parties' child constituted substantial compliance with his support obligation. The Supreme Court held that obtaining the benefits required no expenditure by the father that constituted substantial compliance with the spirit and intent of the decree. In re Marriage of Gallant, 241 M 363, 786 P2d 1193, 47 St. Rep. 354 (1990), overruled in part in In re Marriage of Durbin, 251 M 51, 823 P2d 243, 48 St. Rep. 1142 (1991).

Father's Parental Rights Terminated Despite Financial Difficulties: The natural father contended that his parental rights should not be terminated against his will for failure to pay support during a 1-year period. He argued that for 4 months of that time, he was unable to earn any money because he had to close his business in Washington and return to the state to defend against the nonsupport criminal action initiated by the State of Montana. The Supreme Court affirmed the termination, holding that the father had made no attempt to earn enough to meet his obligations and did not move to have the support amount modified. In re Adoption of R.M., 241 M 111, 785 P2d 709, 47 St. Rep. 124 (1990).

Father Not Required to Pay Support Due to Equity Considerations: The mother sought 118 months of back child support. After the parties divorced, they resumed living together and remained together for approximately 6 years and had two additional children. The parties modified the original decree in writing, and the Supreme Court found that the children had lived with their father for one-half of the time and were supported by him during that period. The court ruled that when the parties had altered the original custody arrangements, equity functions to reconcile reasonable child support with actual residential custody. The father was not obligated to pay any back child support. In re Marriage of Guckeen, 240 M 136, 782 P2d 1284, 46 St. Rep. 2002 (1989).

Mutual Failure to File Support Brief and Response Pleading — Technical Errors Cured by Oral Argument: Husband pointed out that wife filed no pleading in response to his motion to void her divorce decree and no brief in support of her motion for modification of child support and that thus the Montana Uniform District Court Rules dictated his motion should be deemed "well-taken" and hers deemed "without merit". However, wife did file an affidavit in support of her motion, and that is all husband filed in support of his motion. Neither party responded to the other's motion. The lower court held oral argument on both motions, thus giving each party a chance to argue in support of its motion and against the other's. This was a wise course, and the Supreme Court would not overturn the decision on technical grounds. In re Marriage of Appleton, 234 M 345, 763 P2d 658, 45 St. Rep. 1959 (1988).

Retroactive Support Improper When Not Requested in Pleadings: In a proceeding for an increase in child support, the lower court could not award wife retroactive child support when she did not seek it in her pleadings. In re Marriage of Appleton, 234 M 345, 763 P2d 658, 45 St. Rep. 1959 (1988).

Factors in Noncustodial Parent's Ability to Pay Support: Factors to be considered when deciding whether a noncustodial parent is able to contribute to the support of a minor child include: (1) the parent's ability to earn an income; (2) the parent's willingness to earn an income and support his child; (3) availability of jobs; and (4) the parent's use of his funds to provide himself only with the bare necessities of life prior to providing support for his child. The factors apply as well to consideration of a modification of support. In re Marriage of Callahan, 233 M 465, 762 P2d 205, 45 St. Rep. 1639 (1988), following In re Adoption of K.L.J.K., 224 M 418, 730 P2d 1135, 43 St. Rep. 2297 (1986).

Guidelines Clarified — Minimum Support Per Child Per Month: While the child support guidelines suggest that no support can be set at less than $50 per month, the Supreme Court clarified that the amount should be $50 per month per child. In re Marriage of Callahan, 233 M 465, 762 P2d 205, 45 St. Rep. 1639 (1988).

Children's Petition for Future Support Not Barred by Equitable Estoppel: Parents entered a stipulation relieving father of any future duty to support his children. Later, the children petitioned for support. The children were not parties to the parents' stipulation. Children are the beneficiaries of child support. It was undisputed that the requested support was necessary and that the father had the ability to contribute what the mother could not. The lower court granted the petition for future support. Under these circumstances, the petition was not barred by equitable estoppel. In re Support of Krug, 231 M 78, 751 P2d 171, 45 St. Rep. 446 (1988), distinguishing State of Wash. ex rel. Blakeslee v. Horton, 222 M 351, 722 P2d 1148, 43 St. Rep. 1321 (1986), In re Marriage of Cook, 223 M 293, 725 P2d 562, 43 St. Rep. 1732 (1986), and In re Marriage of Jensen, 223 M 434, 727 P2d 512, 43 St. Rep. 1891 (1986). However, see In re Marriage of Shorten, 1998 MT 267, 291 M 317, 967 P2d 797, 55 St. Rep. 1108 (1998), distinguishing Cook and Jensen regarding application of the elements of equitable estoppel in an action for back-due child support. Shorten was overruled in In re Marriage of v. Pfeifer, 2013 MT 129, 370 Mont. 158, 301 P.3d 821, to the extent that Shorten allows for the application of general principles of estoppel to claims for unpaid child support in the absence of an agreement between the parties to accept a modification of the child support obligation.

Failure to Order Past Support — Absence of Past Contact: The District Court did not err in failing to award support not paid for 7 years in light of a complete absence of contact between the parent and children during that period. The court could have restored the monetary support that should have been paid but could not restore missed visitation. Additionally, there was no evidence the children required payment of past support. In re Support of Krug, 231 M 78, 751 P2d 171, 45 St. Rep. 446 (1988).

Modification of Future Support Payments — Not Barred by Collateral Estoppel: Collateral estoppel bars relitigation of issues on which a final judgment has been entered in a different cause of action. Under this section, future support installments may be modified; therefore, they are not final judgments for purposes of collateral estoppel. In re Support of Krug, 231 M 78, 751 P2d 171, 45 St. Rep. 446 (1988).

Use of Net Rather Than Gross Income in Applying Carlson Formula: The District Court used gross rather than net income as a factor in the Carlson formula for figuring child support. The Supreme Court held that the amounts used should be net amounts; however, since the figures finally established were substantially less than what the formula could have obliged the parties to pay, there was no error. In re Marriage of Revious, 226 M 304, 735 P2d 301, 44 St. Rep. 674 (1987).

Child Support for Emancipated Child: This section clearly empowers the trial court to provide that support of a child may be extended beyond the age of emancipation. In re Marriage of Bowman, 226 M 99, 734 P2d 197, 44 St. Rep. 488 (1987), distinguished in In re Marriage of McFate, 239 M 492, 781 P2d 759, 46 St. Rep. 1858 (1989).

Retroactive Award of Child Support Payments Proper: While modification of child support applies to existing support payments, the court has jurisdiction to award child support payments retroactive to the time of the separation of the parties. In re Marriage of Shirilla, 225 M 106, 732 P2d 397, 44 St. Rep. 75 (1987).

No Evidence of Actual Earning Capability — Error in Application of Formula: In remanding, the Supreme Court ruled that the District Court erred in applying the algebraic formula set out in In re Marriage of Carlson, 214 M 209, 693 P2d 496, 41 St. Rep. 2419 (1984), in determining the respective contributions of each party to child support because there was no evidence of wife's actual earning capability. Absent substantial credible evidence of actual earning, the capability formula could not be applied. In re Marriage of Goodman, 222 M 446, 723 P2d 219, 43 St. Rep. 1410 (1986).

Marital Assets Not Considered Child Support — Modification of Payments: Property that was clearly denominated personal property in a division of marital assets may not later be claimed for inclusion as child support simply because it is used primarily for a child. Modification of payments that are part of a property settlement agreement is governed by former Rule 60(b), M.R.Civ.P. (now superseded), rather than the rules for modification of support in 40-4-208. In re Marriage of Conklin/Clark, 220 M 130, 716 P2d 629, 43 St. Rep. 611 (1986).

Deferred Payment Plan for Delinquent Payments — Court Error — Attorney Fees: The District Court erred by adopting a deferred payment plan for the payment of unpaid and delinquent child support without reference to contempt. Modification of a judgment for accrued payments could not be done without the court finding husband in contempt. To hold otherwise would be to take away wife's right to levy execution for accrued payments if property could be found in possession of husband that could be applied to the arrearages. The lower court also erred in denying wife's costs and attorney fees incurred in enforcing judgments for accrued child support obligation. In re Marriage of Bordner, 220 M 339, 715 P2d 436, 43 St. Rep. 417 (1986).

Parent Not to Unilaterally Declare Emancipation of Child — Terminate Support: Husband petitioned District Court to excuse support arrearages on grounds minor child was emancipated. The Supreme Court reversed the lower court's finding that petitioner's child support obligation was terminated. The court noted that the obligated parent may not unilaterally declare the child emancipated and terminate support. The question of whether a child is emancipated is a question of fact to be determined by the court. If emancipation can be established, a parent generally has no further duty to support the child. Prior to the age of 18, however, there is a presumption against the emancipation of a child, and the burden of establishing emancipation is on the party asserting it. The child in this case was adjudicated a youth in need of care. Parents have a continuing duty of support for a youth in need of care which runs contrary to the concept of emancipation. A decree may be modified to terminate support because of the emancipation of a child only as to installments accruing after the motion. In re Marriage of Bordner, 220 M 339, 715 P2d 436, 43 St. Rep. 417 (1986).

Ordering Review of Child Support After Four Years: It was not an abuse of discretion to make the child support order subject to review after 4 years. In re Marriage of Williams, 220 M 232, 714 P2d 548, 43 St. Rep. 319 (1986).

Interpretation of Decree Provision on Termination of Support Obligation: In the decree of dissolution, the paragraph immediately following the paragraph concerning payment of child support provided that "Upon termination of the child support obligation" the appellant must pay the respondent maintenance until her death or remarriage. A dispute arose over the meaning of "termination of the child support obligation". The Supreme Court held that the District Court's ruling that the obligation terminated when the appellant stopped making monthly child support payments, rather than when the youngest child turned 18, was not clearly erroneous. In re Marriage of Jones, 218 M 441, 709 P2d 158, 42 St. Rep. 1722 (1985).

Written Consent to Modification of Support Decree — When Not Relevant: The absence of written consent to modification of a support decree, as required under this section, is not relevant in determining whether support in any form has been validly paid and consequently whether parental consent for adoption is required under 40-8-111 (now repealed). In re Adoption of E.S.R., 218 M 118, 706 P2d 132, 42 St. Rep. 1448 (1985).

Effective Date of Modification: Section 40-4-208 leaves the effective date for a modification with the discretion of the court, and the District Court did not err in making the modification effective later than the date on which the father filed his motion for modification. In re Support of Rockman, 217 M 498, 705 P2d 590, 42 St. Rep. 1323 (1985), followed in In re Support of Krug, 231 M 78, 751 P2d 171, 45 St. Rep. 446 (1988).

Retroactive Modification of Child Support Not Allowed: Father and mother filed a stipulation with the court that the father would pay monthly child support. Several months later, the father applied for and was allowed to have the children live with him during the summer months. On their return to the mother at the end of the summer, the father sought to modify the stipulation retroactively so as not to have to pay back support for the time he had the children with him. A decree may be modified as to support only as to installments accruing subsequent to the motion for modification. In re Marriage of Rolfe, 216 M 39, 699 P2d 79, 42 St. Rep. 623 (1985).

Notice of Trial Issues — Notice Through Interrogatories: Father petitioning for change of child custody had notice that mother would raise an issue as to increased child support where his interrogatories to her involved questions as to the income and expenses of mother and her new husband. Her failure to follow District Court's rule as to financial affidavits for support cases would not be considered on appeal because it was being raised for the first time, particularly when the issue involved adherence to the District Court's own rule. In re Custody of Holm, 215 M 413, 698 P2d 414, 42 St. Rep. 504 (1985).

Cost-of-Living Increases Attributable to Support Increase — Date of Amended Award Is Base Month: Wife was granted a modification of child support, but husband used the date of modification as the base month for calculating the cost-of-living increase, rather than the original date the support commenced. A cost-of-living escalation clause contained in a dissolution decree is a provision "relating to maintenance or support" and, as such, is subject to modification under the terms of this section. However, to the extent that cost-of-living increases are attributable to the court-ordered increase in support payments, the date of the amended award must be used as the base month of calculation. The use of the amended amount of support in the original calculation of the trial court, which used the date of the initial decree, would create an impermissible retroactive modification of support. In re Marriage of Richardson, 214 M 353, 693 P2d 524, 42 St. Rep. 16 (1985).

Algebraic Formula to Compute Child Support: After dissolution of his marriage, husband sought and received a reduction in his child support amount based primarily on the fact that he was unemployed at the time he petitioned for a reduction. The Supreme Court held that the trial court erred in not considering all the requisite factors in child support modification, including whether the husband is capable of working. As a guideline to computing support, the Supreme Court offered an algebraic formula. The theory of the formula is that the financial needs of the child should be paid by both parents in proportion to their earning capacity. (See 1989 amendment notes for 40-4-204.) In re Marriage of Carlson, 214 M 209, 693 P2d 496, 41 St. Rep. 2419 (1984). See also Hansen v. Jurgens, 222 M 345, 722 P2d 1151, 43 St. Rep. 1316 (1986).

Diligent Effort to Comply With Decree — No Contempt: The parties were divorced in 1976. A continuous visitation-support battle was waged afterward. The husband fell 16 months behind in his child-support payments. The wife filed an affidavit and application for an order requiring payment of the arrearage. Both parties testified. The court found that because of the husband's physical and mental condition he was unable to make all support payments required. He had made 13 monthly payments in the prior 2 years. The court found that the husband was not in contempt as he had made a diligent effort to comply with the support order. On appeal, the Supreme Court found there was substantial evidence to support the District Court's decision. In re Marriage of Smith, 214 M 66, 692 P2d 1221, 41 St. Rep. 2325 (1984).

Requirement of Additional Findings for Enforcement of Arrearages as Constituting Unlawful Modification of Prior Award: Where the State brought an action to enforce child support payments and the District Court found the defendant to be in arrears but held that the defendant was unable to make the payments and that "until such time no further action will be taken" and where this language was subsequently determined by another District Court to require a hearing to determine arrearages, the Supreme Court held that the action by the second District Court interpreting the order of the first District Court was an unlawful modification of the first court's judgment. The practical effect of the second order was to defer the State's right to levy upon the bank account of the defendant for accrued child support payments. This constituted a retroactive modification of the original order. Dept. of Revenue v. Dawson, 207 M 417, 674 P2d 1091, 41 St. Rep. 46 (1984).

No Basis for Review:

Where the District Court denied the wife's petition for modification of a child support decree without making findings on any of the factors set forth in 40-4-208 but merely adopted the father's proposed findings and conclusions verbatim that he could not pay more, there was no basis for review. The Supreme Court remanded for proper findings. In re Marriage of West, 203 M 469, 661 P2d 1289, 40 St. Rep. 573 (1983).

On remand, neither the parties in their evidence nor the court in its findings and conclusions properly focused on the financial needs of the children. When the parties failed to enter sufficient evidence on the needs of the children, the trial court should have inquired further into that issue. A determination of the financial needs of the children is essential when considering a petition for modification of child support. The Supreme Court remanded the case for the second time for proper findings. In re Marriage of West, 212 M 374, 692 P2d 1213, 41 St. Rep. 1803 (1984).

Inflation Factor: In a petition to increase child support payments, the District Court used inflation as a factor to find an increased need for support. On appeal, the husband contended that this was error and that no evidence of inflation's effects on him had been presented. On appeal, the Supreme Court found no merit in the argument, saying, "Today inflation is not open to reasonable dispute." Reynolds v. Reynolds, 203 M 97, 660 P2d 90, 40 St. Rep. 321 (1983).

Present Spouse's Income — Not Factor in Ability to Pay: The parties were married in 1961, and the marriage was dissolved in 1979. In 1982, the wife petitioned for an increase in support payments. The District Court considered many factors and granted the increase. One of the factors considered was the income of the husband's present spouse. The husband contended that Duffey v. Duffey, 193 M 241, 631 P2d 697, 38 St. Rep. 1105 (1981), precluded the consideration of the husband's present spouse in determining the husband's increased ability to pay child support. The Supreme Court agreed but distinguished Duffey, which relied solely on the income of the husband's spouse, from this case where it was only one factor considered and was mentioned simply to indicate remarriage was not materially affecting the husband's ability to pay increased support. Reynolds v. Reynolds, 203 M 97, 660 P2d 90, 40 St. Rep. 321 (1983).

Exact Words of Statute Not Required in Findings and Conclusions: In a proceeding to modify the child support provisions of a divorce decree, the fact that the exact words of subsection (2)(b) do not appear in the trial court's findings and conclusions is of no consequence. Rather, the findings must not be clearly erroneous and must be based on the standards of subsection (2)(b). In re Marriage of Baer, 199 M 21, 647 P2d 835, 39 St. Rep. 1178 (1982), distinguished in In re Marriage of Jarussi, 1998 MT 272, 291 M 371, 968 P2d 720, 55 St. Rep. 1124 (1998).

Interest on Child Support Arrearage: A noncustodial father decreased his child support payments by one-half when one of his two children joined the Navy at the age of 17. The District Court properly required the continuation of the entire monthly payment until the second child attained majority but improperly failed to order interest on the child support arrearage. Interest is automatically collectible by the judgment creditor spouse on past due support payments, absent contrary provision in a dissolution decree. Torma v. Torma, 198 M 161, 645 P2d 395, 39 St. Rep. 839 (1982), followed in In re Marriage of Callahan, 233 M 465, 762 P2d 205, 45 St. Rep. 1639 (1988), and In re Marriage of Gingerich/Stroop, 269 M 161, 887 P2d 714, 51 St. Rep. 1417 (1994).

Termination of Support to Adult Children:

A noncustodial father decreased his child support payments by one-half when one of his two children joined the Navy at the age of 17. In a contempt proceeding instituted by the custodial mother 2 years later, the District Court improperly directed the father to pay the balance of payments owing, and to continue the payments until the second child was 22 years of age if she attended college. Child support payments need not be made for adult or emancipated children unless the parents agree in writing or the dissolution decree expressly so provides. Torma v. Torma, 198 M 161, 645 P2d 395, 39 St. Rep. 839 (1982).

In appealing an order amending a decree on dissolution of her marriage, the wife contended that the termination of support for two adult daughters was error. A parent's legal obligation terminates when the child becomes an adult. Parties could agree in writing or expressly provide in a decree of dissolution for termination of child support at an agreed-upon age or time. Because there was no such agreement here and the daughters were 18 and 19 at the time of the original decree, the District Court was merely conforming its original decree to the law cited above. That part of the modifying order was affirmed. Tefft v. Tefft, 192 M 456, 628 P2d 1094, 38 St. Rep. 837 (1981), following Chrestenson v. Chrestenson, 180 M 96, 589 P2d 148 (1979). See also In re Marriage of McFate, 239 M 492, 781 P2d 759, 46 St. Rep. 1858 (1989).

Undivided Monthly Sum for Two Children — Effect of Emancipation of One Child: Pursuant to a dissolution decree, a noncustodial father was "ordered to pay for the support of the two minor children in the sum of $125.00 per month . . .". Upon the emancipation of one of the children, the father was not entitled to unilaterally reduce the payments by one-half. It became his burden to make such a showing as would entitle him to be relieved of all or a part of such obligation. Torma v. Torma, 198 M 161, 645 P2d 395, 39 St. Rep. 839 (1982).

Motion to Dismiss — Appeal of Denial of Motion: After the plaintiff had rested her case in an action to increase the amount of child support, the defendant made a motion under former Rule 41(b), M.R.Civ.P. (now superseded), for dismissal upon the ground that the plaintiff failed to make a showing of changed circumstances so substantial and continuing as to make the terms of the child support previously granted unconscionable. The motion was denied, and the defendant then presented his case. By proceeding to offer evidence, the defendant waived any right of appeal as to the denial of his motion to dismiss. If the defendant wished to challenge the decision, his avenue for doing so was to refuse to offer evidence, accept a judgment for plaintiff, and appeal it on the ground that plaintiff's evidence was insufficient. Nicolai v. Nicolai, 193 M 203, 631 P2d 300, 38 St. Rep. 1100 (1981).

Voluntary Change in Circumstances — Petition to Modify Support: Although a reduction in ability of a supporting parent to pay support brought about through a voluntary change in circumstances is not, in itself, sufficient to mandate a modification of support, neither are self-imposed changes reasons never to modify support provisions in a dissolution decree. Courts, in considering whether to modify a support provision, must consider the nature and extent of the changes experienced by the petitioning party and the reasons for the changes. Where respondent changed his job and remarried, he did not show that these changes substantially altered his ability to pay, and thus the prior support order may not be considered unconscionable. Rome v. Rome, 190 M 495, 621 P2d 1090, 38 St. Rep. 50 (1981), followed in In re Marriage of Jacobson, 228 M 458, 743 P2d 1025, 44 St. Rep. 1678 (1987), and In re Marriage of Clyatt, 267 M 119, 882 P2d 503, 51 St. Rep. 997 (1994).

Findings Showing Changed Circumstances Required: Since this section allows modification of child support payments only on a showing of changed circumstances so substantial and continuing as to make the terms unconscionable, it is essential that the District Court issue findings to that effect so that the decision is reviewable upon appeal. The changed circumstances may not be speculative, future, or possible conditions. Gall v. Gall, 187 M 17, 608 P2d 496 (1980), followed in In re Marriage of Stroop, 269 M 161, 887 P2d 714, 51 St. Rep. 1417 (1994), and distinguished, with regard to a lack of specific evidence of changed economic circumstances or actual increased need, in In re Marriage of Gingerich/Stroop, 269 M 161, 887 P2d 714, 51 St. Rep. 1417 (1994). See also Nicolai v. Nicolai, 193 M 203, 631 P2d 300, 38 St. Rep. 1100 (1981), and In re Marriage of Cox, 266 M 67, 878 P2d 903, 51 St. Rep. 672 (1994).

Deferred Payment Plan for Delinquent Support Payments as Modification of Judgment for Accrued Payments: The District Court has jurisdiction in contempt proceedings for the purpose of enforcing a support money decree, to find the defaulting party in contempt and to stay execution of punishment upon the condition that the defaulting party purge himself by making payments according to a schedule established by the court. However, the adoption of a deferred schedule, without reference to contempt, constitutes a modification of judgment for accrued payments, which is not permitted under 40-4-208. Williams v. Budke, 186 M 70, 606 P2d 515 (1980). See also In re Marriage of Uphus, 221 M 347, 720 P2d 231, 43 St. Rep. 882 (1986).

Terms Concerning Home as Child Support — Modification: A property settlement provided that the family home be sold after the second youngest child graduated from high school. The trial court modified this to allow the wife and the youngest child to remain in the home until that child graduated from high school. The home was an integral part of the child support provisions so long as the second child was still in high school. There is no reason why the availability of the home to the wife and third child should become any less important as a term of child support once the second child has graduated from high school. Consequently, the terms concerning the home were part of the child support provision and as such may be modified by further order. Phennicie v. Phennicie, 185 M 120, 604 P2d 787 (1979).

Effect of Not Following Procedure Strictly: Even though procedure requirements were not strictly followed, this alone did not outweigh the "best interest of the child" standard. Lehman v. Billman, 178 M 367, 584 P2d 662 (1978).

Survival of Child Support Obligation: District Court may make child support obligation a continuing one that survives the father's death and is enforceable against his estate. Hornung v. Estate of Lagerquist, 155 M 412, 473 P2d 541 (1970).

Doctrine of "Collateral Estoppel" Barring Wife's Suit on Prior Contractual Child Support Provision: Where District Court had twice reduced child support payments requested by husband with wife appearing by counsel, she was estopped to contend at subsequent litigation that a greater amount was due under separation agreement recognized by divorce decree as collateral estoppel bars the same parties from relitigating issues which were decided with respect to a different cause of action. Gessell v. Jones, 149 M 418, 427 P2d 295 (1967).

Modification Proper

Request for Modification of Property Settlement Agreement Properly Granted Despite Nonmodification Clause — Agreement Unconscionable Due to Extreme and Unanticipated Events: The parties divorced and entered a property settlement agreement, under which the husband retained the bulk of the marital assets and assumed responsibility for the marital debts and agreed to pay the wife a $10,000 monthly payment for life. The agreement contained a nonmodification clause and a provision that the prevailing party in any future dispute would be entitled to attorney fees. Subsequently, it became apparent that the stated value of the parties' combined assets had been vastly overstated. Additionally, much of the value of the assets was lost during the economic recession of 2008-2009. After some years, the husband fell behind on monthly payments and the wife filed a motion to hold the husband in contempt. The husband filed a countermotion to modify the agreement on the grounds that it had become unconscionable due to changed circumstances. The District Court ordered the husband to pay a lump sum to cover missed payments and also prospectively modified the property settlement agreement by terminating the $10,000 monthly payment. The Supreme Court found that the termination of the monthly payments was not an abuse of discretion despite the nonmodification provision. Although the Supreme Court noted that the statutory provisions addressing modification of maintenance payments in 40-4-208(2)(b)(i), modification of property disposition provisions in 40-4-208(3)(b), enforcement of separation agreements in 40-4-201(2), and nonmodification clauses in 40-4-201(6) appear to conflict when read separately, the Supreme Court relied on the fundamental rule in 1-2-101 that statutes should be interpreted as a whole, giving meaning to all, if possible. The Supreme Court found that when the statutes are read together it is apparent that the Legislature considered unconscionability as an appropriate reason to modify property settlement agreements in all cases. Beyond general principles of statutory interpretation, the court also noted that the inclusion of an attorney fee provision in the agreement anticipated potential future modification efforts by the parties. In re Marriage of Simpson, 2018 MT 281, 393 Mont. 340, 430 P.3d 999.

Child Support Reduction Proper — Budgetary Shortfall From Significant Illness of Another Child: The District Court did not err by ordering a reduction in the support obligation of the respondent father for the parties' child. The District Court found that the respondent's son from a current marriage had a significant illness that contributed to a budgetary shortfall such that the respondent's income could not meet his household expenses while also paying the support obligation determined by Child Support Enforcement Division (CSED), and that the respondent had to borrow money to meet monthly expenses. The District Court also found that, with budgeting and appropriate adjustment of monthly expenses, the respondent would be able to pay $200 a month in child support, as opposed to $679 a month. Sufficient evidence was presented to support the District Court's findings and to demonstrate that the CSED-determined obligation would be unjust to any of the parties or that it was inappropriate in that particular case. Myrick v. Skolrud, 2016 MT 341, 386 Mont. 39, 386 P.3d 934.

Retroactive Date for Modified Child Support Order — Abuse of Discretion — Order Vacated and Remanded: The respondent's ex-wife filed a petition with the Child Support Enforcement Division (CSED) to recalculate the amount of child support she received from him each month. CSED ordered the respondent to increase the amount of child support he paid from $600 a month to $1,142 a month beginning in February 2014. Two months later, the respondent appealed to the District Court and challenged the increase, arguing that CSED had used the wrong method for calculating the new child support amount. In September 2014, CSED recalculated child support and recommended the respondent's child support payment increase to $2,048 a month. Ultimately, in April 2015, the District Court issued an order requiring the respondent to pay $2,048 a month and for him to pay it retroactively from February 2014. On appeal, the Supreme Court vacated the District Court order and remanded the matter, noting that the District Court abused its discretion by making the new support order retroactive to February 2014 instead of September 2014. In re Marriage of Healy, 2016 MT 154, 384 Mont. 31, 376 P.3d 99.

Significant Changes in Income and Parenting — Child Support Reduction Proper — Attorney Fees for District Court Proceedings and on Appeal Proper Under Clear Terms of Dissolution Agreement: At the time of their divorce, the parties executed an agreement whereby the husband paid roughly a quarter of his salary to the wife for support of their three children. Though both parties were physicians, the wife stayed at home with the children and they resided with her on a primary basis. Five years later, the husband moved to modify child support, claiming that there had been a significant change in circumstances, namely that the children resided equally with each parent and that the wife was now working part-time. Ultimately, the District Court ordered that the husband's child support obligation be vastly reduced, that the wife pay the husband for his overpayments retroactive to the time he filed his motion to modify child support, and that the wife pay for the husband's attorney fees pursuant to the parties' dissolution agreement. The wife appealed, contending that the District Court's findings regarding the parties' change in circumstances were insufficient and that the District Court erred in awarding the husband his attorney fees. The Supreme Court agreed with the District Court that there was sufficient evidence of a substantial change in circumstance to warrant a modification of support and that under the express terms of the parties' dissolution agreement, the husband, as the prevailing party, was entitled to attorney fees for the District Court and appellate proceedings. In re Marriage of Damschen, 2011 MT 297, 363 Mont. 19, 265 P.3d 1245.

Residence of Child Changed to Other Parent — Sufficient Change of Circumstances to Warrant Revision of Support: Pursuant to a support order, the father was to pay the mother $250 a month for support of each of the parties' two children. One of the children subsequently went to live with the father, who then moved to modify the support arrangement based on a change in circumstances. The District Court concluded that the child's move constituted a change in circumstances sufficient to warrant modification of the support amount, imputed the parents' income into the support guidelines, and ordered that the father pay a monthly amount of $104 for the child that was not living with him. The mother appealed both the determination that circumstances were sufficiently changed and the revised monthly support amount. The Supreme Court deferred to the District Court's judgment regarding changed circumstances because the move of one child to the father's residence would decrease the mother's expenses and increase the father's expenses and tend to make the prior support order unconscionable. However, because the District Court made no findings of fact regarding the mother's income when entering her income amount into the guideline formula, the Supreme Court reversed for findings of fact and conclusions of law sufficient to allow a meaningful review of the calculation of support under the guidelines. In re Marriage of Mills, 2006 MT 149, 332 M 415, 138 P3d 815 (2006).

Deferred Payment Plan for Child Support Arrearages Proper With Parties' Agreement but Improper for Medical Support Arrearages Absent Agreement — Estoppel: Rather than requiring immediate payment of all past-due amounts for child support and medical support, the District Court set up a deferred payment plan that required payment of current child support, an additional monthly amount for past-due child support, and an additional monthly amount for past-due medical support. The wife contended that the deferred payment plan violated this section because the plan constituted a retroactive modification of support. The Supreme Court held in In re Marriage of Hooper & Crittendon, 247 M 322, 806 P2d 541 (1991), that the doctrine of estoppel applies to support payments if: (1) there is a substantial and continuing change in circumstances rendering the original decree inequitable; (2) there is a mutual agreement between the parties made in good faith; and (3) conduct over a period of years is consistent with the agreement. Here, the parties made an express agreement regarding the deferred payment plan, based on the husband's reduced income because of his failing business, that was followed for over 3 years. Thus, under the estoppel doctrine, the husband was entitled to rely on the wife's conduct in making the agreement. However, the parties made no agreement concerning medical support, so the District Court erred in ordering deferred payment of medical support because estoppel did not apply, and the case was remanded for judgment for the amount of past-due medical support. In re Marriage of Winters, 2004 MT 82, 320 M 459, 87 P3d 1005 (2004).

Increase in Day-Care Costs Considered Substantial and Continuing as to Warrant Modification of Support Obligation: A support decree may be modified upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable, and in order to demonstrate changed circumstances, a party must provide specific evidence about changed economic circumstances or actual increased need. Here, the mother showed an overall 25% increase in the cost of day care, which made the support decree unconscionable enough to warrant modification. In re Marriage of Kummer & Heinert, 2002 MT 168, 310 M 470, 51 P3d 513 (2002).

Order Dismissing Case Without Prejudice Not Considered Modification of Original Child Support Order — Laches and Equitable Estoppel Inapplicable to Child Support Enforcement Proceeding: The parties' Canadian divorce decree provided that the husband was not liable to pay child support. Because of changed financial circumstances not contemplated by the parties at the time of divorce, the mother later petitioned for modification of the decree to include child support. Relying on Willick v. Willick, 173 N.R. 321 (1984), a decision of the Supreme Court of Canada, the divorce court noted that separation agreements and divorce judgments are not absolute bars to an order of support when there is a material change in circumstances. The Canadian court reassessed the needs of the children and ordered the father to pay $250 a month for each child. The mother sought enforcement of the order in Hawaii, where the father resided. A Hawaiian hearings officer dismissed the case without prejudice and with little comment. The mother later sought enforcement in Montana, where an administrative law judge held that the Hawaiian order did not modify the Canadian support order and ordered payment of back child support. The District Court subsequently reversed the order of the administrative law judge and held that because the Hawaiian order had nullified the Canadian support order, no current, back, or future support was owed. On appeal, the Montana Supreme Court held that the effect of the Hawaiian dismissal order was not a complete modification of the original support order, did not constitute any final decision on the part of the State of Hawaii, and was void. Dismissal of the case without prejudice did not act as a bar to a further suit on the same action, and the parties were free to refile an action at any time. Further, the doctrines of laches and equitable estoppel do not apply to recovery of child support arrears. If the court or custodian do not promptly proceed to seek compliance with a child support order, the person who chooses not to make support payments is not to profit or benefit thereby, and the rights of the children, as interested and affected parties, are to be served and protected. In re Support Obligation of Schmitz v. Engstrom, 2000 MT 275, 302 M 121, 13 P3d 38, 57 St. Rep. 1152 (2000). See also Fitzgerald v. Fitzgerald, 190 M 66, 618 P2d 867 (1980), and In re Marriage of v. Pfeifer, 2013 MT 129, 370 Mont. 158, 301 P.3d 821.

Retroactive Revision of Temporary Child Support Order: When the parties separated, the District Court entered a temporary child support order directing the husband to pay $300 a month in spousal maintenance and $200 a month for each child in support. That temporary order was later modified to require the husband to pay a total of $800 a month in temporary maintenance and support. The final decree directed the husband to pay child support of $190 a month for each child, retroactive to the time of separation, and did not award any spousal maintenance. The wife alleged error in the retroactive modification of support, arguing that there was no change in circumstances that would allow a downward modification. The Supreme Court affirmed the modification, noting that the District Court was revising a temporary order, not modifying a final decree as specified in subsection (1) of this section. It is clearly within the District Court's authority to make the maintenance and support awards retroactive (see In re Marriage of Wersland, 249 M 169, 814 P2d 991 (1991)), and the revision of the order did not constitute an abuse of discretion. In re Marriage of Stoneman, 2000 MT 274, 302 M 107, 14 P3d 12, 57 St. Rep. 1145 (2000).

Failure to Submit Available Evidence Precluding Setting Aside of Judgment: At a 1995 hearing on child support, a father was defiantly uncooperative in providing documentation of any kind regarding his finances, assets, the provision of insurance for the children, or past child support payments. At a 1998 hearing on suspension of his driver's, hunting and fishing, and electrician's licenses, he claimed that he should be allowed to present the evidence that he refused to provide earlier. The District Court declined to reopen the 1995 hearing, and the Supreme Court affirmed. If there was anything that prevented the father from a fair submission of the controversy, it was his own defiance of the justice system. His failure to avail himself of the opportunity to present the appropriate information in 1995 and his desire to retroactively argue a factual issue in the case were not sufficient reasons to justify setting aside the judgment. His motion for a new trial was properly denied, and in the interests of finality of litigation, the Supreme Court declined to upset the judgment. In re Marriage of Hopper, 1999 MT 310, 297 M 225, 991 P2d 960, 56 St. Rep. 1247 (1999). See also Karlen v. Evans, 276 M 181, 915 P2d 232, 53 St. Rep. 337 (1996).

Failure to Demonstrate Changed Circumstances — Modification of Support Properly Denied: The mother identified four factors that she claimed evidenced changed circumstances warranting modification of child support: (1) the father significantly decreased visitation so that the mother had sole financial responsibility for the children's care; (2) the mother was forced to liquidate the bulk of her assets received in the marital property dissolution, resulting in insufficient funds to care for the children; (3) the father earned more income than he reported; and (4) because of the mother's financial situation and the father's increased annual income, the children's health insurance premiums, deductibles, and uncovered sums should be allocated proportionately based on a ratio of the parties' annual incomes. The District Court examined each factor supporting the mother's claim of changed circumstances and dismissed each claim as not credible. Giving due regard to the District Court's opportunity to judge the credibility of witnesses, the Supreme Court affirmed the decision that the mother failed to meet the burden of demonstrating substantial and continuing changed circumstances. In re Marriage of Pearson, 1998 MT 236, 291 M 101, 965 P2d 268, 55 St. Rep. 992 (1998).

Failure to Include Life Insurance Allegation in Initial Pleading — Failure to Address Issue Not Error: The mother testified at trial that the father failed to maintain or provide proof of life insurance coverage for the benefit of the children, although the decree did not require the father to maintain life insurance but only to name the children as beneficiaries to any life insurance policy that he might have. However, the mother failed to include any findings or conclusions pertaining to life insurance in her proposed findings and conclusions submitted to the court. It is fundamentally unfair to fault the trial court for failing to rule correctly on an issue that it was never given an opportunity to consider, so the trial court was entitled to treat the life insurance allegation as a nonissue. In re Marriage of Pearson, 1998 MT 236, 291 M 101, 965 P2d 268, 55 St. Rep. 992 (1998). See also Day v. Payne, 280 M 273, 929 P2d 864 (1996).

Increased Child Support Not Substitute for Debt Barred by Bankruptcy Discharge: After Debra and Kenneth were divorced, Kenneth filed a bankruptcy petition, and certain debts for which he was responsible were discharged. Debra later moved for increased child support and maintenance. The District Court increased the child support award but denied the request for maintenance. Kenneth argued that the increased support was ordered in place of his payment of a debt on a second mortgage discharged in bankruptcy that Debra was then required to pay. The Supreme Court held that although there was substantial credible evidence supporting the increased support award, the District Court did not abrogate the benefit received by Kenneth from his discharge in bankruptcy by increasing the amount of child support that he was required to pay. In re Marriage of Craib & Rhodes, 266 M 483, 880 P2d 1379, 51 St. Rep. 937 (1994).

Child Support Obligation Accrues During Incarceration — Denial of Modification Not Unconscionable: After signing an agreement obligating payment of $500 a month in child support, the father was subsequently incarcerated after pleading guilty to criminal charges. The District Court, citing the father's lack of assets and reduced income while in prison, modified the support amount by ordering the father to pay $50 a month in support while incarcerated. Payments were subject to modification upon release from prison and return to employment. On appeal, the Supreme Court reversed, holding that it is not unconscionable to deny a temporary termination or reduction in child support payments because of incarceration even though the incarcerated parent has no income and has no assets to pay the support. Mooney v. Brennan, 257 M 197, 848 P2d 1020, 50 St. Rep. 229 (1993).

Modification of Support Obligation Retroactive to Date Before Motion Filed Improper: In December 1990, when both parties were residing in Washington, mother sent a letter to father requesting child support modification. A subsequent petition filed in a Washington superior court was dismissed on jurisdictional grounds. Mother subsequently filed a motion in Montana on August 15, 1991, seeking modification of support from $300 a month to $1,172.50 a month. The modification was granted, retroactive to December 1990, the date father allegedly became aware of the legal proceeding. Under this section, the right to modified child support accrues on the date actual notice was given in the Montana proceedings. The Supreme Court concluded that the District Court erred in ordering increased support retroactive to December 1990, holding the modification retroactive only to August 15, 1991. In re Marriage of Howard, 255 M 64, 840 P2d 1217, 49 St. Rep. 894 (1992).

Payments in Support of Nonindigent Parent Not Considered in Modification of Child Support: Parent claimed that the District Court should have deducted, for child support purposes, annual payments of $15,148.58 for a residence, vehicle, and insurance and $225 a month made to his mother for her support, citing his legal obligation under 40-6-301 (now repealed) to support his mother. However, absent proof that his mother was indigent, the trial court was not bound to consider the support of his mother as a legal duty when calculating expenses applicable to child support. In re Marriage of Howard, 255 M 64, 840 P2d 1217, 49 St. Rep. 894 (1992).

Support Increase From $300 to $1,172.50 a Month Not Per Se Unconscionable: Father contended that an increase in his child support obligation from $300 to $1,172.50 a month was so enormous as to be per se unconscionable, but he cited no authority for his argument, nor could he specify any error in the District Court's extensive and particular findings regarding the parties' incomes and respective child support obligations. Absent a clear abuse of court discretion, the increase was affirmed. In re Marriage of Howard, 255 M 64, 840 P2d 1217, 49 St. Rep. 894 (1992).

Prospective Modification of Child Support Not Abuse of Discretion: This section does not mandate that modifications of child support must be made retroactive to the date of notice of the motion for modification; rather, it sets a limit as of that date. A prospective modification of child support does not necessarily constitute an abuse of discretion. In re Marriage of Fronk v. Wilson, 250 M 291, 819 P2d 1275, 48 St. Rep. 936 (1991).

Accelerated Depreciation Deduction Not Factor in Determining Disposable Income: The husband appealed the lower court's decision to increase his support obligation. The Supreme Court ruled that it was not error to determine a parent's net income without taking into consideration the accelerated depreciation deductions listed on the parent's tax return. The court held that the purpose of depreciation is to enable a person to regain business expenditures and therefore cannot be considered an expense. In re Marriage of Stewart, 243 M 180, 793 P2d 813, 47 St. Rep. 1116 (1990).

Joint Care and Support — Support Proportional to Ability to Pay: The parties will be required to contribute to the support of their children in proportion to their ability to make such contributions, determined on a case-by-case basis. When the wife's income was less than half of the husband's, it was unconscionable that the wife should bear one-half of the cost of supporting the children. The District Court did not err in modifying the child support decree to require contribution from the husband. In re Marriage of Thane, 238 M 349, 777 P2d 881, 46 St. Rep. 1325 (1989).

Jurisdiction to Modify — Joint Custody — Medical and Dental Insurance: Even though the joint marital dissolution decree contained no provisions for child support, the District Court in effect required child support from the husband by providing directly for health insurance for the children and by providing for their joint care and support. The court had jurisdiction to modify the child support provisions after the lapse of 2 years. (See 1995 amendment.) In re Marriage of Thane, 238 M 349, 777 P2d 881, 46 St. Rep. 1325 (1989).

Child's Need for Ski Activity Funding Not Substantial Change in Circumstances: Wife's contention that a child needed a four-wheel drive vehicle and traveling expenses while skiing did not show a change in circumstances so substantial and continuing as to render the original child support provisions unconscionable. In re Marriage of Lyman, 233 M 283, 762 P2d 203, 45 St. Rep. 1491 (1988).

Assumption of Permanent Custody by Noncustodial Parent — No Child Support Obligation: A noncustodial parent who assumed permanent custody and support of the children, with the consent of the custodial parent, was relieved of the obligation to pay child support accruing after and during the consensual assumption of custody. In re Marriage of Sabo, 224 M 252, 730 P2d 1112, 43 St. Rep. 2175 (1986), overruling Dahl v. Dahl, 176 M 307, 577 P2d 1230 (1978).

Equitable Grounds for Modification — Oral Agreement: Knowing her former husband would be working fewer hours because of layoffs and strikes at his workplace, wife orally agreed to a reduction of child support on a monthly basis during the times of layoff and strike. She also orally agreed that when husband took the children for an extended visit his payment would be reduced proportionately with the number of days he had the children. A decree for child support may be modified on equitable grounds by a court if there is clear and compelling evidence of the terms of an oral agreement of modification. The modification may be applied only to maintenance and support payments to be made subsequent to the oral agreement for modification and may not impair the rights of any assignee of support payments based on public assistance paid a party. In re Marriage of Jensen, 223 M 434, 727 P2d 512, 43 St. Rep. 1891 (1986), followed in In re Marriage of Glanville, 272 M 22, 899 P2d 527, 52 St. Rep. 563 (1995), and In re Marriage of Jarussi, 1998 MT 272, 291 M 371, 968 P2d 720, 55 St. Rep. 1124 (1998).

Unconscionable Child Support Payment:

Change in couple's circumstances was so substantial and continuing as to make an earlier support agreement unconscionable. Husband's wages had been reduced and his employment was subject to strikes and layoffs. His living conditions were significantly more modest than wife's. Wife had remarried and her new husband had a steady job. She owned rental property and had no day-care expenses. Therefore, court properly reduced father's support amount. In re Marriage of Jensen, 223 M 434, 727 P2d 512, 43 St. Rep. 1891 (1986).

The trial court did not abuse its discretion in modifying a divorce decree to increase child support payments. The underlying evidence was sufficient to support the decision to increase a payment of $120 a month for a 15-year-old boy, which in the circumstances revealed was unconscionable. Green v. Green, 176 M 532, 579 P2d 1235 (1978).

Reduction in Child Support Payments — Changed Circumstances Rendering Original Decree Unconscionable: Since the entry of the original decree of dissolution: both parties remarried; the mother moved with the children to a permanent residence in northern Idaho; the move had substantial consequences on the father's ability to see the children due to increased costs; and the father apparently earned approximately $150 a month less than at the time of the decree. The District Court found these to be changed circumstances so substantial and continuing as to make the original decree unconscionable and granted a reduction in child support payments. In affirming the judgment, the Supreme Court found that the mother had not overcome the presumption that the modification was correct and that the District Court had not abused its discretion. In re Marriage of Uphus, 221 M 347, 720 P2d 231, 43 St. Rep. 882 (1986).

Cost of Living Increase Factor — Vagueness — Modification: Where a 1980 dissolution decree provided for 10% annual increase in support payments, with vague provisions for limitation in case of economic depression or lower rate of economic inflation, the Supreme Court held that modification was proper when the rate of inflation had declined significantly and when the modification decree tied the change in support obligation directly to the U.S. Department of Labor Consumer Price Index. In re Marriage of Gies, 218 M 433, 709 P2d 635, 42 St. Rep. 1715 (1985).

Change of Circumstances — Inheritance — Offset: When, after dissolution, the mother inherited a substantial sum of money, received periodic income from the family corporation, and became owner of a debt-free home, and the father's income decreased by one-third, the findings of the District Court reducing the father's child support obligation from $330 to $175 a month per child were not clearly erroneous. The court need not limit calculation of child support to a percentage of out-of-pocket expenses. When the record contains substantial credible evidence to support the findings, the Supreme Court will not reverse on the issue of modification. Absent an agreement between the parties to the contrary, the father was not entitled to an offset for voluntary supplementary house payments made to help sell the home he was ordered to sell by dissolution decree. In re Support of Rockman, 217 M 498, 705 P2d 590, 42 St. Rep. 1323 (1985).

Same Support When One of Two Children Dies: Father was paying $150 a month child support for each of two children. One child died. In light of the discrepancy between the incomes of the father and mother, it was not an abuse of discretion to raise the support for the remaining child to $300 a month. There was no evidence that the father was less capable of paying $300 than he was at the time of the original decree. In re Custody of Holm, 215 M 413, 698 P2d 414, 42 St. Rep. 504 (1985).

Loss of Job by Person With Custody — Sufficient Cause for Raise in Support: Where neither parent was financially well-situated and divorce decree had granted mother the relatively small amount of $100 a month child support for each child, mother's loss of her job was sufficient to justify raising the child support to $175 a month for each child. McNeff v. McNeff, 207 M 297, 673 P2d 473, 40 St. Rep. 2050 (1983), followed in In re Marriage of Purkett, 222 M 225, 721 P2d 349, 43 St. Rep. 1217 (1986).

Child Support Modification Based on Inflation and Increased Age of Child Upheld: Five years after entry of the parties' original divorce decree, the District Court, on motion of the mother, ordered that the father's monthly child support payments be increased from $125 to $200. On appeal, the Supreme Court, noting that it will reverse the District Court only if its findings are clearly erroneous, declined to overrule the District Court. The Supreme Court stated that the factors relied upon by the District Court, i.e., the increase in the child's age and needs, inflation, and the fact that the wife's expenses exceed her income, rendered the terms of the original decree unconscionable within the meaning of this section. Johnson v. Johnson, 205 M 259, 667 P2d 438, 40 St. Rep. 1255 (1983), followed in In re Marriage of Barber, 252 M 458, 830 P2d 97, 49 St. Rep. 367 (1992), and distinguished, with regard to a lack of specific evidence of changed economic circumstances or actual increased need, in In re Marriage of Gingerich/Stroop, 269 M 161, 887 P2d 714, 51 St. Rep. 1417 (1994).

Ability to Meet Current Needs: The parties were married in 1961, and the marriage was dissolved in 1979. The husband was required to pay $100 per month child support for each of the four children. Two children had reached majority. The wife petitioned to increase support payments, saying they were insufficient to meet the current needs of the children because of increased costs and greater expenses related to their age status. The District Court found that expenses for the wife exceeded her income, while the husband's income had increased due to pension increases and reduction in support payments. The court found these to be substantially changed circumstances, and the Supreme Court agreed. The findings of the District Court were not clearly erroneous, and the increase in support was upheld. Reynolds v. Reynolds, 203 M 97, 660 P2d 90, 40 St. Rep. 321 (1983), followed in In re Marriage of Barber, 252 M 458, 830 P2d 97, 49 St. Rep. 367 (1992).

Modification Improper

Monthly Payment Part of Property Settlement — Not Subject to Modification Under Child Support Law: As a part of their divorce, the parties executed two written agreements. The parenting plan required the husband to pay the wife $10,000 per month in child support until the youngest of the parties' three children graduated from high school. The property settlement agreement required the husband to pay the wife a lump sum of $500,000 as well as a payment of $10,000 per month for life as soon as the youngest of the parties' three children graduated from high school. The husband later moved to modify the child support order, arguing the amount of child support was unconscionable. The District Court correctly concluded that the $10,000 monthly payment for life was meant to be a part of the distribution of the marital estate and was not subject to modification regardless of the parties' parenting obligations. Simpson v. Simpson, 2013 MT 22, 368 Mont. 315, 294 P.3d 1212.

No Notice of Motion for Modification — Order to Pay Child Support Vacated: Under the parties' original dissolution, the father was granted primary custody and neither party was required to pay child support. One of the children later began living with the mother. The mother sought assistance from the Child Support Enforcement Division, and the Division in turn sought reimbursement from the father. However, no party sought to modify the original custody order. The father subsequently moved to prohibit the Division from further proceedings and to terminate any child support orders it had issued. Following a hearing, the District Court modified the original parenting plan, ordering that the father pay child support retroactive to about the time the child moved in with the mother. The father appealed, and the Supreme Court reversed. The original decree, which provided no child support obligation for the father, was in effect until later modified. Under 40-4-208, a decree may modify only support installments that accrue after actual notice to a party of a motion for modification. Because there was never a motion to modify child support, the father received no notice that the decree would be modified to require him to pay support, so the portion of the order requiring the father to pay child support prior to notice of modification was vacated. Cook v. McClammy, 2009 MT 115, 350 M 159, 206 P3d 906 (2009).

No Evidence of Changed Circumstances or Increased Need — Modification of Support Unwarranted: Modification of child support requires a finding of substantial and continuing changed circumstances that make the terms of the original support award unconscionable. Here, the original decree temporarily set support at $2,500 a month, to be revised when the father obtained new employment. When a new job was obtained, the mother sought to increase the support amount to $3,723, pursuant to the support guidelines and the father's new income, and sought to have the new amount applied retroactively to the date of the beginning of the new employment. The District Court increased the amount to $2,990, holding that that amount was reasonable and that even the original award of $2,500 a month more than met the needs of the children according to figures provided by the mother, and the court declined to apply the new amount retroactively. The mother appealed. Referring to the original agreement to revise support when the father gained new employment, the Supreme Court held that the agreement did not allow a revised amount to be so large as to be unjust, but that the statutes and support guidelines were still applicable in determining whether a variance should be granted. Without specific evidence of changed economic circumstances or actual increased need, a change in a party's income is not sufficient to warrant modification or to support a conclusion of a substantial change in circumstances. The revised amount was affirmed absent a showing of actual increased need, and it was within the discretion of the District Court to refuse to order retroactive support, so the revised support order was affirmed. In re Marriage of Midence, 2006 MT 294, 334 M 388, 147 P3d 227 (2006).

Deferred Payment Plan for Child Support Arrearages Proper With Parties' Agreement but Improper for Medical Support Arrearages Absent Agreement — Estoppel: Rather than requiring immediate payment of all past-due amounts for child support and medical support, the District Court set up a deferred payment plan that required payment of current child support, an additional monthly amount for past-due child support, and an additional monthly amount for past-due medical support. The wife contended that the deferred payment plan violated this section because the plan constituted a retroactive modification of support. The Supreme Court held in In re Marriage of Hooper & Crittendon, 247 M 322, 806 P2d 541 (1991), that the doctrine of estoppel applies to support payments if: (1) there is a substantial and continuing change in circumstances rendering the original decree inequitable; (2) there is a mutual agreement between the parties made in good faith; and (3) conduct over a period of years is consistent with the agreement. Here, the parties made an express agreement regarding the deferred payment plan, based on the husband's reduced income because of his failing business, that was followed for over 3 years. Thus, under the estoppel doctrine, the husband was entitled to rely on the wife's conduct in making the agreement. However, the parties made no agreement concerning medical support, so the District Court erred in ordering deferred payment of medical support because estoppel did not apply, and the case was remanded for judgment for the amount of past-due medical support. In re Marriage of Winters, 2004 MT 82, 320 M 459, 87 P3d 1005 (2004).

Parent's Venture Into Temporarily Unprofitable Self-Employment Insufficient to Warrant Reduction in Child Support Payments: While the mother was employed as a trust officer, she was ordered to pay $544 a month in child support payments. She lost the job when the company closed the local office, decided to begin self-employment as an interior designer with substantial financial help from her new husband, and then moved for a reduction in support because the new business did not show a profit the first year, even though it gained over $92,000 in revenue and she anticipated making a profit the second year. In order to modify a child support obligation, the person seeking the modification must establish changed circumstances so substantial and continuing that to keep the existing obligation intact would be unconscionable. The District Court erred in annualizing the mother's previous trust-related salary in calculating her income because she did not return to customary self-employment as contemplated in ARM 37.62.108(3). The temporarily unprofitable state of her business was not of such a continuing nature as to warrant a change in support. The Supreme Court recognized that 40-6-217 does not require a supporting parent's new spouse to contribute to the supporting parent's support obligations; however, when a supporting parent remarries and is in a position in which a contribution to the new family's finances is not required, the supporting parent is still required to do whatever is necessary to ensure that child support payments are made. In re Marriage of McDermott, 2003 MT 283, 318 M 13, 79 P3d 245 (2003).

Failure to Address Separate Issue of Unconscionability Prior to Modification of Child Support — Reversible Error: Before modifying a child support order, the trial court must find a change in circumstances so substantial and continuing as to make the terms of the order unconscionable. The finding of substantial and continuing change is separate from the finding of unconscionability, and the court must find both criteria before modifying a child support order. Here, the court's findings were too brief and conclusory to demonstrate that the unconscionability requirement was considered. The agreement between the parties also required a finding of unconscionability, and the failure to address the issue was reversible error. In re Marriage of O'Moore, 2002 MT 31, 308 M 258, 42 P3d 767 (2002). See also In re Marriage of Jarussi, 1998 MT 272, 291 M 371, 968 P2d 720 (1998).

Failure to Demonstrate Changed Circumstances — Modification of Support Properly Denied: The mother identified four factors that she claimed evidenced changed circumstances warranting modification of child support: (1) the father significantly decreased visitation so that the mother had sole financial responsibility for the children's care; (2) the mother was forced to liquidate the bulk of her assets received in the marital property dissolution, resulting in insufficient funds to care for the children; (3) the father earned more income than he reported; and (4) because of the mother's financial situation and the father's increased annual income, the children's health insurance premiums, deductibles, and uncovered sums should be allocated proportionately based on a ratio of the parties' annual incomes. The District Court examined each factor supporting the mother's claim of changed circumstances and dismissed each claim as not credible. Giving due regard to the District Court's opportunity to judge the credibility of witnesses, the Supreme Court affirmed the decision that the mother failed to meet the burden of demonstrating substantial and continuing changed circumstances. In re Marriage of Pearson, 1998 MT 236, 291 M 101, 965 P2d 268, 55 St. Rep. 992 (1998).

Failure to Include Life Insurance Allegation in Initial Pleading — Failure to Address Issue Not Error: The mother testified at trial that the father failed to maintain or provide proof of life insurance coverage for the benefit of the children, although the decree did not require the father to maintain life insurance but only to name the children as beneficiaries to any life insurance policy that he might have. However, the mother failed to include any findings or conclusions pertaining to life insurance in her proposed findings and conclusions submitted to the court. It is fundamentally unfair to fault the trial court for failing to rule correctly on an issue that it was never given an opportunity to consider, so the trial court was entitled to treat the life insurance allegation as a nonissue. In re Marriage of Pearson, 1998 MT 236, 291 M 101, 965 P2d 268, 55 St. Rep. 992 (1998). See also Day v. Payne, 280 M 273, 929 P2d 864 (1996).

Continuing Changed Circumstances Required: Seven months after Raymond was ordered to pay child support, he petitioned to have it modified. Evidence showed, among other things, that he testified that his circumstances were essentially the same as at the time of the original support order, that, in the year of his petition, he deposited over $135,000 in the bank, that he received $62,000 that year from the sale of a house, and that he chose to pay off a $24,000 note and over $21,000 in credit card bills with the house sale money instead of paying child support, for which he was in arrears. Clearly, he failed to show a change in circumstances so substantial and continuing as to make the existing support order unconscionable, and the lower court did not abuse its discretion in refusing to modify the order. In addition, the District Court properly ordered him to pay his former wife's court costs and attorney fees and the Supreme Court ordered him to pay her costs and attorney fees for the appeal. In re Marriage of Paunovich, 270 M 200, 890 P2d 1291, 52 St. Rep. 144 (1995).

Failure to Prove That Cost-of-Living Increase Sufficient Change to Justify Modification: Relying on In re Marriage of Johnson, 205 M 259, 667 P2d 438 (1983), and In re Marriage of Barnard, 264 M 103, 870 P2d 91 (1994), wife's counsel elicited at the hearing that proposed child support modifications were based on the parties' incomes, justifying an increase in support, but the calculations gave no indication of the increase in the cost of living. The record did not contain sufficient evidence of an increase or even a degree of increase in the cost of living. Distinguishing Johnson, the Supreme Court held that the change in the parties' incomes was not a sufficient basis to warrant modification of the decree or to support a conclusion that there was a change in circumstances so substantial as to render the original decree unconscionable. In re Marriage of Gingerich/Stroop, 269 M 161, 887 P2d 714, 51 St. Rep. 1417 (1994).

Improper Modification to Lengthen Time Support to Be Paid: The date established for terminating child support payments may be extended or knowingly waived by written agreement or express provision of the decree, but absent either of those factors, a parent is obligated to provide support only until the child reaches 18 years of age or is earlier emancipated. Although the Supreme Court noted that there may be situations in which the termination date should be extended, in this case, the District Court abused its discretion by modifying the decree to include the months during which a child was not emancipated and was still enrolled in high school but not yet 19 years old and the months between a child's attaining majority and graduating from high school. In re Marriage of Gingerich/Stroop, 269 M 161, 887 P2d 714, 51 St. Rep. 1417 (1994).

Retroactive Creation of Trust for Support Payments Held to Be Error: When Carol Ann and Roland divorced, Roland was ordered to pay $125 a month in child support. Years later, Roland had paid nothing and had accumulated arrearages of $13,000. After a hearing sought by Carol Ann to collect the arrearages, the District Court ordered that $10,000 be paid by Roland and put into a trust for the education of the parties' daughter. Neither party had requested the creation of the trust. Citing Williams v. Budke, 186 M 71, 606 P2d 515 (1980), the Supreme Court held that support payments are to be paid to the custodial parent to be used for the support of the child at the discretion of that parent. The Supreme Court also noted that the District Court did not have jurisdiction to modify the original order retroactively. Willoughby v. Loomis, 264 M 44, 869 P2d 271, 51 St. Rep. 138 (1994).

Retroactive Reduction in Child Support Payments Beyond Jurisdiction of Court: Willoughby brought an action under the Revised Uniform Reciprocal Enforcement of Support Act (now Uniform Interstate Family Support Act) to collect arrearages of $13,000 owed to her by her ex-husband Loomis. After a hearing, the District Court ordered that a trust be established for the parties' child and that it be funded in the amount of $10,000 in lieu of the $13,000 in arrears, which Loomis admitted. Citing In re Marriage of Crittendon, 247 M 322, 806 P2d 541 (1991), the Supreme Court held that the child support payments could not be retroactively modified, absent extraordinary circumstances that did not appear in this case. Willoughby v. Loomis, 264 M 44, 869 P2d 271, 51 St. Rep. 138 (1994).

Supreme Court's Adoption of Child Support Guidelines Not Grounds for Modification: The District Court failed to make findings of fact showing a change in husband's circumstances that supported a reduction of child support below the amount set by the original decree. The Supreme Court's adoption of child support guidelines was not in itself a sufficient change of circumstances to justify the modification. Therefore, the modification was reversed and the case was remanded. In re Marriage of Kukes, 258 M 324, 852 P2d 655, 50 St. Rep. 553 (1993).

Error in Adoption of Circumstances Mitigating Payment of Support: A noncustodial parent contended he was prevented from making support payments because of lack of income, a spinal injury that prevented employment, and lack of knowledge of the whereabouts of his children in order to make payments. The Supreme Court held the District Court erred in finding these circumstances mitigated payment of child support after noting that: (1) income was essentially unchanged and the parent had failed to pay any of a $20,000 injury settlement in support; (2) the parent turned down full-time jobs and stayed active; and (3) no support was paid even during the 1½ years when the children's whereabouts was known. In re Marriage of Callahan, 233 M 465, 762 P2d 205, 45 St. Rep. 1639 (1988).

Stipulation to Provide Personal Tax Returns — No Allegations of Change in Financial Circumstances to Warrant Production of Corporate Returns: To determine the amount of a lump-sum support payment due from father each year, parties stipulated the amount be based on father's income as reported on his personal tax returns. Mother instituted a series of actions to obtain returns from father's farm corporation, alleging the corporate returns were relevant to setting the support level. The District Court properly interpreted the stipulation as not inclusive of father's nontaxable corporate benefits. Absent allegations of substantial changes in the financial circumstances of either party, mother's request for production of corporate returns and for modification of support was denied. In re Support of K.F., 232 M 326, 756 P2d 460, 45 St. Rep. 1087 (1988).

Temporary Change in Circumstances Not Sufficient to Render Support Payments Unconscionable: It was reversible error for the District Court to grant a reduction in child support payments based on father's contention that his income declined by 40% when the decline was a temporary change in circumstances. By its own terms, this section precludes modification to cure a temporary change in circumstances. In re Marriage of Forsman, 229 M 411, 747 P2d 861, 44 St. Rep. 2093 (1987), followed in In re Marriage of Craib & Rhodes, 266 M 483, 880 P2d 1379, 51 St. Rep. 937 (1994).

Agreement for Modification of Child Support Void as Against Public Policy: Parents entered into an agreement to modify a child support arrangement to relieve the father of $9,000 in future payments. It was within the trial court's discretion to declare the modification agreement void as a violation of public policy since the custody and support of children are never left to contract between the parties. In re Marriage of Neiss, 228 M 479, 743 P2d 1022, 44 St. Rep. 1695 (1987). See also St. v. Shaver, 233 M 438, 760 P2d 1230, 45 St. Rep. 1617 (1988).

Support Issue Not Subject to Modification When Not Determined: A dissolution decree did not set specific child support payments but reserved the issue for a later date. As child support issue was never determined, it could not later be modified; therefore, the limitations period in this section did not apply. St. v. Hubbard, 222 M 156, 720 P2d 1177, 43 St. Rep. 1135 (1986).

Speculative Conditions Not to Be Basis for Support Modification:

In granting modification of a child support obligation, the District Court relied on findings of fact and conclusions of law based on speculative conditions, including the father's potential involvement in lawsuits in regard to the sale of his Great Falls home and recovery of his investment in a Minneapolis condominium, as well as his assertion that a "reduction in income plus the presence of anticipated debt results in making the original terms of the Decree unconscionable". The Supreme Court reversed, holding that the District Court abused its discretion by not limiting its consideration to circumstances in existence at the time of the hearing. The Supreme Court found no substantial credible evidence on the record to justify the District Court's conclusion that the change in conditions was continuing or permanent. In re Marriage of Conklin/Clark, 220 M 130, 716 P2d 629, 43 St. Rep. 611 (1986), followed in In re Marriage of Platt, 267 M 38, 881 P2d 634, 51 St. Rep. 926 (1994).

The trial court based its order increasing the amount of child support on the fact that the husband's social security disability benefits had increased 14% and that the benefits were sure to increase in the future. The trial court cannot base child support upon such speculative conditions. Duffey v. Duffey, 193 M 241, 631 P2d 697, 38 St. Rep. 1105 (1981).

No Modification of Order Solely by Acts of Parties — Modification Petition Must Be Filed: The child support provisions of a dissolution decree may be modified only by filing a petition under this section, not by the actions of the parties. State of Oregon ex rel. Worden v. Drinkwalter, 216 M 9, 700 P2d 150, 42 St. Rep. 599 (1985).

Improvement in Son's Financial Circumstances — Father's Support Obligation Not Rendered Unconscionable: Pursuant to a dissolution decree, a noncustodial father was ordered to support his son until he reached 18 years of age and for 4 years thereafter if the child pursued further education. The father sought modification of the support order, based upon certain changes in his son's financial circumstances. The Supreme Court held that the facts that his son obtained majority, received an academic scholarship to attend college, worked while attending school, and financed the purchase of a vehicle were not circumstances which abrogated his father's support. His son's scholarship and other endeavors did not constitute a change in circumstances that rendered the child support obligation unconscionable, nor was the provision in the dissolution decree which required the father to pay child support beyond the age of majority unconscionable. In re Marriage of Redfern, 214 M 169, 692 P2d 468, 41 St. Rep. 2391 (1984).

Provision Ordering Child Support Past Age of Majority Not Unconscionable: A noncustodial father sought a modification of his child support obligation after his son reached the age of majority. The father challenged the conscionability of the support provision, claiming he did not fully understand language in the support provision of the joint petition for dissolution that obligated him to support his son after the age of 18 years for 4 additional years as long as the child was pursuing further education. No evidence was presented at trial to support his contention that he did not understand the support provision. The provision that required the father to support his son past the age of majority was not unconscionable, and thus his motion for modification of the prior dissolution decree was properly denied. In re Marriage of Redfern, 214 M 169, 692 P2d 468, 41 St. Rep. 2391 (1984).

Stub for Single Pay Period Insufficient Supportive Evidence: The parties' marriage was dissolved on February 25, 1983. The decree incorporated a custody and support agreement requiring husband to pay $350 a month child support for each of the parties' two children. Husband made the payments in March but wrote to the wife in March to inform her that due to a decrease in pay he would no longer be able to meet the payments. Husband, a driver for Rimrock Stages, contended that the company had switched from a salary pay plan to a wage plan. He supported his testimony at the modification hearing with his pay stub for April 1 through April 15, 1983. His net income for the period was $587. The trial court declined to modify the support payments. On appeal the Supreme Court affirmed, saying the husband had not presented sufficient evidence to show that his total financial situation warranted a modification of support or that the decrease in his income was continuing. Trimp v. Trimp, 206 M 499, 672 P2d 612, 40 St. Rep. 1806 (1983).

No Evidence of Changed Financial Circumstances of Payor: Immediately upon being terminated from his job, husband petitioned for reduction of $750 a month child support payments on grounds that he was unemployed and had no income. Evidence showed he could rebuild his prior self-employment business in 3 to 6 months and that he received from it $1,475 and $1,900 during the 2 months after filing the petition. It was clearly erroneous and reversible error to lower the payments, since no evidence was presented to prove husband's change in circumstances was continuing so as to make the original court-approved support agreement unconscionable. Hughes v. Hughes, 205 M 69, 666 P2d 739, 40 St. Rep. 1102 (1983), followed in In re Custody & Support of H.Q. & T.Q., 218 M 308, 709 P2d 154, 42 St. Rep. 1604 (1985). See also In re Marriage of Carlson, 214 M 209, 693 P2d 496, 41 St. Rep. 2419 (1984).

Modification of Judgment for Accrued Payments — Impermissible: Williams sustained a work-related injury to his foot, which resulted in a temporary total disability. This situation was brought to the attention of the District Court and a full review of Williams' child support obligation was conducted. On appeal, the Supreme Court reversed that part of the District Court order which suspended payments for Williams' delinquent child support during the period of his disability. That portion of the order, in effect, modified the judgment previously entered as to accrued child support payments. As such, it conflicts with 40-4-208 and is impermissible. In re Marriage of Williams, 188 M 160, 612 P2d 212 (1980), followed in In re Marriage of Carlson, 214 M 209, 693 P2d 496, 41 St. Rep. 2419 (1984).

Contractual Obligation for Support Incorporated in Decree — Not Subject to Modification: Husband, to avoid having his divorce contested and thereby besmirching his girlfriend's name, agreed, in a property settlement agreement incorporated into the divorce decree, to pay $500 per month for 10 years for support of his children and maintenance of their home. In husband's petition for modification of this amount, the District Court was correct in identifying the property settlement agreement as a contract supported by valid consideration that, in the absence of any showing that the welfare of the children was affected, could not be modified. Winters v. Winters, 188 M 43, 610 P2d 1165 (1980).

Modification of Child Support — Absence of Required Showing: The District Court abused its discretion in increasing petitioner's child support obligation without a showing of changed circumstances so substantial and continuing as to make the original child support provision unconscionable. Furthermore, there was a complete absence of evidence concerning the need for increased child support or the petitioner's increased ability to pay. In re Marriage of Firman, 187 M 465, 610 P2d 178 (1980). See also In re Marriage of Cox, 266 M 67, 878 P2d 903, 51 St. Rep. 672 (1994); Duffey v. Duffey, 193 M 241, 631 P2d 697, 38 St. Rep. 1105 (1981); Jensen v. Jensen, 192 M 547, 629 P2d 765, 38 St. Rep. 927 (1981).

Improper Modification of Support Payments: The trial court did not enter appropriate findings and conclusions upon which to predicate a modification of child support provisions. Absent findings that substantial and continuing circumstances make the terms of child support unconscionable, the Supreme Court will not independently search the record to determine if there is nonetheless an evidentiary basis for the order modifying the child support provisions. In re Marriage of Bliss, 187 M 331, 609 P2d 1209 (1980). See also In re Marriage of Johnson, 1999 MT 254, 296 M 311, 989 P2d 356, 56 St. Rep. 1011 (1999).

Erroneous Cancellation of Child Support: The trial court erred in modifying a divorce decree to cancel past due and unpaid child support. Dahl v. Dahl, 176 M 307, 577 P2d 1230 (1978), overruled in In re Marriage of Sabo, 224 M 252, 730 P2d 1112, 43 St. Rep. 2175 (1986).

Erroneous Increase: The court abused its discretion by increasing child support payments in the absence of written consent of the parties or a showing of increased need. Gianotti v. McCracken, 174 M 209, 569 P2d 929 (1977).

PROPERTY DISPOSITION

Request for Modification of Property Agreement Properly Denied — No Duty for District Court to Determine Value of Assets When Parties Agree to Distribution: The parties divorced after 32 years of marriage. The parties stipulated to a property settlement agreement providing that the wife received the equity in the marital home, approximately $80,000, and the husband received his retirement income, $4,000 per month; that the agreement "may not be modified by any court"; and that the parties waived the exchange of final financial disclosures. Both parties were represented by counsel at the time the agreement was made. Nearly a year after the District Court approved the agreement, the wife filed a petition to modify the agreement, claiming that the District Court had failed to determine the value of the assets covered by the agreement. The District Court denied the petition, and the wife appealed to the Supreme Court. The Supreme Court affirmed, concluding that the wife had entered into the agreement with full knowledge of the relevant facts, that she had endorsed the agreement to the District Court, and that the District Court did not have an independent duty to determine the value of the assets under these circumstances. In re Marriage of Tanascu, 2014 MT 293, 377 Mont. 1, 338 P.3d 47, distinguished by In re Marriage of Simpson, 2018 MT 281, 393 Mont. 340, 430 P.3d 999, based on the fact that the parties' estimated net worth at the time of divorce was grossly exaggerated and most assets were completely lost with the 2008 economic decline.

Business Expense Account Not Exempt From Execution: The husband maintained an account for business expenses that were not personal income. The District Court exempted that account from execution for a property settlement that survived the husband's bankruptcy. The Supreme Court reversed. The funds that passed through the account were neither tools of the trade nor a percentage of the husband's disposable earnings, and the District Court did not have authority to exempt an account that was not addressed or exempted from execution by statute. Further, the exemption was a retroactive modification of the property settlement that violated this section and improperly restricted the wife's ability to levy execution. In re Marriage of Winters, 2004 MT 82, 320 M 459, 87 P3d 1005 (2004).

Collateral Estoppel Applied to Preclude Reopening Settlement Agreement Regarding Disposition of Jointly Owned Marital Property — Property Interest Not Altered by Filing of Partition Action: When the husband and wife separated, they entered a property settlement agreement dividing all their real and personal property, agreeing that they would continue to jointly own their residence, with the right of survivorship. In the decree of dissolution, the District Court affirmed that the property settlement agreement was fair and equitable. Several years after the divorce, seeking to wrap up financial affairs with her former husband, the wife moved to partition the residence and obtain an equal division of the value of the property. At trial, the husband argued that the property settlement agreement was unfair and that the wife should be denied any recovery for her interest in the residence because it was purchased prior to the marriage and because she did not contribute to the marriage financially. The wife moved in limine to preclude the husband from reopening matters that should have been raised in the divorce proceedings. The court denied her motion, reasoning that the property was not divided in the divorce and that because the partition action was an action at equity, surrounding circumstances could be considered. The court found that the filing of the partition action severed the joint tenancy, and the husband was then allowed to introduce evidence regarding the marital equities. The court ultimately concluded that the wife's interest in the residence was not compensable because she had not contributed significantly to the acquisition or improvement of the property or contributed to the parties' assets during the marriage. The wife appealed. The Supreme Court found that res judicata and equitable estoppel barred relitigation of the fairness of the joint ownership issue, which was considered and approved in the decree of dissolution. Further, the mere filing of the partition action does not sever one's interest in property. Rather, the parties' respective interests remain intact until the judgment severing the tenancy is entered. The rebuttable presumption that underlies a joint tenancy in property is equal shares, and there was nothing in the evidence to rebut that presumption and no evidence of postdecree events that would justify a different result. The husband failed to carry the burden of rebutting the presumption of equal shares, and the Supreme Court remanded for a 50-50 partition of the value of the residence. Rausch v. Hogan, 2001 MT 123, 305 M 382, 28 P3d 460 (2001).

Spouse Responsible for Bankruptcy Credit Card Obligations Pursuant to Dissolution Decree: As part of the dissolution decree, the wife was ordered to return a quarterhorse and horse trailer to the husband. However, she sold both horse and trailer and used the proceeds for her own purposes, then declared bankruptcy. The District Court offset the husband's obligation to pay credit cards debts that resulted from discharge of the debts in the bankruptcy proceedings because the husband was then held solely responsible by the credit card companies for the debts that the wife had been ordered to pay under the dissolution decree. State District Courts have concurrent jurisdiction with federal bankruptcy courts in determining the dischargeability of debts, and the District Court thus had jurisdiction to determine that the wife was responsible for the credit card obligation. This determination conformed to federal bankruptcy law and was within the District Court's broad discretion to equitably apportion marital property. Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000). See also State ex rel. Rough v. District Court, 218 M 499, 710 P2d 47, 42 St. Rep. 1773 (1985).

No Abuse of Discretion Found in Refusal to Amend Award of Personal Property — Findings and Conclusions, Decree, and Minute Order Held Consistent — Award Based Upon Stipulation of Current Cash Value of IRA Accounts Upheld: Soon after a decree was issued dissolving her marriage, Janet moved, pursuant to former Rule 59(g), M.R.Civ.P. (now superseded), to amend the judgment because it concerned the distribution of the parties' personal property. Janet claimed that the District Court should have awarded her the personal property listed on Exhibit "A" to her proposed findings of fact and conclusions of law. The District Court denied her motion. Janet argued before the Supreme Court that the decree of dissolution did not conform to the District Court's findings of fact and conclusions of law in that the District Court intended to award her the property listed on Exhibit "A" to her proposed findings and conclusions but that the property awarded was taken from a different exhibit and paragraph of her amended proposed findings and conclusions. The Supreme Court held that the District Court's distribution of the parties' property was clear and definite. The Supreme Court noted that the District Court had made a minute entry 10 days before Janet filed her motion to amend and that the minute order stated that certain items from Janet's Exhibit "A" were to be returned to her. The Supreme Court concluded that by using this language in the minute order, the District Court intended that certain items of Janet's property listed in her exhibit were to be returned to her and that the remainder was to remain with her ex-husband. In all material respects, the Supreme Court said, the findings and conclusions, decree, and minute order all conform with one another, and therefore, the District Court did not abuse its discretion in denying the motion to amend. The Supreme Court also upheld the District Court's division of the parties' two IRA accounts, noting that the parties arrived at the value by adding the two together for a total of $64,445 and then subtracting 30% for taxes and a 10% penalty, leaving a net redemption value of $38,666, and then dividing that remainder in half. The District Court gave Janet's ex-husband the option of transferring ownership of one-half of the IRAs to Janet or paying Janet $19,333, one-half the net value of those accounts. The Supreme Court held that because Janet had stipulated to the present cash value of the IRAs, if her ex-husband chose to pay her one-half the current cash value of the accounts, she is receiving an equitable distribution. In re Marriage of Dorsey, 284 M 392, 945 P2d 430, 54 St. Rep. 934 (1997).

Fraud as Grounds for Relief From Property Disposition:

Upon the divorce of John and Andrea, John agreed to pay certain jointly held debts, and the District Court entered the agreement into its decree. Later, after John filed a Chapter 11 bankruptcy proceeding, Andrea obtained a modification of the original decree on the basis that John's representations of payment constituted extrinsic fraud. The modification was obtained by a motion made long after the expiration of the 60-day deadline provided in former Rule 60(b), M.R.Civ.P. (now superseded). The Supreme Court reversed the District Court, holding that the representations made by John did not come within the scope of the residual clause of the rule because those representations did not constitute a fraud upon the court or serve as the basis for an independent action for extrinsic fraud. Thus, the Supreme Court held that the motion for relief was untimely made and improperly granted. In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995).

Under subsection (1)(b)(ii), the District Court has jurisdiction to determine whether fraud has been committed upon the court and, if it has, may grant relief in accordance with former Rule 60(b), M.R.Civ.P. The power of the court to set aside a judgment on the basis of fraud is inherent and independent of statute, and the 60-day time limitation in former Rule 60(b), M.R.Civ.P., does not apply. However, after 60 days the issue cannot be raised by motion but must be raised in an independent action for relief. In this case, the court found that the failure of the wife to disclose her recently secured employment was properly held by the District Court not to be fraud since it was not an intentional concealment or misrepresentation and since the judgment was based on an agreement between the parties. Hopper v. Hopper, 183 M 543, 601 P2d 29 (1979).

Fraud upon the court is a species of extrinsic fraud that will afford equitable relief. Fraud upon the court and upon one of the parties to the property settlement agreement is within the scope of 40-4-208, justifying a reopening of the provisions of a divorce decree as to property disposition. Pilati v. Pilati, 181 M 182, 592 P2d 1374 (1979), followed in Best v. Best, 202 M 109, 656 P2d 201, 39 St. Rep. 2362 (1982). Pilati was overruled in part in In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995).

Settlement Agreement From Parties' First Divorce Not to Be Set Aside Sua Sponte by Trial Court: The parties entered into a property settlement agreement that was incorporated into their divorce decree in 1989. Seven months later, they remarried; their marriage was again dissolved in 1993. The lower court found that the parties had not performed or complied with the terms of the prior decree and that they were estopped from asserting any rights under the previous agreement. The Supreme Court held that the lower court had no jurisdiction to declare the agreement null and void because neither party had requested that the agreement be set aside and there had been no finding that the agreement was unconscionable. In re Marriage of Nordberg, 265 M 352, 877 P2d 987, 51 St. Rep. 531 (1994).

Fraud Between Parties Not Fraud Upon Court: More than 2 years after the dissolution order, Wise brought a motion to set aside the property settlement agreement drawn up by her attorney, contending that her husband had committed fraud against her and the court in that he told her that his work pension was not a marital asset. The statute of limitations had run for appealing the order on the basis of fraud between the parties, but the lower court found that the husband's statements to his wife constituted an extrinsic fraud upon the court. The Supreme Court held that fraud upon the court includes only the most egregious conduct and that generally fraud between the parties does not rise to that level, particularly in the present case when Wise's attorney drew up the property settlement agreement. Wise v. Nirider, 261 M 310, 862 P2d 1128, 50 St. Rep. 1334 (1993), followed in In re Marriage of Hopper, 1999 MT 310, 297 M 225, 991 P2d 960, 56 St. Rep. 1247 (1999).

Stipulated Modification Limitation — Events Following Dissolution Not Justification for Reopening Judgment: The parties signed a property settlement agreement that included a modification limitation authorized under 40-4-201 and that required the agreement of both parties for modification. Wife contended that several events substantially altered the valuation of the marital estate, making it necessary to reopen the agreement, including: (1) the forgiveness of a substantial debt owed to husband's parents, knowledge of which was allegedly withheld from wife during settlement negotiations; (2) gifts of stock interests made to husband by his parents after dissolution; (3) the diagnosis of cancer in wife's father and his pending divorce, which precluded his financial help to her; and (4) action by her former attorney for unpaid fees. The District Court did not find any of the changed circumstances to be substantial and continuing so as to make the terms of the agreement unconscionable, nor did the Supreme Court, which noted that the parties freely stipulated to the modification limitation and that although the changed conditions resulted in a predictably better financial condition for the husband, he could not be held responsible for the events. After-acquired property did not become part of the marital estate, and there was no evidence of fraud perpetrated by husband to deny wife her rightful share of the estate. In re Marriage of Hamilton, 254 M 31, 835 P2d 702, 49 St. Rep. 604 (1992), distinguishing In re Marriage of Madden, 211 M 237, 683 P2d 493 (1984), and In re Marriage of Dalley, 232 M 235, 756 P2d 1131 (1988).

Standard of Review in Division of Marital Property: The standard of review in regard to the factual findings of the District Court relating to the division of marital property, as set out in In re Marriage of Sacry, 253 M 378, 833 P2d 1035, 49 St. Rep. 452 (1992), is whether the findings are clearly erroneous. The Supreme Court is not bound by the District Court's conclusions and is free to reach its own conclusions. The basis for simply determining whether the lower court's conclusions are correct is that there is no discretion in determining a question of law; the lower court either correctly or incorrectly applies the law. However, discretionary judgments made by the trial court are presumed to be correct and will not be disturbed absent an abuse of discretion by the trial court. In re Marriage of Danelson, 253 M 310, 833 P2d 215, 49 St. Rep. 597 (1992), followed in In re Marriage of Hamilton, 254 M 31, 835 P2d 702, 49 St. Rep. 604 (1992), In re Marriage of Johnston & Turrin, 255 M 421, 843 P2d 760, 49 St. Rep. 1047 (1992), in In re Marriage of Newton, 255 M 463, 844 P2d 47, 49 St. Rep. 1068 (1992), In re Marriage of Foreman, 1999 MT 89, 294 M 181, 979 P2d 193, 56 St. Rep. 373 (1999), and In re Marriage of Hanni, 2000 MT 59, 299 M 20, 997 P2d 760, 57 St. Rep. 279 (2000).

Reopening of Dissolution Decree Without Finding of Unconscionability — Reversible Error: A dissolution decree found that although husband's military pension was not included in a separation agreement, it was included in the general terminology of the agreement. The District Court applied former Rule 60(b)(6), M.R.Civ.P. (now superseded), in granting wife's motion for reconsideration because wife had been advised by counsel that she had a vested interest in the pension and that mention of the pension was therefore not required. The District Court found that the lack of mention of the pension was intentional and did not constitute a waiver or relinquishment of the pension by wife. After reopening the decree, the court granted wife 50% of the pension and made further modifications in property disposition. On appeal, the Supreme Court applied 40-4-201(3), which governs separation agreements, in stating that the standard that justifies reopening the judgment is unconscionability. As in Patzer v. Patzer, 243 M 34, 792 P2d 1101 (1990), absent facts or allegations by wife that the agreement was unconscionable, reopening the decree constituted reversible error. In re Marriage of Laskey, 252 M 369, 829 P2d 935, 49 St. Rep. 322 (1992).

Property Settlement Agreement Not Mentioning Military Pension: Ten years after a dissolution, the wife moved to modify the parties' separation agreement on the basis that it had not referred to the husband's military pension, thus making the pension an undivided asset. The wife argued that the dissolution was prior to McCarty v. McCarty, 453 US 210 (1981), and therefore the pension came under the Uniformed Services Former Spouses' Protection Act (USFSPA), which would allow the pension to be divided as an asset not before the court at the time of the original decree. The Supreme Court ruled that although the parties' settlement agreement had been executed prior to McCarty and the USFSPA, the pension was a marital asset at that time. The court went on to hold that the property settlement did not have to itemize every asset and that the military pension was the property of the husband under the language of the settlement. Patzer v. Patzer, 243 M 34, 792 P2d 1101, 47 St. Rep. 1071 (1990).

Factors Necessary to Show Extrinsic Fraud in Property Disposition: Wife contended that husband's failure to fully inform her of family assets, his misrepresentations concerning certain debts and property, and his forging of her name on the couple's joint income tax return were sufficient factors to demonstrate extrinsic fraud. However, in order to demonstrate extrinsic fraud, it must be shown that there was a material misrepresentation or concealment of assets that prevented a party from fully trying the case and that other equities, such as laches or negligence, were not present. In re Marriage of Lyman, 233 M 283, 762 P2d 203, 45 St. Rep. 1491 (1988), overruled in part in In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995).

Question of Full Disclosure in Property Settlement Agreement — Fraud and Misrepresentation Not Found: Wife appealed the lower court denial of her motion to set aside a property settlement agreement, contending that the court approved the settlement without knowing of certain assets which formed part of the marital estate. However, she overlooked the fact that even after the court became aware of the disputed items, it still found nothing on the face of the agreement which made it unconscionable. Ample evidence indicated that there was no fraud or misrepresentation. Denial of the motion to set aside was affirmed. In re Marriage of Gerleman, 228 M 158, 741 P2d 426, 44 St. Rep. 1421 (1987).

Military Pension Considered Marital Asset — Retroactive Modification of Decree Allowed: Six years after husband retired from the Air Force and began receiving a military pension, the husband and wife dissolved the marriage. At the time, Montana treated military pensions as a marital asset. Before entry of the final decree, however, the U.S. Supreme Court in McCarty ruled that federal law precluded state courts from dividing military pensions. As a result, the District Court ruled that the husband's pension was not a marital asset and awarded the wife $300 a month in maintenance. Passage of the Uniformed Services Former Spouses' Protection Act (USFSPA) allowed state courts to once again consider military pensions when making property distribution. Subsequently, the wife filed a petition under former Rule 60(b)(5), M.R.Civ.P. (now superseded), to modify the dissolution decree, contending that the USFSPA should be applied retroactively to allow her a share of the husband's pension. The District Court denied the husband's motion to dismiss, entering a judgment awarding the wife one-half of the pension. On appeal, the Supreme Court affirmed the judgment, ruling that the USFSPA should be applied retroactively to modify dissolution decrees that were final after McCarty but before the USFSPA effective date. In re Marriage of Waters, 223 M 183, 724 P2d 726, 43 St. Rep. 1642 (1986). See also In re Marriage of Blair, 271 M 196, 894 P2d 958, 52 St. Rep. 401 (1995) (special separation payments received by military member are subject to division as marital property).

Unclear Language in Decree — Modification: Trial court refused wife's request to enforce property settlement decree. The problem was that the original decree failed to place specific burdens on either party within reasonable time limits. The Supreme Court remanded the case, stating that the decree must be modified but that the trial court should make such provisions as may be needed. In re Marriage of Hereford, 223 M 31, 723 P2d 960, 43 St. Rep. 1508 (1986), followed in In re Marriage of Scott, 246 M 10, 803 P2d 620, 47 St. Rep. 2237 (1990).

Action to Reopen and Modify Dissolution Decree After Sixty Days — Not Timely: The husband and wife were married in 1945. In 1975, the wife vanished and her whereabouts is unknown. In 1976, the husband filed for dissolution. The wife was served by publication. The court entered its decree but made no order with respect to distribution of property. In 1983, the husband started a quiet title action to jointly held property. Three months later, the daughter commenced an action in which her mother was determined to be presumed dead. The daughter was named personal representative of the mother's estate. As personal representative, the daughter filed a motion in the dissolution action to reopen and modify the decree regarding property disposition. The District Court refused to reopen the decree. On appeal, the Supreme Court pointed out that 40-1-105 makes the Rules of Civil Procedure applicable to all proceedings relating to marital dissolutions. This section provides that the provisions of the decree relating to property disposition may not be revoked or modified by the court unless it finds conditions justifying the reopening of a judgment. The court held that even if the District Court failed in its mandatory duty to equitably apportion the property, the decree was final, and that under former Rule 60(b), M.R.Civ.P. (now superseded), the motion to reopen had to be brought within 60 days. Once the judgment was final, it was too late to raise issues of misrepresentation that could have been contested in the cause prior to entry of judgment. In re Marriage of Woolsey, 214 M 106, 692 P2d 451, 41 St. Rep. 2349 (1984).

No Basis to Reopen Dissolution Decree: The appellant did not claim the existence of unconscionability, fraud, or any other inequitable situation that would give a court a legal basis upon which to reopen a dissolution decree. She attempted to enhance enforcement of the judgment that incorporated the parties' stipulations as to the property division by making a motion to modify. She was precluded by statutory time limits and by the fact that she had no legal basis to compel a court to reopen the judgment. Since no conditions existed that would justify reopening the judgment, the District Court was not required to enter findings of fact. Keirle v. Keirle, 210 M 214, 681 P2d 703, 41 St. Rep. 1016 (1984).

Order Conditionally Setting Aside Prior Decree Found to Be Abuse of Discretion: Where the District Court entered a decree in 1981 finding the property settlement agreement of the parties not unconscionable within the meaning of 40-4-201(2) and in 1983 issued an order stating that the property settlement agreement would be set aside if not complied with by the husband by a specific date, the Supreme Court found that the District Court erred in making the 1983 order. The 1981 decree and property settlement could, under the rationale of Hadford v. Hadford, 194 M 518, 633 P2d 1181, 38 St. Rep. 1308 (1981), be modified only if the conditions specified in former Rule 60(b), M.R.Civ.P. (now superseded), were found to exist. Because the court issued no findings of fact indicating conditions that justified the reopening of the 1981 decree, the court abused its discretion in making the 1983 order. Lorge v. Lorge, 207 M 423, 675 P2d 115, 41 St. Rep. 50 (1984).

Property Disposition Not Modified by Oral Agreement of Parties: Where the parties to a divorce action entered into a property settlement agreement, later incorporated into a dissolution decree, which provided that a final $7,500 payment was due within 6 months of the final divorce decree and the defendant did not make the payment, the District Court erred in finding an oral modification of the settlement by the parties. The requirements contained in 40-4-208 for modification of property settlement provisions were not met either by the District Court or by the parties. The finding by the District Court was a clear abuse of discretion. Gibson v. Gibson, 206 M 460, 671 P2d 629, 40 St. Rep. 1780 (1983).

Agreement Basing Payments on Taxable Income of Payor Unconscionable: Four years after entry of a decree of dissolution of marriage, wife moved the District Court to hold husband in contempt for failure to comply with the property settlement agreement that had been incorporated in the dissolution decree and to increase monthly maintenance payments. The agreement provided that husband pay wife $750 a month or 13% of his annual income. The amount of the monthly payment was to be adjusted annually, based on husband's taxable income for the previous calendar year. The District Court refused to hold husband in contempt and denied wife's modification motion, holding that the evidence presented did not indicate that circumstances had changed so much as to render the agreement unconscionable within the meaning of this section. The District Court interpreted the words "taxable income" to mean taxable income within the meaning of the Internal Revenue Code, except that husband would not be permitted to subtract the amount of his maintenance payments in calculating his taxable income. This interpretation ensured that wife would receive larger payments in the future. The Supreme Court affirmed the District Court on the contempt issue but reversed on the maintenance issue, ruling that the agreement was unconscionable as a matter of law because husband could adjust his deductible expenses in such a way as to reduce the total amount of his taxable income and ultimately the amount of wife's monthly maintenance payments. In re Marriage of Rowen, 199 M 315, 649 P2d 1259, 39 St. Rep. 1423 (1982).

Negotiated Agreement — Not Required to Be Reopened by Later Court Decision: At the time of their divorce, the parties entered a property agreement which was approved by the court and entered into the decree of dissolution. Appellant failed to perform as agreed, and respondent filed a petition seeking to have him held in contempt and requiring him to perform under the agreement. The District Court ordered appellant to perform the agreement. Appellant contends the court erred in refusing to set aside the property settlement agreement on the basis of McCarty v. McCarty, 453 US 210, 69 L Ed 2d 589, 101 S Ct 2728 (1981), excluding military pensions from marital estates. Appellant contends he entered the agreement in exchange for respondent relinquishing her claim to his military retirement, and the agreement was therefore unfair. The Supreme Court distinguished McCarty, saying appellant chose to settle the property distribution by contractual relations with respondent. He was not coerced into the agreement by the District Court, so there was no basis to overrule the District Court. In re Marriage of Grace, 198 M 97, 643 P2d 1188, 39 St. Rep. 791 (1982).

Challenge of Decree and Property Settlement After Six Years — Res Judicata: A property settlement and decree entered in 1974 cannot be set aside in 1980 on the grounds of unconscionability. The failure of the spouse to appeal the court's decree in 1974 has rendered the issue res judicata. Hadford v. Hadford, 194 M 518, 633 P2d 1181, 38 St. Rep. 1308 (1981).

Award of FELA Settlement Funds Prohibited After Completion of Property Settlement: Where, following appeal and remand of the District Court's maintenance award to the plaintiff in a divorce action, the District Court awarded the plaintiff a one-quarter interest in Federal Employers' Liability Act (FELA) settlement funds received by the defendant, the District Court had no jurisdiction to make the award of FELA funds, in addition to maintenance, as to do so would be to amend its property settlement order. The plaintiff had not petitioned the court to reopen the property settlement, nor did the District Court make any findings of changed conditions requiring relief from judgment. The prior opinion of the Supreme Court dealt only with the maintenance award and cannot serve as a separate basis to reopen the property settlement award. Heintzelman v. Heintzelman, 193 M 183, 631 P2d 290, 38 St. Rep. 1074 (1981).

Review of Substantial Credible Evidence — Property Settlement — Accounting: The husband brought an action to enforce the property settlement. The wife sought modification. The property settlement provided that the wife was to provide an accounting for all sums paid. The trial judge found that the wife had made an adequate accounting. The wife testified that she made what she thought was an adequate accounting, and the husband testified that the accounting he received was not sufficient. On appeal, the Supreme Court said that it will not substitute its judgment for that of the trier of fact but rather will only consider whether substantial credible evidence supports the finding and conclusions. Those findings will not be overturned by the court unless there is a clear preponderance of the evidence against them. The court will view the evidence in a light most favorable to the prevailing party, recognizing that substantial evidence may be weak or conflicting with other evidence, yet still support the findings. The findings are affirmed since there is not a clear preponderance of evidence against the findings. Phennicie v. Phennicie, 185 M 120, 604 P2d 787 (1979).

Second Appeal — "Law of the Case" Rule Applied: When the Supreme Court states a principle or rule of law necessary to the decision of a case, such pronouncement becomes the "law of the case" and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal. Here, a previous case involving the same parties established the "law of the case" for this appeal. The former husband was estopped, in the previous case, from challenging monthly payments to the former wife, having successfully availed himself of the benefits of the property settlement provisions of the marriage dissolution decree (the monthly payments having been held to be a part of the property settlement). Therefore, the denial of the former husband's second petition to terminate the payments is affirmed on the "law of the case" of his first petition. Englund v. Englund, 184 M 488, 603 P2d 1048, 36 St. Rep. 2211 (1979).

Distribution of Marital Property: For a proper distribution of marital property the trial court in this case must consider at least these two factors: (1) the net worth of the parties at the time of divorce; and (2) the effect on control of a family corporation upon transfer of any shares of corporation stock during a property distribution. Grenfell v. Grenfell, 182 M 229, 596 P2d 205 (1979).

Reduction in Value of Stock: If shares of stock in the company controlled by the husband become worthless or reduced in value or incapable of being sold for reasons beyond the control of the wife and within the control of the husband or the company, the District Court would be empowered by this section to reopen the judgment and modify the property disposition. In re Marriage of Jorgensen, 180 M 294, 590 P2d 606 (1979).

Monthly Payments of Property Settlement Agreement Not "Alimony" Payments Subject to Modification: Trial court erred in setting aside "alimony" of property settlement agreement incorporated in divorce decree where wife agreed to assume $10,000 of husband's liability and release her interest in all jointly held property in return for receipt of 51% of jointly held corporation and payment of $750 per month for 9 years, which payments were to continue regardless if wife remarried or if husband died before full payment was made, as monthly payments were not "alimony" but were a part of property settlement agreement which could not be modified or severed from the divorce decree without destroying the contract. Washington v. Washington, 162 M 349, 512 P2d 1300 (1973), followed in Shultz v. Shultz, 205 M 212, 666 P2d 1242, 40 St. Rep. 1223 (1983), and King v. King, 276 M 500, 917 P2d 434, 53 St. Rep. 489 (1996). See also In re Marriage of Richardson, 214 M 353, 693 P2d 524, 42 St. Rep. 16 (1985)

Equitable Powers of District Court to Adjust Property Interests in Divorce Action: It was proper for divorce court, pursuant to former Rules 18(a) and 54(c), M.R.Civ.P. (now superseded), to divest wife of her interest in joint tenancy property and provide for payment of alimony in lieu thereof. Libra v. Libra, 157 M 252, 484 P2d 748, (1971), overruling Emery v. Emery, 122 M 201, 200 P2d 251 (1948), and affirming rule of Johnson v. Johnson, 137 M 11, 349 P2d 310 (1960).

MISCELLANEOUS

Abuse of Discretion in Reopening and Amending Final Dissolution Decree Absent Evidence of Fraud or Newly Discovered Evidence: Following judgment in a dissolution proceeding, the husband moved to reopen the case on grounds that the wife's testimony constituted fraud and that the husband had newly discovered evidence that was not available at trial. The District Court reopened the case and held that the husband was not responsible for the wife's dental bills, even though the husband had agreed to pay them. The wife appealed. The record showed that the wife used the present tense in answering a question regarding whether she was providing medical coverage for the husband, even though she had terminated coverage on the husband over a year before. However, the deficient question and answer did not rise to the level of fraud because the husband: (1) knew that coverage had been discontinued and failed to object to the inaccurate answer; (2) was not misled by the response; and (3) was not deprived of the opportunity to rebut the testimony or to present his case. Further, he admitted at a postdissolution hearing that he had no new evidence. Thus, the conditions were not sufficient to justify the reopening of the judgment, and the District Court committed reversible error in reopening and amending the final decree. The Supreme Court remanded with instructions to reinstate the final decree. In re Marriage of Weber, 2004 MT 211, 322 M 341, 96 P3d 716 (2004).

Standard of Review of Family Law Contempt Decisions: Because contempt is intended as a discretionary power necessary to enforce the dignity and authority of the court, in a family law matter, the Supreme Court will review the findings and decision not to hold a party in contempt for a blatant abuse of discretion. In the present case, the husband was essentially in compliance with previous orders regarding payment of child support, so the District Court's dismissal of contempt charges was not a blatant abuse of discretion. In re Marriage of Winters, 2004 MT 82, 320 M 459, 87 P3d 1005 (2004), following In re Marriage of Baer, 1998 MT 29, 287 M 322, 954 P2d 1125 (1998).

Parent-Child Relationship Thwarted — Equitable Estoppel Precluding Payment of Child Support: When Stiles and his wife separated, he was given responsibility for the care of his newborn son. Because Stiles was in the military at the time, he asked his sister, Cynthia, if she would care for the child for a short time while he fulfilled his duties in the Navy. Cynthia agreed, but immediately sought legal custody of the child, and physical custody of the child was ultimately granted to her by a California court. She often did not comply with court orders resulting from her custody efforts, including orders to allow Stiles visitation with the child. Stiles initially offered to pay for the child's care, but Cynthia refused any money, saying it was not needed. Nevertheless, Stiles did provide ongoing health insurance for the child. Over a decade later, Cynthia applied for and was granted public assistance, assigning any right to child support to the state. The Child Support Enforcement Division established Stiles's support obligation at $511 a month. Stiles asked Cynthia to sign a waiver of this obligation, but she refused. Stiles petitioned for judicial review, and the District Court remanded to an administrative law judge to make findings regarding Stiles's claim that Cynthia had waived her right to receive child support or that she was equitably estopped from asserting or assigning those rights. The administrative law judge found that the requisite elements of waiver and estoppel were present, and the District Court upheld the findings, holding that because Cynthia had no right to child support, she could not convey to the state rights greater than those to which she was entitled. The state appealed, asserting that the court erred when it held that estoppel and waiver applied to relieve Stiles of the obligation to provide support. The Supreme Court concluded that all six elements of equitable estoppel were met and that Cynthia had no right to receive child support from Stiles either retroactively or prospectively. Cynthia waived her right to support through her language and conduct. Nothing in the record indicated that the child's needs were not being met, and the court declined to order additional support. Although a parent is still responsible for support even in cases of voluntary relinquishment of parental rights, Stiles's relinquishment was involuntary. The court declined to hold Stiles to normal parental responsibilities under these unique circumstances, given that the child's best interests were being served, Stiles provided health insurance for the child at all times, and Stiles was thwarted by Cynthia in his attempts to have a parent-child relationship and was not attempting to exploit narrow legal technicalities to avoid undisputed court-ordered support obligations awarded at the time of dissolution. Stiles v. Dept. of Public Health and Human Services, 2000 MT 257, 301 M 482, 10 P3d 819, 57 St. Rep. 1054 (2000), distinguishing Fitzgerald v. Fitzgerald, 190 M 66, 618 P2d 867 (1980), In re Marriage of Neiss, 228 M 479, 743 P2d 1022 (1987), and In re Support of Krug, 231 M 78, 751 P2d 171 (1988).

Construction of Settlement Agreement Provision for Payment of Attorney Fees — Refusal to Allow Fees Upheld: When Kitty and Bernard divorced in 1983, they entered into a property settlement agreement that provided that neither would make child support payments to the other, although the three children of the parties were to live with Bernard. The agreement also provided that "Bernard agrees to pay [Kitty] all attorney's fees and costs incurred in modifying the Decree of Dissolution or the [settlement] agreement in the event there is a change of custody and a support amount required". In 1987, the parties' oldest daughter went to live with Kitty, and in 1990, Bernard moved the District Court to modify the divorce decree and determine the the child support obligations of both parties. Kitty filed a cross-motion. The Supreme Court held that the District Court made no error when it refused to grant Kitty her attorney fees. The Supreme Court noted that only the change in custody occurred when the oldest daughter moved, that Kitty incurred fees only when she elected to file a cross-motion. The Supreme Court also pointed out that the parties were of approximately equal earning capacity. In re Marriage of Widhalm/Miller, 279 M 97, 926 P2d 748, 53 St. Rep. 1067 (1996).

Lack of Hearing Record on Support Modification — Vacation of District Court Decree Required: Pamela filed a motion to amend the decree dissolving her marriage, in order to increase child support payments, and a motion to hold her ex-husband, Earl, in contempt for failure to pay child support. The District Court held a hearing, which Earl did not attend. Based upon the hearing, of which no record was made, the District Court modified the decree by increasing Earl's child support payments. Earl was also ordered to pay Pamela's attorney fees and costs. In response, Earl filed a motion under former Rule 60, M.R.Civ.P. (now superseded), for relief from the judgment, but that motion was denied when the District Court failed to rule. Citing Malley v. Malley, 190 M 141, 619 P2d 531 (1980), the Supreme Court held that without a record, the Supreme Court could not determine the change in circumstances justifying the amended decree and Earl was thereby denied effective appellate review. The District Court's order was vacated, and the case was remanded for a hearing on the merits of Pamela's motion. In re Marriage of Long, 268 M 187, 885 P2d 533, 51 St. Rep. 1252 (1994).

No Jurisdiction for Retroactive Modification of Order Providing Insurance for Children — Duplicative Insurance for Children Not Reimbursable: Parties stipulated that mother would continue to provide health insurance for the children until relieved of the obligation by final decree. About 4 months before the decree, father unilaterally purchased insurance, notifying mother but not the court. Mother sought reimbursement for the months of dual coverage, but father failed to pay. In an order on a separate motion, the trial court denied reimbursement, stating that mother should have suspended her policy upon learning that father had obtained insurance. The Supreme Court held that the lower court had no jurisdiction to retroactively modify its own order providing support for the children and that the modification constituted an abuse of discretion by requiring mother to act in opposition to its own order. The case was remanded for issuance of an order requiring reimbursement to mother for the money she paid for premiums following father's unilateral action of providing insurance prior to entry of the final order. (See 1995 amendment.) In re Marriage of Neal, 267 M 455, 884 P2d 789, 51 St. Rep. 1109 (1994).

Award of Attorney Fees Based Upon Property Settlement Agreement Upheld: Debra and Kenneth were divorced, settling their differences in support, maintenance, and property division by signing an agreement addressing all issues. The agreement also provided that if one of the parties had to pay a debt of the other, the paying party could recoup the payment with interest and fees. Later, Debra sought reimbursement for debts that belonged to Kenneth but that were not disclosed at the time of the divorce. The Supreme Court held that attorney fees were properly payable under the language of the agreement. The fact that there was no clear winner in the proceedings and that there was no showing by Debra that she was without resources to pay her own fees was irrelevant because the award of fees was pursuant to the agreement and not pursuant to statute. In re Marriage of Craib & Rhodes, 266 M 483, 880 P2d 1379, 51 St. Rep. 937 (1994).

Failure to Disclose Income Tax Debt in Violation of Property Settlement Agreement — Liability for Tax Debt by Nondisclosing Party Upheld: Kenneth and Debra were divorced and settled disputes over child support, maintenance, and property division by an agreement that contained language providing that each had disclosed each other's debts and that if either later became obligated for a debt of the other, the other spouse could recover the amount paid, with interest and attorney fees. After the divorce, Debra discovered that Kenneth had not paid state and federal income taxes for 3 years during their marriage and that, as a signer of a joint return, Debra was required to pay both tax debts. The Supreme Court held that there was no error in requiring Kenneth to reimburse Debra for 100% of the parties' tax liability because (1) Debra's employer withheld sufficient amounts to pay her liability; (2) Kenneth had not disclosed the debt, thus violating the parties' agreement; and (3) had Debra known that the taxes were not to be paid, she could have filed a separate return. In re Marriage of Craib & Rhodes, 266 M 483, 880 P2d 1379, 51 St. Rep. 937 (1994).

Refusal to Offset Medical Expense Arrearages by Amount of Donated Funds Upheld: Dale and Sandy were divorced in 1986. In January 1991, the District Court issued an order modifying the original decree to make Dale responsible for part of his daughter's medical costs. In March of 1991, a snowmobile club in Lincoln, Montana, held a fundraiser and donated $5,000 to Sandy, to be used for the daughter's medical expenses. However, the money was not used for the daughter's expenses. Dale argued that the amount given to Sandy should be offset against his obligation to pay medical expenses. The Supreme Court held that Dale had an independent obligation under the January order to pay medical expenses and that if he wanted that obligation modified subsequent to the fundraiser, he should have petitioned the District Court for a modification. Because he failed to petition for a modification, the Supreme Court held that the District Court did not abuse its discretion in refusing to reduce Dale's medical arrearages by the $5,000 given to Sandy. (See 1995 amendment.) In re Marriage of Malquist, 266 M 447, 880 P2d 1357, 51 St. Rep. 914 (1994).

Modification Proper Despite Wife's Limited Capacity: After the parties' divorce, the husband, Arthur, was given an opportunity to retire early from the railroad. He contacted his ex-wife, Shirley, and the parties modified the divorce settlement to allow him to take early retirement. At the hearing to modify the decree, Shirley's attorney argued that the modification was inequitable and that Shirley had been diagnosed with a schizoaffective disorder so that she was unable to give an informed consent to the modification. The Supreme Court held that the evidence indicated that Shirley was better off under the new agreement and that the evidence also showed that the modification negotiations between the parties were amiable and that Shirley had consulted with her adult children and parents prior to signing the agreement. In re Marriage of Brownell, 263 M 78, 865 P2d 307, 50 St. Rep. 1714 (1993).

No Error in Clarification of Visitation Rights Without Advance Notice: At a hearing to determine proper levels of child support, the District Court granted father's oral motion to modify certain aspects of the visitation schedule to change his visitation day from Monday to Thursday, to clarify summer visitation, and to allow additional visits when his relatives visited from out of town. Mother claimed the modification was in error because she was not provided advance notice as required by this section. The Supreme Court noted that mother's counsel was able to discuss these matters at the hearing and raise mother's concerns. No prejudice resulted from the lack of notice because the modification was only a clarification of visitation resulting from some confusion over the previous schedule and was considered in the best interest of the child. In re Marriage of Wackler, 258 M 12, 850 P2d 963, 50 St. Rep. 406 (1993), followed in In re Marriage of Hunt, 264 M 159, 870 P2d 720, 51 St. Rep. 209 (1994).

No Equitable Modification of Child Support Decree Upon Agreement of Parties: Wife and husband were divorced after several years of marriage, and the District Court awarded custody of the couple's two children to the wife, with visitation awarded to the husband. The wife remarried a year later and shortly thereafter moved to Nebraska. At all times, the wife kept the Missoula County Attorney's Office informed of her whereabouts and brought a URESA (replaced by UIFSA) action against her former husband for back child support. Husband made few attempts to contact his children, even though he knew where they were living. Wife's new husband later adopted the children, and wife sought back child support for those payments up until the time the children were adopted, which payments the District Court awarded. The Supreme Court distinguished the case from State ex rel. Blakeslee v. Horton, 222 M 351, 722 P2d 1148 (1986), stating that there was no implicit agreement between the parties for one parent to give up child support in exchange for the other parent giving up visitation. Wife always sought to enforce her right to child support and made no attempt to discourage her former husband from exercising his right to visitation. Husband gave up visitation on his own, but the right to visitation is legally separate and distinct from the husband's enforceable duty to provide child support pursuant to the District Court's previous decree. In re Marriage of Bronzynski, 246 M 200, 806 P2d 8, 47 St. Rep. 1853 (1990).

Failure to Allow Arguments on Inflation and Health Provisions — Reversible Error: It was reversible error to modify inflation and health provisions of an original decree without providing ample opportunity for a party to argue against the modification. In re Marriage of Forsman, 229 M 411, 747 P2d 861, 44 St. Rep. 2093 (1987).

Statutory Provisions Subject to Equitable Estoppel: The provisions of this section providing that a decree may be modified by a court as to maintenance and support only as to installments accruing subsequent to the motion for modification is subject to the doctrine of equitable estoppel upon clear and compelling evidence. Generally, the equitable principle arises when the recipient of support has expressly or impliedly consented to an arrangement other than payment of the support judgment. In applying the estoppel doctrine, the guiding principle is that while the judgment for support may be in another's name, the real beneficiaries of the judgment are the children, not the person named. In re Marriage of Cook, 223 M 293, 725 P2d 562, 43 St. Rep. 1732 (1986), followed in In re Marriage of Neiss, 228 M 479, 743 P2d 1022, 44 St. Rep. 1695 (1987), and In re Marriage of Glanville, 272 M 22, 899 P2d 527, 52 St. Rep. 563 (1995).

Equity to Override Legally Correct Claim: The parties were divorced in 1970, and the father was ordered to pay $50 a month in child support through the Clerk of Court. No payments were ever made, and no visitation was ever sought. In 1984, the mother filed a URESA (replaced by UIFSA) action for back support. In defending the action, the father contended that the mother took the position that if he would stay out of her life and the child's life, they would stay out of his. He had no contact with either party during the ensuing 14 years. The District Court denied enforcement of the petition for child support. The Supreme Court on appeal upheld the District Court. Recognizing that the law is clear that an arrearage in child support payment cannot be modified on any retroactive basis and that child support and child visitation are separate incidents, neither being dependent or conditioned upon the other, the court found these legal principles rendered impotent when the parties mutually agreed that they be ignored and carried out the agreement in fact for 14 years. The court stated that equity could not allow the mother to participate in nullification of the purpose of the law in fact and, at the same time, allow her to claim the benefit of it in theory simply because there was a meter running which could total a dollar loss in child support but nothing to total the loss of a father-son association. The court stated that the principles of equity applied in this case did not reverse or modify any previous case law. State of Wash. ex rel. Blakeslee v. Horton, 222 M 351, 722 P2d 1148, 43 St. Rep. 1321 (1986), followed in In re Marriage of Becker, 244 M 469, 798 P2d 124, 47 St. Rep. 1729 (1990), and distinguished in In re Marriage of Bronzynski, 246 M 200, 806 P2d 8, 47 St. Rep. 1853 (1990).

Consent to Retroactive Increase in Judgment — Merits of Increase Waived: Wife obtained an increase in child support and maintenance after claiming the original amounts were not correctly determined. Husband consented to retroactively apply the increase back to the date of the original decree. This consent made it unnecessary for the Supreme Court to consider the merits of the wife's request for modification. The consent indicated the original decree was not correct. In re Marriage of Wilson, 216 M 392, 701 P2d 1372, 42 St. Rep. 894 (1985).

Modification of Incorrect Money Judgment — Interest Due on Retroactively Due Increase: If a judgment is effective from the date of entry and any changes to the judgment relate back to the entry date, it follows that interest is assessed from the date of judgment. Where a child support and maintenance decree was later modified and larger payments granted, with the increase made retroactive to the date of the original decree, interest was due on that retroactive amount, beginning on the date of the original decree. In re Marriage of Wilson, 216 M 392, 701 P2d 1372, 42 St. Rep. 894 (1985).

Custody, Support Not Left to Contract Between Parties: After dissolution of his marriage, father was granted a reduction in his child support amount. On appeal, mother argued that the original agreement between the parties at the time of dissolution as to the amount of child support created a contractual obligation that precludes modification by the trial court. The Supreme Court held that in all dissolution matters relating to children, the best interests of the children control. While terms of a contract may be introduced in evidence in certain cases, the custody and support of children are not left to contract between the parties. In re Marriage of Carlson, 214 M 209, 693 P2d 496, 41 St. Rep. 2419 (1984), followed in In re Marriage of Syverson, 281 M 1, 931 P2d 691, 54 St. Rep. 32 (1997).

Failure to Disclose Assets to Court — Extrinsic Fraud: The husband retained an attorney in a dissolution proceeding. Husband convinced the wife that only one attorney was necessary, and that attorney represented both parties, with the wife being named as the petitioner. The husband and the attorney failed to disclose to the court the balloon payment due on the house given to the wife and the value of the husband's pension. This failure to disclose relevant information to the court was extrinsic fraud and was the basis upon which to reopen a judgment dividing the marital estate. In re the Marriage of Madden, 211 M 237, 683 P2d 493, 41 St. Rep. 1332 (1984), overruled in part in In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995). See also In re Marriage of Staudt, 216 M 196, 700 P2d 175, 42 St. Rep. 740 (1985).

"Unconscionable" — Interpretation: The interpretation of "unconscionable" as that word is used in this section must be on a case-by-case basis after scrutiny of the underlying facts and must begin with an objective standard, which is found in the basic purpose behind support payments and how that purpose is to be achieved. The purpose is to make reasonable provisions for the spouse and minor children during and after litigation, reflecting a balance between the needs of the parties and the ability of the parents to pay. The court must look at the relative positions of the parties and how close the present arrangement is to that balance. McNeff v. McNeff, 207 M 297, 673 P2d 473, 40 St. Rep. 2050 (1983).

Unilateral Modification — Contempt: The husband under a dissolution decree stopped making house payments as required by the decree. The wife, who had custody of the son and daughter, proved to have him held in contempt. After a hearing the court modified custody so that the father had custody of the son, but also held the father in contempt. Sixteen months later the husband stopped making payments again. At the hearing he alleged no changed circumstances, and was held in contempt again. A party may not unilaterally modify a decree. State ex rel. Voorhies v. District Court, 668 P2d 241, 40 St. Rep. 1368 (1983) (apparently not reported in Montana Reports).

Discovery of Income Sources, Amount, and Disposition: Husband petitioned for reduction of child support payments, claiming he had become unemployed and had no income. He refused to answer wife's interrogatories requesting information as to money he placed in his new wife's bank accounts and as to the names of the clients he had in his position as a management consultant and the income received from them. The information sought was neither irrelevant nor privileged. Wife was not seeking information as to the new wife's income, and there is no confidential information privilege for the management consultant-client relationship. It was error for the lower court to allow husband to refuse to answer. Hughes v. Hughes, 205 M 69, 666 P2d 739, 40 St. Rep. 1102 (1983).

Marital Separation Agreement Not Conveyance: A marital separation agreement is not a conveyance. A separation agreement incorporated into a divorce decree is enforceable only as a judgment. A judgment can be reopened if obtained through fraud but not for lack of fair consideration. It was error to annul a marital separation agreement under 31-2-311 (now repealed). Witbart v. Witbart, 204 M 446, 666 P2d 1217, 40 St. Rep. 994 (1983).

Remarriage as Substantial Change in Circumstances: As part of the parties' decree of dissolution, a provision terminating maintenance upon the wife's remarriage was included. The wife remarried, and the husband stopped maintenance payments. Subsequently the wife filed a motion to increase child support payments because of changed circumstances. The District Court increased the husband's child support payments approximately by the amount equivalent to the lost maintenance payments. The husband appealed. The Supreme Court, relying on Rome v. Rome, 190 M 495, 621 P2d 1090, 38 St. Rep. 50 (1981), held that in this particular case, the remarriage of the former spouse, which by terms of the decree terminated maintenance, was a substantial change of circumstances allowing for an increase in child support payments. In re Marriage of Richardson, 202 M 380, 658 P2d 398, 40 St. Rep. 155 (1983).

Order That Rental Property Granted Wife Be Placed Under Professional Management: Divorce decree granted wife a four-plex described as being among the most rentable properties in Missoula, wife to have the rental income for support. Wife moved for enforcement of various aspects of the decree, and husband complained that due to wife's mismanagement there were unnecessary vacancies in the apartments. Husband introduced evidence of a real estate agent that agent could manage the four-plex and keep it full for approximately a 5% commission. Trial court properly directed that the four-plex be managed by a competent real estate person and that husband pay the management fee. Baker v. Baker, 198 M 371, 646 P2d 522, 39 St. Rep. 1031 (1982).

Prohibiting Sale of Residence Past Majority Age of Child — Abuse of Discretion: A 1971 dissolution decree apportioned only the personal property of the parties. In 1981, in a proceeding for modification of the decree, the District Court abused its discretion by ordering that the parties' residence not be sold until the youngest child finished college at the age of 22. This in effect amounted to child support past the age of majority when no express agreement or decree provision provided for such support. Torma v. Torma, 198 M 161, 645 P2d 395, 39 St. Rep. 839 (1982).

Jurisdiction Over Appeal of Untimely Modification Order: The lower court order modified the findings of fact and conclusions of law more than 15 days after submission of appellant's posttrial motions. By exceeding the time period mandated by former Rule 59, M.R.Civ.P. (now superseded), the District Court divested itself of jurisdiction to determine the motion, and its order was a nullity. The original notice of appeal from the second decree, based on that order, was untimely under former Rule 5, M.R.App.Civ.P. (now M.R.App.P., now superseded), and the Supreme Court has no jurisdiction as to the second decree. However, the jurisdictional defect is cured by the appellants having lodged an appeal to the first decree. Sell v. Sell, 193 M 88, 630 P2d 222, 38 St. Rep. 956 (1981).

Use of Father's Surname in Best Interest of Child: The District Court erred in allowing the children to use the surname of their stepfather. Under the circumstances presented, it is in the best interest of the children to use the father's surname until the children reach an age when they can fully understand the circumstances of their parents' dissolution. In re the Marriage of Firman, 187 M 465, 610 P2d 178 (1980).

Review of Awards: If there is no clear abuse of discretion resulting in substantial injustice, the award made by the District Court will not be disturbed. Grenfell v. Grenfell, 182 M 229, 596 P2d 205 (1979), following Brown v. Brown, 179 M 417, 587 P2d 361 (1978).

Continuing Jurisdiction of Sister State to Modify Custody Order After Child Becomes Resident of Montana: Under section 21-139, R.C.M. 1947 (since repealed), court of sister state entering valid custody order retained continuing jurisdiction to modify such award after party changed domicile to this state since change in child's domicile did not in itself deprive court of sister state of its jurisdiction; courts of either state could possess jurisdiction resulting in concurrent jurisdiction of matter. Corkill v. Cloninger, 153 M 142, 454 P2d 911 (1969), overruling Application of Enke, 129 M 353, 287 P2d 19 (1955), and affirming rule of State ex rel. Nipp v. District Court, 46 M 425, 128 P 590 (1912).

Attorney General's Opinions

Fee for Filing Petition for Contested Amendment of Parenting Plan Not Applicable to Petition to Modify Child Support: Modification of child support pursuant to this section is a separate procedure that does not necessarily entail amendment of a parenting plan pursuant to 40-4-219. Therefore, for filing purposes, a petition to modify child support is not considered a petition for amendment of a parenting plan, and it is inappropriate for a Clerk of Court to collect the $120 statutory fee for filing a petition for a contested amendment of a parenting plan under 25-1-201(1)(a) upon the filing of a petition to modify child support in an existing cause. 47 A.G. Op. 14 (1998).

Commencement Filing Fee Not Chargeable for Certain Postdissolution Proceedings: The Attorney General relied on the holding in In re Marriage of Billings, 189 M 520, 616 P2d 1104 (1980), in finding that a District Court Clerk may not charge a commencement filing fee for postdissolution of marriage action that is brought under the same cause number as the marital dissolution proceeding and that remains under the continuing jurisdiction of the District Court. 43 A.G. Op. 72 (1990).

County Attorney Not Authorized to Compromise Support Order on Behalf of Obligee: A County Attorney, in carrying out his responsibility under URESA (replaced by UIFSA) to represent obligees, may not enter into an agreement with an obligor or his agent to compromise a support order or to allow the sale of property on which a support order is a lien, since under 40-4-208 a support order may only be modified by a court. Further, 40-4-208 provides that a modification of a court support decree may affect only amounts that accrue subsequent to the motion for modification. 41 A.G. Op. 7 (1985).

Law Review Articles

Retroactive Modification of Accrued Child Support Payments, Sheehy, 48 Mont. L. Rev. 151 (1987).

40-4-209. Security or guaranty to secure support.

Compiler's Comments

1995 Amendment: Chapter 546 in (1) substituted "department of public health and human services" for "department of family services or the department of social and rehabilitation services"; in (5), in two places, substituted "department of public health and human services" for "department of social and rehabilitation services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1989 Amendment: In (1), before "the department of family services", deleted "the department of revenue"; and in (5), in two places, substituted "department of social and rehabilitation services" for "department of revenue". Amendment effective July 1, 1989.

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

1987 Amendments: Chapter 370 and Ch. 609 in two places in (5) substituted "department of revenue" for "department".

Chapter 609 near beginning of (1), after "department of revenue", inserted "the department of family services".

Case Notes

Wage Assignment Proper: This section grants a court the authority to execute a security or other guarantee for the payment of child support delinquencies in amounts equal to the total of 6 months' support payments. Therefore, the District Court did not abuse its discretion in ordering husband to sign a wage assignment in the amount of $500 a month over all amounts collected for unpaid back child support and current child support. In re Marriage of Hunt, 264 M 159, 870 P2d 720, 51 St. Rep. 209 (1994).

Supreme Court's Adoption of Child Support Guidelines Not Grounds for Modification: The District Court failed to make findings of fact showing a change in husband's circumstances that supported a reduction of child support below the amount set by the original decree. The Supreme Court's adoption of child support guidelines was not in itself a sufficient change of circumstances to justify the modification. Therefore, the modification was reversed and the case was remanded. In re Marriage of Kukes, 258 M 324, 852 P2d 655, 50 St. Rep. 553 (1993).

Child Support Guidelines — Bankruptcy Payments Representing Principal on Mortgage Payments Improperly Deducted: As part of an order for child support, the District Court allowed Alan to deduct payments made by order of a bankruptcy trustee. The Supreme Court held that it was error under Rule 5 of the Guidelines for Determining Child Support for the District Court to allow the deductibility of all of the bankruptcy payments in calculating Alan's child support payments. The rule limits deductions to legitimate business expenses, but part of the bankruptcy payments went to increase Alan's equity in his home located on his ranch. The Supreme Court remanded to the District Court for recalculation of all factors relating to child support. In re Marriage of Nikolaisen, 257 M 1, 847 P2d 287, 50 St. Rep. 133 (1993).

Personal Property "Security or Other Guaranty" Pending Payment of Delinquent Spousal Support: Until support obligations have been paid, personal property awarded in a dissolution decree can serve as "security or other guaranty". The District Court stayed within guidelines and did not abuse its discretion in ordering ex-spouse to deliver personal property belonging to former husband after payment of delinquent support obligation. In re Marriage of Castor, 249 M 495, 817 P2d 665, 48 St. Rep. 807 (1991).

40-4-210. Child support jurisdiction — nonresident individual.

Compiler's Comments

Code Commissioner Correction: In (1)(a) substituted "Rule 4(b)" for "Rule 4B" to reflect revisions adopted by Supreme Court Order No. AF 07-0157 dated April 26, 2011.

1999 Amendment: Chapter 579 at beginning of (1) substituted "In a proceeding to establish or modify a child support order, a district court may acquire" for "A court of this state that is competent to decide child support matters may exercise" and at end deleted "in a child support determination in the initial or modification decree"; inserted (2) requiring district court to recognize and, if petitioned, enforce child support order issued by another state; inserted (3) prohibiting district court from establishing conflicting support order or modifying existing order entitled to recognition; inserted (4) requiring district court when interpreting support order to apply law of issuing state; inserted (5) requiring district court to apply statute of limitations of issuing state in action to enforce arrears under support order; inserted (6) authorizing district court to modify support order issued by another state only after meeting requirements of 40-5-194 (renumbered

40-5-1065, 40-5-1067, and 40-5-1068) and standards of modification of federal interstate support orders; and made minor changes in style. Amendment effective October 1, 1999.

1993 Amendment: Chapter 328 in introduction, after "nonresident", substituted "individual or the individual's guardian or conservator" for "parent"; in (1) substituted "individual is personally served with notice within this state in accordance with Rule 4B, Montana Rules of Civil Procedure" for "nonresident parent has resided with the child in this state"; in (2) substituted jurisdiction by consent for jurisdiction by reason of maintaining a marital domicile in this state from which the child was conceived or adopted; in (4), before "adopted", deleted "conceived or"; inserted (5) through (7) relating to an individual residing in this state and providing prenatal expenses or support for the child, a child residing in this state because of the individual's acts or directives, and a child that may have been conceived in this state by the individual; and made minor changes in style.

Preamble: The preamble to Ch. 459, L. 1989, provided: "WHEREAS, the state of Montana has both a social and an economic interest in ensuring that minor children residing in or having significant connections with this state receive ample financial support from their nonresident parents; and

WHEREAS, the procedure established by the Uniform Reciprocal Enforcement of Support Act of 1968 (URESA), while valuable in many instances, sometimes causes delay in obtaining support orders; and

WHEREAS, empowering state district courts to adjudicate child support actions over nonresident parents with ties to the state of Montana will enhance child support collection efforts; and

WHEREAS, enactment of [this act] [40-4-210] will permit Montana courts to exercise the most extensive jurisdiction over child support actions involving nonresident parents as is permissible under the constitutions of the United States and Montana."

Severability: Section 2, Ch. 459, L. 1989, was a severability clause.

Case Notes

Refusal to Terminate Parental Rights and Grant Petition for Adoption Proper: In an adoption proceeding, the stepfather petitioned to adopt his wife's child and sought to terminate the parental rights of the natural father of the child on the sole basis that the natural father was an unfit parent because he had failed to pay child support during the year prior to the filing of the petition for adoption. The District Court refused to terminate the parental rights of the natural father based on an existing child support order that set the amount of child support due at zero. On appeal, the Supreme Court affirmed, concluding that the natural father could not be declared unfit and have his parental rights terminated and his child adopted after complying with a valid court order specifying a child support obligation, albeit one of "zero". In re Adoption of P.T.H., 2015 MT 316, 381 Mont. 373, 364 P.3d 1235.

Child Support — No Jurisdiction Over Father When No Minimum Contacts by Father With Montana: Verleen and Howard were divorced in California, and Howard was ordered to pay child support. Thereafter, Verleen moved with the children to Montana, where she sought and obtained a decree in Missoula County to modify the California court order with respect to visitation and the amount of child support. Howard was personally served in California but did not respond to the motion. Later, Verleen obtained a default judgment against Howard. Later still, Verleen sought an order in California that Howard's home be sold to satisfy the Montana judgments. Howard responded that the Montana court had no jurisdiction. The Supreme Court held that while a question of waiver was raised because of Howard's failure to raise the issue of personal jurisdiction through a motion under former Rule 12(b), M.R.Civ.P. (now superseded), the correct analysis is whether the District Court ever had personal jurisdiction over Howard. The Supreme Court held that because the requirements of this section had not been satisfied, the only method under which jurisdiction could otherwise obtain was under former Rule 4B, M.R.Civ.P. (now superseded). Citing Kulko v. Calif. Superior Court, 436 US 84 (1978), the Supreme Court held that there were simply no facts to suggest that Howard had any "minimum contacts" with Montana to warrant a Montana court obtaining jurisdiction over him because Howard's only connection with Montana is that his children now reside here. Heinle v. District Court, 260 M 489, 861 P2d 171, 50 St. Rep. 1141 (1993). However, see Cardneaux v. Cardneaux, 1998 MT 256, 291 M 230, 967 P2d 410, 55 St. Rep. 1055 (1998) (father's stipulation to modify Louisiana child support judgment constituted consent to the District Court's exercise of personal jurisdiction for purposes of modifying both the Louisiana judgment and the court's earlier order declining modification).

40-4-211. Jurisdiction — commencement of parenting proceedings.

Commissioners' Note

The provisions of the Act concerning custody adjudication are integrated with the provisions of the Uniform Child Custody Jurisdiction Act, promulgated by the Conference in 1968. The latter Act deals with judicial jurisdiction to adjudicate a custody case when more than one state has an interest in the litigation. The Uniform Marriage and Divorce Act governs the substantive and procedural aspects of custody adjudication once the court has decided that it can and should hear the case on the merits. States considering the adoption of this Act should also consider adopting the Uniform Child Custody Jurisdiction Act. If that Act is adopted in the state, subsections (a) [(1)], (b), [(2)] and (c)[(3)], which are intended to track the interstate jurisdictional sections of that Act, should be omitted, and the remaining subsections should be relettered, accordingly.

The court authorized to hear custody cases has not been identified. In many states the legislature will want to consider the establishment of a Family Court for these purposes; in other states the trial court of general jurisdiction will be named.

Subsection (d) [(4)] makes an important distinction between custody disputes commenced by parents and those commenced by some other person interested in a particular child. A custody proceeding is commenced automatically whenever one of the parents files for a dissolution of legal separation under Part III [Chapter 4]. Also, a parent may commence a custody proceeding without filing a petition for dissolution or legal separation. On the other hand, subsection (d)(2) [(4)(b)] makes it clear that if one of the parents has physical custody of the child, a non-parent may not bring an action to contest that parent's right to continuing custody under the "best interest of the child" standard of Section 402 [40-4-212]. If a non-parent (a grandparent or an aunt or uncle, perhaps) wants to acquire custody, he must commence proceedings under the far more stringent standards for intervention provided in the typical Juvenile Court Act. In short, this subsection has been devised to protect the "parental rights" of custodial parents and to insure that intrusions upon those rights will occur only when the care the parent is providing the child falls short of the minimum standard imposed by the community at large—the standard incorporated in the neglect or delinquency definitions of the state's Juvenile Court Act. Once a custody proceeding is commenced, the court should be able to hear the views of all interested persons; Subsection (d) [(4)] therefore authorizes the judge to permit intervention by relatives who would not have been allowed to commence an action.

Compiler's Comments

2009 Amendment: Chapter 210 inserted (1)(c)(ii) regarding a child who has been with a caretaker relative; in (6)(a) at end deleted "and which relationship"; inserted (6)(c) expanding the child-parent relationship to include meeting a child's need for continuity of care; and made minor changes in style. Amendment effective October 1, 2009.

2001 Amendment: Chapter 277 in (1)(c)(i) after "has been abandoned" inserted reference to surrender to emergency services provider; inserted (4)(a)(iii) regarding custody; inserted (7) regarding custody proceeding; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 414 in (4)(b) after "parent" inserted "if the person has established a child-parent relationship with the child", after "child" substituted "resides" for "is permanently resident", and after "found" deleted "but only if the child is not physically residing with one of the child's parents"; inserted (6) defining child-parent relationship; and made minor changes in style. Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 414, L. 1999, provided: "WHEREAS, it is undisputed that parents have a fundamental right to autonomy in child-rearing decisions; and

WHEREAS, the United States Supreme Court has long recognized a constitutionally protected interest of parents to raise their children without state interference; and

WHEREAS, the liberty interest guaranteed by the 14th amendment to the United States Constitution includes freedom to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home, and to bring up children; and

WHEREAS, the freedom of personal choice in matters of family life is a fundamental liberty interest protected by the 14th amendment to the United States Constitution; and

WHEREAS, the integrity of the family unit has found protection in the due process clause of the 14th amendment, the equal protection clause of the 14th amendment, and the 9th amendment; and

WHEREAS, the Montana Supreme Court has recognized the constitutionally protected rights of natural parents to parent their children; and

WHEREAS, the Montana Legislature recognizes that the careful protection of parental rights is not merely a matter of legislative grace but is constitutionally required; and

WHEREAS, the Montana Constitution recognizes the constitutional rights of children; and

WHEREAS, Article II, section 15, of the Montana Constitution provides that the rights of persons under 18 years of age shall include but not be limited to all the fundamental rights of Article II, unless specifically precluded by law which enhances the protection of the persons; and

WHEREAS, these fundamental rights include but are not limited to freedom; pursuing life's basic necessities, enjoying and defending life and liberty, and seeking safety, health, and happiness in lawful ways and the rights of individual dignity and privacy; and

WHEREAS, the Legislature finds that there are times when the rights of parents must be balanced against the rights of children; and

WHEREAS, the Legislature further finds that the courts need direction and authority to consider the best interests of children in parenting and visitation matters; and

WHEREAS, the Legislature finds it is appropriate to establish standards and direction for resolving these issues."

1997 Amendment: Chapter 343 in (1), in first clause in two places, substituted "parenting" for "child custody" and near end of clause, after "initial or", substituted "amended" for "modification"; in (1)(a)(ii), near middle after "person", deleted "claiming his custody or for other reason"; in (1)(d), near end after "determine", substituted "parenting" for "custody"; in (2), at end before "determination", substituted "parenting" for "child custody"; in (3), at end, substituted "parenting of the child" for "his custody"; in (4), at beginning, substituted "parenting plan" for "child custody"; at beginning of (4)(a)(ii) and in (4)(b), near beginning after "petition for", substituted "parenting" for "custody of the child"; in (4)(b), after "petition for", substituted "parenting" for "custody of the child" and near end, after "is not", substituted "physically residing with" for "in the custody of"; in (5), in first sentence near beginning before "proceeding", substituted "parenting" for "child custody", near middle substituted "caretaker" for "custodian", and substituted "those persons with whom the child is physically residing" for "those persons having physical custody of the child"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Source: Section 401, Uniform Marriage and Divorce Act.

Montana Changes: In subsection (5) Montana deletes "and" following "guardian" and inserts "those persons having physical custody of the child and all other contestants", following "custodian". This section is substantially similar to section 3 of the Uniform Child Custody Jurisdiction Act; the commissioners' note to section 3 of the UCCJA is compiled under 40-7-104 (now repealed).

Case Notes

General 1005
Out-of-State Proceedings, Decree 1011
Nonparent Custody 1013
Home-State Determination 1015

GENERAL

No Fundamental Liberty Interest by Foster Parents in Foster Child During Neglect and Dependency Proceedings. In re U.A.C., 2022 MT 230, 410 Mont. 493, 520 P.3d 295.

State Subject Matter Jurisdiction Relationship to Tribal Court Jurisdiction — No Abuse of Discretion for District Court Amendment of Parenting Plan — Mother Failed to Establish Definite Fixed Residence on Reservation — Proper Exercise of Jurisdiction Despite Allegation of Inconvenient Forum — Concurrent State Jurisdiction Proper. In re Parenting of L.D.C., 2022 MT 161, 409 Mont. 439, 516 P.3d 631.

Order Requiring Nonparty in Parenting Plan Case to Attend Family Counseling: In an action concerning the modification of a parenting plan, although the District Court has discretion in fashioning appropriate provisions for the best interests of the children, the District Court erred when it ordered the mother's current husband to attend family counseling because he was not a party to the case and he did not voluntarily submit himself to the jurisdiction of the District Court, nor could the mother be held in contempt if her husband failed to comply with the order. In re Parenting of P.H.R., 2021 MT 231, 405 Mont. 334, 495 P.3d 38.

Determination of Parental Interest — Montana as Inconvenient Forum: A mother allowed the petitioner to care for her 1-year-old child for a 6-month period. At the end of the period, the petitioner refused to return the child. Nearly a year later, the child was returned to her mother, who then moved to Oklahoma. The petitioner filed a petition requesting a parental interest determination and interim custody. Ultimately, a District Court concluded that Montana was an inconvenient forum. On appeal, the Supreme Court affirmed, holding that although Montana could exercise jurisdiction over the matter because the petition had been filed while the child was still living in Montana, proceedings in Montana would place a heavy burden of time, travel, and dislocation on the mother and her family. In re Parenting of M.M.K., 2016 MT 81, 383 Mont. 161, 369 P.3d 344.

Venue for Parenting Plan Proper Where Filed — Transfer of Venue Improper: The grandmother filed a petition for a parenting plan in Flathead County, where she and the child resided. The mother filed a motion for a change of venue to Hill County, where she resided. The District Court granted the change of venue, believing that 1-1-215 required the change in venue. On appeal, the Supreme Court reversed the change of venue, ruling that under 40-4-211 venue was proper in either county. In re S.C.B., 2015 MT 19, 378 Mont. 89, 342 P.3d 46.

No Error in Finding That Parent-Child Relationship Not Established: After the death of a divorced mother of two children, the father, who had a history of violent and unpredictable behavior, filed for exclusive parental control. The children's maternal grandmother also filed for a parental interest. The District Court granted sole custody of both children to the father. The Supreme Court found that the grandmother failed to prove the establishment of a parent-child relationship, rather than the relationship of an involved grandmother. Therefore, the court did not need to determine whether the natural parent engaged in conduct contrary to the parent-child relationship. In re Parenting of S.J.H., 2014 MT 40, 374 Mont. 31, 318 P.3d 1021.

Jurisdiction Over Modification of Child Support — UIFSA, not UCCJEA, Controls: In a matter involving only child support issues, jurisdiction is controlled by the Uniform Interstate Family Support Act (UIFSA), not the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The District Court erred in concluding it did not have jurisdiction over the matter based on Montana being an inconvenient forum under UCCJEA when the only issue before the court involved child support. Because the UIFSA, unlike the UCCJEA, does not provide an inconvenient forum provision, the Supreme Court reversed and remanded the matter to the District Court. Ervin v. Ervin, 2011 MT 309, 363 Mont. 80, 265 P.3d 1272.

Parental Interest Properly Awarded to Both Parties in Same-Sex Relationship: A same-sex couple entered a financial and domestic long-term relationship. Because a same-sex couple may not adopt children in Montana, defendant adopted two children and both parties acted as parents to the children. When the parties separated, the District Court declined to grant plaintiff's petition to dissolve the parties' common-law marriage because Montana does not recognize same-sex marriage, but the court awarded a parental interest to both parties on grounds that plaintiff had established that a child-parent relationship existed in accordance with 40-4-211 and held that 40-4-228 applied to final adjudication of parenting between the parties. Defendant appealed on grounds that the statutes violated defendant's fundamental constitutional rights as a parent, specifically that 40-4-228 improperly fails to require a court to determine the fitness of a natural parent before awarding a nonparent a parental interest based on the child's best interests. The Supreme Court disagreed, noting that 1999 amendments to nonparental statutes allow a nonparent standing to seek a parenting interest of a minor child if the nonparent has established a child-parent relationship. It is not necessary for a court to find a natural parent unfit before awarding a parental interest to a third party, even though in this case the District Court did in fact correctly find that defendant acted contrary to the children's best interests. Also, numerous witnesses, including mental health professionals, the children's therapists, and the court-appointed guardian ad litem, testified that plaintiff had established a child-parent relationship with the children. This testimony, coupled with the fact that defendant's actions from the time the children entered the home were entirely inconsistent with an exclusive child-parent relationship and that plaintiff had served in a parental role for a sufficient time to establish a bonded, dependent relationship with the minor children, established that defendant's constitutional parenting rights were not violated when the District Court granted plaintiff a parenting interest. The District Court was affirmed. Kulstad v. Maniaci, 2009 MT 326, 352 M 513, 220 P3d 595 (2009), followed in In re Parenting of L.F.A., D.F.A., & D.F.A., 2009 MT 363, 353 M 220, 220 P3d 391 (2009), and distinguishing Polasek v. Omura, 2006 MT 103, 332 M 157, 136 P3d 519 (2006).

Proper Venue for Custody and Parenting Plan Petition: When their child was born, the parties lived in Yellowstone County, but the father subsequently moved to Gallatin County. When the child was 4 years old, her paternal grandmother, who resided in Beaverhead County, took the child to Beaverhead County at the mother's request to facilitate the mother's move to a new residence. While the child was with her grandmother, the father petitioned for a parenting plan and temporary custody, alleging abuse of the child by the mother. In the petition, the father stated that the child's residence was Beaverhead County. The mother then moved to change venue to Yellowstone County on grounds that neither parent lived in Beaverhead County, that the child actually lived in Yellowstone County, and that the facts upon which the father was seeking relief arose in Yellowstone County. The District Court changed venue to Gallatin County where the father resided, in deference to the father's allegations of child abuse in Yellowstone County. The mother appealed, and the Supreme Court reversed. Under 25-2-118, the proper place for trial of an action brought under Title 40, ch. 4, is the county where the petitioner or the respondent has resided for 90 days preceding the action, so either Gallatin or Yellowstone County would have been a proper venue. However, by failing to file the action in either of those counties, the father waived his right to have the matter tried in the county of his residence, so the mother was entitled to a change of venue to Yellowstone County. In re Custody & Parenting Plan of B.C.B.W, 2008 MT 147, 343 M 215, 185 P3d 327 (2008).

Motion to Modify Child Custody Not Considered New Proceeding Vesting New Right to Substitute Judge: More than 19 months after commencement of a dissolution action, the father petitioned to modify the parenting plan custody provision, at which point the mother moved for substitution of the presiding judge, contending that the petition for modification was a new action entitling her to a change of venue to her latest county of residence. The District Court denied the substitution motion, and the Supreme Court affirmed. A motion to modify child custody is not considered the commencement of a new proceeding and cannot result in the vesting of a new right to substitute a District Court Judge. In re Marriage of Toavs, 2002 MT 230, 311 M 455, 56 P3d 356 (2002).

Parent's Failure to Pay Support Not Basis for Nonparent's Standing to Seek Custody: A parent's failure to provide adequately for a child's basic necessities when financially able to do so is an express statutory basis for a finding that the child is a youth in need of care and is also a statutory exception to the requirement that a natural parent consent to the adoption of a child. However, this section contains no provision under which a parent's failure to provide support when able to do so can serve as a basis for a nonparent's standing to seek custody of that parent's child, nor does failure to pay child support when able constitute voluntary relinquishment of a parent's right to custody. Girard v. Williams, 1998 MT 231, 291 M 49, 966 P2d 1155, 55 St. Rep. 965 (1998).

Voluntary Relinquishment Defined — Abandonment by Incarceration Not Equated With Voluntary Relinquishment: In determining whether a nonparent had standing to petition for child custody based on voluntary relinquishment, the Supreme Court held that that determination is dependent on the particular facts and circumstances of a given case. Generally, however, in order for a parent to voluntarily relinquish the right to custody of a child, the parent must manifest an intentional renouncement of the right to custody. Custodial rights cannot be relinquished unconsciously or accidentally. In finding that a father's incarceration constituted abandonment of his children in the present case, the District Court equated abandonment via incarceration to voluntary relinquishment. This section does not mention abandonment by a natural parent as a circumstance under which a nonparent may seek custody, and abandonment terminology has no place in determining a nonparent's standing in custody proceedings under this section. The mere fact of incarceration did not rise to the level of a voluntary relinquishment when considered in conjunction with the father's actions to maintain contact with his children, establish his paternity, and seek their custody. In order to establish standing pursuant to this section, a nonparent must present evidence sufficient to convincingly prove that the parent voluntarily relinquished custody rights. Girard v. Williams, 1998 MT 231, 291 M 49, 966 P2d 1155, 55 St. Rep. 965 (1998).

Indians — Subject Matter Jurisdiction Over Dissolution of Marriage — Different Residences of Parties — Factors to Be Considered — Bertelson Followed: Stacey, an enrolled member of the Fort Peck Tribes, married Shane, a non-Indian. After the marriage ceremony, Stacey returned to the Fort Peck Indian Reservation and Shane went to Forsyth, where his parents lived and where he worked. Some time later, Stacey had a child who also became an enrolled member and lived with Stacey on the Fort Peck Indian Reservation. Still later, Shane filed a dissolution action in a state District Court. The District Court ordered joint custody and ordered that Shane would be the primary residential custodian. Approximately 1 month later, the Fort Peck Tribal Court awarded temporary custody to Stacey. She then filed a motion in District Court under former Rules 12(h) and 60, M.R.Civ.P. (now superseded), to dismiss Shane's dissolution action for lack of subject matter jurisdiction. The District Court held that it had subject matter jurisdiction over the case and issued a final decree of dissolution. In that decree, the District Court held that the parties' child had significant contacts both off and on the reservation, held that the District Court shared concurrent jurisdiction with the tribal court, and therefore denied Stacey's motion to dismiss. The Supreme Court reviewed its previous holdings regarding tribal jurisdiction and child custody jurisdiction under the Uniform Child Custody Jurisdiction Act. The Supreme Court also reviewed the purposes of the Indian Child Welfare Act, which, while not strictly applicable to the case before it, cautions that state courts should be careful not to erode the sovereignty of tribes and tribal courts. In reliance upon In re Bertelson, 189 M 524, 617 P2d 121 (1980), the Supreme Court held that the best interests of the child should be determined and followed in deciding whether a state or tribal court has jurisdiction for the purposes of awarding custody but that when an Indian child resides off the reservation, state courts and tribal courts share concurrent jurisdiction. The Supreme Court then held, in further reliance upon Bertelson, that even when jurisdiction is concurrent, it does not mean that states courts should exercise jurisdiction and that in deciding whether to exercise concurrent jurisdiction, the state courts should consider: (1) 40-4-102, 40-4-107, 40-7-108, and this section; (2) certain policy issues; and (3) the residence of the parties pursuant to 1-1-215. For this reason, the Supreme Court remanded the case to the District Court for a determination of the residence of Stacey and her child, saying that if the District Court determines that both reside on the reservation, the District Court must dismiss the case. However, if the District Court finds that Stacey's child is not a resident of the reservation and that the District Court shares jurisdiction with the tribal court, the District Court must then consider factors from Bertelson, previously discussed by the Supreme Court, to determine whether the District Court or the tribal court is better able to determine the best interests of the child. In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

Automatic Transfer of Custody to Surviving Parent — Grandparents' Lack of Standing to Petition for Custody: Lora lived with her children at her parents' home for 5 months. She decided to go to California, leaving the children with their grandparents. Neither of the children's fathers had been in contact with the children. Although the father of the oldest child paid child support, he never exercised visitation. Lora was killed in a car accident on her way back to Montana, at which point both fathers stepped forward and asserted themselves as ready and willing to care for the children. The grandparents contended that a lack of parental custody by the fathers, coupled with the grandparents' physical control of the children, gave them standing under this section to petition for custody. The District Court held, and the Supreme Court affirmed, that when one parent dies, the surviving parent automatically assumes the right to custody of the couple's children and that the lack of evidence that either father had voluntarily relinquished his right of custody precluded the grandparents' standing to petition for custody. A lack of visitation, in and of itself, was insufficient to divest Jeff of parental rights in light of the fact that he acknowledged paternity and monetarily supported the child. In re Estate, Conservatorship, & Guardianship of K.M., Kr.O., & Ka.O., 280 M 256, 929 P2d 870, 53 St. Rep. 1392 (1996), followed in Girard v. Williams, 1998 MT 231, 291 M 49, 966 P2d 1155, 55 St. Rep. 965 (1998).

Concurrent State Jurisdiction Under UCCJA Determined by PKPA: Pamela Shupe obtained a divorce decree from Utah granting her sole custody of the couple's child. The father, Yancy, petitioned for a change of custody in Montana. The Supreme Court determined that each state had adopted the UCCJA and therefore each state had jurisdiction to make a custody determination. The Supreme Court stated that the PKPA had been enacted to remedy problems of concurrent state jurisdiction under the UCCJA. The Supreme Court held that because Utah had jurisdiction and had not declined to exercise its jurisdiction, then under the PKPA, Montana was not authorized to modify the original custody determination of Utah. In re Marriage of Shupe, 276 M 409, 916 P2d 744, 53 St. Rep. 447 (1996), followed in Vannatta v. Boulds, 2003 MT 343, 318 M 472, 81 P3d 480 (2003).

Appointment of Attorney for Children Not Necessary — Children's Position Adequately Developed: In a change of custody proceeding, mother's motion that the court appoint an attorney for the children was not ruled on and the court did not state why an appointment was not made. The Supreme Court carefully reviewed the record to determine if an attorney was required for the children. The court found substantial expert and other evidence, largely uncontradicted, that stepfather subjected the children to ritual satanic sexual abuse, that the boy had expressed suicidal wishes, that the father and his subsequent wife were better suited to have custody, that the children were progressing well in the father's custody and had not progressed well in the mother's custody, and that the mother behaved erratically toward the children and sometimes acted contrary to the children's best interests. The Supreme Court found that the lower court did not err in failing to appoint an attorney for the children because the issues as to their best interests were well-developed. The court also expressly overruled the holding in In re Gullette, 173 M 132, 566 P2d 396 (1977), that in a contested guardianship proceeding in which custody is in serious dispute, the court must appoint independent counsel for the child or make a finding stating why the appointment was not necessary. McDowell v. McDowell, 263 M 252, 868 P2d 1250, 51 St. Rep. 42 (1994).

Jurisdictional Requirements Not Met — Inapplicability of Uniform Child Custody Jurisdiction Act: The Uniform Child Custody Jurisdiction Act does not apply unless the jurisdictional conditions of this section are met, including whether: (1) a determination of the child's home state has been made; (2) the child and parents or at least one contestant has a significant connection with Montana and substantial evidence is available in Montana concerning the child's present or future care, training, and personal relationships; (3) the child is physically present in this state and has been abandoned or an emergency situation necessitates the child's protection; or (4) another state has jurisdiction or has declined jurisdiction because Montana is a more appropriate forum and it is in the child's best interest that Montana assume jurisdiction. In re Marriage of Erler, 261 M 65, 862 P2d 12, 50 St. Rep. 1195 (1993), distinguished in In re Marriage of Shupe, 276 M 409, 916 P2d 744, 53 St. Rep. 447 (1996).

Marriage and Divorce Law Inapplicable to Nonparent Seeking Child Custody: As part of a change in custody proceeding conducted under the marriage and divorce statutes, the District Court erred in granting to a nonparent the custody of a child who was neither a natural child nor adopted. The proper procedure to be followed is contained in the child abuse, neglect, and dependency statutes. Although the nonparent apparently fit the requirements for custodian under either scenario, the case was remanded for correct procedural consideration under Title 41, ch. 3. In re Marriage of Miller, 251 M 300, 825 P2d 189, 49 St. Rep. 36 (1992), following In re Doney, 174 M 282, 570 P2d 575 (1977), and overruling a contrary prior holding in In re Custody of C.C., K.C., & B.C., 215 M 72, 695 P2d 816 (1985).

Jurisdiction Under Abuse and Neglect Statutes Based on Presence of Child in State: In a case in which the natural parents were residents of Wyoming but the child was born in Montana and present in Montana, the District Court had jurisdiction in an action to terminate parental rights under the abuse and neglect statutes, 41-3-601 through 41-3-612 (41-3-601 now repealed), based on the presence of the child in Montana. The District Court did not err when, based on lack of standing, it denied a motion to dismiss Catholic Social Services' petition to terminate the father's rights. A petition to terminate parental rights was not a petition for adoption, and the father's consent under 40-8-111 (now repealed) was not necessary. In re Parental Rights of Baby Girl W., 249 M 206, 814 P2d 976, 48 St. Rep. 643 (1991).

Venue for Custody Dispute in County Where Child Resides: The petitioner filed for custody and visitation in the county where he resided. The lower court denied the respondent's motion for a change of venue to the county where she and the child lived. The Supreme Court reversed on the grounds that the action was controlled by the Uniform Child Custody and Jurisdiction Act, not the Uniform Marriage and Divorce Act, so that the proper venue was the county in which the child resided. In re Custody of C.A.C., 246 M 291, 806 P2d 19, 47 St. Rep. 2032 (1990).

General Jurisdictional Rules for Divorce, Custody, and Child Support: A divorce action is generally in rem as to the status of the parties and in personam as to other matters. Thus, the lower court did not need in personam jurisdiction to grant dissolution to wife living in Montana when husband was in Tennessee. The court could grant the wife custody of the children living in Montana, but not of the child living in Tennessee with his father, since this section specifically granted jurisdiction to determine custody of children living in Montana. The court was without jurisdiction to award child support because the court did not have in personam jurisdiction over the father under former Rule 4, M.R.Civ.P. (now superseded). In re Marriage of Appleton, 234 M 345, 763 P2d 658, 45 St. Rep. 1959 (1988).

Adoption by Stepparent — No Mandatory Termination of Grandparents' Visitation: There is no clear legislative intent or public policy that mandates termination of visitation for natural grandparents when a grandchild is adopted by a stepparent. Kanvick v. Reilly, 233 M 324, 760 P2d 743, 45 St. Rep. 1524 (1988).

Continuing Court Jurisdiction Regarding Maintenance, Support, Property Disposition, and Child Custody — New Judge: Since under Montana law a court has continuing jurisdiction in matters of maintenance, support, property disposition, and child custody, a newly appointed judge may make findings in a case he or she has not heard, may need to hear new evidence, and

is entitled to rely on the record established in the case. In re Marriage of Ensign, 227 M 357, 739 P2d 479, 44 St. Rep. 1146 (1987).

Final Custody Plan and Maintenance Schedule Required: Where the District Court on one hand stated that the sale of the family home "should be retained as an available option" and on the other hand set terms of a 30-day buy-out or sale period, the case was remanded for determination of a final custody plan and maintenance schedule, since resolution of custody and maintenance hinged on sale of the home. In re Marriage of Ensign, 227 M 357, 739 P2d 479, 44 St. Rep. 1146 (1987).

Statutory Conditions Met — Children's Best Interests Served in Montana: The District Court properly exercised jurisdiction under this section by: (1) establishing a significant connection of the father and children with Montana; (2) noting that there was substantial evidence available locally that was relevant to the custody issue; and (3) finding that a Utah court declined to accept jurisdiction, deferring to a Montana court which it expressly found to be the more convenient forum. In re Marriage of Cook, 223 M 293, 725 P2d 562, 43 St. Rep. 1732 (1986).

Management of Children's Accounts: District Court did not abuse its discretion when it allowed husband to manage financial accounts of the children that were to be kept separate from accounts of the husband and wife. In re Marriage of Williams, 220 M 232, 714 P2d 548, 43 St. Rep. 319 (1986).

Child Custody Jurisdiction: According to 40-7-104 (now repealed), the provisions of 40-4-211 determine whether a state has a sufficient interest in a child custody dispute to assume jurisdiction. In the present case, Montana does not have the authority under any of the provisions of 40-4-211 to hear the present custody proceeding. Even if Montana had such authority, several provisions of the Uniform Child Custody Jurisdiction Act (UCCJA), including 40-7-107 and 40-7-108, would confer jurisdiction in the Arizona court. In re Marriage of Brown, 218 M 14, 706 P2d 116, 42 St. Rep. 1360 (1985).

Best Interests Criteria — Criteria Not Including Past Contacts: The plain meaning of the criteria in 40-4-211(1)(b)(ii) focuses on "present or future" care, protection, etc., and an argument that concentrates on the past situation of the children does not satisfy the jurisdictional requirements of the subsection. In re Marriage of Lance, 213 M 182, 690 P2d 979, 41 St. Rep. 2032 (1984).

Significant Connection and Substantial Evidence Not Limited to One State: The husband petitioned in Montana for a change of custody of his daughter. The former wife resided in California. Because the daughter was sent by the wife on two occasions to reside with the husband and attend school, the Supreme Court upheld the District Court's jurisdiction of a petition to change custody. The Supreme Court noted that 40-4-211 does not require that the child's only significant connection be with Montana in order for a District Court to assume jurisdiction. The same is true of the availability of substantial evidence concerning the child's present or future care, protection, training, and personal relationships. Bolton v. Bolton, 212 M 212, 690 P2d 401, 41 St. Rep. 1698 (1984), followed in In re Custody of N.G.H., 1998 MT 212, 290 M 426, 963 P2d 1275, 55 St. Rep. 892 (1998).

When "Continuing Jurisdiction" Applicable: The Supreme Court held that the father's reliance on the doctrine of "continuing jurisdiction" as being the sole jurisdictional test in interstate custody disputes is misplaced. That doctrine is linked to 40-4-219 regarding jurisdiction to modify prior custody decrees. In those custody cases where a state other than Montana has a possible interest, the jurisdictional requirements of 40-4-211 must be met before a court may assert "continuing jurisdiction" under 40-4-219. In this custody dispute, the issue is one of overcoming the premier jurisdictional hurdle by establishing one of the disjunctive requirements of 40-4-211. The father established that both he and the child have a significant connection with Montana and there is substantial pertinent evidence here. Bolton v. Bolton, 212 M 212, 690 P2d 401, 41 St. Rep. 1698 (1984), followed in In re Marriage of Harper, 235 M 41, 764 P2d 1283, 45 St. Rep. 2145 (1988), In re Marriage of Alpert/Hameline, 258 M 344, 852 P2d 669, 50 St. Rep. 564 (1993), and in In re Marriage of Miller/Beam, 259 M 424, 856 P2d 1378, 50 St. Rep. 863 (1993).

Determination of Improper Retention of Child: A mother was granted custody of her child in Kentucky but consented to the child's removal to Montana by its father for a visit. In determining whether the father improperly retained the child, all the circumstances surrounding the retention should be examined. The retention is not improper per se merely because the custodial parent requested return. Pierce v. Pierce, 197 M 16, 640 P2d 899, 39 St. Rep. 315 (1982).

Custody of Indian Children — Appropriate Forum: The District Court ordered Mr. and Mrs. Stanley, members of the Chippewa Cree Tribe, to return their grandchildren to Bertelson, the natural mother. On appeal, the Supreme Court remanded the case to develop a complete evidentiary record and to determine whether the tribal court is the appropriate forum. In re

Bertelson, 189 M 524, 617 P2d 121, 37 St. Rep. 1682 (1980), followed in In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

Motion Granted — Preclusion of Child Custody Challenge: The mother of the child over whom a custody dispute arose was precluded from having set aside the child custody provision in the default marriage dissolution decree awarding custody to the respondent. The mother was barred by estoppel, laches, and res judicata from asserting that the respondent was not the child's natural parent. Morrell v. Giesick, 188 M 89, 610 P2d 1189 (1980).

Abandoned and Abused Child Present in Montana — Jurisdictional Test Met: When a child was present in Montana, having been abandoned by both of her natural parents, having been subjected to mistreatment and abuse, and having been threatened with further mistreatment and abuse, her situation met the test for jurisdiction expressed in 40-4-211. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

No Retroactive Application of UCCJA: Absent a clear expression of legislative purpose, retrospective application of even a procedural statute so as to affect prior proceedings of a pending action cannot be justified. Therefore, jurisdictional rulings entered before the effective date of the Uniform Child Custody Jurisdiction Act (UCCJA) are not subject to the UCCJA. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Lack of Jurisdiction — Award Only Two Years Old — No Finding of Danger: The District Court did not have jurisdiction to modify a prior custody award made less than 2 years prior when the court made no finding that the child's present environment seriously endangers his physical, mental, moral, or emotional health. The court also lacked jurisdiction to issue an order to show cause under 40-4-220 or to modify the custody decree under 40-4-211. Strouf v. Strouf, 176 M 406, 578 P2d 746 (1978), distinguished in Connolly v. Connolly, 209 M 298, 680 P2d 568, 41 St. Rep. 720 (1984).

When Act Applies: Where second custody hearing was based on another application for change of custody after Uniform Marriage and Divorce Act became effective, and the application alleged change in circumstances based in part on events that had occurred following effective date of Act, application was governed by the Act. Holm v. Holm, 172 M 81, 560 P2d 905 (1977).

"Seize and Run" of Minor Children as Not Conferring Jurisdiction in Custody Modification Cases: District Court erred in assuming jurisdiction to award custody of minor children to father living in Montana based on children's physical presence before court where divorce and custody had been previously awarded to mother in State of Washington. Mere fact father seized children from mother living in Washington and brought them before Montana court is insufficient to establish jurisdiction over mother who has no "contacts" with State of Montana, and any attempt by Montana to exercise jurisdiction over her would be in violation of the Due Process Clause of 14th amendment to the United States Constitution. Therefore, any custody decree rendered by Montana court would not be entitled to full faith and credit, and the interstate custody battle would continue, and whatever chance the children have for stability and happiness would be lost amidst the din of warring parents. State ex rel. Muirhead v. District Court, 169 M 535, 550 P2d 1304 (1976).

OUT-OF-STATE PROCEEDINGS, DECREE

Continuing Custody Jurisdiction in North Dakota Court — Modification by Montana Court Improper: When the parties were divorced in North Dakota, that state properly exercised jurisdiction in entering divorce and custody decrees. A Montana District Court subsequently modified the custody decree. The Supreme Court reversed. Under the Uniform Child Custody Jurisdiction and Enforcement Act and the Parental Kidnapping Prevention Act of 1980 (PKPA), full faith and credit must ordinarily be given to child custody determinations made by another state's court if that court appropriately exercised jurisdiction under PKPA standards. Further, under Thompson v. Thompson, 484 US 174 (1988), once a state exercises appropriate PKPA jurisdiction, no other state may exercise concurrent jurisdiction even if it would have been empowered to exercise original jurisdiction. Absent a determination by the North Dakota court that it no longer had exclusive and continuing jurisdiction or that a Montana court would be a more convenient forum, the Montana court had no jurisdiction to modify the North Dakota decree. Vannatta v. Boulds, 2003 MT 343, 318 M 472, 81 P3d 480 (2003), following In re Marriage of Shupe, 276 M 409, 916 P2d 744 (1996).

Full Faith and Credit Afforded Out-of-State Renewable Child Support Judgment — Res Judicata Applicable: Article IV, sec. 1, U.S. Const., provides that full faith and credit be given in each state to the public acts, records, and judicial proceedings of every other state. As restated in Baker v. Gen. Motors Corp., 522 US 222, 139 L Ed 2d 580, 118 S Ct 657 (1998), a final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. When issues of jurisdiction have been determined by one court, the doctrine of res judicata precludes a second court from considering jurisdiction as long as the first court fully and fairly considered the issue, and that judgment, as to jurisdiction, is entitled to full faith and credit in the second court. In the present case, a Utah renewable child support judgment, in which the Utah court established jurisdiction of the parties, was entitled to full faith and credit in Montana, despite contentions by the husband that he no longer had minimum contacts with Utah after moving to Montana. The jurisdiction arguments raised before the Montana Supreme Court were identical to the arguments that were previously raised, fairly considered, and finally decided in Utah, precluding relitigation by the Montana court under res judicata. In re Child Support of Mason, 1998 MT 192, 290 M 253, 964 P2d 743, 55 St. Rep. 803 (1998), followed with regard to full faith and credit of a judgment by an out-of-state court following full and fair consideration of jurisdiction in Genuine Parts Co. v. Rascal's Auto Parts, Inc., 2008 MT 313, 346 M 56, 192 P3d 1153 (2008).

Concurrent State Jurisdiction Under UCCJA Determined by PKPA: Pamela Shupe obtained a divorce decree from Utah granting her sole custody of the couple's child. The father, Yancy, petitioned for a change of custody in Montana. The Supreme Court determined that each state had adopted the UCCJA and therefore each state had jurisdiction to make a custody determination. The Supreme Court stated that the PKPA had been enacted to remedy problems of concurrent state jurisdiction under the UCCJA. The Supreme Court held that because Utah had jurisdiction and had not declined to exercise its jurisdiction, then under the PKPA, Montana was not authorized to modify the original custody determination of Utah. In re Marriage of Shupe, 276 M 409, 916 P2d 744, 53 St. Rep. 447 (1996), followed in Vannatta v. Boulds, 2003 MT 343, 318 M 472, 81 P3d 480 (2003).

Excusal of Wyoming Judge Based on Attempted Payoff — Not Declined Jurisdiction: Where an individual judge in Wyoming, the state in which the subject children resided, advised petitioner he would not sit on any controversy involving petitioner because of an attempted payoff by petitioner, this circumstance did not amount to deference to Montana as a more appropriate state to assume jurisdiction. The District Court properly declined jurisdiction as contemplated in 40-4-211. In re Marriage of Lance, 213 M 182, 690 P2d 979, 41 St. Rep. 2032 (1984).

"Forum Non Conveniens" — "Clean Hands": In a proceeding to modify a Kentucky child custody decree, the "forum non conveniens" and "clean hands" provisions come into play only after the following findings are made: (1) Kentucky no longer has jurisdiction; (2) Montana has jurisdiction under 40-4-211; and (3) under 28 U.S.C. § 1738A(f), 40-4-211, and 40-7-114 (now repealed), Montana has jurisdiction to modify the Kentucky decree. Pierce v. Pierce, 197 M 16, 640 P2d 899, 39 St. Rep. 315 (1982).

Full Faith and Credit for Out-of-State Custody Determination: Custody determinations made in accordance with the Uniform Child Custody Jurisdiction Act must be given full faith and credit under section 8 of the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A. The same two-step procedure set forth in Wenz v. Schwartze, 183 M 166, 598 P2d 1086, 36 St. Rep. 1360 (1979), must be followed in applying the federal law. Pierce v. Pierce, 197 M 16, 640 P2d 899, 39 St. Rep. 315 (1982).

Insufficient Evidence to Support Trial Court's Finding: In a proceeding to determine jurisdiction in a modification of a Kentucky child custody decree, the only evidence before the trial court was a copy of a Kentucky contempt order, a letter from a Kentucky court officer, and an affidavit from the Montana parent. None of this evidence supported a finding of continuing jurisdiction in Kentucky. A trial court must make specific findings based on evidence in the record as to the particular basis upon which another state can continue to exercise jurisdiction. Pierce v. Pierce, 197 M 16, 640 P2d 899, 39 St. Rep. 315 (1982).

Proceedings by Out-of-State Court After Jurisdiction Established: A father initiated a proceeding in Montana to modify a Kentucky child custody decree. Subsequently, a Kentucky court issued a contempt order against the father for his alleged wrongful removal of his child from Kentucky. If Montana originally had jurisdiction to modify the decree, the contempt order by the Kentucky court was in violation of Kentucky and federal law, there being an action pending in an out-of-state court. Pierce v. Pierce, 197 M 16, 640 P2d 899, 39 St. Rep. 315 (1982).

Custody Jurisdiction Under UCCJA and Interstate Compact on Juveniles: Wyoming had jurisdiction over the runaway juvenile as it was her home state. The District Court in Montana therefore did not have jurisdiction to modify the Wyoming court's custody decree. The interaction of the Interstate Compact on Juveniles and the Uniform Child Custody Jurisdiction Act (UCCJA) placed the District Court in the following position: (1) under the Compact, it had the authority to deny Wyoming's requisition ordering the juvenile's return to Wyoming and to place her in the custody of her grandparents; and (2) under the UCCJA, it was not required to recognize or enforce the Wyoming custody decree but was precluded from modifying the decree order. The District Court concluded that the juvenile's best interest would be served by having her in the custody of her grandparents and denied the Wyoming requisition. The court did not modify the Wyoming custody order. This procedure appears to be allowed under the interaction of the Compact and the UCCJA. Application of Pierce, 184 M 82, 601 P2d 1179 (1979).

Notice Requirements for Enforcement of Out-of-State Decree: Before the recognition and enforcement provisions of the Uniform Child Custody Jurisdiction Act (UCCJA) can be applied, the initial decree must be entered in conformity with strict notice requirements. If there is no compliance with the notice requirements of the UCCJA by the state entering the initial decree, Montana courts are not required to recognize and enforce the out-of-state decree. (Following Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).) Here notice of the Wyoming hearing was not given to the Raws, the persons in physical custody of Katherine, and the District Court therefore was not required to recognize or enforce the Wyoming order. Application of Pierce, 184 M 82, 601 P2d 1179 (1979).

Custody — Jurisdiction — Recognition of Foreign Decree: When a custody decree of another state is in force, a question of the applicability of the Full Faith and Credit Clause to custody decrees arises. When the California court heard no testimony on the best interests of the child, the precise question at issue in the Montana action, the Montana court was not bound to follow the California court's decree. Similarly, the Montana court was not prevented by the Uniform Child Custody Jurisdiction Act from modifying the California decree. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Jurisdiction to Modify a Foreign Custody Decree: There is no requirement that the Montana court recognize or enforce a foreign court's decree when the foreign court failed to give notice to the person in physical custody of the child as required by the Uniform Child Custody Jurisdiction Act. Further, the foreign court did not retain the jurisdiction it had at the time of initial custody proceedings because the foreign state had long since ceased to be the home of the child. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

NONPARENT CUSTODY

District Court Erred in Relying on Special Standing Requirements for Nonparent in 40-4-221 to Determine Parental Interest for Nonparent — Parental Interest of Nonparent in Dissolution Proceeding Must Be Determined Under Substantive Provisions of 40-4-228. Sayler v. Yan Sun, 2023 MT 175, 413 Mont. 303, 536 P.3d 399, distinguishing Kulstad v. Maniaci, 2009 MT 326, 352 Mont. 513, 220 P.3d 595, and In re L.F.A., 2009 MT 363, 353 Mont. 220, 220 P.3d 391.

Mother Signed Parenting Plan Giving Custody of Children to Paternal Grandparents — Mother Petitioned Years Later for Return of Custody — District Court's Denial of Petition Reversed to Require Court to Consider Indian Child Welfare Act. In re L.R.J., 2023 MT 1, 411 Mont. 149, 523 P.3d 22.

No Fundamental Liberty Interest by Foster Parents in Foster Child During Neglect and Dependency Proceedings. In re U.A.C., 2022 MT 230, 410 Mont. 493, 520 P.3d 295.

Termination of Visitation Agreement — Correctly Classified as Grandparent Visitation Agreement and Not Parental Visitation Agreement: The grandparents filed a petition for a parental interest determination after the mother moved to North Dakota with the child. Following mediation, the parties signed an agreement that allowed the child to live with the mother and gave day-to-day decisionmaking to the mother, but specifying certain visitation rights for the grandparents. Years later, the grandparents filed contempt motions, requesting that the District Court enforce the parties' agreement. The District Court eventually terminated the agreement, finding that it was a grandparent visitation agreement subject to modification and termination and not a parental visitation agreement. On appeal, the Supreme Court affirmed, holding that the agreement was correctly classified and that the District Court correctly terminated the grandparents' visitation. King v. Chilcott, 2020 MT 224, 401 Mont. 204, 472 P.3d 155.

District Court Upheld in Denial of Parental Interest to Nonparent — Mother Retained Decisionmaking Authority — Nonparent Never Assumed Equal Parenting Role: The District Court did not abuse its discretion in denying a parental interest over a minor child under 40-4-228 to the petitioning nonparent. Substantial credible evidence supported the District Court's finding that the respondent mother did not cede her parenting authority to the petitioning nonparent and thus did not engage in conduct contrary to her child-parent relationship. Neither the petitioning nonparent nor the respondent mother entered the relationship with the intent that the petitioning nonparent would be considered a coparent. The mother retained decisionmaking authority in all matters relating to the child's care and paid for the child's diapers, clothes, and day care. The petitioning nonparent never assumed an equal parenting role or equal responsibility with the respondent mother in raising the minor child. Cross v. Verploegen, 2016 MT 322, 385 Mont. 479, 385 P.3d 564, distinguishing Kulstad v. Maniaci, 2009 MT 326, 352 Mont. 513, 220 P.3d 595.

District Court Jurisdiction to Determine Establishment of Child-Parent Relationship Warranting Parenting Plan — Natural Parents' Parental Rights Need Not Be Terminated: Upon meeting the petitioners for the first time at a gas station, the respondent, M.M.G.'s mother, allowed the petitioners to take 1-year old M.M.G. home and care for M.M.G. over the weekend. Over the next several years, the mother began leaving M.M.G. with the petitioners for longer periods of time and, when M.M.G. was 4, informed the petitioners she was no longer interested in parenting M.M.G. and left her with the petitioners. The mother visited M.M.G. a few times a year and, when M.M.G. was 10, took M.M.G. for a weekend visit, then told the petitioners that she was moving with M.M.G. to Wyoming. The petitioners filed a petition for a parenting plan providing that M.M.G. would continue to live with them. After concluding that the petitioners could not seek a parenting plan unless the mother's parental rights had been terminated, the District Court dismissed the petition for lack of jurisdiction because the mother's parental rights had not been terminated. In reversing the dismissal, the Supreme Court distinguished this case from In re Parenting of J.N.P., 2001 MT 120, 305 Mont. 351, 27 P.3d 953, in which the petitioners had not established a child-parent relationship. The court held that if the petitioners could demonstrate that they had established a child-parent relationship with M.M.G., the District Court would have jurisdiction to consider whether to grant the petitioners a parental interest in M.M.G. even though no parental rights had been terminated. The court remanded the case to the District Court for a hearing on whether the petitioners had established a child-parent relationship with M.M.G. In re Parenting of M.M.G., 2012 MT 228, 366 Mont. 386, 287 P.3d 952.

No Standing for Grandparents to Bring Emergency Child Custody Case: The father physically abused the mother while the family lived in Maine. The mother moved the children to her parents' home in Oregon, and the grandparents, mother, and children subsequently moved to Montana. Meanwhile, the father filed for divorce and child custody in Maine, and the Maine court ordered that the children be returned to Maine. The grandparents filed for an emergency custody determination in Montana, seeking to block the Maine court's order. A Montana District Court initially accepted jurisdiction of the children, but after communicating with the Maine court, the Montana court declined jurisdiction, dismissed the grandparents' case, and remanded to the Maine court. The grandparents appealed. The Supreme Court determined the issue based on the question of standing, noting that this section allows a parenting plan to be commenced in District Court by a person other than a parent if the person has established a parent-child relationship and has filed a parenting petition in the county where the child resides or is found. However, in this case, no petition to establish parenting rights was filed, and neither parent voluntarily relinquished custody to the grandparents or had their parental rights terminated, so the grandparents could not make the predicate showing that they were entitled to custody. Because the grandparents lacked standing to gain custody of the children, the petition for emergency custody was properly denied and remand to the Maine court was affirmed. In re Parenting of D.A.H. & G.M.H. v. C.P.H., 2005 MT 68, 326 M 296, 109 P3d 247 (2005).

No Authority to Grant Third-Party Petition for Parenting Plan Absent Termination of Parental Rights: A young, single mother left her child in the temporary care of the Knopps, her aunt and uncle, while she sought employment and a place to live. About 2 months after the child was left with them, the Knopps petitioned for a parenting plan and support for the child. Although the document was referred to as a petition for a parenting plan, child support, and medical support, it was the functional equivalent of a petition for permanent custody. The Knopps applied for temporary custody and received it, ex parte, so that when the mother returned and tried to remove the child to their new home, she was not allowed to do so. The mother then sought termination of the guardianship and the return of her child. The mother's parental rights were never terminated or suspended by the state or county, nor were any proceedings ever commenced to demonstrate that the child was abused, dependent, or neglected. The District Court dismissed the petition, relying on In re Guardianship of D.T.N., 275 M 480, 914 P2d 579 (1996), in holding that the mother had a constitutional right to custody of her child and that permanent guardianship could not be granted because the mother's parental rights had not been terminated or suspended. The Knopps appealed, but the Supreme Court affirmed. The rule of law does not permit destruction of a natural parent's fundamental right to the custody of a child based simply on the subjective determination of the child's best interests. Rather, a natural parent cannot be denied custody of a child absent termination of parental rights for abuse or neglect pursuant to Title 41, ch. 3. In re Parenting of J.N.P., 2001 MT 120, 305 M 351, 27 P3d 953 (2001). See also In re A.R.A., 276 M 66, 919 P2d 388 (1996), and Girard v. Williams, 1998 MT 231, 291 M 49, 966 P2d 1155 (1998). However, see In re Parenting of M.M.G., 2012 MT 228, 366 Mont. 386, 287 P.3d 952, in which the Supreme Court held that the petitioners could seek a parenting plan if the petitioners could establish a child-parent relationship, even though the mother's parental rights had not been terminated, distinguishing this case from In re Parenting of J.N.P.

Probate Code Permanent Guardianship Proceeding — Dependency or Neglect Not Grounds for Terminating Mother's Custody of Child: A mother's parental rights were not terminated by circumstance when a court order granted, with her consent, temporary guardianship in the paternal grandparents. A later court, on the grandparents' petition for permanent guardianship under the Uniform Probate Code, found that the child was neglected or dependent and that the child's best interests would be served by granting the petition. The mother appeared in and contested the later action, withdrew her consent, and filed a petition to terminate the temporary guardianship. The guardianship provisions of the Uniform Probate Code were never intended as a substitute for the child custody provisions of this title governing dissolution of marriage or for the procedures of Title 41 governing termination of the parent-child relationship. The court relied on cases stating that a dependent neglected best interests of the child determination could not be made in a Uniform Probate Code permanent guardianship proceeding and had to be made under a child custody or parental termination proceeding. In re Guardianship of D.T.N., 275 M 480, 914 P2d 579, 53 St. Rep. 253 (1996).

Intervention by Nonparent in Custody Proceeding: The lower court refused to allow the children's grandparents, who were seeking custody, to intervene in the parents' dissolution. The Supreme Court held that if a nonparent moves to intervene in an ongoing dissolution proceeding and presents a prima facie case demonstrating that the child is not in the physical custody of either of the parents, the lower court must grant the motion. In re Custody of R.R.K., R.D.K., & L.M.K., 260 M 191, 859 P2d 998, 50 St. Rep. 1002 (1993).

Nonparent to Establish Standing to Initiate Custody Action: The grandparents filed an action to obtain custody of their grandchildren. The Supreme Court held that this section authorizes a nonparent to seek custody, but the nonparent must satisfy the standing requirement by demonstrating that the child is not in the physical custody of one of the parents. Standing for a nonparent does not depend on who has actual physical possession of the child at the moment the petition is filed; rather, the trial court should focus on whether the parent actually relinquished physical custody and on the length of the separation. If the nonparent successfully establishes standing, custody must be determined based on the best interests of the child pursuant to 40-4-212. In re Custody of R.R.K., R.D.K., & L.M.K., 260 M 191, 859 P2d 998, 50 St. Rep. 1002 (1993), followed in Girard v. Williams, 1998 MT 231, 291 M 49, 966 P2d 1155, 55 St. Rep. 965 (1998).

Rights and Obligations of Stepfather — Equitable Adoption Not Recognized: Pierce sought custody of his spouse's child in connection with a dissolution of marriage. Pierce never formally adopted the child, but argued that an equitable adoption existed giving him standing to seek custody. The court reaffirmed the law that equitable adoption is not recognized in Montana. To adopt a child, the correct statutory procedures must be followed, and followed rigorously. Pierce had no standing to contest the custody of the child, nor had he any obligation to that child. In re Marriage of Pierce, 198 M 255, 645 P2d 1353, 39 St. Rep. 914 (1982).

Custody Awarded Nonparent: Permanent custody cannot be awarded to a nonparent on the basis of the "best interest" test, it being appropriate only to determine custody rights between natural parents, but rather when natural parents forfeit their rights by not meeting the minimum standards of the child abuse, neglect, and dependent statutes. Henderson v. Henderson, 174 M 1, 568 P2d 177 (1977).

Erroneous Award of Temporary Custody to Aunt: An aunt did not have standing to bring an action for temporary custody of her brother's children because they were in the "physical custody", although not actual and immediate control, of their mother. The aunt was not a party to the original custody proceeding, the motion for temporary custody was accompanied by a deficient affidavit, and no notice was given to the mother. Henderson v. Henderson, 174 M 1, 568 P2d 177 (1977).

HOME-STATE DETERMINATION

Short Amount of Time Spent in Montana Not Enough for Jurisdiction — Meaning of Home State Under UCCJEA — Legislative Intent Analyzed — Totality of Circumstances Approach

Adopted: A child moved to Montana with both of his parents toward the end of September 2013, but the mother and the child departed to Canada in October 2013. The child never returned. In February 2014, the mother traveled to Montana to retrieve her and her son's belongings and returned to Canada without the father's knowledge. In May 2014, the father sought resolution of parenting and custody in Montana, but the District Court determined that it lacked subject matter jurisdiction on the grounds that Montana was not the home state of the child. On appeal, the Supreme Court affirmed after determining that the Legislature's intent in adopting the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was to create a bright-line rule. Using a totality of the circumstances approach, the court concluded that an absence is not temporary if the character of the absence would make it unreasonable to assume a child would integrate into a community of Montana during the portions of the 6-month period when the child is not absent from the state. Consequently, the child did not live in Montana for the timeframe required by 40-7-201. In re Marriage of Sampley, 2015 MT 121, 379 Mont. 131, 347 P.3d 1281.

No Dual Residency in Montana Despite Joint Custody Provisions — Affidavit Indicating Future Residency Intent Irrelevant: When the parties were divorced in Nevada, physical custody of their child was granted to the mother, who continued to reside with the child in Nevada, and Umland moved to Montana, having been granted visitation rights. When the child died in an automobile accident, Umland attempted to collect a settlement under his insurance policy, which provided coverage for relatives who were residents of the insured's household. As proof that the child was a resident of Montana, Umland submitted an affidavit asserting that the child had indicated an intent to reside with Umland. The District Court disallowed the affidavit and held that the policy did not apply because the child was not a resident. On appeal, Umland argued that because 1-1-215 establishes a minor's residence as the residence of the parent having legal custody and because Montana allows for joint custody, it naturally followed that Montana allows dual residency. The Supreme Court disagreed. Montana law provides that there may be only one residence. The child customarily resided with the mother and thus was a Nevada resident. Further, the affidavit indicating the child's intent to reside in Montana in the future was irrelevant because the child was a Nevada resident at the time of death. Umland v. Nat'l Cas. Co., 2003 MT 356, 319 M 16, 81 P3d 500 (2003).

Lack of Montana Residency and Significant Connections — No Montana Jurisdiction: The statutory considerations of this section were not met and thus a Montana court had no jurisdiction over a child custody case when: (1) prior to commencement of the proceeding, the child lived in Pennsylvania for about 8 years, visiting Montana only briefly; (2) the child's significant connections were with Pennsylvania, with only minimal Montana connections; (3) Pennsylvania, under its version of the Uniform Child Custody Jurisdiction Act, had subject matter jurisdiction and, absent evidence that Pennsylvania had declined to exercise that jurisdiction, jurisdiction did not confer to Montana; and (4) the facts of the case did not constitute such an extraordinary or emergency situation as to confer custody jurisdiction to Montana. In re Marriage of Miller/Beam, 259 M 424, 856 P2d 1378, 50 St. Rep. 863 (1993).

Montana Not Child's "Home State" — Lack of Child Custody Jurisdiction: A Montana court granted father's petition for dissolution but ruled that it lacked jurisdiction over the question of child custody because neither child of the marriage had lived in Montana for 6 months prior to filing of the dissolution petition. Because Montana was not the children's home state under subsection (2)(a) of this section, the court's ruling regarding lack of jurisdiction was proper because a court does not acquire subject matter jurisdiction merely by ruling on a matter, nor does jurisdiction over a dissolution of marriage necessarily confer jurisdiction over related child custody issues. In re Marriage of Oltersdorf, 256 M 96, 844 P2d 778, 49 St. Rep. 1153 (1992). See also In re Marriage of Lance, 213 M 182, 690 P2d 979 (1984), and In re Marriage of Brown, 218 M 14, 706 P2d 116 (1985).

Frequent Parental Moves — Mere Presence Out-of-State Insufficient to Confer Jurisdiction: Mother contended the District Court lacked subject matter jurisdiction, asserting that California was the proper forum due to the child's and mother's residency there. The court properly assumed jurisdiction after finding that: (1) California was not the child's home state because mother and child moved to California less than 3 months before father filed the modification action, in August 1987, and had not previously lived there; (2) before moving to California in June 1987, mother and child had lived primarily in Oregon and one or both had lived in Washington and Nevada for periods of 1 to 3 months since November 1986; (3) mother and child moved frequently and lived in four or more households in the previous 2 years; (4) there was no evidence of any significant connection between mother and child and the state of California or proof that mother intended to remain there; and (5) mere physical presence in California for less than 6 months before commencement of proceedings was insufficient to confer jurisdiction in California. In re Marriage of Klose, 243 M 211, 793 P2d 1311, 47 St. Rep. 1156 (1990).

Residency Establishing Home State — Out-of-State Parent Claiming Custody: Jurisdiction was properly in Montana and the provisions of this section applied in a case where the family lived in Montana several years, the mother claimed custody and moved the child to New Mexico, and the father filed for custody in Montana 5 months later. In re Marriage of Cox, 226 M 176, 736 P2d 97, 44 St. Rep. 567 (1987).

No Tolling of Six-Month Home State Period: The children had moved from Montana with the custodial parent and resided in Wyoming for 7 months, but the custodial parent did not give notice to the District Court of her move as required by a District Court order. At the time of the move, the father was incarcerated in Montana. The Supreme Court held that neither circumstance tolled the home state period of 6 months established by 40-4-211. The court based its decision on the legislative history of the section, following Pierce v. Pierce, 197 M 16, 640 P2d 899, 39 St. Rep. 315 (1982), and upon the fact that incarceration is no bar to petitioning for custody modification. In re Marriage of Lance, 213 M 182, 690 P2d 979, 41 St. Rep. 2032 (1984).

"Home State" — Improper Conduct: A noncustodial parent's refusal to return his child to the custodial parent does not toll the calculation of the 6-month period to establish "home state". Facts relating to the improper conduct of a petitioner should only be addressed in the context of determining whether it is appropriate to exercise jurisdiction once it has been determined that Montana has jurisdiction. Pierce v. Pierce, 197 M 16, 640 P2d 899, 39 St. Rep. 315 (1982).

"Home State" — "Significant Connection": A mother was granted custody of her son in July 1979 in Kentucky. In August 1979 she permitted the father to take the child to Montana but requested the child's return after 5 months. The child was not returned, and in August 1980 the father filed a petition for modification of the Kentucky child custody decree. Montana has jurisdiction under either the "home state" or "significant connection" standard. Pierce v. Pierce, 197 M 16, 640 P2d 899, 39 St. Rep. 315 (1982).

Jurisdiction and Venue — Home State — County Residence: The court had jurisdiction to modify the child's custody because Montana was the home state of the child at the time the action was commenced and venue of the case because defendant was a resident of the county when the action was commenced. Ronchetto v. Ronchetto, 173 M 285, 567 P2d 456 (1977).

"Seize and Run" of Minor Children as Not Conferring Jurisdiction in Custody Modification Cases: District Court erred in assuming jurisdiction to award custody of minor children to father living in Montana based on children's physical presence before court where divorce and custody had been previously awarded to mother in State of Washington. Mere fact father seized children from mother living in Washington and brought them before Montana court is insufficient to establish jurisdiction over mother who has no "contacts" with State of Montana, and any attempt by Montana to exercise jurisdiction over her would be in violation of the Due Process Clause of 14th amendment to the United States Constitution. Therefore, any custody decree rendered by Montana court would not be entitled to full faith and credit, and the interstate custody battle would continue, and whatever chance the children have for stability and happiness would be lost amidst the din of warring parents. State ex rel. Muirhead v. District Court, 169 M 535, 550 P2d 1304 (1976).

Attorney General's Opinions

Transfer of Child Custody Proceeding to Tribal Jurisdiction — No Continuance of State Child Protection Services: Once a child custody proceeding has been transferred from state District Court to tribal jurisdiction under sec. 101(b) of the Indian Child Welfare Act (25 U.S.C. 1911(b)), the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) may not continue to provide child protection services or benefits to the Indian child. 41 A.G. Op. 76 (1986).

Law Review Articles

A Look at Kulstad v. Maniaci in Light of Changing Cultural Norms, Neilson, 71 Mont. L. Rev. 449 (2010).

Jurisdictional Problems of Foreign Divorce Decrees Under the Full Faith and Credit Clause, Muckelston, 31 Mont. L. Rev. 112 (1969).

40-4-212. Best interest of child.

Commissioners' Note

This section [except the last sentence] is designed to codify existing law in most jurisdictions. It simply states that the trial court must look to a variety of factors to determine what is the child's best interest. The five factors mentioned specifically are those most commonly relied upon in the appellate opinions; but the language of the section makes it clear that the judge need not be limited to the factors specified. Although none of the familiar presumptions developed by the case law are mentioned here, the language of the section is consistent with preserving such rules of thumb. The preference for the mother as custodian of young children when all things are equal, for example, is simply a shorthand method of expressing the best interest of children—and this section enjoins judges to decide custody cases according to that general standard. The same analysis is appropriate to the other common presumptions: a parent is usually preferred to a non-parent; the existing custodian is usually preferred to any new custodian because of the interest in assuring continuity for the child; preference is usually given to the custodian chosen by agreement of the parents. In the case of modification, there is also a specific provision designed to foster continuity of custodians and discourage change. See Section 409 [40-4-219].

Compiler's Comments

2009 Amendment: Chapter 356 inserted (2) concerning best interest of child of a parent in military service; and made minor changes in style. Amendment effective October 1, 2009.

1997 Amendment: Chapter 343 in (1), in first sentence, substituted "the parenting plan" for "custody" and in second sentence, after "relevant", inserted "parenting"; at end of (1)(a) deleted "as to custody"; at end of (1)(b) deleted "as to a custodian"; in (1)(c), near middle after "person who", deleted "may"; inserted (1)(h) through (1)(m) setting out additional factors a court shall consider in determining the parenting plan; in (2), in two places, substituted "parenting" for "custody"; deleted former (3)(a) that read: "Custody should be granted to the parent who has provided most of the primary care during the child's life"; at beginning of (3)(a) substituted "parenting plan" for "custody"; inserted (3)(b) describing when a motion to amend a final parenting plan is vexatious; deleted (4) that read: "(4) The following are rebuttable presumptions:

(a) A knowing failure to pay birth-related costs that the person is able to pay is not in the best interest of the child.

(b) Failure to pay child support that the person is able to pay is not in the best interest of a child in need of the child support"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

1995 Amendment: Chapter 467 inserted (3) concerning rebuttable presumptions that apply unless contrary to best interest of child; inserted (4) concerning rebuttable presumptions related to birth costs and child support; and made minor changes in style. Amendment effective April 15, 1995.

Severability: Section 5, Ch. 467, L. 1995, was a severability clause.

1989 Amendment: Inserted (2) that read: "(2) A de facto custody arrangement, in the absence of a prior custody decree, does not require the child's parent or parents to prove the factors set forth in 40-4-219"; and made changes in form.

1987 Amendment: In introduction, at end, inserted "but not limited to"; inserted (6) requiring the court to consider any abuse or threat of abuse by one parent against the other parent or a child; and inserted (7) requiring the court to consider any chemical dependency or chemical abuse by either parent.

Source: Section 402, Uniform Marriage and Divorce Act.

Montana Changes: The Montana version deletes the last sentence of the Uniform Act: "The Court shall not consider conduct of a proposed custodian that does not affect his relationship to the child." See also 1987 and 1989 amendment notes.

Case Notes

General 1019
Joint Custody — Decisions Under Former Law 1027
Sufficiency of Evidence, Findings 1030
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Wishes of Child 1040
Adjustment of Child 1042
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GENERAL

Recommendations of Parenting Evaluator Rejected — No Abuse of Discretion When District Court Thoroughly Considered Best Interests of Children: The mother appealed the District Court's parenting plan, which provided that the children would remain in Columbus and live with their father on a primary basis and not move to Lewistown to live with her on a primary basis. She argued the District Court had abused its discretion because the children had stated their wishes to reside with her on a primary basis and because a parenting evaluator had recommended the children live with her. However, the Supreme Court affirmed the ruling, citing that the District Court was not required to adopt the evaluator's recommendations. It also ruled that the District Court had considered the best interests of the children in concluding that the children should remain in Columbus, where many family members resided and the school district provided resources to two of the children born deaf. In re Marriage of Williams, 2018 MT 221, 392 Mont. 484, 425 P.3d 1277.

Mother's Fundamental Right to Travel — Father's Burden of Proof That Mother's Move From Montana to Vermont Not in Best Interest of Child: The District Court correctly held that the petitioning father had the burden of showing that imposing a travel restriction against the respondent mother was in the best interest of the child. The District Court acted within its broad discretion and considered the best interest of the child factors in 40-4-212 while balancing the respective and competing constitutional rights of the parties when it allowed a child to move from Montana to Vermont with the respondent mother. In re Parenting of C.J., 2016 MT 93, 383 Mont. 197, 369 P.3d 1028.

Best Interests of Child Sufficient to Restrict Parent's Fundamental Right to Travel: In a custody dispute over the residency of a minor child born while both parents were living in Montana, the District Court ordered that if the mother remained in Ohio, where she had traveled with the child and then decided to stay, and the father remained in Montana, it was in the child's best interests for the father to become the custodial parent. On appeal, the Supreme Court affirmed, holding that the District Court's order on custody was appropriate and that the mother's fundamental right to travel was not violated when the record demonstrated that the father was more likely to facilitate frequent and continuing contact with the mother. In Re Parenting of M.C., 2015 MT 57, 378 Mont. 305, 343 P.3d 569.

Child Residing With Mother During School Year — Best Interests of Child Appropriately Considered: A husband and wife separated with one child. A standing master issued findings of fact, conclusions of law, and a final decree establishing a final parenting plan, which was adopted by the District Court. The parenting plan gave the mother custody of the child during the school year. The husband appealed, arguing that the District Court erred in adopting several of the standing master's findings. The Supreme Court held that substantial credible evidence supported the parenting plan and that the lower court properly considered the statutory factors to assess the child's best interests. In re Parenting of G.J.A., 2014 MT 215, 376 Mont. 212, 331 P.3d 835.

Amendment of Parenting Plan Based Solely on Party's Absence From Mediation — Violation of Due Process: After the father failed to attend a court-ordered mediation concerning the mother's motion to amend the parties' parenting plan, the District Court, without holding a hearing, amended the parenting plan, citing the father's failure to appear at the mediation as the sole reason for the amendment. On appeal, the Supreme Court reversed, concluding that the order violated due process of law, which required that the father be heard to show cause why the amendment to the parenting plan should not be granted and required that the court consider the best interest of the child. In re Marriage of Wendt, 2014 MT 174, 375 Mont. 388, 329 P.3d 567.

Mother's Move From Montana to Utah in Best Interest of Children — Proper for District Court to Conduct In Camera Interview — Mother's Medical Records Not Required: The District Court permitted a mother to move her children from Montana to Utah. Subsequently, the father moved to amend the parenting plan to require the children to move back to Montana. In denying the motion, the District Court weighed the factors in 40-4-212 and concluded that the children could stay in Utah with the mother. On appeal the father claimed, among other things, that the District Court abused its discretion by interviewing the children in camera, by determining that the children had adjusted to their home, school, and community, and by not requiring the mother to produce medical records. The Supreme Court determined that the District Court did not abuse its discretion by interviewing the children in camera without cross-examination as permitted under 40-4-214, that the father failed to present any evidence that the children were not adjusted, and that the mother's medical records were being sought to attack the mother's credibility, not to determine the best interest of the children. Hood v. Hood, 2012 MT 158, 365 Mont. 442, 282 P.3d 671.

No Requirement to Allow Cross-Examination of Child in Custody Case: The mother in a custody case argued that she was not afforded a fair trial because the judge interviewed the child in chambers and did not allow the parties to cross-examine the child. The Supreme Court held that there is no statutory requirement that a child be subjected to cross-examination in a courtroom and that the trial court did not abuse its discretion. In re Parenting of N.S., 2011 MT 98, 360 Mont. 288, 253 P.3d 863.

Consideration of Parent's Motives When Parent Moves Children: Unless a District Court finds that a parent's decision to move exemplifies a willful and consistent attempt to frustrate or deny the other parent contact with the children, the decision to move cannot be held against the moving parent or considered as being against the best interests of the children. The District Court committed a clear abuse of discretion in considering the move in its adoption of the amended final parenting plan. In re Marriage of Plaisted-Harman, 2010 MT 100, 356 Mont. 218, 232 P.3d 888.

Final Parenting Plan Awarding Sole Custody to Same-Sex Partner Affirmed: Maniaci and Kulstad, as same-sex domestic partners, adopted two children and functioned as coparents. The parties agreed Maniaci would be the adoptive parent. The relationship between Maniaci and Kulstad dissolved in 2007. Thereafter, the Supreme Court in Kulstad v. Maniaci, 2009 MT 326, 352 Mont. 513, 220 P.3d 595, awarded both parties a parental interest. In 2008, following a hearing that Maniaci did not attend, the District Court approved a final parenting plan that awarded sole custody to Kulstad with supervised visitation for Maniaci, who had relocated to Tennessee. Maniaci appealed and argued the final parenting plan was based on unreliable evidence and testimony in violation of her constitutional rights. The Supreme Court disagreed. The final parenting plan was supported by substantial evidence. The District Court was not required to make specific findings as to every parenting factor in 40-4-212. The District Court clearly considered the factors in 40-4-212, including the children's emotional and mental health, their relationship to both parties, Maniaci's role in the unsubstantiated abuse allegations against Kulstad, and Maniaci's decision to relocate to Tennessee and leave the children in the care of Kulstad despite allegations of abuse. Kulstad v. Maniaci, 2010 MT 248, 358 Mont. 230, 244 P.3d 722.

Primary Custody Based on Child's Best Interests Affirmed: The District Court did not abuse its discretion in assigning primary residential custody of a child to the mother given that both parents were in good physical health and could adequately parent, the mother had provided the majority of care for the child during the marriage and had more time to parent, and the child had extended family and a doctor in Oklahoma and was integrated into the community in Oklahoma where the mother resided. The child's best interests were served by adopting the parenting plan under which the child would reside with the mother the majority of the time. In re Marriage of Graham, 2008 MT 435, 347 M 483, 199 P3d 211 (2008).

Recognition of Paternity in Child's Best Interests: A woman had an extramarital affair and became pregnant. After the biological father's paternity was determined, the District Court held that a father-child relationship was in the child's best interests and devised a parenting plan for the biological father's visitation and support. The mother and putative father disagreed and appealed, but the Supreme Court affirmed. The District Court properly applied the best interest of the child standard and did not abuse its discretion in extending to the biological father the opportunity uniquely afforded him by biology to parent his child. In re Parenting of K.P., 2005 MT 297, 329 M 337, 124 P3d 1091 (2005). See also In re Paternity of "Adam", 273 M 351, 903 P2d 207 (1995).

Failure of District Court to Consider Parental Visitation Frustration in Denial of Parenting Plan Modification — Remand: The District Court declined to amend a parenting plan after concluding that there was no change of circumstances since the adoption of the prior parenting plan sufficient to necessitate amendment of the prior parenting plan. However, nothing in the record indicated that the District Court considered the presumption in 40-4-219 that a parent is not considered to be acting in the child's best interests if the parent willfully and consistently attempts to frustrate or deny contact with the child by the other parent. Absent consideration of this presumption, the Supreme Court remanded for detailed findings and conclusions on the issue. In re Marriage of Olson, 2005 MT 111, 327 M 82, 111 P3d 686 (2005).

Standard of Review of Findings Related to Custody Modification: The Supreme Court reviews a District Court's findings relating to custody modification to determine whether the findings are clearly erroneous. Findings are clearly erroneous if they are not supported by substantial evidence, if the District Court misapprehended the effect of the evidence, or if the Supreme

Court's review of the record indicates that a mistake has been made. In re Marriage of Olson, 2005 MT 111, 327 M 82, 111 P3d 686 (2005), followed in In re Marriage of Lawrence, 2005 MT 125, 327 M 209, 112 P3d 1036 (2005). See also In re Marriage of Johnson, 266 M 158, 879 P2d 689 (1994), and In re Custody of Arneson-Nelson, 2001 MT 242, 307 M 60, 36 P3d 874 (2001).

No Requirement That Any Best Interest Factor Be Weighed More Heavily Than Another: Appellant contended that to protect and preserve a natural parent's rights and fundamental liberty interests to the care and custody of a child, the parent's rights must be protected by fundamentally fair procedures and that the procedure for deciding custody decisions in dissolution proceedings should mirror the procedure for terminating parental rights, wherein the District Court is required to address the relevant individual criteria of the statute. The Supreme Court noted that Montana has at least five statutory schemes relevant to different types of situations. A custody proceeding is not as harsh as a termination proceeding and does not share the same constitutional implications or require such a steep burden of proof. Under this section, the District Court must consider all relevant statutory factors, which may be different on a case-by-case basis. However, it would be inappropriate to arbitrarily require that one or two factors be more heavily considered than the other permissive, nonexclusive factors in the best interest statute or to require a District Court to analyze custody determinations in a manner similar to the statutory scheme for terminating parental rights. In re Marriage of Czapranski, 2003 MT 14, 314 M 55, 63 P3d 499 (2003), distinguishing In re Marriage of Stephenson, 230 M 439, 750 P2d 1073 (1988), and followed in In re Marriage of McDermott, 2003 MT 283, 318 M 13, 79 P3d 245 (2003).

Child's Best Interest Outweighs Parent's Fundamental Right to Travel: A final parenting plan provided that the mother be allowed to remain in the family home and that the parties' three children reside primarily with the mother, with liberal visitation by the father. The mother later decided to move with the children to Idaho. The District Court issued an order preventing the mother from removing the children from Montana, and the mother sought to amend the parenting plan to allow her to move. A psychiatrist found that the children loved both parents and that both parents agreed that the children needed to have regular contact with and the support of the other parent. The psychiatrist recommended that the children remain together and not be separated. The mother testified that she was moving to Idaho because her fiance lived there, the schools were superior, and she had an employment opportunity there. The District Court concluded that the children's best interests would be served if the children remained in Montana and that the children's primary residence would remain with the mother if she stayed in Montana, but that if she moved to Idaho, the children should remain in Montana with their father. The mother appealed. The mother claimed that she had a constitutional right to relocate her children to Idaho that could not be restricted merely because it might be best for the children if both parents lived in the same town, citing In re Marriage of Cole, 224 M 207, 729 P2d 1276 (1986), and In re Custody of D.M.G. & T.J.G., 1998 MT 1, 287 M 120, 951 P2d 1377 (1998). The Supreme Court distinguished both Cole and D.M.G., holding that although the fundamental nature of the constitutional right to travel and the need to demonstrate a compelling interest before violating that right are still viable, a presumption in favor of the parent who provides most of the child's primary care no longer exists. Contrary to the mother's assertion that the parent resisting the move must show that the move would be disadvantageous to the child or that the child would be harmed by the move, the burden of proof is the best interests of the child standard. The District Court properly considered the standard in this section and the psychiatrist's recommendations, noting that the children had an established support system in Montana that did not exist in Idaho, and the court did not abuse its discretion in amending the parenting plan to reflect the reality of the parties' actual parenting arrangement. The best interests of a child outweigh a parent's fundamental right to travel. In re Marriage of Robison, 2002 MT 207, 311 M 246, 53 P3d 1279 (2002). See also In re Parenting of N.P. v. Perkins, 2006 MT 10, 330 M 293, 127 P3d 1035 (2006), in which the Supreme Court noted that application of the Robison criteria must be made cautiously and only in furtherance of the best interests of the child and held that because a father was unable to prove that restricting the mother's travel was in their child's best interests, the mother was allowed to continue to reside with the child in another state where the child had become accustomed to home, school, and community and where the mother had extended family and better job opportunities.

No Abuse of Discretion in Finding Compliance With Parenting Plan Despite Impossibility of Confirmation of Parent's Participation in Alcoholics Anonymous and Domestic Violence Counseling — Parenting Agreement Not Binding if Not in Best Interest of Child: As part of a parenting plan, the mother agreed to attend Alcoholics Anonymous meetings and domestic violence counseling and to provide the father's attorney with written confirmation of attendance. Because of the confidential nature of the meetings and counseling, no confirmation was provided, so the father sought to modify the parenting plan to limit the mother's visitation. The District Court concluded that the confirmation condition was impossible to perform, accepted testimony from the mother's probation officer and counselor as adequate proof of the mother's attendance, and held that further visitation restrictions were not in the child's best interest. The father appealed, but the Supreme Court affirmed. The District Court was not bound by the parents' agreement when the child's best interest was concerned, nor were the findings regarding the impossibility of obtaining the required confirmation clearly erroneous. The District Court was in the best position to judge the credibility of the witnesses and the weight to be given to the evidence, and absent clear error, its findings were not disturbed. Pankratz v. Teske, 2002 MT 112, 309 M 499, 48 P3d 30 (2002).

Implied Finding of Changed Circumstances Warranting Revision of Parenting Plan Absent Showing of Abuse of Discretion: A District Court may, in its discretion, amend a parenting plan if it finds that there has been a change in circumstances of the child and that a change is necessary for the child's best interests. In making the determination, the court relies on facts that arose after the prior parenting plan or that the court was unaware of at the time of the prior plan. Here, the court did not make a specific finding of changed circumstances, but such a finding was implied, and the court's failure to specifically cite the words "a change in circumstances" was at most harmless error. The trial court is in the best position to resolve child custody issues, and it is that court's duty to resolve conflicts regarding evidence and to determine the qualifications and competency of expert witnesses. The court's decisions in regard to these duties will not be disturbed absent a showing of an abuse of discretion. In re Custody of Arneson-Nelson, 2001 MT 242, 307 M 60, 36 P3d 874 (2001).

Sua Sponte Modification of Postadoption Visitation Agreement Within Discretion of District Court: The rule that in the context of separation agreements made between spouses, parties cannot make binding agreements concerning the support, custody, or visitation of children applies equally to postadoption agreements made between an adopted child's birth parents and adoptive parents. The best interests of the child are paramount, and sua sponte modification of an original visitation agreement in this case was within the discretion of the District Court after determining the best interests of the adopted child. Groves v. Clark, 1999 MT 117, 294 M 417, 982 P2d 446, 56 St. Rep. 490 (1999). See also In re Marriage of Mager, 241 M 78, 785 P2d 198, 47 St. Rep. 97 (1990), and In re Marriage of Widhalm/Miller, 279 M 97, 926 P2d 748, 53 St. Rep. 1067 (1996).

No Duty of Attorney to Nonclient in Child Custody Case: An attorney must be able to vigorously advocate a client's interests in litigation without being compromised by obligations to nonclients. If an attorney were considered to owe the same duty of care to both a parent and child in an adversarial custody case, neither parent nor child would be served effectively. Because the interests of a parent and those of a child may not be identical, the attorney's duty runs solely to the client except if the conduct rises to the level of deceit or collusion or is intentionally reckless. Rhode v. Adams, 1998 MT 73, 288 M 278, 957 P2d 1124, 55 St. Rep. 303 (1998). See also Redies v. Attorneys Liability Protection Soc'y, 2007 MT 9, 335 M 233, 150 P3d 930 (2007).

Primary Caretaker Presumption Rebutted — Modification of Joint Custody Affirmed: Michael and Michelle entered a joint child custody arrangement with physical custody shared equally, alternating weekly. One year after the dissolution, Michelle was accepted at a Billings university and sought a custody modification that would designate her as primary custodian and that would allow her to move with the child to Billings from the family's hometown of Glasgow. Michael testified as to the child's ties to home, school, community, and family in Glasgow, while Michelle stressed the importance of consistency of herself as primary physical custodial parent, having provided the primary care for the child during the 3 years prior to dissolution. After considering all the factors in this section, the District Court granted Michael primary residential custody during the school year and Michelle during the summer, with 9 days a month visitation for Michelle during the school year and Michael one weekend visitation a month during the summer. Michelle appealed, contending that the court failed to properly apply the primary care presumption in subsection (3) of this section (deleted 1997) because the court considered that both parents shared primary care equally since their divorce rather than considering that she had provided most of the primary care during the child's life. The Supreme Court, noting that there was no initial designation of primary caregiver or custodian in this case, held that a proper determination of the child's best interests was sufficient to rebut the primary care presumption. In re Marriage of Hlad, 282 M 449, 938 P2d 673, 54 St. Rep. 426 (1997), distinguishing In re Marriage of Abrahamson, 278 M 336, 924 P2d 1334 (1996).

Modification of Custody Order Required by Substantial Change in Circumstances — Application of In Re Marriage of Johnson Required — Jurisdictional Prerequisites — Absurd Application of Statute Avoided: After making an agreement for child custody as part of the dissolution of her marriage, Kimberly determined to attend college and moved from Lewistown to Billings with her children. On a remand from the Supreme Court, the District Court held that In re Marriage of Johnson, 266 M 158, 879 P2d 689 (1994), did not apply because custody was not being transferred from the primary custodian to the secondary custodian. The Supreme Court held that contrary to the District Court's interpretation, Johnson did apply to the case and that Johnson applied to any case in which a custody modification would have the effect of substantially changing the children's primary residence, requiring that the District Court must first meet the jurisdictional requirements of 40-4-219. However, the Supreme Court found that a literal application of that statute would cause an absurd result by its application only to movement of a child to another state and not to instances in which the child is moved from one end of the state to another or to another country. For this reason, the Supreme Court held that if a change has occurred in the circumstances of the child or the child's custodian, causing the children to move from one location to another in a manner that would hinder the effectiveness of the custody arrangement, then the jurisdictional requirements of 40-4-219 have been met and the District Court may modify the custody arrangement pursuant to this section. The Supreme Court then applied the rule to the case before it and concluded that the modification of the custody arrangement changing the custody of Kimberly's ex-husband from 160 days to 75 days annually was in the best interests of the children, as demonstrated in the record. In re Marriage of Syverson, 281 M 1, 931 P2d 691, 54 St. Rep. 32 (1997), followed in In re Marriage of Oehlke, 2002 MT 79, 309 M 254, 46 P3d 49 (2002).

Failure to Mention Statute Not Reversible Error — Presumption Adequately Rebutted: This section does not require the District Court to find that one parent is unfit to have custody, but rather creates a rebuttable presumption in favor of the preexisting custodial parent. In this case, the District Court failed to explicitly mention the statute, but nevertheless considered the substantial evidence and determined that the statutory presumption had been adequately rebutted. Failure to explicitly mention the statute was, at most, harmless error. In re Marriage of Abrahamson, 278 M 336, 924 P2d 1334, 53 St. Rep. 939 (1996), followed in In re Marriage of Baer, 1998 MT 29, 287 M 322, 954 P2d 1125, 55 St. Rep. 104 (1998).

Best Interest of Child Standard Unconstitutional in Custody Award to Nonparent Over Natural Parent Absent Finding of Abuse, Neglect, or Dependency: The best interest of the child standard incorporated into 40-4-221 in determining the custody of a child whose custodial parent dies is unconstitutional to the extent that it allows the grant of a petition prior to the termination of the noncustodial parent's constitutional right to custody. Use of the standard is improper in that any showing that a nonparent may be able to provide a better environment than a natural parent is irrelevant to the question of custody between the two in view of the constitutional right of a parent to custody. Although 40-4-221 gives a nonparent standing to request a custody hearing, it does not give the District Court authority to deprive a natural parent of the right to custody absent a finding of abuse, neglect, or dependency on the part of the natural parent. In re A.R.A., 277 M 66, 919 P2d 388, 53 St. Rep. 543 (1996), following In re Doney, 174 M 282, 570 P2d 575 (1977), and overruling Brost v. Glasgow, 200 M 194, 651 P2d 32 (1982), and In re C.G., 228 M 118, 740 P2d 1139 (1987).

Modification of Custody Based on Best Interests of Children — Affirmed Despite Application of Wrong Statute: The lower court granted the father's motion to modify the joint custody provisions of the divorce decree to allow him to have primary custody of three of the parties' five children. The Supreme Court noted that the lower court should have applied 40-4-219 because the modification had the effect of substantially changing the primary residence of the three children. However, because the mother had not objected to the application of the wrong statute, the Supreme Court stated that it would review the lower court's action based upon its application of this section. The Supreme Court held that the lower court had not erred in finding that the best interests of the three children were served by a change in custody even if it resulted in splitting up the five children. In re Marriage of Lockman, 266 M 194, 879 P2d 710, 51 St. Rep. 726 (1994).

Petition Resulting in Change of Primary Residence of Children in Joint Custody Construed as Petition to Terminate Joint Custody — Jurisdictional Requirements Applicable — Best Interest Standard Applicable on Petition Not Resulting in Change of Primary Residence: A motion or petition to modify a sole custody provision or to terminate a joint custody provision must satisfy the jurisdictional prerequisites set out in 40-4-219. Likewise, a motion or petition to modify child custody provisions in a dissolution decree that have the effect of substantially changing the primary residence of the parties' children, even though the formal joint custody designation is retained, is to be construed as a motion or petition to terminate joint custody and must also satisfy the jurisdictional prerequisites set out in 40-4-219. Any effort to modify the physical custody arrangement in a decree that provides for joint custody but that does not seek a substantial change in the children's primary residence may be considered according to the best interest standard set out in this section. In this case, because the mother sought a modification of the children's physical custody arrangement, the District Court erred in modifying physical custody without finding substantial endangerment as required by 40-4-219. In re Marriage of Johnson, 266 M 158, 879 P2d 689, 51 St. Rep. 703 (1994), followed in In re Marriage of Gallagher, 266 M 358, 880 P2d 1303, 51 St. Rep. 840 (1994), and In re Marriage of Syverson, 281 M 1, 931 P2d 691, 54 St. Rep. 32 (1997).

Sole Custody Awarded Father — Mother's Mental Health a Factor in Granting Supervised Visitation — No Abuse of Discretion: Mother appealed from the District Court child custody order in a dissolution of marriage granting the father sole custody of their son and granting the mother supervised visitation rights. The Supreme Court ruled that because mental health is a factor used in determining the best interests of the child, the District Court did not abuse its discretion in relying upon the opinion of experts that the mother was in need of treatment and in granting sole custody to the father and ordering supervised visitation by the mother. In re Marriage of Cook, 250 M 210, 819 P2d 180, 48 St. Rep. 795 (1991).

Best Interests of Child in Determining Custody for Purposes of Religious Education: A question of religious education must be strictly limited to the context of the best interests of the child. Courts will not debate the merits of different religions or show partiality to any religious faith, but courts will examine religious practices that interfere with a child's general welfare. In re Marriage of Gersovitz & Siegner, 238 M 506, 779 P2d 883, 46 St. Rep. 1455 (1989).

"Best Interest" Factors Examined — No Abuse of Discretion: When facts were examined under the statutory standards, including allegations of physical abuse, wishes of the parents, wishes of the children, and the interaction and interrelationship of the parents with the children, there was no abuse of discretion through failure to examine the best interests of the children in the District Court award of joint custody. In re Marriage of Allen, 237 M 64, 771 P2d 578, 46 St. Rep. 624 (1989).

Changed Circumstances Rule Applicable to Modification of De Facto Custody Arrangement: The changed circumstances rule and the best interests test applicable to modification of judicial custody decrees, as set forth in 40-4-219, are to be applied in modifying a child custody arrangement where there has been no previous judicial supervision or decree. The best interests test of this section does not apply. (See subsequent 1989 amendment.) In re Custody of Pierre Daniel Andre, 234 M 80, 761 P2d 809, 45 St. Rep 1745 (1988).

Qualified Intervenor and Natural Father Claiming Custody — "Best Interest" Standard Properly Applied: In a case where the natural custodial parent died, the District Court partially relied on the stringent standard set forth in In re Guardianship of Doney, 174 M 282, 570 P2d 575 (1977), in holding that, to gain custody, the intervenor must show that the natural father was unfit. The Supreme Court found that the Doney standard was incorrectly applied, but since the lower court ultimately applied the correct standard (best interest of the child) in its final determination, that determination did not constitute reversible error. Weber v. Van De Kop, 228 M 118, 740 P2d 1139, 44 St. Rep. 1388 (1987).

Award to Father — Care Provided by Grandparent: Mother appealed order granting child custody to father, arguing that since the child's grandmother provided daily care while the husband worked, custody had in fact been awarded to the grandparents and the best interest of the child standard was therefore inappropriate to determine the custody rights between natural parents. The court held that the award of custody to the father does not in effect award custody to the grandparents who care for the child during the father's working hours. In re Custody of N.T.E., 227 M 396, 739 P2d 485, 44 St. Rep. 1178 (1987).

Travel Restriction in Best Interest of Child — Proof Required: The parent who requests a travel restriction for the time the other parent has physical custody must provide sufficient proof that a restriction is in the best interest of the child. In re Marriage of Cole, 224 M 207, 729 P2d 1276, 43 St. Rep. 2136 (1986).

No Conflict Between UCCJA and "Best Interests of Child" Test: Under the provisions of the Uniform Child Custody Jurisdiction Act (UCCJA) and 40-4-211, the Montana court properly declined to exercise its jurisdiction. The custody proceedings in Arizona, the children's residence, were filed prior to those in Montana, and Arizona had not stayed its proceedings. The provisions of the UCCJA which are rules for determining jurisdiction do not conflict with this state's rules for determining custody. The former is a procedural determination as to the proper forum, made prior to any substantive inquiry, and the latter is the application of substantive rules. No evidentiary hearing is required in a procedural determination as to the proper forum. In re Marriage of Brown, 218 M 14, 706 P2d 116, 42 St. Rep. 1360 (1985).

Standard Governing Custody and Visitation Decisions — Best Interests of Child — Whether or Not Parents Married: In an action filed under 40-6-115, the father of a child sought to establish paternity of the child and petitioned for joint custody, visitation rights, and settlement of child support. The District Court awarded sole custody to the mother and granted the father limited visitation rights. The father appealed, claiming that it was a denial of equal protection of the law to determine his parental rights under the Uniform Parentage Act, Title 40, ch. 6, part 1, rather than under Title 40, ch. 4, the chapter that would have governed the case had he and the child's mother been married. The Supreme Court affirmed, ruling that the standard for determination of child custody and visitation, best interests of the child, was the same in both laws, and the legally proper result was the same. Schuman v. Bestrom, 214 M 410, 693 P2d 536, 42 St. Rep. 54 (1985).

Potential for Serious Harm Sufficient for Jurisdiction — Best Interests of Children — Modification Granted: There was a sufficient change of circumstances in children's environment to justify change in custody when custodial father of four married mother of four minor children, became a member of a nondenominational religious group advocating rigid religious beliefs, and adopted a strict child-rearing philosophy involving physical punishment and a prohibition against school activities or extracurricular activities until high school. Fact that father had inflicted severe disciplinary practices only on the older children was sufficient to establish jurisdiction to consider modification. District Court awarded custody to the mother, who had remarried and had stable employment and a home in town that could provide children with opportunity for interaction with peers. Supreme Court found substantial credible evidence to support finding of District Court that change in custody was in best interests of children. Reinoehl v. Perry, 213 M 479, 691 P2d 1384, 41 St. Rep. 2269 (1984).

Two-Part Test for Modification: Section 40-4-219 sets out a two-part test to judge whether to modify a prior custody decree. The first part of the test contains two subparts. There must be a change of circumstances, and the change must be significant enough in relation to the best interests of the child that those interests are no longer served by the decree in force as judged by the criteria of 40-4-212. The second part of the test is that the primary custodian may not be changed unless the court finds the enumerated dangers exist and that the advantages of change outweigh the disadvantages. The facts of this case support the modification. R.L.S. & T.L.S. v. Barkhoff, 207 M 199, 674 P2d 1082, 40 St. Rep. 1982 (1983).

Child Custody Dispute — Allegedly Unsafe Condition of Custodian's Yard Knowable Before Trial: There was no merit to husband's claim that new evidence warranted a new trial of divorce proceeding. Wife was granted custody of the child of the marriage, and the asserted new evidence, that part of the backyard where wife lived was bounded by a ditch, was available at the time of the trial and could have been ascertained by husband. Cherewick v. Cherewick, 205 M 75, 666 P2d 742, 40 St. Rep. 1106 (1983).

Separation of Children — Best Interest to Be Considered Separately: In a dissolution proceeding the trial court awarded custody of the older child to the wife and the two younger children to the husband. Wife contended this was error. The Supreme Court held that in child custody matters, the primary factor to be considered is the best interest of the child. The plain meaning of the word "child" mandates that the best interest of each child be considered, not the best interest of the children as a collective. Where there were findings on the factors set forth in 40-4-212, which set out the essential and determining facts upon which the District Court rested its conclusions, there was no abuse of discretion in separating the children. Meyer v. Meyer, 204 M 177, 663 P2d 328, 40 St. Rep. 753 (1983).

Death of Custodial Parent — "Best Interest of Child" Test Applicable: After the death of the custodial mother, the natural father and the maternal grandmother both requested custody of the children pursuant to 40-4-221. The trial court properly determined custody in accordance with the "best interest of child" test of this section. A more stringent standard was not required. Brost v. Glasgow, 200 M 194, 651 P2d 32, 39 St. Rep. 1679 (1982).

Best Interests — Findings on Statutory Factors — No Abuse of Discretion: The marriage of the parties was dissolved, and the mother was awarded custody of the three minor children. The father appealed the custody order, claiming that the District Court abused its discretion in awarding custody because the mother had lived with another man prior to the dissolution and had locked the children in the car with a loaded gun. The mother testified that she and the children had lived with another man prior to the dissolution. She also testified that the gun incident came about when the father attempted to take the children and the mother held him off. She then put the gun in her purse and left it in the car with the children. The Supreme Court found that the District Court properly considered every factor set out in 40-4-212. There was no finding of abuse of discretion, and the award of custody was affirmed. Malcolm v. Malcolm, 196 M 477, 640 P2d 450, 39 St. Rep. 262 (1982).

Fit Parent Properly Denied Custody — Factors to Be Considered by Court: In an action for dissolution of the parties' marriage in which the court found the wife not an unfit mother, the trial court did not err in granting custody of the two children of the parties to the father. The fitness of either party as a parent is only one factor to be considered by the court in granting custody. The court also found that the wife's new husband had an unsettling influence upon the children. Therefore, no error was committed. Bier v. Sherrard, 191 M 215, 623 P2d 550, 38 St. Rep. 158 (1981).

Severance of Parental Rights — Counsel Not Absolutely Required at In-Chambers Interview of Children: In the trial court, a mother's parental rights to her two children were terminated and custody granted to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services). On appeal, the issue was whether the court had erred by interviewing the children in chambers without the presence of the mother and counsel. When the trial court announced to counsel and the mother that it wished to interview both children in chambers, neither counsel nor the mother objected. The mother claimed that the interview of the children without the presence of her counsel violated her rights to due process. She relied on a case in which it was stated that a child may testify out of the parents' presence in abuse and neglect cases subject to the cross-examination by the parents' attorney. The reviewing court noted that nothing in that opinion suggested that it was the duty of the trial judge to assert a parent's right to cross-examination if counsel for the parent does not. Here, in any event, there was no testimony in chambers, just an inquiry into the children's desires regarding custody. A record of the interviews was made and any claimed right of cross-examination was waived by failing to assert that right at the trial level. In re A.C.S. & E.S.S., 190 M 180, 619 P2d 1199, 37 St. Rep. 1868 (1980).

Custody Also Based on Natural Parent Rights: As between a natural father of a child and grandparents of the child, the natural father is entitled to prevail on the basis of his superior rights as a parent. Moreover, absent a finding of abuse, neglect, or unfitness as a parent, a natural parent is entitled to the custody of his child, citing In re Doney, 174 M 282, 570 P2d 575 (1977). In re Marriage of Korol, 188 M 351, 613 P2d 1016 (1980).

Custody Within Court's Discretion: The award of custody is a matter for the trial court's discretion. When the child in question said in an in-chambers interview that it would be "O.K." if he lived with his mother, there was no abuse of discretion. Bailey v. Bailey, 184 M 418, 603 P2d 259 (1979).

Parent's Activities in the Home: While a mother's relationship with another man may not in itself be adequate to support a finding of her unfitness as a parent, especially in a change of custody proceeding, a District Court should not be directed to ignore a parent's activities in the home. Wilson v. Wilson, 180 M 377, 590 P2d 1136 (1979).

Failure to Properly Pursue Appeal — Best Interest of the Child: Even though a party may fail to both timely appeal and to pursue the appeal with some measure of diligence, in hearing a motion to dismiss said party's appeal, the court must still pay heed to the statutory requirement that it look to the best interest of the child. Lehman v. Billman, 178 M 367, 584 P2d 662 (1978).

Removal of Children Warranted: The District Court did not abuse its discretion when it granted the Department of Social and Rehabilitation Services' (now Department of Public Health and Human Services) petition for permanent custody and authority to consent to adoption of three children since they were adjudged dependent and neglected and there was ample evidence to warrant removal from their parents. In re Gore, Youths in Need of Care, 174 M 321, 570 P2d 1110 (1977).

Custody Awarded Nonparent: Permanent custody cannot be awarded to a nonparent on the basis of the "best interest" test, it being appropriate only to determine custody rights between natural parents, but rather when natural parents forfeit their rights by not meeting the minimum standards of the child abuse, neglect, and dependent statutes. Henderson v. Henderson, 174 M 1, 568 P2d 177 (1977).

Contested Guardianship Custody: When a guardianship case is before the court under 72-5-222 and the custody of a child is being contested, the court must consider the provisions of 40-4-212 and guidelines set forth by this court in recent custody cases. In re Guardianship of Gullette, 173 M 132, 566 P2d 396 (1977).

Award to Father — No Need to Prove Mother Unfit: The court did not abuse its discretion by determining that the interests of the children would be best served by granting custody to the father. Absent any other indication in the record, the court's award will not be presumed to be based on superior earning power. The rebuttable presumption favoring mothers (no longer followed) was overcome by the evidence without the need of proving the mother unfit. Isler v. Isler, 173 M 29, 566 P2d 55 (1977).

Custody Award Supported by Favorable Interaction and Interrelationship of Boys With Father: District Court properly awarded custody to father where evidence showed he spent considerable amounts of time with boys and entered into activities with them, whereas mother had made no attempt to see children for a year and had not written or sent birthday gifts. Haywood v. Sedillo, 167 M 101, 535 P2d 1014 (1975).

Change of Circumstances Warranting Change of Custody: To prevent uprooting of child of tender years who had been in physical custody of her father by agreement of parents because of child's emotional problem, it was in the best interest of the child to change legal custody to the father because of change of circumstances. Gilbert v. Gilbert, 166 M 312, 533 P2d 1079 (1975).

Custody of Younger Children Awarded to Father: District Court did not abuse its discretion in awarding custody of two younger children to father who had moved to California, as they have a good home with their father and paternal grandparents, are well cared for and happy, their educational and religious training is being more than adequately fulfilled, and they have lived with their father for more than 5 years. Anderson v. Anderson, 145 M 244, 400 P2d 632 (1965).

JOINT CUSTODY — DECISIONS UNDER FORMER LAW

School-Year Custody to Primary Caregiver Mother, With Summer Custody and Alternate Holidays to Father Who Had Shown Little Interest in Eight-Year-Old Son's School Activities: It was not an abuse of discretion to award divorced parents joint custody of an 8-year-old boy, with the boy's primary residence being with his mother in Oregon and the father (in Montana) having liberal visitation. A doctor and another evaluator, both agreed to by the parents, determined that the mother should have custody during the school year and that the father should have custody during the summers and on alternating holidays. The court found that the mother had been the primary caregiver most of the time because the father's employment was often away from home. The court also found that the father showed little interest in the boy's school activities and that the mother would be better able to provide for the boy during the school year. In re Marriage of Hogstad, 275 M 489, 914 P2d 584, 53 St. Rep. 257 (1996).

No Bias Against Shared Custody or Gender Bias Demonstrated by District Court: Throughout Ed and Ann's marriage, Ed was the homemaker and primary caretaker of the couple's four children, while Ann pursued medical studies and then practiced medicine. Upon moving to Montana, the couple sought a dissolution. After the District Court awarded primary residential custody to Ann, Ed argued that the District Court demonstrated a bias against shared custody and a gender bias against him in awarding maintenance. The Supreme Court held that the record adequately demonstrated that the District Court's award of primary physical custody to Ann was based upon the parties' preferences against shared custody and that the award of maintenance was limited because Ed had failed to take advantage of employment opportunities in order to be with his children. In re Marriage of Bukacek, 274 M 98, 907 P2d 931, 52 St. Rep. 1141 (1995).

Visitation Used as Factor in Awarding Custody: Laurie Wang argued that the lower court erred in awarding her husband custody of their child based in part on a finding that the father was more likely to allow frequent and continuing visitation. The Supreme Court held that the lower court had properly considered visitation in awarding custody because Laurie had interfered with the father's visitation in the past. In re Marriage of Wang, 271 M 291, 896 P2d 450, 52 St. Rep. 449 (1995).

Petition Resulting in Change of Primary Residence of Children in Joint Custody Construed as Petition to Terminate Joint Custody — Jurisdictional Requirements Applicable — Best Interest Standard Applicable on Petition Not Resulting in Change of Primary Residence: A motion or petition to modify a sole custody provision or to terminate a joint custody provision must satisfy the jurisdictional prerequisites set out in 40-4-219. Likewise, a motion or petition to modify child custody provisions in a dissolution decree that have the effect of substantially changing the primary residence of the parties' children, even though the formal joint custody designation is retained, is to be construed as a motion or petition to terminate joint custody and must also satisfy the jurisdictional prerequisites set out in 40-4-219. Any effort to modify the physical custody arrangement in a decree that provides for joint custody but that does not seek a substantial change in the children's primary residence may be considered according to the best interest standard set out in this section. In this case, because the mother sought a modification of the children's physical custody arrangement, the District Court erred in modifying physical custody without finding substantial endangerment as required by 40-4-219. In re Marriage of Johnson, 266 M 158, 879 P2d 689, 51 St. Rep. 703 (1994), followed in In re Marriage of Gallagher, 266 M 358, 880 P2d 1303, 51 St. Rep. 840 (1994), and In re Marriage of Syverson, 281 M 1, 931 P2d 691, 54 St. Rep. 32 (1997).

Alternating Months of Physical Custody Properly Rejected: Colleen and Daniel were married in 1983 and divorced approximately 10 years later. At the custody hearing, counsel for the parties' children presented a plan in which the parties would have joint custody and actual physical custody would alternate between the parties monthly. The District Court rejected this plan and awarded primary physical custody to Colleen. Citing In re Marriage of McLean/Fleury, 257 M 55, 849 P2d 1012 (1993), the Supreme Court upheld the award of primary physical custody. The Supreme Court held that the District Court properly based its award upon the standard of best interests of the child and correctly cited numerous considerations that supported its award, including the testimony of a licensed clinical therapist who testified that the plan submitted by the children's counsel was an impossible plan for the children. In re Marriage of Strizic, 263 M 193, 867 P2d 386, 51 St. Rep. 11 (1994).

Statutory Factors Considered — Failure to Award Sole Custody Not Error: The District Court found that both parents were in good health, that the child had lived with his mother since birth, and that the father had visited him on numerous occasions. It was undisputed that the mother was doing a good job raising the child and that she should be his primary custodian. These findings constituted adequate consideration of the child's best interests. Absent any findings to rebut the statutory presumption of joint custody, it was not error for the court to fail to award mother sole custody. In re Paternity of W.L., 259 M 187, 855 P2d 521, 50 St. Rep. 751 (1993).

No Error in Modification of Joint Custody Order Against Child's Own Wishes: When the mother and father were divorced, they entered into a stipulation providing for joint custody of their daughter, with primary physical custody for the mother and liberal visitation for the father. In the years following the divorce, the mother, by moving to other states and not allowing the daughter to see her father, continually frustrated the father's attempts to have a meaningful relationship with his daughter. The father petitioned for a change of primary physical custody. The petition was granted by the District Court after the court interviewed the daughter, who did not want to live with her father. The Supreme Court held that there was no error in the District Court's modification of the custody order. The record showed that the District Court considered the best interests of the child. The Supreme Court stated, citing Marriage of Mitchell, 248 M 105, 809 P2d 582 (1991), that although the testimony was not the same on both sides, it was the District Court's duty to resolve those conflicts and further stated that the Court's resolution of those conflicts will not be disturbed on appeal absent an abuse of discretion. In re Marriage of Ulland, 251 M 160, 823 P2d 864, 48 St. Rep. 1159 (1991).

Modification of Physical Custody Within Joint Custody Proper — Best Interest of Child: The District Court did not abuse its discretion in modifying physical custody within a joint custody situation from mother to father after finding that: (1) mother used profane or abusive language toward children; (2) father was refused visitation; (3) mother was drinking a number of times in children's presence; (4) mother engaged in inappropriate behavior with her fiance in children's presence; (5) testimony of a Department of Family Services (now Department of Public Health and Human Services) social worker indicated that mother was verbally abusive, uncooperative in arranging a home study, and the subject of referrals for investigation of child abuse or neglect from three sources. In re Marriage of Gravely, 248 M 105, 809 P2d 582, 48 St. Rep. 353 (1991).

Determination of Primary Custodian Not Reversible Absent Clear Error: Father, who was the primary caretaker for 1 year while mother was away on military duty overseas, asserted he should have been given primary physical custody. Evidence showed that both parents had loving relationships with the children and would be good caretakers. In the presence of conflicting testimony, it was not error for the trial court to grant primary physical custody to the mother regardless of the father's assertion. The award was not reversible absent a showing of clear error. In re Marriage of Merriman, 247 M 491, 807 P2d 1351, 48 St. Rep. 275 (1991).

Award of Joint Custody With Unequal Time Share of Physical Custody Not Per Se Abuse of Discretion: The fact that a District Court awarded joint custody absent an equal time share of the children did not, per se, amount to an abuse of discretion. In re Marriage of Otto, 245 M 271, 800 P2d 706, 47 St. Rep. 2080 (1990). See also In re Marriage of Kovarik, 1998 MT 33, 287 M 350, 954 P2d 1147, 55 St. Rep. 117 (1998).

Joint Custody Award Proper: For a period of time after the wife filed for divorce, she and her child continued to live with the husband. After the couple separated, the wife moved out of state with the child. The Supreme Court stated that a custody arrangement had never been agreed upon and remained at issue pending resolution of the action; therefore, de facto custody had not been established. The court went on to hold that because no de facto custody existed, then 40-4-219, which provides that a court may modify a prior custody decree, did not apply to the case before it because there was no decree or informal arrangement to modify. In re Marriage of Hoffmaster, 239 M 84, 780 P2d 177, 46 St. Rep. 1531 (1989).

Family Integration — Not Grounds for Modifying Joint Custody Decree: The divorce decree between the parties provided for joint custody, and a subsequent modification gave primary physical custody to the mother. When the mother decided to move out of state, the father brought a motion to modify custody to give him primary physical custody on the basis that the child was integrated into his family and the Butte community. The Supreme Court held that the integration rationale only applied to proceedings to terminate joint custody and was inapplicable to modification actions. In re Marriage of Johnson, 238 M 153, 777 P2d 305, 46 St. Rep. 1164 (1989), distinguished, in implementing a prior order, in In re Marriage of Zuelke, 274 M 362, 909 P2d 684, 52 St. Rep. 1225 (1995).

Joint Custody Not Awarded — When Written Findings Adequate: Where substantial evidence existed in the record to support an award of sole custody, the fact that the District Court's written findings supporting nonaward of joint custody were not "exemplary" did not constitute reversible error. In re Marriage of Syljuberget, 234 M 178, 763 P2d 323, 45 St. Rep. 1825 (1988).

Equal Physical Custody Not in Best Interests of Child: Father appealed trial court custody and visitation schedule that provided 140 days to father and 225 to mother. He alleged that based on Montana's equal allotment of custodial time provision, the court's grant of less than one-half of the child's time constituted a misapplication of the best interest of the child standard. The Supreme Court upheld the award, stating that substantial credible evidence supported the specific custody and visitation award. Depending on the circumstances in joint custody awards, equal physical custody will not be awarded if not in the best interests of the child. In re Marriage of Smyka & Dayton, 227 M 408, 739 P2d 489, 44 St. Rep. 1188 (1987).

Joint Custody Not Awarded — No Abuse of Discretion:

Although both mother and father are fit parents, the record and findings show substantial reasons why joint custody would not be in the best interest of the infant children. These findings include the geographical distance between the parents, their inability to communicate regarding issues involving the children due to interference from the father's present female cohabitant, the father's record of indifference regarding visitation, and the mother's role as primary caretaker for the infants' entire 2 years of life. In re Marriage of Dunn, 226 M 394, 735 P2d 1117, 44 St. Rep. 749 (1987).

Upon a showing of adequate care by the mother and finding that the father had made no application for joint custody nor shown a willingness to assume child support responsibilities, the District Court did not abuse its discretion in granting sole custody to the mother. In re Marriage of Shirilla, 225 M 106, 732 P2d 397, 44 St. Rep. 75 (1987).

The court did not abuse its discretion in not allowing joint custody when it considered the prospect of joint custody and the criteria set forth in 40-4-212, 40-4-222 through 40-4-224 (all now repealed), and 40-4-225. In re Marriage of Alt, 218 M 327, 708 P2d 258, 42 St. Rep. 1621 (1985).

Joint Custody as Precluding Specific Visitation Schedule: It was not error for the District Court to award joint custody, give primary residential custody to the mother, permit the children to live with the father "at such times and places as the parties may agree", provide that in the absence of agreement the mother had discretion to determine visitation based on "the best interests and reasonable desires of the children", and rule that a specific visitation schedule was therefore unnecessary. In re Marriage of Revious, 226 M 304, 735 P2d 301, 44 St. Rep. 674 (1987).

Well-Being, Mental Health, Best Wishes, and Desires of Children — Father's Desire for Joint Custody Overridden: Any 40-4-224 (now repealed) presumption favoring joint custody was overridden by abundant evidence supporting grant of sole custody to the wife. The findings and reasons for granting her sole custody are identical to those for denying husband's request for joint custody. The lower court found that one of the two children, both of whom are girls, was mildly retarded; that the retarded girl had been molested by the paternal grandfather while visiting the father and as a result needed continuous psychiatric care; that the mother had told the father of a previous molestation attempt; that the retarded child attended a special education program, could not care for herself, and probably would not be able to for many years; that the mother and daughters had a close relationship and had lived together continuously since the parents' separation and the mother took care of the children's daily needs, including the special needs of the retarded child; and that the father, who lived in Whitefish, Montana, had seen the children, who lived in Washington and are 16 and 17 years old, only three times in the last 18 months and the children did not express a desire to spend time with him. In re Marriage of Manus, 225 M 457, 733 P2d 1275, 44 St. Rep. 398 (1987).

Petition to Modify Joint Custody — Standard — Change of Residence of Custodial Spouse: Wife appealed a District Court order that modified a joint custody decree by changing the physical custody of the children from the wife to the husband after the wife had requested that the husband assume custody for 1½ years because of her difficult financial circumstances. The Supreme Court affirmed, holding that the District Court properly applied the best interest of children standard, rather than serious endangerment, which may be relied on only to terminate a joint custody arrangement. Furthermore, the husband was denied custody not because the wife moved to Texas but because the children's interests would best be served by allowing them to remain in the same family, school, and community they have enjoyed for several years. In re Marriage of Bergner & Owens, 222 M 305, 722 P2d 1141, 43 St. Rep. 1285 (1986).

Physical Custody Shared: The trial court did not abuse its discretion in determining that the children's best interests would be served by awarding joint custody, with physical custody shared equally by the parents. If either parent moved from the local area, the other parent would have physical custody of the children. In re Marriage of Ryan, 222 M 188, 720 P2d 691, 43 St. Rep. 1163 (1986).

Joint Custody Not Mandated — Material Outside Record Not Considered: Montana's policy favoring joint custody does not mandate joint custody. When the District Court carefully considered the best interests of the children and the recommendations of the children's guardian ad litem before awarding sole custody to the wife with reasonable visitation for the husband, the Supreme Court will not modify sole custody and will not consider a supplemental affidavit concerning the current residence of one of the children. The court will not consider any material outside the record developed at trial. In re Marriage of Cruikshank, 222 M 152, 720 P2d 1191, 43 St. Rep. 1132 (1986).

Court Not in Error in Denying Joint Custody and Limiting Summer Visitation: Appellant husband appealed judgment denying joint custody and limiting summer visitation to 2 weeks each summer. Appellant sought joint custody and summer visitation of 6 to 10 weeks. The District Court detailed to an extraordinary degree its concerns on the children's best interests. Furthermore, it left the door open for modification and for appellant to demonstrate, in the future, his capacity for joint custody or a longer period of visitation. The Supreme Court held that the District Court did not abuse its discretion and that its judgment was supported by substantial credible evidence. In re Marriage of Shelton, 219 M 456, 712 P2d 782, 43 St. Rep. 89 (1986).

Findings on Joint Custody Required: After several attempts at reconciliation, the parties' marriage was dissolved. During the dissolution the mother asked the court to grant the parties joint custody, with the provision that she be the residential parent. An attorney was appointed to represent the children, and he recommended that joint custody be awarded with the mother designated as the residential parent. The court awarded custody to the father. On appeal, the Supreme Court vacated the custody order and remanded for findings on why joint custody was not awarded as required by 40-4-224 (now repealed). Murphy v. Murphy, 205 M 162, 666 P2d 755, 40 St. Rep. 1188 (1983).

SUFFICIENCY OF EVIDENCE, FINDINGS

Parent Challenge of Findings of Fact As Not Supported By Evidence — Custody Determination Proper: A parent appealed the District Court's order adopting in full a Standing Master's findings of fact, conclusions of law, and amended parenting plan directing a 50-50 division of parenting time on the grounds that the District Court erred by making findings of fact that were not supported by evidence. On appeal, the Supreme Court affirmed, noting that the Standing Master entered 42 findings of fact and expressly referenced 40-4-212(1) when providing the rationale for amending the parenting plan. The Supreme Court explained that review of the record revealed thoughtful factual findings. In re Parenting of D.C.N.H, 2020 MT 119, 400 Mont. 59, 463 P.3d 445.

Mother Not Allowed to Relocate Out of State With Child Despite Better Employment Opportunities — Child's Primary Relationships Considered by Standing Master — No Abuse of Discretion: The mother appealed the standing master's order, which was affirmed by the District Court, to not allow her to relocate her child to Boston. The District Court considered the fact that the parents had equal parenting time and that three of the child's four primary relationships, including a half sister, would have remained in Montana. On appeal, the mother argued that the standing master abused her discretion in not allowing her to relocate with the child because she would have better employment opportunities in Boston and her family lived there. The Supreme Court affirmed, holding that the standing master appropriately considered the weight of the evidence in reaching her decision. In re Parenting of G.M.N., 2019 MT 18, 394 Mont. 112, 433 P.3d 715.

Parenting Plan Developed by District Court Upheld Despite Errors in Record: The District Court made a parenting plan determination in a custody dispute. On appeal, the mother alleged errors in the record and claimed that the District Court improperly relied more on one expert's testimony than on the other and that she was being punished for moving and beginning a new relationship. The Supreme Court acknowledged multiple errors in the District Court's findings of fact but stated that it was appropriate to consider the distance between parents and weigh the evidence presented by the experts. Because the District Court considered the relevant statutory factors and made findings, it was not an abuse of discretion to develop a final parenting plan. In re Kesler, 2018 MT 231, 392 Mont. 540, 427 P.3d 77.

Equal Parenting Time for Nonschool-Age Child in Child's Best Interests — Sufficient Findings: Following a hearing on a parenting plan for a 3-year-old child whose father lived in Montana and whose mother lived in Arizona, the District Court issued a parenting plan giving equal parenting time in which the child would live with the mother for 6 weeks and then with the father for 6 weeks. The mother appealed and argued that the judge did not address the statutory factors of this section in the court's order. The Supreme Court disagreed and affirmed the decision, noting that while the findings could have been more precise, they did explain the District Court's reasoning for its decision. In re Marriage of Woerner, 2014 MT 134, 375 Mont. 153, 325 P.3d 1244.

Award of Custody to Father Supported by Evidence: The Supreme Court noted that the trial court bears a difficult responsibility in determining the best interests of the child and that the trial court's award of custody to the father was supported by substantial credible evidence that the father's home situation provided more continuous and stable care for the child. In re Parenting of N.S., 2011 MT 98, 360 Mont. 288, 253 P.3d 863. See also In re Marriage of Pesanti, 2014 MT 324, 377 Mont. 256, 342 P.3d 679.

Finding by Family Court Services That Sole Custody in Children's Best Interests Affirmed — Specific Endangerment Finding Not Required: A mother became concerned that her minor daughters had become infected with Lyme disease, and she proceeded to visit a number of doctors throughout Montana and California, depriving the father of contact with the children. The father filed for dissolution and filed a motion for referral to Flathead County Family Court Services (FCS). The District Court, upon FCS recommendation, placed the children with the father because it served the children's best interests. Noting the mother's unwillingness to work with FCS and her continued "out of control" behavior, the District Court subsequently made placement with the father permanent and required the mother's visits to be supervised. The mother appealed, noting that the District Court failed to make a specific finding that unsupervised visits would endanger the children. The Supreme Court affirmed. There was sufficient evidence supporting the decision to follow the FCS recommendation regarding placement with the father as being in the children's best interests. Additionally, there was no statutory requirement that a finding of endangerment was required as long as the District Court considered the best interest factors in 40-4-212. In re Marriage of Wilson, 2009 MT 203, 351 M 204, 210 P3d 170 (2009).

Consideration of Child's Best Interests in Out-of-State Move: The father resisted the mother's move with the child to North Carolina, contending that the move was not in the child's best interests. When presented with a contested parenting plan, the District Court must consider the child's best interests, and the parent who resists the move need not show that the move would be disadvantageous or harmful to the child, but merely that the move would not be in the child's best interests. In this case, the father failed to provide legally sufficient proof that the child's best interests would be most appropriately served by effectively requiring the mother to stay in Montana or, if she chose not to, by transferring primary physical custody to the father. The District Court did not abuse its discretion in concluding, based on substantial evidence, that it was in the child's best interests to move with the mother to North Carolina where she had a better job, a good support system, and a good community. In re Marriage of Thorner & Davis, 2008 MT 270, 345 M 194, 190 P3d 1063 (2008). See also In re Parenting of S.E.L., 2015 MT 228, 380 Mont. 256, 354 P.3d 1237.

Without Any Findings by District Court, Modification of Parenting Plan Invalid: The special master appointed by the District Court to assist the parties in developing a parenting plan reported certain disturbing actions by the mother that prompted the guardian ad litem in the case to file a motion to suspend the mother's parenting time until a parenting plan could be agreed to by the parties or ordered by the court. The District Court granted the motion and, at the same time, ordered a show cause hearing. At the show cause hearing, the court did not address the show cause issue but focused on the parenting plan submitted that day by the special master. The court adopted the plan as temporary. Subsequently, the District Court entered an order stating that the plan adopted as temporary "is hereby adopted and made final". The mother appealed, and the Supreme Court held that the District Court had not made any findings let alone the prerequisite finding of a change in circumstances and therefore the District Court's purported modification of the parties' parenting plan was invalid. In re Marriage of Jacobsen, 2006 MT 212, 333 M 323, 142 P3d 859 (2006).

No Abuse of Discretion in Award of Primary Residential Custody to Father: Pursuant to a final parenting plan, the parties' daughter spent alternating months with each parent, but as the child approached school age, the mother moved to amend the plan to grant her primary residential custody and to establish child support to be paid by the father. The District Court heard contradictory testimony from the parents regarding who would be the best primary custodian, granted primary residential custody to the father, and provided that the child would spend summers and most holidays with the mother. The mother appealed on grounds that it was in the child's best interests to reside with the mother. The Supreme Court considered whether the District Court abused its discretion by acting arbitrarily or outside the bounds of reason or committed clear error in its findings. Noting that the custody decision was a close call, the Supreme Court deferred to the District Court's assessment of the parents' credibility and affirmed. Given the mother's apparent insincerity about coparenting, the father was more likely to ensure continuing and frequent contact with both parents, so the District Court did not abuse its discretion by awarding primary residential custody to the father. In re Marriage of Toavs, 2006 MT 68, 331 M 437, 133 P3d 202 (2006), followed in In re Marriage of Olson, 2008 MT 232, 344 M 385, 194 P3d 619 (2008). See also In re Marriage of Chamberlin, 2011 MT 253, 362 Mont. 226, 262 P.3d 1097, which held that the District Court properly awarded primary residential custody to the mother.

Error in Failure to Set Out Findings of Fact When Modifying Parenting Plan: Findings of fact are required when a District Court considers a petition for modification or amendment of a parenting plan. Although specific findings regarding each element in this section are not necessary, the court must set forth the essential and determining facts upon which its conclusion rests. In the present case, the record was devoid of any oral or written findings of fact, and the District Court abused its discretion by amending a parenting plan without making the required findings and conclusions, constituting reversible error. In re Marriage of Lawrence, 2005 MT 125, 327 M 209, 112 P3d 1036 (2005). See also In re Marriage of Ulland, 251 M 160, 823 P2d 864 (1991).

Substantial Though Conflicting Evidence of Abuse by Father — Award of Custody to Mother Affirmed: The father contested an award of primary residential care of the children to the mother because she had been unable to provide the children with a stable home, to keep a stable job, and to consistently get the children to school on time, was going to regular counseling, and opposed the father's visitation with the children. The father also contended that findings of his possible abuse of the mother and children were erroneous. Nevertheless, the Supreme Court affirmed custody to the mother, noting that the deficiencies cited by the father were at least partially caused by his own actions and that although the testimony regarding abuse was conflicting, the record contained sufficient evidence detailing the father's history of violence to warrant making a protection order permanent and to support the finding that the children's best interests were served by primary custody with the mother. In re Marriage of Bock, 2005 MT 40, 326 M 123, 107 P3d 488 (2005).

Best Interests of Child Determinative Factor in Adoption of Final Parenting Plan: A paternity test determined the father of the child, and the District Court adopted an interim parenting plan allowing the father joint contact with the child. After the child was born, the mother had actively concealed the birth from the father and obfuscated the father's efforts to locate the child by failing to list the father on the birth certificate and to disclose her whereabouts, and even despite the test, the mother continued to attempt to exclude the father from the child's life. The District Court subsequently adopted a final parenting plan that gave primary residential custody to the father, and the mother appealed. The Supreme Court declined to disturb the final plan. The District Court had substantial evidence to conclude that the mother's behavior throughout the matter was troubling and cast a shadow of implication regarding the interplay of the relevant factors regarding the best interests of the child. Even though it was determined that the continuity and stability of care would be good in either household, the District Court did not err in concluding that it was in the child's best interests, including the child's developmental needs, that the father be designated the primary residential custodian after the first 18 months of the child's life, given the grave concern as to the probable continuance of the mother's pattern of exclusion. In re Paternity of C.T.E.-H., 2004 MT 307, 323 M 498, 101 P3d 254 (2004), following In re Marriage of Hedges, 2002 MT 204, 311 M 230, 53 P3d 1273 (2002). See also In re Marriage of Crowley, 2014 MT 42, 374 Mont. 48, 318 P.3d 1031.

Mother's Refusal to Inform Father of Birth — Payment of Birth-Related Costs Not Required — Child Support Owing From Determination of Paternity, Not From Birth: Following the birth of a child, the mother deliberately refused to inform the father of the birth, which prevented placing the child on the father's insurance within the required time, failed to list the father on the birth certificate and to disclose her whereabouts, and, even despite a paternity test, continued to attempt to exclude the father from the child's life. Nevertheless, the mother sought to recover birth-related costs and child support from the father dating back to the time of the birth. The District Court declined the awards, and on appeal, the Supreme Court affirmed. Child support payments and birth-related costs are nonexclusive factors to be considered when determining the best interests of the child. In this case, the District Court did not abuse its discretion in denying birth-related costs and determining that child support was owed only from the time of the determination of paternity, not from the time of birth. In re Paternity of C.T.E.-H., 2004 MT 307, 323 M 498, 101 P3d 254 (2004).

Adequate Consideration of Children's Best Interests and Parental Interaction — Parenting Plan Affirmed: Each parent submitted a different plan for custody and visitation. Both parents were able and neither acted neglectfully or abusively toward the children. The District Court adopted most provisions of the mother's proposed plan, and the father appealed. The District Court properly considered the best interests of the children and entered an independent judgment regarding parenting after considering the statutory factors, making appropriate findings supported by substantial evidence, and setting forth findings that explained the basis of the court's decision. Absent an abuse of discretion, the parenting plan was affirmed. In re Marriage of Carter, 2003 MT 19, 314 M 84, 63 P3d 1124 (2003). See also In re Marriage of Anderson, 260 M 246, 859 P2d 451 (1993), and In re Marriage of McKenna, 2000 MT 58, 299 M 13, 996 P2d 386 (2000).

Findings Setting Forth Essential and Determining Factors Upon Which Custody Determination Based — No Abuse of Discretion in Award of Primary Custody to Father: The District Court considered the children's adjustment to home and school, the mother's mental health and history of chemical dependency, the continuity and stability of care, and the interaction and interrelationship of the parents and the effect that this interaction had on the children and then awarded primary custody to the father. The mother challenged the completeness and accuracy of the findings on several grounds, but the Supreme Court held that the findings, although not a model of completeness, were supported by substantial credible evidence and set forth the essential and determining factors on which the custody decision was based. Because the findings were not clearly erroneous, the District Court did not abuse its discretion, and the custody award was affirmed. In re Marriage of Czapranski, 2003 MT 14, 314 M 55, 63 P3d 499 (2003).

Reversal Based on Radical Departure in Final Parenting Plan From Interim and Proposed Parenting Plans — Best Interest of Child of Primary Concern: An interim parenting plan called for a child to live with her father as the primary residence and spend 3 days a week with her mother. The parents' proposed final parenting plan had the child residing with each parent as equally as possible. The final parenting plan departed radically from the interim plan and the parties' proposed plans and provided that the child reside primarily with the mother, with provisions for visitation by the father. The standard to be applied when adopting a final parenting plan, even one that departs substantially from an interim parenting plan, is the best interests of the child. Here, both parents suggested parenting plans that provided much more equal division of time with the child than the final parenting plan allowed, and nothing in the evidence supported a final parenting plan so fundamentally different from the proposed or interim plans or demonstrated that the final parenting plan was in the child's best interests. Because it was not supported by substantial evidence, the final parenting plan was reversed and remanded for adoption of a parenting plan that allowed the child to spend approximately equal time with both parents. In re Marriage of Hedges, 2002 MT 204, 311 M 230, 53 P3d 1273 (2002).

Lack of Contact Between Father and Child — Proper Award of Sole Custody to Mother: Although a father was present at the birth of his child, he had no contact with the mother or child after that time and never attempted to visit the child or find out about the child's well-being. The District Court awarded sole custody of the child to the mother, and the father appealed, asserting that had he appeared at trial, he would have testified that the only reason he failed to have contact with the child was because the mother constantly frustrated his attempts to do so. However, the Supreme Court confined its review to the evidence on the record, concluding that the District Court properly considered the best interests of the child and did not abuse its discretion in awarding custody to the mother. In re Marriage of Fishbaugh, 2002 MT 175, 310 M 519, 52 P3d 395 (2002).

Discretion of District Court to Amend Temporary Protective Order — Evidence of Domestic Violence Prior to Birth of Child Irrelevant to Determination of Child Custody: Following incidents of domestic abuse unwitnessed by the parties' child, the father received a temporary protective order prohibiting contact by the mother with both the husband and child. The court subsequently held a hearing regarding the temporary order pursuant to 40-15-202 and amended the protective order by extending it for an additional 6 months as to the husband, but found that the child was not in substantial danger, so the order was not extended to the child. Rather, the court issued an interim parenting plan that provided primary residential custody to the mother. The father appealed, but the Supreme Court affirmed. It is within the discretion of the District Court, upon a showing of good cause, to continue, amend, or make permanent a protection order, and its decision will not be overturned absent an abuse of that discretion. Here, the District Court properly considered the child's best interests in fashioning the interim parenting plan, and correctly declined to limit the mother's contact with the child through the protective order. Evidence of alleged incidents of domestic violence prior to the couple's marriage and the birth of the child was irrelevant. In re Schiller, 2002 MT 103, 309 M 431, 47 P3d 816 (2002), distinguishing Stoneman v. Drollinger, 2000 MT 274, 302 M 107, 14 P3d 12 (2000). However, while Schiller established that a change to a protective order is appealable, see LeProwse v. Garrett, 2012 MT 275, 367 Mont. 161, 291 P.3d 110, in which the Supreme Court dismissed an appeal of the dissolution of a temporary order of protection because the order was not the only issue in the case and the District Court had not yet ordered a final decision and resolution of the other issues.

Findings of District Court Regarding Custody of Child With Mother Not Erroneous Despite Evidence of Inappropriate Physical Contact Between Child and Mother's Relative: As part of a paternity action, the mother was awarded primary physical custody, and the father appealed. An amended parenting plan arrived at during mediation gave each parent physical custody of the child during alternating months. Near the end of one month's visit with the father, the child divulged that inappropriate physical contact with her stepgrandfather had occurred while in the mother's custody. The father moved for modification of the parenting plan. The District Court was faced with conflicting evidence in the case, receiving testimony from the stepgrandfather that no inappropriate touching occurred, as well as testimony from professionals who opined that sexual abuse had occurred. Additional expert testimony suggested that the child's constant travel was a possible cause of her troubling behavior and that the experts who suggested that sexual abuse occurred had not followed standard protocols when interviewing the child. Lay testimony indicated that it was unlikely that the stepgrandfather had an opportunity to commit the alleged abuse. The court ultimately determined that sexual abuse had not been proved. The father appealed on grounds that the court's findings were insufficient, that the court erred in not giving the father custody based on the evidence presented, and that the court erred by apparently rejecting the testimony of the child's clinical psychologist and the disclosures made by the child relating to sexual abuse. The Supreme Court noted that credibility determinations are within the province of the trier of fact and held that, in light of the conflicting testimony, the trial court's findings and conclusions were sufficient to support the court's decision. Although the trial court did not specifically articulate the elements of this section, it clearly made determinations that it considered to be in the child's best interests. Failure to list the contentions of a particular witness, such as the child's clinical psychologist, was not sufficient to determine a per se abuse of discretion on the part of the trial court. Without a clear showing of abuse of discretion, the Supreme Court declined to disturb the decision and affirmed the denial of the father's motion to modify the parenting plan. In re Paternity & Custody of A.D.V., 2001 MT 74, 305 M 62, 22 P3d 1124 (2001).

Credible Evidence in Expert's Recommendations That Child's Interests Best Served by Awarding Primary Custody to One Parent During School Year — Trial Court's Child Custody Decision Presumed Correct — Affirmation Absent Abuse of Discretion: Both parents were recognized as good but were unable to agree on important coparenting decisions once the child reached school age. The father wished to continue equal visitation time, and his experts expressed the opinion that the shared custody arrangement could work. The mother maintained that she could provide a more stable, structured home environment once school began, and her experts testified that the mother should have primary custody to achieve that stability. The District Court considered the opinions of all the experts and then granted primary residential custody to the mother. The Supreme Court found substantial credible evidence to support the custody award and found no indication that the court misapprehended the effect of the evidence or committed a clear and definite mistake in making the award. The trial court's decision is presumed correct and, absent a clear abuse of discretion, will be upheld on appeal. Here, the District Court properly considered the child's best interests, relied on professional assessments of those interests, and made an independent analysis of the facts, so no abuse of discretion occurred. In re Marriage of McKenna, 2000 MT 58, 299 M 13, 996 P2d 386, 57 St. Rep. 276 (2000), following In re Marriage of Baer, 1998 MT 29, 287 M 322, 954 P2d 1125 (1998). See also In re Marriage of Anderson, 260 M 246, 859 P2d 451 (1993), In re Marriage of Czapranski, 2003 MT 14, 314 M 55, 63 P3d 499 (2003), in which it was held that the Supreme Court's "clearly erroneous" standard of reviewing a District Court's custody determinations and adoption of parenting plans in dissolution matters remains appropriate, despite urging for a heightened standard that would require the District Court to consider and issue findings on each statutory factor in this section, and In re Marriage of Carter, 2003 MT 19, 314 M 84, 63 P3d 1124 (2003).

Right of Interstate Travel as Basic Constitutional Freedom — Custodial Designation Improperly Revised: The District Court ordered that a mother who had relocated out of state must forfeit her status as primary custodian unless she moved back to Montana with the children. However, the right of interstate travel, which includes the right to migrate, resettle, find a new job, and start a new life, is a basic constitutional freedom recognized in Memorial Hosp. v. Maricopa County, 415 US 250, 39 L Ed 2d 306, 94 S Ct 1076 (1974), and described in Shapiro v. Thompson, 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322 (1969), and Dunn v. Blumstein, 405 US 330, 31 L Ed 2d 274, 92 S Ct 995 (1972). A classification that operates to penalize persons who exercise this right must be justified by a compelling state interest, and the government's burden to justify this compelling interest is heavy. Absent legitimate, case-specific reasons and evidence pertaining to the particular child, there is no compelling state interest that justifies a court ordering a custodial parent to live in a state other than the state in which the parent freely chooses to reside. In the present case, the father failed in his burden to provide sufficient proof that the children's best interests would be most appropriately served by requiring the mother to move back to Montana or lose her status as primary physical custodian. The trial court erred in failing to apply the former rebuttable statutory presumption in subsection (3)(a) of this section (deleted 1997) regarding a grant of custody to the parent who has provided most of the primary care during the child's life and in ordering that custody be alternated between the parents every 2 years. In re Custody of D.M.G. & T.J.G., 1998 MT 1, 287 M 120, 951 P2d 1377, 55 St. Rep. 1 (1998), followed with respect to intrastate travel in In re Marriage of Guffin & Plaisted-Hartman, 2009 MT 169, 350 M 489, 209 P3d 225 (2009), following In re Marriage of Cole, 224 M 207, 729 P2d 1276 (1986), and distinguishing In re Marriage of Abrahamson, 278 M 336, 924 P2d 1334 (1996), and In re Marriage of Tade, 282 M 449, 938 P2d 673 (1997).

Independent Review of Facts Conducted by District Court — District Court Did Not Ignore or Misconstrue Facts: Throughout Ed and Ann's marriage, Ed was the homemaker and primary caretaker of the couple's four children, while Ann pursued medical studies and then practiced medicine. Upon moving to Montana, the couple sought a dissolution. After the District Court awarded primary residential custody to Ann, Ed argued that the District Court failed to give an independent review of the facts, that it failed to review Ed's record as a caretaker, and that it misconstrued or ignored facts concerning the children's welfare. Citing In re Marriage of Merriman, 247 M 491, 807 P2d 1351 (1991), the Supreme Court held that the District Court is not required to make specific findings on each factor set forth in this section but must set forth only the "essential and determining factors" on which its determination is based. After reviewing the record, the Supreme Court held that the District Court did consider such factors as the wishes of the parties and the welfare of the children. In re Marriage of Bukacek, 274 M 98, 907 P2d 931, 52 St. Rep. 1141 (1995).

Court Not Required to Address Allegations That Father's Religion Practiced Exorcism and Taught Subservience of Women: Laurie Wang argued that the lower court had erred in not addressing her allegation that her child's best interests would not be served by awarding the father custody based on the fact that his religion practiced exorcism and taught that women should be subservient to men. The Supreme Court held that the lower court was not required to address every allegation of the parties and that the record showed sufficient evidence to support awarding custody to the father. In re Marriage of Wang, 271 M 291, 896 P2d 450, 52 St. Rep. 449 (1995).

Exercise of Independent Trial Court Judgment in Adopting Findings of Child's Best Interests: Mother asserted that the trial court failed to exercise independent judgment by adopting its findings of fact nearly verbatim from the findings proposed by the child's guardian ad litem. The court's findings were not clearly erroneous, and independent judgment was shown by the fact that: (1) the trial court appointed a guardian ad litem for the child; (2) custodial evaluation of the parties was ordered and conducted and the results were carefully considered; (3) the trial court carefully observed the testimony of witnesses and its appointed neutral experts, finding some persuasive and some not credible; and (4) the trial court thoroughly analyzed the record before it and considered the factors of this section when making its determinations. Although the court adopted the findings of the guardian ad litem, the recommendations of the custody evaluator were also considered and adopted in part. In re Marriage of Dreesbach, 265 M 216, 875 P2d 1018, 51 St. Rep. 374 (1994). See also In re Marriage of DeWitt, 273 M 513, 905 P2d 1084, 52 St. Rep. 1089 (1995).

Relevant Factors Considered in Award of Sole Custody: An award of sole custody to mother was justified based on sufficient District Court findings that: (1) experts performing home studies found both parents fit but disagreed over the effects of split physical custody of a preschool child; (2) mother was the child's psychological parent; (3) mother had provided for the child's physical needs, environmental stimuli, emotional needs, and moral development; and (4) mother had maintained interaction with father's family and home community. In re Marriage of Nash, 254 M 231, 836 P2d 598, 49 St. Rep. 747 (1992).

Reasons Not Given for Adopting One Plan Over Another — Not Error: The husband argued that the lower court erred in adopting the wife's custody plan without giving any reasons for rejecting the husband's plan. The Supreme Court held that the lower court did not abuse its discretion in adopting any plan so long as the plan was supported by the evidence and the law of the case. In re Marriage of Tahija, 253 M 505, 833 P2d 1095, 49 St. Rep. 571 (1992).

Failure to State Basis for Custody Decision as Reversible Error: When nothing in the record demonstrated that the statutory criteria for making a custody determination were considered and that the essential and determining facts upon which the lower court rested its conclusions were not set forth, the omission constituted reversible error despite the court's attempts to bring the parties together amicably without having to resort to a trial. In re Marriage of Converse, 252 M 67, 826 P2d 937, 49 St. Rep. 162 (1992), followed in In re Marriage of Jacobsen, 2006 MT 212, 333 M 323, 142 P3d 859 (2006). Converse was distinguished in In re Custody of J.M.D., 259 M 468, 857 P2d 708, 50 St. Rep. 884 (1993), in which a custody trial was conducted prior to the parties' stipulation and there was no disagreement between the parties regarding the stipulation.

Credible Evidence Presented by Both Parties — Court's Determination Controlling: Both parties presented credible evidence supporting their respective custody claims. The District Court, after considering the factors set out in this section and making appropriately supported findings, decided the father's testimony was more substantial and credible and awarded custody to him. Absent abuse of discretion, it is the District Court's determination of the child's best interest that controls. In re Marriage of Otto, 245 M 271, 800 P2d 706, 47 St. Rep. 2080 (1990).

Findings — Wishes of Child: The District Court need not make specific findings of each statutory element. It must demonstrate only that it has considered each element by making specific findings as to the best interest of the child. The court is not required to award custody based on a child's preference. The District Court did not abuse its discretion by awarding primary custody of the parties' daughter to the mother in light of the child's expressed preference to live with her father. In re Marriage of Arrotta, 244 M 508, 797 P2d 940, 47 St. Rep. 1775 (1990), followed in In re Marriage of Kovash, 260 M 44, 858 P2d 351, 50 St. Rep. 934 (1993).

Adoption of One Party's Findings Not Error: The appellant argued that the lower court's adoption of the respondent's proposed findings and conclusions was error. The Supreme Court held that when the findings and conclusions are not clearly erroneous and are supported by the record, the judge has not abused his discretion. Lorenz v. Lorenz, 242 M 62, 788 P2d 328, 47 St. Rep. 546 (1990).

Findings Not Model of Completeness but Sufficient: The appellant argued that the lower court had erred in not addressing each element set out in the statute relating to determining the best interests of the children. The Supreme Court held that although the findings were not a model of completeness, the lower court did not have to specifically address each item and that taken as a whole, the findings were sufficient. Lorenz v. Lorenz, 242 M 62, 788 P2d 328, 47 St. Rep. 546 (1990).

Order Incorporating Findings of Earlier Decree Sufficient: The appellant argued that the findings of the lower court on the issue of the best interests of the child were insufficient. The Supreme Court disagreed, stating that the lower court's order contained 20 findings and also incorporated by reference the 58 findings of the original decree. In re Marriage of Susen, 242 M 10, 788 P2d 332, 47 St. Rep. 528 (1990).

Child Custody — Reliance on Expert Testimony Not Clearly Erroneous: The lower court heard testimony from numerous witnesses, including experts, as to the issue of child custody. The court did not abuse its discretion in relying heavily on the testimony and observations of two of the experts concerning the children's wishes, interrelationship of the children with their parents, and the mental and physical health of all individuals. In re Marriage of Ereth, 232 M 493, 757 P2d 1312, 45 St. Rep. 1223 (1988).

Statutory Factors Considered: The trial court issued nine findings relating to the custody issue, citing mother's remarriage into a stable family environment, her continuous custody of the child, father's sporadic visits, his home environment, and the child's attitude toward each parent. This evidence was sufficient to confirm that the court considered all five factors of this section. In re Marriage of Jacobson, 228 M 458, 743 P2d 1025, 44 St. Rep. 1678 (1987), followed in In re Marriage of Reininghaus, 250 M 86, 817 P2d 1159, 48 St. Rep. 868 (1991), and in In re Marriage of Clingingsmith, 254 M 399, 838 P2d 417, 49 St. Rep. 794 (1992). See also In re Marriage of Bolt, 259 M 54, 854 P2d 322, 50 St. Rep. 672 (1993).

Failure to State Essential and Determining Facts in Preliminary Decree of Dissolution — Remand: While the District Court is not required to make specific findings on each of the statutory elements, it was an abuse of discretion warranting remand when the court, in the preliminary decree of dissolution, simply found that the "care, custody and control of the minor children of the parties should be with the petitioner, with reasonable visitation to the respondent". This conclusion lacked the required essential and determining facts on which custody was based. In re Marriage of Bloom-Higham, 227 M 217, 738 P2d 114, 44 St. Rep. 1025 (1987).

Adequacy of Nonspecific Findings Supported by Evidence: Although the Supreme Court would prefer that a trial court specifically address the factors listed in this section in the trial court's findings, failure to do so is not always fatal and was not fatal in this case because the trial court made numerous findings that basically addressed the factors and the findings were supported by substantial credible evidence. In re Marriage of Nalivka, 222 M 84, 720 P2d 683, 43 St. Rep. 1079 (1986). See also In re Marriage of J.J.C. & P.R.C., 227 M 264, 739 P2d 465, 44 St. Rep. 1068 (1987).

Written Findings Required: In awarding joint custody, the District Court should enter specific findings regarding the willingness of the parents to cooperate in custody matters and in their parental roles, the interaction and interrelationship of the child with each parent, and the effect of the geographic proximity of the parents' residences on their ability to share the rights and responsibilities of child rearing, particularly where there is a post-divorce birth and an absent parent requesting joint custody. In re Custody & Support of B.T.S., 219 M 391, 712 P2d 1298, 43 St. Rep. 37 (1986), followed in In re Marriage of Cole, 224 M 207, 729 P2d 1276, 43 St. Rep. 2136 (1986), and in In re Marriage of Anderson, 260 M 246, 859 P2d 451, 50 St. Rep. 1028 (1993).

Court to Make Specific Findings as to Child's Best Interests: Because the trial court did not make findings or other indications that it had considered each of the factors set forth in 40-4-212, the award of custody was set aside and the cause remanded for appropriate findings. Although the District Court need not make specific findings on each statutory element, it must demonstrate that it has considered each element by making specific findings as to the best interests of the child. In re Marriage of Keating, 212 M 462, 689 P2d 249, 41 St. Rep. 1865 (1984).

Statutory Factors Considered and Referred to Sufficient — Findings as to Mineral Interest and Attorney Fees Required: In awarding child custody to the husband, the court included in its finding the factors outlined in 40-4-212. In ordering the husband to pay maintenance, the court applied the factors set forth in 40-4-203 and referred to them in its findings of fact. There is no clear abuse of discretion by the District Court on either of these issues, and therefore the findings are affirmed. The District Court did not, however, place a value on a mineral interest, and the findings do not explain this exclusion. The court also failed to substantiate why attorney fees were not awarded to the wife. The case is therefore remanded to make findings on the value of the mineral interest and to state reasons as to the grant or denial of the wife's attorney fees. Hammeren v. Hammeren, 201 M 443, 663 P2d 1152, 39 St. Rep. 2222 (1982).

Specific Findings on Each Element Unnecessary — No Abuse of Discretion: In awarding custody, the District Court must consider the guidelines set forth in this section, although the court need not make specific findings on each of the elements. The record in this case demonstrates that the court heard sufficient testimony on each of the factors to support the findings of fact. Absent a clear abuse of discretion, the finding of the District Court will not be disturbed. No such abuse was shown in this case. In re Marriage of Speer, 201 M 418, 654 P2d 1001, 39 St. Rep. 2204 (1982), followed in In re Custody of Ericka M., 208 M 201, 676 P2d 231, 41 St. Rep. 267 (1984), In re Marriage of DiPasquale, 220 M 497, 716 P2d 223, 43 St. Rep. 557 (1986), and In re Marriage of Saylor, 232 M 294, 756 P2d 1149, 45 St. Rep. 1062 (1988). See also In re Marriage of Rolfe, 216 M 39, 699 P2d 79, 42 St. Rep. 623 (1985), In re Marriage of Penning, 238 M 75, 776 P2d 1214, 46 St. Rep. 1103 (1989), In re Custody of J.M.D., 259 M 468, 857 P2d 708, 50 St. Rep. 884 (1993), and In re J.J.G., 1998 MT 28, 287 M 313, 954 P2d 1120, 55 St. Rep. 100 (1998).

Custody Award to Wife Supported by Substantial Evidence Although Husband Also Qualified: The two children of the marriage lived with the mother from the time of separation until the time of the divorce. The court granted the wife custody in the divorce decree and ordered the husband to pay $400 per month child support. The husband argued that he should have been awarded custody of the children because he fulfilled all the criteria of 40-4-212. He also argued that the court's findings did not properly address the children's interaction with other people in the wife's home, including the wife's new husband. The Supreme Court rejected the husband's argument, holding that there was substantial credible evidence to support the trial court's judgment. In addition, the court found that the trial court considered the needs of the children and the financial status of the husband and affirmed the child support award. In re Marriage of Burleigh, 200 M 1, 650 P2d 753, 39 St. Rep. 1538 (1982).

Custody Order — Necessity of Supporting Fact Findings: Where court's finding granting custody of 3-year-old child of divorced parents to the father was a conclusive statement unsupported by fact findings explaining why husband and not wife should have custody, the award was vacated and the cause remanded for new findings and conclusions and an order. The evidence supported an award to either party, but in making a prior order the court had found a close relationship between the child and his 7-year-old half sister, who lived with her mother, and had emphasized the relationship and ordered the parties to work out a joint custody arrangement, which they were unable to do, resulting in a subsequent grant of custody to only one party. Thus, the evidence and the findings in relation to the prior joint custody order tended to support a conclusion that the wife should have custody. Cameron v. Cameron, 197 M 226, 641 P2d 1057, 39 St. Rep. 485 (1982).

Criteria for Best Interests — Inadequate Findings: In determining child custody, trial courts must consider all of the pertinent criteria under the statute. Here the trial court failed to make findings as to the pertinent criteria and the case is therefore remanded for another hearing. In re Marriage of Markegard, 189 M 374, 616 P2d 323, 37 St. Rep. 1539 (1980). (Mr. Justice J. Sheehy dissenting.) See also Tomaskie v. Tomaskie, 191 M 508, 625 P2d 536, 38 St. Rep. 416 (1981).

Custody Award Undisturbed — No Clear Preponderance That Court Erred: Since the husband failed to establish by a clear preponderance of the evidence that the court erred in awarding custody of minor children to the wife, the trial court's decision will not be disturbed. Allen v. Allen, 175 M 527, 575 P2d 74 (1978).

Reputation Evidence: The admission of reputation evidence concerning petitioner's present husband's violent conduct in the home would be relevant as affecting his relationship with the child. Schiele v. Sager, 174 M 533, 571 P2d 1142 (1977).

Specific Finding Regarding Change of Circumstances: The court erred in relying on the "best interest of the child" test without making a specific finding that there had been a change in circumstances which seriously endangered the children's physical, mental, moral, or emotional health, and that the harm likely to be caused by a change of environment was outweighed by its advantages to the children. Schiele v. Sager, 174 M 533, 571 P2d 1142 (1977).

VISITATION

Initial Best Interest Standard Applicable to Nonparent Visitation Proceedings: Since a child's birth and until his father's death 5 years later, the child had been raised by his father and stepmother. Soon after the father's death, the biological mother took custody of the child and the stepmother filed a petition seeking visitation. The District Court granted visitation to the stepmother, and the biological mother appealed. The Supreme Court reversed, ruling that the analysis adopted in Polasek v. Omura, 2006 MT 103, 332 Mont. 157, 136 P.3d 519, which considers grandparent-grandchild visitation, applies in any case involving nonparent visitation. Accordingly, the Supreme Court remanded the case for the District Court to apply the correct analysis. In re C.T.C., 2014 MT 306, 377 Mont. 106, 339 P.3d 54.

Sufficient Evidence of Best Interests of Child to Warrant Change in Custody — Visitation: The District Court revised a parenting plan by changing residential custody from the mother to the father, and the mother appealed, but the Supreme Court affirmed. The District Court's findings that the mother had frustrated visitation on numerous occasions and had made false accusations regarding the father's alleged sexual abuse of the child and that the child's best interests would be served by the custody change were supported by substantial evidence and were not clearly erroneous. In re Marriage of Nies & Cooper, 2003 MT 100, 315 M 260, 68 P3d 697 (2003).

Error in Allowing Unsupervised Visitation by Spouse With History of Domestic Violence: Despite the father's history of violent behavior and convictions for domestic abuse, the District Court found that because the father had been observed several times acting appropriately with his children, unsupervised visitation was suitable. However, the court had an obligation to consider the mental and emotional impact that unsupervised visitation would have on the children in light of the father's history of violent behavior against the mother. The overwhelming evidence showed that there was at least some risk to the children if left alone with their father. Several therapists opposed unsupervised visitation, and psychologists treating the children reported to the guardian ad litem that the father's actions during visitation had a negative effect on the children's emotional well-being. The Supreme Court reversed the decision allowing unsupervised visitation and directed development of a parenting plan that included supervised, well-structured visitation—not to punish the father, but for the benefit of the children. In re Marriage of Stoneman, 2000 MT 274, 302 M 107, 14 P3d 12, 57 St. Rep. 1145 (2000).

Counseling as Condition to Visitation With Two-Year-Old Child by Violent Father: Husband was properly ordered to undergo counseling as a condition to visitation with a child less than 2 years old because both he and his wife presented evidence that he had hit her, that several times he had destroyed property in anger, that police had been called to the home at least six times due to his violence, and that he had twice been hospitalized for suicidal ideation. In re Marriage of Bradshaw, 270 M 222, 891 P2d 506, 52 St. Rep. 154 (1995).

Visitation Restrictions Based on Unsupported Claims of Potential Harm From Transvestism as Abuse of Discretion: Wife claimed that husband had exhibited compulsive transvestite tendencies and that exposure of the child to that behavior could result in irreparable harm. The trial court agreed, severely limiting visitation to the daytime weekend hours and requiring that visits be supervised by the wife or an adult, nontransvestite member of the husband's family. However, every expert who testified on the issue stated that: (1) the husband's therapy had been successful; (2) the husband exhibited above-average parenting skills; (3) any negative impact on the child because of the father's behavior would be less than the impact from not having a normal relationship with the father; and (4) the highly restrictive visitation arrangement was not conducive to a normal father-child relationship. The trial court's imposition of visitation restrictions, in spite of uncontroverted expert testimony, was an abuse of discretion and reversible error. In re Marriage of D.F.D. & D.G.D., 261 M 186, 862 P2d 368, 50 St. Rep. 1280 (1993).

Sole Custody Awarded Father — Mother's Mental Health a Factor in Granting Supervised Visitation — No Abuse of Discretion: Mother appealed from the District Court child custody order in a dissolution of marriage granting the father sole custody of their son and granting the mother supervised visitation rights. The Supreme Court ruled that because mental health is a factor used in determining the best interests of the child, the District Court did not abuse its discretion in relying upon the opinion of experts that the mother was in need of treatment and in granting sole custody to the father and ordering supervised visitation by the mother. In re Marriage of Cook, 250 M 210, 819 P2d 180, 48 St. Rep. 795 (1991).

Reasonableness of Order Authorizing No Fixed Holiday Visitation: The District Court did not err in setting father's visitation arrangements as alternating weekends from 6 p.m. Friday until 6 p.m. Sunday, plus 60 days during the year at times agreeable to the parties. Despite father's contention that the arrangement "totally eliminated any contact between the father and the child on any holidays", substantial evidence showed the visitation schedule to be in the child's best interests. In re Marriage of Graveley, 244 M 137, 796 P2d 585, 47 St. Rep. 1497 (1990).

Reasonable Visitation Provision Replaced by Fixed Visitation Schedule — No Abuse of Discretion: Following dissolution of marriage, mother was granted custody of two minor children with reasonable visitation awarded to father. In the ensuing months, the father was permitted to visit the children only once and further attempts to arrange visitation were not successful since the mother had no phone and would not respond to messages. The father petitioned the District Court to grant a fixed visitation schedule, and the petition was granted. Although not required under former Rule 52(a), M.R.Civ.P. (now superseded), the order contained findings and conclusions, including evidence that the District Court Judge considered the best interests of the children and the conclusion that the mother's suggested graduated basis visitation schedule required reasonableness that was lacking in both parties. The Supreme Court held that the District Court's aid was necessary to clarify the meaning of "reasonable visitation" and found no abuse of discretion in the District Court Judge's conclusion. In re Marriage of Vinecke, 221 M 58, 716 P2d 638, 43 St. Rep. 633 (1986).

Visitation as Incident of Custody — Same Considerations: The visitation rights of a parent are merely incidents of custody, and the same principles that apply to custody apply to visitation rights as well. In this case, the court based its decision on prior agreements and dealings between the parents and ignored certain other factors that must be considered under 40-4-212. Factors ignored included testimony of a psychiatrist as to the mother's mental health, the wishes of the children, and the testimony of a clinical psychologist as to the best interest of the children. The judgment of the District Court was reversed. Milanovich v. Milanovich, 201 M 332, 655 P2d 959, 39 St. Rep. 1554 (1982).

WISHES OF PARENT, PARENTS

Mother's Fundamental Right to Travel — Move from Utah to Montana Not Required: The District Court permitted a mother to move her children from Montana to Utah under certain conditions. Subsequently, the father moved to amend the parenting plan to move the children back to Montana, arguing that the mother was not following the conditions set forth in the District Court's order. The District Court concluded that the children could stay in Utah with the mother. On appeal, the Supreme Court determined that the father did not prove that moving the children back to Montana was in their best interest and that doing so would interfere with the mother's fundamental right to travel. Hood v. Hood, 2012 MT 158, 365 Mont. 442, 282 P.3d 671, citing In re Marriage of Cole, 224 Mont. 207, 729 P.2d 1276 (1986), and In re Custody of D.M.G. & T.J.G., 1998 MT 1, 287 Mont. 120, 951 P.2d 1377.

Use of Mother's Surname in Best Interests of Child: The selection of a child's surname is a matter of choice, not law, and in determining whether to change a child's surname, a District Court must be guided by a child's best interests. In this case, the court correctly applied the best interests of the child standard in a nonsexist, nonpaternalistic manner, focusing on the child's interests rather than the wishes of a parent, such as the father's desire that his surname be carried on into future generations, in determining that the child would best carry the mother's surname. In re Custody of J.C.O., 1999 MT 325, 297 M 327, 993 P2d 667, 56 St. Rep. 1298 (1999).

Best Interest Used to Determine Custody of Child, Not Employment of Parent: Mother contended that because she was raising the child alone, it was in the child's best interests that she remain at home 5 days a week and work part-time 2 days a week. However, a court cannot order a mother to stay home and raise a child. The best interest criteria are used to determine the type of custody arrangement for a child, not to determine the employment status of parents, and it was not error for the court to find that the child's best interests did not require the mother to stay home to raise him. In re Paternity of W.L., 259 M 187, 855 P2d 521, 50 St. Rep. 751 (1993).

Custody Award Supported by Favorable Interaction and Interrelationship of Boys With Father: District Court properly awarded custody to father where evidence showed he spent considerable amounts of time with boys and entered into activities with them, whereas mother had made no attempt to see children for a year and had not written or sent birthday gifts. Haywood v. Sedillo, 167 M 101, 535 P2d 1014 (1975).

WISHES OF CHILD

Acceptance of Expert Testimony Regarding Child's Custodial Preference — Determination of Admissibility Not Necessary When Qualified as Professional Advice: During trial on modification of a parenting plan, the District Court considered statements made by the children during a session with a psychologist hired by the father. During the session, the children indicated their unhappiness living with their mother and their desire to live with their father. The mother objected on grounds that the statements were inadmissible hearsay, arguing that the Supreme Court had previously declined to extend the hearsay exception in Rule 803, M.R.Ev. (Title 26, ch. 10), to statements made by a child to a counselor and should have appointed an independent counselor. The Supreme Court noted that under 40-4-214, the District Court could have interviewed the children to determine their wishes, but declined to do so in deference to the mother's objection. However, a District Court need not interview children to determine their preferences, but may rely on the evaluation of a professional counselor. Special appointment of an independent counselor is not necessary in all circumstances. Here, the children underwent extensive counseling by a doctor, as well as by counselors hired by both the father and mother, and the District Court admitted the entire testimony of all the professionals. It was not necessary to determine whether the psychologist's testimony was admissible under Rule 803 because it qualified as professional advice available under 40-4-214. The trial court was in the best position to evaluate the credibility of witnesses, and the Supreme Court declined to overturn the custody matter absent a clear abuse of discretion. In re Marriage of Drake, 2002 MT 127, 310 M 114, 49 P3d 38 (2002).

No Error in Modification of Joint Custody Order Against Child's Own Wishes: When the mother and father were divorced, they entered into a stipulation providing for joint custody of their daughter, with primary physical custody for the mother and liberal visitation for the father. In the years following the divorce, the mother, by moving to other states and not allowing the daughter to see her father, continually frustrated the father's attempts to have a meaningful relationship with his daughter. The father petitioned for a change of primary physical custody. The petition was granted by the District Court after the court interviewed the daughter, who did not want to live with her father. The Supreme Court held that there was no error in the District Court's modification of the custody order. The record showed that the District Court considered the best interests of the child. The Supreme Court stated, citing Marriage of Mitchell, 248 M 105, 809 P2d 582 (1991), that although the testimony was not the same on both sides, it was the District Court's duty to resolve those conflicts and further stated that the Court's resolution of those conflicts will not be disturbed on appeal absent an abuse of discretion. In re Marriage of Ulland, 251 M 160, 823 P2d 864, 48 St. Rep. 1159 (1991).

Children's Expressed Wishes Not Determinative of Best Interests: Following an interview with the children, aged 5 and 7 years, the trial court ascertained their wishes as to custody. Rather than expressly following their wishes, the court granted primary physical custody of both children to their mother, which father contended necessitated reversal of the custody order. A review of the children's testimony in light of other testimony supported the court's conclusion that the children's expressed wishes were not determinative of their best interests. The court considered the children's desires but did not err in failing to follow their wishes. In re Marriage of Merriman, 247 M 491, 807 P2d 1351, 48 St. Rep. 275 (1991).

Findings — Wishes of Child: The District Court need not make specific findings of each statutory element. It must demonstrate only that it has considered each element by making specific findings as to the best interest of the child. The court is not required to award custody based on a child's preference. The District Court did not abuse its discretion by awarding primary custody of the parties' daughter to the mother in light of the child's expressed preference to live with her father. In re Marriage of Arrotta, 244 M 508, 797 P2d 940, 47 St. Rep. 1775 (1990).

Interview Not Necessary to Determine Wishes of Child: The appellant argued that the lower court erred in failing to interview the child to determine what her wishes were. The Supreme Court held that the findings demonstrated that the court had made a determination of the child's wishes based upon the testimony of others and that the court was not obligated to interview the child to ascertain her wishes. In re Marriage of Susen, 242 M 10, 788 P2d 332, 47 St. Rep. 528 (1990), followed in In re Marriage of Bukacek, 274 M 98, 907 P2d 931, 52 St. Rep. 1141 (1995).

Failure to Ask Children About Parental Preference — No Error: The Supreme Court refused to state categorically that because a District Court failed to directly ask children which parent they would rather live with, the judgment must be reversed. The record indicated that the children were asked questions about which place they preferred without being asked which parent they preferred to live with. Given the youth of the children, the lower court was not willing to place the children in the position to make such a decision. However, their wishes and best interests were adequately considered. In re Custody of J.H., S.H., & Ja.H., 231 M 301, 752 P2d 194, 45 St. Rep. 627 (1988).

Custody Based on Children's Preference — Custody to Father After School Year in Which They Reach Age Twelve: It was not an abuse of discretion for the judge to award custody of 8- and 10-year-old boys to the mother until the end of the school year in which each would turn 12 years old, with the father having custody all but 10 days of each summer, and thereafter permanent custody to the father, with the mother having custody for a month each summer and the children spending alternate holidays with the parents. Each boy had a strong preference for living with the father and for the farm lifestyle of the father, and though each boy had a normal and healthy relationship with the mother, each had some negative feelings about that relationship and did not wish to live with her. In addition, all four grandparents and assorted maternal and paternal cousins, aunts, and uncles lived near the father. The court's findings and conclusions were supported by substantial credible evidence. In re Marriage of Obergfell, 218 M 83, 708 P2d 561, 42 St. Rep. 1414 (1985).

Failure to Find as to Child's Wishes — Remand: The presumption that husband was the natural father of child arose when he married its mother after it was born and, with his consent, was named as the father on the birth certificate. This presumption was rebutted when, in proceeding upon mother's petition for dissolution of the marriage, she and her husband acknowledged under oath that he was not the natural father. Therefore, he could be granted custody of the child only in the capacity of a nonparent. The mother could be deprived of custody only upon a finding of unfitness, abuse, or neglect. The record supported the trial court's finding that the mother was unfit and unable to care for the child. Thus, the husband could be considered as a potential custodian and was granted custody. The trial court made no finding as to the wishes of the child because there was no evidence on this point. Though the wishes of the child would have little weight, as the child was only 4 years old, a remand was necessary for consideration of the child's wishes and a new custody determination. In re Custody of C.C., K.C., & B.C., 215 M 72, 695 P2d 816, 42 St. Rep. 190 (1985), overruled, with regard to use of marriage and divorce procedures in determination of appropriateness of custodianship for nonparent, in In re Marriage of Miller, 251 M 300, 825 P2d 189, 49 St. Rep. 36 (1992).

Wishes of Children Considered — Interview Not Necessary: The court rejected appellant's contention that there were no findings regarding the factors specified in 40-4-212, particularly as to the wishes of the children regarding custody as required by In re Kramer, 177 M 61, 580 P2d 439 (1978). The court distinguished this case from Kramer, which is limited only to those situations where the District Court has interviewed the children. The District Court was not compelled by 40-4-214 to interview the children. The court found that the preferences of the children, as well as their best interests, were considered. In re Marriage of Hickey, 213 M 38, 689 P2d 1222, 41 St. Rep. 1931 (1984), followed in In re Marriage of Bukacek, 274 M 98, 907 P2d 931, 52 St. Rep. 1141 (1995).

Court to Make Specific Findings as to Child's Best Interests: Because the trial court did not make findings or other indications that it had considered each of the factors set forth in 40-4-212, the award of custody was set aside and the cause remanded for appropriate findings. Although the District Court need not make specific findings on each statutory element, it must demonstrate that it has considered each element by making specific findings as to the best interests of the child. In re Marriage of Keating, 212 M 462, 689 P2d 249, 41 St. Rep. 1865 (1984).

Award of Custody Contrary to Child's Wishes Upheld — No "Tender Years Presumption" Applied: In an action for dissolution of the parties' marriage in which the custody of all of the children was awarded to the father, despite the wishes of at least one of the children, the court did not err in making its custody decree, as the wishes of the children are only one factor to be considered by the court. Additionally, the mother is not to be considered the "preferred" parent in cases involving young children, as the Supreme Court previously held in In re Marriage of Markegard, 189 M 374, 616 P2d 323 (1980), that the "presumption of tender years" is no longer to be followed in the courts of this state. Bier v. Sherrard, 191 M 215, 623 P2d 550, 38 St. Rep. 158 (1981).

Finding as to Child's Wishes:

Although the District Court did not make a specific finding in the decree concerning a child's wishes, the court amended its finding on his custody and at that time stated the child's wishes as expressed in chambers, thereby satisfying the requirement set forth in Kramer. Kaasa v. Kaasa, 181 M 18, 591 P2d 1110 (1979).

A court considering custody in a divorce proceeding should make a specific finding, stating the wishes of the children as to their custodian, and if the court determines that the children's wishes are not to be followed, the court should state in its findings the reason it has chosen not to follow their wishes. In re Marriage of Kramer, 177 M 61, 580 P2d 439 (1978), followed in Murphy v. Murphy, 205 M 162, 666 P2d 755, 40 St. Rep. 1188 (1983), and Kuzara v. Kuzara, 211 M 43, 682 P2d 1371, 41 St. Rep. 1201 (1984).

Welfare of Child Paramount to Child's Wishes: Where evidence showed emotional instability on part of mother and that welfare of child would be better served by awarding custody to father, it was not an abuse of discretion to award custody to father even though child expressed desire to live with her mother. Libra v. Libra, 157 M 252, 484 P2d 748 (1971).

ADJUSTMENT OF CHILD

Modification of Parenting Plan by District Court Requiring Child to Move Six Times in Single Year — Insufficient Findings — Reversed and Remanded to Consider Child's Best Interests: The parties entered a parenting plan whereby the mother was the primary parent of the child with regular parenting by the father. Four years later, the mother filed a motion to amend the parenting plan to allow her to move with the child from Missoula to Kalispell because of her job. The father objected, and the District Court held a hearing on her motion. The District Court then issued a modified parenting plan whereby the now school-aged child would have to move six times and attend two different schools throughout the school year. On appeal, the Supreme Court reversed and remanded, holding that the District Court had issued insufficient findings, had abused its discretion in modifying the plan, and had not considered the child's best interests. In re G.M.O., 2017 MT 116, 387 Mont. 390, 394 P.3d 913.

Adoption of Parenting Plan Providing for Stability and Convenience of Child Affirmed: A father contended that a parenting plan erroneously allowed for the child to spend three-fourths of her time with the mother and called for the child to reside with the father during his busy summer work season, reducing the time that he would actually have with the child and increasing child-care costs. However, substantial credible evidence supported the plan. The mother was the primary caregiver since the child's birth, and that living situation provided stability in the child's home life. The father lived 40 miles from the child's school, and granting him custody during the school year would have required an inconvenient 80-mile commute to school each day. The plan allowed frequent contact and a significant time to be spent between father and child, including every other weekend, various holidays, and the majority of the summer. It was not an abuse of discretion for the District Court to adopt a parenting plan favoring stability and convenience for the child over an equal apportionment of time between the parents, and the plan was affirmed. In re Marriage of Dennison, 2006 MT 56, 331 M 315, 132 P3d 535 (2006).

Children's Best Interests Served by Parent Willing to Provide Public Education and More Tolerant Lifestyle: Seven children were raised in an isolated rural setting, home schooled, and allowed little contact with the outside world. People who did not subscribe to the parents' strict religious tenets, including relatives, were shunned. When the marriage disintegrated, the District Court applied the best interests of the children standard to the question of primary residential custodian and designated the father as primary custodial parent. The mother appealed, but the Supreme Court affirmed. The father was less judgmental and more flexible and tolerant, was more likely to promote a healthy, respectful relationship between the children and their mother, and would allow the children to go to school. The mother failed to demonstrate that the District Court's findings were an abuse of discretion. In re Marriage of Epperson, 2005 MT 46, 326 M 142, 107 P3d 1268 (2005).

No Error in Return of Children to Parent Four Days Before Start of School to Allow Adequate Adjustment of Children: One of the few aspects of a parenting plan that the parents could not agree to was the time period that the children needed to spend with the mother before school started to readjust to living in the mother's home. The mother's expert asserted that 2 weeks were necessary for the adjustment period, while the father's expert testified that children who move frequently have less trouble adjusting and that 1 or 2 days might be sufficient. The District Court settled on a 4-day adjustment period, and the mother appealed. The Supreme Court noted that in light of the conflicting testimony, it was the District Court's determination of the children's best interests, not the expert witnesses' opinions, that controlled. The District Court's decision was supported by evidence in the record, and not being clearly erroneous, that decision was affirmed. In re Marriage of Banka, 2003 MT 84, 315 M 97, 67 P3d 885 (2003).

Requirement That Children Remain Together Not Erroneous — Sibling Bond: Mother contended that the lower court erred in holding that the best interests of the children required that they remain together, ignoring the special bond between mother and daughter. The Supreme Court found no error in the conclusion that splitting the children was not advisable because of the danger of the children identifying with the parent with whom they live at the expense of alienation from the other parent and that the bond between the children would remain of great value in the coming years. In re Marriage of Smith, 232 M 528, 757 P2d 784, 45 St. Rep. 1253 (1988).

Factors in Custody Decision — Close Relationship of Child to Other Family Members: The continuity and stability of the family relationship between a child and its custodian are important; therefore, court to which custody case was remanded after vacation of order was requested to consider, in framing a new order, its previous factual determination that the 3-year-old child, while temporarily living with mother, had a close relationship with his 7-year-old half sister who lived with her mother. Cameron v. Cameron, 197 M 226, 641 P2d 1057, 39 St. Rep. 485 (1982).

Custody Award Supported by Favorable Interaction and Interrelationship of Boys With Father: District Court properly awarded custody to father where evidence showed he spent considerable amounts of time with boys and entered into activities with them, whereas mother had made no attempt to see children for a year and had not written or sent birthday gifts. Haywood v. Sedillo, 167 M 101, 535 P2d 1014 (1975).

MENTAL, PHYSICAL HEALTH

No Abuse of Discretion for Limiting Mother to Supervised Visitation — Specific Findings of Fact Encouraged — Written Findings Sufficient: The District Court did not abuse its discretion when it limited the mother to supervised visitation without making the requisite finding of fact under 40-4-218. The Supreme Court cautioned that District Courts should make specific findings on all relevant statutory criteria in making parenting plan determinations. However, regardless of other conflicting evidence, substantial record evidence supported the findings of fact made by the District Court. In context of its conclusions of law, the written findings made by the District Court were further manifestly sufficient to support and imply a finding that the failure to temporarily limit the mother to supervised visitation would likely significantly impair the child's emotional development under the circumstances. The circumstances and needs were not contemplated or provided for in the prior parenting plan. Apart from the District Court's failure to make a specific finding of fact under 40-4-218, the mother failed to demonstrate that the findings made were clearly erroneous. In re Marriage of Bessette, 2019 MT 35, 394 Mont. 262, 434 P.3d 894.

Children's Best Interests Served by Parent Willing to Provide Public Education and More Tolerant Lifestyle: Seven children were raised in an isolated rural setting, home schooled, and allowed little contact with the outside world. People who did not subscribe to the parents' strict religious tenets, including relatives, were shunned. When the marriage disintegrated, the District Court applied the best interests of the children standard to the question of primary residential custodian and designated the father as primary custodial parent. The mother appealed, but the Supreme Court affirmed. The father was less judgmental and more flexible and tolerant, was more likely to promote a healthy, respectful relationship between the children and their mother, and would allow the children to go to school. The mother failed to demonstrate that the District Court's findings were an abuse of discretion. In re Marriage of Epperson, 2005 MT 46, 326 M 142, 107 P3d 1268 (2005).

Visitation Restrictions Based on Unsupported Claims of Potential Harm From Transvestism as Abuse of Discretion: Wife claimed that husband had exhibited compulsive transvestite tendencies and that exposure of the child to that behavior could result in irreparable harm. The trial court agreed, severely limiting visitation to the daytime weekend hours and requiring that visits be supervised by the wife or an adult, nontransvestite member of the husband's family. However, every expert who testified on the issue stated that: (1) the husband's therapy had been successful; (2) the husband exhibited above-average parenting skills; (3) any negative impact on the child because of the father's behavior would be less than the impact from not having a normal relationship with the father; and (4) the highly restrictive visitation arrangement was not conducive to a normal father-child relationship. The trial court's imposition of visitation restrictions, in spite of uncontroverted expert testimony, was an abuse of discretion and reversible error. In re Marriage of D.F.D. & D.G.D., 261 M 186, 862 P2d 368, 50 St. Rep. 1280 (1993).

Failure to Consider Mental and Physical Health and Physical Abuse Documented by Case Worker — Reversal Warranted: The District Court committed reversible error in failing to consider the information provided in a home and family assessment study by a social worker regarding the mother's mental health and her documented physical and emotional abuse of the children and in neglecting to order a psychological evaluation of the mother to determine her parenting capability or neglecting to order counseling for the mother and other family members. Maxwell v. Maxwell, 248 M 189, 810 P2d 311, 48 St. Rep. 386 (1991), citing In re Marriage of Bloom-Higham, 227 M 217, 738 P2d 114 (1987). However, see In re Marriage of McLean/Fleury, 257 M 55, 849 P2d 1012, 50 St. Rep. 35 (1993).

Sexual Abuse of Parent Not Determinative of Fitness for Custody: Appellant contended that custody of two children should not have been granted to mother because she was sexually abused by her father as a child and yet allowed him to see the children. The fact that mother was a child victim of sexual abuse had no relevance to the children's best interests absent evidence that the abuse affected her mental or physical health to the extent that her ability to act as a caretaker was diminished. In light of the fact that her father's visitation was not allowed unless she was present, the award of custody to her was affirmed. In re Marriage of Merriman, 247 M 491, 807 P2d 1351, 48 St. Rep. 275 (1991).

Itinerant Lifestyle and Physical Abuse — Modification Granted: The District Court did not err in transferring custody of a child from mother to father when court found: (1) that mother's remarriage resulted in an itinerant lifestyle with crowded and substandard housing conditions; (2) that the child was subjected to harsh, repeated, inappropriate, and excessive physical discipline and showed signs of abuse and fear of his stepfather; and (3) that the father had superior child raising and discipline practices and stability and security over that to which the child had been subject. The District Court's findings were supported by substantial evidence. The father met his required burden of proof to support his contention that modification of the decree was necessary to serve the best interests of the child. In re Custody of Dumont, 216 M 118, 700 P2d 167, 42 St. Rep. 687 (1985).

Abuse and Neglect — Custody With Intervening Divorce: Where a couple voluntarily surrendered their child to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) because of abuse and neglect by the mother, the District Court was correct in continuing with the abuse and neglect custody proceeding rather than dismissing it and allowing custody to be determined in the couple's divorce action. Once a determination of abuse and neglect has been made, the court proceeds to a dispositional hearing to determine the custody of the child. In re M.M., 200 M 244, 650 P2d 784, 39 St. Rep. 1716 (1982).

Fit Parent Properly Denied Custody — Factors to Be Considered by Court: In an action for dissolution of the parties' marriage in which the court found the wife not an unfit mother, the trial court did not err in granting custody of the two children of the parties to the father. The fitness of either party as a parent is only one factor to be considered by the court in granting custody. The court also found that the wife's new husband had an unsettling influence upon the children. Therefore, no error was committed. Bier v. Sherrard, 191 M 215, 623 P2d 550, 38 St. Rep. 158 (1981).

Removal of Children Warranted: The District Court did not abuse its discretion when it granted the Department of Social and Rehabilitation Services' (now Department of Public Health and Human Services) petition for permanent custody and authority to consent to adoption of three children since they were adjudged dependent and neglected and there was ample evidence to warrant removal from their parents. In re Gore, Youths in Need of Care, 174 M 321, 570 P2d 1110 (1977).

Change of Circumstances Warranting Change of Custody: To prevent uprooting of child of tender years who had been in physical custody of her father by agreement of parents because of child's emotional problem, it was in the best interest of the child to change legal custody to the father because of change of circumstances. Gilbert v. Gilbert, 166 M 312, 533 P2d 1079 (1975).

Law Review Articles

Judicial Discretion and the Homosexual Parent: How Montana Courts Are and Should Be Considering a Parent's Sexual Orientation in Contested Custody Cases, Runnette, 57 Mont. L. Rev. 177 (1996).

Child Custody and the Alcoholic Parent, Bradley, 46 Mont. L. Rev. 433 (1985).

Uniform Marriage and Divorce Act—Child Custody, Kilbourne, 37 Mont. L. Rev. 411 (1976).

Child Custody—Principal—Agency, Aune, 9 Mont. L. Rev. 47 (1948).

40-4-213. Interim parenting plan.

Commissioners' Note

Subsection (a) [(1)] encourages trial courts to issue temporary custody orders without formal hearing whenever possible. Since the hearing itself may be a traumatic event for both parents (and therefore for their children, indirectly), the trial court is authorized to make temporary orders on the basis of affidavits alone unless one of the parties files formal objection to that procedure. In most cases, it is expected that trial judges will award temporary custody to the existing custodian so as to minimize disruption for the child.

Subsection (b) [(2)] states an important principle designed to foster values supporting family privacy. If a petition for dissolution or legal separation is dismissed voluntarily, there is no reason for the court to hold a special hearing and make a special (and extraordinary) finding before making any substantive custody decision. In most cases, then, if the dissolution petition is dismissed, the parties, whether or not they reconcile, will determine for themselves who should be the child's custodian. If the child's circumstances warrant concern for his physical or emotional security, the standard for community intervention expressed in the state's Juvenile Court Act should be the measure applied to the family. The divorce court can always alert juvenile court or welfare department staff informally that a problem may exist.

Compiler's Comments

1997 Amendment: Chapter 343 in (1), in first sentence near beginning, substituted "parenting" for "custody" and at end substituted "an interim parenting plan" for "a temporary custody order" and in third sentence, near beginning, substituted "adopt an interim parenting plan" for "award temporary custody"; in (2), in first sentence near beginning before "is vacated", substituted "interim parenting plan" for "temporary custody order", after "unless a parent" deleted "or the child's custodian", near middle, before "proceeding", substituted "parenting" for "custody", and at end substituted "that a parenting plan be adopted" for "that a custody decree be issued" and inserted second sentence providing that a child support delinquency existing at the time an interim parenting plan is vacated remains collectible; in (3), in first sentence near beginning, substituted "parenting" for "custody" and near end substituted "interim parenting plan" for "temporary custody order" and inserted second sentence providing that a child support delinquency existing at the time an interim parenting plan is vacated remains collectible; inserted (4) providing that adoption of a final parenting plan vacates any interim parenting plan and that a child support delinquency existing at the time an interim parenting plan is vacated remains collectible; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Source: Section 403, Uniform Marriage and Divorce Act.

Montana Changes: In subsection (3) Montana deletes "under subsection (1)(ii) or (2) of section 401", codified as 40-4-211.

Case Notes

Alteration of Temporary Custody Order — Showing of Changed Circumstances Not Required: Wife was awarded custody on an ex parte motion and at a later hearing was granted temporary custody pending final resolution of the action. Although the temporary order did not specifically state that the rights of the noncustodial parent would not be prejudiced, the Supreme Court held that the temporary order did not require a showing of changed circumstances before the final custody order could alter the terms of the temporary order. It would be inherently unfair to require a noncustodial parent to make a higher threshold showing of changed circumstances before a custody order may deviate from a temporary order. In re Marriage of Allen, 237 M 64, 771 P2d 578, 46 St. Rep. 624 (1989), distinguishing In re Custody of Andre, 234 M 80, 761 P2d 809, 45 St. Rep. 1745 (1988), and followed in In re Marriage of Kovash, 260 M 44, 858 P2d 351, 50 St. Rep. 934 (1993), in which it was held that forcing parents to litigate temporary custody by requiring proof of changed circumstances before temporary custody orders could be modified would be contrary to the purpose of this section.

Change in Custody From Temporary Order: In 1981, the District Court awarded the wife custody of the minor children during the pendency of an action for dissolution of marriage. The court specifically stated that this order was made without prejudice to the rights of the parties or their children. Two years later, the court entered the final custody order and in it awarded custody of one child to the father. The wife appealed, claiming that the District Court had erroneously modified an existing custody decree and had disturbed custodial continuity. The Supreme Court affirmed, ruling that although custody should be determined without delay and 2 years had elapsed prior to the final custody award, modification of the temporary custody order was proper. In re Marriage of Beitz, 211 M 111, 683 P2d 485, 41 St. Rep. 1247 (1984).

Abuse of Discretion in Awarding Custody: The court abused its discretion in awarding custody of children to the mother by ignoring the desires of the children, excluding a report of investigation by the welfare department, and in hearing the child custody issue without the presence of the children's attorney. The court should make a specific finding, stating the wishes of the children as to their custodian and, if the court determines that the children's wishes are not being followed, the court should state in its findings the reason it has chosen not to follow their wishes. Kramer v. Kramer, 177 M 61, 580 P2d 439 (1978).

Erroneous Award of Temporary Custody to Aunt: An aunt did not have standing to bring an action for temporary custody of her brother's children because they were in the "physical custody", although not actual and immediate control, of their mother. The aunt was not a party to the original custody proceeding, the motion for temporary custody was accompanied by a deficient affidavit, and no notice was given to the mother. Henderson v. Henderson, 174 M 1, 568 P2d 177 (1977).

40-4-214. Interviews.

Commissioners' Note

This section, and the two which follow, are designed to permit the court to make custodial and visitation decisions as informally and non-contentiously as possible, based on as much relevant information as can be secured, while preserving a fair hearing for all interested parties.

The general rule is that the judge may interview the child in chambers. It is often important for the judge to discover the attitudes and wishes of the child, and there is no reason to subject the child to the formality of the courtroom and the unpleasantness of cross-examination. This provision does not require the judge to permit counsel to be present at the interview, but he must make some kind of record of the interview (using a court reporter or a tape recorder) so that counsel for all parties will have access to the substance of the interview. Similarly, the judge may call informally on experts in a variety of disciplines without subjecting them, in the first instance, to the formal hearing process. But the experts' advice should be available to counsel for the parties so that the judge's decision will not be based on secret information; and the parties should be able to examine the expert as to the substance of his advice to the judge.

Compiler's Comments

1997 Amendment: Chapter 343 in (1), in first sentence at end, substituted "residence and parental contact" for "his custodian and as to visitation"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Source: Section 404, Uniform Marriage and Divorce Act.

Case Notes

Disclosure of Transcript of In-Chambers Interview With Children Not Required: In a dissolution of parental rights proceeding, the District Court interviewed the children in chambers without the mother present. The District Court then denied the mother's requests for the transcripts. On appeal, the Supreme Court affirmed, holding that the language of 40-4-214 does not support an interpretation requiring the District Court to disclose the transcript upon request. In re T.N.-S., 2015 MT 117, 379 Mont. 60, 347 P.3d 1263.

Testimony Regarding Children's Wishes — Proper Use of Counselor: During a contested parenting proceeding, a counselor testified that the children had expressed to him that they did not want to live with their father, who they had not seen in over 4 years. The District Court relied in part on the counselor's testimony in its decision to have the children remain in the mother's custody. The father appealed and argued that the District Court had relied too heavily on the counselor's testimony. The Supreme Court disagreed and ruled that the District Court had properly relied on the counselor's testimony given that the father had not seen his children for such a long period of time. In re Marriage of Anderson, 2014 MT 111, 374 Mont. 526, 323 P.3d 895.

Mother's Move From Montana to Utah in Best Interest of Children — Proper for District Court to Conduct In Camera Interview — Mother's Medical Records Not Required: The District Court permitted a mother to move her children from Montana to Utah. Subsequently, the father moved to amend the parenting plan to require the children to move back to Montana. In denying the motion, the District Court weighed the factors in 40-4-212 and concluded that the children could stay in Utah with the mother. On appeal the father claimed, among other things, that the District Court abused its discretion by interviewing the children in camera, by determining that the children had adjusted to their home, school, and community, and by not requiring the mother to produce medical records. The Supreme Court determined that the District Court did not abuse its discretion by interviewing the children in camera without cross-examination as permitted under 40-4-214, that the father failed to present any evidence that the children were not adjusted, and that the mother's medical records were being sought to attack the mother's credibility, not to determine the best interest of the children. Hood v. Hood, 2012 MT 158, 365 Mont. 442, 282 P.3d 671.

Acceptance of Expert Testimony Regarding Child's Custodial Preference — Determination of Admissibility Not Necessary When Qualified as Professional Advice: During trial on modification of a parenting plan, the District Court considered statements made by the children during a session with a psychologist hired by the father. During the session, the children indicated their unhappiness living with their mother and their desire to live with their father. The mother objected on grounds that the statements were inadmissible hearsay, arguing that the Supreme Court had previously declined to extend the hearsay exception in Rule 803, M.R.Ev. (Title 26, ch. 10), to statements made by a child to a counselor and should have appointed an independent counselor. The Supreme Court noted that under this section, the District Court could have interviewed the children to determine their wishes, but declined to do so in deference to the mother's objection. However, a District Court need not interview children to determine their preferences, but may rely on the evaluation of a professional counselor. Special appointment of an independent counselor is not necessary in all circumstances. Here, the children underwent extensive counseling by a doctor, as well as by counselors hired by both the father and mother, and the District Court admitted the entire testimony of all the professionals. It was not necessary to determine whether the psychologist's testimony was admissible under Rule 803 because it qualified as professional advice available under this section. The trial court was in the best position to evaluate the credibility of witnesses, and the Supreme Court declined to overturn the custody matter absent a clear abuse of discretion. In re Marriage of Drake, 2002 MT 127, 310 M 114, 49 P3d 38 (2002).

Necessity of Determining Child's Preference When Record Clearly Shows Change Is Necessary: Although it would have been preferable for the judge to interview the children in a change of custody proceeding to determine which parent they wanted to live with, such a determination is not required in every case. Here, failure to make the determination was not error because the record clearly showed that the best interests of the children required a change of custody from the mother to the father. McDowell v. McDowell, 263 M 252, 868 P2d 1250, 51 St. Rep. 42 (1994).

Failure to Release Transcript of Interview Not Abuse of Discretion: Appellant argued that the trial court abused its discretion in failing to release the transcript of the interview with the children and in making specific findings concerning the children's wishes. The Supreme Court disagreed, noting that the children's wishes were known to all parties prior to the hearing and that the trial court clearly set forth its reasons for awarding physical custody of one child to the father and leaving physical custody of the other child with the mother. In re Marriage of Arbuckle, 243 M 10, 792 P2d 1123, 47 St. Rep. 1150 (1990).

Wishes of Children Considered — Interview Not Necessary: The court rejected appellant's contention that there were no findings regarding the factors specified in 40-4-212, particularly as to the wishes of the children regarding custody as required by In re Kramer, 177 M 61, 580 P2d 439 (1978). The court distinguished this case from Kramer, which is limited only to those situations where the District Court has interviewed the children. The District Court was not compelled by 40-4-214 to interview the children. The court found that the preferences of the children, as well as their best interests, were considered. In re Marriage of Hickey, 213 M 38, 689 P2d 1222, 41 St. Rep. 1931 (1984).

No Abuse of Discretion Found in Failure to Require Psychological Testing: In an action for dissolution of the parties' marriage in which the trial court left a permanent custody decision pending until the wife and husband received psychological evaluations, the court did not abuse its discretion when, upon a later showing that the wife had not obtained the evaluation, it failed to order the test. Whether or not to require psychological testing is a matter within the court's discretion, and the husband has not demonstrated any abuse of it. A review of the transcript also indicated sufficient other evidence upon which the court could base its decision. Bier v. Sherrard, 191 M 215, 623 P2d 550, 38 St. Rep. 158 (1981).

Failure to Include Children's Names in Record: The failure of the court reporter to include the children's names in the record of an in-chambers interview was not reversible error. Bailey v. Bailey, 184 M 418, 603 P2d 259 (1979).

Leading Questions to Child: The trial court did not err in asking a child leading questions during an in-chambers interview. Leading questions may be asked if necessary to develop testimony, and whether or not they will be allowed is a matter for the trial court's discretion. One of the exceptions to the prohibition against leading questions is when the witness is a child, and here, where the child was rather withdrawn, the asking of leading questions was not an abuse of discretion. Bailey v. Bailey, 184 M 418, 603 P2d 259 (1979).

Presence of Child Who Had Reached Age of Majority: There is no basis for appellant's contention that the parties' oldest son, who had reached the age of majority, should not have been present at the in-chambers interview. There was no request for his exclusion and no objection to his inclusion, and the issue cannot be raised for the first time on appeal. Bailey v. Bailey, 184 M 418, 603 P2d 259 (1979).

Undue Influence Over Children: Although the trial judge did not inquire whether the children had been "coached" before the interview by someone sympathetic to the wife, the record reveals that upon being asked, one of the children said that any conversation that took place was among themselves. The credibility of the declarant and the effect of his statement was for the judge to determine, and the judge was apparently satisfied that no undue influence had been exerted and did not pursue the matter further. Bailey v. Bailey, 184 M 418, 603 P2d 259 (1979).

Finding as to Child's Wishes: Although the District Court did not make a specific finding in the decree concerning a child's wishes, the District Court amended its finding on his custody and at that time stated the child's wishes as expressed in chambers, thereby satisfying the requirement set forth in Kramer v. Kramer, 177 M 61, 580 P2d 439 (1978). Kaasa v. Kaasa, 181 M 18, 591 P2d 1110 (1979).

Lack of Record: While the practice of conducting off-record interviews is not desirable, the lack of a record alone does not always require reversal. Wilson v. Wilson, 180 M 377, 590 P2d 1136 (1979).

Waiver of Transcript: The statutory requirement of a verbatim transcript of the District Court interview of minor children is a provision that can be waived by the parents in a dissolution of marriage proceeding. Having voluntarily waived a known right they cannot complain about the lack of a record for appeal. Counts v. Chapman, 180 M 102, 589 P2d 151 (1979).

Record of Interview Required:

The holding of the interview pursuant to this section is discretionary. However, once such discretion is exercised, the statute mandates that a record of the interview be made and that such record be part of the case record. Brown v. Brown, 179 M 417, 587 P2d 361 (1978).

The mandate of this section was not complied with when the trial court failed to cause a record of the interview to be made. Schiele v. Sager, 174 M 533, 571 P2d 1142 (1977).

Specific Finding Required: When an interview is held, the District Court must make a specific finding stating the wishes of the child as to his custodian. Brown v. Brown, 179 M 417, 587 P2d 361 (1978).

Waiver of Record Requirement: An attorney may waive the requirement that all interviews with the child be on the record but may not then complain that he was prejudiced by not having the interviews recorded. Lehman v. Billman, 178 M 367, 584 P2d 662 (1978).

Determining Custody Distinguished From Modification: The court did not err by failing to interview a minor child and order that an investigation and report concerning custodial arrangements be made, since the only issue before the court was whether to modify a custody decree, determination of custody already having been made. Easton v. Easton, 175 M 416, 574 P2d 989 (1978).

Failure to Interview: The trial court did not err in failing to interview 3-year-old child as to his preference on dissolution of his parents' marriage, where both parents testified as to their desire to have custody of the child. In re Marriage of Tweeten, 172 M 404, 563 P2d 1141 (1977).

Record Not Required: Supreme Court will not require entire record in making its decision when no objections were made of interviews conducted in chambers. Solie v. Solie, 172 M 132, 561 P2d 443 (1977).

40-4-215. Investigations and reports.

Commissioners' Note

The Act steers a middle course between those courts which prohibit a custody investigation unless both parties stipulate to it and those statutes which permit the judge to order an investigation in every case. It is obvious that custody investigations, whether made by a member of the court's staff or by a public or private agency employed for that purpose, can be useful aids to the court. But most custody dispositions are consensual decisions of the parents, and there is no reason to permit the judge to order an investigation in such cases unless one of the spouses, although agreeing to the disposition, wants some further inquiry made. Under these circumstances, the court can order an investigation even if the other spouse opposes it. Similarly, in contested cases, where the judge's need for independent investigation is greatest, a custody study can be ordered even if both spouses are opposed.

The provisions of subsections (b) [(2)] and (c) [(3)] detail the procedural aspects of custody investigations and reports. They assure that investigations will be conducted with due regard to fair hearing values, while encouraging investigators to provide accurate information to the court.

Compiler's Comments

2019 Amendment: Chapter 41 in (1) in third sentence substituted "cash assistance" for "financial assistance". Amendment effective July 1, 2019.

2013 Amendment: Chapter 88 in (4) in first sentence substituted "investigator shall mail" for "court shall mail". Amendment effective October 1, 2013.

Applicability: Section 11, Ch. 88, L. 2013, provided: "[This act] applies to proceedings filed after [the effective date of this act]." Effective October 1, 2013.

2001 Amendments — Composite Section: (Temporary version) Chapter 465 in (1) in third sentence after "recipient of" substituted "financial assistance, as defined in 53-4-201, or a participant in the food stamp program" for "cash assistance under the temporary assistance for needy families block grant, FAIM financial assistance" and after "53-2-902" deleted "food stamps, or public assistance"; and made minor changes in style. Amendment effective July 1, 2001.

(Version effective July 1, 2002) Chapter 585 in (1) at end of sixth sentence substituted "must be paid by the state as provided in 3-5-901" for "must be paid from the fees for filing petitions for contested amendment of a parenting plan, as provided in 25-1-201(9)".

The amendments to this section in sec. 146, Ch. 574, L. 2001, were rendered void by sec. 255(3), Ch. 574, L. 2001, a coordination section.

Retroactive Applicability: Section 45, Ch. 465, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to payments made after January 1, 2001, for mental health services provided to children with serious emotional disturbances for whom mental health services are not provided by any other public mental health services program and whose family income is at or below 150% of the federal poverty level."

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1997 Amendments — Composite Section: Chapter 343 in (1), at beginning of first sentence, substituted "If a parent or a court-appointed third party requests, or if the court finds that a parenting proceeding is contested" for "In contested custody proceedings and in other custody proceedings if a parent or the child's custodian requests" and near end, before "arrangements", substituted "parenting" for "custodial", inserted second sentence concerning what persons may act as the investigator, in third sentence, near middle before "requesting", substituted "person" for "parent or the child's custodian" and after "recipient of" substituted "cash assistance under the temporary assistance for needy families block grant" for "aid to families with dependent children", and inserted sixth sentence providing that the cost of the educational evaluation be paid from fees for filing petitions for contested amendment of a parenting plan; inserted (2) providing for court determination of the level of evaluation necessary for adequate investigation and preparation of the report; in (3), at end of first sentence, substituted "parenting arrangements" for "custodial arrangements" and at beginning of third sentence inserted exception clause and at end substituted "persons or entities authorized by law to grant or withhold access to records" for "parent or the child's custodian"; in (4), at beginning of second sentence, inserted "When consistent with state and federal law" and inserted fifth sentence requiring the results of the investigation to be included in the court record and allowing without objection the investigation to be sealed; adjusted subsection references; and made minor changes in style.

Chapter 486 in second sentence in (1), after "recipient", substituted "of FAIM financial assistance, as defined in 53-2-902" for "of aid to families with dependent children". Amendment effective May 2, 1997.

Both chapters substituted phrases for "aid to families with dependent children". The codifier has retained both substitutions.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Section 50, Ch. 486, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

1995 Amendments: Chapter 18 in second sentence of (1), after "food stamps", substituted "or public assistance" for "or general relief benefits".

Chapter 546 in (1), in second sentence, substituted "department of public health and human services" for "department of family services" and after "food stamps" deleted "[or general relief benefits]"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendments — Composite Section: Chapter 434 in (1) substituted present second and third sentences regarding conditions under which the Department may be ordered to conduct the investigation or draft a report for former second and third sentences that read: "If the court orders the department of family services to conduct the investigation, the department may charge a reasonable fee. The department shall waive the fee for conducting the investigation if the parent or the child's custodian requesting the investigation is a recipient of aid to families with dependent children, food stamps, or general relief benefits"; and made minor changes in style. Amendment effective April 21, 1993.

Chapter 561 in (1), at end of third sentence after "food stamps", deleted "or general relief benefits"; and made minor changes in style. Amendment effective July 1, 1993.

Bracketed language in (1), though technically valid, is of no legal effect because general relief benefits were eliminated by other legislation adopted by the 1993 Legislature.

Chapter 434 and Ch. 561 made style changes that were slightly different. In each case, the codifier chose the more appropriate of the two.

1987 Amendment: In (1) inserted second and third sentences concerning fee and waiver of fee.

Function Transfer: Pursuant to sec. 117, Ch. 609, L. 1987, the Governor by executive order transferred the function and authority contained in this section from the Department of Social and Rehabilitation Services to the Department of Family Services (now Department of Public Health and Human Services).

1981 Amendment: Inserted "cost of the" before "investigation and report" in the last sentence of (1); substituted "shall be paid according to the final order" for "may be made by the county welfare department" at the end of (1).

Source: Section 405, Uniform Marriage and Divorce Act.

Montana Changes: See 1981 and 1987 amendment notes.

Case Notes

Modification of Parenting Plan Based on Recommendations of Guardian Ad Litem — Hearing Required: The father challenged the District Court's order that modified a parenting plan based on the recommendations of a guardian ad litem without holding a hearing. The father argued that the modification effectively terminated his parental rights without permitting him the opportunity to cross-examine the guardian ad litem about her recommendations. On appeal, the Supreme Court agreed that the father should be allowed to cross-examine the guardian ad litem and remanded the matter for a hearing. Wendlandt v. Johnson, 2012 MT 90, 365 Mont. 1, 277 P.3d 1208.

Nonreversible Error in Not Allowing Attorney Serving as Guardian Ad Litem to Testify at Final Custody Hearing — Parent's Substantial Rights Not Affected: At a final custody hearing, the District Court refused to allow the testimony and cross-examination of an attorney who was acting as a guardian ad litem because attorneys are not normally allowed to testify under the Montana Rules of Professional Conduct for attorneys. The mother appealed on grounds that it was a denial of due process to give a guardian ad litem authority to investigate and report to the court and then prevent the guardian's testimony based on the Rules of Professional Conduct and that cross-examination was necessary to ensure that the children's best interests were protected. The Supreme Court held that when an attorney is appointed as a guardian ad litem, the guardian ad litem is not to act as an attorney unless directed to do so by the appointing court. Rather, the guardian ad litem is required to fulfill the statutory role to objectively aid the court in decisions regarding a child's best interests, which includes the duty to testify and be cross-examined if the guardian ad litem gives evidence concerning an investigation. Thus, the District Court in this case erred in not allowing the testimony of the guardian ad litem. However, the error did not require reversal because it was not so significant as to materially prejudice the mother, who was given numerous meaningful opportunities to examine the guardian ad litem during the 1 ½ years of proceedings and to question the guardian ad litem's assertions and credibility. Jacobsen v. Thomas, 2004 MT 273, 323 M 183, 100 P3d 106 (2004).

Power of Nonexpert Guardian Ad Litem to Conduct Assessment and Investigation in Protecting Rights of Child: At contempt proceedings brought by the father to enforce a stipulated parenting plan, the District Court appointed a guardian ad litem in order to protect the rights of the children. The guardian ad litem conducted an assessment and investigation and recommended that the father be the primary residential parent. The mother objected to the report on grounds that the guardian ad litem exceeded statutory authority by submitting recommendations. The Supreme Court disagreed. The District Court clearly intended the guardian ad litem to fulfill the general statutory duties and to carry out the court's requests regarding a proposed move by the parties to North Carolina. Further, the guardian ad litem had authority to conduct an investigation under both 40-4-205 and this section, so the court did not err in accepting the guardian's report, even though the guardian was not an expert. There is no general requirement that a guardian ad litem be an expert, only that the guardian ad litem not have a conflict of interest with the best interests of the children. Jacobsen v. Thomas, 2004 MT 273, 323 M 183, 100 P3d 106 (2004). See also In re Custody of Krause, 2001 MT 37, 304 M 202, 19 P3d 811 (2001).

Guardian Ad Litem Serving as Investigator Must Release Investigation Background Information: This section's provision that the investigator must make the investigator's underlying data and reports, texts of diagnostic reports, and the names and addresses of persons whom the investigator consulted available to counsel and to any party not represented by counsel applies to a guardian ad litem serving as an investigator. The District Court improperly denied the father access to the information. Because this section requires release at least 10 days before the hearing and the investigator's report was not filed with the court until after the hearing, the Supreme Court ordered the District Court to order release of the information and to conduct a final hearing no fewer that 10 days after the release. In re Custody of Krause, 2001 MT 37, 304 M 202, 19 P3d 811 (2001).

Consideration of but Failure to Adopt Investigation Report — No Abuse of Discretion: The District Court considered but did not adopt recommendations in a custody report from a clinical social worker that the mother remain the primary residential custodian, instead modifying custody and designating father as primary residential custodian. The court was required to consider but not necessarily adopt the custody report and fulfilled its obligation in referencing the report four times and reciting its recommendations verbatim in the findings of fact. The court also considered a great deal of conflicting evidence regarding the parties' stability and forthrightness, resolving a myriad of factual disputes. Issues of evidentiary weight and witness credibility are within the province of the trial court and will not be overturned absent an abuse of discretion. In this case, the court's findings were supported by substantial evidence and were not clearly erroneous, and thus no abuse of discretion occurred. In re Marriage of Abrahamson, 278 M 336, 924 P2d 1334, 53 St. Rep. 939 (1996), followed in Houdashelt v. Lutes, 282 M 435, 938 P2d 665, 54 St. Rep. 420 (1997).

Authority of Court to Require Sex Offender Evaluation — Relevancy of Report Undeterminable — Expert Testimony Unnecessary: After Robert's divorce from Tamara, Robert's visitation rights were changed to allow only supervised visitation of the parties' minor daughter. The basis for the modification of Robert's visitation rights was evidence that he had sexually assaulted Tamara's sisters. At the same time that the District Court modified Robert's visitation rights, it also required Robert to undergo a sex offender evaluation. Robert challenged the requirement for an evaluation as an abuse of the District Court's authority. The Supreme Court held that relevancy or admissibility of the report of the evaluation could not be determined until after the evaluation was completed. The Supreme Court also held that although the District Court could refuse to consider the testimony of Silvers, who recommended the evaluation, because Silvers was not qualified as an expert witness, the District Court could nonetheless order the evaluation because no expert testimony is required by statute as a prerequisite for ordering the evaluation. In re Marriage of Njos/Allard, 270 M 54, 889 P2d 1192, 52 St. Rep. 74 (1995).

Introduction of Polygraph Results in Custody or Visitation Dispute Prohibited: As part of a modification of Robert's visitation rights, the District Court required that Robert undergo a sex offender evaluation. Robert argued that the results of a polygraph test taken as a part of the sex offender evaluation should not be introducible. Citing St. v. Staat, 248 M 291, 811 P2d 1261 (1991), and 37-62-302, the Supreme Court held that the results of a polygraph test taken as part of a court-ordered sex offender evaluation would not be admissible in subsequent proceedings in the case. In re Marriage of Njos/Allard, 270 M 54, 889 P2d 1192, 52 St. Rep. 74 (1995), followed in St. v. Anderson, 1999 MT 58, 293 M 472, 977 P2d 315, 56 St. Rep. 243 (1999).

Objection to Home Study Report Not Based on Proper Grounds: The husband's attorney objected to the home study report on several occasions during the trial, primarily on the basis that it contained hearsay testimony. On appeal, the husband's attorney objected to the report on the basis that he had not received the report within the limits created by the statute. The Supreme Court held that the appellant had waived the right to object to the timeliness of the report by not objecting to the timeliness during the trial. In re Marriage of Clingingsmith, 254 M 399, 838 P2d 417, 49 St. Rep. 794 (1992).

Investigation Ordered After Modification Hearing — Remand: Remand was appropriate in a case in which: (1) an order for investigation was made after the hearing for modification of custody was held; (2) the report was mailed to counsel, but no request was made for an additional hearing to take testimony relative to the investigation; and (3) the District Court received the report prior to issuing findings of fact and conclusions of law, but it was impossible to determine whether the court even considered the report because the court failed to mention the report in its findings and conclusions. In re Marriage of Moseman, 253 M 28, 830 P2d 1304, 49 St. Rep. 349 (1992).

Failure to Consider Mental and Physical Health and Physical Abuse Documented by Case Worker — Reversal Warranted: The District Court committed reversible error in failing to consider the information provided in a home and family assessment study by a social worker regarding the mother's mental health and her documented physical and emotional abuse of the children and in neglecting to order a psychological evaluation of the mother to determine her parenting capability or neglecting to order counseling for the mother and other family members.

Maxwell v. Maxwell, 248 M 189, 810 P2d 311, 48 St. Rep. 386 (1991), citing In re Marriage of Bloom-Higham, 227 M 217, 738 P2d 114 (1987).

Custodial Investigation Not Mandatory: This section provides that the order for a custodial investigation is permissive rather than mandatory. In re Marriage of Merriman, 247 M 491, 807 P2d 1351, 48 St. Rep. 275 (1991).

Failure by Court to Forward Copies of Investigative Report — Harmless Error: Home investigation reports were received by the District Court, and the court erred in not forwarding copies to counsel upon receipt. However, the Supreme Court found that the reports provided no additional information or insight for the District Court to rely on in making a custody determination; therefore, the error was harmless. In re Marriage of Kuzara, 224 M 124, 728 P2d 786, 43 St. Rep. 2068 (1986).

Abuse of Discretion to Order Then Fail to Consider Report: The mandatory language of this statute requires District Courts to provide copies of a custody investigation report to the parties involved. No discretionary power of the trial court is evoked. Once the trial judge determined it was appropriate to order an investigation of the custodial arrangement, this section mandated that copies of the report be distributed by the trial court to counsel and parties. Not only did the trial court fail to send copies of the report, but no hearing was held to permit testimony on the issue. The trial court abused its discretion by not considering the report in the process of reaching its final custody decision. In re Marriage of Ziegler, 215 M 208, 696 P2d 983, 42 St. Rep. 298 (1985), followed in In re Marriage of Bloom-Higham, 227 M 217, 738 P2d 114, 44 St. Rep. 1025 (1987).

Court Advised to Order Investigation: The stories of the parties in a child custody dispute were diametrically opposed. The father requested an investigation of the mother's home by Department of Social and Rehabilitation Services (now Department of Public Health and Human Services), but no investigation was ordered. The Supreme Court advised District Courts that they would be well advised to make use of the authority to order an investigation under this section to avoid having to rule simply by choosing between two incredible stories. Where the respective tales are nearly irreconcilable, as here, it is possible that the true facts may not be ascertained by oral testimony alone and an independent investigation may aid the court immensely. R.L.S. & T.L.S. v. Barkhoff, 207 M 199, 674 P2d 1082, 40 St. Rep. 1982 (1983).

Abuse of Discretion in Awarding Custody: The trial court abused its discretion in awarding custody of children to the mother by ignoring the desires of the children, excluding a report of investigation by the welfare department, and in hearing the child custody issue without the presence of the children's attorney. The court should make a specific finding, stating the wishes of the children as to their custodian and, if the court determines that the children's wishes are not being followed, the court should state in its findings the reason it has chosen not to follow their wishes. Kramer v. Kramer, 177 M 61, 580 P2d 439 (1978).

Untimely Request for Custodial Investigation: Failure to give the husband a County Welfare Department investigative report of custodial arrangements did not constitute grounds for vacating judgment in light of his untimely request and his failure to submit a timely motion for a continuance. Allen v. Allen, 175 M 527, 575 P2d 74 (1978).

Determining Custody Distinguished From Modification: The trial court did not err by failing to interview a minor child and order that an investigation and report concerning custodial arrangements be made, since the only issue before the trial court was whether to modify a custody decree, determination of custody already having been made. Easton v. Easton, 175 M 416, 574 P2d 989 (1978).

Seeking Advice — Discretionary: The trial court did not abuse its discretion when it determined the aid of professional personnel was not necessary to the resolution of the instant case. Schiele v. Sager, 174 M 533, 571 P2d 1142 (1977).

Law Review Articles

Protecting the Biological Parent's Rights at the Child's Expense, Latino, 58 Mont. L. Rev. 599 (1997).

40-4-216. Hearings.

Commissioners' Note

This section further details procedural aspects of custody hearings. Subsection (c) [(3)] changes the law in those states which now permit a jury to determine child custody. Subsection (d) [(4)] authorizes the court to protect the child by preventing unnecessary publicity if it finds that sealing the record is necessary for the child's welfare. Although this authority restricts access to public records, the evil of limitation is clearly outweighed by the public interest in the protection of children.

Compiler's Comments

2009 Amendment: Chapter 356 inserted (2) concerning expedited hearing for parent who has received military service orders; and made minor changes in style. Amendment effective October 1, 2009.

1997 Amendment: Chapter 343 in (1), at beginning, substituted "Parenting plan" for "Custody"; in (3), near middle before "hearing", substituted "parenting" for "custody"; in (4), near middle before "proceeding", substituted "parenting" for "custody"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Source: Section 406, Uniform Marriage and Divorce Act.

Case Notes

Opportunity for Hearing on Sealing of Record of Interview of Child by District Court Judge: In a proceeding for modification of visitation rights, the District Court interviewed the 12-year-old child involved and then, without a hearing, ordered the record of the interview sealed under 40-4-216. The only explanation given for the sealing was that contained in the order, that its purpose was to protect the child's welfare. The Supreme Court remanded the case to the District Court for the purpose of giving the custodial parent a hearing on whether the record of the interview should continue to be sealed for all purposes or whether some modification of the sealing order should be made for purposes of the appeal. The Supreme Court further ruled that if the District Court does not modify the sealing order, the record of the interview may be submitted in camera in any future appellate proceedings. In re Custody of Maycelle D., 213 M 225, 691 P2d 410, 41 St. Rep. 2066 (1984).

Hearing Priority — No Precedence Over Issue of Subject Matter Jurisdiction: Because the issue of subject matter jurisdiction may be invoked at any time in the course of a proceeding, there was no merit in the contention that because priority must be given custody proceedings such custody must be ruled on before a court may decide the issue of whether it had subject matter jurisdiction. In re Marriage of Lance, 213 M 182, 690 P2d 979, 41 St. Rep. 2032 (1984).

No Duty to Outline All Evidence in Findings: Judge, trying divorce proceeding involving custody without a jury, was not obligated to outline all the testimony presented at trial in his findings of fact, and no error was found on appeal in which husband claimed the judge ignored evidence husband had submitted and failed to make necessary findings thereon. Cherewick v. Cherewick, 205 M 75, 666 P2d 742, 40 St. Rep. 1106 (1983).

40-4-217. Notice of intent to move.

Commissioners' Note

With two important exceptions, this section [prior to 1997 amendment] states [stated] the traditional rule for visitation rights. The general rule implies a "best interest of the child" standard. Although the judge should never compel the noncustodial parent to visit the child, visitation rights should be arranged to an extent and in a fashion which suits the child's interest rather than the interest of either the custodial or noncustodial parent. The empirical data on post-divorce living arrangements suggests that, if the judge can arrange visitation with a minimum of contest, most parties will eventually reach an accommodation and the bitterness accompanying the divorce will gradually fade. The section does make clear, however, that the judge must hold a hearing and make an extraordinary finding to deprive the noncustodial parent of all visitation rights. To preclude visitation completely, the judge must find that visitation would endanger "seriously the child's physical, mental, moral, or emotional health." These words are intended to mesh with other uniform legislation. See Uniform Juvenile Court Act, Section 47. Although the standard is necessarily somewhat vague, it was deliberately chosen to indicate its stringency when compared to the "best interest" standard traditionally applied to this problem. The special standard was chosen to prevent the denial of visitation to noncustodial parent on the basis of moral judgments about parental behavior which have no relevance to the parent's interest in or capacity to maintain a close and benign relationship to the child. The same onerous standard is applicable when the custodial parent tries to have the noncustodial parent's visitation privileges restricted or eliminated.

Compiler's Comments

2015 Amendment: Chapter 111 deleted former (2) that read: "(2) If a parent's change in residence will significantly affect the child's contact with the other parent, notice must be served personally or given by certified mail not less than 30 days before the proposed change in residence and must include a proposed revised residential schedule. Proof of service must be filed with the court that adopted the parenting plan. Failure of the parent who receives notice to respond to the written notice or to seek amendment of the residential schedule pursuant to 40-4-219 within the 30-day period constitutes acceptance of the proposed revised residential schedule"; and inserted (2) through (5) concerning filing a motion to amend the parenting plan. Amendment effective October 1, 2015.

1997 Amendment: Chapter 343 deleted former (1) through (4) that read: "A parent who is not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health.

(2) In a proceeding for dissolution of marriage or legal separation, the court may, upon the petition of a grandparent, grant reasonable visitation rights to the grandparent of the child if the court finds, after a hearing, that the visitation would be in the best interest of the child.

(3) The court may modify an order granting or denying visitation rights whenever modification would serve the best interest of the child; however, the court may not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health or unless the provisions of subsection (6) apply.

(4) As long as a noncustodial parent who has visitation rights under a decree or a custody agreement remains a resident of this state, a resident custodial parent shall, before changing the child's residence to another state and unless the noncustodial parent has given written consent, give written notice to the noncustodial parent, as provided in subsection (5)"; in (1) substituted "A parent who intends to change residence shall, unless precluded under 40-4-234, provide written notice to the other parent" for "The written notice required by subsection (4)"; in (2), at beginning of first sentence, inserted "If a parent's change in residence will significantly affect the child's contact with the other parent, notice" and at end inserted "and must include a proposed revised residential schedule", at end of second sentence substituted "adopted the parenting plan" for "issued the custody order", deleted former third sentence that read: "The purpose of the notice is to allow the noncustodial parent to seek a modification of the parent's visitation schedule", and inserted third sentence providing that failure to respond to the notice within 30 days constitutes acceptance of the proposed revised residential schedule; deleted (6) that read: "(6) (a) If a noncustodial parent or other person residing in the noncustodial parent's household has been convicted of any of the crimes listed in subsection (6)(c), the custodial parent or any other person who has been granted custody of the child pursuant to court order may file an objection to visitation with the court. The custodial parent or other person having custody shall give notice to the noncustodial parent of the objection as provided by the Montana Rules of Civil Procedure, and the noncustodial parent has 20 days from the notice to respond. If the noncustodial parent fails to respond within 20 days, the visitation rights of the noncustodial parent are suspended until further order of the court. If the noncustodial parent responds and objects, a hearing must be held within 30 days of the response.

(b) The noncustodial parent has the burden at the hearing to prove that visitation by the noncustodial parent does not seriously endanger the child's physical, mental, moral, or emotional health and that the modification of visitation is not in the best interest of the child.

(c) This subsection (6) applies to the following crimes:

(i) deliberate homicide, as described in 45-5-102;
(ii) mitigated deliberate homicide, as described in 45-5-103;
(iii) sexual assault, as described in 45-5-502;
(iv) sexual intercourse without consent, as described in 45-5-503;
(v) deviate sexual conduct with an animal, as described in 45-2-101 and prohibited under 45-5-505;
(vi) incest, as described in 45-5-507;
(vii) aggravated promotion of prostitution of a child, as described in 45-5-603(1)(b);
(viii) endangering the welfare of children, as described in 45-5-622;
(ix) partner or family member assault of the type described in 45-5-206(1)(a);
(x) sexual abuse of children, as described in 45-5-625"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

1995 Amendments: Chapter 350 in (6)(c)(ix), at beginning, substituted "partner or family member assault" for "domestic abuse"; and made minor changes in style.

Chapter 467 in (6)(a), near beginning after "parent", inserted "or other person residing in the noncustodial parent's household"; inserted (6)(c)(v) concerning deviate sexual conduct with an animal; and made minor changes in style. Amendment effective April 15, 1995.

Severability: Section 31, Ch. 350, L. 1995, was a severability clause.

Section 5, Ch. 467, L. 1995, was a severability clause.

1989 Amendment: In (3), at end, inserted reference to subsection (6); inserted (6) establishing procedure whereby custodial parent or guardian may file objection to visitation right of other parent convicted of certain serious crimes and placing burden on convicted parent to prove visitation with convicted person does not seriously endanger child's health and modification of visitation is not in child's best interest; and made minor change in grammar.

1987 Amendment: Inserted (4) and (5) requiring notice to resident noncustodial parent of custodial parent's intent to move child to another state and stating required notice procedure.

Source: Section 407, Uniform Marriage and Divorce Act.

Montana Changes: See 1987 and 1989 amendment notes.

Case Notes

Decisions Under Current Law

General 1056
Limitations on Visitation 1058

Decisions Under Former Law Prior To 1997 Revision

General 1058
Limitations on Visitation 1061
Modification 1064
Movement of Residence 1066

DECISIONS UNDER CURRENT LAW

General

Mother's Fundamental Right to Travel — Father's Burden of Proof That Mother's Move From Montana to Vermont Not in Best Interest of Child: The District Court correctly held that the petitioning father had the burden of showing that imposing a travel restriction against the respondent mother was in the best interest of the child. The District Court acted within its broad discretion and considered the best interest of the child factors in 40-4-212 while balancing the respective and competing constitutional rights of the parties when it allowed a child to move from Montana to Vermont with the respondent mother. In re Parenting of C.J., 2016 MT 93, 383 Mont. 197, 369 P.3d 1028.

Mother's Fundamental Right to Travel — Move from Utah to Montana Not Required: The District Court permitted a mother to move her children from Montana to Utah under certain conditions. Subsequently, the father moved to amend the parenting plan to move the children back to Montana, arguing that the mother was not following the conditions set forth in the District Court's order. The District Court concluded that the children could stay in Utah with the mother. On appeal, the Supreme Court determined that the father did not prove that moving the children back to Montana was in their best interest and that doing so would interfere with the mother's fundamental right to travel. Hood v. Hood, 2012 MT 158, 365 Mont. 442, 282 P.3d 671, citing In re Marriage of Cole, 224 Mont. 207, 729 P.2d 1276 (1986), and In re Custody of D.M.G. & T.J.G., 1998 MT 1, 287 Mont. 120, 951 P.2d 1377.

Consideration of Parent's Motives When Parent Moves Children: Unless a District Court finds that a parent's decision to move exemplifies a willful and consistent attempt to frustrate or deny the other parent contact with the children, the decision to move cannot be held against the moving parent or considered as being against the best interests of the children. The District Court committed a clear abuse of discretion in considering the move in its adoption of the amended final parenting plan. In re Marriage of Plaisted-Harman, 2010 MT 100, 356 Mont. 218, 232 P.3d 888.

Parent's Proposed Move Constituting Change in Circumstances as Matter of Law — Remand to Determine Whether Amendment in Best Interests of Children and Whether to Award Attorney Fees: After a mediated parenting plan provided for equal parenting and residential time for both parents who resided in the same town, the mother notified the court that she would be moving to another town 90 miles away. She proposed an amendment to the parenting plan that would give primary residential custody to her and allow the children to stay with the father every other weekend. The father opposed the mother's amendment and submitted his own proposed plan. After hearing the mother's proposal and before the father presented his case, the District Court held that insufficient evidence supported changing the parenting plan and subsequently rejected both proposed amendments. A guardian ad litem was appointed to secure recommendations to resolve the parenting problem, implement visitation, and initially establish workable guidelines and visitation schedules. The District Court again rejected the guardian's proposed changes, reasoning that the guardian's proposal would have resulted in a change of living arrangements but cited no substantial change in circumstances not considered by the court at the time of the previous order. The mother moved to adopt the guardian's recommendations, and the father responded and requested attorney fees and costs. The court denied the mother's motion and awarded attorney fees and costs to the father, and the mother appealed. The Supreme Court held that as a matter of law and based on the facts that arose since adoption of the original parenting plan, a change in the children's circumstances occurred and that the District Court erred in concluding otherwise. The case was remanded for the District Court's determination of whether an amendment to the parenting plan was in the children's best interests and ultimately whether and how the plan should be amended. The award of fees and costs to the father was vacated because the decision on remand would necessarily factor such an award into the subsequent decision. In re Marriage of Clay & Hagedorn, 2007 MT 228, 339 M 147, 168 P3d 665 (2007).

Child's Best Interest Outweighs Parent's Fundamental Right to Travel: A final parenting plan provided that the mother be allowed to remain in the family home and that the parties' three children reside primarily with the mother, with liberal visitation by the father. The mother later decided to move with the children to Idaho. The District Court issued an order preventing the mother from removing the children from Montana, and the mother sought to amend the parenting plan to allow her to move. A psychiatrist found that the children loved both parents and that both parents agreed that the children needed to have regular contact with and the support of the other parent. The psychiatrist recommended that the children remain together and not be separated. The mother testified that she was moving to Idaho because her fiance lived there, the schools were superior, and she had an employment opportunity there. The District Court concluded that the children's best interests would be served if the children remained in Montana and that the children's primary residence would remain with the mother if she stayed in Montana, but that if she moved to Idaho, the children should remain in Montana with their father. The mother appealed. The mother claimed that she had a constitutional right to relocate her children to Idaho that could not be restricted merely because it might be best for the children if both parents lived in the same town, citing In re Marriage of Cole, 224 M 207, 729 P2d 1276 (1986), and In re Custody of D.M.G. & T.J.G., 1998 MT 1, 287 M 120, 951 P2d 1377 (1998). The Supreme Court distinguished both Cole and D.M.G., holding that although the fundamental nature of the constitutional right to travel and the need to demonstrate a compelling interest before violating that right are still viable, a presumption in favor of the parent who provides most of the child's primary care no longer exists. Contrary to the mother's assertion that the parent resisting the move must show that the move would be disadvantageous to the child or that the child would be harmed by the move, the burden of proof is the best interests of the child standard. The District Court properly considered the standard in 40-4-212 and the psychiatrist's recommendations, noting that the children had an established support system in Montana that did not exist in Idaho, and the court did not abuse its discretion in amending the parenting plan to reflect the reality of the parties' actual parenting arrangement. The best interests of a child outweigh a parent's fundamental right to travel. In re Marriage of Robison, 2002 MT 207, 311 M 246, 53 P3d 1279 (2002). See also In re Parenting of N.P. v. Perkins, 2006 MT 10, 330 M 293, 127 P3d 1035 (2006), in which the Supreme Court noted that application of the Robison criteria must be made cautiously and only in furtherance of the best interests of the child and held that because a father was unable to prove that restricting the mother's travel was in their child's best interests, the mother was allowed to continue to reside with the child in another state where the child had become accustomed to home, school, and community and where the mother had extended family and better job opportunities.

Retroactive Revision of Temporary Child Support Order: When the parties separated, the District Court entered a temporary child support order directing the husband to pay $300 a month in spousal maintenance and $200 a month for each child in support. That temporary order was later modified to require the husband to pay a total of $800 a month in temporary maintenance and support. The final decree directed the husband to pay child support of $190 a month for each child, retroactive to the time of separation, and did not award any spousal maintenance. The wife alleged error in the retroactive modification of support, arguing that there was no change in circumstances that would allow a downward modification. The Supreme Court affirmed the modification, noting that the District Court was revising a temporary order, not modifying a final decree as specified in 40-4-208(1). It is clearly within the District Court's authority to make the maintenance and support awards retroactive (see In re Marriage of Wersland, 249 M 169, 814 P2d 991 (1991)), and the revision of the order did not constitute an abuse of discretion. In re Marriage of Stoneman, 2000 MT 274, 302 M 107, 14 P3d 12, 57 St. Rep. 1145 (2000).

Limitations on Visitation

Visitation in Another State Limited — No Abuse of Discretion: A father requested that the final parenting plan allow him 7 days of uninterrupted parenting time whenever he elected to visit his child in Elko, Nevada. After weighing concerns raised by both parents, the District Court did not abuse its discretion by issuing a final parenting plan that allowed the father only one long weekend visit per month while the child resides in Elko. In re Parenting of S.E.L., 2015 MT 228, 380 Mont. 256, 354 P.3d 1237.

DECISIONS UNDER FORMER LAW PRIOR TO 1997 REVISION

General

Refusal to Order Mother to Pay Part of Child Visitation Travel Costs of Father Given Credit Against His Child Support Payment for Such Costs: The District Court did not err in refusing to order the mother, who lived in Oregon with the parties' child, to pay at least one-half of the travel costs of the child's visitations with the father, who lived in Livingston, because the father received credit for such costs against his child support payment. In re Marriage of Hogstad, 275 M 489, 914 P2d 584, 53 St. Rep. 257 (1996).

Slight Change, Based on Travel Distance, of Visitation Schedule Recommended by Custody Evaluators: The District Court did not err in slightly altering the child visitation schedule, based on the distance between the father (who resided in Livingston) and the child (who resided in Oregon with the mother), recommended by the child custody evaluators. In re Marriage of Hogstad, 275 M 489, 914 P2d 584, 53 St. Rep. 257 (1996).

Disallowing Visitation Because Child Was Grounded for Failure to Do Homework: The husband, who traveled from Montana to Louisiana for a weekend child visitation, was entitled to a $550 travel expense offset against support that he failed to pay because the wife punished the child for failure to do homework by not allowing the child to leave the house for the weekend to go on the planned outing with the father. The wife should have chosen a punishment that did not interfere with the visitation right. In re Marriage of Heath, 272 M 522, 901 P2d 590, 52 St. Rep. 915 (1995).

Grant of Grandparent Visitation Reversed in Absence of Grandparent Petition and Hearing on Issue: Granting visitation to the paternal grandparents was reversible error because no grandparent petitioned for visitation in the dissolution proceedings and there was no evidence that a hearing was held on the issue. Husband did not prevail on his claim that the visitation was granted in order to facilitate the visitation right of the husband, who had a history of violence, and as a condition to his exercise of that right, the court having ordered that the grandparents had to supervise husband's visitation with the child. In re Marriage of Bradshaw, 270 M 222, 891 P2d 506, 52 St. Rep. 154 (1995).

Standard of Review of Visitation and Custody Orders — No Abuse of Discretion Found in Supervised Visitation for Sex Offender: After Robert's divorce from Tamara, Robert's visitation rights were changed to allow only supervised visitation of the parties' minor daughter. Robert claimed that the change was an abuse of the District Court's discretion. Citing In re Marriage of Hunt, 264 M 159, 870 P2d 720 (1994), the Supreme Court held that the standard for review of visitation and custody orders was whether there is substantial credible evidence that supports the District Court's action. Because there was evidence before the District Court that Robert had sexually assaulted two of his former wife's sisters, the Supreme Court held that the modification of visitation rights was not an abuse of discretion. In re Marriage of Njos/Allard, 270 M 54, 889 P2d 1192, 52 St. Rep. 74 (1995).

Conclusion Regarding Absence of Serious Endangerment in Contempt Proceeding as Error — Substantial Rights Not Affected: At a contempt hearing to determine whether mother fabricated an incident of child sexual abuse in order to deprive father of visitation rights, the District Court entered a conclusion of law regarding the absence of serious endangerment under this section. That conclusion exceeded the scope of the show cause hearing but did not constitute reversible error because the substantial rights of the mother were not affected, in light of the fact that the contempt ruling was sufficiently supported. Woolf v. Evans, 264 M 480, 872 P2d 777, 51 St. Rep. 355 (1994).

Father in Alaska, Mother in Montana — Reasonable Visitation Provisions: When father lived in Alaska and mother lived in Montana, the following visitation provisions were found to be reasonable: (1) liberal visitation by father when he was in Montana so long as the child's schooling was not interrupted; (2) week-long blocks of time every 3 or 4 months at the father's home or other appropriate location, provided that the child was accompanied by an adult family member when traveling; (3) 14-day visitation blocks when the child was in elementary school; and (4) increased visitation after the child entered junior high school, to be decided jointly by father and child. In re Marriage of Nash, 254 M 231, 836 P2d 598, 49 St. Rep. 747 (1992).

Reasonable Visitation When Parties at Odds and Husband Can Petition for Specific Schedule: Grant of "reasonable rights of visitation" to husband without an established schedule was not an abuse of discretion when his adopted daughter was 16 years of age. Husband claimed that there was recognized animosity between him and his wife and that she had discouraged visitation in the past. The court decreed that the husband could petition for a specific visitation schedule if the "reasonable rights" became unworkable. In re Marriage of Dirnberger, 237 M 398, 773 P2d 330, 46 St. Rep. 898 (1989).

Notice of Parental Location Advised: Although a custodial parent did not have an affirmative duty to tell a noncustodial parent of every move within the state (prior to 1997 amendment), it was suggested that parents keep each other advised of their whereabouts to prevent secreting of children and to allow ease in payment of support and in visitation. In this case, leaving a forwarding address with the postal service and obtaining a valid Montana driver's license with the most current address were sufficient. In re Marriage of Callahan, 233 M 465, 762 P2d 205, 45 St. Rep. 1639 (1988).

Adoption by Stepparent — No Mandatory Termination of Grandparents' Visitation: There is no clear legislative intent or public policy that mandates termination of visitation for natural grandparents when a grandchild is adopted by a stepparent. Kanvick v. Reilly, 233 M 324, 760 P2d 743, 45 St. Rep. 1524 (1988).

Parent's Rights Not Limited by Grant of Visitation in Preference to Placement in Day Care or With Nonfamily Members: The District Court's conclusion that the mother be allowed liberal visitation when the children were in the father's care, rather than placing them in day care or with nonfamily members, did not confer superior custody rights to the father's household companion or limit or adversely affect the mother's visitation rights. In re Marriage of Smith, 232 M 528, 757 P2d 784, 45 St. Rep. 1253 (1988).

Lack of Contact and Sexual Abuse Allegations Unfounded — Visitation Proper: The District Court properly awarded reasonable visitation to the noncustodial parent when allegations of lack of contact, transmission of sexually related disease, and sexual abuse were unsupported by substantial credible evidence. In re Marriage of J.A.M. & D.A.M., 230 M 168, 750 P2d 1097, 45 St. Rep. 437 (1988).

No Contempt in Denial of Visitation by Parent — Concern for Child's Health: The trial court properly denied a motion that the mother be held in contempt for denying visitation to the father on several occasions after it found that the mother's denials were based on concerns for the child's health and not a desire to restrict the father's access. In re Marriage of Jacobson, 228 M 458, 743 P2d 1025, 44 St. Rep. 1678 (1987).

Reasonableness of Grandparent Visitation Schedule: The trial court granted to grandparents a total of 4 weeks per year of visitation, plus holidays, and allowed additional visitation conditioned on the mother's approval. Such a schedule was reasonable and provided adequate access to the child by the grandparents. In re Marriage of Jacobson, 228 M 458, 743 P2d 1025, 44 St. Rep. 1678 (1987).

Custody Based on Children's Preference — Custody to Father After School Year in Which They Reach Age Twelve: It was not an abuse of discretion for the judge to award custody of 8- and 10-year-old boys to the mother until the end of the school year in which each would turn 12 years old, with the father having custody all but 10 days of each summer, and thereafter permanent custody to the father, with the mother having custody for a month each summer and the children spending alternate holidays with the parents. Each boy had a strong preference for living with the father and for the farm lifestyle of the father, and though each boy had a normal and healthy relationship with the mother, each had some negative feelings about that relationship and did not wish to live with her. In addition, all four grandparents and assorted maternal and paternal cousins, aunts, and uncles lived near the father. The court's findings and conclusions were supported by substantial credible evidence. In re Marriage of Obergfell, 218 M 83, 708 P2d 561, 42 St. Rep. 1414 (1985).

Standard Governing Custody and Visitation Decisions — Best Interests of Child — Whether or Not Parents Married: In an action filed under 40-6-115, the father of a child sought to establish paternity of the child and petitioned for joint custody, visitation rights, and settlement of child support. The District Court awarded sole custody to the mother and granted the father limited visitation rights. The father appealed, claiming that it was a denial of equal protection of the law to determine his parental rights under the Uniform Parentage Act, Title 40, ch. 6, part 1, rather than under Title 40, ch. 4, the chapter that would have governed the case had he and the child's mother been married. The Supreme Court affirmed, ruling that the standard for determination of child custody and visitation, best interests of the child, was the same in both laws, and the legally proper result was the same. Schuman v. Bestrom, 214 M 410, 693 P2d 536, 42 St. Rep. 54 (1985).

Necessity of Consideration of Older Children's Wishes in Visitation Determinations: The rule in child custody determinations that the trial court must consider the wishes of older children is also applicable in parental visitation determinations. Thus, when the District Court interviews a child of 12 as to his wishes respecting visitation, the court should make a specific finding, stating the wishes of the child as to visitation with the noncustodian. If the court determines that the child's wishes are not to be followed, the court should state in its findings the reasons it has chosen not to follow such wishes. In re Custody of Maycelle D., 213 M 225, 691 P2d 410, 41 St. Rep. 2066 (1984).

Opportunity for Hearing on Sealing of Record of Interview of Child by District Court Judge: In a proceeding for modification of visitation rights, the District Court interviewed the 12-year-old child involved and then, without a hearing, ordered the record of the interview sealed under 40-4-216. The only explanation given for the sealing was that contained in the order, that its purpose was to protect the child's welfare. The Supreme Court remanded the case to the District Court for the purpose of giving the custodial parent a hearing on whether the record of the interview should continue to be sealed for all purposes or whether some modification of the sealing order should be made for purposes of the appeal. The Supreme Court further ruled that if the District Court does not modify the sealing order, the record of the interview may be submitted in camera in any future appellate proceedings. In re Custody of Maycelle D., 213 M 225, 691 P2d 410, 41 St. Rep. 2066 (1984).

Obligation to Support Independent of Visitation Rights: A child's right to support and the parent's support obligation are not affected by misconduct of the parent or violations of visitation provisions of a custody decree. The District Court therefore was in error in making the enforcement of the child support payments, under a Uniform Reciprocal Enforcement of Support Act (URESA) (replaced by UIFSA) action, contingent upon visitation compliance by the custodial parent. State ex rel. Dewyea v. Knapp, 208 M 19, 674 P2d 1104, 41 St. Rep. 143 (1984), affirmed in In re Adoption of K.L.J.K., 224 M 418, 730 P2d 1135, 43 St. Rep. 2297 (1986). See also In re Marriage of Cox, 266 M 67, 878 P2d 903, 51 St. Rep. 672 (1994).

Investigation of Party Granted Visitation — Found Unnecessary: Since the trial court considered the evidence at the trial and made sufficient findings and conclusions to support its visitation order, it did not err by not conducting a further investigation of the person granted the visitation rights, even though the court had formerly stated that it would request a welfare investigation of that person before granting visitation rights. Overton v. Overton, 207 M 292, 674 P2d 1089, 40 St. Rep. 2047 (1983).

Reasonable Visitation: In a dissolution proceeding the court awarded both parties custody of at least one child and granted "reasonable visitation". The wife contended it was an abuse of discretion not to set a specific visitation schedule in light of the animosity the court found to exist between the parties. The Supreme Court found that the record indicated each party's willingness to allow the other visitation. In leaving the parties latitude in the matter of visitation privileges, if they are reasonable, they can work out a mutually satisfactory solution and avoid the inherent difficulties of a hard and fast visitation schedule. The court's findings supported its conclusion that reasonable visitation was all that was required. If visitation turned out to be unworkable, the parties could return to District Court for clarification. Meyer v. Meyer, 204 M 177, 663 P2d 328, 40 St. Rep. 753 (1983), followed in Romo v. Hickok, 264 M 341, 871 P2d 894, 51 St. Rep. 320 (1994), and distinguished in In re Marriage of Corey, 266 M 304, 880 P2d 824, 51 St. Rep. 859 (1994).

Clarification of Visitation on Motion to Enforce Decree: Divorce decree gave wife custody of the minor children and gave husband reasonable visitation rights and certain periods of time during the summer and holidays. On wife's motion for enforcement of the decree, husband was clearly shown to have abused his visitation rights. The evidence warranted court's clarification of the rights by granting each party alternate weekends with the children, setting a specific 40-day summer visitation, and providing for the manner in which the husband was to arrange visitations. There was clearly no abuse of discretion. Baker v. Baker, 198 M 371, 646 P2d 522, 39 St. Rep. 1031 (1982).

Clarification of Visitation Rights When Custodial Parent Moves Away: In a dissolution of marriage action, the wife was granted custody of the child and the husband had reasonable visitation rights under this section. After the wife moved 600 miles away, the husband petitioned the District Court for specification of his visiting rights but was denied. On appeal, the Supreme Court found that the District Court had abused its discretion, saying that the noncustodial parent should not be restricted unless visitation would endanger the child and that the father's visitation rights should be defined allocating sufficient time for his visitation so that a meaningful relationship can be nurtured. Sanderson v. Sanderson, 191 M 316, 623 P2d 1388, 38 St. Rep. 277 (1981), distinguished in Romo v. Hickok, 264 M 341, 871 P2d 894, 51 St. Rep. 320 (1994).

Necessity of Proper Findings and Conclusions — Incorporation of Property Settlement: An action for the dissolution of marriage was brought, and dissolution was granted. The parties entered into a property settlement a week before the decree of dissolution was entered. About 3 months later, one party brought a motion to incorporate the agreement in the court's final decree. The other party objected to the adoption of the visitation provisions. After a hearing, the District Court entered a supplemental decree of dissolution, incorporating all the terms of the property settlement agreement. On appeal, the appellant argued that the trial court erred in incorporating the property settlement without making specific findings of fact regarding the impact of the visitation provided for on the best interests of the child. The Supreme Court held that the purpose of the findings and conclusions required under the Montana Rules of Civil Procedure was to provide a foundation for the court's judgment. The record should include the essential and determining facts upon which the court rested its conclusions of law and without which the judgment would lack support. The finding of a fact and conclusion of law that the visitation provision in the property settlement agreement was in the best interest of the child failed to set forth the essential and determining facts upon which the court rested its conclusion. Without those factors, the Supreme Court was unable to determine the propriety of the determination. The case was remanded for the required factual findings. Jones v. Jones, 190 M 221, 620 P2d 850, 37 St. Rep. 1973 (1980).

Visitation and Obligation to Support — Interest on Unpaid Support: The Supreme Court rejected respondent's contention that he had no obligation to support his child under a divorce decree unless and until he exercised his right of visitation. The lower court incorrectly applied the rule in this case. Visitation has no bearing whatsoever upon the father's legal and moral obligation to support his child. Similarly, the father could not claim laches to avoid support payments owing over an 8-year period. Furthermore, on the basis of Williams v. Budke, 186 M 70, 606 P2d 515 (1980), appellant is entitled to receive interest on the past-due payments. Fitzgerald v. Fitzgerald, 190 M 66, 618 P2d 867, 37 St. Rep. 1350 (1980), followed, with regard to inapplicability of laches and equitable estoppel to recovery of child support arrears, in In re Marriage of Petranek, 255 M 458, 843 P2d 784, 49 St. Rep. 1107 (1992).

Section Controlling on Visitation Actions: This section and not 40-4-220 is controlling regarding child visitation actions, and therefore it was not error for the father to fail to file the affidavits required by 40-4-220. Gall v. Gall, 187 M 17, 608 P2d 496 (1980), followed in In re Marriage of Smith, 214 M 66, 692 P2d 1221, 41 St. Rep. 2325 (1984).

Failure to Properly Pursue Appeal — Best Interest of the Child: Even though a party may fail to both timely appeal and to pursue the appeal with some measure of diligence, in hearing a motion to dismiss said party's appeal, the District Court must still pay heed to the statutory requirement that it look to the best interest of the child. Lehman v. Billman, 178 M 367, 584 P2d 662 (1978).

Limitations On Visitation

Temporary Modification Requiring Supervised Visitation — Supervision Not "Restriction" Requiring Special Procedure: Following Tamara's divorce from Robert, Tamara moved for an ex parte order modifying Robert's visitation rights to require that Robert's visitation with the parties' daughter be supervised. The basis for the motion was that Robert had secretly sexually assaulted other women, including Tamara's sisters. The motion was made on the basis of 40-4-220(2)(a)(ii). The District Court granted the motion without following the procedure provided in subsections (3) and (6) of this section. The Supreme Court upheld the granting of the ex parte order, citing

In re Marriage of Hickey, 213 M 38, 689 P2d 1222 (1984), and the commissioners' note to this section and noting that the imposition of supervision is not a "restriction" within the meaning of subsection (3) of this section. In re Marriage of Njos/Allard, 270 M 54, 889 P2d 1192, 52 St. Rep. 74 (1995).

Primary Custodial Parent as Noncustodial Parent During Summer Months — Visitation Entitlement: Mother had primary custody of children during school months, and father had visitation rights during summer months, on weekends and alternating holidays, and at other reasonable times. No corresponding visitation allowance was made for mother during summer months. The Supreme Court held that father's visitation rights for 3 summer months amounted to custody of the children and that mother, who was the noncustodial parent during those months, was entitled to reasonable visitation because there was no evidence that visitation would in any way endanger the children. In re Marriage of Corey, 266 M 304, 880 P2d 824, 51 St. Rep. 859 (1994), distinguishing Meyer v. Meyer, 204 M 177, 663 P2d 328 (1983).

Order to Provide Visitation Information Not Abuse of Discretion: Father expressed a desire to share in decisionmaking regarding his children's activities but refused to communicate with the children's mother except through third-party intermediaries, which was found by the trial court to be an unsatisfactory method of communication in such matters. Because it was in the children's best interests, the District Court did not abuse its discretion in requiring father to provide information concerning the children's whereabouts when they spent time with father and in ordering that priority be given to the children's scheduled activities. In re Marriage of Hunt, 264 M 159, 870 P2d 720, 51 St. Rep. 209 (1994).

Visitation Contingent on Child Support Payments Being Current — Visitation and Support Not Interdependent: While recognizing that visitation and child support are not interdependent, under the unique circumstances of this case, the Supreme Court nevertheless affirmed the trial court's intention to ensure that child support would be current before visitation could be exercised, based on the wife's continuing problems in receiving support and a stipulation by the parties at trial that support be current before visitation would be allowed. In re Marriage of Erler, 261 M 65, 862 P2d 12, 50 St. Rep. 1195 (1993).

Error to Limit Visitation When Evidence That Liberal Visitation in Best Interest of Child: The trial court reduced the father's visitation, apparently on the basis that the father had moved away and would not be able to visit his daughter on weekends during the school year. The Supreme Court held that it was error to deny the husband weekend visitation that had been granted in a previous order, particularly when uncontroverted evidence indicated that the frequent visitation was in the child's best interest. In re Marriage of Anderson, 260 M 246, 859 P2d 451, 50 St. Rep. 1028 (1993).

Conditional Exercise of Grandparent Visitation: It was not an abuse of District Court discretion to grant grandparents the right of visitation only if the visitation was simultaneous with that of the father. In re Marriage of Kovash, 260 M 44, 858 P2d 351, 50 St. Rep. 934 (1993).

Effort to Curb Parental Behavior Through Visitation Conditions Not Abuse of Discretion: Father's contact with his children was suspended with conditions. He was allowed to visit but was required to meet specific conditions regarding weekly telephone calls. If he complied with those conditions, he was given the opportunity to visit the children during Christmas holidays. If the Christmas visits were successful, he was allowed 1 month of summer visitation. If he did not meet the conditions, the court would terminate his visitation rights. Placing conditions on visitation in an effort to curb the father's behavior toward the children and foster a more healthy relationship did not amount to a termination of visitation rights or constitute an abuse of court discretion. In re Marriage of Kovash, 260 M 44, 855 P2d 351, 50 St. Rep. 934 (1993). See also In re Marriage of Hunt, 264 M 159, 870 P2d 720, 51 St. Rep. 209 (1994).

Restrictions on Travel Improper: As part of its visitation order, the District Court restrained father from going to Coeur D'Alene, Idaho, where the mother and children resided, on the grounds that his past travel to the city had resulted in harassment. While maintaining that other portions of the order intended to keep the father away from the mother and children, the Supreme Court struck the travel restrictions as overly broad, considering that the father might travel through the city or have other business there. In re Marriage of Kovash, 260 M 44, 858 P2d 351, 50 St. Rep. 934 (1993).

Visitation More Reasonable Than Standard Set in In Re Marriage of Alt: The Supreme Court held that the burden was on the father to show that a visitation schedule was unreasonable since it was more generous than the schedule of alternate weekends, alternate holidays, 1 evening per week, and 2 weeks in the summer found to be reasonable in In re Marriage of Alt, 218 M 327, 708 P2d 258 (1985). In re Marriage of Tahija, 253 M 505, 833 P2d 1095, 49 St. Rep. 571 (1992).

Visitation Dependent on Mental Health Evaluation: The father was granted reasonable visitation dependent upon his obtaining a mental health evaluation and meeting with a psychologist to discuss how to create a nondestructive relationship with his children. He appealed, arguing that the lower court had not made a finding of endangerment, as required by statute. The Supreme Court held that it would not construe the statute so narrowly that a lower court would be unable to design visitation to reflect the children's best interests. In re Marriage of Reininghaus, 250 M 86, 817 P2d 1159, 48 St. Rep. 868 (1991), followed in Romo v. Hickok, 264 M 341, 871 P2d 894, 51 St. Rep. 320 (1994). See also In re Marriage of Njos/Allard, 270 M 54, 889 P2d 1192, 52 St. Rep. 74 (1995).

Sole Custody Awarded Father — Mother's Mental Health a Factor in Granting Supervised Visitation — No Abuse of Discretion: Mother appealed from the District Court child custody order in a dissolution of marriage granting the father sole custody of their son and granting the mother supervised visitation rights. The Supreme Court ruled that because mental health is a factor used in determining the best interests of the child, the District Court did not abuse its discretion in relying upon the opinion of experts that the mother was in need of treatment and in granting sole custody to the father and ordering supervised visitation by the mother. In re Marriage of Cook, 250 M 210, 819 P2d 180, 48 St. Rep. 795 (1991).

Superior Rights Not Given Stepmother: The original divorce decree did not give the mother the right to visit the children when they were in the sole custody of the father's new wife. The Supreme Court held that the lower court had not abused its discretion in placing that restriction on the mother's visitation rights and that the decree did not create superior rights for the new wife. In re Marriage of Smith & Foley, 242 M 378, 791 P2d 51, 47 St. Rep. 814 (1990).

No Evidence That Father Posed Threat to His Children — No Limitations on Visitation: In the wife's proposed findings adopted by the trial court, there were allegations that the father had physically abused the children. The Supreme Court ruled that the lower court had erred in placing restrictions on the father's visitation rights with no evidence to support the allegations that he constituted a threat to the well-being of his children. In re Marriage of Gebhardt, 240 M 165, 783 P2d 400, 46 St. Rep. 2026 (1989).

Limitation Upon Evidence of Drug Involvement: Findings of past but extensive involvement with illegal drugs, a comparatively affluent lifestyle without employment, and failure to successfully complete inpatient treatment for chemical dependency constituted sufficient credible evidence to warrant limitation of a parent's overnight visitation rights. In re Marriage of B.H.J. & D.J., 233 M 461, 760 P2d 753, 45 St. Rep. 1636 (1988).

Liberal Visitation Contingent on Establishment of Relationship: A District Court's decision to require that a man determined to be the father in paternity proceedings, who was a complete stranger to the child, establish a relationship with the child before beginning more liberal visitation did not violate this section. State ex rel. Sorenson v. Roske, 229 M 151, 745 P2d 365, 44 St. Rep. 1854 (1987).

Child's Health as Factor in Limiting Visitation — Arrangements to Suit Child, Not Parents: The trial court noted that the child appeared to suffer some emotional problems as a result of visitation with the father and had suffered a physical injury as a result of the father's carelessness. The court was also concerned about the father's potential for chemical abuse. These health concerns were properly considered in limiting the father's visitation. Further, visitation rights should be arranged to suit the best interests of the child, not the parents. In re Marriage of Jacobson, 228 M 458, 743 P2d 1025, 44 St. Rep. 1678 (1987).

Joint Custody Visitation Limitations Proper: It was within the court's discretion to award parents joint custody while limiting the father's visitation to alternate weekends, alternate holidays, an alternate week night, Father's Day, and 3 nonconsecutive weeks in the summer. In re Marriage of Tonne, 226 M 1, 733 P2d 1280, 44 St. Rep. 411 (1987), followed in In re Marriage of Fitzhugh, 248 M 306, 811 P2d 1273, 48 St. Rep. 438 (1991).

Fifty-Mile Radius Visitation Limit Upheld: It was reasonable and in the children's best interests for trial court to put a 50-mile radius limitation in its order that when husband and wife were within a 50-mile radius of each other they had the privilege of visitation for alternating weekends. The husband lived in Havre and the wife in Billings. Constant travel by the children between those two cities would be too much of a hardship in view of the 250-mile distance (by road) between them. Furthermore, the court also allowed the parties to work out any visitation agreement they wished, and they could thus modify the 50-mile radius limit by mutual consent. In re Marriage of Nalivka, 222 M 84, 720 P2d 683, 43 St. Rep. 1079 (1986).

Court Not in Error in Denying Joint Custody and Limiting Summer Visitation: Appellant husband appealed judgment denying joint custody and limiting summer visitation to 2 weeks each summer. Appellant sought joint custody and summer visitation of 6 to 10 weeks. The District Court detailed to an extraordinary degree its concerns on the children's best interests. Furthermore, it left the door open for modification and for appellant to demonstrate, in the future, his capacity for joint custody or a longer period of visitation. The Supreme Court held that the District Court did not abuse its discretion and that its judgment was supported by substantial credible evidence. In re Marriage of Shelton, 219 M 456, 712 P2d 782, 43 St. Rep. 89 (1986).

Visitation Under Supervision of Director of Family Court Services: The District Court did not abuse its discretion by awarding custody to wife with reasonable rights of visitation remaining with husband under the supervision of the Director of Family Court services. The parties' welfare and the moral, physical, and emotional well-being of the two minor children must remain the primary consideration of the court. The court refused to interpret 40-4-217 so narrowly as to prevent the trial court from overseeing the visitation arrangements between the parties who exhibit emotions of aggression, anger, and violence. In re Marriage of Hickey, 213 M 38, 689 P2d 1222, 41 St. Rep. 1931 (1984).

Restricting Visitation — Same Standard as Modifying Custody Decree: The District Court modified custody and limited the mother's visitation rights. The District Court's restriction of mother's visitation is governed by 40-4-217, which is the same standard used to judge modification of a custody decree in 40-4-219. Since the modification is supported by the court's finding, there is no error in restricting the mother's visitation rights. R.L.S. & T.L.S v. Barkhoff, 207 M 199, 674 P2d 1082, 40 St. Rep. 1982 (1983).

Modification

Denial of Visitation — Expansion of Visitation Supported by Substantial Evidence: The record revealed substantial, credible evidence that the father was denied reasonable or liberal visitation and that it was in the child's best interests to expand the father's visitation schedule. Both parties presented evidence regarding visitation, and the court found the father's evidence more credible. Having considered all the evidence relating to visitation and the child's best interests, the court's finding that visitation was denied and its decision that visitation be expanded were affirmed. In re Marriage of Pearson, 1998 MT 236, 291 M 101, 965 P2d 268, 55 St. Rep. 992 (1998).

Modification Resulting in Reduction of Visitation Properly Denied: Gail and Tom Boyer had two children during their marriage. Their dissolution decree established joint custody, with physical custody awarded to Gail and visitation to Tom, including 6 weeks in the summer. Karleen and Stanley Overman had two children during their marriage. Their dissolution decree established joint custody, with physical custody awarded to Karleen and visitation to Stanley, including 4 weeks in the summer. After entry of the final dissolution decrees in each case, Gail married Stanley and Karleen married Tom, and the children of each marriage began residing with their mothers, with visitation arrangements worked out between the parties that respected each father's decreed rights. About 5 years later, the Overmans proposed a modified visitation plan to equalize the amount of time the children spent with their fathers by allowing each father 4 weeks of visitation. The District Court properly found that modification was not in the children's best interests because: (1) the proposed plan would require Tom to relinquish time with his children, to their detriment; (2) the proposed plan was more confusing than the existing plan and would alter a Christmas visitation that was previously agreed upon; (3) the plans in existence were workable and reasonable; and (4) the parties had accommodated each other's requests for visitation alterations in the past and a new plan would not make the parties cooperate any more than they had previously. In re Marriages of Boyer & Overman, 261 M 179, 862 P2d 384, 50 St. Rep. 1277 (1993).

Motion for Sole Custody — Change in Visitation Not Considered Change in Joint Custody: Parents were awarded joint custody, with mother as the primary caretaker. Father subsequently petitioned for sole custody based on changed circumstances, and a temporary modification to sole custody was granted. Later, the District Court quashed the temporary order and requested a custody evaluation and chemical dependency evaluation of the mother. After considering the evaluation results and interviewing the children, the court continued joint custody but amended the visitation schedule. Mother contended error in modification of the schedule because a change in visitation was not the issue before the court. However, when the parties retain joint custody, a change in visitation does not constitute a change in custody requiring a finding of serious endangerment. Therefore, denying the motion for sole custody but modifying the existing visitation schedule was not an abuse of discretion. In re Marriage of Cogar, 252 M 272, 828 P2d 1361, 49 St. Rep. 247 (1992).

Motion Filed for Modification: Wife filed for modification of a child custody order, and the subsequent order issued by the court affected only the terms of the original custody decree that relate to the notice required prior to visitation and to allocation of transportation costs. In response to husband's argument that wife's motion for modification should be denied because it was not properly filed under the time limitations established in either former Rule 59 or 60, M.R.Civ.P. (now superseded), the court held that the motion was filed under this section, which contains no time limitations. In re Marriage of Chase, 237 M 224, 772 P2d 1264, 46 St. Rep. 754 (1989), replacing previous opinion at 46 St. Rep. 540 (1989).

Unclear Whether Modification Affected Best Interest: Husband appealed from a modification order that altered only the terms of the original child custody order relating to the notice required prior to visitation and allocation of transportation costs. In response to husband's argument that the matter should be returned for further consideration of the best interests of the children, the court held that although there is not an adequate record to review the issue of best interests, the record does not disclose that the modification affected the best interests of the children. Therefore, the matter will not be reopened. In re Marriage of Chase, 237 M 224, 772 P2d 1264, 46 St. Rep. 754 (1989), replacing previous opinion at 46 St. Rep. 540 (1989).

Reasonable Visitation Provision Replaced by Fixed Visitation Schedule — No Abuse of Discretion: Following dissolution of marriage, mother was granted custody of two minor children with reasonable visitation awarded to father. In the ensuing months, the father was permitted to visit the children only once and further attempts to arrange visitation were not successful since the mother had no phone and would not respond to messages. The father petitioned the District Court to grant a fixed visitation schedule, and the petition was granted. Although not required under former Rule 52(a), M.R.Civ.P. (now superseded), the order contained findings and conclusions, including evidence that the District Court Judge considered the best interests of the children and the conclusion that the mother's suggested graduated basis visitation schedule required reasonableness that was lacking in both parties. The Supreme Court held that the District Court's aid was necessary to clarify the meaning of "reasonable visitation" and found no abuse of discretion in the District Court Judge's conclusion. In re Marriage of Vinecke, 221 M 58, 716 P2d 638, 43 St. Rep. 633 (1986). See also In re Marriage of Jensen, 223 M 434, 727 P2d 512, 43 St. Rep. 1891 (1986).

Modification of Visitation Rights — Finding Required by District Court: District Court may restrict a parent's visitation rights only if it finds the existing visitation arrangement seriously endangers the child's physical, mental, moral, or emotional health. Such a finding must appear in the record. This case was remanded for the lower court to enter such a finding in the record. In re Marriage of Robbins, 219 M 130, 711 P2d 1347, 42 St. Rep. 1897 (1985).

Prerequisites to Modification of Visitation Rights Order: Before order setting visitation rights could be modified, the court had to hold a visitation hearing on the matter, find that modification was in the best interests of the child, and support that finding with findings and conclusions. A modification order made without any of those steps, after the court held a contempt hearing to determine if the wife, who had custody, had denied the husband visitation, was vacated. Strong v. Weaver, 211 M 320, 683 P2d 1330, 41 St. Rep. 1386 (1984), followed in In re Marriage of Cox, 266 M 67, 878 P2d 903, 51 St. Rep. 672 (1994). See also In re Marriage of Nevin, 284 M 468, 945 P2d 58, 54 St. Rep. 981 (1997).

Modification — Restriction of Previous Rights: The District Court abused its discretion in issuing a judgment modifying a dissolution decree to restrict the petitioner's prior visitation rights without a finding that the existing visitation arrangement seriously endangered the child's physical, mental, moral, or emotional health. Furthermore, the record indicates no substantial credible evidence that would support such a finding. In re Marriage of Firman, 187 M 465, 610 P2d 178 (1980). Distinguished from case where amount of visitation time has not been reduced, but rather is merely to be exercised under guidance and supervision of Family Court services. In re Marriage of Hickey, 213 M 38, 689 P2d 1222, 41 St. Rep. 1931 (1984), followed in In re Marriage of Njos/Allard, 270 M 54, 889 P2d 1192, 52 St. Rep. 74 (1995). See also In re Custody of R.L.S. & T.L.S., 193 M 469, 632 P2d 703, 38 St. Rep. 1328 (1981).

Grounds for Modifying Visitation Decree: When visitation can be accomplished only by physically taking the boy against his will and forcing the visitation, grounds for modification of visitation exist. Lehman v. Billman, 178 M 367, 584 P2d 662 (1978).

Time Limit for Modification: The 2-year prohibition on motions to modify custody does not apply to motions for modification of visitation rights. Olson v. Olson, 175 M 444, 574 P2d 1004 (1978).

Moral Judgment of Parental Behavior — Modification of Visitation: The standard of physical, moral, mental, or emotional health used in the Uniform Marriage and Divorce Act does not introduce any new concepts into the law as it has existed for many years. The Supreme Court does not make a moral judgment of the particular litigant. Here, no abuse of discretion or mistake of law was found in order reducing father's visitation rights. Solie v. Solie, 172 M 132, 561 P2d 443 (1977).

Reduction of Visitation Right: The District Court did not make a mistake of law or abuse its discretion by concluding that the interest of a minor child, so that there would be no mental or emotional detriment, would be best served by reduction of the father's visitation right. Solie v. Solie, 172 M 132, 561 P2d 443 (1977).

Movement of Residence

Right of Interstate Travel as Basic Constitutional Freedom — Custodial Designation Improperly Revised: The District Court ordered that a mother who had relocated out of state must forfeit her status as primary custodian unless she moved back to Montana with the children. However, the right of interstate travel, which includes the right to migrate, resettle, find a new job, and start a new life, is a basic constitutional freedom recognized in Memorial Hosp. v. Maricopa County, 415 US 250, 39 L Ed 2d 306, 94 S Ct 1076 (1974), and described in Shapiro v. Thompson, 394 US 618, 22 L Ed 2d 600, 89 S Ct 1322 (1969), and Dunn v. Blumstein, 405 US 330, 31 L Ed 2d 274, 92 S Ct 995 (1972). A classification that operates to penalize persons who exercise this right must be justified by a compelling state interest, and the government's burden to justify this compelling interest is heavy. Absent legitimate, case-specific reasons and evidence pertaining to the particular child, there is no compelling state interest that justifies a court ordering a custodial parent to live in a state other than the state in which the parent freely chooses to reside. In the present case, the father failed in his burden to provide sufficient proof that the children's best interests would be most appropriately served by requiring the mother to move back to Montana or lose her status as primary physical custodian. The trial court erred in failing to apply the former rebuttable statutory presumption in 40-4-212(3)(a) (deleted 1997) regarding a grant of custody to the parent who has provided most of the primary care during the child's life and in ordering that custody be alternated between the parents every 2 years. In re Custody of D.M.G. & T.J.G., 1998 MT 1, 287 M 120, 951 P2d 1377, 55 St. Rep. 1 (1998), followed with respect to intrastate travel in In re Marriage of Guffin & Plaisted-Hartman, 2009 MT 169, 350 M 489, 209 P3d 225 (2009), following In re Marriage of Cole, 224 M 207, 729 P2d 1276 (1986), and distinguishing In re Marriage of Abrahamson, 278 M 336, 924 P2d 1334 (1996), and In re Marriage of Tade, 282 M 449, 938 P2d 673 (1997).

Custodial Parent in Joint Custody Moving to Another State — Entitled to Presumption: A parent, under a joint custody arrangement of 6 months' custody to each parent, is presumptively entitled under former law to move with the child and settle in a new home; such moving and resultant school change do not constitute grounds for modification of the terms of the joint custody by the other parent. In re Marriage of Paradis, 213 M 177, 689 P2d 1263, 41 St. Rep. 2041 (1984).

Right of Custodial Parent to Fix Residence of Children: Oregon court had jurisdiction to award custody of children where both parties in divorce action were before court, although father then left state with children before decree was rendered. Under 40-6-231 (now repealed), mother who was awarded custody of children had right to fix their residence, and their residence could not be changed except by her. Application of Butts, 129 M 440, 289 P2d 949 (1955).

Custodial Parent Moving From Jurisdiction Granting Divorce to Montana — Child's Domicile Changed Causing Out-of-State Divorce Court to Lose Jurisdiction: Where mother received a California divorce and custody of minor children with permission of California divorce court to move to Montana, children became domiciliaries of Montana and California court lost jurisdiction to modify decree so as to increase father's visitation rights. (Dissent by Chief Justice Adair.) Application of Enke, 129 M 353, 287 P2d 19 (1955), certiorari denied 350 US 923, 100 L Ed 808, 76 S Ct 212 (1955).

Custodial Parent Authorized to Change Residence of Minor Child: Under 40-6-231 (now repealed), a divorced wife to whom custody of minor child had been awarded was authorized to fix child's place of residence. In re Metcalf's Estate, 93 M 542, 19 P2d 905 (1933).

40-4-218. Judicial supervision.

Commissioners' Note

This section states an important rule designed to promote family privacy and to prevent intrusions upon the prerogatives of the custodial parent at the request of the noncustodial parent. In general, the custodial parent should be, and in this section is designated as, the person responsible for post-divorce decisions concerning the upbringing of the child. If the parents agree in writing about a particular problem such as the child's religious upbringing, the court may enforce the agreement subject to constitutional constraints, Lynch v. Uhlenhopp, 78 N.W.2d 491, 248 Iowa 68 (1956). But in the absence of parental agreement, the court should not intervene solely because a choice made by the custodial parent is thought by the noncustodial parent (or by the judge) to be contrary to the child's best interest. To justify such an intervention, the judge must find that the custodial parent's decision would "endanger the child's physical health or significantly impair his emotional development"—a standard patently more onerous than the "best interest" test. The standard would leave to the custodial parent such decisions as whether the child should go to private or public school, whether the child should have music lessons, what church the child should attend. The court could intervene in the decision of grave behavioral or social problems such as refusal by a custodian to provide medical care for a sick child. [Annotator's note: See 1997 parenting plan provisions in 40-4-233 and 40-4-234.]

Subsection (b) [(2)] pursues the family privacy theme by significantly limiting the judge's authority to order supervision of the child and the custodial parent. To be sure, there are situations in which an objective umpire is needed to facilitate post-divorce adjustment to the custody and visitation decree. But in these situations both parents will usually recognize the need and agree to supervision. If the parents cannot agree to supervision, however, it should not be ordered unless the judge finds some extraordinary need for it. Thus, the provision adopts a more stringent standard than the normal "best interest" standard.

Compiler's Comments

1997 Amendment: Chapter 514 in (2), at end of first sentence, inserted "supervised visitation by the noncustodial parent" and at beginning of second sentence inserted "The court may not order the" and at end substituted "to supervise the visitation" for "to exercise continuing supervision over the case to assure that the custodial or visitation terms of the decree are carried out". Amendment effective May 2, 1997.

1995 Amendment: Chapter 546 in (2) substituted "department of public health and human services" for "department of family services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1987 Amendment: Substituted "department of family services" for "county welfare department".

Source: Section 408, Uniform Marriage and Divorce Act.

Case Notes

No Abuse of Discretion for Limiting Mother to Supervised Visitation — Specific Findings of Fact Encouraged — Written Findings Sufficient: The District Court did not abuse its discretion when it limited the mother to supervised visitation without making the requisite finding of fact under 40-4-218. The Supreme Court cautioned that District Courts should make specific findings on all relevant statutory criteria in making parenting plan determinations. However, regardless of other conflicting evidence, substantial record evidence supported the findings of fact made by the District Court. In context of its conclusions of law, the written findings made by the District Court were further manifestly sufficient to support and imply a finding that the failure to temporarily limit the mother to supervised visitation would likely significantly impair the child's emotional development under the circumstances. The circumstances and needs were not contemplated or provided for in the prior parenting plan. Apart from the District Court's failure to make a specific finding of fact under 40-4-218, the mother failed to demonstrate that the findings made were clearly erroneous. In re Marriage of Bessette, 2019 MT 35, 394 Mont. 262, 434 P.3d 894.

Best Interests of Child in Determining Custody for Purposes of Religious Education: A question of religious education must be strictly limited to the context of the best interests of the child. Courts will not debate the merits of different religions or show partiality to any religious faith, but courts will examine religious practices that interfere with a child's general welfare. In re Marriage of Gersovitz & Siegner, 238 M 506, 779 P2d 883, 46 St. Rep. 1455 (1989).

Management of Children's Accounts: District Court did not abuse its discretion when it allowed husband to manage financial accounts of the children that were to be kept separate from accounts of the husband and wife. In re Marriage of Williams, 220 M 232, 714 P2d 548, 43 St. Rep. 319 (1986).

Continuing Jurisdiction of the Court: Under the Uniform Marriage and Divorce Act, as under prior law, the District Court's jurisdiction in matters of custody is continuing. Foss v. Leifer, 170 M 97, 550 P2d 1309 (1976); Erhardt v. Erhardt, 171 M 49, 554 P2d 758 (1976).

Right of Custodial Parent to Fix Residence of Children: Oregon court had jurisdiction to award custody of children where both parties in divorce action were before court, although father then left state with children before decree was rendered. Mother who was awarded custody of children had right to fix their residence, and their residence could not be changed except by her. Application of Butts, 129 M 440, 289 P2d 949 (1955).

Custodial Parent Moving From Jurisdiction Granting Divorce to Montana — Child's Domicile Changed Causing Out-of-State Divorce Court to Lose Jurisdiction: Where mother received a California divorce and custody of minor children with permission of California divorce court to move to Montana, children became domiciliaries of Montana and California court lost jurisdiction to modify decree so as to increase father's visitation rights. (Dissent by Chief Justice Adair.) Application of Enke, 129 M 353, 287 P2d 19 (1955), certiorari denied 350 US 923, 100 L Ed 808, 76 S Ct 212 (1955).

Custodial Parent Authorized to Change Residence of Minor Child: Under this section a divorced wife to whom custody of minor child had been awarded was authorized to fix child's place of residence. In re Metcalf's Estate, 93 M 542, 19 P2d 905 (1933).

40-4-219. Amendment of parenting plan — mediation.

Commissioners' Note

Most experts who have spoken to the problems of post-divorce adjustment of children believe that insuring the decree's finality is more important than determining which parent should be the custodian. See Watson, The Children of Armageddon: Problems of Custody Following Divorce, 21 Syracuse L.Rev. 55 (1969). This section is designed to maximize finality (and thus assure continuity for the child) without jeopardizing the child's interest. Because any emergency which poses an immediate threat to the child's physical safety usually can be handled by the juvenile court, subsection (a) [(omitted in Montana)] prohibits modification petitions until at least two years have passed following the initial decree, with a "safety valve" for emergency situations. To discourage the noncustodial parent who tries to punish a former spouse by frequent motions to modify, the subsection includes a two-year waiting period following each modification decree. During that two-year period, a contestant can get a hearing only if he can make an initial showing, by affidavit only, that there is some greater urgency for the change than that the child's "best interest" requires it. During the two-year period the judge should deny a motion to modify, without a hearing, unless the moving party carries the onerous burden of showing that the child's present environment may endanger his physical, mental, moral, or emotional health.

Subsection (b) [(1)] in effect asserts a presumption that the present custodian is entitled to continue as the child's custodian. It does authorize modifications which serve the child's "best interest;" but this standard is to be applied under the principle that modification should be made only in three situations: where the custodian agrees to the change; where the child, although formally in the custody of one parent, has in fact been integrated into the family of the petitioning parent (to avoid encouraging noncustodial kidnapping, this ground requires the consent of the custodial parent); or where the noncustodial parent can prove both that the child's present environment is dangerous to physical, mental, moral, or emotional health and that the risks of harm from change of environment are outweighed by the advantage of such a change to the child. The last phrase of subsection (b) (3) [(1) (c), now deleted] is especially important because it compels attention to the real issue in modification cases. Any change in the child's environment may have an adverse effect, even if the noncustodial parent would better serve the child's interest. Subsection (b) (3) [(1) (c), now deleted] focuses the issue clearly and demands the presentation of evidence relevant to the resolution of that issue.

Subsection (c) [(5)] provides an additional sanction against vexatious and harassing attempts to relitigate custody.

Compiler's Comments

2023 Amendments — Composite Section: Section 4, Ch. 167, L. 2023, in (8)(b)(vii) substituted "child sex trafficking" for "aggravated promotion of prostitution of a child" and substituted "45-5-711" for "45-5-603(1)(b)". Amendment effective April 19, 2023.

Section 1, Ch. 465, L. 2023, in (8)(b)(v) near middle inserted "or dead human body". Amendment effective October 1, 2023.

Severability: Section 38, Ch. 167, L. 2023, was a severability clause.

2021 Amendment: Chapter 219 in (1)(a) after "determining" substituted "how a proposed change will affect the child, the court shall consider the potential impact of the change on the criteria in 40-4-212 and" for "the child's best interest under this section, the court may, in addition to the criteria in 40-4-212, also consider"; in (1)(b) at beginning inserted "If" and at end inserted "the court shall consider, in addition to all the criteria in 40-4-212 and subsection (1)(a)"; inserted (1)(b)(i), (1)(b)(ii), (1)(b)(iii), and (1)(b)(iv) regarding relocations; and made minor changes in style. Amendment effective October 1, 2021.

2017 Amendment: Chapter 394 in (6) moved reference to 40-4-221 from end to middle; inserted (8)(b)(xi) concerning strangulation of partner or family member; and made minor changes in style. Amendment effective May 19, 2017.

2013 Amendments — Composite Section: Chapter 88 in (8)(a) in two places extended response deadline from 20 to 21 days. Amendment effective October 1, 2013.

Chapter 350 in (9) in two places before "abuse" inserted "sexual, or emotional"; and made minor changes in style. Amendment effective October 1, 2013.

Applicability: Section 11, Ch. 88, L. 2013, provided: "[This act] applies to proceedings filed after [the effective date of this act]." Effective October 1, 2013.

2009 Amendment: Chapter 356 inserted (10) concerning temporary nature of parenting plan based on military service orders and modification of that plan. Amendment effective October 1, 2009.

1997 Amendment: Chapter 343 in (1), in first sentence near beginning after "discretion", substituted "amend a prior parenting plan" for "modify a prior custody decree", near middle, in two places after "prior", substituted "plan" for "decree", after "circumstances of the child" deleted "or the child's custodian", near end, before "is necessary", substituted "amendment" for "modification", and at end, after "child", deleted "and if it further finds that" and inserted second sentence providing additional criteria a court may consider in determining a child's best interest; in (1)(a) substituted "parents agree to the amendment" for "custodian agrees to the modification"; at end of (1)(b) substituted "parents" for "custodian"; deleted former (1)(c) that read: "the child's present environment endangers seriously the child's physical, mental, moral, or emotional health and that the harm likely to be caused by a change of environment is outweighed by its advantages to the child"; at end of (1)(c) substituted "amendment" for "modification"; at beginning of (1)(d) substituted "one parent" for "the custodian"; at end of (1)(d)(i) substituted "other parent" for "noncustodial parent"; in (1)(d)(ii), after "deny", substituted "contact with the child by the other parent" for "the noncustodial parent's exercise of visitation rights"; in (1)(e), at beginning, substituted "one parent" for "the custodial parent" and at end, after "residence", substituted "in a manner that significantly affects the child's contact with the other parent" for "to another state"; in (2), after "de facto", substituted "parenting" for "custody"; in (3), in two places, substituted "parent" for "custodian"; in (4), near beginning after "may", substituted "amend the prior parenting plan" for "modify the prior decree" and near middle, after "new", substituted "residential schedule for parental contact with the child" for "visitation schedule"; in (5), near middle after "seeking", substituted "frivolous or repeated amendment" for "modification" and before "action" substituted "amendment" for "modification"; in (6), at beginning, substituted "A parenting plan may be amended" for "A custody decree may be modified" and after "death of" substituted "one parent" for "the custodial parent"; in (7), in first sentence near beginning, substituted "parenting plan" for "custody decree" and in two places substituted "parenting" for "custody" and inserted second and third sentences requiring a proposed amended parenting plan to be filed and served with the motion for and response to the motion for amendment and creating a preference for carrying out the parenting plan; in (8), in first sentence near middle after "granted", substituted "rights to" for "custody of" and near end, before "order", substituted "parenting" for "custody", in second sentence, near beginning after "having", substituted "rights to the child pursuant to court order" for "custody", in third sentence, near beginning, substituted "parent who receives notice of objection" for "other parent" and near middle substituted "parenting rights of that parent" for "custody rights of the other parent", and at beginning of fourth sentence substituted "If that parent" for "If the other parent"; deleted former (8)(b) that read: "The other parent has the burden at the hearing to prove that custody by the other parent does not seriously endanger the child's physical, mental, moral, or emotional health and that the modification of custody is not in the best interest of the child"; inserted (9) providing when a court may order the parties to participate in a dispute resolution process and providing that the process may include counseling or mediation; adjusted subsection references; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

1995 Amendments: Chapter 350 in (8)(c)(ix), at beginning, substituted "partner or family member assault" for "domestic abuse"; and made minor changes in style.

Chapter 467 in seven places substituted "other parent" for "convicted parent"; in (8)(a), near beginning after "parent", inserted "or other person residing in that parent's household"; inserted (8)(c)(v) concerning deviate sexual conduct with an animal; and made minor changes in style. Amendment effective April 15, 1995.

Severability: Section 31, Ch. 350, L. 1995, was a severability clause.

Section 5, Ch. 467, L. 1995, was a severability clause.

1989 Amendments: Chapter 303 inserted (2) that read: "(2) A court may modify a de facto custody arrangement in accordance with the factors set forth in 40-4-212"; inserted (7) that read: "(7) As used in this section, "prior custody decree" means a custody determination contained in a judicial decree or order made in a custody proceeding"; and made minor changes in form.

Chapter 405 In (3), at end, inserted reference to subsection (8); and inserted (8) establishing procedure whereby parent or person granted custody may file objection to current custody right of parent convicted of certain serious crimes and placing burden on convicted parent to prove custody by convicted parent does not seriously endanger child's health and modification of custody is not in child's best interest.

1987 Amendment: Inserted (1)(e) and (1)(f) providing as a basis for modification of a custody decree a custodial parent's attempts to prevent contact or visitation between the child and noncustodial parent or a change of a child's residence to another state; inserted (2) creating presumption based on subsection (1)(e); and inserted (3) providing for a new visitation schedule under subsection (1)(f) and apportionment of transportation costs.

1983 Amendment: Near beginning of (1), after "court" substituted "may in its discretion" for "shall not"; after "decree" changed "unless" to "if"; at end of (1) changed "In applying these standards the court shall retain the custodian appointed pursuant to the prior decree unless" to "and if it further finds that"; and inserted (1)(d) allowing modification when child 14 years of age or older desires it.

Source: Section 409, Uniform Marriage and Divorce Act.

Montana Changes: The Montana act omits reference to the Uniform Child Custody Jurisdiction Act and omits subsection (a) stating that no motion for modification may be made earlier than 2 years after the decree, unless the welfare of the child is threatened. See also 1983, 1987, and 1989 amendment notes.

Case Notes

Decisions Under Current Law
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DECISIONS UNDER CURRENT LAW

General

State Subject Matter Jurisdiction Relationship to Tribal Court Jurisdiction — No Abuse of Discretion for District Court Amendment of Parenting Plan — Mother Failed to Establish Definite Fixed Residence on Reservation — Proper Exercise of Jurisdiction Despite Allegation of Inconvenient Forum — Concurrent State Jurisdiction Proper. In re Parenting of L.D.C., 2022 MT 161, 409 Mont. 439, 516 P.3d 631.

Failure to Apply Statutory Requirements While Holding Parties to Their Stipulations — Abuse of Discretion: The District Court found that the father's communications expectations were unreasonable, and the mother never unreasonably attempted to frustrate the father's communication with the children. Nevertheless, despite the parties' mediated stipulation regarding communication, which only allowed contact at specified times, the District Court departed from the stipulation and allowed the father to communicate with the children regularly.

On appeal, the Supreme Court held that the District Court abused its discretion when it failed to incorporate the parties' stipulation terms regarding communication with the children. In re Parenting of P.H.R., 2021 MT 231, 405 Mont. 334, 495 P.3d 38.

Amendment to Allow Out-of-State Relocation Declined — No Abuse of Discretion: A mother sought to amend a parenting plan so she could move out of state with her child. The District Court declined to amend the parenting plan, and the mother appealed, asserting that the adverse party failed to provide evidence that it was not in the child's best interests to relocate out of state. The Supreme Court explained that when a parent wants to relocate with a child, the courts must consider the parent's fundamental right to travel and the co-equal fundamental constitutional rights of both parents to coparent. The Supreme Court affirmed, finding that the District Court conscientiously considered the child's interaction and interrelationships with both parents and the child's ties to Montana and the prospective state and that the District Court did not abuse its discretion. In re Marriage of Solem, 2020 MT 141, 400 Mont. 186, 464 P.3d 981.

Mother Not Allowed to Relocate Out of State With Child Despite Better Employment Opportunities — Child's Primary Relationships Considered by Standing Master — No Abuse of Discretion: The mother appealed the standing master's order, which was affirmed by the District Court, to not allow her to relocate her child to Boston. The District Court considered the fact that the parents had equal parenting time and that three of the child's four primary relationships, including a half sister, would have remained in Montana. On appeal, the mother argued that the standing master abused her discretion in not allowing her to relocate with the child because she would have better employment opportunities in Boston and her family lived there. The Supreme Court affirmed, holding that the standing master appropriately considered the weight of the evidence in reaching her decision. In re Parenting of G.M.N., 2019 MT 18, 394 Mont. 112, 433 P.3d 715.

Parenting Plan Amended — Modification and Periodic-Review Provision — District Court Order Not Required to Find Change in Circumstance: The mother and father, never married, agreed to a stipulated parenting plan. The plan provided for a modification provision and a periodic-review provision. The father filed a motion to amend the parenting plan and to modify child support. Ultimately, the District Court approved an amended parenting plan. On appeal, the mother argued that the District Court erred because it did not cite a change in the child's circumstances as required in 40-4-219. The Supreme Court affirmed, holding that a parenting plan may be reviewed and amended pursuant to the plan's periodic-review provision, which serves as an alternative to amending a parenting plan under 40-4-219. In re Parenting of S.W.B.S., 2019 MT 1, 394 Mont. 52, 432 P.3d 709.

Military Father Stationed Around World — Summer Visitation Stipulated by Parenting Plan — Role of Guardian ad Litem Distinct from Role of Mediator: In a protracted dissolution proceeding involving a mother residing in Montana and a father residing in various military bases, the District Court issued an amended parenting plan that required the parents' teenage daughter to visit the father during the summer. The District Court also found the mother in contempt for not following the terms of the parenting plan. On appeal, the mother argued that the District Court erred because it had failed to consider the best interests of the teenage daughter, who wished to spend more time in Montana during the summers instead of with her father, and that it had wrongly found her in contempt and ordered attorney fees. The Supreme Court affirmed, holding that the District Court's findings were not clearly erroneous, that the original parenting plan's appointment of the child's guardian ad litem as a mediator was not consistent with the purposes of the impartial position, and that, because the District Court did not conduct a hearing on the contempt and attorney fee provisions, it was not proper for appellate review. In re Marriage of Brockington & Brown, 2017 MT 92, 387 Mont. 260, 400 P.3d 205. However, see In re Marriage of Weigand, 2021 MT 128, 404 Mont. 223, 486 P.3d 1272, holding that the dismissal of the appeal of contempt order, while not incorrect, was unnecessary under Rule 58(e), M.R.Civ.P. (Title 25, ch. 20).

Finding of Contempt for Parent Who Acquiesces to Child's Wishes Instead of Abiding by Parenting Plan: The mother, who had primary custody of the parties' child, stopped making her available for the father's scheduled visitation. The mother explained that the child, now 14, did not want to spend time with the father. The mother's spouse also filed a petition for stepparent adoption, which included an affidavit in support from the mother. The father moved to hold the mother in contempt and the District Court granted the motion, noting that the mother's actions in supporting her spouse's stepparent petition were contrary to her claim that she was willing to help the father repair his relationship with their child. On appeal, the Supreme Court affirmed the finding of contempt, concluding that when a parent fails to make reasonable efforts to require a recalcitrant child to attend visitation, the parent has not made a good faith effort to comply with the parenting plan. In re Marriage of Marez/Marshall, 2014 MT 333, 377 Mont. 304, 340 P.3d 520.

Modification of Parenting Plan Based on Military Orders — Not Applicable to Original Court-Ordered Parenting Plan: The portion of this section pertaining to the modification of a parenting plan based on military orders of a parent applies to the modification of a parenting plan, not to the adoption of the original court-ordered parenting plan. In re Marriage of Schmidt, 2014 MT 182, 375 Mont. 420, 329 P.3d 570.

Amendment of Parenting Plan Based Solely on Party's Absence From Mediation — Violation of Due Process: After the father failed to attend a court-ordered mediation concerning the mother's motion to amend the parties' parenting plan, the District Court, without holding a hearing, amended the parenting plan, citing the father's failure to appear at the mediation as the sole reason for the amendment. On appeal, the Supreme Court reversed, concluding that the order violated due process of law, which required that the father be heard to show cause why the amendment to the parenting plan should not be granted and required that the court consider the best interest of the child. In re Marriage of Wendt, 2014 MT 174, 375 Mont. 388, 329 P.3d 567.

Failure to Follow Parenting Plan — Change of Circumstances Warranting Amendment: After filing for dissolution of their marriage in 2006, the mother and father agreed on a parenting plan that alternated custody of the children every 2 weeks with 5 uninterrupted vacation weeks for each parent. In 2009, the mother moved to modify the parenting plan because the children had spent much less time with their father than outlined in the parenting plan, constituting a substantial change of circumstances as contemplated by this section. The parties agreed to hire a parenting plan coordinator, who observed the family for about 1½ years before filing a final report that recommended the parenting plan be amended to have the children reside with the mother during most of the school year and then alternate custody between the parents during the summer. In 2012, the District Court ordered a new parenting plan that provided the children would reside primarily with their mother during the school year and granted the father visitation 1 weekday each week and every other weekend. The father appealed, arguing that the District Court failed to make the requisite finding of changed circumstances. The Supreme Court upheld the amended parenting plan, holding that while the District Court did not expressly discuss changed circumstances in its order, the record contained the District Court's acknowledgment of this section's requirements, and it noted numerous facts had arisen to establish changed circumstances, including the parties' failure to follow the original parenting plan. In re Marriage of Klatt, 2013 MT 17, 368 Mont. 290, 294 P.3d 391.

Guardian Ad Litem's Revised Parenting Plan Recommendations — Adoption by Court Without Hearing Reversed — Recommendations Hearsay: A guardian ad litem (GAL) was appointed to represent the parties' children. While the GAL initially supported equal parenting and the parties had agreed with the GAL's recommendation, the GAL subsequently submitted written recommendations that the father be the primary parent. The District Court, without holding a hearing on the revised recommendations, adopted them, and the mother appealed. The mother argued that the District Court had erred in relying on the GAL's recommendations, which, she contended, constituted inadmissable hearsay. Moreover, she argued that the District Court's failure to hold a hearing on the revised recommendations violated her due process rights. The Supreme Court agreed that the recommendations were hearsay and that the District Court's failure to allow the mother to cross-examine the GAL had violated her due process rights. Accordingly, the Supreme Court reversed and remanded the matter to the District Court for a hearing. Puccinelli v. Puccinelli, 2012 MT 46, 364 Mont. 235, 272 P.3d 117, distinguished in In re Marriage of Schmidt, 2014 MT 182, 375 Mont. 420, 329 P.3d 570.

Change of Father's Residence on Account of Disability Held Sufficient Justification for Hearing on Amendment of Parenting Plan: The uncontroverted record indicated that Kooyer had moved to Arizona because of his health and, because of that move, could no longer maintain contact with the parties' daughter, as provided in the parties' parenting plan, because it was too far for him to travel on his limited income. The District Court therefore committed an abuse of discretion when it denied Kooyer a hearing on his motion to amend the parties' parenting plan. Sian v. Kooyer, 2010 MT 178, 357 Mont. 215, 239 P.3d 121.

Lack of Adequate Notice for Change of Residential Parent Custodian — Violation of Due Process: Mother was denied due process of law when she was not given notice, prior to a parenting plan change hearing, that her status as primary residential parent was going to be challenged. Steab v. Luna, 2010 MT 125, 356 Mont. 372, 233 P.3d 351.

Consideration of Parent's Motives When Parent Moves Children: Unless a District Court finds that a parent's decision to move exemplifies a willful and consistent attempt to frustrate or deny the other parent contact with the children, the decision to move cannot be held against the moving parent or considered as being against the best interests of the children. The District Court committed a clear abuse of discretion in considering the move in its adoption of the amended final parenting plan. In re Marriage of Plaisted-Harman, 2010 MT 100, 356 Mont. 218, 232 P.3d 888.

Improper Reliance on Parenting Plan Statutes in Granting Temporary Guardianship — Reversal Required: Pursuant to a stipulated parenting plan, the father was designated primary custodian of the couple's son and the mother was awarded visitation every other weekend. When the father received orders to report for active military duty, he moved to have the couple that he and the son lived with and the mother's sister appointed as temporary guardians. The mother moved to dismiss, but the District Court granted the father's motion, and the mother appealed. Reviewing the appealable order granting temporary guardianship, the Supreme Court reversed. The District Court's reliance on this section for granting the guardianship was misplaced because this section applies only to modification of a parenting plan with respect to the parents and does not provide authority to decide custody matters between a parent and a third party, including appointment of a third party as a guardian. The District Court's reliance on 40-4-228 for granting the guardianship was also misplaced because that section provides standards by which a court may award a parental interest to a nonparent who has brought a parenting plan proceeding pursuant to 40-4-211, but no such proceeding was brought in this case. The District Court also mistakenly relied on 41-3-427 in granting the guardianship because that section deals with child abuse and neglect, but does not provide independent authority for appointment of a guardian in disregard of the guardianship statutes. Rather, the father's request was governed by the guardianship statutes in Title 72, ch. 5, which the District Court did not address. The Supreme Court noted that the guardianship provisions in 72-5-222 apply only when a court order has addressed a party's right to parent, as opposed to arrangements defining a parent's custody and visitation under a parenting plan. The mother's right to parent was never previously limited by court order, so the District Court lacked jurisdiction to appoint a guardian for the child pursuant to 72-5-222, and granting the father's petition for temporary guardianship was reversible error. The Supreme Court remanded for the entry of an order vacating the guardianship. Fischer v. Fischer, 2007 MT 101, 337 M 122, 157 P3d 682 (2007).

Standard of Review of Findings Related to Custody Modification: The Supreme Court reviews a District Court's findings relating to custody modification to determine whether the findings are clearly erroneous. Findings are clearly erroneous if they are not supported by substantial evidence, if the District Court misapprehended the effect of the evidence, or if the Supreme Court's review of the record indicates that a mistake has been made. In re Marriage of Olson, 2005 MT 111, 327 M 82, 111 P3d 686 (2005), followed in In re Marriage of Lawrence, 2005 MT 125, 327 M 209, 112 P3d 1036 (2005). See also In re Marriage of Johnson, 266 M 158, 879 P2d 689 (1994), and In re Custody of Arneson-Nelson, 2001 MT 242, 307 M 60, 36 P3d 874 (2001).

Motion to Modify Child Custody Not Considered New Proceeding Vesting New Right to Substitute Judge: More than 19 months after commencement of a dissolution action, the father petitioned to modify the parenting plan custody provision, at which point the mother moved for substitution of the presiding judge, contending that the petition for modification was a new action entitling her to a change of venue to her latest county of residence. The District Court denied the substitution motion, and the Supreme Court affirmed. A motion to modify child custody is not considered the commencement of a new proceeding and cannot result in the vesting of a new right to substitute a District Court Judge. In re Marriage of Toavs, 2002 MT 230, 311 M 455, 56 P3d 356 (2002).

Child's Best Interest Outweighs Parent's Fundamental Right to Travel: A final parenting plan provided that the mother be allowed to remain in the family home and that the parties' three children reside primarily with the mother, with liberal visitation by the father. The mother later decided to move with the children to Idaho. The District Court issued an order preventing the mother from removing the children from Montana, and the mother sought to amend the parenting plan to allow her to move. A psychiatrist found that the children loved both parents and that both parents agreed that the children needed to have regular contact with and the support of the other parent. The psychiatrist recommended that the children remain together and not be separated. The mother testified that she was moving to Idaho because her fiance lived there, the schools were superior, and she had an employment opportunity there. The District Court concluded that the children's best interests would be served if the children remained in Montana and that the children's primary residence would remain with the mother if she stayed in Montana, but that if she moved to Idaho, the children should remain in Montana with their father. The mother appealed. The mother claimed that she had a constitutional right to relocate her children to Idaho that could not be restricted merely because it might be best for the children if both parents lived in the same town, citing In re Marriage of Cole, 224 M 207, 729 P2d 1276 (1986), and In re Custody of D.M.G. & T.J.G., 1998 MT 1, 287 M 120, 951 P2d 1377 (1998). The Supreme Court distinguished both Cole and D.M.G., holding that although the fundamental nature of the constitutional right to travel and the need to demonstrate a compelling interest before violating that right are still viable, a presumption in favor of the parent who provides most of the child's primary care no longer exists. Contrary to the mother's assertion that the parent resisting the move must show that the move would be disadvantageous to the child or that the child would be harmed by the move, the burden of proof is the best interests of the child standard. The District Court properly considered the standard in 40-4-212 and the psychiatrist's recommendations, noting that the children had an established support system in Montana that did not exist in Idaho, and the court did not abuse its discretion in amending the parenting plan to reflect the reality of the parties' actual parenting arrangement. The best interests of a child outweigh a parent's fundamental right to travel. In re Marriage of Robison, 2002 MT 207, 311 M 246, 53 P3d 1279 (2002). See also In re Parenting of N.P. v. Perkins, 2006 MT 10, 330 M 293, 127 P3d 1035 (2006), in which the Supreme Court noted that application of the Robison criteria must be made cautiously and only in furtherance of the best interests of the child and held that because a father was unable to prove that restricting the mother's travel was in their child's best interests, the mother was allowed to continue to reside with the child in another state where the child had become accustomed to home, school, and community and where the mother had extended family and better job opportunities.

Remand of Final Parenting Plan — Recalculation of Child Support Appropriate: Because a final parenting plan was not supported by substantial evidence, it was reversed and remanded for adoption of a parenting plan that allowed the child to spend approximately equal time with both parents. On remand, the District Court was directed to recalculate monthly child support obligations based on the terms of the new final parenting plan, considering the parties' current financial circumstances in its calculations. In re Marriage of Hedges, 2002 MT 204, 311 M 230, 53 P3d 1273 (2002).

Failure to Raise Constitutional Parenting Rights at Earliest Opportunity Resulting in Waiver of Issues: Nelson argued for the first time on appeal that the District Court's substantial modification of his parenting rights violated his constitutional rights to due process and equal protection. Because parenting rights are fundamental, Nelson contended that the hearing and findings of the District Court must undergo constitutional analysis. However, Nelson never objected at the hearing or in any posthearing motions to the District Court that the hearing violated his constitutional rights. A constitutional issue is waived if not presented at the earliest opportunity, and Nelson's failure to raise the questions until appeal resulted in waiver of those issues. In re Custody of Arneson-Nelson, 2001 MT 242, 307 M 60, 36 P3d 874 (2001). See also Dodd v. East Helena, 180 M 518, 591 P2d 241 (1979), and Billings Deaconess Hosp. v. Angel, 219 M 490, 712 P2d 1323 (1986).

Sufficiency of Evidence, Findings

Modification of Parenting Plan by District Court Requiring Child to Move Six Times in Single Year — Insufficient Findings — Reversed and Remanded to Consider Child's Best Interests: The parties entered a parenting plan whereby the mother was the primary parent of the child with regular parenting by the father. Four years later, the mother filed a motion to amend the parenting plan to allow her to move with the child from Missoula to Kalispell because of her job. The father objected, and the District Court held a hearing on her motion. The District Court then issued a modified parenting plan whereby the now school-aged child would have to move six times and attend two different schools throughout the school year. On appeal, the Supreme Court reversed and remanded, holding that the District Court had issued insufficient findings, had abused its discretion in modifying the plan, and had not considered the child's best interests. In re G.M.O., 2017 MT 116, 387 Mont. 390, 394 P.3d 913.

No Error in Amendment to Parenting Plan Due to Breakdown in Communications: The District Court did not err by affirming the standing master's order amending the parenting plan in favor of a 5-year-old child staying with the mother during the school year rather than splitting her time equally between both parents because, although both parents were fit, there were difficulties in communication between the parents when the child stayed with the father. In re Marriage of Davis, 2016 MT 52, 382 Mont. 378, 367 P.3d 400.

Father Blocked From Contacting Child's Cell Phone but Provided Alternative Methods of Communication — Presumption Against Acting in Child's Best Interest Not Applicable: In a proceeding to amend the existing parenting plan, the District Court granted primary custody during the school year to the mother and granted the father visitation 1 weekday each week and every other weekend. On appeal, the father argued that the District Court failed to properly presume that the mother failed to act in the best interest of the children under the presumption in this section because she had denied him contact with one of the children, had blocked his calls to that child's cell phone, and had supported the child's decision not to return to the father's custody as required under the existing parenting plan. The Supreme Court upheld the amended parenting plan, noting that the District Court had referred to a number of incidents that demonstrated the father's tendency to overdiscipline the children, the children and father's mutual anger, and their lack of mutual respect. The District Court also specifically noted a lack of evidence that the mother was trying to make a wedge between the father and the children, as the mother testified that while she blocked the father from contacting the cell phone of one of the children because he sent disrespectful text messages, she informed the father he could contact the home to talk with the children. The Supreme Court held that the District Court did not clearly err in determining that the presumption that a parent is not acting in a child's best interest did not apply in this case. In re Marriage of Klatt, 2013 MT 17, 368 Mont. 290, 294 P.3d 391.

No Evidence That Mother Willfully Disregarded Parenting Plan — No Error in Modifying Parenting Plan: On appeal of an amended parenting plan, the father argued that the District Court erred in its determination of the best interest of the children because it failed to rule on his petition to hold the mother in contempt for failing to follow the court's orders and the original parenting plan. The Supreme Court disagreed, finding that the father's concerns had been addressed by the District Court during the hearing. Substantial evidence showed that the mother had not willfully disregarded the terms of the parenting plan. Further, the evidence supported the District Court's findings under five of the parenting factors in 40-4-212, and thus the District Court did not err in modifying the parenting plan to award the mother primary custody of the children during the school year. In re Marriage of Klatt, 2013 MT 17, 368 Mont. 290, 294 P.3d 391.

Mother's Move From Montana to Utah in Best Interest of Children — Proper for District Court to Conduct In Camera Interview — Mother's Medical Records Not Required: The District Court permitted a mother to move her children from Montana to Utah. Subsequently, the father moved to amend the parenting plan to require the children to move back to Montana. In denying the motion, the District Court weighed the factors in 40-4-212 and concluded that the children could stay in Utah with the mother. On appeal the father claimed, among other things, that the District Court abused its discretion by interviewing the children in camera, by determining that the children had adjusted to their home, school, and community, and by not requiring the mother to produce medical records. The Supreme Court determined that the District Court did not abuse its discretion by interviewing the children in camera without cross-examination as permitted under 40-4-214, that the father failed to present any evidence that the children were not adjusted, and that the mother's medical records were being sought to attack the mother's credibility, not to determine the best interest of the children. Hood v. Hood, 2012 MT 158, 365 Mont. 442, 282 P.3d 671.

No Change in Circumstances — Aging of Child Insufficient to Satisfy Initial Statutory Threshold to Amend Parenting Plan: The parties entered into a stipulated parenting plan whereby the mother would be the primary parent of the child until he entered 6th grade, at which point the father would become the primary parent. When the child was in 5th grade, the mother filed a motion to amend the parenting plan for her to remain the primary parent. Following a hearing on the motion, and meeting with the 12-year-old child in chambers, the District Court granted the mother's motion. The father appealed to the Supreme Court. The Supreme Court vacated the order amending the parenting plan and reinstated the former parenting plan, concluding that the mother had not proved a change in circumstances and therefore had not satisfied the threshold requirement to amend a parenting plan. The court also noted that the aging of a child is not a change of circumstances for purposes of 40-4-219. In re Marriage of Whyte, 2012 MT 45, 364 Mont. 219, 272 P.3d 102.

Absence of Findings and Conclusions Regarding Amendment of Parenting Plan — Remand: The District Court repeatedly modified a parenting plan but entered no findings of fact or conclusions of law supporting its orders. If the record does not contain the essential facts underlying a court decision, the Supreme Court cannot conduct a meaningful review on appeal and the case must be remanded to allow the District Court to issue findings and conclusions that clarify the rationale for judgment. Here, the Supreme Court was unable to ascertain what essential and determining facts the District Court relied on when fashioning a parenting plan, so the case was remanded for entry of findings of fact and conclusions of law underlying the decisions to modify the parenting plan and to support the arrangement that was ordered. In re Marriage of Banka, 2009 MT 33, 349 M 193, 201 P3d 830 (2009). See also In re Marriage of Mills, 2006 MT 149, 332 M 415, 138 P3d 815 (2006). However, see In re Marriage of Klatt, 2013 MT 17, 368 Mont. 290, 294 P.3d 391, in which the Supreme Court upheld the District Court's amended parenting plan when the District Court did not expressly discuss changed circumstances in its order but had acknowledged this section's requirements on the record and noted numerous facts that had arisen to establish changed circumstances, including the parties' failure to follow the parenting plan.

Without Any Findings by District Court, Modification of Parenting Plan Invalid: The special master appointed by the District Court to assist the parties in developing a parenting plan reported certain disturbing actions by the mother that prompted the guardian ad litem in the case to file a motion to suspend the mother's parenting time until a parenting plan could be agreed to by the parties or ordered by the court. The District Court granted the motion and, at the same time, ordered a show cause hearing. At the show cause hearing, the court did not address the show cause issue but focused on the parenting plan submitted that day by the special master. The court adopted the plan as temporary. Subsequently, the District Court entered an order stating that the plan adopted as temporary "is hereby adopted and made final". The mother appealed, and the Supreme Court held that the District Court had not made any findings let alone the prerequisite finding of a change in circumstances and therefore the District Court's purported modification of the parties' parenting plan was invalid. In re Marriage of Jacobsen, 2006 MT 212, 333 M 323, 142 P3d 859 (2006).

No Abuse of Discretion in Award of Primary Residential Custody to Father: Pursuant to a final parenting plan, the parties' daughter spent alternating months with each parent, but as the child approached school age, the mother moved to amend the plan to grant her primary residential custody and to establish child support to be paid by the father. The District Court heard contradictory testimony from the parents regarding who would be the best primary custodian, granted primary residential custody to the father, and provided that the child would spend summers and most holidays with the mother. The mother appealed on grounds that it was in the child's best interests to reside with the mother. The Supreme Court considered whether the District Court abused its discretion by acting arbitrarily or outside the bounds of reason or committed clear error in its findings. Noting that the custody decision was a close call, the Supreme Court deferred to the District Court's assessment of the parents' credibility and affirmed. Given the mother's apparent insincerity about coparenting, the father was more likely to ensure continuing and frequent contact with both parents, so the District Court did not abuse its discretion by awarding primary residential custody to the father. In re Marriage of Toavs, 2006 MT 68, 331 M 437, 133 P3d 202 (2006), followed in In re Marriage of Olson, 2008 MT 232, 344 M 385, 194 P3d 619 (2008).

Error in Failure to Set Out Findings of Fact When Modifying Parenting Plan: Findings of fact are required when a District Court considers a petition for modification or amendment of a parenting plan. Although specific findings regarding each element in 40-4-212 are not necessary, the court must set forth the essential and determining facts upon which its conclusion rests. In the present case, the record was devoid of any oral or written findings of fact, and the District Court abused its discretion by amending a parenting plan without making the required findings and conclusions, constituting reversible error. In re Marriage of Lawrence, 2005 MT 125, 327 M 209, 112 P3d 1036 (2005). See also In re Marriage of Ulland, 251 M 160, 823 P2d 864 (1991).

Failure of District Court to Consider Parental Visitation Frustration in Denial of Parenting Plan Modification — Remand: The District Court declined to amend a parenting plan after concluding that there was no change of circumstances since the adoption of the prior parenting plan sufficient to necessitate amendment of the prior parenting plan. However, nothing in the record indicated that the District Court considered the presumption in this section that a parent is not considered to be acting in the child's best interests if the parent willfully and consistently attempts to frustrate or deny contact with the child by the other parent. Absent consideration of this presumption, the Supreme Court remanded for detailed findings and conclusions on the issue. In re Marriage of Olson, 2005 MT 111, 327 M 82, 111 P3d 686 (2005).

Best Interests of Child Determinative Factor in Adoption of Final Parenting Plan: A paternity test determined the father of the child, and the District Court adopted an interim parenting plan allowing the father joint contact with the child. After the child was born, the mother had actively concealed the birth from the father and obfuscated the father's efforts to locate the child by failing to list the father on the birth certificate and to disclose her whereabouts, and even despite the test, the mother continued to attempt to exclude the father from the child's life. The District Court subsequently adopted a final parenting plan that gave primary residential custody to the father, and the mother appealed. The Supreme Court declined to disturb the final plan. The District Court had substantial evidence to conclude that the mother's behavior throughout the matter was troubling and cast a shadow of implication regarding the interplay of the relevant factors regarding the best interests of the child. Even though it was determined that the continuity and stability of care would be good in either household, the District Court did not err in concluding that it was in the child's best interests, including the child's developmental needs, that the father be designated the primary residential custodian after the first 18 months of the child's life, given the grave concern as to the probable continuance of the mother's pattern of exclusion. In re Paternity of C.T.E.-H., 2004 MT 307, 323 M 498, 101 P3d 254 (2004), following In re Marriage of Hedges, 2002 MT 204, 311 M 230, 53 P3d 1273 (2002).

No Violation of Motion In Limine in Allowing Certain Evidence Regarding Tendency of Parent for Sexual Abuse of Child in Custody Modification Proceeding: In a proceeding to revise a parenting plan, the mother made a motion in limine to preclude the testimony of a medical expert who performed a psychosexual evaluation of the father. The District Court ruled that the expert could testify as to whether the father was a person who had a tendency to sexually abuse a minor child, but could not testify about the child's credibility or the polygraph examination that was administered to the father. The mother then appealed on grounds that the court claimed that it would sustain the objection to certain testimony, but then adopted the testimony in its oral statement of findings. The Supreme Court found no violation of the motion in limine. The testimony considered by the trial court was the type of testimony that the trial court said it would allow. Further, deposition testimony by one of the mother's experts essentially affirmed the findings, and there was no motion in limine to preclude any deposition testimony. In re Marriage of Nies & Cooper, 2003 MT 100, 315 M 260, 68 P3d 697 (2003).

Sufficient Evidence of Best Interests of Child to Warrant Change in Custody — Visitation: The District Court revised a parenting plan by changing residential custody from the mother to the father, and the mother appealed, but the Supreme Court affirmed. The District Court's findings that the mother had frustrated visitation on numerous occasions and had made false accusations regarding the father's alleged sexual abuse of the child and that the child's best interests would be served by the custody change were supported by substantial evidence and were not clearly erroneous. In re Marriage of Nies & Cooper, 2003 MT 100, 315 M 260, 68 P3d 697 (2003).

Two Fit Parents — Parenting Plan Provisions for Modification — Error in Granting Custody to One Parent Absent Hearing: The father moved to revise a parenting plan to provide equal custody until the child reached school age. The District Court did so, but then went further and granted primary residential custody to the father. The mother appealed. The Supreme Court found that modification for equal custody was appropriate because the original parenting plan provided for modification when the child reached 2 years of age, and when there are two fit parents, custodial time should be allocated as equally as possible. However, the District Court exceeded its authority in granting the father primary residential custody because the father did not request that relief in the modification petition and there was no hearing or testimony concerning which parent would be a more suitable residential custodian, so that portion of the District Court's order was vacated. In re Marriage of Toavs, 2002 MT 230, 311 M 455, 56 P3d 356 (2002).

Reversal Based on Radical Departure in Final Parenting Plan From Interim and Proposed Parenting Plans — Best Interest of Child of Primary Concern: An interim parenting plan called for a child to live with her father as the primary residence and spend 3 days a week with her mother. The parents' proposed final parenting plan had the child residing with each parent as equally as possible. The final parenting plan departed radically from the interim plan and the parties' proposed plans and provided that the child reside primarily with the mother, with provisions for visitation by the father. The standard to be applied when adopting a final parenting plan, even one that departs substantially from an interim parenting plan, is the best interests of the child. Here, both parents suggested parenting plans that provided much more equal division of time with the child than the final parenting plan allowed, and nothing in the evidence supported a final parenting plan so fundamentally different from the proposed or interim plans or demonstrated that the final parenting plan was in the child's best interests. Because it was not supported by substantial evidence, the final parenting plan was reversed and remanded for adoption of a parenting plan that allowed the child to spend approximately equal time with both parents. In re Marriage of Hedges, 2002 MT 204, 311 M 230, 53 P3d 1273 (2002).

Acceptance of Expert Testimony Regarding Child's Custodial Preference — Determination of Admissibility Not Necessary When Qualified as Professional Advice: During trial on modification of a parenting plan, the District Court considered statements made by the children during a session with a psychologist hired by the father. During the session, the children indicated their unhappiness living with their mother and their desire to live with their father. The mother objected on grounds that the statements were inadmissible hearsay, arguing that the Supreme Court had previously declined to extend the hearsay exception in Rule 803, M.R.Ev. (Title 26, ch. 10), to statements made by a child to a counselor and should have appointed an independent counselor. The Supreme Court noted that under 40-4-214, the District Court could have interviewed the children to determine their wishes, but declined to do so in deference to the mother's objection. However, a District Court need not interview children to determine their preferences, but may rely on the evaluation of a professional counselor. Special appointment of an independent counselor is not necessary in all circumstances. Here, the children underwent extensive counseling by a doctor, as well as by counselors hired by both the father and mother, and the District Court admitted the entire testimony of all the professionals. It was not necessary to determine whether the psychologist's testimony was admissible under Rule 803 because it qualified as professional advice available under 40-4-214. The trial court was in the best position to evaluate the credibility of witnesses, and the Supreme Court declined to overturn the custody matter absent a clear abuse of discretion. In re Marriage of Drake, 2002 MT 127, 310 M 114, 49 P3d 38 (2002).

Trial Court Not Required to Make Specific Findings on Every Fact Presented or Piece of Evidence Offered: The mother argued that the District Court failed to review records requested by the court that pertained to a state investigation of the mother, her fiance, and the children, and that failure to make specific findings regarding uncontradicted facts in the records was an abuse of discretion. The Supreme Court disagreed. A District Court is not required to make specific findings on every fact presented or every piece of evidence offered, but need include only the essential and determining factors upon which its conclusions rest. Here, the District Court had a working familiarity with the family upon which to critically weigh the evidence and decide what was in the children's best interests. The District Court did not misapprehend the effect of the evidence, and its conclusions and findings were supported in the record. The findings were not clearly erroneous, and the custody decision was affirmed. In re Marriage of Drake, 2002 MT 127, 310 M 114, 49 P3d 38 (2002), distinguishing In re Marriage of Abrahamson, 278 M 336, 924 P2d 1334 (1996).

No Abuse of Discretion in Finding Compliance With Parenting Plan Despite Impossibility of Confirmation of Parent's Participation in Alcoholics Anonymous and Domestic Violence Counseling — Parenting Agreement Not Binding if Not in Best Interest of Child: As part of a parenting plan, the mother agreed to attend Alcoholics Anonymous meetings and domestic violence counseling and to provide the father's attorney with written confirmation of attendance. Because of the confidential nature of the meetings and counseling, no confirmation was provided, so the father sought to modify the parenting plan to limit the mother's visitation. The District Court concluded that the confirmation condition was impossible to perform, accepted testimony from the mother's probation officer and counselor as adequate proof of the mother's attendance, and held that further visitation restrictions were not in the child's best interest. The father appealed, but the Supreme Court affirmed. The District Court was not bound by the parents' agreement when the child's best interest was concerned, nor were the findings regarding the impossibility of obtaining the required confirmation clearly erroneous. The District Court was in the best position to judge the credibility of the witnesses and the weight to be given to the evidence, and absent clear error, its findings were not disturbed. Pankratz v. Teske, 2002 MT 112, 309 M 499, 48 P3d 30 (2002).

Change in Circumstances; Danger to Child

No Abuse of Discretion for District Court Amendment of Parenting Plan — Substance Abuse and Violent Incident by Parent Was Substantial Change in Child's Circumstances — Necessary to Serve Best Interests of Child. In re Parenting of L.D.C., 2022 MT 161, 409 Mont. 439, 516 P.3d 631.

Temporary Emergency Order Warranted Based on Changed Circumstances — Mother's Subsequent Behavior Not Contemplated by Prior Parenting Plan: The District Court did not erroneously grant and maintain a temporary emergency order pursuant to 40-4-220 without an adequate showing and finding of changed circumstances under 40-4-219 and 40-4-220. The District Court's written findings of fact did not similarly state or manifestly imply that it found that no change in circumstances had arisen since imposition of the prior parenting plan.

Moreover, the District Court's written findings clearly manifested a change in circumstances that would have supported an express finding under 40-4-219. Under the terms of the prior parenting plan, the mother would either have had limited visitation as provided by the transition schedule or, upon satisfaction of the specified conditions precedent, have shared custody with the father on a specified 50-50 basis. In either event, the prior parenting plan clearly contemplated that its structure and provisions would be sufficient to adequately protect the child under the then-contemplated circumstances. The terms of the parenting plan did not contemplate or provide for the nature and occurrence of the mother's subsequent behavior and the resulting need for additional protection of the child not provided under the prior parenting plan. In re Marriage of Bessette, 2019 MT 35, 394 Mont. 262, 434 P.3d 894.

Parenting Plan Amended — Modification and Periodic-Review Provision — District Court Order Not Required to Find Change in Circumstance: The mother and father, never married, agreed to a stipulated parenting plan. The plan provided for a modification provision and a periodic-review provision. The father filed a motion to amend the parenting plan and to modify child support. Ultimately, the District Court approved an amended parenting plan. On appeal, the mother argued that the District Court erred because it did not cite a change in the child's circumstances as required in 40-4-219. The Supreme Court affirmed, holding that a parenting plan may be reviewed and amended pursuant to the plan's periodic-review provision, which serves as an alternative to amending a parenting plan under 40-4-219. In re Parenting of S.W.B.S., 2019 MT 1, 394 Mont. 52, 432 P.3d 709.

Father's Move Three Hundred Miles Away — Change in Circumstances: The parents agreed to a parenting plan in which the father would serve as the sole custodian of their child and the mother, who would be moving away from Missoula to Idaho, would have parenting time on certain holidays, during the summer, and at other times agreed to by the parties. Several years after the parents agreed to the parenting plan, the father filed a notice of intent to move with the child from Missoula to West Yellowstone, asserting that amendment of parenting time was not necessary. The mother objected, asserting that the move would add an additional 300 miles of distance between her and the child, significantly affecting her ability to see and spend time with the child. The District Court, finding that the father's move would not negatively impact the mother's visitation because the father would drive the child to Missoula for visitation, concluded that the mother had not established a change in circumstances warranting amendment of the parenting plan. On appeal, the Supreme Court reversed, noting that when a parenting plan provides for additional time as the parties may agree, a District Court should consider the additional time agreed to by the parties and whether it is of such nature, extent, and duration to constitute a de facto modification of the original parenting schedule. Because the mother had enjoyed significant parenting time that she had agreed to with the father and the evidence demonstrated that the father's relocation significantly reduced the amount of time the child spent with the mother, the move constituted a change in the child's circumstances. In re Marriage of Schilling, 2018 MT 59, 391 Mont. 25, 414 P.3d 775.

Motion to Amend Parenting Plan, Modify Support — Failure to Provide Facts to Change in Circumstances or Offer Proposed Amended Plan — Dismissal of Motion Without Hearing Proper: The father filed a motion to amend the parties' parenting plan and to modify the amount of child support he paid. The mother opposed the motion, arguing that the father had failed to show a substantial change in circumstances to support an amended plan or a modification to child support. Without a hearing, the District Court denied the father's motion to modify and the father appealed. The Supreme Court affirmed, noting that the father had failed to file a proposed amendment to the parenting plan and that the District Court was not required to hold a hearing to allow him to cure his failure to raise facts that should have been provided in his initial pleadings. In re Marriage of Brown, 2016 MT 299, 385 Mont. 369, 384 P.3d 476.

Child Moved to Several Schools in Short Time Frame — Change in Circumstances — Modification of Parenting Plan Proper: The mother, who had primary parenting of the parties' child, had moved the child to six schools in six towns in 6 years. Finally, after the mother pulled the child from a school abruptly and without any input from the father or having another school immediately lined up, the father filed a motion to modify the parenting plan for him to be the child's primary parent. The District Court granted the modification, and the mother appealed to the Supreme Court, alleging that there had not been a change in circumstances that would justify a modification of the parenting plan. The court, however, affirmed, noting that if moving occurs in a manner that becomes disruptive to the child, as it did in this case, it may constitute a change in circumstances. In re Parenting of Z.D.L.-B., 2016 MT 164, 384 Mont. 65, 375 P.3d 378.

Moving From One County to Another Insufficient to Warrant Modification of Parenting Plan — Venue Proper: A father petitioned to amend a parenting plan on the basis that his son's move from one county to another neighboring county and back adversely affected his right to spend time with his son. The father also made a motion to change venue. The District Court found that a mother moving from one county to another and back was not a sufficient change in circumstances that warranted a modification of the parenting plan and also denied the motion to change venue, holding that venue is proper where the majority of the evidence as to the best interest of the child is located. On appeal, the Supreme Court affirmed. In re C.M.R., 2016 MT 120, 383 Mont. 398, 372 P.3d 1275.

Insufficient Change in Circumstances of Children to Warrant Modification of Parenting Plan: The father of two children contended that his petition to modify a parenting plan was appropriate because the children had aged and started school, their nanny was terminated, and their mother attempted to frustrate his contact with the children. The District Court denied modification, and on appeal the Supreme Court affirmed. Modification is based on the best interests of the children, not the parents. The mere aging of children is not a sufficient change in circumstances to warrant modification, nor is loss of a nanny upon starting school. The father did not meet the burden of showing changed circumstances of the children sufficient to warrant modification in their best interests. In re Marriage of D'Alton, 2009 MT 184, 351 M 51, 209 P3d 251 (2009). See also In re C.M.R., 2016 MT 120, 383 Mont. 398, 372 P.3d 1275, and In re Parenting of R.J.N. & H.E.N., 2017 MT 249, 389 Mont. 68, 403 P.3d 675.

Communication Breakdown Between Parents Constituting Change in Circumstances Warranting Modification of Parenting Plan — Best Interests Implied in Findings: The parents stipulated to a final parenting plan. The District Court appointed a guardian ad litem, and based on the guardian ad litem's recommendations, the court modified the parenting plan by designating the father as the primary residential parent and allowing the parties to reside in other states. The mother contended that it was error to modify the stipulated plan because the court did not make a specific finding of a change in circumstances or properly assess the children's best interests when relying on the guardian ad litem's recommendations. The Supreme Court agreed that the District Court did not incorporate the change of circumstances and best interests language into its findings and conclusions, but noted that it is not error when a court fails to use the statutory language if all the statutory requirements are implicit in the findings. Implicit in the findings in this case was the reality that a substantial change in circumstances had occurred because the parties were able to resolve visitation issues only through mediation, which significantly affected the children because the parents were unable to follow the stipulated parenting plan. Further, the guardian ad litem found that coparenting was no longer an option because of the discord between the parents and that residential custody should be granted to the father, who could provide better stability and predictability for the children. Thus, both the change of circumstances and the children's best interests were impliedly addressed in the District Court's findings, and modification of the parenting plan was affirmed. Jacobsen v. Thomas, 2004 MT 273, 323 M 183, 100 P3d 106 (2004). See also In re Marriage of Klatt, 2013 MT 17, 368 Mont. 290, 294 P.3d 391.

Moving of Children to Home of Grandparents Without Knowledge of Court Considered Change in Circumstances — Parental Rights Not Subjugated to Rights of Grandparents: Shortly after a parenting plan was adopted giving primary residential custody to the father, he moved the children into their grandparents' home and thereafter seldom saw the children while working as a logger. The mother moved to change the children's primary residence to her, and the motion was granted. The father appealed on grounds that there was not a sufficient change in circumstances to warrant switching the children's residence. The Supreme Court affirmed. The District Court was not aware that the children had been moved prior to the request for modification, so placement of the children with their grandparents was a proper basis for consideration of a change in circumstances. The District Court was also correct in finding that even if the grandparents were providing a good home for the children, the mother's parental rights could not be subjugated to the rights of the grandparents. The District Court did not abuse its discretion in changing the children's primary residence to the mother inasmuch as the father was indifferent, was not adequately committed to the children, and had basically abandoned them. In re Marriage of Burk, 2002 MT 173, 310 M 498, 51 P3d 1149 (2002).

Insufficient Facts to Compel Finding of Changed Circumstances — No Authority of District Court to Modify Parenting Plan: Without a finding of changed circumstances, a District Court does not have jurisdiction to modify an existing custody arrangement. Here, the father contended that he was incorrectly required to show a change of circumstances before the court would consider his petition for modification of a parenting plan because the petition sought only to make a de facto modification permanent, and did not seek to change the primary residence of the child. The Supreme Court disagreed. The proposed amendment to the parenting plan was not merely a de facto modification, but would have the effect of substantially changing the primary residence of the child. Thus, the father was required to meet the jurisdictional threshold of this section. However, no allegation was made that circumstances had changed, no new facts had arisen, nor were there facts unknown to the court at the time that the plan was entered into. The District Court properly considered the parenting plan as a whole and correctly concluded that there was not substantial evidence of changed circumstances to warrant modification of the existing parenting plan. In re Marriage of Oehlke, 2002 MT 79, 309 M 254, 46 P3d 49 (2002), following In re Marriage of Syverson, 281 M 1, 931 P2d 691 (1997).

Implied Finding of Changed Circumstances Warranting Revision of Parenting Plan Absent Showing of Abuse of Discretion: A District Court may, in its discretion, amend a parenting plan if it finds that there has been a change in circumstances of the child and that a change is necessary for the child's best interests. In making the determination, the court relies on facts that arose after the prior parenting plan or that the court was unaware of at the time of the prior plan. Here, the court did not make a specific finding of changed circumstances, but such a finding was implied, and the court's failure to specifically cite the words "a change in circumstances" was at most harmless error. The trial court is in the best position to resolve child custody issues, and it is that court's duty to resolve conflicts regarding evidence and to determine the qualifications and competency of expert witnesses. The court's decisions in regard to these duties will not be disturbed absent a showing of an abuse of discretion. In re Custody of Arneson-Nelson, 2001 MT 242, 307 M 60, 36 P3d 874 (2001).

Attorney Fees and Costs

Proper Consideration of Attorney Fees and Costs — Reduction if Requested Amount Warranted: Defendant prevailed in a dispute regarding a parenting plan and sought attorney fees at $120 an hour plus $983.79 in costs. The District Court noted that the character and amount of services rendered were not unusual, the time indicated was needed, the litigation was important, and counsel demonstrated professional skill and experience, but the court nevertheless reduced the billable rate to $80 an hour and deducted several items that had been included as costs. Defendant appealed, but the award was affirmed. The District Court considered the appropriate factors, in addition to the billable rate in its judicial district, and did not abuse its discretion in reducing the amount of attorney fees and costs. Pankratz v. Teske, 2002 MT 112, 309 M 499, 48 P3d 30 (2002).

DECISIONS UNDER FORMER LAW PRIOR TO 1997 REVISION

General

Motion to Modify Custody Considered at Hearing on Ex Parte Temporary Custody — Abuse of Discretion: Father filed two motions, one to modify custody pursuant to this section and one to continue a temporary ex parte custody order pursuant to 40-4-220. At the hearing held for the sole purpose of determining whether the temporary custody order should be continued, the District Court also resolved father's motion to modify custody, concluding that the requirements for modification were not met. However well intentioned, the procedure used by the District Court in considering both motions at the same hearing was an abuse of discretion and deprived father of notice and the opportunity to be heard on the modification motion. The Supreme Court reversed and remanded for further proceedings on the motion to modify. In re Marriage of Huotari, 284 M 285, 943 P2d 1295, 54 St. Rep. 884 (1997).

Modification of Custody Order Required by Substantial Change in Circumstances — Application of In Re Marriage of Johnson Required — Jurisdictional Prerequisites — Absurd Application of Statute Avoided: After making an agreement for child custody as part of the dissolution of her marriage, Kimberly determined to attend college and moved from Lewistown to Billings with her children. On a remand from the Supreme Court, the District Court held that In re Marriage of Johnson, 266 M 158, 879 P2d 689 (1994), did not apply because custody was not being transferred from the primary custodian to the secondary custodian. The Supreme Court held that contrary to the District Court's interpretation, Johnson did apply to the case and that Johnson applied to any case in which a custody modification would have the effect of substantially changing the children's primary residence, requiring that the District Court must first meet the jurisdictional requirements of this section. However, the Supreme Court found that a literal application of that statute would cause an absurd result by its application only to movement of a child to another state and not to instances in which the child is moved from one end of the state to another or to another country. For this reason, the Supreme Court held that if a change has occurred in the circumstances of the child or the child's custodian, causing the children to move from one location to another in a manner that would hinder the effectiveness of the custody arrangement, then the jurisdictional requirements of this section have been met and the District Court may modify the custody arrangement pursuant to 40-4-212. The Supreme Court then applied the rule to the case before it and concluded that the modification of the custody arrangement changing the custody of Kimberly's ex-husband from 160 days to 75 days annually was in the best interests of the children, as demonstrated in the record. In re Marriage of Syverson, 281 M 1, 931 P2d 691, 54 St. Rep. 32 (1997), followed in In re Marriage of Oehlke, 2002 MT 79, 309 M 254, 46 P3d 49 (2002).

Denial of Motion for Temporary Change of Custody Not Appealable: The Supreme Court held that although the denial of Shupe's motion for a temporary change of custody was not appealable under appellate rules, the District Court also denied Shupe's petition to modify custody and that order was appealable. In re Marriage of Shupe, 276 M 409, 916 P2d 744, 53 St. Rep. 447 (1996).

Modification Limited to Older Child: The divorce decree gave sole custody of all children to the wife. The husband subsequently moved to modify the decree to change the custody status of the older child. In its order, the District Court changed the custody of all children from sole to joint. On appeal, the Supreme Court reversed, ruling that because the issue of two children was not properly before the court and because the court failed to comply with the statutory requirements, the court lacked jurisdiction to modify the existing custody of the two younger children. In re Marriage of Boyer, 274 M 282, 908 P2d 665, 52 St. Rep. 1233 (1995), clarified in Steab v. Luna, 2010 MT 125, 356 Mont. 372, 233 P.3d 351.

Modification of Custody Based on Best Interests of Children — Affirmed Despite Application of Wrong Statute: The lower court granted the father's motion to modify the joint custody provisions of the divorce decree to allow him to have primary custody of three of the parties' five children. The Supreme Court noted that the lower court should have applied this section because the modification had the effect of substantially changing the primary residence of the three children. However, because the mother had not objected to the application of the wrong statute, the Supreme Court stated that it would review the lower court's action based upon its application of 40-4-212. The Supreme Court held that the lower court had not erred in finding that the best interests of the three children were served by a change in custody even if it resulted in splitting up the five children. In re Marriage of Lockman, 266 M 194, 879 P2d 710, 51 St. Rep. 726 (1994).

Petition Resulting in Change of Primary Residence of Children in Joint Custody Construed as Petition to Terminate Joint Custody — Jurisdictional Requirements Applicable — Best Interest Standard Applicable on Petition Not Resulting in Change of Primary Residence: A motion or petition to modify a sole custody provision or to terminate a joint custody provision must satisfy the jurisdictional prerequisites set out in this section. Likewise, a motion or petition to modify child custody provisions in a dissolution decree that have the effect of substantially changing the primary residence of the parties' children, even though the formal joint custody designation is retained, is to be construed as a motion or petition to terminate joint custody and must also satisfy the jurisdictional prerequisites set out in this section. Any effort to modify the physical custody arrangement in a decree that provides for joint custody but that does not seek a substantial change in the children's primary residence may be considered according to the best interest standard set out in 40-4-212. In this case, because the mother sought a modification of the children's physical custody arrangement, the District Court erred in modifying physical custody without finding substantial endangerment as required by this section. In re Marriage of Johnson, 266 M 158, 879 P2d 689, 51 St. Rep. 703 (1994), followed in In re Marriage of Gallagher, 266 M 358, 880 P2d 1303, 51 St. Rep. 840 (1994), In re Marriage of Ansell/Elser, 271 M 265, 895 P2d 619, 52 St. Rep. 434 (1995), and In re Marriage of Syverson, 281 M 1, 931 P2d 691, 54 St. Rep. 32 (1997).

Appointment of Attorney for Children Not Necessary — Children's Position Adequately Developed: In a change of custody proceeding, mother's motion that the court appoint an attorney for the children was not ruled on and the court did not state why an appointment was not made. The Supreme Court carefully reviewed the record to determine if an attorney was required for the children. The court found substantial expert and other evidence, largely uncontradicted, that stepfather subjected the children to ritual satanic sexual abuse, that the boy had expressed suicidal wishes, that the father and his subsequent wife were better suited to have custody, that the children were progressing well in the father's custody and had not progressed well in the mother's custody, and that the mother behaved erratically toward the children and sometimes acted contrary to the children's best interests. The Supreme Court found that the lower court did not err in failing to appoint an attorney for the children because the issues as to their best interests were well-developed. The court also expressly overruled the holding in In re Gullette, 173 M 132, 566 P2d 396 (1977), that in a contested guardianship proceeding in which custody is in serious dispute, the court must appoint independent counsel for the child or make a finding stating why the appointment was not necessary. McDowell v. McDowell, 263 M 252, 868 P2d 1250, 51 St. Rep. 42 (1994).

Evidentiary Objections Raised for First Time on Appeal: The lower court made a finding based on hospital reports that were not a part of the record. Objection on appeal could not be considered because no objection was made in the lower court. McDowell v. McDowell, 263 M 252, 868 P2d 1250, 51 St. Rep. 42 (1994).

Refusal to Allow Children to Testify Not Error: The Supreme Court affirmed the lower court's decision to refuse to require the parties' children to testify in a custody modification action. The Supreme Court held that the lower court had considered the children's wishes, as reflected in a doctor's notes, but was not required to allow them to testify and further noted that the children were under 14 years of age. In re Marriage of Weis, 254 M 266, 837 P2d 407, 49 St. Rep. 800 (1992).

Motion for Sole Custody — Change in Visitation Not Considered Change in Joint Custody: Parents were awarded joint custody, with mother as the primary caretaker. Father subsequently petitioned for sole custody based on changed circumstances, and a temporary modification to sole custody was granted. Later, the District Court quashed the temporary order and requested a custody evaluation and chemical dependency evaluation of the mother. After considering the evaluation results and interviewing the children, the court continued joint custody but amended the visitation schedule. Mother contended error in modification of the schedule because a change in visitation was not the issue before the court. However, when the parties retain joint custody, a change in visitation does not constitute a change in custody requiring a finding of serious endangerment. Therefore, denying the motion for sole custody but modifying the existing visitation schedule was not an abuse of discretion. In re Marriage of Cogar, 252 M 272, 828 P2d 1361, 49 St. Rep. 247 (1992).

Apprehension and Potential for Abuse in Home Environment Sufficient to Satisfy Serious Endangerment Standard: Mother remarried and moved her children to the home of their stepfather. The District Court found that the stepfather created a "hostile, siege-like" environment, partially because of his alcohol consumption, and that he had threatened to hit the children, verbally abused them, and mistreated the children's dog. The Supreme Court found that the children's fear of their stepfather, heightened by his drinking problem, the hostile home environment, and the potential for physical abuse, was sufficient to meet the standard of serious endangerment, warranting modification of the custody decree. In re Marriage of Anderson, 240 M 316, 783 P2d 1372, 46 St. Rep. 2155 (1989).

Changed Circumstances Rule Applicable to Modification of De Facto Custody Arrangement: The changed circumstances rule and the best interests test applicable to modification of judicial custody decrees, as set forth in this section, are to be applied in modifying a child custody arrangement where there has been no previous judicial supervision or decree. The best interests test of 40-4-212 does not apply. (See subsequent 1989 amendment.) In re Custody of Pierre Daniel Andre, 234 M 80, 761 P2d 809, 45 St. Rep 1745 (1988).

Repeated Custody Challenges — Attorney Fees Proper — Meritless Appeal Warranting Sanctions: The District Court's determination that the father's repeated actions for sole custody were intended to harass, obstruct, and delay the mother's right to joint custody and were an abuse of process highly detrimental to the best interests of the children was sufficient to trigger the award of attorney fees and costs against the father under this section. Appeal of the custody question to the Supreme Court was meritless, and sanctions were proper under former Rule 32, M.R.App.P. (now superseded). In re Marriage of West, 233 M 47, 758 P2d 282, 45 St. Rep. 1281 (1988).

Judgment on Matters Outside Pleadings Void: A judgment or final order adjudging matters outside the issues raised by the pleadings is void as to the matters outside the pleadings. In re Custody of C.S.F., 232 M 204, 755 P2d 578, 45 St. Rep. 992 (1988), following Welch v. All Persons, 78 M 370, 254 P 179 (1927).

Continuing Court Jurisdiction Regarding Maintenance, Support, Property Disposition, and Child Custody — New Judge: Since under Montana law a court has continuing jurisdiction in matters of maintenance, support, property disposition, and child custody, a newly appointed judge may make findings in a case he or she has not heard, may need to hear new evidence, and

is entitled to rely on the record established in the case. In re Marriage of Ensign, 227 M 357, 739 P2d 479, 44 St. Rep. 1146 (1987).

Petition to Terminate Joint Custody — Standard: A husband petitioned for modification of a joint custody arrangement. He sought permanent custody of the children, with limited visitation rights for the wife. The District Court denied the petition, finding that husband failed to establish that the children's present environment seriously endangered their physical, mental, moral, or emotional health. On appeal, the husband contended that the District Court should have applied the best interest of the children as the standard for the petition to modify joint custody. The Supreme Court held that under 40-4-224 (now repealed) the appropriate standard was serious endangerment, as applied by District Court under 40-4-219, since the husband's petition was one to actually terminate the wife's custody. In re Marriage of Gahm & Henson, 222 M 300, 722 P2d 1138, 43 St. Rep. 1281 (1986), followed in In re Marriage of Frydenlund, 255 M 474, 844 P2d 58, 49 St. Rep. 1074 (1992), distinguishing In re Custody of J.H., 231 M 301, 752 P2d 194 (1988), and In re Marriage of Johnson, 238 M 153, 777 P2d 305 (1989).

Reasonable Visitation Provision Replaced by Fixed Visitation Schedule — No Abuse of Discretion: Following dissolution of marriage, mother was granted custody of two minor children with reasonable visitation awarded to father. In the ensuing months, the father was permitted to visit the children only once and further attempts to arrange visitation were not successful since the mother had no phone and would not respond to messages. The father petitioned the District Court to grant a fixed visitation schedule, and the petition was granted. Although not required under former Rule 52(a), M.R.Civ.P. (now superseded), the order contained findings and conclusions, including evidence that the District Court Judge considered the best interests of the children and the conclusion that the mother's suggested graduated basis visitation schedule required reasonableness that was lacking in both parties. The Supreme Court held that the District Court's aid was necessary to clarify the meaning of "reasonable visitation" and found no abuse of discretion in the District Court Judge's conclusion. In re Marriage of Vinecke, 221 M 58, 716 P2d 638, 43 St. Rep. 633 (1986).

Exclusion of Evidence on Child Abuse Proceeding Concerning Father — Harmless Error: It was harmless error, in a child custody modification proceeding, for a District Court Judge to exclude evidence that a petition for temporary investigative authority, alleging sexual abuse by the father, had been filed under Title 41, ch. 3, and dismissed for lack of evidence after being heard by the same judge who made the custody modification determination. In re Marriage of Stout, 216 M 342, 701 P2d 729, 42 St. Rep. 856 (1985).

Joint Custody — Section for Termination Not Modification of Terms or Times: Based upon the terms of the uniform marriage and divorce law, 40-4-219 primarily addresses the traditional sole custody/visitation situation. However, in Montana, under 40-4-222 through 40-4-224 (all now repealed), joint custody is encouraged and provides shared rights and responsibilities for child rearing. Pursuant to 40-4-224(3) (now repealed), any modification of joint custody under 40-4-219 is for the termination of joint custody, not for the resolution of a dispute over the times or terms of physical custody. In re Marriage of Paradis, 213 M 177, 689 P2d 1263, 41 St. Rep. 2041 (1984).

When "Continuing Jurisdiction" Applicable: The Supreme Court held that the father's reliance on the doctrine of "continuing jurisdiction" as being the sole jurisdictional test in interstate custody disputes is misplaced. That doctrine is linked to 40-4-219 regarding jurisdiction to modify prior custody decrees. In those custody cases where a state other than Montana has a possible interest, the jurisdictional requirements of 40-4-211 must be met before a court may assert "continuing jurisdiction" under 40-4-219. In this custody dispute, the issue is one of overcoming the premier jurisdictional hurdle by establishing one of the disjunctive requirements of 40-4-211. The father established that both he and the child have a significant connection with Montana and there is substantial pertinent evidence here. Bolton v. Bolton, 212 M 212, 690 P2d 401, 41 St. Rep. 1698 (1984), followed in In re Marriage of Harper, 235 M 41, 764 P2d 1283, 45 St. Rep. 2145 (1988).

Change in Custody From Temporary Order — Not Modification of "Prior Custody Decree": In 1981, the District Court awarded the wife custody of the minor children during the pendency of an action for dissolution of marriage. The court specifically stated that this order was made without prejudice to the rights of the parties or their children. Two years later, the court entered the final custody order and in it awarded custody of one child to the father. The wife appealed, claiming that the District Court had erroneously modified an existing custody decree and had disturbed custodial continuity. The Supreme Court affirmed, ruling that although custody should be determined without delay and 2 years had elapsed prior to the final custody award, modification of the temporary custody order was proper. In re Marriage of Beitz, 211 M 111, 683 P2d 485, 41 St. Rep. 1247 (1984).

Admission of Opinion Testimony Not Based on Personal Observation — Not Reversible Error: In a custody dispute, when a social worker testified on the children's environment in their mother's home even though the social worker had not been to the home, the Supreme Court ruled that this was not reversible error because there was no evidence that the trial judge had relied on the social worker's testimony on this matter since there was other similar evidence in the record. Connolly v. Connolly, 209 M 298, 680 P2d 568, 41 St. Rep. 720 (1984).

Grounds for Modification: The marriage of the parents was dissolved in 1980 in Helena, Montana. Custody of the two older children was awarded to the father and that of the two younger children, aged 5 and 6, to the mother. The father and the older children remained in Helena, and the mother moved to Wyoming. In 1983, the father filed in District Court for a modification of the custody decree under the dangerous environment provision of this section, requesting that he be given custody of all four children. The District Court granted the father's request, and the mother appealed. The Supreme Court affirmed, ruling that because testimony in the District Court indicated that: (1) on numerous occasions, the mother had left the younger children entirely unattended or in the care of their older siblings, the elder of whom was 10 years old, and the mother did not believe this to be a dangerous practice although expert testimony indicated that it was a dangerous practice; (2) the mother was having an intimate relationship with a married man who spent five nights a week with her and used obscene and abusive language in front of the children; and (3) it would be in the best interests of the children to grow up together, the District Court's decision was correct. Connolly v. Connolly, 209 M 298, 680 P2d 568, 41 St. Rep. 720 (1984), distinguished in In re Marriage of Youngs, 215 M 330, 698 P2d 404, 42 St. Rep. 405 (1985).

Hostility and Lack of Cooperation by Custodial Parent — Modification Granted: In proceeding relating to father's child visitation rights the mother testified, and the evidence showed, that she did not and would not encourage the child to have a relationship with child's father or father's parents. The mother was hostile toward all three and influenced the child against them. Various attempts at visitation agreements had all required the three to travel from California to Montana, where the mother and child resided. The court found a material change of circumstances threatening the emotional health and welfare of the child. Order giving the father custody for 3 weeks in California each August until further order of the court was affirmed. In re Custody of Ericka M., 208 M 201, 676 P2d 231, 41 St. Rep. 267 (1984).

Restricting Visitation — Same Standard as Modifying Custody Decree: The District Court modified custody and limited the mother's visitation rights. The District Court's restriction of mother's visitation is governed by 40-4-217, which is the same standard used to judge modification of a custody decree in 40-4-219. Since the modification is supported by the court's finding, there is no error in restricting the mother's visitation rights. R.L.S. & T.L.S v. Barkhoff, 207 M 199, 674 P2d 1082, 40 St. Rep. 1982 (1983).

Pre-Decree Facts to Be Considered — Best Interests of Child to Be Determined: Where the husband petitioned the court to modify its prior custody decree and, after the initial hearing on the petition, the wife sought to introduce evidence of the husband's unfitness as a parent, the District Court erred in refusing to admit that evidence. The statute requires the court to consider pre-decree facts unknown to the court, and even if the fitness of the husband was not challenged at the first hearing after which a custody order was issued, the court must still determine the best interests of the child. The court may therefore not exclude any testimony bearing on that issue which constitutes "facts . . . unknown to the court" at the time the decree was issued. Sarsfield v. Sarsfield, 206 M 397, 671 P2d 595, 40 St. Rep. 1736 (1983), distinguished in In re Marriage of Starks, 259 M 138, 855 P2d 527, 50 St. Rep. 719 (1993), and followed in In re Marriage of Johansen, 261 M 451, 863 P2d 407, 50 St. Rep. 1403 (1993).

Motion to Enforce Decree — Clarification of Visitation Provisions: Divorce decree gave wife custody of the minor children and gave husband reasonable visitation rights and certain periods of time during the summer and holidays. On wife's motion for enforcement of the decree, husband was clearly shown to have abused his visitation rights. The evidence warranted court's clarification of the rights by granting each party alternate weekends with the children, setting a specific 40-day summer visitation, and providing for the manner in which the husband was to arrange visitations. There was clearly no abuse of discretion. Baker v. Baker, 198 M 371, 646 P2d 522, 39 St. Rep. 1031 (1982).

Clarification of Visitation Rights Not Decree Modification: In a dissolution of marriage action, the wife was granted custody of the child and the husband had reasonable visitation rights. After the wife moved 600 miles away, the husband petitioned for specification of his visiting rights and was granted the right of clarification of his rights after appeal. The specification of visitation was not a modification of decree because the rights were not expanded but clarified. Sanderson v. Sanderson, 191 M 316, 623 P2d 1388, 38 St. Rep. 277 (1981).

Prior Custody Not Modified: Upon a petition for habeas corpus filed by a natural father for transfer of his child out of the temporary custody of the child's grandparents back to the father, who was initially awarded custody, the District Court erred in awarding custody to a third party who had not even sought custody, and the court erred in dismissing the father's petition. A District Court is without authority to award custody to a nonpetitioning party under ordinary circumstances. Moreover, where, as here, grandparents are seeking to modify a custody decree awarded to a natural parent, the District Court was bound to follow the law as set out in Schiele v. Sager, 174 M 533, 571 P2d 1142 (1977), Holm v. Holm, 172 M 81, 560 P2d 905 (1977), Groves v. Groves, 173 M 291, 567 P2d 459 (1977), and Easton v. Easton, 175 M 416, 574 P2d 989 (1978), that 40-4-211 through 40-4-221 are designed to favor custodial continuity over the rights of the custodians. In re Marriage of Korol, 188 M 351, 613 P2d 1016 (1980).

Custody Modification Denied — Elements of Section Not Established: The District Court did not err in failing to modify a custody decree since the elements of this section were not established to the satisfaction of the District Court, whose judgment remains undisturbed absent abuse of discretion. Weber v. Weber, 176 M 144, 576 P2d 1102 (1978).

Determining Custody Distinguished From Modification: The court did not err by failing to interview a minor child and order that an investigation and report concerning custodial arrangements be made, since the only issue before the court was whether to modify a custody decree, determination of custody already having been made. Easton v. Easton, 175 M 416, 574 P2d 989 (1978).

Jurisdictional Prerequisites: Subsections (1)(a) through (1)(c) are jurisdictional prerequisites to modification that were placed there to serve the basic policy behind the entire section, the policy of custodial continuity. To allow these crucial issues to be resolved merely by references to the best interests of the children would seriously weaken the statute. In re Custody of Dallenger, 173 M 530, 568 P2d 169 (1977).

Discretion of Court — Denial of Custody to and Limitation of Visitation Rights of Father: The District Court did not abuse its discretion in failing to modify the decree of divorce to award custody to the father in agreeing to modify the decree to limit his visitation rights in the best interests of the children. However, the mother's request for attorney fees was denied because the father's modification petition was not vexatious. Lee v. Gebhardt, 173 M 305, 567 P2d 466 (1977).

"Seize and Run" of Minor Children as Not Conferring Jurisdiction in Custody Modification Cases: District Court erred in assuming jurisdiction to award custody of minor children to father living in Montana based on children's physical presence before court where divorce and custody had been previously awarded to mother in State of Washington. Mere fact father seized children from mother living in Washington and brought them before Montana court is insufficient to establish jurisdiction over mother who has no "contacts" with State of Montana, and any attempt by Montana to exercise jurisdiction over her would be in violation of the Due Process Clause of 14th amendment to the United States Constitution. Therefore, any custody decree rendered by Montana court would not be entitled to full faith and credit, and the interstate custody battle would continue, and whatever chance the children have for stability and happiness would be lost amidst the din of warring parents. State ex rel. Muirhead v. District Court, 169 M 535, 550 P2d 1304 (1976).

Requirement of Procedural Due Process: In custody hearings one must receive notice, and therefore it was improper to terminate custody at a hearing on contempt for nonsupport when respondent had not been given notice that custody would be at issue. State ex rel. Shelhamer v. District Court, 159 M 11, 494 P2d 928 (1972).

Sufficiency of Evidence, Findings

Primary Caretaker Presumption Rebutted — Modification of Joint Custody Affirmed: Michael and Michelle entered a joint child custody arrangement with physical custody shared equally, alternating weekly. One year after the dissolution, Michelle was accepted at a Billings university and sought a custody modification that would designate her as primary custodian and that would allow her to move with the child to Billings from the family's hometown of Glasgow. Michael testified as to the child's ties to home, school, community, and family in Glasgow, while Michelle stressed the importance of consistency of herself as primary physical custodial parent, having provided the primary care for the child during the 3 years prior to dissolution. After considering all the factors in 40-4-212, the District Court granted Michael primary residential custody during the school year and Michelle during the summer, with 9 days a month visitation for Michelle during the school year and Michael one weekend visitation a month during the summer. Michelle appealed, contending that the court failed to properly apply the primary care presumption in 40-4-212(3) (deleted 1997) because the court considered that both parents shared primary care equally since their divorce rather than considering that she had provided most of the primary care during the child's life. The Supreme Court, noting that there was no initial designation of primary caregiver or custodian in this case, held that a proper determination of the child's best interests was sufficient to rebut the primary care presumption. In re Marriage of Hlad, 282 M 449, 938 P2d 673, 54 St. Rep. 426 (1997), distinguishing In re Marriage of Abrahamson, 278 M 336, 924 P2d 1334 (1996).

Return of Custody to Primary Residential Parent Following Temporary Change in Residence: Following a period of change in residential custody from mother to father after allegations of neglect and abuse were raised by the father, mother sought a reinstatement of her residential custody. Following a number of hearings over 2 years, the District Court found that: (1) there had been no significant change in circumstances of either the children or the mother; (2) it was in the best interests of the children to return to the mother; and (3) none of the six factors in subsection (1) of this section merited a permanent change in residential custody. The court further found that the father had denied and frustrated and likely would continue to deny and frustrate contact between the mother and the children. Because the court made a determination on each of the statutory factors and because the findings and conclusions were supported by substantial credible evidence, the court did not err in returning residential custody to the mother. In re Marriage of Allison, 269 M 250, 887 P2d 1217, 51 St. Rep. 1502 (1994), followed in In re J.J.G., 1998 MT 28, 287 M 313, 954 P2d 1120, 55 St. Rep. 100 (1998).

Verbatim Adoption of One Party's Findings, Conclusions, and Order Not Error: The mother asserted that the lower court erred in adopting verbatim the father's proposed findings of fact, conclusions of law, and proposed order modifying custody. The Supreme Court held that it was not error so long as the proposed findings, conclusions, and order were comprehensive, detailed, and supported by the evidence. In re Marriage of Lockman, 266 M 194, 879 P2d 710, 51 St. Rep. 726 (1994).

Necessity of Determining Child's Preference When Record Clearly Shows Change Is Necessary: Although it would have been preferable for the judge to interview the children in a change of custody proceeding to determine which parent they wanted to live with, such a determination is not required in every case. Here, failure to make the determination was not error because the record clearly showed that the best interests of the children required a change of custody from the mother to the father. McDowell v. McDowell, 263 M 252, 868 P2d 1250, 51 St. Rep. 42 (1994).

Evidence of Frustration or Denial of Visitation Rights — Modification Proper: The following evidence showed a willful and continuous attempt to frustrate visitation sufficient to warrant a modification of joint custody to sole custody by mother: (1) father denied visitation on consecutive Christmases, requiring mother to contact the court and her attorney to receive visitation; (2) father obstructed mother's ability to have telephone contact with the children by refusing to give her his unlisted phone number; (3) father failed to notify mother of one child's tonsillectomy; and (4) father neglected to communicate regarding the children's progress in school. In re Marriage of Moseman, 253 M 28, 830 P2d 1304, 49 St. Rep. 349 (1992).

Evidence of Serious Endangerment Sufficient to Warrant Modification: Modification of a joint custody order to grant physical custody to father was warranted based on the following evidence of serious endangerment: (1) a Department of Family Services (now Department of Public Health and Human Services) agent testified that the children's best interests would be served and physical, emotional, and educational endangerment avoided by the change in custody; (2) mother was consistently uncooperative, antagonistic, and intimidating toward the children's teachers and school authorities; (3) mother arbitrarily refused when assistance was urged, available, and offered in providing special help for one of the children; (4) mother abused alcohol; (5) mother moved frequently; (6) mother refused to allow visitation; (7) mother did not exhibit a stable lifestyle or living situation; (8) school authorities and neighbors noted that the children were happier, more open, and more relaxed with father; and (9) children made remarkable educational progress when living with father. In re Marriage of Miller, 251 M 300, 825 P2d 189, 49 St. Rep. 36 (1992), criteria clarified in In re Marriage of Ansell/Elser, 271 M 265, 895 P2d 619, 52 St. Rep. 434 (1995).

Modification of Custody — Applicability of Best Interest Standard: In resolving whether modification of custody will be allowed, a court need merely make a "best interest" determination pursuant to 40-4-224(2) (now repealed) rather than deciding whether the more stringent requirements of this section are satisfied. As long as a court correctly complies with 40-4-224 (now repealed), consideration of this section is harmless and does not constitute reversible error. In re Marriage of Ferguson, 246 M 344, 805 P2d 1334, 47 St. Rep. 2142 (1990).

Standard of Review — "Clearly Erroneous" Standard: As set out in In re Marriage of Johnson, 238 M 153, 777 P2d 305, 46 St. Rep. 1164 (1989), when reviewing a District Court's findings regarding modification of custody and whether a party has met the custody criteria in this section, the Supreme Court will not reverse the findings unless they are clearly erroneous. In re Marriage of Arbuckle, 243 M 10, 792 P2d 1123, 47 St. Rep. 1150 (1990).

Affidavits Insufficient to Warrant Hearing on Custody Modification — Determination in Discretion of District Court: It was within the discretion of the District Court to determine that affidavits filed by the mother relating to a psychologist's report on the adverse effects of the custody litigation on the child did not constitute the necessary factual basis to warrant a hearing on the modification of custody. In re Marriage of Cox, 226 M 176, 736 P2d 97, 44 St. Rep. 567 (1987).

Sufficient Grounds for Modification — Parental Interference — Children's Requests: The District Court's decision to modify custody was clearly supported by evidence that: (1) the children requested they be allowed to live with the father; (2) the mother had removed one of the children to Utah despite her knowledge of a court order restraining her from doing so; (3) the relationship among the children, father, and stepmother was extremely close and loving; (4) the mother impaired, frustrated, and attempted to stifle the children's relationship with their father and interfered with the children's communications with each other while they were separated; (5) the mother monitored and tape-recorded calls to and from the father and children; (6) the mother delayed or intercepted letters and photographs sent through the mail; and (7) the mother discouraged the children's desire to spend time with the father and threatened to sell the children's toys and move to another country and never see them again should custody be changed at their request. In re Marriage of Cook, 223 M 293, 725 P2d 562, 43 St. Rep. 1732 (1986).

Court Not in Error in Denying Joint Custody and Limiting Summer Visitation: Appellant husband appealed judgment denying joint custody and limiting summer visitation to 2 weeks each summer. Appellant sought joint custody and summer visitation of 6 to 10 weeks. The District Court detailed to an extraordinary degree its concerns on the children's best interests. Furthermore, it left the door open for modification and for appellant to demonstrate, in the future, his capacity for joint custody or a longer period of visitation. The Supreme Court held that the District Court did not abuse its discretion and that its judgment was supported by substantial credible evidence. In re Marriage of Shelton, 219 M 456, 712 P2d 782, 43 St. Rep. 89 (1986).

Modification of Custody — Sufficiency of Evidence: The primary duty of deciding proper custody of children is the task of the District Court. On appeal, all reasonable presumptions as to the correctness of the determination of the District Court will be made, and that determination will not be disturbed unless there is a mistake of law or finding of fact not supported by credible evidence which would amount to a clear abuse of discretion. The finding must be clearly erroneous. In re Marriage of Robbins, 219 M 130, 711 P2d 1347, 42 St. Rep. 1897 (1985).

Allowable Evidence — Events Since Original Decree or Last Petition: Under this section, a judge should hear only facts and evidence arising since or that were unknown to the court at the time of the original decree, or since the last petition to modify it, whichever is later. A purpose of this section is to prevent repeated attempts by a noncustodial parent to modify custody. In this case, counsel for both sides were admonished for repeated references at the District Court level and on appeal to evidence before the District Court on the prior petition to modify, references made solely in an attempt to unduly prejudice the court. In re Custody of Holm, 215 M 413, 698 P2d 414, 42 St. Rep. 504 (1985).

Evidence — Supported, Almost Uncontradicted, Social Worker Testimony: District Court's decision not to change child's custody from the mother to the father was supported by the almost uncontradicted testimony of a social worker familiar with the mother and child, which was itself supported by several witnesses. Father's assertion that the child was integrated into the father's new family, because the child spent most of the time between March and September (the month of his petition) with that family, was erroneous. In re Custody of Holm, 215 M 413, 698 P2d 414, 42 St. Rep. 504 (1985).

Substantial Evidence Found to Support Change of Custody — Potential for Child Abuse: Where the wife's former husband petitioned for a change in the custody of the parties' children, alleging that the boyfriend and future husband of his former wife was an admitted child molester and posed a substantial risk to the welfare of his children, the District Court did not err in modifying its original custody decree and awarding custody to the husband. Although the evidence was conflicting, there was substantial record evidence to support the theory that the wife's boyfriend posed a risk to the children and the custody decree was therefore correctly modified. Sarsfield v. Sarsfield, 206 M 397, 671 P2d 595, 40 St. Rep. 1736 (1983), followed in In re Marriage of Starks, 259 M 138, 855 P2d 527, 50 St. Rep. 719 (1993).

Contradictory Evidence in Custody Dispute — Findings Supported by Substantial Evidence: Where there was contradictory evidence introduced by the parties to a custody dispute, the Supreme Court held that the findings of fact, while lacking in detail, were sufficiently supported by record evidence, especially that of a county social worker, to support the District Court's findings that the welfare of the parties' children was endangered by being in their mother's custody. C.C.W. v. H.M.W., 205 M 498, 668 P2d 1065, 40 St. Rep. 1455 (1983).

Change of Custody — Factual Determination Required: The parents were granted a dissolution of marriage in 1977, and the mother was awarded custody of the two children. The mother was in an automobile accident in 1969 and has been subject to periodic epileptic seizures. The father petitioned for change of custody after the children had been with him during the summer and after the mother's new husband had called him saying the mother was unfit. Evidence was presented that the mother frequently left the children unattended, that several times she had seizures involving automobile accidents while the children were with her, and that she had a problem with alcohol abuse. The District Court granted custody to the father, and the mother appealed. The Supreme Court found that the District Court had correctly determined under 40-4-219(1)(c), upon the basis of the facts presented, that there had been a change of circumstances since the original decree and that the change in custody was necessary in the best interests of the children. Corbett v. Corbett, 195 M 279, 635 P2d 1319, 38 St. Rep. 1852 (1981).

Facts Unknown to Court at Time of Prior Decree — Error to Limit Testimony to Period Following Decree: The initial custody decree ratified and incorporated an agreement executed by the parties. Appellant later petitioned for a modification of the original decree. During trial the District Court limited the testimony to the period following the original decree. The Supreme Court found that it was reversible error to limit the evidence to postdecree facts. The statute requires the court to examine all relevant facts unknown to the court at the time of entry of the prior decree. When the original decree is based on an agreement, the court's inquiry is not limited to changed circumstances. The court is required to consider facts which existed at the time of the original decree. In re Custody of R.L.S. & T.L.S., 193 M 469, 632 P2d 703, 38 St. Rep. 1328 (1981).

Disregard for Provisions of Act: The court erred in relying on the "best interest of the child" test without making a specific finding that there had been a change in circumstances which seriously endangered the children's physical, mental, moral, or emotional health, and that the harm likely to be caused by a change of environment was outweighed by its advantages to the children. Schiele v. Sager, 174 M 533, 571 P2d 1142 (1977).

Temporary Custody Order — Ex Parte: To prevent ping-pong custody litigation, this section places a heavy burden on the person seeking to modify a prior custody decree. Plaintiff did not meet this burden and could not shift it to defendant by an ex parte temporary order of custody. Groves v. Groves, 173 M 291, 567 P2d 459 (1977), followed in In re Custody & Support of H.Q. & T.Q., 218 M 308, 709 P2d 154, 42 St. Rep. 1604 (1985), as to burden of proof.

Change in Circumstances; Danger to Child

Petition Resulting in Change of Primary Residence of Children in Joint Custody Construed as Petition to Terminate Joint Custody — Jurisdictional Requirements Applicable — Best Interest Standard Applicable on Petition Not Resulting in Change of Primary Residence: A motion or petition to modify a sole custody provision or to terminate a joint custody provision must satisfy the jurisdictional prerequisites set out in this section. Likewise, a motion or petition to modify child custody provisions in a dissolution decree that have the effect of substantially changing the primary residence of the parties' children, even though the formal joint custody designation is retained, is to be construed as a motion or petition to terminate joint custody and must also satisfy the jurisdictional prerequisites set out in this section. Any effort to modify the physical custody arrangement in a decree that provides for joint custody but that does not seek a substantial change in the children's primary residence may be considered according to the best interest standard set out in 40-4-212. In this case, because the mother sought a modification of the children's physical custody arrangement, the District Court erred in modifying physical custody without finding substantial endangerment as required by this section. In re Marriage of Johnson, 266 M 158, 879 P2d 689, 51 St. Rep. 703 (1994), followed in In re Marriage of Gallagher, 266 M 358, 880 P2d 1303, 51 St. Rep. 840 (1994), In re Marriage of Ansell/Elser, 271 M 265, 895 P2d 619, 52 St. Rep. 434 (1995), and In re Marriage of Syverson, 281 M 1, 931 P2d 691, 54 St. Rep. 32 (1997).

Frequent Moves and Lack of Stable Lifestyle — Modification Warranted: Following dissolution, mother moved some 13 times, affording the child little opportunity for a stable home environment. She removed the child from school in the middle of the year on at least two occasions and testified at trial that she planned to change schools again the following year. Citing her lack of a stable lifestyle and living situation, while noting that the father resided permanently in Missoula in a stable environment, the District Court's findings met the criteria of this section for modification of custody to the father on the basis of facts that arose subsequent to the prior decree. In re Marriage of Klose, 243 M 211, 793 P2d 1311, 47 St. Rep. 1156 (1990).

Joint Custody Award Proper: For a period of time after the wife filed for divorce, she and her child continued to live with the husband. After the couple separated, the wife moved out of state with the child. The Supreme Court stated that a custody arrangement had never been agreed upon and remained at issue pending resolution of the action; therefore, de facto custody had not been established. The court went on to hold that because no de facto custody existed, then this section, which provides that a court may modify a prior custody decree, did not apply to the case before it because there was no decree or informal arrangement to modify. In re Marriage of Hoffmaster, 239 M 84, 780 P2d 177, 46 St. Rep. 1531 (1989).

Instability of Mother's Lifestyle Justifies Custody Modification: The District Court had sufficient reason to find that family circumstances had changed since the original award of custody to the mother. The changed circumstances show that the physical, mental, moral, and emotional health of the children would be seriously endangered if they remained with her. The mother's lifestyle for several years showed an inability to maintain a stable environment for her children. The advantages to the children under their father's custody outweigh any harm that would accompany a change in their environment. He has a stable job and home life and has exhibited concern for their well-being. In re Marriage of Morazan, 237 M 294, 772 P2d 872, 46 St. Rep. 814 (1989).

Alteration of Temporary Custody Order — Showing of Changed Circumstances Not Required: Wife was awarded custody on an ex parte motion and at a later hearing was granted temporary custody pending final resolution of the action. Although the temporary order did not specifically state that the rights of the noncustodial parent would not be prejudiced, the Supreme Court held that the temporary order did not require a showing of changed circumstances before the final custody order could alter the terms of the temporary order. It would be inherently unfair to require a noncustodial parent to make a higher threshold showing of changed circumstances before a custody order may deviate from a temporary order. In re Marriage of Allen, 237 M 64, 771 P2d 578, 46 St. Rep. 624 (1989), distinguishing In re Custody of Andre, 234 M 80, 761 P2d 809, 45 St. Rep. 1745 (1988).

Petition to Modify Joint Custody — Standard — Change of Residence of Custodial Spouse: Wife appealed a District Court order that modified a joint custody decree by changing the physical custody of the children from the wife to the husband after the wife had requested that the husband assume custody for 1½ years because of her difficult financial circumstances. The Supreme Court affirmed, holding that the District Court properly applied the best interest of children standard, rather than serious endangerment, which may be relied on only to terminate a joint custody arrangement. Furthermore, the husband was denied custody not because the wife moved to Texas but because the children's interests would best be served by allowing them to remain in the same family, school, and community they have enjoyed for several years. In re Marriage of Bergner & Owens, 222 M 305, 722 P2d 1141, 43 St. Rep. 1285 (1986).

Father's Fitness as Parent — Scope of Authority on Remand: Noncustodial father filed a petition to modify custody decree. In the original proceeding, the District Court held that mother's proposed marriage to admitted child molester was sufficient change of circumstances to warrant grant of custody to father. On appeal, Supreme Court affirmed the finding of changed circumstances, but remanded to District Court for findings regarding father's fitness as a parent. On remand, the District Court found the father to be fit to have custody of his children, but concluded that mother's decision to break off relations with child molester created a lack of changed circumstances preventing modification of custody. The Supreme Court reversed District Court decision and awarded custody to father. On remand, a District Court must abide by the Supreme Court mandate; in this case, the District Court was bound by prior finding of changed circumstances and the court erred in reconsidering the question of changed circumstances. In re Marriage of Sarsfield, 215 M 123, 695 P2d 473, 42 St. Rep. 231 (1985).

Custodial Parent in Joint Custody Moving to Another State — Entitled to Presumption: A parent, under a joint custody arrangement of 6 months' custody to each parent, is presumptively entitled under former law to move with the child and settle in a new home; such moving and resultant school change do not constitute grounds for modification of the terms of the joint custody by the other parent. In re Marriage of Paradis, 213 M 177, 689 P2d 1263, 41 St. Rep. 2041 (1984).

Modification of Joint Custody Based on Avoiding Change of School — Error: The District Court decision to modify joint custody was apparently based on the requirement that under the existing custody arrangement the child would be required to change schools to one not in Montana. The Supreme Court held that it disapproves favoring institutions in our state over those in another and further held that, as provided in 40-6-231 (now repealed), a parent is presumptively entitled to move with a child and settle in a new home. In re Marriage of Paradis, 213 M 177, 689 P2d 1263, 41 St. Rep. 2041 (1984).

Two-Part Test for Modification:

Under this section (prior to 1983 and 1997 amendments), a finding that the child has been integrated into the noncustodial parent's home merely satisfies the jurisdictional prerequisite of modification. Once jurisdiction to modify is established, in order to modify the custody decree the court must also find that a change has occurred in the child's circumstances and that the effect of the change is that the child's best interests would be best served by a modification in custody. Hardy v. Hans, 212 M 25, 685 P2d 372, 41 St. Rep. 1566 (1984).

Section 40-4-219 sets out a two-part test to judge whether to modify a prior custody decree. The first part of the test contains two subparts. There must be a change of circumstances, and the change must be significant enough in relation to the best interests of the child that those interests are no longer served by the decree in force as judged by the criteria of 40-4-212. The second part of the test is that the primary custodian may not be changed unless the court finds the enumerated dangers exist and that the advantages of change outweigh the disadvantages. The facts of this case support the modification. R.L.S. & T.L.S. v. Barkhoff, 207 M 199, 674 P2d 1082, 40 St. Rep. 1982 (1983).

Grounds for Modification:

The marriage of the parents was dissolved in 1980 in Helena, Montana. Custody of the two older children was awarded to the father and that of the two younger children, aged 5 and 6, to the mother. The father and the older children remained in Helena, and the mother moved to Wyoming. In 1983, the father filed in District Court for a modification of the custody decree under the dangerous environment provision of this section, requesting that he be given custody of all four children. The District Court granted the father's request, and the mother appealed. The Supreme Court affirmed, ruling that because testimony in the District Court indicated that: (1) on numerous occasions, the mother had left the younger children entirely unattended or in the care of their older siblings, the elder of whom was 10 years old, and the mother did not believe this to be a dangerous practice although expert testimony indicated that it was a dangerous practice; (2) the mother was having an intimate relationship with a married man who spent five nights a week with her and used obscene and abusive language in front of the children; and (3) it would be in the best interests of the children to grow up together, the District Court's decision was correct. Connolly v. Connolly, 209 M 298, 680 P2d 568, 41 St. Rep. 720 (1984), distinguished in In re Marriage of Youngs, 215 M 330, 698 P2d 404, 42 St. Rep. 405 (1985).

A District Court may not exercise its discretionary power to modify a custody decree unless new facts or facts unknown to the court at the time of the original decree demonstrate that a change has occurred in the circumstances of the child or his custodian and such change is sufficient to warrant modification of the decree in order to promote the child's best interest. Foss v. Leifer, 170 M 97, 550 P2d 1309 (1976); Erhardt v. Erhardt, 171 M 49, 554 P2d 758 (1976).

Lack of Proper Care Constituting Change in Circumstances and Danger to Health: Where the District Court, in a custody dispute, found that since the entry of a prior decree by the court, changes occurred in the circumstances of the mother in that she did not properly care for the parties' children and that their physical and emotional health had been endangered, there was a sufficient change of circumstances shown to satisfy the statutory requirement. C.C.W. v. H.M.W., 205 M 498, 668 P2d 1065, 40 St. Rep. 1455 (1983).

Circumstances Changed to Detriment of Children: The parties were married and divorced twice. After the second divorce, custody of the oldest child was awarded to the father and the younger two children to the mother. The father petitioned for a change of custody so that he would be custodian of all the children. Evidence was presented that the mother had not been steadily employed since the divorce and her primary source of income was welfare. She was living with her father and was away for substantial periods of time. The grandfather and his wife had difficulty caring for the children. The boy had disciplinary, hygiene, and school problems that greatly improved when he was with the father. The children living with the mother were often dirty, and the baby had severe diaper rash. The evidence supported findings that circumstances had changed to the detriment of the children and that custody should be awarded to the father. In re Marriage of A.R.C. v. C.K.C., 203 M 353, 661 P2d 459, 40 St. Rep. 499 (1983).

Court Order to Give Notice of Change of Residence — Enforcement: The parties to this action were divorced and custody of their minor daughter was awarded to the mother. The decree provided that if the mother intended to establish residence in another state, she first obtain permission from the District Court. The mother moved to North Carolina in order to remarry, without informing the court. The father brought suit for a change of custody on the grounds that the mother had changed her residence within the state several times and had lived with men prior to her remarriage. The father did not prove that the mother's actions adversely affected the child's welfare so as to require a change of custody. The Supreme Court noted that because the mother had left the state without informing the trial court, she had effectively nullified the father's visitation rights. The change of custody action was the only meaningful option the father had to change visitation to reflect the geographical change in circumstances. The court suggested that District Courts could compel compliance with their orders concerning removal of children from the state by requiring a bond, security, or by holding the removing parent in contempt. In re Marriage of Winn, 190 M 73, 618 P2d 870, 37 St. Rep. 1734 (1980).

Best Interests of Child — Mother's Behavior: The welfare of the child is the paramount consideration in awarding custody. Mother's behavior was sufficient for court to award custody to father by modification. Brooks v. Brooks, 171 M 132, 556 P2d 901 (1976).

"Change of Circumstances" Construed:

The fact that the mother and custodian of the child in question permitted her paramour to take up residence in her home for a short time before their marriage did not constitute a "change in circumstances" sufficient to support a modification of the custody decree when it did not appear that this conduct caused any "moral decline" in the home, or in any way affected the physical, mental, or emotional well-being of the child. Foss v. Leifer, 170 M 97, 550 P2d 1309 (1976).

The phrase "change of circumstances" as used in this section with respect to modifications of custody orders is a term of art meaning circumstances changed so substantially that the best interests and general welfare of the child can best be promoted by alteration of the decree. Foss v. Leifer, 170 M 97, 550 P2d 1309 (1976).

Insufficient Change of Circumstance — Litigation to Be Minimized:

Changed circumstances or conditions are based on the principle that stability of home life of children is a vital factor to their well-being, and the turmoil of litigation must be minimized and sometime brought to an end. Gilbert v. Gilbert, 166 M 312, 533 P2d 1079 (1975).

Mother's restored mental health and remarriage was not a change in circumstances sufficient to change custody where all witnesses, including the mother, agreed that the father was a fit parent and that the children were well cared for. The crucial factor is the children's welfare, both material and psychological, considering in particular the ties of affection the children have formed and the consequences of breaking those ties based on the reason for the requirement of a change of circumstances. The principal concern is not only that the stability of the homelife of the children is an important factor, but also that the turmoil of litigation must somewhere end. Gilmore v. Gilmore, 166 M 47, 530 P2d 480 (1975).

Change in Circumstances or Unfitness of Custodial Parent — Prerequisite to Modification: If the court, in an uncontested hearing, has made any award or adjudication of custody, the issue of custody has been heard and may not be changed without a showing of justifiable grounds occurring after the custody award, testimony relating back to and prior to time of divorce being inadmissible, to protect the person who has custody from the harassment of further litigation. Svennungsen v. Svennungsen, 165 M 161, 527 P2d 640 (1974).

Remarriage of Custodial Parent: When father is custodial parent his remarriage is not sufficient change of circumstance to require change of custody without evidence that this remarriage was detrimental to the welfare of the child. Svennungsen v. Svennungsen, 165 M 161, 527 P2d 640 (1974).

Mother's Positive Development as Sufficient Change of Circumstances: Evidence the mother had, since time of divorce, remarried, overcome previous emotional difficulties, and quit her job in order to provide for time and attention needed to raise child supported modification of divorce decree, in best interest of child, so as to grant custody to mother. McCullough v. McCullough, 159 M 419, 498 P2d 1189 (1972).

Cases Under Former Provision Regarding Serious Endangerment

Judicial Notice of Disputable Fact Regarding Safety of Kerosene Heater Not Basis of Custody Decision — Harmless Error: Wife argued that the trial court improperly took judicial notice of a disputable fact regarding the safety of a kerosene heater used in the wife's home and that by permitting its personal views to become part of its decision, the court became an advocate for the husband. The court did make statements concerning the safety of using a kerosene heater in the home but stated that it did not base its decision on those statements; therefore, any error was harmless. In re Marriage of Gallagher, 266 M 358, 880 P2d 1303, 51 St. Rep. 840 (1994).

Petition Resulting in Change of Primary Residence of Children in Joint Custody Construed as Petition to Terminate Joint Custody — Jurisdictional Requirements Applicable — Best Interest Standard Applicable on Petition Not Resulting in Change of Primary Residence: A motion or petition to modify a sole custody provision or to terminate a joint custody provision must satisfy the jurisdictional prerequisites set out in this section. Likewise, a motion or petition to modify child custody provisions in a dissolution decree that have the effect of substantially changing the primary residence of the parties' children, even though the formal joint custody designation is retained, is to be construed as a motion or petition to terminate joint custody and must also satisfy the jurisdictional prerequisites set out in this section. Any effort to modify the physical custody arrangement in a decree that provides for joint custody but that does not seek a substantial change in the children's primary residence may be considered according to the best interest standard set out in 40-4-212. In this case, because the mother sought a modification of the children's physical custody arrangement, the District Court erred in modifying physical custody without finding substantial endangerment as required by this section. In re Marriage of Johnson, 266 M 158, 879 P2d 689, 51 St. Rep. 703 (1994), followed in In re Marriage of Gallagher, 266 M 358, 880 P2d 1303, 51 St. Rep. 840 (1994), In re Marriage of Ansell/Elser, 271 M 265, 895 P2d 619, 52 St. Rep. 434 (1995), and In re Marriage of Syverson, 281 M 1, 931 P2d 691, 54 St. Rep. 32 (1997).

Joint Custody Allowed Despite Abuse and Neglect Investigation: A father appealed from the District Court's denial of a motion to modify the joint custody agreement to award the father sole custody of an older daughter and primary physical custody of a younger daughter after the state removed the children from the mother's custody as a result of an abuse and neglect investigation. The Supreme Court affirmed, holding that the father failed to establish that modification would serve the best interest of the children. In re Marriage of McClain, 257 M 371, 849 P2d 194, 50 St. Rep. 314 (1993).

Mother's Contribution to Dangerous Environment Not Bar to Obtaining Custody: The parties' divorce decree awarded child custody and the family ranch to the father. The mother continued to reside at the ranch, refusing to leave. On several occasions, the situation resulted in physical violence between the parties. The mother sought modification on the basis that the environment endangered the parties' child. The Supreme Court ruled that there was a change in circumstances and that the mother's contribution to the dangerous environment did not bar her from obtaining a change in custody. In re Marriage of Hay, 241 M 372, 786 P2d 1195, 47 St. Rep. 361 (1990).

Poor Hygiene Practices Not Danger to Children: The petitioner moved for a change of custody on the basis that a court-ordered home study indicated that the custodial parent did not provide a clean home for the children. The Supreme Court upheld the lower court's decision that the custodial parent's housekeeping standards did not seriously endanger the children in any way. In re Marriage of Hoodenpyle, 241 M 345, 787 P2d 326, 47 St. Rep. 340 (1990).

Instability of Mother's Lifestyle Justifies Custody Modification: The District Court had sufficient reason to find that family circumstances had changed since the original award of custody to the mother. The changed circumstances show that the physical, mental, moral, and emotional health of the children would be seriously endangered if they remained with her. The mother's lifestyle for several years showed an inability to maintain a stable environment for her children. The advantages to the children under their father's custody outweigh any harm that would accompany a change in their environment. He has a stable job and home life and has exhibited concern for their well-being. In re Marriage of Morazan, 237 M 294, 772 P2d 872, 46 St. Rep. 814 (1989).

Father's Poor Home Environment — Children's Stress and Fear of Father: Substantial credible evidence supported the finding that custody of the children should be switched from father to mother because father has proved himself incapable of maintaining or portraying a loving, affectionate home environment free of stress and abuse. Testimony of mother's witnesses refuted that of father. The children testified that they feared their father and that they were extremely unhappy living with him. This was supported by testimony of a psychologist and the judicial district's director of family services. In re Marriage of Ostrem, 234 M 324, 763 P2d 35, 45 St. Rep. 1943 (1988).

Failure to Consider Children's Present Environment: On appeal by wife from modification of child custody, the Supreme Court held it was error for the District Court to fail to address the children's present environment and to adequately consider the harmful effects of a change in that environment. In re Marriage of Stephenson, 230 M 439, 750 P2d 1073, 45 St. Rep. 335 (1988).

Sexual Abuse of Daughters as Witnessed by Sons — Sufficient Grounds for Modification: In affirming an order modifying custody, the Supreme Court upheld as substantially credible the evidence, based on the children's statements, of sexual abuse by the father of the daughters that was observed by the sons, and psychologists' testimony that the boys were at high risk to begin acting out sexually (citing In re Marriage of Sarsfield, 206 M 397, 671 P2d 595, 40 St. Rep. 1736 (1983)). The court followed its decision in In re T.Y.K., 183 M 91, 598 P2d 593 (1979), that 41-3-101, et seq., grants the District Court the ability to make a determination of abuse and neglect as to all children in a family based on the policy that abuse of one child may have a detrimental effect on the other children's development. In re B.T., B.T., M.T., & M.T., 223 M 287, 725 P2d 230, 43 St. Rep. 1728 (1986).

Custody Modification Denied — Equivalent Vague Testimony as to Other's Wrongs: Divorced parents had joint custody of their two children, with residential custody in the mother. It was not an abuse of discretion to refuse to grant father's request for a custody modification. The father claimed the mother drank too much, neglected the children, and persistently violated the spirit and intent of the custody decree. The mother claimed the father was uncooperative, inconsiderate, and not prompt on visits. Each testified and had witnesses testify as to his respective parenting skills and the other's specific wrongdoings. The lower court found that neither was an unfit parent but that each attempted to use the children to aggravate the other. In re Custody & Support of H.Q. & T.Q., 218 M 308, 709 P2d 154, 42 St. Rep. 1604 (1985).

Custodial Parent Found Unstable and Alcoholic — Modification Granted: The Supreme Court refused to set aside, as not supported by evidence, a District Court order granting a change of a child's custody from the mother to the father when evidence indicated that: (1) the mother's lifestyle and living situation lacked stability; (2) the mother had been arrested for driving under the influence of alcohol with the child in her vehicle; (3) the mother had attended a residential alcoholism treatment center but had failed to stop drinking or follow up on her problem after her discharge; and (4) the father was able and willing to provide a more stable environment for the child. In re Marriage of Stout, 216 M 342, 701 P2d 729, 42 St. Rep. 856 (1985).

Itinerant Lifestyle and Physical Abuse — Modification Granted: The District Court did not err in transferring custody of a child from mother to father when court found: (1) that mother's remarriage resulted in an itinerant lifestyle with crowded and substandard housing conditions; (2) that the child was subjected to harsh, repeated, inappropriate, and excessive physical discipline and showed signs of abuse and fear of his stepfather; and (3) that the father had superior child raising and discipline practices and stability and security over that to which the child had been subject. The District Court's findings were supported by substantial evidence. The father met his required burden of proof to support his contention that modification of the decree was necessary to serve the best interests of the child. In re Custody of Dumont, 216 M 118, 700 P2d 167, 42 St. Rep. 687 (1985).

Potential for Serious Harm Sufficient for Jurisdiction — Best Interests of Children — Modification Granted: There was a sufficient change of circumstances in children's environment to justify change in custody when custodial father of four married mother of four minor children, became a member of a nondenominational religious group advocating rigid religious beliefs, and adopted a strict child-rearing philosophy involving physical punishment and a prohibition against school activities or extracurricular activities until high school. Fact that father had inflicted severe disciplinary practices only on the older children was sufficient to establish jurisdiction to consider modification. District Court awarded custody to the mother, who had remarried and had stable employment and a home in town that could provide children with opportunity for interaction with peers. Supreme Court found substantial credible evidence to support finding of District Court that change in custody was in best interests of children. Reinoehl v. Perry, 213 M 479, 691 P2d 1384, 41 St. Rep. 2269 (1984).

Finding of Serious Danger as Jurisdictional Prerequisite:

Where a psychologist, a witness for the husband in a custody dispute, testified that a child molester like the boyfriend of the wife could pose a substantial risk to the children of the parties in the setting of the wife's home, the District Court did not err in refusing to dismiss the husband's petition for a change of custody. Under this section, the petitioner must show only a potential for or probability of serious harm to a child in order to invoke the court's jurisdiction to amend a previous custody award. The probability of harm was sufficiently demonstrated in the husband's case in chief, and the petition for modification of custody was therefore properly heard. Sarsfield v. Sarsfield, 206 M 397, 671 P2d 595, 40 St. Rep. 1736 (1983), followed in In re Marriage of Starks, 259 M 138, 855 P2d 527, 50 St. Rep. 719 (1993).

A finding that the present custody arrangement "endangers seriously" the welfare of the children is the threshold to any court-ordered change of custody and, as such, is jurisdictional. "Welfare" and "best interests" of the children may not be considered until jurisdiction is established. Gianotti v. McCracken, 174 M 209, 569 P2d 929 (1977). See also In re Marriage of Starks, 259 M 138, 855 P2d 527, 50 St. Rep. 719 (1993).

Lack of Proper Care Constituting Change in Circumstances and Danger to Health: Where the District Court, in a custody dispute, found that since the entry of a prior decree by the court, changes occurred in the circumstances of the mother in that she did not properly care for the parties' children and that their physical and emotional health had been endangered, there was a sufficient change of circumstances shown to satisfy the statutory requirement. C.C.W. v. H.M.W., 205 M 498, 668 P2d 1065, 40 St. Rep. 1455 (1983).

Circumstances Changed to Detriment of Children: The parties were married and divorced twice. After the second divorce, custody of the oldest child was awarded to the father and the younger two children to the mother. The father petitioned for a change of custody so that he would be custodian of all the children. Evidence was presented that the mother had not been steadily employed since the divorce and her primary source of income was welfare. She was living with her father and was away for substantial periods of time. The grandfather and his wife had difficulty caring for the children. The boy had disciplinary, hygiene, and school problems that greatly improved when he was with the father. The children living with the mother were often dirty, and the baby had severe diaper rash. The evidence supported findings that circumstances had changed to the detriment of the children and that custody should be awarded to the father. In re Marriage of A.R.C. v. C.K.C., 203 M 353, 661 P2d 459, 40 St. Rep. 499 (1983).

Modification of a Custody Award Not Pending — No Finding That Child Is Endangered: Respondent's contention that denial of a petition for Writ of Habeas Corpus to obtain custody of a child is not appealable on the ground that a motion for modification of the custody decree filed against appellant by a third party was still pending cannot stand because under the governing provision then in effect, section 48-339, R.C.M. 1947, as amended [now as amended 40-4-219], the petition was not actually pending. Section 48-339, R.C.M. 1947, is jurisdictional and requires the District Court to find that the child is seriously endangered if a motion for a change of custody is brought within 2 years of entry of a divorce decree. Strouf v. Strouf, 176 M 406, 578 P2d 746 (1978); Olson v. Olson, 175 M 444, 574 P2d 1004 (1978). Here, the motion to modify custody was brought within the 2-year limitation, and the District Court failed to find that the child's health was seriously endangered or that the child would be endangered in the custody of his father. Thus there is no jurisdictional basis for the court to consider the parent's petition for change of custody and no petition is pending. In re Marriage of Korol, 188 M 351, 613 P2d 1016 (1980).

Family Integration

Family Integration — Not Grounds for Modifying Joint Custody Decree: The divorce decree between the parties provided for joint custody, and a subsequent modification gave primary physical custody to the mother. When the mother decided to move out of state, the father brought a motion to modify custody to give him primary physical custody on the basis that the child was integrated into his family and the Butte community. The Supreme Court held that the integration rationale only applied to proceedings to terminate joint custody and was inapplicable to modification actions. In re Marriage of Johnson, 238 M 153, 777 P2d 305, 46 St. Rep. 1164 (1989), distinguished, in implementing a prior order, in In re Marriage of Zuelke, 274 M 362, 909 P2d 684, 52 St. Rep. 1225 (1995).

Joint Custody — No Modification Based Upon Family Integration: The family integration standard of this section recognizes the need for continuity and stability where a custodial parent has freely relinquished his right to custody for a considerable length of time; however, under the joint custody provisions set forth in 40-4-222 through 40-4-224 (all now repealed), it was intended that the child be integrated into both homes of his parents and that this dual integration not be used as grounds for modification of a joint custody decree. In re Marriage of Paradis, 213 M 177, 689 P2d 1263, 41 St. Rep. 2041 (1984).

Voluntary Transfer of Custody Implied: The findings of the District Court that the mother acquiesced to the child's integration into the father's home are supported by substantial credible evidence. There were a voluntary transfer of the child's physical custody from the custodial to the noncustodial parent to avoid the atmosphere of grief following an unexpected family death and a subsequent transfer with knowledge of the child's integration into the father's home. Bolton v. Bolton, 212 M 212, 690 P2d 401, 41 St. Rep. 1698 (1984).

Attorney Fees and Costs

Lack of Evidence of Vexatiousness or Harassment Precluding Award of Attorney Fees: The award of attorney fees and costs was inappropriate when the record was void of any facts to support a finding that a modification action was vexatious or constituted harassment. In re Marriage of Miller, 251 M 300, 825 P2d 189, 49 St. Rep. 36 (1992).

Attorney Fees Awarded for Past Actions, Not Modification Action: As part of a modification order awarding physical custody of a child to the father, the court awarded attorney fees to the mother. The father contended that no fees should have been assessed because the action was for modification. The Supreme Court affirmed after noting that the award was for fees necessitated by the father's past legal actions and not by the modification action. In re Marriage of Arbuckle, 243 M 10, 792 P2d 1123, 47 St. Rep. 1150 (1990).

Child Custody to Be in Issue — Award of Attorney Fees: Because the wife's petition to hold the husband in contempt of the dissolution decree was so unfounded as to constitute harassment, the trial court awarded attorney fees to the husband. Trial court did not have authority to award attorney fees under 40-4-219 because child custody was not in issue. The Supreme Court nevertheless upheld the award, stating that the trial court did not abuse its discretion under general powers of equity. In re Marriage of Hereford, 223 M 31, 723 P2d 960, 43 St. Rep. 1508 (1986).

Attorney Fees: The Supreme Court affirmed a trial court award of attorney fees based on a finding that the modification of custody action was vexatious and constituted harassment. Easton v. Easton, 175 M 416, 574 P2d 989 (1978).

Cases Under Former Provision Prohibiting Modification Within Two Years

Affidavit Requirement: Prior to amendment in 1979, 40-4-219 required a motion for change of custody, filed within 2 years of the decree of dissolution, to be accompanied by an affidavit establishing that "there is reason to believe the child's present environment may endanger seriously his physical, mental, moral, or emotional health". This affidavit was also a jurisdictional prerequisite to a court's modification of its custody decree. The finding that the affidavit sufficiently established jurisdiction did not entail a finding that it also sufficiently established a motion to modify. McLean v. Seright, 187 M 194, 609 P2d 282 (1980).

Modification of Custody Award Within Two Years of Decree: Custody of the child was awarded to the father following a divorce, but the child remained with the mother while the father was in the Navy. Even after the father received a hardship discharge from the Navy, ostensibly to care for his daughter, the mother continued to have physical custody until the daughter was taken, without the mother's knowledge or consent, to Indiana by the father. The mother filed for modification of the custody decree but was within the former 2-year prohibition period (now deleted) of 40-4-219. The court found, however, that the actions of the father in removing the child from the only environment she had ever known since birth seriously endangered her physical, mental, moral, and emotional health. Such a finding was prerequisite to a court order changing custody within the 2-year period, and custody was accordingly changed to the mother. Mikkelson v. Mikkelson, 184 M 314, 602 P2d 984 (1979).

Allegation Regarding Environment Absent: The Supreme Court vacated an earlier order which stayed the District Court's judgment ordering return of custody of a child to the mother because the father was petitioning to modify custody within 2 years of the custody decree (restriction now deleted) with no allegation concerning what kind of environment the mother would provide in another state. Hamilton v. Hamilton, 176 M 488, 580 P2d 104 (1978).

Findings Required: The District Court did not have jurisdiction to modify a prior custody award made less than 2 years prior (restriction now deleted) when the court made no finding that the child's present environment seriously endangers his physical, mental, moral, or emotional health. The court also lacked jurisdiction to issue an order to show cause under 40-4-220 or to modify the custody decree under 40-4-211. Strouf v. Strouf, 176 M 406, 578 P2d 746 (1978).

Circumvention of Custody Modification Procedure: An order covering child custody, support, and visitation rights entered pursuant to a motion to set aside default judgment in the original divorce proceeding was issued in circumvention of the former 2-year prohibition against modification of custody decrees (now deleted) since it granted custody for 2 months each year to the noncustodial parent under the guise of modifying visitation rights. Olson v. Olson, 175 M 444, 574 P2d 1004 (1978).

Lack of Compliance — Two-Year Limitation: Defendant failed to meet the requirements imposed by this section when a petition for modification of a custody decree was brought within 2 years of its date of entry (which provision is now deleted). Easton v. Easton, 175 M 416, 574 P2d 989 (1978).

Temporary Order: A temporary custody order is not equivalent to a custody decree within the meaning of this section, thus defendant's petition for custody was not barred by the former 2-year limitation (now deleted). Groves v. Groves, 173 M 291, 567 P2d 459 (1977).

Computation of Time: When the prior District Court action dealt only with clarification of visitation rights and not with child custody, it was properly disregarded in computing the time elapsed from date of the custody decree sought to be modified. Ronchetto v. Ronchetto, 173 M 285, 567 P2d 456 (1977).

Jurisdiction: Court lacked jurisdiction for modification petition when filed earlier than 2 years from date of decree (restriction now deleted). The fact that original petition was filed prior to effective date of Uniform Marriage and Divorce Act was to no avail in avoiding application of Act. Holm v. Holm, 172 M 81, 560 P2d 905 (1977).

Attorney General's Opinions

Fee for Filing Petition for Contested Amendment of Parenting Plan Not Applicable to Petition to Modify Child Support: Modification of child support pursuant to 40-4-208 is a separate procedure that does not necessarily entail amendment of a parenting plan pursuant to this section. Therefore, for filing purposes, a petition to modify child support is not considered a petition for amendment of a parenting plan, and it is inappropriate for a Clerk of Court to collect the $120 statutory fee for filing a petition for a contested amendment of a parenting plan under 25-1-201(1)(a) upon the filing of a petition to modify child support in an existing cause. 47 A.G. Op. 14 (1998).

Commencement Filing Fee Not Chargeable for Certain Postdissolution Proceedings: The Attorney General relied on the holding in In re Marriage of Billings, 189 M 520, 616 P2d 1104 (1980), in finding that a District Court Clerk may not charge a commencement filing fee for postdissolution of marriage action that is brought under the same cause number as the marital dissolution proceeding and that remains under the continuing jurisdiction of the District Court. 43 A.G. Op. 72 (1990).

Law Review Articles

Child Custody and the Alcoholic Parent, Bradley, 46 Mont. L. Rev. 433 (1985).

Gilmore v. Gilmore: Modifying Child Custody Awards, Kilbourne, 37 Mont. L. Rev. 411 (1976).

40-4-220. Affidavit practice.

Commissioners' Note

This section establishes a procedure for seeking temporary custody or a modification of a custody decree by motion supported with affidavits. The procedure is designed to result in denial of the motion without a hearing unless the court finds that the affidavits establish adequate cause for holding a hearing. The procedure will thus tend to discourage contests over temporary custody and prevent repeated or insubstantial motions for modification.

Compiler's Comments

2013 Amendment: Chapter 88 in (2)(b) extended show cause deadline from 20 to 21 days. Amendment effective October 1, 2013.

Applicability: Section 11, Ch. 88, L. 2013, provided: "[This act] applies to proceedings filed after [the effective date of this act]." Effective October 1, 2013.

1999 Amendment: Chapter 541 in two places in section substituted "endangers the child's physical, mental, or emotional health" for "is detrimental to the child's best interests"; and made minor changes in style. Amendment effective April 29, 1999.

1997 Amendment: Chapter 343 in (1), at beginning of first sentence, substituted "Unless the parties agree to an interim parenting plan or an amended parenting plan, the moving party seeking an interim parenting plan or amendment of a final parenting plan" for "A party seeking a temporary custody order or modification of a custody decree", near middle of first sentence and near end of second sentence, after "requested", substituted "plan or amendment" for "order or modification", and near middle of second sentence, after "affidavits", inserted "based on the best interests of the child"; in (2)(a), in first sentence after "seeking", substituted "an interim parenting plan" for "a temporary custody order" and near end, after "temporary", substituted "order providing for living arrangements for the child" for "assignment of custody"; near beginning of (2)(a)(i) and (2)(a)(ii) substituted "parenting plan" for "determination of custody"; near end of (2)(a)(i), after "temporary", substituted "living arrangements for the child were as proposed" for "custody were placed with the person designated"; in (2)(a)(ii), near beginning after "has been", substituted "ordered" for "made" and substituted language concerning emergency situations detrimental to a child's best interests for former language that read: "the child's present environment endangers his physical or emotional health and an immediate change of custody would serve to protect the child's physical or emotional health"; in (2)(b), in first sentence near beginning before "would be", substituted "the interim parenting plan proposed by the moving party" for "a temporary assignment of custody" and near middle, after "the child's", substituted language requiring the court to implement an interim parenting plan if the child's present environment is detrimental for former language that read: "physical or emotional health is endangered and would be protected by a temporary assignment of custody, the court shall make an order placing temporary custody with the person designated by the moving party or with some other person designated by the court" and in second sentence, near middle before "why", substituted "interim parenting plan" for "order", before "should not" substituted "the interim parenting plan" for "in the case of a temporary order issued under subsection (2)(a)(i) the temporary order", and at end, after "court", deleted "or, in the case of a temporary order issued under subsection (2)(a)(ii), the court should not restore the child to the custodian from whom the child was removed by the temporary order"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Source: Section 410, Uniform Marriage and Divorce Act.

Case Notes

DECISIONS AFTER 1997 REVISION

Temporary Emergency Order Warranted Based on Changed Circumstances — Mother's Subsequent Behavior Not Contemplated by Prior Parenting Plan: The District Court did not erroneously grant and maintain a temporary emergency order pursuant to 40-4-220 without an adequate showing and finding of changed circumstances under 40-4-219 and 40-4-220. The District Court's written findings of fact did not similarly state or manifestly imply that it found that no change in circumstances had arisen since imposition of the prior parenting plan. Moreover, the District Court's written findings clearly manifested a change in circumstances that would have supported an express finding under 40-4-219. Under the terms of the prior parenting plan, the mother would either have had limited visitation as provided by the transition schedule or, upon satisfaction of the specified conditions precedent, have shared custody with the father on a specified 50-50 basis. In either event, the prior parenting plan clearly contemplated that its structure and provisions would be sufficient to adequately protect the child under the then-contemplated circumstances. The terms of the parenting plan did not contemplate or provide for the nature and occurrence of the mother's subsequent behavior and the resulting need for additional protection of the child not provided under the prior parenting plan. In re Marriage of Bessette, 2019 MT 35, 394 Mont. 262, 434 P.3d 894.

Motion to Amend Parenting Plan, Modify Support — Failure to Provide Facts to Change in Circumstances or Offer Proposed Amended Plan — Dismissal of Motion Without Hearing Proper: The father filed a motion to amend the parties' parenting plan and to modify the amount of child support he paid. The mother opposed the motion, arguing that the father had failed to show a substantial change in circumstances to support an amended plan or a modification to child support. Without a hearing, the District Court denied the father's motion to modify and the father appealed. The Supreme Court affirmed, noting that the father had failed to file a proposed amendment to the parenting plan and that the District Court was not required to hold a hearing to allow him to cure his failure to raise facts that should have been provided in his initial pleadings. In re Marriage of Brown, 2016 MT 299, 385 Mont. 369, 384 P.3d 476.

Moving From One County to Another Insufficient to Warrant Modification of Parenting Plan — Venue Proper: A father petitioned to amend a parenting plan on the basis that his son's move from one county to another neighboring county and back adversely affected his right to spend time with his son. The father also made a motion to change venue. The District Court found that a mother moving from one county to another and back was not a sufficient change in circumstances that warranted a modification of the parenting plan and also denied the motion to change venue, holding that venue is proper where the majority of the evidence as to the best interest of the child is located. On appeal, the Supreme Court affirmed. In re C.M.R., 2016 MT 120, 383 Mont. 398, 372 P.3d 1275.

Amendment of Parenting Plan Based Solely on Party's Absence From Mediation — Violation of Due Process: After the father failed to attend a court-ordered mediation concerning the mother's motion to amend the parties' parenting plan, the District Court, without holding a hearing, amended the parenting plan, citing the father's failure to appear at the mediation as the sole reason for the amendment. On appeal, the Supreme Court reversed, concluding that the order violated due process of law, which required that the father be heard to show cause why the amendment to the parenting plan should not be granted and required that the court consider the best interest of the child. In re Marriage of Wendt, 2014 MT 174, 375 Mont. 388, 329 P.3d 567.

Insufficient Change in Circumstances of Children to Warrant Modification of Parenting Plan: The father of two children contended that his petition to modify a parenting plan was appropriate because the children had aged and started school, their nanny was terminated, and their mother attempted to frustrate his contact with the children. The District Court denied modification, and on appeal the Supreme Court affirmed. Modification is based on the best interests of the children, not the parents. The mere aging of children is not a sufficient change in circumstances to warrant modification, nor is loss of a nanny upon starting school. The father did not meet the burden of showing changed circumstances of the children sufficient to warrant modification in their best interests. In re Marriage of D'Alton, 2009 MT 184, 351 M 51, 209 P3d 251 (2009). See also In re C.M.R., 2016 MT 120, 383 Mont. 398, 372 P.3d 1275, and In re Parenting of R.J.N. & H.E.N., 2017 MT 249, 389 Mont. 68, 403 P.3d 675.

Lay Person May Be Guardian Ad Litem in Child Custody Proceeding: Generally, in a child custody proceeding, the court may appoint as a guardian ad litem for the child any person who does not have interests adverse to those of the child. The Supreme Court rejected the father's claim that the lower court should not have appointed a lay person, who the father likened to an expert witness and claimed was unqualified and had no known or disclosed experience or qualifications. In re Custody of Krause, 2001 MT 37, 304 M 202, 19 P3d 811 (2001).

DECISIONS PRIOR TO 1997 REVISION

Failure to File Motion or Affidavit Requesting Custody Modification — Adoption of Special Master Report Improper When Jurisdiction Lacking: Both the father and the mother filed motions for contempt of court, claiming failure by the other party to abide by past court orders regarding custody and visitation. A special master was appointed to make a final report concerning all pending custody, visitation, child support, medical expenses, and contempt issues between the parties. The special master submitted a report recommending changing primary physical custody from the mother to the father, and the report was adopted. However, the only pending issue was the question of contempt. Neither party moved for or filed an affidavit requesting a custody modification. Under former Rule 53, M.R.Civ.P. (now superseded), a special master's authority is limited to the issues or acts stated in the order of reference to the special master. Thus, the District Court erred in adopting the special master's report recommending a custody change because the court lacked jurisdiction to do so absent a motion or affidavit for modification. In re Marriage of Lundby, 1998 MT 122, 289 M 74, 959 P2d 485, 55 St. Rep. 486 (1998), distinguishing In re Marriage of Stout, 216 M 342, 701 P2d 729 (1985).

Failure to Extend Ex Parte Temporary Custody Order — Statutory Requirements: The father submitted the affidavit required under this section in seeking a temporary assignment of custody ex parte when a determination of custody had been previously made. The District Court entered the temporary custody order and scheduled a show cause hearing. The burden was on the father to support a continuation of the temporary change in custody that he had obtained ex parte. Following the hearing, the District Court ordered that the temporary custody order remain in effect, allowing the father to retain temporary custody until the final order was entered. Noting that 40-4-217 and 40-4-219 did not apply under the circumstances, the Supreme Court held that the District Court did not abuse its discretion with regard to the temporary custody situation. In re Marriage of Huotari, 284 M 285, 943 P2d 1295, 54 St. Rep. 884 (1997), distinguishing In re Marriage of Morazan, 237 M 294, 772 P2d 872 (1989).

Motion to Modify Custody Considered at Hearing on Ex Parte Temporary Custody — Abuse of Discretion: Father filed two motions, one to modify custody pursuant to 40-4-219 and one to continue a temporary ex parte custody order pursuant to this section. At the hearing held for the sole purpose of determining whether the temporary custody order should be continued, the District Court also resolved father's motion to modify custody, concluding that the requirements for modification were not met. However well intentioned, the procedure used by the District Court in considering both motions at the same hearing was an abuse of discretion and deprived father of notice and the opportunity to be heard on the modification motion. The Supreme Court reversed and remanded for further proceedings on the motion to modify. In re Marriage of Huotari, 284 M 285, 943 P2d 1295, 54 St. Rep. 884 (1997).

Temporary Modification Requiring Supervised Visitation — Supervision Not "Restriction" Requiring Special Procedure: Following Tamara's divorce from Robert, Tamara moved for an ex parte order modifying Robert's visitation rights to require that Robert's visitation with the parties' daughter be supervised. The basis for the motion was that Robert had secretly sexually assaulted other women, including Tamara's sisters. The motion was made on the basis of subsection (2)(a)(ii) of this section. The District Court granted the motion without following the procedure provided in 40-4-217(3) and (6). The Supreme Court upheld the granting of the ex parte order, citing In re Marriage of Hickey, 213 M 38, 689 P2d 1222 (1984), and the commissioners' note to 40-4-217 and noting that the imposition of supervision is not a "restriction" within the meaning of 40-4-217(3). In re Marriage of Njos/Allard, 270 M 54, 889 P2d 1192, 52 St. Rep. 74 (1995).

Motion Required to Be Supported by Affidavits: This section establishes a procedure for seeking temporary custody or a modification of a custody decree by motion supported by affidavits. There is no exception to the affidavit requirement; thus, failure to file supporting affidavits with a motion to change custody properly resulted in denial of the motion. In re Marriage of Allison, 269 M 250, 887 P2d 1217, 51 St. Rep. 1502 (1994).

Averred Facts and Allegations Sufficient to Constitute Adequate Cause for Hearing: Father's affidavit seeking modification of custody stated that: (1) his children had always expressed a desire to live with him; (2) the children had repeatedly expressed a lack of "feeling at home" in their mother's house, possibly as a result of strained relations with their new stepfather; (3) the boys perceived their homelife as "uncomfortable"; and (4) the children had cousins their age in North Dakota. The affidavit stated facts constituting adequate cause for a hearing, and the District Court properly assumed jurisdiction. In re Marriage of Anderson, 240 M 316, 783 P2d 1372, 46 St. Rep. 2155 (1989).

Sworn Statement Concerning Mother's Threat Sufficient for Temporary Restraining Order: The sworn statement of the natural father that the mother had threatened to remove their children from the court's jurisdiction pending a determination of custody modification was sufficient grounds for issuing a temporary restraining order to prevent their removal. In re Marriage of Morazan, 237 M 294, 772 P2d 872, 46 St. Rep. 814 (1989).

Opposing Affidavit Required Prior to Custody Modification: Mother, an enrolled member of the Chippewa Cree Tribe, appealed from an order that modified original dissolution decree of joint custody and which swapped custody schedules, effectively granting primary custody of son to non-Indian father. Subsequently, facts indicated that the father's affidavit, upon which the modification was based, contained inaccurate information and failed to reveal the father's custodial interference conviction. Likewise, irregularities in service provided mother no opportunity to file opposing affidavit. The Supreme Court remanded the lower court modification, holding the lower court may act on a motion to modify custody only after the adverse party has had an opportunity to file an opposing affidavit. Joint custody may be modified only to terminate the custody rights of one of the parties. In re Custody of A.L.S., 229 M 297, 747 P2d 192, 44 St. Rep. 1979 (1987).

Affidavits Insufficient to Warrant Hearing on Custody Modification — Determination in Discretion of District Court: It was within the discretion of the District Court to determine that affidavits filed by the mother relating to a psychologist's report on the adverse effects of the custody litigation on the child did not constitute the necessary factual basis to warrant a hearing on the modification of custody. In re Marriage of Cox, 226 M 176, 736 P2d 97, 44 St. Rep. 567 (1987).

Verified Petition — Adequate Substitute for Affidavit: The affidavit requirement of subsection (1) of this section may be satisfied by a verified petition. In re Marriage of Stout, 216 M 342, 701 P2d 729, 42 St. Rep. 856 (1985).

Affidavit Practice — Attorney's Fees: In applying for a contempt citation, a mother filed an affidavit alleging the father's failure to provide the beef required by the decree. The father's attorney countered by asking for custody of two of the children. No affidavit was filed by the father. For that reason the order granting modification of custody was set aside even though the issue was not raised on appeal. The trial court was also ordered to enter an order compelling the father to comply with the accrued beef support obligations. The trial court had no right to excuse support arrearages. In addition, due to errors of counsel, they were urged not to charge their clients for future services rendered in proceedings relating to these matters. Knowlton v. Knowlton, 193 M 448, 632 P2d 336, 38 St. Rep. 1304 (1981).

Section Not Applicable to Change of Visitation Rights: This section applies only to change of custody actions and not to change of visitation rights, which is controlled by 40-4-217. Therefore the lack of affidavits by husband in a change of visitation action did not affect the jurisdiction of the District Court. Gall v. Gall, 187 M 17, 608 P2d 496 (1980).

Modification of Custody Award Within Two Years of Decree: Custody of the child was awarded to the father following a divorce, but the child remained with the mother while the father was in the Navy. Even after the father received a hardship discharge from the Navy, ostensibly to care for his daughter, the mother continued to have physical custody until the daughter was taken, without the mother's knowledge or consent, to Indiana by the father. The mother filed for modification of the custody decree but was within the former 2-year prohibition period (now deleted) of 40-4-219. The court found, however, that the actions of the father in removing the child from the only environment she had ever known since birth seriously endangered her physical, mental, moral, and emotional health. Such a finding was prerequisite to a court order changing custody within the 2-year period, and custody was accordingly changed to the mother. Mikkelson v. Mikkelson, 184 M 314, 602 P2d 984 (1979).

Effect of Not Following Procedure Strictly: Even though procedure requirements were not strictly followed, this alone did not outweigh the "best interest of the child" standard. Lehman v. Billman, 178 M 367, 584 P2d 662 (1978).

Lack of Jurisdiction: The District Court did not have jurisdiction to modify a prior custody award made less than 2 years prior (restriction now deleted) when the court made no finding that the child's present environment seriously endangers his physical, mental, moral, or emotional health. The court also lacked jurisdiction to issue an order to show cause under 40-4-220 or to modify the custody decree under 40-4-211. Strouf v. Strouf, 176 M 406, 578 P2d 746 (1978).

Erroneous Award of Temporary Custody to Aunt: An aunt did not have standing to bring an action for temporary custody of her brother's children because they were in the "physical custody", although not actual and immediate control, of their mother. The aunt was not a party to the original custody proceeding; and the motion for temporary custody was accompanied by a deficient affidavit, and no notice was given to the mother. Henderson v. Henderson, 174 M 1, 568 P2d 177 (1977).

40-4-221. Determination of child's care upon death of parent.

Compiler's Comments

1999 Amendment: Chapter 414 inserted (2)(f) authorizing person who has established child-parent relationship with child to request parenting plan hearing; and made minor changes in style. Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 414, L. 1999, provided: "WHEREAS, it is undisputed that parents have a fundamental right to autonomy in child-rearing decisions; and

WHEREAS, the United States Supreme Court has long recognized a constitutionally protected interest of parents to raise their children without state interference; and

WHEREAS, the liberty interest guaranteed by the 14th amendment to the United States Constitution includes freedom to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home, and to bring up children; and

WHEREAS, the freedom of personal choice in matters of family life is a fundamental liberty interest protected by the 14th amendment to the United States Constitution; and

WHEREAS, the integrity of the family unit has found protection in the due process clause of the 14th amendment, the equal protection clause of the 14th amendment, and the 9th amendment; and

WHEREAS, the Montana Supreme Court has recognized the constitutionally protected rights of natural parents to parent their children; and

WHEREAS, the Montana Legislature recognizes that the careful protection of parental rights is not merely a matter of legislative grace but is constitutionally required; and

WHEREAS, the Montana Constitution recognizes the constitutional rights of children; and

WHEREAS, Article II, section 15, of the Montana Constitution provides that the rights of persons under 18 years of age shall include but not be limited to all the fundamental rights of Article II, unless specifically precluded by law which enhances the protection of the persons; and

WHEREAS, these fundamental rights include but are not limited to freedom; pursuing life's basic necessities, enjoying and defending life and liberty, and seeking safety, health, and happiness in lawful ways and the rights of individual dignity and privacy; and

WHEREAS, the Legislature finds that there are times when the rights of parents must be balanced against the rights of children; and

WHEREAS, the Legislature further finds that the courts need direction and authority to consider the best interests of children in parenting and visitation matters; and

WHEREAS, the Legislature finds it is appropriate to establish standards and direction for resolving these issues."

1997 Amendment: Chapter 343 in (1), in first sentence near beginning after "a parent", deleted "granted custody of a child, custody shall pass to the noncustodial parent unless" and at end, after "subsection (2)", substituted "may request a parenting plan hearing" for "request a custody hearing" and in second sentence substituted "surviving parent" for "noncustodial parent"; in (2), near beginning after "a parent", deleted "granted custody of a child" and after "may request" substituted "a parenting plan hearing" for "a custody hearing and seek custody of the child"; in (2)(a), before "natural", deleted "noncustodial"; in (2)(b) and (2)(c), before "parent", deleted "custodial"; in (3), before "governing", substituted "a parenting plan is" for "custody shall be"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Not Uniform Act: This section is not part of the Uniform Marriage and Divorce Act.

Case Notes

Father's Testamentary Appointment of Stepmother as Guardian Not Effective — Natural Mother Living and Not Incapacitated — Temporary Guardianship to Paternal Grandparents Proper: After their father's death, the District Court appointed the two children's paternal grandparents as their temporary guardians. The stepmother appealed the appointment, citing the father's testamentary appointment of her to serve as guardian of his minor child under 40-4-221. The Supreme Court affirmed, agreeing with the District Court that the children's best interests would be served by the appointment and that the father's testamentary appointment was not effective because their natural mother was living and not incapacitated. In re Guardianship of J.S.M., 2021 MT 86, 404 Mont. 21, 484 P.3d 939.

District Court Upheld in Denial of Parental Interest to Nonparent — Mother Retained Decisionmaking Authority — Nonparent Never Assumed Equal Parenting Role: The District Court did not abuse its discretion in denying a parental interest over a minor child under 40-4-228 to the petitioning nonparent. Substantial credible evidence supported the District Court's finding that the respondent mother did not cede her parenting authority to the petitioning nonparent and thus did not engage in conduct contrary to her child-parent relationship. Neither the petitioning nonparent nor the respondent mother entered the relationship with the intent that the petitioning nonparent would be considered a coparent. The mother retained decisionmaking authority in all matters relating to the child's care and paid for the child's diapers, clothes, and day care. The petitioning nonparent never assumed an equal parenting role or equal responsibility with the respondent mother in raising the minor child. Cross v. Verploegen, 2016 MT 322, 385 Mont. 479, 385 P.3d 564, distinguishing Kulstad v. Maniaci, 2009 MT 326, 352 Mont. 513, 220 P.3d 595.

Parental Interest Properly Awarded to Stepfather and Half Sister Upon Mother's Death: Brian and Judith married in 2003 and had a child, A.P.P. Judith had two other children, Angelina and J.M., from a previous relationship. Upon divorcing in 2007, Judith had primary custody of A.P.P. Brian had visitation rights and child support obligations, but he missed several visits and paid only 25 to 30% of his child support obligations. Judith married Gerald in 2009 but was subsequently killed in an accident. Upon learning of Judith's death, Brian demanded A.P.P.'s return and took her out of state to keep A.P.P. from Gerald and Angelina. The District Court ultimately awarded a parental interest to Gerald and visitation rights to Angelina, A.P.P.'s half sister, which Brian appealed. The Supreme Court affirmed and held that the District Court did not abuse its discretion. Brian engaged in conduct contrary to the parent-child relationship, Gerald established a child-parent relationship, and it was in A.P.P.'s best interest to continue the nonparent relationship. Angelina was correctly awarded visitation rights, in part because Angelina provided a strong caregiving role after Brian and Judith divorced. In re Parenting of A.P.P. v. Price, 2011 MT 50, 359 Mont. 386, 251 P.3d 127.

Best Interest of Child Standard Unconstitutional in Custody Award to Nonparent Over Natural Parent Absent Finding of Abuse, Neglect, or Dependency: The best interest of the child standard referred to in this section in determining the custody of a child whose custodial parent dies is unconstitutional to the extent that it allows the grant of a petition prior to the termination of the noncustodial parent's constitutional right to custody. Use of the standard is improper in that any showing that a nonparent may be able to provide a better environment than a natural parent is irrelevant to the question of custody between the two in view of the constitutional right of a parent to custody. Although this section gives a nonparent standing to request a custody hearing, it does not give the District Court authority to deprive a natural parent of the right to custody absent a finding of abuse, neglect, or dependency on the part of the natural parent. In re A.R.A., 277 M 66, 919 P2d 388, 53 St. Rep. 543 (1996), following In re Doney, 174 M 282, 570 P2d 575 (1977), and overruling Brost v. Glasgow, 200 M 194, 651 P2d 32 (1982), and In re C.G., 228 M 118, 740 P2d 1139 (1987).

Parent Generally Preferred to Nonparent in Award of Custody: The District Court did not abuse its discretion in finding that a parent was generally preferred to a nonparent in award of custody, given evidence of the parent's good character. Weber v. Van De Kop, 228 M 118, 740 P2d 1139, 44 St. Rep. 1388 (1987).

Qualified Intervenor and Natural Father Claiming Custody — "Best Interest" Standard Properly Applied: In a case where the natural custodial parent died, the District Court partially relied on the stringent standard set forth in In re Guardianship of Doney, 174 M 282, 570 P2d 575 (1977), in holding that, to gain custody, the intervenor must show that the natural father was unfit. The Supreme Court found that the Doney standard was incorrectly applied, but since the lower court ultimately applied the correct standard (best interest of the child) in its final determination, that determination did not constitute reversible error. Weber v. Van De Kop, 228 M 118, 740 P2d 1139, 44 St. Rep. 1388 (1987).

Best Interests of Child: If the statutory requirements for consent to adoption are met, the best interests of the child become the paramount consideration. In re Adoption of S.T.V., 226 M 18, 733 P2d 841, 44 St. Rep. 425 (1987).

"Best Interest of Child" Test Applicable: After the death of the custodial mother, the natural father and the maternal grandmother both requested custody of the children. The trial court properly determined custody in accordance with the "best interest of child" test set forth in 40-4-212. A more stringent standard was not required. Brost v. Glasgow, 200 M 194, 651 P2d 32, 39 St. Rep. 1679 (1982).

Determination of Neglect — No Jurisdiction for Adoption: After the death of the custodial mother, the maternal grandmother took the children into her home. The natural father petitioned to have the children restored to his custody. The grandmother requested custody and filed a petition for adoption. In a proceeding pursuant to this section, the grandmother was granted custody because the father had failed to make child support payments for more than a year and had generally neglected the children. The trial court properly dismissed the grandmother's petition for adoption for lack of jurisdiction. The determination of neglect needed to excuse the need for the father's consent to adoption under 40-8-111 (now repealed) must be made in a separate proceeding pursuant to Title 41, ch. 3, part 6. Brost v. Glasgow, 200 M 194, 651 P2d 32, 39 St. Rep. 1679 (1982).

Basis for Depriving Natural Parent of Custody: The father automatically assumes the right to custody of the children at the moment of the mother's death. A judicial hearing and finding of dependency and neglect under Title 41, ch. 3, part 4 or a judicial finding of willful abandonment or nonsupport under 40-8-111 (now repealed) are the exclusive means by which a natural parent may be involuntarily deprived of custody. Schultz v. Schultz, 184 M 245, 602 P2d 595 (1979), following Henderson v. Henderson, 174 M 1, 568 P2d 177 (1977); In re Guardianship of Doney, 174 M 282, 570 P2d 575 (1977).

40-4-225. Access to records by parent.

Compiler's Comments

1997 Amendment: Chapter 343 near end, after "denied to a parent", substituted "who is a party to the parenting plan" for "because such parent is not the child's custodial parent".

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Case Notes

Opinion and Order Declaring Section Unconstitutional Reversed: Maniaci appealed from the adoption of a final parenting plan in which the court awarded sole custody of her two minor children to Kulstad, her former same-sex partner. Maniaci argued the District Court erred when it denied her access to the children's therapy records on the basis that this section is unconstitutional because it infringes upon the children's right to privacy. The Supreme Court held that it was not necessary to decide the constitutionality of this section. The evidence supported the final parenting plan, and the denial of access to the children's therapy notes did not affect the outcome of the case. The District Court's order holding this section unconstitutional was vacated, but its findings of fact and conclusions of law regarding the final parenting plan were affirmed. Kulstad v. Maniaci, 2010 MT 248, 358 Mont. 230, 244 P.3d 722.

40-4-226. Court-sanctioned educational program on effects of dissolution of marriage on children.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 585 in (2) at end of first sentence substituted "must be paid by the state as provided in 3-5-901" for "must be paid from the fees for filing petitions for contested amendment of a parenting plan, provided for in 25-1-201(9)". Amendment effective July 1, 2002.

The amendments to this section in sec. 147, Ch. 574, L. 2001, were rendered void by sec. 255(3), Ch. 574, L. 2001, a coordination section.

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1997 Amendment: Chapter 343 in (1), in first sentence near beginning before "proceeding", substituted "parenting plan" for "custody modification", near end substituted "shall order" for "may order", and at end, before "program", inserted "court-sanctioned"; deleted former (2) and (3) that read: "Any facts presented at an educational session resulting from a referral under this section may not be considered in a dissolution of a marriage or a custody modification proceeding, nor may a report resulting from an educational session become part of the record of the dissolution or proceeding unless the parties have stipulated in writing to the contrary.

(3) The fees or costs of an educational session under this section must be borne by the parties and may be assessed by the court in an equitable manner"; and inserted (2) concerning costs of court-sanctioned education programs.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Case Notes

No Error in Disallowing State Payment of Court-Sanctioned Custody Evaluation: In establishing a parenting plan, the District Court directed the parties to obtain a psychological custodial evaluation. The father claimed that he did not have the funds to pay for the evaluation and requested that his share of the cost be paid out of the fund established in this section. The request was denied, and on appeal, the Supreme Court affirmed. This section does not provide that a District Court may order the state to pay for custody evaluations. The fund in this section is for payment of costs of a court-ordered educational program, and because neither parent was ordered to attend a court-sanctioned educational program, the District Court did not err in disallowing the father's costs. In re Parenting of N.P. v. Perkins, 2006 MT 10, 330 M 293, 127 P3d 1035 (2006).

40-4-227. Rights of parents and children — policy — findings.

Compiler's Comments

Preamble: The preamble attached to Ch. 414, L. 1999, provided: "WHEREAS, it is undisputed that parents have a fundamental right to autonomy in child-rearing decisions; and

WHEREAS, the United States Supreme Court has long recognized a constitutionally protected interest of parents to raise their children without state interference; and

WHEREAS, the liberty interest guaranteed by the 14th amendment to the United States Constitution includes freedom to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home, and to bring up children; and

WHEREAS, the freedom of personal choice in matters of family life is a fundamental liberty interest protected by the 14th amendment to the United States Constitution; and

WHEREAS, the integrity of the family unit has found protection in the due process clause of the 14th amendment, the equal protection clause of the 14th amendment, and the 9th amendment; and

WHEREAS, the Montana Supreme Court has recognized the constitutionally protected rights of natural parents to parent their children; and

WHEREAS, the Montana Legislature recognizes that the careful protection of parental rights is not merely a matter of legislative grace but is constitutionally required; and

WHEREAS, the Montana Constitution recognizes the constitutional rights of children; and

WHEREAS, Article II, section 15, of the Montana Constitution provides that the rights of persons under 18 years of age shall include but not be limited to all the fundamental rights of Article II, unless specifically precluded by law which enhances the protection of the persons; and

WHEREAS, these fundamental rights include but are not limited to freedom; pursuing life's basic necessities, enjoying and defending life and liberty, and seeking safety, health, and happiness in lawful ways and the rights of individual dignity and privacy; and

WHEREAS, the Legislature finds that there are times when the rights of parents must be balanced against the rights of children; and

WHEREAS, the Legislature further finds that the courts need direction and authority to consider the best interests of children in parenting and visitation matters; and

WHEREAS, the Legislature finds it is appropriate to establish standards and direction for resolving these issues."

Effective Date: This section is effective October 1, 1999.

40-4-228. Parenting and visitation matters between natural parent and third party.

Compiler's Comments

2009 Amendment: Chapter 356 inserted (6) concerning visitation rights of family member of parent receiving military service orders involving moving a substantial distance from parent's residence. Amendment effective October 1, 2009.

Preamble: The preamble attached to Ch. 414, L. 1999, provided: "WHEREAS, it is undisputed that parents have a fundamental right to autonomy in child-rearing decisions; and

WHEREAS, the United States Supreme Court has long recognized a constitutionally protected interest of parents to raise their children without state interference; and

WHEREAS, the liberty interest guaranteed by the 14th amendment to the United States Constitution includes freedom to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home, and to bring up children; and

WHEREAS, the freedom of personal choice in matters of family life is a fundamental liberty interest protected by the 14th amendment to the United States Constitution; and

WHEREAS, the integrity of the family unit has found protection in the due process clause of the 14th amendment, the equal protection clause of the 14th amendment, and the 9th amendment; and

WHEREAS, the Montana Supreme Court has recognized the constitutionally protected rights of natural parents to parent their children; and

WHEREAS, the Montana Legislature recognizes that the careful protection of parental rights is not merely a matter of legislative grace but is constitutionally required; and

WHEREAS, the Montana Constitution recognizes the constitutional rights of children; and

WHEREAS, Article II, section 15, of the Montana Constitution provides that the rights of persons under 18 years of age shall include but not be limited to all the fundamental rights of Article II, unless specifically precluded by law which enhances the protection of the persons; and

WHEREAS, these fundamental rights include but are not limited to freedom; pursuing life's basic necessities, enjoying and defending life and liberty, and seeking safety, health, and happiness in lawful ways and the rights of individual dignity and privacy; and

WHEREAS, the Legislature finds that there are times when the rights of parents must be balanced against the rights of children; and

WHEREAS, the Legislature further finds that the courts need direction and authority to consider the best interests of children in parenting and visitation matters; and

WHEREAS, the Legislature finds it is appropriate to establish standards and direction for resolving these issues."

Effective Date: This section is effective October 1, 1999.

Case Notes

District Court Erred in Relying on Special Standing Requirements for Nonparent in 40-4-221 to Determine Parental Interest for Nonparent — Parental Interest of Nonparent in Dissolution Proceeding Must Be Determined Under Substantive Provisions of 40-4-228. Sayler v. Yan Sun, 2023 MT 175, 413 Mont. 303, 536 P.3d 399, distinguishing Kulstad v. Maniaci, 2009 MT 326, 352 Mont. 513, 220 P.3d 595, and In re L.F.A., 2009 MT 363, 353 Mont. 220, 220 P.3d 391.

Termination of Visitation Agreement — Correctly Classified as Grandparent Visitation Agreement and Not Parental Visitation Agreement: The grandparents filed a petition for a parental interest determination after the mother moved to North Dakota with the child. Following mediation, the parties signed an agreement that allowed the child to live with the mother and gave day-to-day decisionmaking to the mother, but specifying certain visitation rights for the grandparents. Years later, the grandparents filed contempt motions, requesting that the District Court enforce the parties' agreement. The District Court eventually terminated the agreement, finding that it was a grandparent visitation agreement subject to modification and termination and not a parental visitation agreement. On appeal, the Supreme Court affirmed, holding that the agreement was correctly classified and that the District Court correctly terminated the grandparents' visitation. King v. Chilcott, 2020 MT 224, 401 Mont. 204, 472 P.3d 155.

Stepgrandmother With Established Parental Interest — Standing to Object to Adoption Petition: The consent of a child's stepgrandmother with a parental interest in the child was not obtained prior to the child's stepmother's adoption petition. The Supreme Court affirmed the District Court in holding that the plain language of statute requires consent of all parties whose parental rights were established by a court before adoption can take place. Since the stepgrandmother's parental interest was established by a court, her consent to the adoption was required. In re N.P.M., 2020 MT 33, 399 Mont. 1, 457 P.3d 962.

Nonparent Lack of Standing During Pendency of Dependent Neglect Case: A grandmother petitioned for a parental interest in a child subject to a dependent neglect case, and the District Court granted her custody. The child's father appealed, arguing lack of standing for the grandmother and lack of jurisdiction for the court. The Supreme Court reversed and remanded, ruling that 40-4-228(1), by clear and unambiguous language, prevented the grandmother's suit while the dependent neglect case was pending. In re A.J.C., 2018 MT 235, 393 Mont. 22, 427 P.3d 67. See also In re A.J.C, 2018 MT 234, 393 Mont. 9, 427 P.3d 59.

Grandparent Visitation — Application of Statutes: When considering a grandparent's visitation request, a District Court is required to apply 40-9-102, which specifically pertains to grandparent visitation, rather than 40-4-228, which pertains to parenting and visitation between a natural parent and a third party. (However, see Title 40, ch. 9, part 2, which was enacted in response to In re Parenting of L.R.S. and provides that a grandparent is not precluded from seeking relief in lieu of or in addition to relief under Title 40, ch. 9.) In re Parenting of L.R.S., 2018 MT 48, 390 Mont. 366, 414 P.3d 285.

District Court Upheld in Denial of Parental Interest to Nonparent — Mother Retained Decisionmaking Authority — Nonparent Never Assumed Equal Parenting Role: The District Court did not abuse its discretion in denying a parental interest over a minor child under 40-4-228 to the petitioning nonparent. Substantial credible evidence supported the District Court's finding that the respondent mother did not cede her parenting authority to the petitioning nonparent and thus did not engage in conduct contrary to her child-parent relationship. Neither the petitioning nonparent nor the respondent mother entered the relationship with the intent that the petitioning nonparent would be considered a coparent. The mother retained decisionmaking authority in all matters relating to the child's care and paid for the child's diapers, clothes, and day care. The petitioning nonparent never assumed an equal parenting role or equal responsibility with the respondent mother in raising the minor child. Cross v. Verploegen, 2016 MT 322, 385 Mont. 479, 385 P.3d 564, distinguishing Kulstad v. Maniaci, 2009 MT 326, 352 Mont. 513, 220 P.3d 595.

Sole Custodial Parent Scrutinized — Absent Natural Parent Irrelevant: When there is an absent natural parent, the only parent that is scrutinized by a proceeding under this section is the sole custodial parent. Cross v. Verploegen, 2016 MT 322, 385 Mont. 479, 385 P.3d 564.

Initial Best Interest Standard Applicable to Nonparent Visitation Proceedings: Since a child's birth and until his father's death 5 years later, the child had been raised by his father and stepmother. Soon after the father's death, the biological mother took custody of the child and the stepmother filed a petition seeking visitation. The District Court granted visitation to the stepmother, and the biological mother appealed. The Supreme Court reversed, ruling that the analysis adopted in Polasek v. Omura, 2006 MT 103, 332 Mont. 157, 136 P.3d 519, which considers grandparent-grandchild visitation, applies in any case involving nonparent visitation. Accordingly, the Supreme Court remanded the case for the District Court to apply the correct analysis. In re C.T.C., 2014 MT 306, 377 Mont. 106, 339 P.3d 54.

District Court Jurisdiction to Determine Establishment of Child-Parent Relationship Warranting Parenting Plan — Natural Parents' Parental Rights Need Not Be Terminated: Upon meeting the petitioners for the first time at a gas station, the respondent, M.M.G.'s mother, allowed the petitioners to take 1-year old M.M.G. home and care for M.M.G. over the weekend. Over the next several years, the mother began leaving M.M.G. with the petitioners for longer periods of time and, when M.M.G. was 4, informed the petitioners she was no longer interested in parenting M.M.G. and left her with the petitioners. The mother visited M.M.G. a few times a year and, when M.M.G. was 10, took M.M.G. for a weekend visit, then told the petitioners that she was moving with M.M.G. to Wyoming. The petitioners filed a petition for a parenting plan providing that M.M.G. would continue to live with them. After concluding that the petitioners could not seek a parenting plan unless the mother's parental rights had been terminated, the District Court dismissed the petition for lack of jurisdiction because the mother's parental rights had not been terminated. In reversing the dismissal, the Supreme Court distinguished this case from In re Parenting of J.N.P., 2001 MT 120, 305 Mont. 351, 27 P.3d 953, in which the petitioners had not established a child-parent relationship. The court held that if the petitioners could demonstrate that they had established a child-parent relationship with M.M.G., the District Court would have jurisdiction to consider whether to grant the petitioners a parental interest in M.M.G. even though no parental rights had been terminated. The court remanded the case to the District Court for a hearing on whether the petitioners had established a child-parent relationship with M.M.G. In re Parenting of M.M.G., 2012 MT 228, 366 Mont. 386, 287 P.3d 952.

Parental Interest Properly Awarded to Stepfather and Half Sister Upon Mother's Death: Brian and Judith married in 2003 and had a child, A.P.P. Judith had two other children, Angelina and J.M., from a previous relationship. Upon divorcing in 2007, Judith had primary custody of A.P.P. Brian had visitation rights and child support obligations, but he missed several visits and paid only 25 to 30% of his child support obligations. Judith married Gerald in 2009 but was subsequently killed in an accident. Upon learning of Judith's death, Brian demanded A.P.P.'s return and took her out of state to keep A.P.P. from Gerald and Angelina. The District Court ultimately awarded a parental interest to Gerald and visitation rights to Angelina, A.P.P.'s half sister, which Brian appealed. The Supreme Court affirmed and held that the District Court did not abuse its discretion. Brian engaged in conduct contrary to the parent-child relationship, Gerald established a child-parent relationship, and it was in A.P.P.'s best interest to continue the nonparent relationship. Angelina was correctly awarded visitation rights, in part because Angelina provided a strong caregiving role after Brian and Judith divorced. In re Parenting of A.P.P. v. Price, 2011 MT 50, 359 Mont. 386, 251 P.3d 127.

Parental Interest Properly Awarded to Both Parties in Same-Sex Relationship: A same-sex couple entered a financial and domestic long-term relationship. Because a same-sex couple may not adopt children in Montana, defendant adopted two children and both parties acted as parents to the children. When the parties separated, the District Court declined to grant plaintiff's petition to dissolve the parties' common-law marriage because Montana does not recognize same-sex marriage, but the court awarded a parental interest to both parties on grounds that plaintiff had established that a child-parent relationship existed in accordance with 40-4-211 and held that 40-4-228 applied to final adjudication of parenting between the parties. Defendant appealed on grounds that the statutes violated defendant's fundamental constitutional rights as a parent, specifically that 40-4-228 improperly fails to require a court to determine the fitness of a natural parent before awarding a nonparent a parental interest based on the child's best interests. The Supreme Court disagreed, noting that 1999 amendments to nonparental statutes allow a nonparent standing to seek a parenting interest of a minor child if the nonparent has established a child-parent relationship. It is not necessary for a court to find a natural parent unfit before awarding a parental interest to a third party, even though in this case the District Court did in fact correctly find that defendant acted contrary to the children's best interests. Also, numerous witnesses, including mental health professionals, the children's therapists, and the court-appointed guardian ad litem, testified that plaintiff had established a child-parent relationship with the children. This testimony, coupled with the fact that defendant's actions from the time the children entered the home were entirely inconsistent with an exclusive child-parent relationship and that plaintiff had served in a parental role for a sufficient time to establish a bonded, dependent relationship with the minor children, established that defendant's constitutional parenting rights were not violated when the District Court granted plaintiff a parenting interest. The District Court was affirmed. Kulstad v. Maniaci, 2009 MT 326, 352 M 513, 220 P3d 595 (2009), followed in In re Parenting of L.F.A., D.F.A., & D.F.A., 2009 MT 363, 353 M 220, 220 P3d 391 (2009), and distinguishing Polasek v. Omura, 2006 MT 103, 332 M 157, 136 P3d 519 (2006).

Improper Reliance on Parenting Plan Statutes in Granting Temporary Guardianship — Reversal Required: Pursuant to a stipulated parenting plan, the father was designated primary custodian of the couple's son and the mother was awarded visitation every other weekend. When the father received orders to report for active military duty, he moved to have the couple that he and the son lived with and the mother's sister appointed as temporary guardians. The mother moved to dismiss, but the District Court granted the father's motion, and the mother appealed. Reviewing the appealable order granting temporary guardianship, the Supreme Court reversed. The District Court's reliance on 40-4-219 for granting the guardianship was misplaced because that section applies only to modification of a parenting plan with respect to the parents and does not provide authority to decide custody matters between a parent and a third party, including appointment of a third party as a guardian. The District Court's reliance on this section for granting the guardianship was also misplaced because this section provides standards by which a court may award a parental interest to a nonparent who has brought a parenting plan proceeding pursuant to 40-4-211, but no such proceeding was brought in this case. The District Court also mistakenly relied on 41-3-427 in granting the guardianship because that section deals with child abuse and neglect, but does not provide independent authority for appointment of a guardian in disregard of the guardianship statutes. Rather, the father's request was governed by the guardianship statutes in Title 72, ch. 5, which the District Court did not address. The Supreme Court noted that the guardianship provisions in 72-5-222 apply only when a court order has addressed a party's right to parent, as opposed to arrangements defining a parent's custody and visitation under a parenting plan. The mother's right to parent was never previously limited by court order, so the District Court lacked jurisdiction to appoint a guardian for the child pursuant to 72-5-222, and granting the father's petition for temporary guardianship was reversible error. The Supreme Court remanded for the entry of an order vacating the guardianship. Fischer v. Fischer, 2007 MT 101, 337 M 122, 157 P3d 682 (2007).

Law Review Articles

A Look at Kulstad v. Maniaci in Light of Changing Cultural Norms, Neilson, 71 Mont. L. Rev. 449 (2010).

40-4-233. Final parenting plan — purpose and objectives.

Compiler's Comments

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Case Notes

Parenting Plan Amended — Modification and Periodic-Review Provision — District Court Order Not Required to Find Change in Circumstance: The mother and father, never married, agreed to a stipulated parenting plan. The plan provided for a modification provision and a periodic-review provision. The father filed a motion to amend the parenting plan and to modify child support. Ultimately, the District Court approved an amended parenting plan. On appeal, the mother argued that the District Court erred because it did not cite a change in the child's circumstances as required in 40-4-219. The Supreme Court affirmed, holding that a parenting plan may be reviewed and amended pursuant to the plan's periodic-review provision, which serves as an alternative to amending a parenting plan under 40-4-219. In re Parenting of S.W.B.S., 2019 MT 1, 394 Mont. 52, 432 P.3d 709.

Final Parenting Plan Awarding Sole Custody to Same-Sex Partner Affirmed: Maniaci and Kulstad, as same-sex domestic partners, adopted two children and functioned as coparents. The parties agreed Maniaci would be the adoptive parent. The relationship between Maniaci and Kulstad dissolved in 2007. Thereafter, the Supreme Court in Kulstad v. Maniaci, 2009 MT 326, 352 Mont. 513, 220 P.3d 595, awarded both parties a parental interest. In 2008, following a hearing that Maniaci did not attend, the District Court approved a final parenting plan that awarded sole custody to Kulstad with supervised visitation for Maniaci, who had relocated to Tennessee. Maniaci appealed and argued the final parenting plan was based on unreliable evidence and testimony in violation of her constitutional rights. The Supreme Court disagreed. The final parenting plan was supported by substantial evidence. The District Court was not required to make specific findings as to every parenting factor in 40-4-212. The District Court clearly considered the factors in 40-4-212, including the children's emotional and mental health, their relationship to both parties, Maniaci's role in the unsubstantiated abuse allegations against Kulstad, and Maniaci's decision to relocate to Tennessee and leave the children in the care of Kulstad despite allegations of abuse. Kulstad v. Maniaci, 2010 MT 248, 358 Mont. 230, 244 P.3d 722.

Adoption of Parenting Plan Providing for Stability and Convenience of Child Affirmed: A father contended that a parenting plan erroneously allowed for the child to spend three-fourths of her time with the mother and called for the child to reside with the father during his busy summer work season, reducing the time that he would actually have with the child and increasing child-care costs. However, substantial credible evidence supported the plan. The mother was the primary caregiver since the child's birth, and that living situation provided stability in the child's home life. The father lived 40 miles from the child's school, and granting him custody during the school year would have required an inconvenient 80-mile commute to school each day. The plan allowed frequent contact and a significant time to be spent between father and child, including every other weekend, various holidays, and the majority of the summer. It was not an abuse of discretion for the District Court to adopt a parenting plan favoring stability and convenience for the child over an equal apportionment of time between the parents, and the plan was affirmed. In re Marriage of Dennison, 2006 MT 56, 331 M 315, 132 P3d 535 (2006).

No Error in Return of Children to Parent Four Days Before Start of School to Allow Adequate Adjustment of Children: One of the few aspects of a parenting plan that the parents could not agree to was the time period that the children needed to spend with the mother before school started to readjust to living in the mother's home. The mother's expert asserted that 2 weeks were necessary for the adjustment period, while the father's expert testified that children who move frequently have less trouble adjusting and that 1 or 2 days might be sufficient. The District Court settled on a 4-day adjustment period, and the mother appealed. The Supreme Court noted that in light of the conflicting testimony, it was the District Court's determination of the children's best interests, not the expert witnesses' opinions, that controlled. The District Court's decision was supported by evidence in the record, and not being clearly erroneous, that decision was affirmed. In re Marriage of Banka, 2003 MT 84, 315 M 97, 67 P3d 885 (2003).

Law Review Articles

The Unfulfilled Promise of Joint Custody in Montana, Mrkich, 48 Mont. L. Rev. 135 (1987).

40-4-234. Final parenting plan criteria.

Compiler's Comments

2009 Amendment: Chapter 356 inserted (3) prohibiting disapproval of parenting plan because of parent's military service; and made minor changes in style. Amendment effective October 1, 2009.

1999 Amendment: Chapter 545 at beginning of (6) inserted "At the request of either parent or appropriate party"; and made minor changes in style. Amendment effective July 1, 1999.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Case Notes

DECISIONS UNDER CURRENT LAW

Parenting Plan Amended — Modification and Periodic-Review Provision — District Court Order Not Required to Find Change in Circumstance: The mother and father, never married, agreed to a stipulated parenting plan. The plan provided for a modification provision and a periodic-review provision. The father filed a motion to amend the parenting plan and to modify child support. Ultimately, the District Court approved an amended parenting plan. On appeal, the mother argued that the District Court erred because it did not cite a change in the child's circumstances as required in 40-4-219. The Supreme Court affirmed, holding that a parenting plan may be reviewed and amended pursuant to the plan's periodic-review provision, which serves as an alternative to amending a parenting plan under 40-4-219. In re Parenting of S.W.B.S., 2019 MT 1, 394 Mont. 52, 432 P.3d 709.

Implicit Denial of Relief From Judgment Regarding Parenting Plan — No Abuse of Discretion: A father filed a motion for relief from the issuance of a final parenting plan, arguing that new evidence made it appear the mother had misled the court about her relocation address and its habitability. However, the mother had also responded with records and photographic proof of her residence, and the District Court did not abuse its discretion by implicitly denying the father's motion for relief. In re Parenting of S.E.L., 2015 MT 228, 380 Mont. 256, 354 P.3d 1237.

Visitation in Another State Limited — No Abuse of Discretion: A father requested that the final parenting plan allow him 7 days of uninterrupted parenting time whenever he elected to visit his child in Elko, Nevada. After weighing concerns raised by both parents, the District Court did not abuse its discretion by issuing a final parenting plan that allowed the father only one long weekend visit per month while the child resides in Elko. In re Parenting of S.E.L., 2015 MT 228, 380 Mont. 256, 354 P.3d 1237.

No Evidence That Parent's Race or National Origin Considered in Adoption of Parenting Plan — No Equal Protection Violation: In proposing a parenting plan, a guardian ad litem referenced the mother's nationality when suggesting that the child would be better integrated into the community by living with her American father than with her Mexican mother. The mother asserted that the standing master and the District Court impermissibly considered the mother's race when adopting the parenting plan. The Supreme Court affirmed that consideration of a parent's race is prohibited by equal protection guarantees in making decisions regarding child custody. However, in this case the standing master made detailed findings on a number of factors that led to the recommendation that the father should be the primary custodial parent, and none of those factors involved the mother's race or national origin. Absent evidence that the standing master's statement regarding community integration was part of the District Court's rationale in adopting the parenting plan, the mother's assertion failed. In re Marriage of Olson, 2008 MT 232, 344 M 385, 194 P3d 619 (2008).

Findings Setting Forth Essential and Determining Factors Upon Which Custody Determination Based — No Abuse of Discretion in Award of Primary Custody to Father: The District Court considered the children's adjustment to home and school, the mother's mental health and history of chemical dependency, the continuity and stability of care, and the interaction and interrelationship of the parents and the effect that this interaction had on the children and then awarded primary custody to the father. The mother challenged the completeness and accuracy of the findings on several grounds, but the Supreme Court held that the findings, although not a model of completeness, were supported by substantial credible evidence and set forth the essential and determining factors on which the custody decision was based. Because the findings were not clearly erroneous, the District Court did not abuse its discretion, and the custody award was affirmed. In re Marriage of Czapranski, 2003 MT 14, 314 M 55, 63 P3d 499 (2003).

DECISIONS UNDER FORMER LAW

Credible Evidence in Expert's Recommendations That Child's Interests Best Served by Awarding Primary Custody to One Parent During School Year — Trial Court's Child Custody Decision Presumed Correct — Affirmation Absent Abuse of Discretion: Both parents were recognized as good but were unable to agree on important coparenting decisions once the child reached school age. The father wished to continue equal visitation time, and his experts expressed the opinion that the shared custody arrangement could work. The mother maintained that she could provide a more stable, structured home environment once school began, and her experts testified that the mother should have primary custody to achieve that stability. The District Court considered the opinions of all the experts and then granted primary residential custody to the mother. The Supreme Court found substantial credible evidence to support the custody award and found no indication that the court misapprehended the effect of the evidence or committed a clear and definite mistake in making the award. The trial court's decision is presumed correct and, absent a clear abuse of discretion, will be upheld on appeal. Here, the District Court properly considered the child's best interests, relied on professional assessments of those interests, and made an independent analysis of the facts, so no abuse of discretion occurred. In re Marriage of McKenna, 2000 MT 58, 299 M 13, 996 P2d 386, 57 St. Rep. 276 (2000), following In re Marriage of Baer, 1998 MT 29, 287 M 322, 954 P2d 1125 (1998). See also In re Marriage of Anderson, 260 M 246, 859 P2d 451 (1993), In re Marriage of Czapranski, 2003 MT 14, 314 M 55, 63 P3d 499 (2003), in which it was held that the Supreme Court's "clearly erroneous" standard of reviewing a District Court's custody determinations and adoption of parenting plans in dissolution matters remains appropriate, despite urging for a heightened standard that would require the District Court to consider and issue findings on each statutory factor in 40-4-212, and In re Marriage of Carter, 2003 MT 19, 314 M 84, 63 P3d 1124 (2003).

Nonmedical Treatment Not Payable Under Order That Father Provide Portion of Medical Treatment for Child: A dissolution decree provided that the father pay 58% and the mother 42% of the children's "medically related expenses" not covered by insurance. When the daughter exhibited behavioral problems, the mother enrolled her in an out-of-state wilderness treatment program, then sought to recover 58% of the expense from the father. However, the mother testified that anyone could send a child to the program without a medical referral and that the insurance company had denied payment for the treatment. Absent evidence of a medical diagnosis and referral, the treatment did not qualify as a medical-related expense contemplated by the decree, and the District Court's findings of fact to deny the mother's motion to require the father to pay a percentage of the cost were sufficient and not in error. In re Marriage of Johnson, 1999 MT 254, 296 M 311, 989 P2d 356, 56 St. Rep. 1011 (1999), distinguishing In re Marriage of Bliss, 187 M 331, 609 P2d 1209 (1980), and Jones v. Jones, 190 M 221, 620 P2d 850, 37 St. Rep. 1973 (1980).

Visitation Restrictions Based on Unsupported Claims of Potential Harm From Transvestism as Abuse of Discretion: Wife claimed that husband had exhibited compulsive transvestite tendencies and that exposure of the child to that behavior could result in irreparable harm. The trial court agreed, severely limiting visitation to the daytime weekend hours and requiring that visits be supervised by the wife or an adult, nontransvestite member of the husband's family. However, every expert who testified on the issue stated that: (1) the husband's therapy had been successful; (2) the husband exhibited above-average parenting skills; (3) any negative impact on the child because of the father's behavior would be less than the impact from not having a normal relationship with the father; and (4) the highly restrictive visitation arrangement was not conducive to a normal father-child relationship. The trial court's imposition of visitation restrictions, in spite of uncontroverted expert testimony, was an abuse of discretion and reversible error. In re Marriage of D.F.D. & D.G.D., 261 M 186, 862 P2d 368, 50 St. Rep. 1280 (1993).

Statutory Factors Considered — Failure to Award Sole Custody Not Error: The District Court found that both parents were in good health, that the child had lived with his mother since birth, and that the father had visited him on numerous occasions. It was undisputed that the mother was doing a good job raising the child and that she should be his primary custodian. These findings constituted adequate consideration of the child's best interests. Absent any findings to rebut the statutory presumption of joint custody, it was not error for the court to fail to award mother sole custody. In re Paternity of W.L., 259 M 187, 855 P2d 521, 50 St. Rep. 751 (1993).

Award of Sole Custody in Absence of Request for Joint Custody Not Error: Mother asserted District Court error in not awarding joint custody or, alternatively, that the award of sole custody should be set aside because the court failed to state its reasons for not awarding joint custody. However, the presumption in favor of joint custody arises only if a party requests it. Absent evidence that either party ever requested joint custody, it was not error for the court to award sole custody without articulating why joint custody would not be in the child's best interests. In re Marriage of Starks, 259 M 138, 855 P2d 527, 50 St. Rep. 719 (1993).

Medical Treatment of Children Properly Considered — Wishes of Children Balanced With Best Interests for Treatment: After their divorce, JoAnn lived in Billings and Alan lived in Plentywood. Both children of the marriage required medical treatment. Alan's efforts to address their conditions were more successful than JoAnn's. Both children desired to live with JoAnn in Billings. The District Court ordered the parents to make an appointment with a specialist concerning their daughter's back problems and ordered JoAnn to require the daughter to wear a brace if indicated by the specialist. The District Court also ordered JoAnn to take whatever action was necessary for her son to lose weight, and if he did not lose weight within a specified time, Alan could petition for a change of custody. The Supreme Court held that the District Court properly considered the health and welfare of the children and their preference to live with their mother. Because JoAnn actively tried to frustrate visitation by Alan, the District Court properly tried to balance the interests of the parents by ordering the custodial parent to restrict nonschool activities of the children if they refuse to visit the noncustodial parent and by ordering the parents to seek counseling. In re Marriage of Nikolaisen, 257 M 1, 847 P2d 287, 50 St. Rep. 133 (1993).

Award of Physical Custody for Six Months With Each Parent as Proper: The District Court considered the best interests of the children and the physical and emotional status of both parents and awarded 6 months physical custody with the father during the tax season when mother would be working long hours and the remaining 6 months with the mother. The court further reserved the right to have the children examined by a proper expert to see if the children were harmed by the custody arrangement. This award of joint physical custody was not error. In re Marriage of Johnston & Turrin, 255 M 421, 843 P2d 760, 49 St. Rep. 1047 (1992).

No Error in Modification of Joint Custody Order Against Child's Own Wishes: When the mother and father were divorced, they entered into a stipulation providing for joint custody of their daughter, with primary physical custody for the mother and liberal visitation for the father. In the years following the divorce, the mother, by moving to other states and not allowing the daughter to see her father, continually frustrated the father's attempts to have a meaningful relationship with his daughter. The father petitioned for a change of primary physical custody. The petition was granted by the District Court after the court interviewed the daughter, who did not want to live with her father. The Supreme Court held that there was no error in the District Court's modification of the custody order. The record showed that the District Court considered the best interests of the child. The Supreme Court stated, citing Marriage of Mitchell, 248 M 105, 809 P2d 582 (1991), that although the testimony was not the same on both sides, it was the District Court's duty to resolve those conflicts and further stated that the Court's resolution of those conflicts will not be disturbed on appeal absent an abuse of discretion. In re Marriage of Ulland, 251 M 160, 823 P2d 864, 48 St. Rep. 1159 (1991).

Sole Custody Awarded Father — Mother's Mental Health a Factor in Granting Supervised Visitation — No Abuse of Discretion: Mother appealed from the District Court child custody order in a dissolution of marriage granting the father sole custody of their son and granting the mother supervised visitation rights. The Supreme Court ruled that because mental health is a factor used in determining the best interests of the child, the District Court did not abuse its discretion in relying upon the opinion of experts that the mother was in need of treatment and in granting sole custody to the father and ordering supervised visitation by the mother. In re Marriage of Cook, 250 M 210, 819 P2d 180, 48 St. Rep. 795 (1991).

Failure to Consider Mental and Physical Health and Physical Abuse Documented by Case Worker — Reversal Warranted: The District Court committed reversible error in failing to consider the information provided in a home and family assessment study by a social worker regarding the mother's mental health and her documented physical and emotional abuse of the children and in neglecting to order a psychological evaluation of the mother to determine her parenting capability or neglecting to order counseling for the mother and other family members. Maxwell v. Maxwell, 248 M 189, 810 P2d 311, 48 St. Rep. 386 (1991), citing In re Marriage of Bloom-Higham, 227 M 217, 738 P2d 114 (1987).

Modification of Physical Custody Within Joint Custody Proper — Best Interest of Child: The District Court did not abuse its discretion in modifying physical custody within a joint custody situation from mother to father after finding that: (1) mother used profane or abusive language toward children; (2) father was refused visitation; (3) mother was drinking a number of times in children's presence; (4) mother engaged in inappropriate behavior with her fiance in children's presence; and (5) testimony of a Department of Family Services (now Department of Public Health and Human Services) social worker indicated that mother was verbally abusive, uncooperative in arranging a home study, and the subject of referrals for investigation of child abuse or neglect from three sources. In re Marriage of Gravely, 248 M 105, 809 P2d 582, 48 St. Rep. 353 (1991).

Modification of Custody — Applicability of Best Interest Standard: In resolving whether modification of custody will be allowed, a court need merely make a "best interest" determination pursuant to 40-4-224 (2) (now repealed) rather than deciding whether the more stringent requirements of 40-4-219 are satisfied. As long as a court correctly complies with 40-4-224 (now repealed), consideration of 40-4-219 is harmless and does not constitute reversible error. In re Marriage of Ferguson, 246 M 344, 805 P2d 1334, 47 St. Rep. 2142 (1990).

"Best Interest" Factors Examined — No Abuse of Discretion: When facts were examined under the statutory standards, including allegations of physical abuse, wishes of the parents, wishes of the children, and the interaction and interrelationship of the parents with the children, there was no abuse of discretion through failure to examine the best interests of the children in the District Court award of joint custody. In re Marriage of Allen, 237 M 64, 771 P2d 578, 46 St. Rep. 624 (1989).

Joint Custody Not Awarded — When Written Findings Adequate: Where substantial evidence existed in the record to support an award of sole custody, the fact that the District Court's written findings supporting nonaward of joint custody were not "exemplary" did not constitute reversible error. In re Marriage of Syljuberget, 234 M 178, 763 P2d 323, 45 St. Rep. 1825 (1988).

Evidence of Spousal Abuse Precluding Joint Custody: Although spousal abuse was not listed as a factor to be considered in awarding custody under 40-4-224 (now repealed) (prior to 1987 amendment), it was within the District Court's discretion to deny joint custody when evidence at trial clearly related the history of abuse to the best interests of the child. In re Marriage of Houtchens, 233 M 266, 760 P2d 71, 45 St. Rep. 1476 (1988).

Adoption of One Party's Proposed Findings Applicable to Custody Proceedings: The rule that even verbatim adoption of a party's proposed findings of fact is not grounds for reversal if supported by substantial credible evidence, as previously applied to marital property disputes in In re Marriage of Sessions, 231 M 437, 753 P2d 1306, 45 St. Rep. 744 (1988), and in In re Marriage of Watson, 227 M 383, 739 P2d 951, 44 St. Rep. 1167 (1987), also applies to findings related to proceedings to determine the custody of a child. In re Marriage of Smith, 232 M 528, 757 P2d 784, 45 St. Rep. 1253 (1988).

Equal or Unequal Physical Custody in Joint Custody Arrangement: Wife contended that access to children becomes an issue only when legal custody is placed with one parent and not when joint custody is granted. However, legal custody must not be confused with physical custody. Joint custody may involve equal physical custody of the children by both parents or it may entail one parent having substantially more or less actual physical custody than the other parent. Although the access factor is not a mandatory consideration in joint custody awards, there is no reason why it should not be considered by the District Court when attempting to arrange for a child's best interests and to facilitate public policy. In re Marriage of Saylor, 232 M 294, 756 P2d 1149, 45 St. Rep. 1062 (1988).

Opposing Affidavit Required Prior to Custody Modification: Mother, an enrolled member of the Chippewa Cree Tribe, appealed from an order that modified original dissolution decree of joint custody and which swapped custody schedules, effectively granting primary custody of son to non-Indian father. Subsequently, facts indicated that the father's affidavit, upon which the modification was based, contained inaccurate information and failed to reveal the father's custodial interference conviction. Likewise, irregularities in service provided mother no opportunity to file opposing affidavit. The Supreme Court remanded the lower court modification, holding the lower court may act on a motion to modify custody only after the adverse party has had an opportunity to file an opposing affidavit. Joint custody may be modified only to terminate the custody rights of one of the parties. In re Custody of A.L.S., 229 M 297, 747 P2d 192, 44 St. Rep. 1979 (1987).

Parental Cooperation as Key in Custody Award: Father contended that joint custody was presumptively in the child's best interests and was necessary because the mother deprived him of adequate visitation. In addressing the issue, the trial court found that the parents were unable to communicate about the child, the father was inflexible, the child had adjusted to the mother's home environment, and the child's interests were best served with sole custody to the mother. Parental cooperation is a key factor in joint custody, and where there is no cooperation, award of sole custody is proper. In re Marriage of Jacobson, 228 M 458, 743 P2d 1025, 44 St. Rep. 1678 (1987).

Rebuttable Presumption as to Change in Custody — Court Order and Judgment Premature: The Supreme Court remanded an appeal of a visitation schedule that established an annually alternating living arrangement between the wife's residence in San Diego and husband's residence in Missoula. The trial court had ordered psychiatric evaluations of the wife and child, which were completed, and of the husband, his present wife, and the child, which were not completed at the time of trial. The trial court also ordered that a "rebuttable presumption will exist as to the change in residency being in [the child's] best interest, which presumption can be overcome by competent evidence, including expert testimony" by the psychiatrist. The Supreme Court declined to decide whether substantial evidence supported the order of alternating custody because, without the benefit of all ordered psychiatric evaluations, the trial court's order and judgment were premature. In re Marriage of Allen/Wagner, 228 M 189, 741 P2d 773, 44 St. Rep. 1447 (1987).

Fixed Visitation Schedule — Equal Physical Custody Not in Best Interests of Child: Father appealed trial court custody and visitation schedule that provided 140 days to father and 225 to mother. He alleged that based on Montana's equal allotment of custodial time provision, the court's grant of less than one-half of the child's time constituted a misapplication of the best interest of the child standard. The Supreme Court upheld the award, stating that substantial credible evidence supported the specific custody and visitation award. Depending on the circumstances in joint custody awards, equal physical custody will not be awarded if not in the best interests of the child. In re Marriage of Smyka & Dayton, 227 M 408, 739 P2d 489, 44 St. Rep. 1188 (1987).

Joint Custody Not in Child's Best Interest: Although both mother and father are fit parents, the record and findings show substantial reasons why joint custody would not be in the best interest of the infant children. These findings include the geographical distance between the parents, their inability to communicate regarding issues involving the children due to interference from the father's present female cohabitant, the father's record of indifference regarding visitation, and the mother's role as primary caretaker for the infants' entire 2 years of life. In re Marriage of Dunn, 226 M 394, 735 P2d 1117, 44 St. Rep. 749 (1987).

Joint Custody Visitation Limitations Proper: It was within the court's discretion to award parents joint custody while limiting the father's visitation to alternate weekends, alternate holidays, an alternate week night, Father's Day, and 3 nonconsecutive weeks in the summer. In re Marriage of Tonne, 226 M 1, 733 P2d 1280, 44 St. Rep. 411 (1987).

Well-Being, Mental Health, Best Wishes, and Desires of Children — Father's Desire for Joint Custody Overridden: Any presumption in 40-4-224 (now repealed) favoring joint custody was overridden by abundant evidence supporting grant of sole custody to the wife. The findings and reasons for granting her sole custody are identical to those for denying husband's request for joint custody. The lower court found that one of the two children, both of whom are girls, was mildly retarded; that the retarded girl had been molested by the paternal grandfather while visiting the father and as a result needed continuous psychiatric care; that the mother had told the father of a previous molestation attempt; that the retarded child attended a special education program, could not care for herself, and probably would not be able to for many years; that the mother and daughters had a close relationship and had lived together continuously since the parents' separation and the mother took care of the children's daily needs, including the special needs of the retarded child; and that the father, who lived in Whitefish, Montana, had seen the children, who lived in Washington and are 16 and 17 years old, only three times in the last 18 months and the children did not express a desire to spend time with him. In re Marriage of Manus, 225 M 457, 733 P2d 1275, 44 St. Rep. 398 (1987).

Special Needs of Child — Equal Physical Custody Not Awarded: Because of special circumstances and responsibilities that must be addressed by the custodial parent of a child with learning and physical disabilities, it may be in the child's best interest that his physical custody for a school year not be interrupted. In that case, equal physical custody between joint custodians may be precluded. In re Marriage of Cole, 224 M 207, 729 P2d 1276, 43 St. Rep. 2136 (1986).

Travel Restriction in Best Interest of Child — Proof Required: The parent who requests a travel restriction for the time the other parent has physical custody must provide sufficient proof that a restriction is in the best interest of the child. In re Marriage of Cole, 224 M 207, 729 P2d 1276, 43 St. Rep. 2136 (1986).

Fixed Visitation Schedule — Allotment of Equal Time to Be Balanced With Best Interests of Child: A District Court order granted a fixed visitation schedule giving father about 75 days out of approximately 170 available nonschool visitation days. On appeal, he contended that 40-4-224 (now repealed) automatically provides equal amounts of a child's time with each parent. The Supreme Court disagreed, finding that 40-4-224 (now repealed) requires that the equal time recommendation be balanced by the practicalities of providing for the best interests of the child and that the allotment need only be as equal as possible. In re Marriage of Ward, 223 M 401, 725 P2d 1211, 43 St. Rep. 1825 (1986), followed in In re Marriage of Fesolowitz/Dechaine, 258 M 380, 852 P2d 658, 50 St. Rep. 575 (1993). See also In re Marriage of Kovash, 260 M 44, 858 P2d 351, 50 St. Rep. 934 (1993).

Petition to Modify Joint Custody — Standard — Change of Residence of Custodial Spouse: Wife appealed a District Court order that modified a joint custody decree by changing the physical custody of the children from the wife to the husband after the wife had requested that the husband assume custody for 1½ years because of her difficult financial circumstances. The Supreme Court affirmed, holding that the District Court properly applied the best interest of children standard, rather than serious endangerment, which may be relied on only to terminate a joint custody arrangement. Furthermore, the husband was denied custody not because the wife moved to Texas but because the children's interests would best be served by allowing them to remain in the same family, school, and community they have enjoyed for several years. In re Marriage of Bergner & Owens, 222 M 305, 722 P2d 1141, 43 St. Rep. 1285 (1986).

Petition to Terminate Joint Custody — Standard: A husband petitioned for modification of a joint custody arrangement. He sought permanent custody of the children, with limited visitation rights for the wife. The District Court denied the petition, finding that husband failed to establish that the children's present environment seriously endangered their physical, mental, moral, or emotional health. On appeal, the husband contended that the District Court should have applied the best interest of the children as the standard for the petition to modify joint custody. The Supreme Court held that under 40-4-224 (now repealed) the appropriate standard was serious endangerment, as applied by District Court under 40-4-219, since the husband's petition was one to actually terminate the wife's custody. In re Marriage of Gahm & Henson, 222 M 300, 722 P2d 1138, 43 St. Rep. 1281 (1986), followed in In re Marriage of Frydenlund, 255 M 474, 844 P2d 58, 49 St. Rep. 1074 (1992), distinguishing In re Custody of J.H., 231 M 301, 752 P2d 194 (1988), and In re Marriage of Johnson, 238 M 153, 777 P2d 305 (1989).

Physical Custody Shared: The trial court did not abuse its discretion in determining that the children's best interests would be served by awarding joint custody, with physical custody shared equally by the parents. If either parent moved from the local area, the other parent would have physical custody of the children. In re Marriage of Ryan, 222 M 188, 720 P2d 691, 43 St. Rep. 1163 (1986).

Joint Custody Not Mandated — Material Outside Record Not Considered: Montana's policy favoring joint custody does not mandate joint custody. When the District Court carefully considered the best interests of the children and the recommendations of the children's guardian ad litem before awarding sole custody to the wife with reasonable visitation for the husband, the Supreme Court will not modify sole custody and will not consider a supplemental affidavit concerning the current residence of one of the children. The court will not consider any material outside the record developed at trial. In re Marriage of Cruikshank, 222 M 152, 720 P2d 1191, 43 St. Rep. 1132 (1986).

Adequate Statement of Reasons for Refusing Joint Custody: The trial court adequately stated why it refused parties' request for joint custody of 3- and 5-year-old children when the court found that: (1) wife was chronically dirty in the care of the house and children and indifferent to serving the children nourishing food; therefore, the children's health was threatened, and they would be invited to adopt similar habits; (2) wife dressed meticulously and was well-groomed when she pursued her outside interests; (3) wife was more interested in her personal ends than the children; (4) husband was significantly more interested in the children's welfare than the wife; and (5) it was in the children's best interests to be in husband's custody with extensive visitation rights in the wife. In re Marriage of Nalivka, 222 M 84, 720 P2d 683, 43 St. Rep. 1079 (1986).

Reasonable Visitation Provision Replaced by Fixed Visitation Schedule — No Abuse of Discretion: Following dissolution of marriage, mother was granted custody of two minor children with reasonable visitation awarded to father. In the ensuing months, the father was permitted to visit the children only once and further attempts to arrange visitation were not successful since the mother had no phone and would not respond to messages. The father petitioned the District Court to grant a fixed visitation schedule, and the petition was granted. Although not required under former Rule 52(a), M.R.Civ.P. (now superseded), the order contained findings and conclusions, including evidence that the District Court Judge considered the best interests of the children and the conclusion that the mother's suggested graduated basis visitation schedule required reasonableness that was lacking in both parties. The Supreme Court held that the District Court's aid was necessary to clarify the meaning of "reasonable visitation" and found no abuse of discretion in the District Court Judge's conclusion. In re Marriage of Vinecke, 221 M 58, 716 P2d 638, 43 St. Rep. 633 (1986).

Written Findings Required: In awarding joint custody, the District Court should enter specific findings regarding the willingness of the parents to cooperate in custody matters and in their parental roles, the interaction and interrelationship of the child with each parent, and the effect of the geographic proximity of the parents' residences on their ability to share the rights and responsibilities of child rearing, particularly where there is a post-divorce birth and an absent parent requesting joint custody. In re Custody & Support of B.T.S., 219 M 391, 712 P2d 1298, 43 St. Rep. 37 (1986).

Sole Custody Award Upheld Under Former Law: Under former law, it was proper for the District Court to award sole custody of the minor child of the marriage to the mother, rather than awarding joint custody to both parents as requested by the father, when the only substantial evidence presented to the court on the issue was a recommendation of a domestic relations worker that sole custody be granted to the mother. In re Marriage of Benner, 219 M 188, 711 P2d 802, 42 St. Rep. 1943 (1985).

Joint Custody Not Awarded — No Abuse of Discretion: The court did not abuse its discretion in not allowing joint custody under former law when it considered the prospect of joint custody and the criteria set forth in 40-4-212, 40-4-222 through 40-4-224 (all now repealed), and 40-4-225. In re Marriage of Alt, 218 M 327, 708 P2d 258, 42 St. Rep. 1621 (1985).

Findings on Joint Custody Required: After several attempts at reconciliation, the parties' marriage was dissolved. During the dissolution the mother asked the court to grant the parties joint custody, with the provision that she be the residential parent. An attorney was appointed to represent the children, and the attorney recommended that joint custody be awarded with the mother designated as the residential parent. The court awarded custody to the father. On appeal, the Supreme Court vacated the custody order and remanded for findings on why joint custody was not awarded as required by 40-4-224 (now repealed). Murphy v. Murphy, 205 M 162, 666 P2d 755, 40 St. Rep. 1188 (1983).

Custody Order — Necessity of Supporting Fact Findings: Where court's finding granting custody of 3-year-old child of divorced parents to the father was a conclusive statement unsupported by fact findings explaining why husband and not wife should have custody, the award was vacated and the cause remanded for new findings and conclusions and an order. The evidence supported an award to either party, but in making a prior order the court had found a close relationship between the child and his 7-year-old half sister, who lived with her mother, and had emphasized the relationship and ordered the parties to work out a joint custody arrangement, which they were unable to do, resulting in a subsequent grant of custody to only one party. Thus, the evidence and the findings in relation to the prior joint custody order tended to support a conclusion that the wife should have custody. In re Marriage of Cameron, 197 M 226, 641 P2d 1057, 39 St. Rep. 485 (1982).

Factors in Custody Decision — Close Relationship of Child to Other Family Members: The continuity and stability of the family relationship between a child and its custodian are important; therefore, court to which custody case was remanded after vacation of order was requested to consider, in framing a new order, its previous factual determination that the 3-year-old child, while temporarily living with mother, had a close relationship with his 7-year-old half sister who lived with her mother. In re Marriage of Cameron, 197 M 226, 641 P2d 1057, 39 St. Rep. 485 (1982).

Attorney General's Opinions

Fee for Filing Petition for Contested Amendment of Parenting Plan Not Applicable to Petition to Modify Child Support: Modification of child support pursuant to 40-4-208 is a separate procedure that does not necessarily entail amendment of a parenting plan pursuant to 40-4-219. Therefore, for filing purposes, a petition to modify child support is not considered a petition for amendment of a parenting plan, and it is inappropriate for a Clerk of Court to collect the $120 statutory fee for filing a petition for a contested amendment of a parenting plan under 25-1-201(1)(a) upon the filing of a petition to modify child support in an existing cause. 47 A.G. Op. 14 (1998).

40-4-235. Vaccination status prohibited as evidence or grounds for decision.

Compiler's Comments

Effective Date: Section 7, Ch. 286, L. 2023, provided: "[This act] is effective on passage and approval." Approved April 26, 2023.

Severability: Section 6, Ch. 286, L. 2023, was a severability clause.

40-4-251. Definitions.

Compiler's Comments

Preamble: The preamble attached to Ch. 326, L. 1997, provided: "WHEREAS, it is the policy of the State of Montana to:

(1) marshal, preserve, and protect marital estate assets and liabilities that exist at the date of separation in order to avoid dissipations of the marital estate before distribution;

(2) ensure fair and sufficient child and spousal support awards; and

(3) achieve an equitable division of marital estate assets and liabilities on the dissolution or nullity of marriage or legal separation of the parties, as provided under Montana law; and

WHEREAS, sound public policy further favors the reduction of the adversarial nature of marital dissolution and the attendant costs by fostering full disclosure and cooperative discovery; and

WHEREAS, in order to promote this public policy, a full and accurate disclosure of all assets and liabilities in which one or both parties have or may have an interest must be made in the early stages of a proceeding for dissolution of marriage or legal separation of the parties, regardless of the characterization as joint or separate, together with a disclosure of all income and expenses of the parties; and

WHEREAS, each party has a continuing duty to update and augment material changes to that disclosure so that at the time that the parties enter into an agreement for the resolution of any of these issues or at the time of trial on these issues, each party will have as full and complete knowledge of the relevant underlying facts as is reasonably possible under the circumstances of the case without the need of formal discovery requests pursuant to the Montana Rules of Civil Procedure.

THEREFORE, the Legislature of the State of Montana finds it appropriate to enact the following provisions relating to disclosure of marital estate assets and liabilities."

Applicability: Section 12, Ch. 326, L. 1997, provided: "[This act] applies to proceedings commenced on or after October 1, 1997."

40-4-252. Preliminary declaration of disclosure — penalty.

Compiler's Comments

1999 Amendment: Chapter 545 in second sentence in (1) inserted "waive the exchange of or". Amendment effective July 1, 1999.

Preamble: The preamble attached to Ch. 326, L. 1997, is printed in the compiler's comments to 40-4-251.

Applicability: Section 12, Ch. 326, L. 1997, provided: "[This act] applies to proceedings commenced on or after October 1, 1997."

40-4-253. Final declaration of disclosure — failure to disclose current income and expense declaration — penalty.

Compiler's Comments

Preamble: The preamble attached to Ch. 326, L. 1997, is printed in the compiler's comments to 40-4-251.

Applicability: Section 12, Ch. 326, L. 1997, provided: "[This act] applies to proceedings commenced on or after October 1, 1997."

Case Notes

Mutual Agreement by Parties to Divorce to Not Disclose Jointly Held Businesses to Court — No Perjury — District Court Erred in Reopening Case: During their divorce proceeding, a husband and wife mutually decided not to disclose their jointly owned businesses to the District Court because they planned to continue operating the businesses in the same manner as before the divorce. Four years after the final decree of dissolution was finalized, the wife sought a buyout from the businesses, but the husband declined and asserted that he was the sole owner. The wife filed motions with the District Court seeking relief from the dissolution decree. The District Court found that the parties' failure to disclose the businesses amounted to mutual perjury that prevented the District Court from equitably apportioning the marital estate and concluded that the dissolution decree must be reconsidered. On appeal, the Supreme Court reversed, finding that the purpose of requiring disclosures is to ensure that the parties each have complete knowledge of the marital assets. Because both parties were aware of the businesses and there was no evidence that the parties had made false statements to each other regarding their assets, there were no grounds to reopen the decree. In re Marriage of Fuller, 2021 MT 175, 404 Mont. 522, 490 P.3d 1254.

Failure to Disclose — Court's Discretion: A husband and wife, married for 22 years before separating, acquired numerous properties and assets that were used for a farming operation. The wife did not file a final declaration of disclosure and a current income and expense declaration. On appeal, the husband argued that the District Court erred by not awarding him the value of the undisclosed assets. The Supreme Court disagreed, stating that the statute allows a District Court to award the disputed property, but does not require it. In re Marriage of Richards, 2014 MT 213, 376 Mont. 188, 330 P.3d 1193.

Fraud Committed in Course of Dissolution Proceeding Considered Intrinsic — Claim of Extrinsic Fraud Properly Dismissed: Castonguay brought a claim against her ex-husband, Andrew, on grounds that Andrew offered perjured testimony in a prior dissolution proceeding regarding Andrew's ownership of real property and that the conflicting statements acted as extrinsic fraud on the trial court and resulted in the court awarding Andrew more property than he was entitled to. Castonguay's claim was summarily dismissed on grounds that Castonguay failed to submit any evidence of extrinsic fraud, and Castonguay appealed. The Supreme Court cited Clark v. Clark, 64 M 386, 210 P 93 (1922), for the holding that acts for which a judgment or decree may be set aside or annulled on grounds of fraud have reference only to fraud that is extrinsic or collateral to the matter tried by the court and not to fraud that is intrinsic to the matter on which judgment was rendered. Castonguay's alleged facts, if taken as true, amounted to perjury intrinsic to the dissolution proceeding. Because Castonguay failed to offer evidence of extrinsic fraud for which relief could be granted, Castonguay's claim was properly dismissed. Castonguay v. Estate of Polson, 2005 MT 265, 329 M 103, 122 P3d 1208 (2005).

No Evidence That Husband Provided False Valuation of Marital Estate — Denial of Motion to Reopen Dissolution Decree Affirmed: At a dissolution trial, the wife sought to introduce a financial statement purporting to show that the husband owned property that he did not declare in the disclosure of marital assets. The trial court found that the wife failed to lay an adequate foundation for the financial statement and declined its introduction. After the dissolution, the wife filed a separate action against the husband, obtained additional financial statements, and moved to reopen the original proceedings on grounds that the husband had committed fraud by failing to disclose an interest in three Montana properties. The District Court denied the motion, and the wife appealed. Noting that under First Sec. Bank of Bozeman v. Tholkes, 169 M 422, 547 P2d 1328 (1976), a personal financial statement to a bank does not establish an ownership interest in real property and that the newly discovered financial statements merely recited the same information rejected by the trial court in the original dissolution action, the Supreme Court held that the wife did not establish any admissible facts upon which the District Court might discover that the husband committed perjury in disclosing marital assets. Denial of the motion to reopen the dissolution proceedings was affirmed. Polson v. Polson, 2005 MT 185, 328 M 49, 121 P3d 1004 (2005).

Presumption That Failure to Disclose Asset Is Grounds to Award Asset to Other Party Considered Disputable: The husband received a bonus and profit-sharing award and deposited the funds in an investment bank account, but failed to disclose the account in the final declaration of disclosure. The account was finally disclosed 2 business days before trial. The wife contended that the presumption in this section required the District Court to penalize the husband by awarding the late-disclosed asset to her. However, nothing in this section states that the presumption is conclusive, so under 26-1-602, the presumption is disputable. The husband testified about why he was late in disclosing the account, and it was within the discretion of the District Court to determine the husband's credibility and decide whether the presumption was overcome. The District Court accepted the husband's explanation, and the Supreme Court declined to disturb the decision. In re Marriage of Gerhart, 2003 MT 292, 318 M 94, 78 P3d 1219 (2003).

40-4-254. Execution and service of final declaration of disclosure and current income and expense declaration.

Compiler's Comments

Preamble: The preamble attached to Ch. 326, L. 1997, is printed in the compiler's comments to 40-4-251.

Applicability: Section 12, Ch. 326, L. 1997, provided: "[This act] applies to proceedings commenced on or after October 1, 1997."

Case Notes

Property Settlement Agreement With Remainder Clause — District Court Finding That Annuity Not Disclosed to Wife During Dissolution Proceedings — Reversed and Husband Awarded Attorney Fees Pursuant to Agreement. In re Harms, 2022 MT 41, 408 Mont. 15, 504 P.3d 1108.

Entry of Dissolution Without Appraisal of Real Estate: When the marital assets and liabilities were well known to both parties, the District Court did not abuse its discretion when it determined that the property settlement agreement between the husband and wife was valid without a full appraisal of certain real property that was awarded to the wife. The wife failed to demonstrate that she suffered any prejudice from the entry of judgment of dissolution without a final disclosure of assets. In re Marriage of Anderson, 2013 MT 238, 371 Mont. 321, 307 P.3d 313.

Valuation of Marital Assets in Absence of Final Disclosure Affirmed: The wife challenged on appeal the District Court's authority to enter judgment regarding the value of marital assets, arguing that the District Court erred in allowing the husband to present his case without first filing a final disclosure, as required under 40-4-254, and erred by valuing the parties' marital assets without first finding that good cause existed to enter judgment absent the husband's final disclosure. Declining to hold the District Court in error for a procedure in which the wife acquiesced by failing to object or claim prejudice, the Supreme Court affirmed and additionally concluded that the District Court had addressed the issue of good cause and had properly found that good cause existed to enter judgment. In re Marriage of Caras, 2012 MT 25, 364 Mont. 32, 270 P.3d 48.

40-4-255. Noncomplying disclosure declarations — requests to comply — remedies.

Compiler's Comments

Preamble: The preamble attached to Ch. 326, L. 1997, is printed in the compiler's comments to 40-4-251.

Applicability: Section 12, Ch. 326, L. 1997, provided: "[This act] applies to proceedings commenced on or after October 1, 1997."

Case Notes

Sanction of Nondisclosing Party by Disallowing Evidentiary Hearing to Discuss Evidence That Should Have Been Covered in Disclosure: The parties in a child support dispute were ordered to disclose pertinent information to a court-appointed child support expert. The father repeatedly refused to provide necessary corporate income information and to cooperate with the expert. Dissatisfied with recommendations by the expert based on information that was provided, the father moved for an evidentiary hearing. The mother objected on grounds that the father should not be allowed to present additional evidence at a hearing after failing to provide the information to the expert. The District Court agreed and denied the motion for a hearing. On appeal, the Supreme Court affirmed. Under the clear language of this section, the District Court may enter an order preventing a noncomplying party from presenting evidence at a hearing as a sanction for failing to fully disclose relevant financial information when ordered by the court. Stewart v. Rogers, 2004 MT 138, 321 M 387, 92 P3d 615 (2004).

Award of Attorney Fees Set Aside Pending Revaluation and Distribution of Premarital and Marital Estate: The District Court awarded attorney fees to the wife based on alleged discovery abuses, but the court failed to cite any authority as justification for the award on discovery issues. Thus, the Supreme Court examined the question in the context of 40-4-110 and this section to determine if the award was proper. To justify an award under 40-4-110, the wife had to demonstrate an inability to pay her own fees; however, there was no finding to that effect in light of the award to the wife of $209,226.14 from the marital estate. Under this section, the noncomplying party may be required to pay attorney fees for failing to comply with the provisions of 40-4-251 through 40-4-258. The record showed that the husband executed a preliminary declaration of disclosure pursuant to 40-4-252 and served it to the wife and that neither party filed a final declaration of disclosure pursuant to 40-4-253, so the wife could not be considered a complying party entitled to an award under this section. Thus, the Supreme Court set aside the award of attorney fees subject to reconsideration by the District Court on remand following revaluation, including consideration of premarital debt, and distribution of the marital estate. In re Marriage of Steinbeisser, 2002 MT 309, 313 M 74, 60 P3d 441 (2002), overruled in part in In re Marriage of Funk, 2012 MT 14, 363 Mont. 352, 270 P.3d 39, holding that there are no restrictions on when a District Court may distribute preacquired, gifted, or inherited property as long as the court equitably apportions the parties' property in accordance with 40-4-202.

40-4-256. Liquidation — transfer of marital estate assets to avoid encumbrance, devaluation, or market or investment risk — authority of court.

Compiler's Comments

Preamble: The preamble attached to Ch. 326, L. 1997, is printed in the compiler's comments to 40-4-251.

Applicability: Section 12, Ch. 326, L. 1997, provided: "[This act] applies to proceedings commenced on or after October 1, 1997."

40-4-257. Default judgments — disclosures.

Compiler's Comments

Preamble: The preamble attached to Ch. 326, L. 1997, is printed in the compiler's comments to 40-4-251.

Applicability: Section 12, Ch. 326, L. 1997, provided: "[This act] applies to proceedings commenced on or after October 1, 1997."

40-4-258. Disclosures — attorney work product privilege — protective orders — Montana Rules of Civil Procedure.

Compiler's Comments

Preamble: The preamble attached to Ch. 326, L. 1997, is printed in the compiler's comments to 40-4-251.

Applicability: Section 12, Ch. 326, L. 1997, provided: "[This act] applies to proceedings commenced on or after October 1, 1997."

Part 3
Family Law Mediation

Part Law Review Articles

Mediator Certification: Should It Be Required in Montana?, Vanisko, 75 Mont. L. Rev. 335 (2014).

Family Mediation After Hendershott: The Case for Uniform Domestic Violence Screening and Opt-In Provision in Montana, Capulong, 74 Mont. L. Rev. 273 (2013).

40-4-301. Family law mediation — exception.

Compiler's Comments

2013 Amendment: Chapter 350 in (2) inserted "Unless each of the parties provides written, informed consent" and inserted second sentence concerning mediator qualifications; inserted (5) defining informed consent; and made minor changes in style. Amendment effective October 1, 2013.

Case Notes

District Court May Not Require Mediation When There Is Reason to Suspect Abuse: The plain language of 40-4-301(2) prohibits a District Court from requiring mediation between a husband

and a wife when the court has "reason to suspect" that one of the parties or a child of a party has been physically, emotionally, or sexually abused by the other party. The District Court erred as a matter of law by requiring mediation when expert testimony established an emotionally abusive relationship. Hendershott v. Westphal, 2011 MT 73, 360 Mont. 66, 250 P.3d 806. See also In re Parenting of P.H.R., 2021 MT 231, 405 Mont. 334, 495 P.3d 38, holding that the District Court's concern that there might have been a history of domestic violence in the parties' relationship was enough to satisfy the "reason to suspect" standard under this section and allowing mediation of future disputes if each party provides written informed consent.

Law Review Articles

Family Mediation After Hendershott: The Case for Uniform Domestic Violence Screening and Opt-In Provision in Montana, Capulong, 74 Mont. L. Rev. 273 (2013).

40-4-302. Mediation proceeding — tolling of statute of limitations.

Compiler's Comments

2013 Amendment: Chapter 350 in (3) inserted "and except in cases involving domestic violence" and inserted third sentence concerning election of right to have advocates and support persons present during mediation. Amendment effective October 1, 2013.

1997 Amendment: Chapter 343 in (2), in first sentence after "settlement of the", substituted "parenting, child support, parental contact with the child" for "child custody, child support, visitation".

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Case Notes

Military Father Stationed Around World — Summer Visitation Stipulated by Parenting Plan — Role of Guardian ad Litem Distinct from Role of Mediator: In a protracted dissolution proceeding involving a mother residing in Montana and a father residing in various military bases, the District Court issued an amended parenting plan that required the parents' teenage daughter to visit the father during the summer. The District Court also found the mother in contempt for not following the terms of the parenting plan. On appeal, the mother argued that the District Court erred because it had failed to consider the best interests of the teenage daughter, who wished to spend more time in Montana during the summers instead of with her father, and that it had wrongly found her in contempt and ordered attorney fees. The Supreme Court affirmed, holding that the District Court's findings were not clearly erroneous, that the original parenting plan's appointment of the child's guardian ad litem as a mediator was not consistent with the purposes of the impartial position, and that, because the District Court did not conduct a hearing on the contempt and attorney fee provisions, it was not proper for appellate review. In re Marriage of Brockington & Brown, 2017 MT 92, 387 Mont. 260, 400 P.3d 205. However, see In re Marriage of Weigand, 2021 MT 128, 404 Mont. 223, 486 P.3d 1272, holding that the dismissal of the appeal of contempt order, while not incorrect, was unnecessary under Rule 58(e), M.R.Civ.P. (Title 25, ch. 20).

40-4-303. Proceedings — records — confidentiality.

Compiler's Comments

1999 Amendment: Chapter 481 inserted first sentence providing that mediation proceedings are subject to statutory confidentiality and privilege provisions; at end of second sentence after "private" inserted "unless otherwise agreed to in writing by the parties and the mediator"; deleted former fourth sentence that read: "Matters subject to the mediation proceeding are confidential"; at end of fourth sentence after "mediation" substituted "under this part are entitled to the confidentiality and privilege provisions of 26-1-813" for "is not subject to compelled disclosure of any part of the mediation proceeding"; and made minor changes in style. Amendment effective October 1, 1999.

40-4-305. Mediation agreement.

Compiler's Comments

2003 Amendment: Chapter 314 at end of first sentence substituted "before the agreement is finalized" for "and the approved agreement may be submitted to the court"; deleted former second and third sentences that read "An agreement may not be submitted to the court if any party objects. The court may adopt the agreement"; and inserted last two sentences providing that the agreement is not admissible as evidence in any action unless it has been affirmed by the parties in a signed and written agreement, which is governed by 40-4-201. Amendment effective October 1, 2003.

40-4-306. Mediator list.

Case Notes

Military Father Stationed Around World — Summer Visitation Stipulated by Parenting Plan — Role of Guardian ad Litem Distinct from Role of Mediator: In a protracted dissolution proceeding involving a mother residing in Montana and a father residing in various military bases, the District Court issued an amended parenting plan that required the parents' teenage daughter to visit the father during the summer. The District Court also found the mother in contempt for not following the terms of the parenting plan. On appeal, the mother argued that the District Court erred because it had failed to consider the best interests of the teenage daughter, who wished to spend more time in Montana during the summers instead of with her father, and that it had wrongly found her in contempt and ordered attorney fees. The Supreme Court affirmed, holding that the District Court's findings were not clearly erroneous, that the original parenting plan's appointment of the child's guardian ad litem as a mediator was not consistent with the purposes of the impartial position, and that, because the District Court did not conduct a hearing on the contempt and attorney fee provisions, it was not proper for appellate review. In re Marriage of Brockington & Brown, 2017 MT 92, 387 Mont. 260, 400 P.3d 205. However, see In re Marriage of Weigand, 2021 MT 128, 404 Mont. 223, 486 P.3d 1272, holding that the dismissal of the appeal of contempt order, while not incorrect, was unnecessary under Rule 58(e), M.R.Civ.P. (Title 25, ch. 20).

40-4-307. Mediator qualifications.

Compiler's Comments

2013 Amendment: Chapter 350 inserted (3) concerning knowledge in the area of domestic violence; and made minor changes in style. Amendment effective October 1, 2013.

1997 Amendment: Chapter 343 in (3), at end before "research", substituted "parenting" for "child custody"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Case Notes

Military Father Stationed Around World — Summer Visitation Stipulated by Parenting Plan — Role of Guardian ad Litem Distinct from Role of Mediator: In a protracted dissolution proceeding involving a mother residing in Montana and a father residing in various military bases, the District Court issued an amended parenting plan that required the parents' teenage daughter to visit the father during the summer. The District Court also found the mother in contempt for not following the terms of the parenting plan. On appeal, the mother argued that the District Court erred because it had failed to consider the best interests of the teenage daughter, who wished to spend more time in Montana during the summers instead of with her father, and that it had wrongly found her in contempt and ordered attorney fees. The Supreme Court affirmed, holding that the District Court's findings were not clearly erroneous, that the original parenting plan's appointment of the child's guardian ad litem as a mediator was not consistent with the purposes of the impartial position, and that, because the District Court did not conduct a hearing on the contempt and attorney fee provisions, it was not proper for appellate review. In re Marriage of Brockington & Brown, 2017 MT 92, 387 Mont. 260, 400 P.3d 205. However, see In re Marriage of Weigand, 2021 MT 128, 404 Mont. 223, 486 P.3d 1272, holding that the dismissal of the appeal of contempt order, while not incorrect, was unnecessary under Rule 58(e), M.R.Civ.P. (Title 25, ch. 20).

Law Review Articles

Mediator Certification: Should It Be Required in Montana?, Vanisko, 75 Mont. L. Rev. 335 (2014).

CHAPTER 5
ENFORCEMENT OF SUPPORT

Chapter Compiler's Comments

Report to Legislature: Chapter 552, L. 1997, was a wide-ranging act that enacted and amended numerous MCA sections relating to enforcement of child support, many of the enactments and amendments mandated by the federal government as a condition to receipt of federal funds. Section 98, Ch. 552, provided: "The department of public health and human services shall report to the regular session of the 56th Legislature on progress toward resolving child support issues between the state, federal, and tribal governments."

Severability: Section 101, Ch. 552, L. 1997, was a severability clause.

Chapter Administrative Rules

Title 37, chapter 62, ARM Child support services.

Chapter Case Notes

No Authority to Extend Child Support Modification to Earlier Date: In a dispute over child support payments in which a motion for modification of child support was filed in 2009, the District Court correctly concluded that it did not have authority to extend the support modification to any date before the motion was filed, even though the father who sought modification signed an affidavit for his lawyer in 2008 in support of modification after certain events led to changes in the father's income. In re Marriage of Wyrick, 2012 MT 244, 366 Mont. 484, 288 P.3d 232.

Nature of Child Support Debt — Higher Order Than Ordinary Civil Debt: The legislative intent underlying the license suspension statutes was to emphasize, as a matter of public policy, that child support obligations have the highest priority in a parent's allocation of income to debt. Unpaid child support may not be analogized to ordinary civil debt because parents have not only a legal obligation, but a social and moral obligation, to support their children, so support of children transcends ordinary individualistic matters, rising to the level of a social obligation that a parent owes not only to the child, but to the state as well. Thus, the law does not look lightly upon those who fail to make a good faith effort to discharge their child support obligations when they are able to do so. The license suspension provisions are remedial in nature, rather than punitive, because they protect the public interest in having parents, not the state, shoulder financial responsibility for children. In the present case, the father was years in arrears in paying child support at the time that the license suspension hearing was held but nevertheless maintained that when the child was emancipated, the child support debt transformed into an ordinary civil debt. The Supreme Court disagreed, expressly approving the use of license suspension statutes as a remedy for the collection of child support arrearages. In re Marriage of Hopper, 1999 MT 310, 297 M 225, 991 P2d 960, 56 St. Rep. 1247 (1999), following Willoughby v. Loomis, 264 M 44, 869 P2d 271, 51 St. Rep. 138 (1994), and distinguishing In re Marriage of Mikesell, 276 M 403, 916 P2d 740, 53 St. Rep. 418 (1996).

Child Support Enforcement Remedies Held Separate Remedies to Be Exercised Within Ten-Year Statute of Limitations — Due Process Requirements Applicable to Separate Remedies — Connell Distinguished: Emery was divorced from Keep in 1987, and Emery was ordered to pay child support. In exchange for Keep's receipt of payments under the Aid to Families With Dependent Children program, Keep assigned the Child Support Enforcement Division (CSED) of the Department of Public Health and Human Services her right to receive child support and her right to enforcement of support. In 1991, CSED served Emery with a Notice of Intent (NOI) to collect the child support payments by referral of his debt to the Internal Revenue Service (IRS) for collection by interception of any federal tax refund owed to Emery. In response to the NOI, Emery timely requested an administrative hearing before CSED, which was granted, but the hearing was indefinitely continued, and no interception was made by the IRS. In 1992, CSED sent a second NOI to Emery, but Emery made no response. In 1992, no interception was made by the IRS. Also in 1992, Emery and Keep executed a stipulated change of their children's custody. In that stipulation, Keep waived her ability to collect child support arrearages, and the District Court approved the stipulation in an order. In 1995, CSED sent a third NOI to Emery notifying him of CSED's intent to collect child support payments by interception of Emery's federal tax refund. In response to the 1995 NOI, Emery requested a hearing before the CSED. Within 8 months from service of the 1995 NOI upon Emery, the Administrative Law Judge (ALJ) held that CSED's assigned right to child support was not affected by the waiver because CSED was not a party to the stipulation. The District Court approved the decision of the ALJ. On a motion for alteration or amendment of the District Court's order, the District Court, relying upon In re

Connell v. St., 280 M 491, 930 P2d 88 (1997), held that the delay between Emery's 1991 request for administrative review and the 1996 hearing before the ALJ violated Emery's right to due process of law and his right to the administration of justice without delay. The Supreme Court reviewed its decision in Connell and pointed out that in that case, 44 months elapsed before the ALJ made a decision in response to Connell's request for administrative review of a CSED NOI and that the 44-month lapse denied Connell his constitutional rights to due process and administration of justice without delay. In contrast, the Supreme Court held that the NOI served upon Emery in 1995 in the case before it was a separate proceeding from the NOI served upon him in 1991 and was not, as interpreted by the District Court, a continuation of the 1991 proceeding because the 1991 proceeding was discontinued once the IRS failed to make an interception of the federal tax refund owed to Emery. Further, the Supreme Court pointed out that the various administrative remedies, such as state debt offsets, license suspension, warrants for distraint, and state income withholding, are all separate remedies for the CSED to pursue, and election of one remedy does not preclude pursuit of another remedy after, or at the same time as, the remedy chosen by the CSED until the debt assigned to the CSED is fully paid. Any of the remedies, the Supreme Court held, were subject to the 10-year statute of limitations provided in 27-2-201. The Supreme Court therefore held that because the lapse of time in the case before it was between different proceedings and not within one proceeding and the lapse of time within the 1995 proceeding was reasonable, Emery's right of due process and right to administration of justice without delay were not violated. The Supreme Court also held that because Emery had no right under Montana law to a hearing when no action was being taken by the CSED against him, the failure of the CSED to grant a hearing did not implicate Emery's rights of due process and administration of justice. In response to Emery's argument that the CSED did not act soon enough in initiating its collection action, the Supreme Court held that Art. II, sec. 16, Mont. Const., imposes no requirement that the CSED act "speedily and without delay" within the 10-year statute of limitations provided in 27-2-201, noting that imposition of such a requirement would effectively eliminate that 10-year limitation period. For these reasons, the Supreme Court reversed the decision made by the District Court that Emery's constitutional rights were violated by the decision of the CSED. Emery v. St., 286 M 376, 950 P2d 764, 54 St. Rep. 1454 (1997).

Original Court Authority Over Support Action Not Affected by URESA Action — Original Decree Unaffected: Although a court in a Uniform Reciprocal Enforcement of Support Act (URESA) (replaced by UIFSA) action looks to the ability of the obligor to pay at the time of the enforcement proceeding, the authority of the court originally ordering payment is not affected, nor is its order modified by an order of a court fixing another or different sum pursuant to the URESA action. Furthermore, child support actions and URESA actions do not merge. A request for modification of a divorce decree is separate and distinct from a URESA action, and URESA support orders that do not reference prior support awards do not modify them. In re Marriage of Petranek, 255 M 458, 843 P2d 784, 49 St. Rep. 1107 (1992).

Obligation to Support Independent of Visitation Rights: A child's right to support and the parent's support obligation are not affected by misconduct of the parent or violations of visitation provisions of a custody decree. The District Court therefore was in error in making the enforcement of the child support payments, under a Uniform Reciprocal Enforcement of Support Act (URESA) (replaced by UIFSA) action, contingent upon visitation compliance by the custodial parent. State ex rel. Dewyea v. Knapp, 208 M 19, 674 P2d 1104, 41 St. Rep. 143 (1984), affirmed in In re Adoption of K.L.J.K., 224 M 418, 730 P2d 1135, 43 St. Rep. 2297 (1986).

Extradition for Criminal Nonsupport: Although a child support order issued by another state is a civil and not a criminal action, failure to pay the support may be a crime (felony criminal nonsupport) in that state, and the defendant is subject to extradition for criminal proceedings. Crabtree v. St., 186 M 340, 607 P2d 566 (1980).

Chapter Law Review Articles

Family Law, Snyder & Sharrock, 40 Mont. L. Rev. 75 (1979).
Recent Developments in Family Law in Montana, Mahan, 39 Mont. L. Rev. 1 (1978).
Presumptions Concerning Family Law, Clarke, 37 Mont. L. Rev. 102 (1976).

Part 2
Administrative Enforcement of Support

Part Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 549, L. 1989, provided: "A statement of intent is required for Senate Bill No. 42 [Ch. 549] because it amends several sections within Title 40, chapter 5, part 2, on child support enforcement services. These amendments are proposed to bring state law into compliance with federal law. The department of revenue [now department of public health and human services] is granted an extension of authority to adopt rules in accordance with this bill that conform with federal laws and regulations.

The legislature intends that the department adopt rules that:

(1) reduce aid to families with dependent children (AFDC) expenditures by ensuring that the parent or other person responsible pays for the care, support, or maintenance of a child under the provisions of 40-5-202(1);

(2) ensure child support enforcement services will continue to be provided to families that cease to receive public assistance under AFDC, without requiring an application or payment of a fee;

(3) establish the terms and conditions of providing continued services for families no longer receiving public assistance; and

(4) establish procedures for the discontinuance of child support enforcement services when the custodial parent:

(a) ceases or fails to cooperate with the department as provided under 40-5-204; or

(b) takes an action to prejudice the rights of the department under 40-5-202(4) and (5)."

Severability: Section 30, Ch. 549, L. 1989, was a severability clause.

Severability: Section 30, Ch. 612, L. 1979, was a severability clause.

1979 Statement of Intent: The statement of intent adopted with SB 221 (Ch. 612, L. 1979) provided: "A statement of intent is required for Senate Bill 221 inasmuch as rulemaking authority is granted to the Department of Revenue [now Department of Public Health and Human Services].

Senate Bill 221 establishes administrative procedures to facilitate the enforcement of support for dependent children. These procedures provide the Department of Revenue [now Department of Public Health and Human Services] with more effective and efficient procedures to ensure that dependent children are supported by those persons who under the law are primarily responsible for such support.

To enable the Department of Revenue [now Department of Public Health and Human Services] to achieve the objectives of SB 221 rulemaking authority is granted as follows:

1. In general the Department of Revenue [now Department of Public Health and Human Services] is authorized to "adopt and enforce such rules as may be necessary to carry out the provisions of [this act]". SB 221, section 2(9).

2. To limit the responsibility of the Department of Revenue [now Department of Public Health and Human Services] to accept applications for support enforcement services on behalf of persons who are not recipients of public assistance. SB 221, sections 1 and 2.

3. To establish reasonable fees for support enforcement services provided to persons who are not recipients of public assistance. SB 221, section 3.

4. To adopt rules, based on ability to pay, defining the extent of the debt due and owing to the State of Montana by the natural or adoptive parent(s) responsible for the support of children who have received public assistance. Where a district court order establishes the level of support, the debt is limited to the amount provided for by the order. SB 221, section 12(4)."

Part Law Review Articles

Child Support Enforcement in Montana, Christie, 50 Mont. L. Rev. 165 (1989).

Reimbursement for Welfare Payments, Johnson, 37 Mont. L. Rev. 272 (1976).

40-5-201. Definitions.

Compiler's Comments

2019 Amendment: Chapter 364 in definition of paternity genetic test at beginning of first and fourth sentences substituted reference to paternity genetic test for reference to paternity blood test. Amendment effective October 1, 2019.

2005 Amendment: Chapter 21 in definition of child in (a)(iv)(D) near beginning after "referral for" substituted "IV-D" for "interstate" and after "state" inserted "or an Indian tribe"; and in definition of obligee in (b) after "state" inserted "or an Indian tribe". Amendment effective March 18, 2005.

1999 Amendment: Chapter 579 in definition of child in (a)(iv) inserted reference to IV-D case; in definition of support debt inserted (c) to include amount created by fines, fees, penalties, interest, and other funds and costs collected by department; in definition of support order inserted (c) to include, when context requires, judgments and orders providing periodic payments and amounts for recovery of fines, fees, penalties, interest, and other funds and costs collected by department; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendments: Chapter 42 in (a)(iv) of definition of child inserted reference to the Revised Uniform Reciprocal Enforcement of Support Act or the Uniform Interstate Family Support Act; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 482 in definition of child, in (a)(iv) after "Support Act" inserted, "(URESA) or the Uniform Interstate Family Support Act (UIFSA)". Amendment effective May 2, 1997.

Chapter 552 in definition of child, in (a), inserted "the Uniform Reciprocal Enforcement of Support Act", before "Uniform" inserted "Revised", and inserted "the Uniform Interstate Family Support Act"; in definition of paternity blood test inserted provisions stating how genetic markers may be identified and how the sample may be taken; in definition of support debt, in (b) after "maintenance", substituted "of" for "if the judgment or order requiring payment of maintenance also contains a judgment or order requiring payment of child support for a child of whom the person awarded maintenance is"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendments: Chapter 60 in definition of support order, near beginning after "means an order", substituted "whether temporary or final" for "providing a determinable amount for temporary or final periodic payment of funds for the support of a child" and inserted subsection (a) of definition concerning specific amount of money, including money for specified purposes; and made minor changes in style.

Chapter 504 in definition of support debt or support obligation, in (a), substituted "provide for the medical, health, and support needs of a child" for "provide support to a child"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in definitions of Department and Director substituted "department of public health and human services" for "department of social and rehabilitation services"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 18, Ch. 60, L. 1995, was a severability clause.

Section 33, Ch. 504, L. 1995, was a severability clause.

Preamble: The preamble attached to Ch. 504, L. 1995, provided: "WHEREAS, it is appropriate to draft a bill specifically to present proposed program improvements for medical support enforcement in a single, comprehensive bill that promotes the needs of legislative energy, efficiency, and economy by limiting the number of possible bills and by reducing the need for hearings and readings on those bills; and

WHEREAS, parents should be held responsible for providing medical care for their children, whether or not the parents voluntarily do so."

1995 Statement of Intent: The statement of intent attached to Ch. 504, L. 1995, provided: "A statement of intent is required for this bill because it grants rulemaking authority to the department of social and rehabilitation services to adopt rules for expedited procedures."

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 631 in definition of child, in (a) after "United States", inserted "any person under 19 years of age and still in high school, or any person who is mentally or physically incapacitated if the incapacity began prior to the person's 18th birthday" and inserted (b) providing that the definition may not be construed to limit the ability of the Department to enforce a support order; in definition of support order, in (b) and (d) after "state", inserted "Indian tribe, or foreign country"; and made minor changes in style.

1991 Amendment: Inserted definitions of guidelines and hearing officer or hearing examiner.

1989 Amendments — Composite Section: Chapter 119 inserted definitions of alleged father and paternity blood test; and in definition of child, at end of introductory phrase, inserted "and for whom" and inserted subsections relating to assigned support rights, public assistance, child support enforcement services, and an interstate services referral.

Chapter 287 inserted definition of IV-D.

Chapter 549 in definition of child deleted "or "dependent child"" as part of the defined term and inserted subsections relating to assigned support rights, public assistance, child support enforcement services, and an interstate services referral; deleted definitions of disposable earnings, District Court order, earnings, and responsible parent; inserted definitions of obligee, obligor, parent, support order, and IV-D; in definition of public assistance, in first sentence, inserted "for a child" and at end deleted "furnished to a person by a state or county agency, regardless of the original source of the assistance" and inserted second sentence relating to payments to meet the need of a relative with whom the child is living; in definition of support debt, in (a) before "child", deleted "dependent", before "state" inserted "or any other", and at end substituted "a support order" for "the decree of any court of appropriate jurisdiction ordering a sum to be paid as child support" and in (b) substituted "a support order for spousal maintenance" for "the sum created by a decree or order of any court of appropriate jurisdiction ordering a sum to be paid as spousal maintenance under chapter 4, part 2, of this title"; and made minor changes in phraseology.

Chapter 702 in (2) and (3) changed "department of revenue" to "department of social and rehabilitation services".

The amendments to the definition of child made by Ch. 119 and Ch. 549, inserting (c) and (d), were identical in content but contained minor differences in phraseology. The Code Commissioner has codified the amendments made by Ch. 119 and not Ch. 549. The meaning of the definition remains unchanged.

Severability: Section 11, Ch. 119, L. 1989, was a severability clause.

1985 Amendment: In (10), in introductory language inserted "or support obligation" and inserted (b) defining debt or obligation as sum ordered as maintenance to custodial parent when child support is also ordered.

Case Notes

Proof of Ability to Pay Some if Not All Support Sufficient for Prosecution for Nonsupport: Price was convicted of nonsupport and received the maximum 2-year sentence. Price appealed, contending that there was insufficient evidence to prove that he was financially capable of making all payments during the period in which nonsupport was a felony after 1993. Price maintained that because the definition of support obligation in this section includes the amount created by a failure to provide support or the amount owed pursuant to a support order, the ability to pay support means the ability to meet the total support obligation and because evidence at trial was insufficient to prove that Price could meet the total support obligation, he could not be convicted of nonsupport. The Supreme Court disagreed. The plain language of 45-5-621 compels a person to pay support that that person is capable of paying, but a defendant who is not capable of paying the entire amount is not immune from prosecution if the person failed to pay support even though support could have been paid in whatever amount. Evidence showed that Price was employed part of the time, but made no voluntary payments whatsoever. A rational trier of fact could have found that Price had the ability to pay some support, even if the amount was limited, and that satisfied the state's burden to prove that Price was able to pay support. St. v. Price, 2002 MT 284, 312 M 458, 59 P3d 1122 (2002).

40-5-202. Department of public health and human services — powers and duties regarding collection of support debt.

Compiler's Comments

2005 Amendment: Chapter 21 in (1)(c) at beginning after "receives" substituted "a" for "an interstate", near end before "action" deleted "interstate", and at end after "agency" deleted "of another state". Amendment effective March 18, 2005.

1999 Amendment: Chapter 579 in (6)(a) inserted reference to 42 U.S.C. 608(a)(3); in (13)(g) after "including" inserted "a hearing on a claim that property is exempt from execution and"; and inserted (16) requiring hearing on exemption claim to be initially conducted by teleconference methods subject to Montana Administrative Procedure Act and requiring hearings officer to grant de novo in-person hearing upon request of party or showing that party's case is substantially prejudiced by lack of in-person hearing. Amendment effective May 10, 1999.

1997 Amendment: Chapter 482 at beginning of (6)(a) inserted "When the department is providing services"; in first sentence in (6)(a) and in second sentence in (10) and (11), after "under", substituted "42 U.S.C. 602(a)(26)" for "53-2-613"; inserted (13)(h) authorizing Department to perfect investigative service and hearing subpoenas by certified mail or other prescribed service; and inserted (15) authorizing Department to collect funds owed using methods of child support collection. Amendment effective May 2, 1997.

1995 Amendments — Composite Section: Chapter 264 in (1) substituted "chapter" for "part"; in (1)(b), after "is providing", deleted "child support enforcement"; in (2), at beginning of second sentence, inserted "Upon filing", inserted "on behalf of itself or on behalf of the obligee, obligor, or child", and inserted "intervene in"; inserted (3) concerning representation of public interest by Department; in (5)(a), at beginning, substituted "If the department is providing IV-D services, the department" for "The department is a party to and", after "participate" inserted "as an independent party", and after "paternity" inserted "to termination of parental rights" and deleted second sentence that read: "A recipient of services may not act to prejudice the rights of the department while the services are being provided"; inserted (5)(b) and (5)(c) relating to content and service of notice; inserted (6) relating to assignment of child support; inserted (7) concerning prejudice to rights of Department; in (8) substituted introductory clause relating to consent by

Department and payment of public assistance for child for "If child support enforcement services are being or have been provided under this part", after "obligor" substituted "or a judgment, decree, or order adopting the agreement does" for "either relieving an obligor of any duty of support or purporting to settle past, present, or future obligations either as settlement or prepayment may", after "department" inserted "to establish a support order or", after "recover" inserted "a support debt", after "obligor" deleted "for support debt provided unless the department has consented to the agreement in writing", and inserted final clause relating to agreement, judgment, decree, or order; inserted (8)(a) through (8)(d) relating to effect of agreement, judgment, decree, or order; in (13) inserted initial clause referring to services under this chapter and substituted "this chapter" for "this part"; in (13)(c) inserted "investigative and hearing"; inserted (13)(d) and (13)(e) relating to discovery and settlement conferences; in (13)(f) inserted "the attendance of"; inserted (13)(g) relating to proceedings concerning execution or distraint; in (14) inserted initial clause concerning requirements for service under Rules of Civil Procedure and near middle substituted "under this chapter" for "in a proceeding concerning the establishment or enforcement of child support"; and made minor changes in style. Amendment effective March 28, 1995.

Chapter 546 in (1)(a) substituted "receives a referral on behalf of the child from an agency providing services to the child under the provisions of Title 41, Title 52, or Title 53" for "receives a referral from the department of social and rehabilitation services or the department of family services on behalf of the child"; and in (14) inserted introductory clause and after "written response to the department" substituted "under this chapter" for "in a proceeding concerning the establishment or enforcement of child support". Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Severability: Section 10, Ch. 264, L. 1995, was a severability clause.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendments: Chapter 328 in (1)(c) inserted reference to the Uniform Interstate Family Support Act; and made minor changes in style.

Chapter 631 near end of (1), after "statutes to", substituted "provide IV-D services" for "ensure that the parent or other person responsible pays for the care, support, or maintenance of a child"; substituted (2) regarding Department's authority to act on a verified statement for former language that read: "If the department is providing child support enforcement services for a child under this part, the department becomes trustee of any cause of action of the child or the obligee to recover support due to the child or obligee from the obligor. The department may bring and maintain the action in its own name or in the name of the obligee"; substituted first sentence of (4) regarding Department's standing as a party to a proceeding for former sentence that read: "For purposes of prosecuting any civil action, the department is a real party in interest if it is providing child support enforcement services under this part" and in second sentence substituted "recipient of services" for "obligee"; inserted (11) requiring that notice, service, or response be made to the Child Support Enforcement Division; and made minor changes in style.

1989 Amendments — Composite Section: Chapter 549 generally rewrote (1) and added reference to the Uniform Parentage Act (see 1987 MCA for former text); in (2), at beginning of first sentence, substituted language relating to Department of Revenue providing services for language relating to public assistance provided by a state or county agency or when the Department has contracted to collect support, before "child" deleted "dependent", substituted "obligee" for "person having legal custody of the dependent child", and at end substituted "the obligor" for "any person"; in (3) substituted "obligee" for "recipient of public assistance" and at end substituted "on behalf of a child" for "and representing support payments for children in whose behalf public assistance has been previously paid"; in (4), after "civil action", deleted "pursuant to this part", after "party in interest" substituted "if it is providing child support enforcement services under this part" for "upon the payment of public assistance", and at end substituted "while such services are being provided" for "after the receipt of public assistance"; in (5), at beginning, inserted "If child support enforcement services are being or have been provided under this part"; in (6), near beginning, inserted "or an administrative agency"; in (7) substituted "obligee" for "children or person having the care, custody, and control of the child or children", before "state" inserted "this or any other", after "state" substituted "to collect a support debt" for "to obtain reimbursement of money thus spent", and inserted last sentence relating to subrogation; substituted (8) concerning subrogation right for former (8) (see 1987 MCA for former text); in (10) inserted "and records"; and made minor changes in phraseology.

Chapter 702 in (1), after "the department of social and rehabilitation services", substituted "shall promptly take" for "or the department of family services shall promptly refer the matter to the department of revenue for"; in (8)(a), after "paid", deleted "by the department of social and rehabilitation services or the department of family services"; and made minor changes in phraseology. Amendment effective July 1, 1989.

In (1) Ch. 702 made a change in phraseology but not in substance. The amendment of Ch. 549 was substantive, changing "shall" to "may". The Code Commissioner has codified the substantive change made by Ch. 549.

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

1987 Amendment: In (1), in two places, inserted reference to Department of Family Services; and in (8)(a), after "department", inserted "of social and rehabilitation services or the department of family services" and after "assistance" deleted "money".

1985 Amendment: In (8), at end of introductory clause, substituted "This subrogation applies both to" for "This subrogation shall apply to temporary spouse support orders and family maintenance orders up to"; in (8)(a), at beginning inserted "(a) the lesser of" and at end inserted "of the responsible parent or the amount of support contained in the court order"; and in (8)(b) at beginning of sentence inserted "(b) to any amount".

1981 Amendment: Inserted "orders" following "district court" in the first line of (8); substituted "the director's" for "his" in (10).

Case Notes

Findings by Court Different From Those Relied on by Administrative Law Judge — Improper Adoption of Support Amount Without Testimony at Merits Hearing: While the marriage dissolution was pending, the wife asked the Child Support Enforcement Division to set child support. The Division gathered information regarding the parties' income, and the Administrative Law Judge (ALJ) set an amount. At the merits hearing, the District Court did not allow the husband to testify about seeking modification of the ALJ's order. The District Court adopted the ALJ's amount even though a number of facts in its findings of facts differed from those relied on by the ALJ in calculating support. The husband appealed the support amount, arguing that the District Court had abused its discretion. The Supreme Court concluded that the District Court had erred in not letting the husband testify and remanded the matter to reconsider child support. In re Marriage of Pesanti, 2014 MT 324, 377 Mont. 256, 342 P.3d 679.

Authority of District Court to Retroactively Supersede Temporary Child Support Enforcement Division's Order: While the wife's dissolution petition was pending, she asked the Child Support Enforcement Division to set child support. The Division gathered information regarding the parties' income and set a support amount. Both parties disputed the amount, and a contested hearing was held. After the hearing, the Division issued a temporary support obligation order. The husband petitioned for judicial review of the order, but the Division informed the court that the order was not appealable, so the parties stipulated to dismiss the petition for judicial review, and the court dismissed the petition. The court eventually set a child support amount, and the husband moved to have the court's order applied retroactively, but the court concluded that the order could not be applied retroactively, so the husband appealed. The Supreme Court reversed. Under 40-5-225, the Division may set a temporary support order if one has not been set, but the very nature of the temporary order contemplates that the Division's order will be superseded by order of the District Court. Thus, the District Court erred when it held that it did not have authority to retroactively supersede the Division's temporary order, and it was an abuse of discretion for the court not to do so. In re Marriage of Banka, 2003 MT 84, 315 M 97, 67 P3d 885 (2003).

Disability Payments in Excess of Support Obligation Not Credited Against Support Arrearages: Father's monthly $250 support obligation was completely offset by the monthly $512 Social Security benefit paid to his children. The District Court did not apply the Social Security payments as a credit toward the support obligation but instead increased the support obligation to a sum equal to the total of the support obligation and the Social Security benefit. Father maintained that the court should have offset the support obligation with the Social Security payment and credited the remaining $262 toward his existing support arrearages. In determining the disposition of the excess benefits, the Supreme Court noted ARM 46.30.1542(1)(b) (now repealed) in holding that the father was entitled to credit for the amount of his monthly obligation for child support, but no more. Therefore, the District Court did not err in refusing to apply any excess monthly benefits to the accrued arrearages. Further, a lump-sum Social Security payment was paid to the children to compensate them for overdue benefits for the period when father became eligible for the benefits and when the benefit payments commenced. The lump-sum payment, like the other monthly Social Security payments, should have been credited to father's monthly support obligation for the months during which the lump sum accumulated. Because those benefits completely offset the monthly support obligation, any excess support paid during that time was in addition to the actual obligation and should have been credited to the accrued arrearages. In re Marriage of Cowan, 279 M 491, 928 P2d 214, 53 St. Rep. 1250 (1996).

Excess Support Properly Retained by State: Holthusen made his child support payments directly to the Child Support Enforcement Division. The payment amount was for $75 more than his current obligation, and the Division retained the excess to reimburse the state for public assistance money that the wife received during the time Holthusen had failed to pay support. The Supreme Court held that the state properly retained the money rather than tendering the excess to the wife for past child support and that after being reimbursed, the state would then be required to pay the excess to the wife. In re Marriage of Holthusen/Jakobson, 259 M 42, 854 P2d 333, 50 St. Rep. 666 (1993).

Husband Credited for Past Social Security Payments to Children: The trial court was not aware of the Supreme Court's decision in In re Marriage of Durbin, 251 M 51, 823 P2d 243 (1991), overruled, inasmuch as a credit may be granted to a parent for Social Security benefits received prior to a motion to modify as a credit against the noncustodial parent's child support obligation without constituting a retroactive modification of the original support order, in In re Marriage of Cowan, 279 M 491, 928 P2d 214, 53 St. Rep. 1250 (1996), and failed to give the husband credit against his support obligation for social security payments made by him to his children. The lower court modified the support obligation beginning with the date of the first hearing after the Durbin decision in which the husband raised the issue of the social security payments. The Supreme Court affirmed the lower court's ruling and held that the District Court did not retroactively apply Durbin. In re Marriage of Holthusen/Jakobson, 259 M 42, 854 P2d 333, 50 St. Rep. 666 (1993).

40-5-203. Child support enforcement services.

Compiler's Comments

2005 Amendment: Chapter 21 in (4) after "available to" substituted "nonresidents" for "obligors, obligees, and residents of other states". Amendment effective March 18, 2005.

1997 Amendment: Chapter 552 in (3), in first sentence, substituted "shall" for "may", inserted "subject to the same conditions and on the same basis as in the case of other individuals to whom services are furnished under this section", and inserted " application fee, or other request for services" and at beginning of second sentence substituted "Acceptance" for "An obligee's acceptance" and near middle, before "agreement", deleted "the obligee's"; inserted (4) making services to nonresidents available on the same terms as to residents; in (5)(a) substituted "request for termination of services from the person to whom services are being provided" for "request from the obligee for termination of services"; in (5)(c) substituted "the person receiving services" for "an obligee"; inserted (6) requiring the Department to indicate if the withholding is for delinquent support or for regular monthly support for purposes of credit rating reports by the Department; and made minor changes in style. Amendment effective July 1, 1997.

1989 Amendments — Composite Section: Chapter 549 in (1), before "support", inserted "child"; in (2), at end, substituted "the terms and conditions by which services are provided under this section" for provision allowing reasonable standards necessary to limit applications for services, taking into account income and resources from other sources; in (3) (now deleted), in three places, substituted "obligor" for "persons from whom the support is being collected"; inserted (3) allowing continued services after public assistance payments end; and inserted (4) stating when services may be terminated. The amendments to (3) made by Ch. 549 were rendered ineffectual by the deletion of (3) in Ch. 702.

Chapter 702 deleted former (3) that read: "(3) The department may not charge the applicant a fee as compensation for services rendered in establishment of or enforcement of support obligations. However, the department may charge a fee to the person from whom the support is being collected. This fee must be in addition to the support payment. The department shall by rule establish reasonable fees commensurate with the cost of enforcement support services to be paid by the person from whom the support is being collected. When payments are scheduled to be paid on an installment basis, a portion of the collection fee owed to the department shall be added to each payment. If the person from whom the support is being collected makes a payment in an amount that is less than the support payment plus the collection fee for that payment, the department may deduct a percentage of the total sum collected which represents the department's standard proportion. The department may, upon a showing of necessity, waive or defer any such fee."

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

1985 Amendment: In (3), in first sentence substituted "may not charge the applicant a fee" for "may charge a fee", and substituted second through fifth sentences authorizing fee and allowing Department to set fee by rule for former text that read: "This fee shall be agreed on in writing with the parent, custodian, or guardian of the person for whom a support obligation is owed or that person if no parent, custodian, or guardian exists. An initiation fee as a portion of the collection fee may be charged the applicant by the department. The department shall by rule establish reasonable fees for support enforcement services, and the schedule of fees shall be made available to all applicants for support enforcement services".

Case Notes

Husband Not Receiving Public Assistance May Apply for Support Enforcement Services Although Ex-Wife Receiving Public Assistance: The Supreme Court affirmed the lower court's finding that Holthusen could apply for support enforcement services under this section even though his ex-wife could not apply for those same services because she was receiving public assistance. In re Marriage of Holthusen/Jakobson, 259 M 42, 854 P2d 333, 50 St. Rep. 666 (1993).

40-5-204. Cooperation by obligee.

Compiler's Comments

1989 Amendment: Rewrote entire section to specifically state obligee's cooperation requirements (see 1987 MCA for former text).

Case Notes

Mother's Cooperation Irrelevant to Father's Support Obligation: Whether an applicant for AFDC assistance cooperates with the state in obtaining child support is not relevant to the issue of a parent's obligation to support his children. The obligation remains whether or not the applicant cooperates. St. v. Hubbard, 222 M 156, 720 P2d 1177, 43 St. Rep. 1135 (1986).

40-5-205. Payment of support money collected to department — notice.

Compiler's Comments

1989 Amendment: Near beginning substituted "obligor" for "responsible person"; after "clerk of the court" deleted "if appropriate" and inserted "or to an administrative agency that issued a support order"; after "receiving" substituted "services from the department" for "public assistance"; after "support money" substituted "must be paid to the department" for "paid by the person or persons responsible for support as a result of any action shall be paid through the support enforcement and collections unit of the department of revenue"; and made minor changes in phraseology.

40-5-206. Central unit for information and administration — cooperation enjoined — availability of records.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 21 in (1) near beginning after "answering" substituted "IV-D" for "interstate"; and in (5)(b) at beginning substituted "government" for "county" and near middle after "proceedings and" substituted "IV-D agencies" for "agencies in other states". Amendment effective March 18, 2005.

Chapter 431 in (2) at end inserted "or as an aid to the operation of the IV-D program"; in (2)(g) inserted reference to federal employer ID number, North American industry classification system code, active or inactive status of the business and status date, phone number, facsimile number, address type, child support withholding address, and e-mail address; in (2)(h) at end inserted "of the obligor or obligee or an entity in which the obligor or obligee directly or indirectly has full or partial ownership with rights to participate in general management and control that are derived from the full or partial ownership interest"; inserted (2)(l) relating to information listed in subsection (2)(g) for all Montana employers for the operation of the directory of new hires; and made minor changes in style. Amendment effective April 28, 2005.

1997 Amendment: Chapter 552 in (2) inserted language clarifying when information may be requested and by whom for "If services are provided to a child under this part"; inserted (2)(h) regarding state and local tax and revenue records; inserted (2)(i) regarding penal corrections records; in (2)(j), after "real property", inserted "or titled personal property"; in (2)(k), after "including", inserted "its location and"; inserted (3) allowing the subpoena of information about an obligor or obligee from public utilities, cable television companies, and financial institutions in certain cases; in (4) and (5) inserted proviso regarding absence of a specific statutory prohibition and subsection (6); inserted (6), (7), and (8) relating to when information may not be disclosed, immunity from liability for disclosure, and contempt for noncompliance with this section; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 264 in (2), near end of introductory clause, inserted "or obligee"; in (2)(b) substituted "residential and mailing addresses" for "address of obligor's residence"; in (2)(h) inserted "location, and description" and after "real property" deleted "owned by the obligor"; in (2)(i) inserted "or obligee"; in (3) inserted second sentence authorizing Department to release information; in (4)(b), after "abandonment proceedings", deleted "or actions" and after "minor children" deleted "as authorized by the rules of the department and by the provisions of"; and made minor changes in style. Amendment effective March 28, 1995.

Severability: Section 10, Ch. 264, L. 1995, was a severability clause.

1993 Amendment: Chapter 631 near beginning of (2), after "request and", inserted "notwithstanding any statute making the information confidential", after "information" inserted "if known", and after "concerning" deleted "the location, income, and assets of"; inserted (2)(a) through (2)(i) outlining information the Department may request; inserted (3) through (4)(a) regarding use and disclosure of information; at beginning of (4)(b) deleted "Except as provided in 40-5-261 and rules adopted under 40-5-262, any records established pursuant to the provisions of this section are available only to the department"; inserted (4)(c) that read: "(c) any other use permitted or required by the federal Social Security Act"; and made minor changes in style.

1989 Amendments: Chapter 418 in (1) inserted reference to requests for information from consumer reporting agencies; and at beginning of (3) substituted exception clause relating to 40-5-261 and 40-5-262 for "Except as provided in 31-3-127".

Chapter 549 rewrote (2) to require only the provision of information by other entities, eliminating the requirement that they assist the Department (see 1987 MCA for former text).

1985 Amendment: In (3) at beginning inserted exception clause.

Federal Statute: The Social Security Act referred to in this section is codified at 42 U.S.C. § 1306, et seq.

40-5-207. Department authorized to enforce maintenance awards.

Compiler's Comments

1999 Amendment: Chapter 579 substituted language authorizing department to use available remedies to collect and enforce judgment or order for maintenance or support of custodial parent if department providing child support for former language that read: "If a judgment or order creating a child support obligation also contains a judgment or order for the support of a spouse or former spouse who is the custodial parent of the child, the department may collect and enforce spousal support under this part." Amendment effective October 1, 1999.

1989 Amendment: Made section applicable to spouses, as well as former spouses.

40-5-208. Medical support — obligation enforcement.

Compiler's Comments

2005 Amendment: Chapter 431 in (1) inserted second sentence allowing department to initiate an independent proceeding for a medical support order; and throughout (2) through (5) substituted reference to parent for reference to obligor. Amendment effective April 28, 2005.

1995 Amendment: Chapter 504 in (1), after "existing order", substituted "the support order must include a medical support order as defined in 40-5-804" for "the department shall require the obligor to obtain and maintain health insurance coverage for each child if health insurance coverage is available through the obligor's employment or other group health insurance plan. The order or modification of an order must include a statement that the insurance must be obtained and maintained whenever the department is providing support enforcement services and that the failure to do so may result in the imposition of sanctions under this section.

(b) If the support order or modification of an order does not include a provision requiring the obligor to provide health insurance coverage for a child, upon notice to the obligor that the child is receiving support enforcement services under Title IV-D of the Social Security Act, the obligor shall obtain and maintain health insurance coverage as provided for in subsection (1)(a). This insurance is in addition to:

(i) an order requiring the obligee to maintain health insurance coverage;

(ii) an agreement that the obligee will maintain health insurance coverage; or

(iii) a failure or omission of the court order or modification of an order to require health insurance coverage"; in (2), after "providing", substituted "IV-D services for a child, the department shall also enforce any order issued by a court or administrative agency of competent jurisdiction that" for "child support enforcement services and the obligor is required by an existing district court order or an administrative order under this section to provide health insurance coverage for a child, the department shall also enforce the health insurance obligation"; substituted (2), (2)(a), and (2)(b) concerning enforcement of order requiring obligor to make payments for health or medical needs of child or to enroll child in health benefit plan for former language that read: "(2) (a) If the department is providing child support enforcement services and the obligor is required by an existing district court order or an administrative order under this section to provide health insurance coverage for a child, the department shall also enforce the health insurance obligation"; in (3)(a), at beginning, substituted "To permit the department to determine whether enforcement action is necessary, if the obligor is required to enroll the child in a health benefit plan or individual insurance" for "To ensure that health insurance coverage is available for the child" and substituted "individual insurance carrier or health benefit plan" for "insurance carrier"; inserted (3)(b) concerning failure of the obligor to provide information to the Department; deleted former (3) that read: "(3) (a) The department may issue a notice commanding the obligor to appear at a hearing held by the department and show cause why a sum of not more than $100 should not be assessed for each month health insurance coverage is not secured or maintained if the department determines an obligor has failed to:

(i) obtain or maintain health insurance coverage as required under this section; or

(ii) provide information required under this section.

(b) If the department finds, after hearing or the obligor's failure to appear, that health insurance coverage has not been obtained or maintained or that the obligor has failed to provide the information required, the department may assess against the obligor not more than $100 for each month health insurance coverage has not been obtained or maintained or for each month information has not been provided. The amounts may be enforced by any administrative remedy available to the department for the enforcement of child support obligations, including warrant for distraint provided for in 40-5-247 and income withholding provided for in Title 40, chapter 5, part 4"; deleted former (4) that read: "(4) The health insurance coverage must be provided under this section even though it may reduce the amount of child support obligation or reduce the obligor's ability to pay child support as required"; inserted (4) and (5) concerning the Department providing services for a child when a child support order or modification of a child support order does not include any provision for the health and medical needs of the child; deleted (5) that read: "(5) Any amounts collected pursuant to this section must be returned to the general fund to help offset expenditures for medicaid"; and made minor changes in style. Amendment effective July 1, 1995.

Coordination Instruction: Section 17, Ch. 60, L. 1995, provided: "If both [this act] and Senate Bill No. 402 [LC 365] are passed and approved and if Senate Bill No. 402 [LC 365] includes a section that amends 40-5-208, then [section 9 of this act], amending 40-5-208, is void." Senate Bill No. 402, including a section amending 40-5-208, was passed and approved; therefore, the amendments to this section that were adopted in sec. 9, Ch. 60, L. 1995, are void.

Preamble: The preamble attached to Ch. 504, L. 1995, provided: "WHEREAS, it is appropriate to draft a bill specifically to present proposed program improvements for medical support enforcement in a single, comprehensive bill that promotes the needs of legislative energy, efficiency, and economy by limiting the number of possible bills and by reducing the need for hearings and readings on those bills; and

WHEREAS, parents should be held responsible for providing medical care for their children, whether or not the parents voluntarily do so."

1995 Statement of Intent: The statement of intent attached to Ch. 504, L. 1995, provided: "A statement of intent is required for this bill because it grants rulemaking authority to the department of social and rehabilitation services to adopt rules for expedited procedures."

Severability: Section 33, Ch. 504, L. 1995, was a severability clause.

1993 Amendment: Chapter 631 near end of second sentence of (3)(b) substituted "40-5-247" for "40-5-241"; and made minor changes in style.

1989 Amendments — Composite Section: Chapter 549 throughout section, before "order", inserted "support" and substituted references to obligor for references to parents obligated to pay child support; in second sentence of (1), before "support order", deleted reference to a court of competent jurisdiction; in first sentence of (2), after "support order", deleted "of a court of competent jurisdiction or an administrative agency empowered to enter such order"; and made minor changes in phraseology.

Chapter 702 in (1)(a) inserted "to establish a child support order, whether final or temporary, and in each modification of an existing order", after "require" substituted "the obligor to obtain and maintain" for "parents obligated to pay child support to secure and maintain", before "child" deleted "dependent", after "child" substituted "if" for "at a cost not to exceed 5% of net income, whenever such", after "health insurance" inserted "coverage", after "through" substituted "the obligor's employment or other group health insurance plan" for "their employment", inserted last sentence relating to a warning statement concerning required health insurance coverage, and deleted former last sentence that read: "However, if a court of competent jurisdiction has entered an order establishing a current support obligation and has ordered the obligated parent to secure and maintain health insurance coverage for each dependent child, the department shall enforce the obligation as ordered by the court"; inserted (1)(b) relating to requirement to obtain and maintain health insurance coverage; inserted (2) requiring Department to enforce health insurance obligation; in (3)(a), before "may issue", substituted "The department" for "If the department determines that an obligated parent has failed to maintain health insurance coverage required by the order of a court of competent jurisdiction or an administrative agency empowered to enter such order, it", substituted "obligor" for "parent", and at end of introductory clause inserted "if the department determines an obligor has failed to"; inserted (3)(a)(i) relating to health insurance coverage; inserted (3)(a)(ii) relating to providing information; in (3)(b), in two places, substituted "obtained" for "secured", substituted "or that the obligor has failed to provide the information required" for "in accordance with the court or administrative order", at end of first sentence inserted "or for each month information has not been provided", in second sentence inserted "any administrative remedy available to the department for the enforcement of child support obligations, including", and at end inserted "and income withholding provided for in Title 40, chapter 5, part 4"; deleted former (3) and (4) that read: "(3) Whenever an obligated parent who has been served with notice under this section appears before the department and shows that health insurance coverage in accordance with the court or administrative order:

(a) has been secured and maintained continuously since the date of the order, the department shall dismiss the pending action; or

(b) has not been secured or continuously maintained but such coverage is presently in effect, the department shall suspend the pending action for a period of 12 months.

(4) At the end of the suspension period, the department may schedule a hearing. If at this hearing the department finds that during the suspension period health insurance coverage:

(a) has been continuously maintained, the department shall dismiss the pending action and the obligated parent will not be assessed under this section; or

(b) has not been continuously maintained, the department may enter a final order requiring the obligated parent to pay the sum assessed in accordance with this section for each month coverage was not maintained"; inserted (4) requiring provision of health insurance coverage even though it reduces a child support obligation or ability to pay; and made minor changes in form.

The amendment to the second sentence of (1) made by Ch. 549 has not been codified because the substance of the amendment is contained in (2)(a), inserted by Ch. 702. The amendments to (3)(a) made by Ch. 549 and Ch. 702 were the same in content but contained minor differences in phraseology. The Code Commissioner has codified the amendments made by Ch. 702. The meaning of the subsection remains unchanged.

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

40-5-209. Child support guidelines — periodic review.

Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 702, L. 1989, provided: "A statement of intent is needed for this bill because the department of social and rehabilitation services [now department of public health and human services] is required by [section 3] [40-5-209] to adopt uniform child support guidelines for use by judges and other officials who have the power to determine child support awards within this state. The department initially shall adopt and promulgate the uniform child support guidelines recommended by the Montana supreme court at 44 State Reporter 828 (1987). Thereafter, the department shall periodically review those guidelines to determine if they are appropriate to determine adequate minimum child support amounts. If the department determines that the guidelines are no longer adequate, it shall amend them, after considering the factors set forth in 40-4-204(2) and 40-6-116(5)."

Case Notes

Presumption Created by Child Support Guidelines Rebutted — Evidence That Child's Needs Have Been and Will Continue to Be Met — Imputed Income of Wife — Equal Parenting Time — Husband Paid Medical — Guidelines Unjust to Husband and Windfall to Wife — District Court's

Factual Findings Regarding Child Support Sufficiently Supported by Record. In re Marriage of Frank, 2022 MT 179, 410 Mont. 73, 517 P.3d 188.

Military Housing and Subsistence Allowances as Actual Income: Under administrative rules implementing this section, a parent's military housing and subsistence allowances are included as part of the parent's actual income when calculating child support obligations. Shelhamer v. Hodges, 2016 MT 29, 382 Mont. 187, 366 P.3d 255.

Salary Determination for Unusual Work Period — 7 Days at Work and 7 Days Off: In determining income under an administrative rule implementing the uniform child support guidelines under 40-5-209, the District Court was correct in determining that the salary of a person who worked 12 hours a day for 7 days and then had 7 days off was equivalent to 80 regular and 4 overtime hours in each 2-week period even though for pay purposes the person was paid overtime for all hours over 40 worked in the first week. In re Marriage of Stevens, 2011 MT 106, 360 Mont. 344, 253 P.3d 877.

Income Determination to Consider More Than W-2 Form: Under this section and the Montana Child Support Guidelines adopted as administrative rules implementing this section, a court may not limit income consideration to that reported on a W-2 form. All payments and benefits must be examined to avoid missing income that may be tax sheltered and to consider other business or personal financial transactions that may support the calculation of an adequate and reasonable support award. In re Marriage of Tipton, 2010 MT 144, 357 Mont. 1, 239 P.3d 116.

Projected Income Method of Determining Income for Assessing Child Support for Self-Employed Parent Not Error: Under ARM 37.62.108(3), two methods may be used to establish a parent's annualized income for child support. ARM 37.62.108(3)(a) provides that seasonal employment or fluctuating income may be averaged over a period sufficient to accurately reflect the parent's earning ability. ARM 37.62.108(3)(b) provides that current income or expenses may be projected when a recent increase or decrease in income is expected to continue for the foreseeable future. The father in this case was a freelance welder with fluctuating income, and the District Court could have applied ARM 37.62.108(3)(a) because the father was self-employed. However, the court noted that the father's income had recently increased and was foreseeably expected to continue during the father's current job that was to last for 16 to 18 months. The court did not abuse its discretion in applying the second method in ARM 37.62.108(3)(b), and because the father failed to establish error in the child support calculations, the District Court was affirmed. In re Marriage of Graham, 2008 MT 435, 347 M 483, 199 P3d 211 (2008).

Failure to Include Parent's Imputed Income in Child Support Calculation — Remand: Although child support obligations are calculated according to uniform guidelines as required in this section, income may include imputed income in order to fairly reflect a parent's income available for child support, and a District Court should impute income when a parent is voluntarily unemployed or underemployed. In the present case, the mother was employed part-time and testified that she could obtain full-time employment and earn significantly more income if she wished, but the District Court erroneously failed to impute any income to the mother. By failing to account for the mother's voluntary underemployment when calculating child support, the District Court abused its discretion, and the Supreme Court remanded for further calculations. In re Marriage of Dennison, 2006 MT 56, 331 M 315, 132 P3d 535 (2006).

Lack of Direction in Support Guidelines Regarding Which Parent to Be Credited for Care of Child When Child in Day Care — Abuse of Discretion Standard Applied: Under ARM 37.62.138 (now repealed), if a child spends more than 110 days a year with both parents, the child support obligation will be adjusted. However, the rule offers no direction as to how the majority of the day is calculated when children spend part of that day not under the explicit control of either parent, such as when the child is in school or day care. Absent clear guidance on how to allocate the majority of a 24-hour calendar day, the Supreme Court will review a District Court's determination of which parent gets credit for certain hours of a day by applying the abuse of discretion standard. Here, the District Court concluded that the father was not entitled to credit for the days that he had the children for less than 12 hours of a calendar day, and the Supreme Court affirmed based on the conclusion that the finding was not a clear abuse of discretion. In re Marriage of Kummer & Heinert, 2002 MT 168, 310 M 470, 51 P3d 513 (2002).

Former Administrative Rule Allowing Variance in Child Support for Housing Considered Discretionary: Prior to 1998, the Department of Public Health and Human Services had an administrative rule in place that allowed a District Court to grant a variance to the child support guidelines in cases in which the custodial parent and child occupied the former family home free of cost or at substantially reduced cost. Here, the father purchased a home for the mother and child, yet the District Court declined to apply the variance, and charged the father with the full child support amount when the support obligation was established in 2000. The father appealed on grounds that the District Court miscalculated the child support amount by not considering the housing variance. The Supreme Court affirmed. The variance allowed by the former administrative rule was not mandatory, but rather applied on a case-by-case basis in the discretion of the District Court. Further, the variance was not in effect in 2000 when this case was finally settled. The District Court properly applied the law in effect at the time, and the Supreme Court found no clear and convincing evidence mandating a different result, and no reason to deviate from the 2000 guidelines. In re Marriage of Albinger, 2002 MT 104, 309 M 437, 47 P3d 820 (2002).

Request for Variance From Support Guidelines to Be Supported by Competent Evidence: Welch argued that the District Court should have granted him a variance from the child support guidelines based upon his increased visitation costs and increased living expenses resulting from living in Washington, D.C. The Supreme Court held that although the alleged higher costs could be the basis for a variance, Welch had failed to provide any competent evidence supporting his argument. Therefore, the lower court had not abused its discretion in following the guidelines. In re Marriage of Welch, 273 M 497, 905 P2d 132, 52 St. Rep. 1081 (1995), following In re Marriage of Nash, 254 M 231, 836 P2d 598 (1992).

Reimbursed Employment Expenses Not Deducted From Gross Income for Child Support Calculation Purposes: In calculating child support using child support guidelines, the District Court properly refused to deduct reimbursed employment expenses from gross income of payor, which an administrative rule stated could not be deducted. In re Marriage of Murphy, 268 M 1, 885 P2d 440, 51 St. Rep. 1198 (1994).

Imputing Income — Court to Impute Deduction From Income for Child Support: The lower court refused to accept the parties' agreed-upon settlement that did not require the unemployed mother to pay child support. The District Court imputed potential income for the mother and ordered her to pay $33 a month for support. The Supreme Court ruled that the lower court erred because it did not calculate a deduction from the mother's imputed income for child-care costs for her two other children from a different relationship if she returned to work. In re Marriage of Noel, 265 M 249, 875 P2d 358, 51 St. Rep. 505 (1994).

Proper Determination of Income Attributed to Assets: Pedersen initiated a suit against Nordahl to establish that he was the father of her unborn twins and to obtain child support. Nordahl argued that the funds in his logging account, personal banking account, and retirement accounts were derived solely from his 1992 income and that therefore the inclusion of those accounts in the "income attributed to assets" calculation resulted in a double counting of income. The Supreme Court held that pursuant to ARM 46.30.1514 (now repealed), income attributed to assets is the amount of interest that would be earned if the nonperforming assets were liquidated and the proceeds invested and that was the amount that the lower court had added to Nordahl's gross income. Therefore, no double counting of his 1992 income had occurred. In re Paternity of Pedersen v. Nordahl, 261 M 284, 862 P2d 411, 50 St. Rep. 1338 (1993).

Proper Average of Income and Refusal to Subtract Deductions From Gross Income in Determining Child Support: Pedersen initiated a suit against Nordahl to establish that he was the father of her unborn twins and to obtain child support. Nordahl argued that the lower court erred in determining the amount of support because it took the average of his income over a 2-year period and failed to subtract certain deductions from the amount of gross income. The Supreme Court held that Nordahl had not objected to the income averaging during trial and could not raise the issue on appeal and also held that the lower court had the option of subtracting certain deductions from gross income but was not required to do so. In re Paternity of Pedersen v. Nordahl, 261 M 284, 862 P2d 411, 50 St. Rep. 1338 (1993).

Support Obligations to Be Set Based on Guidelines in Effect at Time Court Makes Decision: The lower court ordered the husband to pay a weekly sum for day care as a supplement to child support. The District Court relied on rules in effect when it first ordered support in 1991. In 1992, child support guidelines were amended to combine child care costs with child support. The Supreme Court held that the lower court must use the law in effect at the time that it modified the support rather than the law in effect when it entered its original order. In re Marriage of Anderson, 260 M 246, 859 P2d 451, 50 St. Rep. 1028 (1993).

Housing Provided by Employer as Constituting Income: The Supreme Court ruled that the lower court erred in failing to consider housing provided to the respondent by his employer as income for purposes of calculating support as required by the Uniform District Court Rule on Child Support Guidelines. In re Marriage of Gray, 242 M 69, 788 P2d 909, 47 St. Rep. 552 (1990).

Unsold Wheat Not Excluded From Support Calculations: The appellant argued that the lower court erred in excluding unsold wheat owned by the respondent in calculating the parties' support obligations. The Supreme Court agreed, holding that under the Uniform District Court Rule on Child Support Guidelines, the wheat was not an income-producing asset but was the fruit of the respondent's labor and therefore income. In re Marriage of Gray, 242 M 69, 788 P2d 909, 47 St. Rep. 552 (1990).

40-5-210. Standardized fee schedule — rules.

Compiler's Comments

2019 Amendment: Chapter 364 in (2) in two places substituted references to paternity genetic test for references to paternity blood test and in two places substituted references to paternity genetic testing for references to paternity blood testing. Amendment effective October 1, 2019.

1999 Amendment: Chapter 579 in (3) near beginning of first sentence substituted "may not charge" for "may charge" and after "collected" substituted "and distributed to an obligee" for "on behalf of any obligee" and deleted former second sentence that read: "The department may withhold the fee from the support payment before distribution to the obligee"; in (6)(b) after "support" inserted "or if the fee has been assessed and deducted from the collection by an entity other than the department"; inserted (10) prohibiting district court from ordering department to charge or collect fees, except as authorized; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendment: Chapter 552 in (2) inserted last sentence providing that a paternity blood test bill is admissible without third-party foundation evidence. Amendment effective July 1, 1997.

1993 Amendments: Chapter 294 inserted (2) concerning paternity blood testing fee; and made minor changes in style. Amendment effective April 9, 1993.

Chapter 631 substituted (1) allowing charging of an application fee for former language that read: "The department shall by rule establish a standardized schedule of fees for the recovery of administrative costs and expenses of child support enforcement. The fees may be recovered from an obligor if the obligor's failure or refusal to support a child makes it necessary for the department to provide child support enforcement services under this part. The fees must be commensurate with costs or an average of the expenditures related to specific or routine activities"; inserted (3) allowing charging of a handling fee; inserted (4) allowing charging of a late payment fee; inserted (5) and (5)(a) providing for establishment of a fee schedule; inserted (5)(b)(ii) that read: "(ii) is not a party but incurs expenses and costs related to the action"; deleted former (3) that read: "(3) Fees awarded under this section are in the nature of child support and are collectible in the same manner as a support order. The fee award may be collected separately or added to and collected with any balance due on a support debt"; deleted former (4) that read: "(4) Collection of a fee award may not reduce any current child support payment due the obligee"; substituted (6) regarding methods of fee collection for former (5) that read: "(5) Arrearage amounts collected that include a fee must be allocated as follows:

(a) If the obligee is a recipient of public assistance, the amount must be allocated first to satisfy the fee.

(b) If the obligee is not a recipient of public assistance, the first 10% of each amount collected must be allocated to satisfy the fee"; inserted (8) allowing rulemaking; inserted (9) regarding deposit of fees; and made minor changes in style.

Preamble: The preamble attached to Ch. 328, L. 1993, provided: "WHEREAS, the United States Commission on Interstate Child Support and the National Conference of Commissioners on Uniform State Laws intend [section 21] [40-5-164, renumbered 40-5-1027] to require a state support enforcement agency, in a Uniform Interstate Family Support Act (UIFSA) proceeding, to provide locator services upon the request of any individual; and

WHEREAS, the Department of Social and Rehabilitation Services [now Department of Public Health and Human Services] is charged under [section 21] [40-5-164, renumbered 40-5-1027] with providing locator services and does not receive a state general fund appropriation for providing locator services; and

WHEREAS, in enacting [section 21] [40-5-164, renumbered 40-5-1027] the Legislature of the State of Montana intends the Department of Social and Rehabilitation Services [now Department of Public Health and Human Services] to establish a fee schedule under 40-5-210 for locator services provided to an individual under [section 21] [40-5-164, renumbered 40-5-1027]."

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

40-5-213. Financial statements by obligor — penalty.

Compiler's Comments

1989 Amendment: At beginning substituted language concerning Department's belief that a support obligation is owed for "Any parent in the state whose absence is the basis upon which an application is filed for public assistance on behalf of a child"; in (1)(d), after "contributing", deleted "regularly" and at end substituted "a child for whom the department is providing services" for "all children for whom application for such assistance is made"; substituted (1)(f) relating to obligor's financial condition for former text relating to method of determining ability to support children; inserted (2) relating to additional statements; and made minor changes in form.

40-5-214. Scale of suggested minimum contributions.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

1989 Amendment: At end of (1) substituted reference to a scale based on uniform child support guidelines adopted by the Department for "The scale shall:

(a) include consideration of gross income;
(b) authorize an expense deduction for determining net income;
(c) designate other available resources to be considered;
(d) specify the circumstances which should be considered in reducing support contributions on the basis of hardship"; in (2) deleted first sentence that read: "The department shall accept and compile pertinent and reliable information from any available source in order to establish a minimum scale of suggested contributions" and at end substituted "access to the scale" for "access to the minimum scale of suggested contribution"; deleted former (3) that read: "(3) No county, court, officer, or agency may be required to use this scale"; and made minor changes in phraseology.

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

40-5-221. Debt to state by obligor — limitations.

Compiler's Comments

1995 Amendment: Chapter 264 in (5), after "40-5-202", deleted "(7)"; and made minor changes in style. Amendment effective March 28, 1995.

Severability: Section 10, Ch. 264, L. 1995, was a severability clause.

1989 Amendment: In (1) and (3) substituted reference to obligor for reference to the responsible parent or parents; in first sentence of (1), after "benefit of", substituted "a child" for "any dependent child or children" and near beginning of second sentence substituted "an obligor who is an adoptive parent" for "an adoptive parent or parents"; substituted (2) relating to conformity with support order for former text that read: "where there has been a district court order established, the debt shall be limited to the amount provided for by the order"; inserted (5) authorizing an independent debt collection action; and made minor changes in phraseology.

Case Notes

Child Support Not Court Ordered — Obligation Not Relieved: In an action brought by the Department of Revenue (now Department of Public Health and Human Services) pursuant to 40-5-221 and 53-4-248 to recoup funds paid by the state to support a father's two children, summary judgment for the Department was upheld. Although the trial court's prior dissolution and custody decree did not provide for support payments, a parent's legal and moral obligation to support his children was not relieved, nor was his obligation relieved by laches. St. v. Hubbard, 222 M 156, 720 P2d 1177, 43 St. Rep. 1135 (1986).

Public Assistance Payments — Father Not Absolved of Duty to Support Minor Children: The District Court did not abuse its discretion in ordering child support and maintenance. It is the legal as well as moral duty of husband to support his minor children. He is not absolved from this duty by public assistance provided to his children by a state agency in the form of AFDC payments. The District Court was not punishing husband for perceived marital misconduct. In re Marriage of Hickey, 213 M 38, 689 P2d 1222, 41 St. Rep. 1931 (1984).

40-5-222. Support debt based upon support order — notice — contents — action to collect.

Compiler's Comments

2007 Amendment: Chapter 202 inserted (5) requiring the department to send a copy of the notice to the clerk of the district court for the district in which the most recent support order was issued; and made minor changes in style. Amendment effective October 1, 2007.

1989 Amendment: At end of first sentence of (1) substituted "a support order" for "subrogation to or assignment of the judgment created by a district court order"; in second sentence of (1) and in (2)(e), (3), and (4) substituted "obligor" for "debtor"; at end of (1) and in two places in (3) reduced time from 30 days to 20 days; at end of (2)(a) substituted "support order" for "any district court order to which the department is subrogated or has an assigned interest"; near beginning of (3), before "support debt", deleted "subrogated or assigned"; and made minor changes in phraseology.

1981 Amendments: Chapter 188 added (2)(e), requiring statement regarding fair hearing, and (4), stating time period in which debtor may request fair hearing.

Chapter 439 increased 20 days to 30 days in (1) and in (3) in two places.

Case Notes

Lack of Notice of Distraint Warrants and Accruing Support Debt as Deprivation of Due Process: Failure by the Department of Revenue (now Department of Public Health and Human Services) to give notice of the filing of distraint warrants in District Court against a father for recoupment of money paid by the state as Aid to Families With Dependent Children to the mother and failure to give any notice of accruing support debt after the first notice had been served on him deprived the father of notice and opportunity for hearing, which would have accorded him due process. St. v. Frank, 226 M 283, 735 P2d 290, 44 St. Rep. 657 (1987).

40-5-224. Finding of support liability based upon payment of public assistance — support lien — bond to release warrant — action to collect.

Compiler's Comments

1999 Amendment: Chapter 579 in first sentence in (1) after "may issue" substituted "a support lien pursuant to 40-5-248" for "a warrant for distraint pursuant to 40-5-247" and after "pendency" substituted "of a collection action initiated by a notice under this chapter" for "the fair hearing or after the hearing, whether or not appealed", in second sentence substituted "lien" for "warrant" and after "determination" substituted "of the collection action" for "after fair hearing or appeal", in third sentence substituted "pending collection action" for "fair hearing", in fourth sentence substituted "the collection action" for "the hearing or after the hearing" and substituted "liens" for "warrants", and in fifth sentence substituted "collection action is resolved" for "decision resulting from the hearing is" and after "obligor" substituted "any lien issued under this section must be amended or released" for "all warrants issued must be released"; at end of (2) substituted "a collection action or upon the obligor's failure to timely request a hearing in a pending collection action" for "the hearing"; and made minor changes in style. Amendment effective October 1, 1999.

1993 Amendment: Chapter 631 near end of first sentence of (1) substituted "40-5-247" for "40-5-241"; and made minor changes in style.

1989 Amendment: Near beginning of (1) substituted "obligor" for "parent" and in last two sentences substituted "obligor" for "responsible parent"; and made minor changes in phraseology.

1981 Amendment: Substituted "warrant for distraint" for "warrant of distraint" in the middle of the first sentence of subsection (1).

40-5-225. Notice of financial responsibility — temporary and final support obligations — administrative procedure.

Compiler's Comments

2019 Amendment: Chapter 364 in (3)(a)(ii) near end substituted "paternity genetic tests" for "paternity blood tests". Amendment effective October 1, 2019.

2009 Amendment: Chapter 184 in (2)(h) after "is" substituted "equivalent to consenting" for "a consent"; inserted (3)(c) regarding modification of temporary support order; in (12) near end of second sentence after "temporary" inserted "support"; and made minor changes in style. Amendment effective October 1, 2009.

Saving Clause: Section 10, Ch. 184, L. 2009, was a saving clause.

2005 Amendment: Chapter 431 in (1) in second sentence at beginning substituted "An order issued under this section" for "The support order"; in (2)(b) at end, (2)(c) near beginning, and (8)(c) in first sentence near middle inserted "if any"; in (2)(d) near beginning inserted "or independent of"; and in (10) near middle inserted "child support or medical". Amendment effective April 28, 2005.

2003 Amendment: Chapter 573 inserted (2)(c) requiring a statement in the notice that the monthly support obligation is effective on the date of service of the notice, unless an objection is made and a hearing is requested, and may be collected during the proceeding that establishes the support obligation by any remedy available to the department; inserted (11) concerning the effective date of a child support and medical support order and the retroactive applicability of a final order; and made minor changes in style. Amendment effective May 5, 2003.

1999 Amendments — Composite Section: Chapter 51 in (4)(b) near end of third sentence after "costs the" substituted "obligor" for "obligee [obligor]"; and made minor changes in style. Amendment effective March 15, 1999.

Chapter 579 in (4)(b) near end of third sentence after "costs" substituted "that the obligor" for "the obligee [obligor]"; inserted (9) authorizing department if unable to enter obligation pursuant to support guidelines because of default to notify parties and substitute a support order made with guidelines for the defaulted order; inserted (10) authorizing department, after order established, to initiate action for support obligation for another child of same parents; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendments — Clarification: Chapter 482 in (6), after "obligation", substituted "may be served either by certified mail or in the manner prescribed" for "must be served in the same manner prescribed"; and made minor changes in style. Amendment effective May 2, 1997.

Chapter 552 substituted subsections (1) through (9) concerning support orders and procedures for former subsections (1) through (6) that read: "(1) (a) In the absence of a support order, the department may serve an obligor with a notice of financial responsibility alleging a child's need for support and the amount of the need and requiring the obligor to appear and show cause at a hearing held by the department why the obligor should not be finally ordered to pay the amount alleged in the notice.

(b) The notice must state:

(i) the names of the obligee and child;

(ii) the amount of current and future support to be paid each month for the child;

(iii) that if the obligor does not file a written answer within 20 days from the date of service or refusal of service, the amount in the notice must be finally ordered;

(iv) that the obligor is entitled to a fair hearing under 40-5-226.

(2) If, prior to the service of the notice under this section, the department has information concerning the obligor's financial condition, the department's allegation of the obligor's monthly support responsibility must be based on the scale of suggested minimum contributions under 40-5-214. If such information is unknown to the department, the allegations of the obligor's monthly support responsibility must be based on the greater of:

(a) the amount of public assistance payable under Title 53, chapter 4; or

(b) the alleged need.

(3) If the obligor objects to the notice, the obligor shall file a written answer with the department within 20 days from the date of service or refusal of service. If the department receives a timely answer, it shall conduct a fair hearing under 40-5-226. If the department does not receive a timely answer, it shall order the obligor to pay the amount stated in the notice.

(4) (a) If a support action is pending in district court and a temporary or permanent support obligation has not been ordered, the department may issue to the obligor a notice of temporary support obligation.

(b) The notice must contain:

(i) the names of the child and the person or agency having the custodial care of the child;

(ii) an amount for temporary monthly support determined as provided in subsection (2);

(iii) a statement that the obligor may request a hearing at which the obligor may show that a different support amount is appropriate or that establishment of a support obligation is inappropriate under the circumstances. The hearing must be conducted in accordance with the procedures of 40-5-226.

(iv) a statement that a hearing must be requested in writing within 10 days of receipt of the notice or the order for a temporary support order will be entered in the amount stated in the notice; and

(v) a statement that the temporary support order will terminate upon the entry of a district court support order. If the district court order is retroactive, any amount paid for a particular period under the temporary support order must be credited against the amounts due under the district court order for the same period, but excess amounts may not be refunded. If the district court determines that a periodic support obligation is not proper, any amount paid under the temporary support order must be refunded to the obligor.

(5) (a) If a temporary support order is entered or if proceedings are commenced under this section for a married obligor, the department shall vacate any support order or dismiss any proceeding under this part if it finds that the parties to the marriage have:

(i) reconciled without the marriage having been dissolved;

(ii) made joint application to the department to vacate the order or dismiss the proceeding; and

(iii) provided proof that the marriage has been resumed.

(b) The department may not vacate a support order or dismiss a proceeding under this subsection (5) if it determines that the rights of a third person or the child are affected. The department may issue a new notice under this section if the parties subsequently separate.

(6) Any notice of financial responsibility and the notice of temporary support obligation must be served in the same manner prescribed for the service of a summons in civil action in accordance with the Montana Rules of Civil Procedure."

At the end of (4)(b), the reference to "costs the obligee incurs in recovering the amount to be refunded" was erroneously enacted and should refer to the costs the "obligor" incurs. Amendment effective July 1, 1997.

1989 Amendment: Completely rewrote section (see 1987 MCA for former text).

1981 Amendment: Increased 20 days to 30 days in the middle of subsection (2).

Case Notes

Findings by Court Different From Those Relied on by Administrative Law Judge — Improper Adoption of Support Amount Without Testimony at Merits Hearing: While the marriage dissolution was pending, the wife asked the Child Support Enforcement Division to set child support. The Division gathered information regarding the parties' income, and the Administrative Law Judge (ALJ) set an amount. At the merits hearing, the District Court did not allow the husband to testify about seeking modification of the ALJ's order. The District Court adopted the ALJ's amount even though a number of facts in its findings of facts differed from those relied on by the ALJ in calculating support. The husband appealed the support amount, arguing that the District Court had abused its discretion. The Supreme Court concluded that the District Court had erred in not letting the husband testify and remanded the matter to reconsider child support. In re Marriage of Pesanti, 2014 MT 324, 377 Mont. 256, 342 P.3d 679.

Authority of District Court to Retroactively Supersede Temporary Child Support Enforcement Division's Order: While the wife's dissolution petition was pending, she asked the Child Support Enforcement Division to set child support. The Division gathered information regarding the parties' income and set a support amount. Both parties disputed the amount, and a contested hearing was held. After the hearing, the Division issued a temporary support obligation order. The husband petitioned for judicial review of the order, but the Division informed the court that the order was not appealable, so the parties stipulated to dismiss the petition for judicial review, and the court dismissed the petition. The court eventually set a child support amount, and the husband moved to have the court's order applied retroactively, but the court concluded that the order could not be applied retroactively, so the husband appealed. The Supreme Court reversed. Under this section, the Division may set a temporary support order if one has not been set, but the very nature of the temporary order contemplates that the Division's order will be superseded by order of the District Court. Thus, the District Court erred when it held that it did not have authority to retroactively supersede the Division's temporary order, and it was an abuse of discretion for the court not to do so. (See 2003 amendment.) In re Marriage of Banka, 2003 MT 84, 315 M 97, 67 P3d 885 (2003).

40-5-226. Administrative hearing — nature — place — time — determinations — failure to appear — entry of final decision and order.

Compiler's Comments

2019 Amendment: Chapter 364 in (13)(c) at end substituted "paternity genetic tests" for "paternity blood tests". Amendment effective October 1, 2019.

2005 Amendments — Composite Section: Chapter 21 in (13)(f) after "department or" substituted "another IV-D agency" for "a IV-D agency of another state". Amendment effective March 18, 2005.

Chapter 431 in (7)(b) and (10) near beginning inserted "or medical support"; and in (8) near beginning inserted "child support or medical". Amendment effective April 28, 2005.

Chapter 564 in (5) in first sentence and in (8) near middle after "40-5-273" substituted "40-5-277, and" for "and 40-5-276 through". Amendment effective July 1, 2005.

2001 Amendment: Chapter 542 in (5) in first sentence inserted references to 40-5-272 and 40-5-276 through 40-5-278; in (8) deleted reference to 40-5-271 and inserted references to 40-5-276 through 40-5-278; and made minor changes in style. Amendment effective July 1, 2001.

1997 Amendments: Chapter 482 in first sentence in (2), after "must", substituted "initially be conducted by teleconferencing methods and is subject to the Montana Administrative Procedure Act" for "be scheduled within 20 days" and inserted second sentence requiring hearings officer, following teleconferencing hearing, to grant de novo in-person hearing upon request or upon showing that party prejudiced by lack of in-person hearing (see coordination instruction comment); at beginning of (7)(a) deleted "Within 20 days of the hearing"; and made minor changes in style. Amendment effective May 2, 1997.

Chapter 552 in (2) substituted provisions relating to teleconference and hearing for "be scheduled within 20 days"; in (3), in first sentence, substituted "parent or parents" for "obligor"; in (4)(a) inserted exception clause, substituted "parent or parents" for "obligor", and inserted "default"; inserted (4)(b) regarding a multiple 40-5-225 proceeding, setting the matter for and notice of a hearing, and the effect of a party's failure to appear; inserted (6) regarding notice of a hearing to enforce a support order or to establish paternity, the obligee's right to attend as a nonparty, and the participation of an obligee who is a party or a witness; in (7)(a) substituted "Within 60 days after the hearing has been concluded, any posthearing briefs are received, and all evidence submitted, except for good cause" for "Within 20 days of the hearing" and at end inserted sentence listing who gets a copy of the final decision; inserted (7)(b) making an established obligation subject to the registration and processing provisions of part 9 of this chapter; at end of (10) inserted sentence requiring the 40-5-411 income withholding exceptions to be considered when a support order is issued; inserted (11)(b) requiring the support order of an obligor excepted from income withholding to provide that if a party is receiving Title IV-D services, the payments must be made through the Department; in (12)(a), in introductory clause at beginning, deleted "For the purposes of income withholding provided for in subsection (10)", inserted "paternity", and at end substituted "each party other than the department to promptly file with the department and to update, as necessary, information on" for "the obligor, for as long as the department is providing support enforcement services, to keep the department informed of the name and address of the obligor's current employer, whether the obligor has access to health insurance through an employer or other group, and, if so, the health insurance policy information"; inserted (12)(a)(i) through (12)(a)(vii) listing information that must be filed and updated; inserted (12)(b) requiring the order to direct that in a subsequent support enforcement action, if it is shown that a diligent effort was made to locate a party, notice and service may be by regular mail to the party's most recent address or employer's address; inserted (12)(c) requiring the Department to keep the subsection (12)(a) information confidential except for Title IV-D purposes; in (13)(a), before "orders issued by", inserted "subpoenas and"; inserted (13)(f) allowing the hearings officer to compel the production of information; inserted (14)(e), (14)(g), and (14)(h) making it a contempt to fail to respond to a subpoena, for a payor or labor union to fail to provide information when requested under 40-5-443, or for a financial institution to use information provided under 40-5-924 for a purpose not authorized by the Department; at beginning of (15) inserted sentence requiring the Department to give notice and an opportunity to cure the infraction before initiating a contempt proceeding and at beginning of second sentence inserted "In order to initiate a contempt proceeding"; and made minor changes in style. Amendment effective July 1, 1997.

Coordination Instruction: Section 100, Ch. 552, L. 1997, a coordination section, deleted the amendment in (2), inserting the second sentence, that read: "At the request of a party or upon a showing that the party's case was substantially prejudiced by the lack of an in-person hearing, the hearings officer shall, following a teleconferencing hearing, grant a de novo in-person hearing."

Contingent Termination — Request for Federal Exemptions: Section 104, Ch. 552, L. 1997, contained the following contingent termination provisions and order that the Department of Public Health and Human Services seek federal exemptions:

"(1) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];
(b) [section 11] [40-5-924];
(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];
(d) [section 93] [50-15-403];
(e) [section 95] [61-5-107];
(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that the federal government has granted this state an exemption from one of the following provisions, the provision terminates on the date the exemption takes effect:

(a) [section 9] [40-5-922];
(b) [section 11] [40-5-924];
(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];
(d) [section 93] [50-15-403, certification filed April 24, 1998];
(e) [section 95] [61-5-107];
(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(5) (a) The department of public health and human services shall do everything reasonably within its power to obtain, as soon as possible, federal government exemptions from the provisions listed in subsection (4).

(b) Because section 395(c) of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) allows a grace period for states to amend their constitutions in order to comply with PRWORA and because the Montana legislature believes that the section of PRWORA prohibiting a jury trial in a paternity proceeding violates Article II, section 26, of the Montana constitution and is therefore rejected, the department of public health and human services shall seek a federal government exemption from the jury trial prohibition in PRWORA as the first exemption it seeks under subsection (5)(a). [This exemption was received on December 8, 1997.]

(6) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate July 1, 1999.

(7) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement."

1995 Amendment: Chapter 264 in (3), after first sentence, inserted introductory clause; inserted (3)(a) through (3)(c) providing dates from which support may be awarded; in (5), in two places before "guidelines", deleted "standards and" and inserted second to last sentence authorizing hearing officer to vary application of support guidelines; and made minor changes in style. Amendment effective March 28, 1995.

Severability: Section 10, Ch. 264, L. 1995, was a severability clause.

1993 Amendments: Chapter 294 in (5), near beginning, inserted reference to temporary or final financial responsibility hearing and support modification proceeding and at end substituted "uniform child support guidelines adopted by the department under 40-5-209" for "scale of suggested minimum contributions under 40-5-214" and inserted third through eighth sentences concerning requirements for use of guidelines and findings by hearing officer; and made minor changes in style. Amendment effective April 9, 1993.

Chapter 328 deleted former (2) that allowed the hearing officer to hold the hearing in the county of residence or other county convenient to the obligor or obligee or in the county in which the Department or one of its offices is located; in (11) substituted "subsection (10)" for "subsection (11)"; and made minor changes in style.

Chapter 631 inserted (12) outlining hearing officer's powers; inserted (13) clarifying what constitutes contempt; inserted (14) explaining procedure for issuance of contempt citation; inserted (15) providing procedure for hearing contempt charge; inserted (16) regarding collection of penalty; inserted (17) specifying deposit of penalties into the state treasury; and made minor changes in style.

1991 Amendments: Chapter 266 deleted former (8) that read: "(8) If a support order is established under this part, any party may file a verified petition with the department alleging facts constituting a material change of circumstances. Upon the filing of such petition, the department shall issue an order to the nonpetitioning party to appear and show cause why the decision previously entered should not be prospectively modified. The order to appear and show cause, together with a copy of the verified petition, must be served by the petitioner upon all other parties in the manner provided by this part. Upon receipt of proof of service, the department shall schedule a hearing not less than 15 or more than 30 days from the date of service, unless extended for good cause shown. Prospective modification may be ordered but only upon a showing of good cause and material change of circumstances"; and inserted (8) requiring statement relating to review and modification of orders by Department.

Chapter 635 inserted (11) providing that a support order is enforceable through immediate or delinquency income withholding; and inserted (12) requiring Department to require an obligated parent to provide certain information. Amendment effective April 24, 1991.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

1989 Amendment: At beginning of (2) inserted "At the discretion of the hearing officer"; in (2)(a) substituted "obligor or obligee" for "responsible parent"; inserted (2)(b) allowing hearing in the county in which the Department or one of its offices is located; in (3) reduced time from 30 days to 20 days; and in (4) through (10) completely revised the former procedural provisions (see 1987 MCA for former provisions).

1981 Amendment: Increased 20 days to 30 days in subsection (5).

40-5-227. Filing and docketing of final orders — orders effective as district court decrees.

Compiler's Comments

2007 Amendment: Chapter 202 in (1) at end of first sentence after "Montana" inserted "and must be filed in the office of the clerk of the district court that received notice under 40-5-222(5)" and at beginning of second sentence deleted "Upon the request of the department"; inserted (4) requiring the department to petition the district court to find the obligor in contempt if payment has not been made within 30 days when an abstract has been filed following issuance of a notice of a support debt; and made minor changes in style. Amendment effective October 1, 2007.

1997 Amendment: Chapter 552 in (1), at beginning of second sentence, substituted "Upon the request of the department, the order" for "The order, if approved" and at end inserted last three sentences making a final Department order effective without filing and docketing in the court, providing that contempt of court and execution based on the order may not be requested from the court unless the order is first docketed with the court, and providing that the order does not operate as a judgment lien unless first docketed with the court or unless a lien is otherwise perfected under applicable law. Amendment effective July 1, 1997.

1993 Amendment: Chapter 631 at end of (3) substituted "40-5-247" for "40-5-241"; and made minor changes in style.

1987 Amendment: In (1) deleted former second sentence that read: "If the administrative order has been entered by nonappearance or default on the part of the responsible parent, the court may reconsider the order on its merits"; and in (2), near end of first sentence after "accruing after", inserted "actual notice to the parties of".

Case Notes

No Notice of Motion for Modification — Order to Pay Child Support Vacated: Under the parties' original dissolution, the father was granted primary custody and neither party was required to pay child support. One of the children later began living with the mother. The mother sought assistance from the Child Support Enforcement Division, and the Division in turn sought reimbursement from the father. However, no party sought to modify the original custody order. The father subsequently moved to prohibit the Division from further proceedings and to terminate any child support orders it had issued. Following a hearing, the District Court modified the original parenting plan, ordering that the father pay child support retroactive to about the time the child moved in with the mother. The father appealed, and the Supreme Court reversed. The original decree, which provided no child support obligation for the father, was in effect until later modified. Under 40-4-208, a decree may modify only support installments that accrue after actual notice to a party of a motion for modification. Because there was never a motion to modify child support, the father received no notice that the decree would be modified to require him to pay support, so the portion of the order requiring the father to pay child support prior to notice of modification was vacated. Cook v. McClammy, 2009 MT 115, 350 M 159, 206 P3d 906 (2009).

40-5-231. Jurisdiction and venue.

Compiler's Comments

1997 Amendment: Chapter 482 in (1)(a), after "personally", inserted "or by certified mail". Amendment effective May 2, 1997.

1993 Amendment: Chapter 328 in (1) substituted language concerning jurisdiction over an individual or the individual's guardian or conservator by personal service in this state, by consent, by the individual residing with the child in this state or residing in this state and providing prenatal expenses or support for the child, by the child residing in this state as a result of the individual's acts or directives, by the individual possibly conceiving the child in this state, and by any other constitutional basis for jurisdiction for former text that read: "For purposes of an administrative action brought under 40-5-231 through 40-5-237, personal jurisdiction is established in the department over any person who has had sexual intercourse in this state that has resulted in the birth of a child who is the subject of such proceedings and over any person subject to the provisions of Rule 4B of the Montana Rules of Civil Procedure, including but not limited to the child, the child's parents, any person having custody of the child, and any alleged father"; in (2), before "described", substituted "individuals" for "persons"; and in (3) substituted "this part" for "40-5-231 through 40-5-237".

Severability: Section 11, Ch. 119, L. 1989, was a severability clause.

40-5-232. Establishment of paternity — notice of parental responsibility — contents.

Compiler's Comments

2019 Amendment: Chapter 364 in (7)(f)(i) substituted "paternity genetic testing" for "paternity blood testing"; and in (7)(f)(ii) and (7)(f)(iii) substituted "paternity genetic test" for "paternity blood test". Amendment effective October 1, 2019.

1997 Amendments: Chapter 398 inserted (6) concerning duty of Department to take reasonable steps to locate and notify alleged father, method of notification, and content of notice; and made minor changes in style.

Chapter 552 throughout section substituted "parental responsibility" for "paternity determination"; in (3) substituted references to entry of an order declaring paternity for references to acknowledgment; and in (5)(a), after "a sworn statement", deleted "from the child's mother". Amendment effective July 1, 1997.

1995 Amendment: Chapter 70 in (3) inserted second sentence that read: "As a part of a voluntary acknowledgment, the department shall provide information to the parents regarding the rights and responsibilities of acknowledging paternity"; inserted (4) requiring full faith and credit to be given to a determination of paternity made by another state; in (6)(f)(i), (6)(f)(ii), and (6)(f)(iii), before "blood test" or "blood testing", inserted "paternity"; and made minor changes in style. Amendment effective July 1, 1995.

1993 Amendment: Chapter 631 substituted (5)(f)(iii) regarding referral to District Court for former language that read: "he may request a trial in district court to determine paternity before the final administrative decision is made"; and made minor changes in style.

Severability: Section 11, Ch. 119, L. 1989, was a severability clause.

Case Notes

Lack of Statement of Paternity Sworn to in Montana Does Not Negate Jurisdiction of Child Support Enforcement Division: Brodzki argued that the Child Support Enforcement Division had no jurisdiction over him to require that he submit to paternity testing because the mother's statement of paternity was sworn to in Rhode Island. The Supreme Court ruled that the statute did not contain language requiring the statement to be made in Montana. In re Paternity of M.J.S., 1998 MT 144, 289 M 249, 960 P2d 308, 55 St. Rep. 571 (1998).

Child Support Enforcement Division as Real Party in Interest in Paternity Action and Underlying Proceedings: Once a parent assigns child support collection rights to the Child

Support Enforcement Division, the Division becomes the real party in interest in a paternity action and in any underlying attempt to recover child support benefits from the putative father. Fife v. Martin, 261 M 471, 863 P2d 403, 50 St. Rep. 1414 (1993).

40-5-233. Establishment of paternity — administrative hearing — subpoena — compulsory paternity genetic testing.

Compiler's Comments

2019 Amendment: Chapter 364 throughout section substituted references to paternity genetic testing for references to paternity blood testing, substituted references to genetic testing for references to blood testing, and substituted references to genetic test for references to blood test. Amendment effective October 1, 2019.

1997 Amendment: Chapter 552 substituted (1), (2) and (3) relating to paternity blood testing and a hearing for former (1) that read: "(1) When the department receives a timely written denial of paternity, it may order the alleged father to appear for an administrative hearing. The hearing may be conducted by teleconferencing methods. If the testimony and other supplementary evidence demonstrate a reasonable probability that the alleged father had sexual intercourse with the child's mother during the probable time of the child's conception or if the evidence shows a probable existence of a presumption under 40-6-105, the department may issue a subpoena ordering the alleged father to submit to paternity blood testing. A reasonable probability of sexual intercourse during the possible time of conception may be established by affidavit of the child's mother"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 70 inserted (2) concerning additional hearing if there is reasonable cause to suggest that a blood test sample of a person submitting to a blood test was not the sample of the alleged father, mother, or child. Amendment effective July 1, 1995.

Severability: Section 11, Ch. 119, L. 1989, was a severability clause.

Case Notes

Denying Alleged Father Access to Certain Records Not Abuse of Discretion: Brodzki argued that the administrative law judge erred in not allowing him access to the mother's medical records and to a claim that she filed with his insurer. The Supreme Court held that the denial was not an abuse of discretion because the sole issue was whether there was a probability that the parties had sexual relations during the time of conception. That fact was proved by the hospital records and the testimony of other witnesses. In re Paternity of M.J.S., 1998 MT 144, 289 M 249, 960 P2d 308, 55 St. Rep. 571 (1998).

40-5-234. Paternity genetic tests — use of expert's affidavit — effect of test results — records — presumption.

Compiler's Comments

2019 Amendment: Chapter 364 in (1), (3), (4), and (5) substituted "genetic test" for "blood test"; and in (2) near middle after "any blood" inserted "or tissue". Amendment effective October 1, 2019.

2005 Amendment: Chapter 564 in (5) after "established in" substituted "40-5-906" for "40-5-271". Amendment effective July 1, 2005.

1995 Amendment: Chapter 70 in (1) deleted second and third sentences that read: "If the issue of paternity is referred to the district court under 40-5-236, the expert's completed and certified report of the results and conclusions of a paternity blood test is admissible as evidence without additional testimony by the expert if the laboratory in which the expert performed the test is accredited for parentage testing by the American association of blood banks. Accreditation may be established by verified statement or reference to the published sources"; in (3), before "blood test", inserted "paternity"; inserted (4) allowing the Department to enter an order of nonpaternity based on a blood test exclusion and to order the Department of Health and Environmental Sciences (now Department of Public Health and Human Services) to prepare an amended or substitute birth certificate; inserted (5) allowing the Department to enter in the support order registry established in 40-5-271 a written finding of any paternity presumption created by paternity blood test results; inserted (6) providing that a presumption of paternity established under this section is a sufficient basis for establishing a support order; and made minor changes in style. Amendment effective July 1, 1995.

Code Commissioner Change: Pursuant to sec. 2, Ch. 546, L. 1995, the Code Commissioner substituted Department of Public Health and Human Services for Department of Family Services.

Severability: Section 11, Ch. 119, L. 1989, was a severability clause.

40-5-235. Effect of order establishing paternity — birth records — relief from order.

Compiler's Comments

Code Commissioner Correction: In (3) substituted "Rule 60(c) and (d)" for "Rule 60(b)" to reflect revisions adopted by Supreme Court Order No. AF 07-0157 dated April 26, 2011.

1997 Amendment: Chapter 552 in (1), after "paternity of a child", deleted "docketed as provided in 40-5-227"; in (2), in first sentence, inserted "born in this state"; in (3) substituted "consent to entry of an order declaring" for "voluntary acknowledgment of"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendments: Chapter 418 in (2) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (2), after "shall", deleted "file a copy of its order with the department of health and environmental sciences, which shall". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, and sec. 571, Ch. 546, L. 1995, were saving clauses.

Severability: Section 11, Ch. 119, L. 1989, was a severability clause.

40-5-236. Referral of paternity issue to district court — record — parties — exclusion of other matters — fees.

Compiler's Comments

2019 Amendment: Chapter 364 in (1) in first sentence in two places and in (2)(d) substituted "paternity genetic test" for "paternity blood test". Amendment effective October 1, 2019.

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (6) after "attorneys" deleted "appointed" and inserted "assigned". Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

1997 Amendments: Chapter 482 at end of first sentence in (1), after "results", inserted "specifically requesting referral of the paternity issue to the district court". Amendment effective May 2, 1997.

Chapter 552 in (2)(a) substituted "parental responsibility" for "paternity determination". Amendment effective July 1, 1997.

1995 Amendment: Chapter 70 near beginning of first sentence of (1), before "blood test", inserted "paternity" and after "continues to deny paternity" inserted "the alleged father shall file a written objection with the department within 20 days after service of the paternity blood test results" and at beginning of second sentence inserted "Upon receipt of the written objection"; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 11, Ch. 119, L. 1989, was a severability clause.

40-5-237. District court paternity proceedings — objection to tests — additional tests — expert's report — admissibility of evidence.

Compiler's Comments

2019 Amendment: Chapter 364 throughout section substituted reference to paternity genetic test for reference to paternity blood test. Amendment effective October 1, 2019.

1997 Amendment: Chapter 552 in (1), in second sentence, inserted "upon the alleged father's advance payment for additional testing" and inserted third sentence requiring return of the advance payment if the test is negative. Amendment effective July 1, 1997.

1995 Amendment: Chapter 70 at beginning of first sentence of (1) inserted "In a matter referred to the district court" and in second sentence, before "filed", inserted "timely"; inserted (2) concerning admissibility of the blood test expert's completed and certified report of the results and conclusions of a paternity blood test; and made minor changes in style. Amendment effective July 1, 1995.

Severability: Section 11, Ch. 119, L. 1989, was a severability clause.

40-5-238. Confidentiality of paternity hearings and records of proceedings.

Compiler's Comments

2019 Amendment: Chapter 364 near end of first sentence substituted "paternity genetic testing" for "paternity blood testing". Amendment effective October 1, 2019.

Severability: Section 10, Ch. 264, L. 1995, was a severability clause.

Effective Date: Section 11, Ch. 264, L. 1995, provided that this section is effective on passage and approval. Approved March 28, 1995.

40-5-242. Notice of support lien — civil liability upon failure to honor support lien or to comply with warrant for distraint.

Compiler's Comments

2001 Amendment: Chapter 465 in (1)(a) at end substituted "for temporary assistance for needy families, as defined in 53-4-201" for "the FAIM financial assistance program". Amendment effective July 1, 2001.

Retroactive Applicability: Section 45, Ch. 465, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to payments made after January 1, 2001, for mental health services provided to children with serious emotional disturbances for whom mental health services are not provided by any other public mental health services program and whose family income is at or below 150% of the federal poverty level."

1999 Amendment: Chapter 305 at end of (3)(c)(iii) substituted "described by 30-9-321" (renumbered 30-9A-301) for "defined by 30-9-107". Amendment effective July 1, 2001.

1997 Amendment: Chapter 262 in (1) inserted third sentence disallowing imposition of a lien upon a self-sufficiency trust or the assets of a self-sufficiency trust; and inserted (1)(a) and (1)(b) providing exceptions to the lien imposition restrictions. Amendment effective July 1, 1997.

Code Commissioner Correction — Name Change: In (1)(a), the Code Commissioner substituted "FAIM financial assistance program" for "aid to families with dependent children program" to correspond to the change in the defined term contained in 53-4-201, as amended by Ch. 486, L. 1997.

1993 Amendment: Chapter 631 inserted (1) regarding service of support lien; at beginning of (2) inserted exception clause, after "person" substituted "or entity" for "firm, corporation, association, political subdivision, or department of the state", after "support" substituted "lien or warrant for distraint" for "debt that is the basis of the distraint or assignment of wages", and after "value of" substituted "real or personal property subject to a support lien or distrained by a warrant for distraint" for "the distrained property"; deleted former (1) that read: "(1) fails or refuses to deliver property pursuant to the order"; in (2)(b), after "property", substituted "of an obligor when presented with a warrant for distraint by a sheriff or levying officer under the provisions of 40-5-247" for "distrained under 40-5-241"; substituted (3) setting out conditions precluding liability to the Department for former (4) that read: "(4) fails or refuses to honor an assignment of wages presented by the department"; and made minor changes in style.

1989 Amendment: At beginning of section deleted material inserted as subsections (1) through (4); in first sentence of introductory clause, before "debt", inserted "support"; and made minor change in phraseology.

40-5-243. Release of excess to obligor.

Compiler's Comments

1989 Amendment: At end of section substituted "person or entity may release the excess to the obligor without liability under this part" for "person, firm, corporation, association, political subdivision, or department of the state may, without liability under this part, release the excess to the debtor".

40-5-247. Warrant for distraint — effect — satisfaction of support lien — redemption.

Compiler's Comments

2005 Amendment: Chapter 431 in (2)(b) in first sentence substituted "including a warrant received by electronic transmission" for "upon an entity that has entered into an agreement with the department to accept service of a warrant for distraint" and in second sentence near end and in (2)(e) near end increased time period from 90 to 120 days. Amendment effective April 28, 2005.

2001 Amendment: Chapter 352 inserted (2)(b) concerning a warrant for distraint; and made minor changes in style. Amendment effective April 23, 2001.

1999 Amendment: Chapter 579 inserted (1)(b)(i) through (1)(b)(iii) outlining notice requirements of warrant; inserted (2)(b) requiring copy of warrant to be mailed to obligor's address at or promptly after seizure; inserted (2)(c) authorizing obligor claiming exemption to request hearing within 10 days of warrant, requiring department to convene contested case hearing to determine exemption, and providing that order is final agency order subject to judicial review; and made minor changes in style. Amendment effective May 10, 1999.

1993 Amendment: Chapter 631 substituted (1) regarding issuance of warrant for distraint for former (1) that read: "(1) After issuing a warrant, the department may file the warrant with the clerk of a district court. The clerk shall file the warrant in the judgment docket, with the name of the delinquent obligor listed as the judgment debtor"; deleted former (2) that read: "(2) Upon filing the warrant, there is a lien against all real and personal property of the delinquent obligor located in the county where the warrant is filed. The resulting lien is treated in the same manner as a properly docketed judgment lien, and the department may collect delinquent child support and enforce the lien in the same manner as a judgment is enforced. The lien is for the amount indicated on the warrant plus accrued interest from the date of the warrant"; in (2)(a), in two places, substituted "levying officer" for "authorized agent", near beginning of first sentence substituted "warrant for distraint" for "copy of the filed warrant", and in second sentence, before "warrant", deleted "copy of the filed"; in (2)(b), near beginning, substituted "levying officer" for "agent" and before "warrant" deleted "copy of the"; inserted (2)(c) regarding application of funds resulting from execution upon the warrant; inserted (3) providing that the levy against real and personal property of the obligor is not limited to property in possession of persons or other entities given notice of the lien; in (4)(a) and (4)(b), after "unpaid", substituted "warrant" for "child support" and once in (4)(a) and three times in (4)(b) substituted "warrant" for "lien"; in (4)(b), near middle after "release the", deleted "lien acquired by filing the"; inserted (5) through (7) regarding restoration, redemption, and release of property; inserted (8) clarifying that a warrant for distraint may be issued at any time within the statutory period; and made minor changes in style.

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

Effective Date: Section 33, Ch. 702, L. 1989, provided that this section is effective July 1, 1989.

Case Notes

Only State Authorized to Foreclose on Child Support Lien: A wife's first husband accrued past due child support and a support lien was placed on 42 acres owned by him. Upon her second divorce, the wife assigned the lien to the second husband, who filed an action to enforce the lien. The District Court entered summary judgment in the second husband's favor and the first husband appealed. The Supreme Court reversed, holding that the statues do not allow for the obligee to directly enforce a child support lien even though the obligee may be entitled to the underlying support obligation; therefore, the state's agreement to transfer its interest conferred no enforceable interest to the second husband, since under the statutes only the state may foreclose on the lien. LeCount v. Davis, 2013 MT 157, 370 Mont. 362, 303 P.3d 281.

Lack of Notice of Distraint Warrants and Accruing Support Debt as Deprivation of Due Process: Failure by the Department of Revenue (now Department of Public Health and Human Services) to give notice of the filing of distraint warrants in District Court against a father for recoupment of money paid by the state as Aid to Families With Dependent Children to the mother and failure to give any notice of accruing support debt after the first notice had been served on him deprived the father of notice and opportunity for hearing, which would have accorded him due process. St. v. Frank, 226 M 283, 735 P2d 290, 44 St. Rep. 657 (1987).

Motion to Set Aside Enforcement of Unserved Warrant of Distraint as Independent Action — Not Subject to Time Limitation: The Department of Revenue (now Department of Public Health and Human Services) was assigned the right of child support and attempted to recoup money paid by the state as Aid to Families With Dependent Children by filing warrants of distraint and Writs of Execution to attach any accounts in which the father had an interest, but the father was never served a notice of accruing debt or informed of his right to a hearing on each warrant. The father moved for relief from the warrants of distraint and for stay of execution, but the issue was not heard until 48 days after the motion, which the Department contended was sufficient to remove jurisdiction from the District Court. The Supreme Court disagreed, holding that the motion to set aside enforcement of the unserved warrants of distraint was an independent action and thus was not subject to the 45-day limitation of former Rule 60(c), M.R.Civ.P. (now superseded). St. v. Frank, 226 M 283, 735 P2d 290, 44 St. Rep. 657 (1987).

40-5-248. Lien against real and personal property — effect of lien — interest — warrant for distraint.

Compiler's Comments

2005 Amendment: Chapter 564 in (1)(b) and (2)(a) after "under" and in (6) at end after "established by" substituted "40-5-906" for "40-5-271"; and made minor changes in style. Amendment effective July 1, 2005.

2003 Amendment: Chapter 477 in (7)(b) near middle substituted "certificate of title" for "certificate of ownership". Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

2001 Amendments — Composite Section: Chapter 352 in (4) substituted "the applicable statute of limitations expires" for "2 years after the child to whom the support lien is related attains the age of majority"; and made minor changes in style. Amendment effective April 23, 2001.

Chapter 465 in (5)(a) at end substituted "for temporary assistance for needy families, as defined in 53-4-201" for "the FAIM financial assistance program". Amendment effective July 1, 2001.

Retroactive Applicability: Section 45, Ch. 465, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to payments made after January 1, 2001, for mental health services provided to children with serious emotional disturbances for whom mental health services are not provided by any other public mental health services program and whose family income is at or below 150% of the federal poverty level."

1999 Amendment: Chapter 305 at end of (3)(c) substituted "described in 30-9-321" (renumbered 30-9A-301) for "defined in 30-9-107"; and in (7)(c) at end of introductory clause substituted "30-9-321" (renumbered 30-9A-301) for "30-9-401". Amendment effective July 1, 2001.

1997 Amendments: Chapter 262 in (5) inserted third sentence disallowing imposition of a lien upon a self-sufficiency trust or the assets of a self-sufficiency trust; and inserted (5)(a) and (5)(b) providing exceptions to the lien imposition restrictions. Amendment effective July 1, 1997.

Chapter 432 at beginning of (8), after "buyer", substituted "in the ordinary course of business, who buys an obligor's personal property for value" for "for value of an obligor's personal property, other than motor vehicles and other items for which a certificate of ownership is issued by the department of justice"; and made minor changes in style.

Applicability: Section 2, Ch. 432, L. 1997, provided: "[This act] [40-5-248] applies to purchases occurring after October 1, 1997."

Code Commissioner Correction — Name Change: In (5)(a), the Code Commissioner substituted "FAIM financial assistance program" for "aid to families with dependent children program" to correspond to the change in the defined term contained in 53-4-201, as amended by Ch. 486, L. 1997.

Case Notes

Only State Authorized to Foreclose on Child Support Lien: A wife's first husband accrued past due child support and a support lien was placed on 42 acres owned by him. Upon her second divorce, the wife assigned the lien to the second husband, who filed an action to enforce the lien. The District Court entered summary judgment in the second husband's favor and the first husband appealed. The Supreme Court reversed, holding that the statues do not allow for the obligee to directly enforce a child support lien even though the obligee may be entitled to the underlying support obligation; therefore, the state's agreement to transfer its interest conferred no enforceable interest to the second husband, since under the statutes only the state may foreclose on the lien. LeCount v. Davis, 2013 MT 157, 370 Mont. 362, 303 P.3d 281.

40-5-251. Debt payment schedule.

Compiler's Comments

1989 Amendment: In two places substituted "obligor" for "debtor"; and made minor change in phraseology.

40-5-252. Interest on debts due — waiver.

Compiler's Comments

1989 Amendment: At end of (1) deleted reference to 40-5-221; and made minor changes in form and phraseology.

40-5-253. Administrative findings and order — administrative remedies — judicial review.

Compiler's Comments

1999 Amendment: Chapter 579 in first sentence in (4) before "department" inserted "child support enforcement division of the" and inserted second sentence allowing division to be served through its employees. Amendment effective May 10, 1999.

1997 Amendment: Chapter 482 at beginning of third sentence in (1) inserted exception clause; inserted (3) providing that judicial review petition is original action and prohibiting filing under preexisting cause number or joining with another action; inserted (4) requiring issuance of summons and service pursuant to rules of civil procedure and providing 30-day time limit for obtaining jurisdiction; inserted (5) requiring briefing schedule for judicial review petition, providing brief criteria, and authorizing oral argument after filing of brief; and made minor changes in style. Amendment effective May 2, 1997.

1989 Amendment: In (2) substituted "obligor's" for "defendant's"; and made minor changes in punctuation and phraseology.

Case Notes

Abuse of Discretion in Failure to Reference Statutory Judicial Review Provisions in Administrative Order Addressing Child Support Enforcement — Due Process Violation Constituting Reversible Error: The mother filed a petition with the Child Support Enforcement Division (CSED) for assistance in obtaining child support from the father. CSED initiated an administrative action to determine the amount of support owing, and an administrative law judge conducted a contested case hearing on the issue and entered an order establishing the father's current and past-due child support obligation. The order included a paragraph notifying the parents of their statutory right to petition for judicial review of the administrative decision under Title 2, ch. 4, part 7 (MAPA), but did not reference this section, which contains more specific procedural requirements for appealing from an administrative decision in a child support enforcement case than the provisions in MAPA. The father filed a petition for judicial review and mailed copies to the mother and CSED but failed to properly serve the parties as required in this section. The District Court concluded that it lacked subject matter jurisdiction because the father failed to comply with this section. The court dismissed the petition. The father moved the court to amend or reconsider the petition, contending that the application of this section violated his due process rights because he did not receive sufficient notice of the procedures by which to obtain judicial review of the administrative decision. The motion was denied, but the court nevertheless subsequently entered another order correcting the clerical error by adding a reference to this section to the notice provision of the earlier order and then granted CSED's motion to dismiss. The father appealed. The Supreme Court noted that proper service of a petition for judicial review was a threshold requirement for the District Court to obtain jurisdiction in this case and that under Title 2, ch. 4, part 7, a petition for judicial review may be properly served by mailing copies to the agency and other parties, but there is no requirement that a summons be issued and served in conjunction with the petition. By filing the petition for judicial review and mailing copies to the mother and CSED, the father fulfilled the service requirements of MAPA and Hilands Golf Club v. Ashmore, 277 M 324, 922 P2d 469 (1996). However, specific statutory requirements prevail over general provisions such as those in MAPA, and the Supreme Court agreed that the portion of the notice informing the father that MAPA would govern the proceedings was misleading, absent any reference to the different, specific procedural requirements for CSED actions under this section. The Supreme Court adopted federal interpretations of the due process notice requirements in this regard, which provide that the opportunity to be heard is not meaningful if the notice provided does not accurately inform the person to whom it is given of how to take advantage of that opportunity. The notice provisions in the administrative order did not provide father with adequate notice to meet due process requirements, so application of this section would violate the father's due process rights. Under these unique circumstances, it was required that the father's petition for judicial review must be governed by the service requirements of MAPA and Hilands. Those requirements were met, so the District Court did acquire subject matter jurisdiction and abused its discretion in dismissing the father's petition for judicial review based on his failure to comply with this section. The case was reversed for further proceedings under MAPA. Pickens v. Shelton-Thompson, 2000 MT 131, 300 M 16, 3 P3d 603, 57 St. Rep. 543 (2000), followed in In re Support Obligation of McGurran v. Dept. of Public Health and Human Services, 2003 MT 145, 316 M 188, 70 P3d 734 (2003). See also Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 94 L Ed 2d 865, 70 S Ct 652 (1950), Gonzales v. Sullivan, 914 F2d 1197 (9th Cir. 1990), Walters v. Reno, 145 F3d 1032 (9th Cir. 1998), and City of W. Covina v. Perkins, 525 US 234, 142 L Ed 2d 636, 119 S Ct 678 (1999).

40-5-254. Statutory limitations.

Compiler's Comments

1989 Amendment: At beginning inserted "support".

40-5-255. Charging off child support debts as uncollectible — sale of support debts.

Compiler's Comments

1995 Amendments: Chapter 60 in (2), near middle of first sentence after "support obligation", inserted "or after 10 years from entry of a lump-sum judgment or order for support arrears, whichever is later".

Chapter 264 inserted (3) authorizing Department to sell interest in unpaid balance of support debt and providing terms of sale. Amendment effective March 28, 1995.

Severability: Section 18, Ch. 60, L. 1995, was a severability clause.

Section 10, Ch. 264, L. 1995, was a severability clause.

1993 Amendment: Chapter 631 near beginning of first sentence of (2) substituted "10 years from the date of termination of the support obligation" for "6 years from the date a support debt was incurred", in second sentence substituted "10-year" for "6-year", and near middle of third sentence, after "distraint", substituted "issued by the department" for "filed with the clerk of court" and in two places substituted "10-year" for "6-year"; and made minor changes in style.

1989 Amendment: Near beginning substituted "an obligor" for "a responsible parent or former spouse"; near end of first sentence of (2), before "debt", inserted "support"; and made minor changes in form and phraseology.

1985 Amendment: Near beginning of first sentence, after "parent", inserted "or former spouse".

1981 Amendment: Substituted "warrant for distraint" for "warrant of distraint" whenever it appeared.

40-5-256. Employee debtor rights protected — limitation.

Compiler's Comments

1981 Amendment: Substituted "warrant for distraint" for "warrant of distraint" in the middle of the section.

40-5-257. Assignment of earnings to be honored — effect.

Compiler's Comments

1989 Amendment: In first sentence of (1), after "employing", substituted "an obligor" for "a person owing a support debt or obligation" and at end of sentence substituted "a support order presented by the department" for "court order, presented by the department as a plan to satisfy or retire a support debt or obligation"; and made minor changes in form and phraseology.

40-5-261. Procedures for making information available to consumer reporting agencies.

Compiler's Comments

Nonseverability: Section 9, Ch. 418, L. 1989, was a nonseverability clause.

Case Notes

Arrearage Not Delinquent Child Support — No Violation of Due Process: Kenck, a uniformed service member, regularly sent child support. While Kenck was serving abroad, the child's mother requested an increase in the support amount, and the Child Support Enforcement Division (CSED) subsequently raised the amount retroactively, resulting in an administrative arrearage that Kenck agreed to pay in installments, in accordance with 40-5-309. Although Kenck faithfully paid his child support debts, CSED reported him to the consumer credit reporting agencies because of the administrative arrearage. Kenck was later denied employment because of the notation on his credit report. The Montana child support enforcement program is based on federal law, which provides that states are required to periodically report the names of noncustodial parents who are delinquent in their support payments. The Supreme Court found that not all past due child support constitutes "delinquency", finding a functional difference between delinquent support and arrearage. However, because Kenck received written notice from CSED and an opportunity to be heard while on active duty but failed to timely respond, Kenck did not avail himself of the administrative process to challenge CSED's actions, and there was no constitutional violation. Kenck v. St., 2013 MT 380, 373 Mont. 168, 315 P.3d 957.

40-5-262. Rules.

Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 418, L. 1989, provided: "This bill requires a statement of intent because [section 7] [40-5-262] requires the department of revenue to adopt rules establishing procedures for making information concerning certain child and spousal support debt available to consumer credit reporting agencies. It is the intent of the legislature to encourage the reporting and use of support debt information whenever practical. The department is encouraged to provide information to consumer reporting agencies for commercial use by business and financial institutions. The legislature intends that the department by rule provide for a fee to cover the costs of providing support debt information. Technological developments have lowered the cost of information sharing and make it practical for state government to share delinquent support information with private enterprise to a much greater extent than was previously possible. Expanded information sharing is intended to promote the payment of delinquent support obligations and to protect commercial lenders and retailers by ensuring that all of a consumer's financial obligations are considered in determining the ability to pay a commercial obligation. Consumers should be discouraged from incurring obligations that they might find difficult to pay because of support enforcement efforts by the department.

The department is directed to promulgate rules for providing notice to obligors owing delinquent support under orders or judgments issued by courts or administrative agencies. Rules should allow the economical issuance of notice to the greatest number of delinquent obligors practical in the ordinary course of agency operations. One notice should be sufficient to allow any delinquent support to be reported whenever it occurs. Rules should require that the agency make a reasonable effort to provide notice prior to the release of information; however, the actual receipt of notice is not required.

The department is instructed to promulgate rules providing for the transfer of information on the greatest number of support delinquencies to the greatest number of credit reporting agencies practical. Electronic transfer of information is encouraged. Support debt information should be provided to consumer reporting agencies in accordance with specific guidelines to be specified in the rules for determining when reporting is inappropriate in a particular case.

The department is further instructed to promulgate rules creating procedures for contesting and determining the accuracy of support debt information. Rules should encourage the informal resolution of disputes as promptly as practicable. Formal adjudication of the accuracy of reported support debt information should be conducted initially by the department, subject to review by the district courts."

40-5-263. Central clearinghouse — enforcement services — powers and duties of the department.

Compiler's Comments

2005 Amendment: Chapter 21 in (1) near end of first sentence after "all" deleted "interstate" and at end after "department" deleted "by other states" and near middle of second sentence after "regarding" substituted "IV-D" for "interstate"; in (1)(a) at end inserted "or Title IV-D of the Social Security Act"; in (2)(b) near beginning of first sentence after "any" and after "made by" deleted "interstate" and at end inserted "or Title IV-D of the Social Security Act"; in (3) near beginning of introductory clause after "initiating" substituted "agency in another state, an Indian tribe, or a country" for "state"; in (5)(a) near end after "any" deleted "interstate"; in (5)(b) at end substituted "agency in another state, an Indian tribe, or a country" for "state"; in (5)(d) near beginning after "initiating" substituted "agency in another state, an Indian tribe, or a country" for "state"; in (5)(f) near middle after "department" deleted "to a resident of this state" and after "obligor" substituted "or the obligor's income or assets reside" for "resides"; in (6) near beginning after "services" deleted "to a resident of this state" and near middle after "any" deleted "interstate"; in (7) near beginning of first sentence after "court or" inserted "another" and after "IV-D" substituted "entity" for "agency in another state"; and made minor changes in style. Amendment effective March 18, 2005.

1997 Amendment: Chapter 552 in (1)(a) and introduction to (3) inserted reference to Uniform Reciprocal Enforcement of Support Act; substituted (3)(a) and (3)(b) allowing the Department to proceed under Title 40, chapter 5, part 1, or to pursue any other available remedy for phrase at end of introduction to (3) that read: "establish or enforce a child support obligation by any appropriate statute, including the remedies in this chapter"; and inserted (7) relating to registration of a lien, what a lien applies to, and its enforcement. Amendment effective July 1, 1997.

1993 Amendment: Chapter 328 in (1)(a), (2)(b), and (3) inserted reference to the Uniform Interstate Family Support Act; and made minor changes in style.

40-5-264. Cooperative agreements.

Compiler's Comments

1997 Amendment: Chapter 552 in (1) inserted "Indian tribe or tribal organization as defined in 25 U.S.C. 450b". Amendment effective July 1, 1997.

40-5-271. Registration of support orders.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 21 in (1) at end of first sentence inserted "an Indian tribe, or a country"; in (3)(a) near middle after "state" inserted "an Indian tribe, or a country"; in (3)(g) near end after "issuing" substituted "jurisdiction" for "state"; and made minor changes in style. Amendment effective March 18, 2005.

Chapter 564 in (1) in first sentence after "issued by" deleted "a district court of this state or by"; and in (2) inserted second sentence providing that notice may be included in the notice issued under 40-5-273. Amendment effective July 1, 2005.

1997 Amendment: Chapter 552 substituted (1), (2), and (3) relating to registration of support orders, a contest of the registration of an order, and a hearing for former text that read: "(1) The department shall establish and maintain a support order registry.

(2) The registry must contain the support orders issued by the department.

(3) In a IV-D case, the department shall, upon the request of the obligor or the obligee, or may register a support order of a district court of this state or a support order of a court or administrative agency of another state with jurisdiction to enter the order. A certified copy of the order to be registered must accompany the written request for registration.

(4) Upon registration, the support order must be treated in the same manner and have the same effect as a support order issued by the department, and an abstract of the order may be filed under the provisions of 40-5-227. Review of the order under 40-5-272 is available only when the department is providing child support enforcement services for the order." Amendment effective July 1, 1997.

40-5-272. Application for review of child support orders.

Compiler's Comments

2019 Amendment: Chapter 131 in (1) after "foreign country" inserted "as defined in 40-5-1002"; in (2)(a) at beginning inserted "this state has issued the order and"; in (2)(b) substituted "this state has jurisdiction as provided under the Uniform Interstate Family Support Act" for "jurisdiction can be obtained as provided under 40-5-231"; deleted former (7) that read: "(7) To the extent that they are consistent with this section, the provisions of 40-5-1008, 40-5-1012, and 40-5-1013 apply to this section"; and made minor changes in style. Amendment effective October 1, 2019.

2015 Amendment: Chapter 174 in (1) inserted "tribe, or foreign country"; and made minor changes in style. Amendment effective July 1, 2015.

Transition: Section 70, Ch. 174, L. 2015, provided: "[This act] applies to proceedings begun on or after July 1, 2015, to establish a support order or determine parentage of a child or to register, recognize, enforce, or modify a prior support order, determination, or agreement, whenever issued or entered."

Severability: Section 72, Ch. 174, L. 2015, was a severability clause.

2005 Amendment: Chapter 564 in (1) near middle after "order" substituted "issued by a district court of this state or by a court or administrative agency of another state" for "filed with the support order registry" and after second "order" inserted "of this state"; in (2) after "40-5-273" substituted "40-5-277, and" for "and 40-5-276 through"; in (4)(b) at beginning inserted "the need to provide for the child's health care needs, regardless of the", after "coverage" deleted "to the obligor's child", and after "through" deleted "the obligor's"; in (4)(c)(i) after "entered" deleted "or last reviewed"; inserted (4)(c)(ii) and (4)(c)(iii) providing that criteria constituting sufficient grounds for review of a child support order include a lapse of 36 months from grant of an administrative hearing or from issuance of an administrative order; inserted (4)(d) providing that criteria constituting sufficient grounds for review of a child support order include a change in child custody; inserted (5) providing that a party may withdraw the party's request for modification prior to the issuance of the notice described in 40-5-273 and that after the issuance of the notice, if a party withdraws a request for modification, the nonrequesting party may continue the modification action by filing with the department a written request to continue; and made minor changes in style. Amendment effective July 1, 2005.

2001 Amendment: Chapter 542 in (1) after "obligee" deleted "hearings officer appointed pursuant to 40-5-273 shall review" and after "registry" inserted "or a previously issued administrative support order may be reviewed by the department"; in (2) inserted "and 40-5-276 through 40-5-278"; in (4)(a) substituted "a substantial change in circumstances as defined by administrative rules" for "inconsistency with this state's guidelines, unless the inconsistency is considered negligible under department rules"; inserted (4)(c) concerning lapse of 36 months; and made minor changes in style. Amendment effective July 1, 2001.

1993 Amendment: Chapter 328 in (2)(b) substituted "40-5-231" for "40-4-210"; deleted (2)(c) allowing jurisdiction when the obligor resides in this state and the Department is providing IV-D enforcement services; and inserted (6) listing sections of Uniform Interstate Family Support Act that apply to this section.

Case Notes

Ten-Year Lapse Since Issuance of Support Order — Jurisdiction to Modify: After the District Court increased the father's monthly child support obligation in accordance with a revised order submitted by the Child Support Enforcement Division, the father appealed to the Supreme Court. The father argued that there had been no showing of changed circumstances, and therefore the District Court lacked jurisdiction. However, under this section, a child support order may be modified after 36 months have passed from the date of the order. In this case, the child support order had not been modified in 10 years. On this basis, the Supreme Court affirmed the District Court's order. In re Marriage of Healy, 2016 MT 154, 384 Mont. 31, 376 P.3d 99.

Justiciable Controversy Created by Intervention of Child Support Enforcement Division With Continuing District Court Jurisdiction Over Child Support Orders: As part of a marriage dissolution, the District Court ordered that the husband pay monthly child support in a specific amount. The Child Support Enforcement Division (CSED) subsequently notified the court that it intended to modify the order pursuant to its authority in 40-5-273 and this section. The court, sua sponte, then enjoined CSED from modifying any child support orders issued by a Montana District Court, asserting that CSED's actions in modifying a court order violated the constitutional separation of powers clause. On appeal, CSED maintained that this case did not present a justiciable controversy, primarily because neither party to the dissolution action challenged the constitutionality of the statutes in question, and that the court was therefore without jurisdiction to decide the issue. The Supreme Court disagreed, finding that a justiciable controversy did exist. Once the original equitable jurisdiction of the District Court was invoked in the dissolution action, the court retained continuing jurisdiction following entry of the child support order. As a result, the court properly used its inherent authority to protect both its continuing jurisdiction and the husband's right not to be adversely affected by an act of CSED that the court considered unconstitutional. Further, the court had personal jurisdiction over CSED because CSED's notification that it intended to intervene interjected CSED into the ongoing matter, constituting a voluntary appearance into the case under former Rule 4B, M.R.Civ.P. (now superseded), and vesting personal jurisdiction over CSED with the District Court. Seubert v. Seubert, 2000 MT 241, 301 M 382, 13 P3d 365, 57 St. Rep. 1006 (2000), rehearing granted and opinion clarified as to the prospective effect of the opinion in 2000 MT 241A, 301 M 399, 13 P3d 365, 57 St. Rep. 1013a (2000). See also In re Marriage of Harper, 235 M 41, 764 P2d 1283 (1988), and Gryczan v. St., 283 M 433, 942 P2d 112 (1997). (See 2001 amendment.)

Statutes Granting Child Support Enforcement Division Judicial Power to Make and Enforce Child Support Orders Violative of Constitutional Separation of Powers: As part of a marriage dissolution, the District Court ordered that the husband pay monthly child support in a specific amount. The Child Support Enforcement Division (CSED) subsequently notified the court that it intended to modify the order pursuant to its authority in 40-5-273 and this section. The court, sua sponte, then enjoined CSED from modifying any child support orders issued by a Montana District Court, asserting that CSED's actions in modifying a court order violated the constitutional separation of powers clause. On appeal, CSED maintained that the statutes did not violate the separation of powers clause because: (1) the statutory scheme was merely a quasi-judicial function that did not threaten the institutional integrity of the Judicial Branch; (2) the statutes in question were a reasonable response to both the federal legal requirements for expedited child support modification and the sheer magnitude of child support collection in Montana; (3) CSED was empowered to modify a support order only if the facts changed; (4) every contested modification was subject to a hearing before an administrative law judge; (5) all modifications were subject to judicial review; and (6) the Legislature's grant of jurisdictional authority to CSED was not exclusive. The District Court responded that the statutes were an unconstitutional violation of separation of powers because: (1) they gave CSED judicial power that is exclusively reserved to the judiciary; (2) they gave CSED statutory authority to modify a child support order, file it with the District Court, and then enforce the order as a District Court judgment; and (3) the procedure for judicial review of a CSED modification was not automatic and was limited by the scope of the Montana Administrative Procedure Act. The Supreme Court concluded that 40-5-273 and this section are an unconstitutional violation of the separation of powers clause to the extent that they grant CSED the judicial power to make and enforce child support orders without automatic and mandatory judicial review. Although appreciative of the magnitude of the agency's modification and enforcement tasks, the court found that that fact did not justify unbridled departure from constitutional norms respecting the autonomy of the individual branches of government. Seubert v. Seubert, 2000 MT 241, 301 M 382, 13 P3d 365, 57 St. Rep. 1006 (2000), rehearing granted and opinion clarified as to the prospective effect of the opinion in 2000 MT 241A, 301 M 399, 13 P3d 365, 57 St. Rep. 1013a (2000), and distinguishing Chastain v. Chastain, 932 SW 2d 396 (Mo. 1996), and State of Iowa ex rel. Sara Allee v. Gocha, 555 NW 2d 683 (Iowa 1996). (See 2001 amendment.)

40-5-273. Notice of review of child support orders — order for production of information.

Compiler's Comments

2005 Amendment: Chapter 564 in (1) near middle of first sentence after "information" inserted "if appropriate", at end of third sentence after "review" inserted "hearing", and at end of fourth sentence after "include" substituted "a statement" for "the following information as an exception to 2-4-601"; in (1)(c) substituted "of the dollar amount of the support obligation to be paid each month for the child" for "a requirement that the obligor and the obligee provide the department with telephone numbers at which they and their witnesses may be contacted for the review"; inserted (1)(d) through (1)(j) setting out further information required in the notice; inserted (2)(b)(iv) providing that if the requested information is not returned, the department may apply to the district court for an order to compel compliance with the order for production of financial information in accordance with 2-4-104; in (2)(c) at end substituted "hearing" for "session"; in (3) near beginning of first sentence after "hearing" deleted "or appears at the administrative review", near middle after "hearing" deleted "or appears at the administrative review", and near end after "hearing" deleted "or attending the administrative review"; inserted (4) providing that the hearings officer may issue subpoenas if additional discovery is requested; and made minor changes in style. Amendment effective July 1, 2005.

2001 Amendments — Composite Section: Chapter 352 in (1) inserted third sentence providing that service of the notice is considered to be effective if, in the absence of a return receipt, the person it was mailed to requests a hearing or appears at the review. Amendment effective April 23, 2001.

Chapter 542 in (1) at beginning of first sentence inserted "Upon receipt of", after "40-5-272" deleted "must be scheduled for an administrative review. Unless the department determines under rules of the department that an in-person review is necessary, the review must be conducted by teleconferencing methods", after "conducted" inserted "and an order for the production of financial information", and at end inserted "and any other party entitled to notice" and inserted third sentence concerning effectiveness of service of notice in the absence of a return receipt; in (1)(a) at end inserted last clause concerning including monthly transfer payment in modified order; substituted (2) concerning content of order for production of financial information for "(2) The department may issue an order commanding the obligor or the obligee, or both, to produce financial information. The order must be served either personally or by certified mail with the notice that a review will be conducted. If service is by certified mail, the department must receive a return receipt signed by the person to whom the order was mailed for the service to be effective. The department may also issue subpoenas ordering the parties to produce information in their possession about the obligor and the obligee that may be reasonably necessary for application of the guidelines. Any information so obtained by the department must be provided to the parties before a hearing"; substituted (3) concerning time for producing financial information for "(3) The requested modification of the order must be determined on the evidence submitted to the department under the following conditions:

(a) If an applicant other than the department fails to provide a telephone number for the review or fails to be at the number provided when telephoned for the review, the failure may be considered a withdrawal of the application.

(b) If a party other than the applicant fails to provide a telephone number for the review or fails to be at the number provided when telephoned for the review, the failure is considered to mean that the party does not oppose the modification.

(c) If the department is the applicant and if either the obligor or the obligee, or both, fails to provide a telephone number for the review or fails to be at the number provided when telephoned for the review, the failure may be considered an admission that the party or parties do not oppose the modification"; deleted former (4) through (12) that read: "(4)(a) An order entered under the circumstances described in subsection (3)(a), (3)(b), or (3)(c) becomes final within 30 days of issuance unless a party provides the hearings officer an affidavit showing good cause for failure to provide a telephone number or failure to be available when telephoned.

(b) A proposed modification consent order or notice of proposed modification becomes final 30 days after issuance unless during that period a party files with the department a written request for further administrative proceedings.

(c) The department shall grant a modification hearing if it receives a timely written request by a party aggrieved by the department's determination. The hearing is subject to the provisions of this section relating to a review. The department may adopt rules regulating the fair and efficient conduct of the hearing. Unless the department determines under department rules that an in-person hearing is necessary, the hearing must be conducted by teleconferencing methods.

(5) A provision of law may not be construed to mean that an obligor or an obligee is a client of the department, and the department is not considered a party to the action.

(6) (a) In addition to the powers and duties provided by other law, the department shall, to ensure the equitable determination of a support obligation, during a review:

(i) question witnesses in a nonadversarial manner to elicit full disclosure of all pertinent facts;

(ii) introduce evidence on behalf of the parties;

(iii) apply the guidelines to the facts elicited from the review; and

(iv) inquire as to any circumstances that may require variance from the guidelines.

(b) If a party is represented by legal counsel, the department may allow the counsel to present that party's case.

(7) The department shall determine a support obligation in accordance with the guidelines and shall issue a modifying order. A stipulation by the parties in a proceeding under this section may not be contested before entry of the final department order. If the department determines that the difference between the existing support order and the amount determined under the guidelines is negligible under rules issued by the department, the modifying order may not change the amount of the support obligation. Even though the review may indicate that a modification of the support obligation is appropriate, the department may not modify the support order if the department determines, after the review, that to do so would not be in the best interests of the child under the rules issued by the department. An increase in child support is presumed to be in the best interests of the child unless, after a review, either the obligor or the obligee demonstrates it would not be in the best interests of the child. The modifying order may modify the underlying support order from the date of service of a notice that an administrative review will be conducted under this section and may modify the underlying order from the date found to be the date that the amount required for support decreased. The obligee may be ordered to repay the obligor for any support amount overpayment found to have been paid since the date that the amount required for support decreased. If the case is a IV-D case, the department shall, on request of the obligor, enforce the obligee's repayment of the overpaid amount using any procedure provided in this chapter for payment, enforcement, and collection of child support or a delinquency.

(8) The department shall consider whether or not health insurance for the child is available and shall include an appropriate requirement for the provision of the child's health insurance needs in a modifying order in accordance with part 8 of this chapter.

(9) In addition to complying with other requirements of law, the modifying order must include provisions:

(a) that each party, other than the department, is required to promptly file with the department and update, as necessary, information on:

(i) the identity of the party;

(ii) the party's social security number;

(iii) the party's residential and mailing addresses;

(iv) the party's telephone number;

(v) the party's driver's license number;

(vi) the name, address, and telephone number of the party's employer; and

(vii) if the child is covered by a health or medical insurance plan, the name of the insurance carrier or medical insurance plan, the policy identification number, the names of the persons covered, and any other pertinent information regarding coverage or, if the child is not covered, information as to availability of coverage for the child through the obligor's and obligee's employers;

(b) that in a subsequent child support enforcement action, upon sufficient showing that diligent effort has been made to ascertain the location of a party, the department's due process requirements for notice and service of process are met with respect to the party upon delivery of written notice by regular mail to the most recent known address of the party or the party's employer's address reported to the department; and

(c) that the modifying order is subject to future administrative review and modification by the department upon the request of the department or a party under 40-5-271 through 40-5-273 when the department is providing services under IV-D.

(10) The department shall keep information provided under subsection (9)(a) confidential except as necessary for purposes of Title IV-D of the Social Security Act.

(11) An order entered under this section by the department is a final agency decision, subject to judicial review pursuant to the Montana Administrative Procedure Act, except as provided in 40-5-253. An order entered under this section must notify the parties that the order is subject to judicial review under Title 2, chapter 4, part 7. A final order entered under a stipulation of parties waives the stipulating parties' right to judicial review.

(12) The parties to the support order and the department when it is providing services under IV-D may enforce the support order or modify that order independently, as provided in 40-4-208 and 53-2-613(5)(d)"; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendments — Composite Section: Chapter 51 in (12) at end after "53-2-613" substituted "(5)(d)" for "(4)(d)". Amendment effective March 15, 1999.

Chapter 579 in (1) and (2) inserted "either personally or by certified mail" and inserted sentence requiring department to receive return receipt if service by certified mail; at end of (9) substituted "provisions" for "the following notices and warnings"; substituted language in (9)(a) and (9)(b) outlining information required to be filed with department and procedures regarding department's due process requirements for notice and service for former language in (9)(a) that read: "that the obligor shall keep the department informed of the name and address of the obligor's current employer and information on health insurance available to the obligor through the obligor's employment or other group insurance"; inserted (10) requiring department to keep information confidential except for purposes of Title IV-D of the Social Security Act; and made minor changes in style. Amendment effective May 10, 1999.

1997 Amendments: Chapter 482 throughout section substituted "department" for "hearings officer"; in first sentence in (1), after "administrative", substituted "review" for "hearing, and a hearings officer must be appointed by the department", in second sentence, in two places substituted "review" for "hearing" and after "conducted" substituted "by teleconferencing methods" for "by telephone conference", at beginning of third sentence substituted "A notice that an administrative review will be conducted" for "The order scheduling the hearing" and after "obligee" deleted "at least 60 days before the hearing", and in fourth sentence substituted "notice" for "order"; deleted former (1)(a) that required order to include "the date and time for the hearing and, if appropriate, the place for the hearing"; in (1)(c) substituted "review" for "hearing"; at end of second sentence in (2) substituted "notice that review will be conducted" for "order scheduling the hearing"; in (3), in six places, substituted "review" for "hearing"; in (4)(a) substituted "within 30 days" for "within 10 days"; inserted (4)(b) providing that order or notice becomes final 30 days after issuance unless request for further proceedings filed; inserted (4)(c) requiring Department to grant modification hearing upon request by aggrieved party and providing procedures for hearing; in (6)(a), after "review", deleted "hearing"; in (6)(a)(iii) substituted "review" for "hearing"; inserted second sentence in (7) prohibiting contesting of stipulation before entry of final Department order, in fourth and fifth sentences, near middle after "review", deleted "hearing", and in sixth sentence substituted "may" for "must" and after "service" substituted "of a notice that an administrative review will be conducted under this section" for "of the order scheduling the hearing"; in (8) substituted language requiring Department to consider availability of health insurance and include appropriate insurance requirement for child in order for former (8) that read: "The hearings officer shall make a written determination whether health insurance is available to the child of the obligor through the obligor's employment or other group insurance. If the hearings officer determines health insurance is available to the child of the obligor, the hearings officer shall issue a modifying order that requires the obligor to obtain and keep health insurance for the child. If the hearings officer determines that health insurance is not available to the child of the obligor, he shall issue a modifying order containing the notices provided in subsection (9). An order to provide health insurance is presumed to be in the best interests of the child unless, after a review hearing, either the obligor or the obligee demonstrates it would not be in the best interests of the child"; deleted former (9)(b) that required modifying order to include notice "that the obligor shall obtain and keep health insurance for the child of the obligor whenever it is available through the obligor's employment or other group insurance"; in first sentence in (10), after "Act", inserted "except as provided in 40-5-253" and inserted third sentence waiving the stipulating parties' right to judicial review when final order is entered under stipulation of parties; and made minor changes in style. Amendment effective May 2, 1997.

Chapter 552 in (7), in sixth sentence after "order must" deleted "prospectively" and inserted provisions allowing modification from the date found to be the date that the amount required for support decreased, allowing the obligee to be ordered to pay overpayments to the obligor, and allowing the obligor to request the department to enforce the obligee's repayment of overpayments; and made minor changes in style. Amendment effective July 1, 1997.

Case Notes

Venue Versus Jurisdiction — Failure to Move for Change of Venue at Initial Appearance Constituting Waiver of Right to Later Object to Venue: A mother filed in District Court in Judith Basin County for review of a child support modification consent order by the Department of Public Health and Human Services Child Support Enforcement Division (CSED) reducing the father's child support obligation. CSED moved for dismissal, claiming that the mother had failed to exhaust her administrative remedies. The District Court granted the motion based on lack of jurisdiction, concluding that the petition should have been filed in a different county. The mother appealed, contending that the court confused the concepts of venue and jurisdiction and contending that dismissal of the petition for lack of jurisdiction was erroneous as a matter of law. The Supreme Court agreed and reversed. The District Court's interpretation of 2-4-702 as a requirement that a petition for judicial review must be filed in the correct venue for the court to obtain jurisdiction was incorrect as a matter of law. Jurisdiction is a court's authority to hear and determine a case that goes to the power of the court and cannot be waived or conferred by consent of the parties when there is no basis for jurisdiction under the law, while venue refers to the place where a case is to be heard or where the power of the court is to be exercised and is a personal privilege of defendant that may be waived and that is considered waived pursuant to former Rule 12(b), M.R.Civ.P. (now superseded), unless a motion to change venue is made at defendant's initial appearance. Thus, the mother's petition for judicial review vested the Judith Basin County District Court with jurisdiction under 2-4-702. Whether venue was proper in the county where the petition was filed was an entirely different issue. Section 2-4-702 also sets forth the proper place where a contested administrative decision can be heard, providing that the petition must be filed in the District Court for the county where the petitioner resides or has a principal place of business or where the agency maintains its principal office. Upon proper motion, the matter should have been transferred to the proper county, but CSED failed to move for a change of venue at the initial appearance, thereby waiving its right to later object to venue, opting instead to move to dismiss for lack of jurisdiction. Therefore, Judith Basin County was a proper place for trial absent agreement by the parties to transfer venue. In re Support Obligation of McGurran, 2002 MT 144, 310 M 268, 49 P3d 626 (2002).

Justiciable Controversy Created by Intervention of Child Support Enforcement Division With Continuing District Court Jurisdiction Over Child Support Orders: As part of a marriage dissolution, the District Court ordered that the husband pay monthly child support in a specific amount. The Child Support Enforcement Division (CSED) subsequently notified the court that it intended to modify the order pursuant to its authority in 40-5-272 and this section. The court, sua sponte, then enjoined CSED from modifying any child support orders issued by a Montana District Court, asserting that CSED's actions in modifying a court order violated the constitutional separation of powers clause. On appeal, CSED maintained that this case did not present a justiciable controversy, primarily because neither party to the dissolution action challenged the constitutionality of the statutes in question, and that the court was therefore without jurisdiction to decide the issue. The Supreme Court disagreed, finding that a justiciable controversy did exist. Once the original equitable jurisdiction of the District Court was invoked in the dissolution action, the court retained continuing jurisdiction following entry of the child support order. As a result, the court properly used its inherent authority to protect both its continuing jurisdiction and the husband's right not to be adversely affected by an act of CSED that the court considered unconstitutional. Further, the court had personal jurisdiction over CSED because CSED's notification that it intended to intervene interjected CSED into the ongoing matter, constituting a voluntary appearance into the case under former Rule 4B, M.R.Civ.P. (now superseded), and vesting personal jurisdiction over CSED with the District Court. Seubert v. Seubert, 2000 MT 241, 301 M 382, 13 P3d 365, 57 St. Rep. 1006 (2000), rehearing granted and opinion clarified as to the prospective effect of the opinion in 2000 MT 241A, 301 M 399, 13 P3d 365, 57 St. Rep. 1013a (2000). See also In re Marriage of Harper, 235 M 41, 764 P2d 1283 (1988), and Gryczan v. St., 283 M 433, 942 P2d 112 (1997). (See 2001 amendment.)

Statutes Granting Child Support Enforcement Division Judicial Power to Make and Enforce Child Support Orders Violative of Constitutional Separation of Powers: As part of a marriage dissolution, the District Court ordered that the husband pay monthly child support in a specific amount. The Child Support Enforcement Division (CSED) subsequently notified the court that it intended to modify the order pursuant to its authority in 40-5-272 and this section. The court, sua sponte, then enjoined CSED from modifying any child support orders issued by a

Montana District Court, asserting that CSED's actions in modifying a court order violated the constitutional separation of powers clause. On appeal, CSED maintained that the statutes did not violate the separation of powers clause because: (1) the statutory scheme was merely a quasi-judicial function that did not threaten the institutional integrity of the Judicial Branch; (2) the statutes in question were a reasonable response to both the federal legal requirements for expedited child support modification and the sheer magnitude of child support collection in Montana; (3) CSED was empowered to modify a support order only if the facts changed; (4) every contested modification was subject to a hearing before an administrative law judge; (5) all modifications were subject to judicial review; and (6) the Legislature's grant of jurisdictional authority to CSED was not exclusive. The District Court responded that the statutes were an unconstitutional violation of separation of powers because: (1) they gave CSED judicial power that is exclusively reserved to the judiciary; (2) they gave CSED statutory authority to modify a child support order, file it with the District Court, and then enforce the order as a District Court judgment; and (3) the procedure for judicial review of a CSED modification was not automatic and was limited by the scope of the Montana Administrative Procedure Act. The Supreme Court concluded that 40-5-272 and this section are an unconstitutional violation of the separation of powers clause to the extent that they grant CSED the judicial power to make and enforce child support orders without automatic and mandatory judicial review. Although appreciative of the magnitude of the agency's modification and enforcement tasks, the court found that that fact did not justify unbridled departure from constitutional norms respecting the autonomy of the individual branches of government. Seubert v. Seubert, 2000 MT 241, 301 M 382, 13 P3d 365, 57 St. Rep. 1006 (2000), rehearing granted and opinion clarified as to the prospective effect of the opinion in 2000 MT 241A, 301 M 399, 13 P3d 365, 57 St. Rep. 1013a (2000), and distinguishing Chastain v. Chastain, 932 SW 2d 396 (Mo. 1996), and State of Iowa ex rel. Sara Allee v. Gocha, 555 NW 2d 683 (Iowa 1996). (See 2001 amendment.)

40-5-277. Administrative review hearing — final order — court approval of order.

Compiler's Comments

2005 Amendment: Chapter 564 in (1) in first sentence after "party" deleted "to a review session" and near end of fourth sentence after "40-5-273" substituted "40-5-277, and" for "and 40-5-276 through"; deleted former (2) and (3) that read: "(2) The administrative hearing following a review session is limited to resolution of contested facts identified by the parties or the department during the review session.

(3) If additional discovery is requested by a party, the hearings officer may issue subpoenas ordering the department to produce unprotected information and ordering other parties to produce information in their possession about the obligor and the obligee that may be reasonably necessary for application of the guidelines"; deleted former (5) that read: "(5) On the basis of evidence presented on the contested facts at the administrative hearing and the agreed facts determined in the review session, the department may:

(a) adopt its own recommendation;

(b) determine a support obligation in accordance with the guidelines and issue a modifying order; or

(c) terminate the review"; inserted (3) regarding the determination of the liability and responsibility of the parent or parents under the notice; in (6)(b) near middle after "under" substituted "this part" for "40-5-271 through 40-5-273 and 40-5-276 through 40-5-278"; in (8)(a) near beginning of first sentence after "under" deleted "40-5-276 or", at end of third sentence after "proceedings" substituted "by mail or personal service in accordance with Rule 5 of the Montana Rules of Civil Procedure" for "personally or by certified mail, return receipt requested", and at end of fourth sentence after "upon" substituted "mailing to the last-known address of the parties and counsel of record" for "signing of the return receipt"; in (8)(c) in first and third sentences after "under" deleted "40-5-276 or"; and made minor changes in style. Amendment effective July 1, 2005.

Effective Date: Section 10, Ch. 542, L. 2001, provided that this section is effective July 1, 2001.

Case Notes

Ten-Year Lapse Since Issuance of Support Order — Jurisdiction to Modify: After the District Court increased the father's monthly child support obligation in accordance with a revised order submitted by the Child Support Enforcement Division, the father appealed to the Supreme Court. The father argued that there had been no showing of changed circumstances, and therefore the District Court lacked jurisdiction. However, under this section, a child support order may be modified after 36 months have passed from the date of the order. In this case, the child support order had not been modified in 10 years. On this basis, the Supreme Court affirmed the District Court's order. In re Marriage of Healy, 2016 MT 154, 384 Mont. 31, 376 P.3d 99.

Venue Versus Jurisdiction — Failure to Move for Change of Venue at Initial Appearance Constituting Waiver of Right to Later Object to Venue: A mother filed in District Court in Judith Basin County for review of a child support modification consent order by the Department of Public Health and Human Services Child Support Enforcement Division (CSED) reducing the father's child support obligation. CSED moved for dismissal, claiming that the mother had failed to exhaust her administrative remedies. The District Court granted the motion based on lack of jurisdiction, concluding that the petition should have been filed in a different county. The mother appealed, contending that the court confused the concepts of venue and jurisdiction and contending that dismissal of the petition for lack of jurisdiction was erroneous as a matter of law. The Supreme Court agreed and reversed. The District Court's interpretation of 2-4-702 as a requirement that a petition for judicial review must be filed in the correct venue for the court to obtain jurisdiction was incorrect as a matter of law. Jurisdiction is a court's authority to hear and determine a case that goes to the power of the court and cannot be waived or conferred by consent of the parties when there is no basis for jurisdiction under the law, while venue refers to the place where a case is to be heard or where the power of the court is to be exercised and is a personal privilege of defendant that may be waived and that is considered waived pursuant to former Rule 12(b), M.R.Civ.P. (now superseded), unless a motion to change venue is made at defendant's initial appearance. Thus, the mother's petition for judicial review vested the Judith Basin County District Court with jurisdiction under 2-4-702. Whether venue was proper in the county where the petition was filed was an entirely different issue. Section 2-4-702 also sets forth the proper place where a contested administrative decision can be heard, providing that the petition must be filed in the District Court for the county where the petitioner resides or has a principal place of business or where the agency maintains its principal office. Upon proper motion, the matter should have been transferred to the proper county, but CSED failed to move for a change of venue at the initial appearance, thereby waiving its right to later object to venue, opting instead to move to dismiss for lack of jurisdiction. Therefore, Judith Basin County was a proper place for trial absent agreement by the parties to transfer venue. In re Support Obligation of McGurran, 2002 MT 144, 310 M 268, 49 P3d 626 (2002).

40-5-278. Limited review of support order.

Compiler's Comments

Effective Date: Section 10, Ch. 542, L. 2001, provided that this section is effective July 1, 2001.

40-5-290. Child support payments to follow child.

Compiler's Comments

1997 Amendment: Chapter 552 in (1), after "child support" inserted "obligation"; substituted (1)(b) and (1)(c) concerning to whom the child support obligation must be paid for former (1)(b)(i) through (1)(d) (see 1997 Session Law for former text); inserted (2) requiring payment through the Department if the Department is providing Title IV-D services; and made minor changes in style. Amendment effective July 1, 1997.

40-5-291. Order to seek employment.

Compiler's Comments

Effective Date: Section 103(1), Ch. 552, L. 1997, provided that this section is effective July 1, 1997.

Part 3
Child Support Income Deduction

Part Compiler's Comments

Source: This part is based on section 49-b of New York personal property law.

40-5-302. Purpose — applicability.

Compiler's Comments

1997 Amendment: Chapter 552 in (1), at end, deleted "if that person has been delinquent in the payment of court-ordered child support"; inserted (2) providing that income withholding is available without amendment of the support order even though the support order did not provide for it or provided another method of payment; and made minor changes in style. Amendment effective July 1, 1997.

40-5-303. Petition for income deduction — who may initiate.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 506, L. 2023. Amendment effective October 1, 2023.

Code Commissioner Correction: In (5)(c) substituted "Rule 4(b)" for "Rule 4B" to reflect revisions adopted by Supreme Court Order No. AF 07-0157 dated April 26, 2011.

2009 Amendment: Chapter 223 inserted (2)(d) allowing the state to initiate income withholding; and made minor changes in style. Amendment effective April 16, 2009.

Retroactive Applicability: Section 6, Ch. 223, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to contribution orders in existence on [the effective date of this act]." Effective April 16, 2009.

1997 Amendment: Chapter 552 inserted (1) relating to income withholding for an obligor who becomes delinquent in support payments; in (2), in introductory clause, substituted "Income withholding for the payment of child support may be initiated by" for "A petition for an income deduction for the payment of delinquent child support payments may be made by"; inserted (3), (4), and (5) relating to issuance of a court order for income deductions, grounds for termination of deductions, and definitions of employer, income, and payor; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 546 in (3) substituted "department of public health and human services" for "department of family services or the department of social and rehabilitation services of the state of Montana". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1989 Amendment: At beginning of (3) deleted "the department of revenue". Amendment effective July 1, 1989.

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

1987 Amendment: In (3), after "revenue", inserted "the department of family services".

Attorney General's Opinions

Commencement Filing Fee Not Chargeable for Certain Postdissolution Proceedings: The Attorney General relied on the holding in In re Marriage of Billings, 189 M 520, 616 P2d 1104 (1980), in finding that a District Court Clerk may not charge a commencement filing fee for postdissolution of marriage action that is brought under the same cause number as the marital dissolution proceeding and that remains under the continuing jurisdiction of the District Court. 43 A.G. Op. 72 (1990).

40-5-304. When child support payments considered delinquent.

Compiler's Comments

1997 Amendment: Chapter 552 in (1) inserted reference to an administrative order and substituted "8 working days after the last day of the month in which the payment is due" for "when the amount owed is equal to 3 months of child support payments"; in (2) inserted reference to an administrative order; in (3) deleted former first sentence that read: "In the case of support orders not subject to immediate income withholding under 40-5-315, including cases in which the court or administrative authority has made a finding of good cause or alternative arrangement, the income of the obligor is subject to withholding under this part beginning on the date on which the obligor is found to be delinquent in the payment of support due under a support order in an amount equal to at least 3 months' support payments" and deleted last sentence that read: "For the purposes of this section, "alternative arrangement" has the meaning provided in 40-5-315(3)(b)"; and made minor changes in style. Amendment effective July 1, 1997.

1991 Amendment: Inserted (3) providing for income withholding for obligors not subject to immediate income withholding. Amendment effective April 24, 1991.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

Case Notes

Intervening Oral Modification of Support Agreement Precluding Enforcement of Purported Delinquency: Mother sought to subject father's income to withholding based on a still-outstanding pre-1987 agreement despite an intervening 1987 stipulation and order that dealt with the pre-1987 delinquency and that altered the original agreement and despite a subsequent oral modification, the terms of which were disputed. The trial court properly found that the mother failed to prove by a preponderance of evidence delinquency in an amount equal to 3 months of support. The Supreme Court affirmed, finding that to hold otherwise would result in repeated litigation with regard to modification of agreements, stipulated and approved by court order, and executed oral agreements. In re Marriage of Hall, 244 M 428, 798 P2d 117, 47 St. Rep. 1705 (1990).

40-5-305. Notice.

Compiler's Comments

1997 Amendment: Chapter 552 substituted (1) stating when notice must be given, (2) stating what it must contain, and (3) requiring service personally or by certified mail for "On petition for income deductions for payment of delinquent child support, the district court shall cause notice to be served upon the obligor, stating that if the delinquency is not discharged within 15 days, the court will order an income deduction for the payment of the delinquent child support and for the payment of current child support as it becomes due and payable. The notice shall also state that the obligor may contest the allegation that child support payments are delinquent." Amendment effective July 1, 1997.

40-5-306. Discharge of delinquency.

Compiler's Comments

1997 Amendment: Chapter 552 at beginning of (1) inserted "In a case in which only arrears are owed" and substituted "in arrears" for "due and payable"; inserted (2) stating that if there is a current support obligation, payment of arrears does not prevent an income-deduction order for current support; and made minor changes in style. Amendment effective July 1, 1997.

40-5-307. Delinquency of child support denied — hearing.

Compiler's Comments

1997 Amendment: Chapter 552 at beginning inserted "within 15 days after service of a notice under 40-5-305", substituted "income withholding initiated because of a delinquency is proper or denies that the amount or arrearages stated in the notice is owing" for "child support payments are delinquent", and substituted "whether income withholding will take place or continue" for "whether or not there is a deficiency in child support payments sufficient to be delinquent under 40-5-304". Amendment effective July 1, 1997.

40-5-308. Order for deduction from income for child support payments.

Compiler's Comments

1997 Amendment: Chapter 552 substituted (1) stating when a court may authorize the continuation, modification, or issuance of income-deduction for former (1) that read: "If the obligor fails to respond to notice within 15 days or if the district court determines that the obligor is delinquent in payment of child support as provided in 40-5-304, the district court shall issue an order to the obligor's employer ordering a deduction from the obligor's wages or salary for the payment of child support"; in (2)(c) substituted "obligor's income" for "wages or salary of the obligor each pay period" and "payor" for "employer"; and in (2)(e) substituted "person or entity" for "clerk of court" and "payor" for "employer". Amendment effective July 1, 1997.

1995 Amendment: Chapter 276 in (2)(e), at beginning, inserted "the name and address of the clerk of court" and near end substituted "paid" for "made payable and where it is to be forwarded"; and made minor changes in style. Amendment effective March 29, 1995.

Saving Clause: Section 6, Ch. 276, L. 1995, was a saving clause.

Severability: Section 7, Ch. 276, L. 1995, was a severability clause.

40-5-309. Amount to be deducted from income.

Compiler's Comments

1997 Amendment: Chapter 552 in (2) substituted "payor" for "employer" and "income" for "wages or salary"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 60 inserted (1)(b) regarding annualized withholding; and made minor changes in style.

Severability: Section 18, Ch. 60, L. 1995, was a severability clause.

1991 Amendment: At end of (1)(b) deleted "but may not be more than the maximum amount allowable by federal garnishment law if the sum provided in subsection (1)(a) exceeds that amount"; inserted (3) concerning maximum deduction; and at beginning of (4) inserted exception clause. Amendment effective April 24, 1991.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

1987 Amendment: In (1)(b) substituted language establishing the minimum and maximum amounts that must be deducted from an obligor's income for former text that read: "the maximum amount allowable by federal garnishment law if the sum provided in subsection (1)(a) exceeds that amount".

Federal Law: The federal garnishment law referred to in this section is codified at 15 U.S.C. § 1673(b) of the federal Consumer Credit Protection Act.

Montana Changes: See 1987 amendment note.

Case Notes

Error in Denial of Motion to Set Aside Past-Due Child Support Judgment for Fraud — Payments Improperly Applied to Barred Debt: In 1998, a mother sought $33,350 in past-due child support owed over a 20-year period. The District Court found that the statute of limitations in 27-2-201 limited recovery to arrearages incurred only in the 10 years prior to filing the complaint. At trial, the father provided documentation that some support had been paid, but the mother denied ever receiving any payments. After trial, the father attempted to introduce evidence of additional payments, but the evidence was disallowed. The District Court then calculated the amount of child support owed since 1988, but applied payments made since 1988 to the obligations incurred prior to 1988, irrespective of the statute of limitations. The father then moved to set aside the judgment because the mother committed fraud by denying the receipt of certain payments, but that motion was denied without reaching the issue of fraud. On appeal, the Supreme Court held that the District Court erred in denying the motion. Although a District Court should apply any payment of child support to the earliest arrearage, an award may be applied only to arrearages due within 10 years of a suit for enforcement. It is incongruous for a court to bar a plaintiff from bringing an action to enforce a certain debt, but then apply payments toward that barred debt. Thus, the District Court erred in applying payments made since 1988 to the obligations incurred prior to 1988, and in turn erred in failing to address the merits of the father's motion alleging fraud. The case was remanded for further consideration. Roberts v. Nickey, 2002 MT 37, 308 M 335, 43 P3d 263 (2002). See also In re Adoption of C.J.H., W.L.H., & T.A.H., 246 M 52, 803 P2d 214 (1990), and In re Marriage of Hooper & Crittendon, 247 M 322, 806 P2d 541 (1991).

40-5-310. Priority of income deduction.

Compiler's Comments

1997 Amendment: Chapter 552 in introductory clause, before "child support", deleted "delinquent"; and in (1), (2), and (3) substituted "income" for "wages or salary". Amendment effective July 1, 1997.

40-5-312. Duties of payors.

Compiler's Comments

1997 Amendment: Chapter 552 throughout section substituted reference to payor for reference to employer and substituted "income" for "wages or salary"; in (1), in second sentence, substituted "7 working days" for "10 working days"; in (2), before "deduction order", deleted "wage"; and in (3)(a), before "deduction orders", deleted "wage". Amendment effective July 1, 1997.

Saving Clause: Section 6, Ch. 276, L. 1995, was a saving clause.

Severability: Section 7, Ch. 276, L. 1995, was a severability clause.

Effective Date: Section 8, Ch. 276, L. 1995, provided: "[This act] is effective on passage and approval." Approved March 29, 1995.

Code Commissioner Change: Pursuant to sec. 1, Ch. 546, L. 1995, the Code Commissioner substituted Department of Public Health and Human Services for Department of Social and Rehabilitation Services.

Pursuant to sec. 2, Ch. 546, L. 1995, the Code Commissioner substituted Department of Public Health and Human Services for Department of Family Services.

Pursuant to sec. 568, Ch. 546, L. 1995, the Code Commissioner substituted Department of Environmental Quality for Department of Health and Environmental Sciences.

40-5-313. Obligor rights protected — penalties.

Compiler's Comments

1997 Amendment: Chapter 552 in (1)(b) substituted "income" for "wages or salary". Amendment effective July 1, 1997.

Saving Clause: Section 6, Ch. 276, L. 1995, was a saving clause.

Severability: Section 7, Ch. 276, L. 1995, was a severability clause.

Effective Date: Section 8, Ch. 276, L. 1995, provided: "[This act] is effective on passage and approval." Approved March 29, 1995.

40-5-314. Civil liability for failure to comply with wage deduction order.

Compiler's Comments

1997 Amendment: Chapter 552 throughout section substituted references to payor for references to employer; and in (1) inserted "purposely and", substituted "income" for "wages or salary", and after "remit the money" deleted "to the district court". Amendment effective July 1, 1997.

Saving Clause: Section 6, Ch. 276, L. 1995, was a saving clause.

Severability: Section 7, Ch. 276, L. 1995, was a severability clause.

Effective Date: Section 8, Ch. 276, L. 1995, provided: "[This act] is effective on passage and approval." Approved March 29, 1995.

40-5-315. Immediate income deductions.

Compiler's Comments

1999 Amendment: Chapter 579 in (3)(b) after "agreement" substituted "between" for "that is signed by" and after "53-2-613" deleted "signed by"; and made minor changes in style. Amendment effective May 10, 1999.

1997 Amendment: Chapter 552 in three places substituted "income" for reference to salaries and wages; in (1), after "immediate deduction order", deleted "under 40-5-308" and at end deleted "regardless of whether there is a delinquency"; in (4), in second sentence, after "order for income deductions", deleted "provided for by 40-5-308" and substituted "payor" for "employer" and in third sentence substituted "payor" for "employer" and "department of public health and human services as provided in 40-5-909" for "clerk of court"; in (5), in introductory clause, substituted "Deductions" for "Wage deductions"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 546 in (3)(b) substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

Effective Date: Section 25, Ch. 635, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 24, 1991.

Part 4

Child Support Enforcement Act

Administrative Income Withholding

Part Compiler's Comments

State Child Support Enforcement Provisions Mandated by Federal Law: This part was enacted to bring Montana law into compliance with one of the mandates of the Child Support Enforcement Amendments of 1984 (Public Law 98-378).

Part Case Notes

Tribal Support Order Entitled to Full Faith and Credit: The lower court held that the state could seek to enforce a tribal court's child support order only by initiating an action in District Court rather than pursuing administrative enforcement. The Supreme Court held that under the Child Support Enforcement Act, the tribal support order was entitled to full faith and credit and therefore could be enforced by the simplified registration procedures of the Act and that, additionally, income could be withheld without court action under the Montana Child Support Enforcement Act. In re Support Obligation of Day v. St., 272 M 170, 900 P2d 296, 52 St. Rep. 680 (1995), distinguishing Wippert v. Blackfeet Tribe, 201 M 299, 654 P2d 512 (1982).

Jurisdiction Over Off-Reservation Income of Indian Living on Reservation: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) attached off-reservation unemployment benefit income of an enrolled tribal member living on the reservation for payment of a child support obligation. The Supreme Court held that the collection action was a quasi in rem action and that the state had jurisdiction over the benefits because they were located within the territorial limits of the state and jurisdiction was not based on the presence of the tribal member. First v. St., 247 M 465, 808 P2d 467, 48 St. Rep. 261 (1991).

40-5-401. Short title.

Compiler's Comments

1989 Amendment: After "Act" deleted "of 1985".

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

40-5-402. Purpose — applicability.

Compiler's Comments

1995 Amendment: Chapter 546 in (2) substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: Inserted (2) providing for applicability to support obligations enforced by Department; inserted (3) requiring employer to withhold income to comply with a support order; inserted (4) providing for withholding of income even if a support order did not address the issue; inserted (5) providing that withholding applies to all payors of income; and inserted (6) providing precedence for income withholding for support. Amendment effective April 24, 1991.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

40-5-403. Definitions.

Compiler's Comments

2019 Amendment: Chapter 131 in definition of income after "any form of" deleted "periodic"; in definition of payor after "obligor" deleted "on a periodic basis"; and made minor changes in style. Amendment effective October 1, 2019.

Code Commissioner Correction: In definition of payor substituted "Rule 4(b)" for "Rule 4B" to reflect revisions adopted by Supreme Court Order No. AF 07-0157 dated April 26, 2011.

2009 Amendment: Chapter 184 inserted definition of financial institution; in definition of income in (b)(i) after "security" inserted "mandatory retirement and disability contributions, and union dues"; and made minor changes in style. Amendment effective October 1, 2009.

Saving Clause: Section 10, Ch. 184, L. 2009, was a saving clause.

2005 Amendment: Chapter 21 in definition of obligee near middle after "state" inserted "or an Indian tribe"; and inserted definition of IV-D agency or Title IV-D agency. Amendment effective March 18, 2005.

2001 Amendment: Chapter 352 in definition of payor at end inserted "or any employer under the Uniform Interstate Family Support Act contained in part 1 of this chapter". Amendment effective April 23, 2001.

1999 Amendment: Chapter 579 in definition of alternative arrangement after "agreement" substituted "between the obligor and obligee and the department" for "signed by the obligor and obligee and signed by the department". Amendment effective October 1, 1999.

1997 Amendments: Chapter 482 in definition of support order substituted present definition for former definition that read: ""Support order" means an order of the district court of the state of Montana, an order of a court of appropriate jurisdiction of another state, an administrative order established pursuant to proceedings under part 2 of this chapter, or an order established by administrative hearing process of an agency of another state with functions similar to those of the department set forth in part 2 of this chapter, that provides a set and determinable amount for temporary or final periodic payment of funds for the support of a child. Support order further includes the following:

(a) an order for reimbursement of public assistance money paid by a public agency for the benefit of a minor child;

(b) an order for maintenance to be paid to a former spouse when the former spouse is the custodial parent of a child for whom child support is awarded under the same order; and

(c) an order requiring payment of interest due on unpaid judgments for child support." Amendment effective May 2, 1997.

Chapter 552 inserted definition of employer; in definition of income, in introductory clause, inserted "regardless of source" and after "including" inserted "commissions, bonuses, workers' compensation, disability payments, payments under a pension or retirement program, interest, and"; in definition of support order, in (b), substituted "collected under this chapter" for "awarded under the same order" (voided by Ch. 482 amendment); and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 546 in definition of Department substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: Inserted definition of alternative arrangement. Amendment effective April 24, 1991.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

1989 Amendment: In definition of Department substituted "department of social and rehabilitation services provided for in 2-15-2201" for "department of revenue provided for in 2-15-1301". Amendment effective July 1, 1989.

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

Case Notes

Authority of CSED to Enforce Support Order — Uncovered Medical Expense Arrearage Not Collectible: In a case for modification of child support obligations, the father appealed the District Court order allowing assessed arrearages, including uncovered medical expenses, to be collected by the CSED. The plain statutory language of this section indicates that the Legislature intended to grant the CSED the power to collect periodic child support payments and did not intend to grant the CSED the authority to collect delinquent medical expense payments. The District Court misinterpreted the law and erred by ordering that the CSED may collect the arrearage for uncovered medical expenses. In re Marriage of Kovash, 270 M 517, 893 P2d 860, 52 St. Rep. 280 (1995).

40-5-404. Other remedies available.

Compiler's Comments

1997 Amendment: Chapter 552 inserted (1)(b) allowing the Department to proceed under part 1 of this chapter when enforcing a support order of another jurisdiction; inserted (2) allowing the Department to enforce another jurisdiction's support order without registration of the order and allowing a party to contest the validity of a support order enforced by the Department under subsection (2)(a); and made minor changes in style. Amendment effective July 1, 1997.

1989 Amendment: Substituted reference to remedies for reference to remedy; and made minor changes in phraseology.

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

40-5-405. Rulemaking authority.

Compiler's Comments

Statement of Intent: The statement of intent attached to Ch. 571, L. 1985, provided: "A statement of intent is required for this bill because it gives the department of revenue [now department of public health and human services] rulemaking authority.

The intent of this bill and federal Public Law 93-378 [sic] [98-378], the Child Support Enforcement Amendments of 1984, on which it is based is to ensure that the support of children is the highest priority in the allocation of a responsible parent's income through the timely and automatic initiation of income withholding procedures whenever a delinquency occurs equal to at least 1 month's support payment. This bill requires the department to monitor and track support payments as they become due for the purpose of detecting delinquencies and further to promptly respond to such delinquency with income withholding procedures. To expedite the process of income withholding, any hearings are to be held under the contested case procedures of the Montana Administrative Procedure Act. Further, income withholding procedures are to be made available for interstate applications.

More specifically, it is the intent of the bill to grant to the department of revenue [now department of public health and human services] the following:

(1) the authority to establish rules and procedures related to the administrative hearing process, including but not limited to procedures for requesting a hearing, for discovery, and for teleconferencing;

(2) the authority to adopt guidelines for the exercise of discretion in reducing the amount to be withheld in satisfaction of arrearages;

(3) the authority to establish procedures for the monitoring, tracking, and dispensing of support payments and payments received from income withholdings; and

(4) the authority to establish procedures for the implementation of interstate withholding."

40-5-411. Immediate income withholding.

Compiler's Comments

1991 Amendment: Substituted present text providing for immediate income withholding for former text that read: "(1) If an obligation for support is being enforced by the department pursuant to Title IV-D of the Social Security Act and the obligation has been established as required by law or administrative process, income due or to become due within this state to the obligor is subject to withholding procedures under this part if:

(a) except as provided in 40-4-204 and 40-6-116, a support obligation is initially decreed and ordered or modified after January 1, 1990, by a district court or administrative process, regardless of whether child support payments are in arrears; or

(b) the obligor is found to owe a combination of unpaid child support under a support order in an amount equal to or in excess of 1 month's support payment.

(2) When the requirements of this part have been met, the department, without necessity for amendment of the support order or further order by a court or other entity, shall issue an order directing the obligor's employer or other payor to withhold and deliver to the department such amount of the obligor's income as will be sufficient to meet the support obligation imposed by the support order and to defray arrearages, if any, due when the withholding order takes place.

(3) The provisions for income withholding under this part take precedence over any other law or court order". Amendment effective April 24, 1991.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

1989 Amendment: In (1) substituted "as required by law" for "by order of a court" and at end inserted "if"; inserted (1)(a) relating to support obligations decreed, ordered, or modified after January 1, 1990; inserted (1)(b) relating to arrearages in excess of 1 month's support payment; in (2), after "defray arrearages", inserted "if any"; and made minor change in phraseology.

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

Federal Law: Title IV-D of the Social Security Act referred to in this section is codified at 42 U.S.C. § 651, et seq.

Case Notes

Effective Date of 1989 Automatic Withholding Statute: The enabling legislation of the 1989 amendments to 40-4-204 provided that the implementation of the automatic withholding of child support payments with regard to modifications of existing child support agreements applied to child support orders and modifications of child support orders issued after September 30, 1989. Therefore, the effective date of the 1989 amendments to 40-4-204, which is specifically excluded under subsection (1)(a) of this section, is October 1, 1989. In re Marriage of Hall, 244 M 428, 798 P2d 117, 47 St. Rep. 1705 (1990).

40-5-412. Delinquency income withholding.

Compiler's Comments

2005 Amendment: Chapter 431 in (2)(a) at end deleted "The order must be limited to current support unless modified to include arrears as provided in 40-5-413." Amendment effective April 28, 2005.

1997 Amendments: Chapter 482 in (5), after "which", inserted "does not include a mistake of fact relating to establishment of custody and visitation but". Amendment effective May 2, 1997.

Chapter 552 in (1)(a) substituted "day the obligor becomes delinquent in the payment of support" for "date on which the obligor is found to owe unpaid support under the support order in an amount equal to or in excess of 1 month's support payment" and at end deleted "Intervening agreements or orders establishing a schedule for payment of delinquent support do not prevent income withholding under this part"; inserted (1)(b) making an obligor delinquent if 8 working days pass after the last day of the month in which a payment is due; inserted (1)(c) providing that an agreement or order establishing a schedule for payment of delinquent support does not prevent income withholding; inserted (2)(a) providing for notice to an obligor that income withholding will be initiated if the delinquency is not received within 8 days, providing for an order to withhold if the obligor does not pay within that time, providing when notice is not necessary, and limiting the order to current support unless it is modified to include arrears; inserted (2)(b) requiring notification to the obligor when an order to withhold is sent to a payor; in (3), in introductory clause, substituted "a delinquency" for "an arrearage"; in (4), in second sentence after "direct an obligor", deleted "who does not owe unpaid child support equal to or in excess of 1 month's support payment"; in (5)(d) substituted "obligor is delinquent in the payment of support" for "delinquent support amounts owed are equal to or greater than 1 month's support payment"; inserted (6) providing that a mistake of fact under subsection (5) does not include a mistake relating to paternity or establishment of custody or visitation; and made minor changes in style. Amendment effective July 1, 1997.

1991 Amendments: Chapter 16 in (4) deleted reference to support enforcement and collections unit (rendered void by Ch. 635); and made minor changes in style.

Chapter 635 substituted present text providing for delinquency income withholding for former text that read: "(1) In a case concerning a support obligation referred to in 40-5-411, the department shall immediately issue an order under 40-5-415 for the payment of current support.

(2) In any other case, the department shall monitor and track all support payments required by the support order. If at any time these records indicate that the obligor owes a combination of unpaid support equal to or in excess of 1 month's support, the department shall commence proceedings to initiate withholding of the obligor's income as provided in this part.

(3) To accomplish the purpose of subsection (2), the department by written notice to the obligor may direct an obligor who does not owe unpaid child support equal to or in excess of 1 month's support payment to pay all support through the department, notwithstanding any court order directing payments to be made to the obligee or clerk of court.

(4) Whenever an obligation for support is paid through the support enforcement and collections unit of the department, the department must forward payment to the obligee within 10 days of the department's receipt of payment from the obligor". Amendment effective April 24, 1991.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

1989 Amendment: In (1) substituted language relating to immediate order for income withholding for "In each case in which the department is enforcing a support order assigned to the state pursuant to 53-2-613 or in which the department is collecting support on behalf of an obligee who has applied for services under 40-5-203, the department shall monitor and track all support payments required by the support order. If at any time these records indicate that the obligor owes any combination of unpaid support equal to or in excess of 1 month's support payment, the department shall commence withholding from the obligor's income"; inserted (2) relating to monitoring and tracking of support payments in cases other than those under 40-5-411 and withholding for arrearages in excess of 1 month's support; and in (3) substituted "subsection (2)" for "subsection (1)".

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

40-5-413. Notice of income withholding.

Compiler's Comments

1999 Amendment: Chapter 51 in (2)(e) near middle substituted "a delinquency" for "an arrearage". Amendment effective March 15, 1999.

1997 Amendment: Chapter 552 in (1), at beginning, deleted "Prior to service of an initial order or a modification of an existing order on the payor under 40-5-415"; in (1)(a), after "initiated", deleted "under 40-5-412"; in (1)(c), after "immediate withholding", inserted "or delinquency withholding"; in (2)(a) substituted "subject to withholding" for "to be withheld"; substituted language in (2)(c) concerning procedures to follow to contest income withholding for former language regarding obligor's right to a hearing to contest income withholding (see 1997 Session Law for former text); in (2)(e) substituted "40-5-412(3)" for "40-5-412(2)"; and made minor changes in style. Amendment effective July 1, 1997.

1991 Amendment: Substituted (1)(a) concerning delinquency income withholding for former (1)(a) that read: "(a) the department previously has not issued an order to withhold and it has determined the obligor owes a combination of unpaid support equal to or in excess of 1 month's support"; at end of (1)(b) inserted "and the department proposes to add those arrearages to the withholding order"; at end of (1)(c) inserted "that the department proposes to add to the withholding order"; in (2)(c), after "contest the", substituted "initiation" for "implementation" and at end inserted "as provided in 40-5-412(4)"; inserted (2)(e) concerning withholding initiated at the request of the obligee; and made minor changes in style. Amendment effective April 24, 1991.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

1989 Amendment: In (1) substituted "an initial order or a modification of an existing order on the payor under 40-5-415" for "an order on the payor to commence income withholding" and at end, after "intended", deleted "withholding"; inserted (1)(a) relating to arrearages in excess of 1 month's support; inserted (1)(b) relating to arrearages accrued subsequent to withholding order; inserted (1)(c) relating to arrearages due when immediate withholding has commenced; in (2)(c) inserted "or modification of an existing order" and after "that" substituted "the intended action" for "withholding, including the amounts to be withheld"; in (2)(d) inserted "for the amount stated in the notice"; and made minor changes in form.

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

40-5-414. Hearing.

Compiler's Comments

1997 Amendments: Chapter 482 at beginning of first sentence of (3), before "hearing", deleted "administrative", after "must" inserted "initially", and after "methods" substituted "and is subject to the Montana Administrative Procedure Act" for "unless the obligor or the department expressly requests an in-person hearing before the hearings examiner" and inserted second sentence requiring hearings officer, following teleconferencing hearing, to grant de novo in-person hearing upon request or upon showing that party prejudiced by lack of in-person hearing. (See coordination instruction comments.) Amendment effective May 2, 1997.

Chapter 552 in (1)(a), after "initiated", deleted "under 40-5-412" and substituted "income withholding" for "intent to withhold"; inserted (1)(b) requiring the obligor to state the grounds for contesting income withholding in a request for a hearing and allowing denial of a hearing for failure to do so; in (3) substituted "The hearing must initially be held by teleconferencing methods and is subject to the Montana Administrative Procedure Act. At the request of a party, the hearings officer shall grant a de novo in-person hearing" for "The administrative hearing must be held by teleconferencing methods unless the obligor or the department expressly requests an in-person hearing before the hearings examiner"; in (4), in introductory clause, substituted "files a timely request for a hearing" for "requests a hearing within the 10-day period"; in (4)(a), in first sentence at beginning, inserted "that includes a statement showing a probable mistake of fact" and substituted "may be stayed upon written request of the obligor" for "must be stayed" and in second sentence, after "However", deleted "in a proceeding to initiate income withholding"; in (4)(b) substituted requirement of a hearing within 60 days, unless good cause is found, and notice within 60 days after that, unless good cause is found, of whether income withholding will take place for requirement that within 45 days after service of the notice of intent to withhold, the Department must inform the obligor of the hearing results; in (5), in introductory clause, substituted "The department may continue an order to withhold income issued because of a delinquency, may modify an existing order to withhold income, or may issue an order to withhold income" for "The department shall issue an order to withhold income or a modified order to withhold in accordance with 40-5-415"; in (5)(a) inserted "timely" and substituted "that includes the statement showing a mistake of fact" for "with the department within the specified 10-day period"; in (5)(c) substituted "is delinquent in the payment of support" for "owes unpaid support equal to or in excess of 1-month's support obligation and the amount of arrearages owing is determined and adjudged to be a fixed and certain sum"; in (6), at end of first sentence, substituted "became delinquent" for "was served with the notice of intent to withhold income", in second sentence substituted "When income withholding is initiated because of a delinquency" for "When the department is enforcing a current support obligation", inserted "or after service of an order to withhold on a payor", and after "initiating" inserted "or continuing", and inserted third sentence requiring the Department to inform the obligor whether income withholding must take place within 60 days after a hearing when notice of income withholding is issued because an arrearage has accrued or additional income is being withheld to satisfy additional arrearages; deleted former (7) that read: "(7) In a case initiated because an arrearage has accrued or because additional income is being withheld to satisfy additional arrearages, the obligor, within 45 days of service of the notice of intent to withhold income, must be informed of the hearing decision on whether income withholding will take place"; in (7) inserted "after service of the notice of income withholding", substituted "unpaid support" for "a combination of unpaid support equal to or in excess of 1 month's support obligation", and substituted "issue an order to withhold income" for "proceed with the intended action"; and made minor changes in style. Amendment effective July 1, 1997.

Coordination Instruction: Section 100, Ch. 552, L. 1997, a coordination section, deleted the amendment in (3), inserting the second sentence, that read: "At the request of a party or upon a showing that the party's case was substantially prejudiced by the lack of an in-person hearing, the hearings officer shall, following a teleconferencing hearing, grant a de novo in-person hearing."

1995 Amendment: Chapter 60 in (1), near beginning after "delinquency", inserted "or the modification of an existing order to withhold"; at beginning of first sentence of (4)(a), after "the", inserted "initiation of" and after "department" inserted "and the modification of an existing withholding order", at beginning of second sentence inserted "However, in a proceeding to initiate income withholding", and inserted third sentence providing that income withholding under an existing order is not stayed in a proceeding to modify; in (5), in introductory clause after "income", inserted "or a modified order to withhold"; in (5)(c), at beginning, substituted "hearings examiner" for "hearing officer"; inserted (5)(d) requiring issuance of a withholding order if evidence indicates that new or additional amounts are owed; in (8), near middle after "support obligation", inserted "or determines that a modification of an existing order is proper"; and made minor changes in style.

Severability: Section 18, Ch. 60, L. 1995, was a severability clause.

1991 Amendment: In (1), at beginning, inserted "To contest the withholding of income initiated under 40-5-412 because of a delinquency, an" and after "notice of" substituted "intent to withhold income" for "the intended action"; deleted former (2) that read: "(2) In a case initiated because an arrearage has accrued or because additional income is to be withheld to satisfy additional arrearages and in which the obligor requests a hearing within the time allowed, the intended action may not take effect until the conclusion of the hearing or the date of the hearing if the obligor fails to appear at a scheduled hearing"; inserted (4) concerning a hearing requested by the obligor; inserted (5) concerning situations in which Department shall issue a withholding order; in (6), at end of first sentence, deleted "and the fact that the obligor may have later paid the arrearage does not remove from the hearing examiner the authority to direct the department to order income withholding" and inserted second sentence providing that payment of arrearages does not preclude income withholding; and made minor change in style. Amendment effective April 24, 1991.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

1989 Amendment: In (1), after "intended", substituted "action" for "income withholding"; in (2) substituted "In a case initiated because an arrearage has accrued or because additional income is to be withheld to satisfy additional arrearages and in which" for "If" and substituted "the intended action" for "income withholding"; in (6) inserted introductory clause relating to accrued arrearages and additional arrearages; inserted (7) relating to failure to request a hearing or determination of arrearages in excess of 1 month's support; and made minor changes in punctuation.

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

Case Notes

Administrative Law Judge Decision — Four-Year Delay Held Violation of Due Process and Right to Justice Without Undue Delay: Based upon an interstate referral from North Dakota, the Child Support Enforcement Division (CSED) of the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) instituted a collection action against Connell to recover child support payments. After a hearing on February 15, 1991, after which Connell submitted proposed findings and conclusions and an order, the administrative law judge (ALJ) failed to make a decision and no further action was taken on the case until December 23, 1994. At that time, a different ALJ required appearance of the parties in a telephone hearing. After the hearing, Connell moved for a default judgment against CSED or dismissal. Citing Mont. Power Co. v. Pub. Serv. Comm'n, 206 M 359, 671 P2d 604 (1983), the Supreme Court pointed out that the due process clause of the Montana Constitution applies to state agencies. The Supreme Court held that the 44-month delay in deciding Connell's case, which CSED tried to explain by saying that the contract of the previous ALJ had terminated and it was unsure how to proceed, violated Art. II, sec. 16 and 17, Mont. Const., several administrative rules of the Department, and this section. The Supreme Court remanded the case to the District Court for an order dismissing the income withholding action and tax offset against a state warrant for Connell. In re Connell v. St., 280 M 491, 930 P2d 88, 54 St. Rep. 28 (1997), distinguished in Emery v. St., 286 M 376, 950 P2d 764, 54 St. Rep. 1454 (1997).

Request for "in Person" Hearing Improperly Denied — Administrative Rule Contrary to Statute and Rules of Evidence Invalid: Charles disputed the amount of child support payments intended to be withheld by an income withholding proceeding and requested that he be given an "in person" hearing, rather than a telephone conference hearing, pursuant to this section. His request was denied by the administrative hearings officer pursuant to ARM 46.30.607(1) (now repealed). The Supreme Court held that the request for the "in person" hearing was improperly denied because 2-4-612(2) makes the Montana Rules of Evidence applicable to administrative hearings and Rule 611(e), M.R.Ev. (Title 26, ch. 10), provides that a witness can be heard only in the presence of other parties. Citing In re Marriage of Bonamarte, 263 M 170, 866 P2d 1132 (1994), the Supreme Court held that Rule 611 requires the physical presence of a witness in the courtroom. The Supreme Court also noted that this section requires a live hearing if a party requests it and that the administrative rule adopted by the Child Support Enforcement Division, providing for a live hearing only upon approval of the hearings officer, was void because it was contrary to statute and Rule 611. Taylor v. Taylor, 272 M 30, 899 P2d 523, 52 St. Rep. 567 (1995).

40-5-415. Order to withhold income — rules.

Compiler's Comments

2001 Amendment: Chapter 352 in (2) at end inserted "or by electronic service upon an entity that has entered into an agreement with the department to accept electronic service of an order entered under this part"; and made minor changes in style. Amendment effective April 23, 2001.

1993 Amendment: Chapter 631 inserted second sentence of (3) regarding consolidation of payments and distribution according to Department rules.

1991 Amendment: In (1), before "serve", deleted "immediately"; inserted (1)(e) concerning providing health insurance coverage; and made minor changes in style. Amendment effective April 24, 1991.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

1989 Amendment: In (1) substituted "When the requirements of this part have been met" for "If the obligor fails to request a hearing within 10 days or fails to appear at a scheduled hearing or if the hearing examiner determines that the obligor owes a combination of unpaid support equal to or in excess of 1 month's support payment" and after "order" inserted "or modification order"; and in (2), in two places after "order", inserted "or modification order".

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

40-5-416. Determination of amount of income to be withheld.

Compiler's Comments

1995 Amendment: Chapter 60 inserted (1)(d) regarding conditions of annualized withholding.

Severability: Section 18, Ch. 60, L. 1995, was a severability clause.

1991 Amendment: In (1)(c), after "withheld", substituted "under this part" for "to satisfy an arrearage"; and in (2), after "salaries", inserted "including fees" and at end inserted "as amended". Amendment effective April 24, 1991.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

1989 Amendment: At beginning of (1)(a) substituted "Subject to the limitations" for "Except as" and at end deleted "plus"; inserted introductory clause of (1)(b) relating to satisfaction of arrearages; at end of (1)(b)(i) substituted "or" for "plus"; inserted (1)(b)(ii) relating to 25% of obligor's income; in (1)(c) inserted "If income is being withheld to satisfy an arrearage, the department may allow"; and made minor changes in form, phraseology, and punctuation.

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

Case Notes

Error in Denial of Motion to Set Aside Past-Due Child Support Judgment for Fraud — Payments Improperly Applied to Barred Debt: In 1998, a mother sought $33,350 in past-due child support owed over a 20-year period. The District Court found that the statute of limitations in 27-2-201 limited recovery to arrearages incurred only in the 10 years prior to filing the complaint. At trial, the father provided documentation that some support had been paid, but the mother denied ever receiving any payments. After trial, the father attempted to introduce evidence of additional payments, but the evidence was disallowed. The District Court then calculated the amount of child support owed since 1988, but applied payments made since 1988 to the obligations incurred prior to 1988, irrespective of the statute of limitations. The father then moved to set aside the judgment because the mother committed fraud by denying the receipt of certain payments, but that motion was denied without reaching the issue of fraud. On appeal, the Supreme Court held that the District Court erred in denying the motion. Although a District Court should apply any payment of child support to the earliest arrearage, an award may be applied only to arrearages due within 10 years of a suit for enforcement. It is incongruous for a court to bar a plaintiff from bringing an action to enforce a certain debt, but then apply payments toward that barred debt. Thus, the District Court erred in applying payments made since 1988 to the obligations incurred prior to 1988, and in turn erred in failing to address the merits of the father's motion alleging fraud. The case was remanded for further consideration. Roberts v. Nickey, 2002 MT 37, 308 M 335, 43 P3d 263 (2002). See also In re Adoption of C.J.H., W.L.H., & T.A.H., 246 M 52, 803 P2d 214 (1990), and In re Marriage of Hooper & Crittendon, 247 M 322, 806 P2d 541 (1991).

40-5-417. Modification or termination of withholding orders.

Compiler's Comments

1991 Amendment: Inserted (4) providing that payment of the full amount of any arrearage does not terminate withholding. Amendment effective April 24, 1991.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

1989 Amendment: Inserted (2) relating to adjustment of withholding amount to satisfy accrued arrearages.

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

40-5-419. Alternative method of payment in lieu of income withholding.

Compiler's Comments

Saving Clause: Section 10, Ch. 184, L. 2009, was a saving clause.

Effective Date: Section 11(2), Ch. 184, L. 2009, provided that this section is effective on passage and approval. Approved April 9, 2009.

40-5-421. Duties of payor.

Compiler's Comments

2019 Amendment: Chapter 131 in (3)(a) after "the payor shall" deleted "comply with the orders in the sequence in which they were served upon the payor and shall" and at end inserted "In no case may the allocation result in a withholding for one of the support obligations not being implemented"; inserted (3)(b) regarding prorating withholding of current support among all obligees; inserted (3)(c) regarding distribution of support arrears among the obligor's cases; and made minor changes in style. Amendment effective October 1, 2019.

1997 Amendment: Chapter 552 in (1), in first sentence after "that occurs after", deleted "14 days from the" and in second sentence substituted "7 working days" for "10 working days"; and made minor changes in style. Amendment effective July 1, 1997.

1991 Amendment: In (1), near beginning of second sentence, inserted "within 10 working days of the date the obligor is paid" and inserted third sentence concerning statement indicating date of withholding; and deleted former (2) that read: "(2) If the obligor's pay periods are at intervals of less than 1 month, the payor may withhold an equal amount at each pay period cumulatively sufficient to pay the monthly withholding as directed by the withholding order". Amendment effective April 24, 1991.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

40-5-422. Obligor rights protected — penalties.

Compiler's Comments

1989 Amendment: Inserted (1)(a) relating to a person with a child support obligation; and made minor changes in form, phraseology, and punctuation.

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

40-5-423. Priority of income withholding.

Compiler's Comments

2019 Amendment: Chapter 131 in introduction substituted "by any Title IV-D agency" for "under this part"; and in (1) at end inserted "by a non IV-D agency". Amendment effective October 1, 2019.

1997 Amendment: Chapter 552 in (1) inserted "and any income-withholding order issued in another state and sent to a payor in this state". Amendment effective July 1, 1997.

40-5-431. Registration of interstate income-withholding orders.

Compiler's Comments

2005 Amendment: Chapter 21 in (1) near middle of first sentence after "issued by" substituted "another IV-D agency" for "a public agency of another state" and in second sentence near beginning after "registration of the" deleted "foreign" and after "order" inserted "issued by an entity other than the department"; in (2) near middle of introductory clause after "registration of" substituted "an order issued by an entity other than the department" for "a foreign order"; in (2)(c) near end before "jurisdiction" substituted "other" for "foreign"; in (2)(e) near end before "jurisdiction" substituted "other" for "foreign"; and in (3) at beginning of first sentence after "When the" deleted "foreign" and after "order" inserted "issued by an entity other than the department" and at beginning of second sentence after "Registration of" substituted "an" for "a foreign" and after “order” inserted “issued by an entity other than the department”. Amendment effective March 18, 2005.

1993 Amendment: Chapter 328 in (1) inserted last sentence that read: “The provisions of 40-5-188 through 40-5-191 [renumbered 40-5-1059 through 40-5-1062] apply to this section to the extent that they are consistent with this section”; in (3) inserted last sentence providing that registration of a foreign income-withholding order does not confer jurisdiction for any other purpose; and made minor changes in style.

Federal Law: Title IV-D of the Social Security Act referred to in this section is codified at 42 U.S.C. § 651, et seq.

40-5-432. Application for withholding.

Compiler’s Comments

2005 Amendment: Chapter 21 in (2) in introductory clause after “application for” deleted “interstate”; in (5) near beginning of second sentence after “because of the” substituted “interjurisdictional” for “interstate”; and made minor changes in style. Amendment effective March 18, 2005.

Federal Law: Title IV-D of the Social Security Act referred to in this section is codified at 42 U.S.C. § 651, et seq.

40-5-433. Additional duties of department in income withholding.

Compiler’s Comments

2005 Amendment: Chapter 21 in (2) at end before “application” deleted “interstate”; and made minor changes in style. Amendment effective March 18, 2005.

1991 Amendment: Deleted former (1) that read: “(1) Unless the public agency of the foreign jurisdiction makes application to the department for additional services, the department is not required to locate the obligor or to locate payors of income to the obligor. If the application for interstate service provided for in 40-5-431 and 40-5-432 fails to provide this information or the information is determined to be incorrect, the department may return the application without further proceeding under this part”. Amendment effective April 24, 1991.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

40-5-434. Initiation of income withholding in other jurisdictions.

Compiler’s Comments

2005 Amendment: Chapter 21 throughout section in four places substituted “jurisdiction” for “state”; and near middle of first sentence after “income” substituted “outside of the state” for “in another state” and after “request the” inserted “Title IV-D”. Amendment effective March 18, 2005.

40-5-443. Payors to provide information — exemption from liability.

Compiler’s Comments

1997 Amendment: Chapter 552 in (1), in introductory clause, inserted “or by another IV-D agency” and substituted “requester” for “department”; in (2), before “union”, inserted “labor” and after “discloses information” deleted “to the department”; and inserted (3) and (4) subjecting a payor or labor union to sanctions for failure to disclose and requiring the requester to keep the information confidential except for Title IV-D purposes. Amendment effective July 1, 1997.

1995 Amendment: Chapter 264 in (1), in two places in introductory clause, and in (2), after “obligor”, inserted “or obligee”; in (1)(d) inserted “contract proceeds”, inserted “or amounts”, and after “amounts paid” deleted “to the obligor during any period when the department provided support enforcement services”; in (1)(e), after “was available”, deleted “to the obligor”; inserted (1)(f) concerning employers, payors, and unions; in (2), after “payor”, inserted “or union”; and made minor changes in style. Amendment effective March 28, 1995.

Severability: Section 10, Ch. 264, L. 1995, was a severability clause.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

Effective Date: Section 25, Ch. 635, L. 1991, provided: “[This act] is effective on passage and approval.” Approved April 24, 1991.

Part 6
Civil Contempt for Nonsupport

40-5-601. Failure to pay support — civil contempt.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 4, Ch. 506, L. 2023. Amendment effective October 1, 2023.

2009 Amendments — Composite Section: Chapter 184 in (7)(e) at beginning substituted "has" for "does not have"; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 223 in (1) at end of first sentence inserted "and contributions ordered pursuant to 41-5-1525"; and made minor changes in style. Amendment effective April 16, 2009.

Saving Clause: Section 10, Ch. 184, L. 2009, was a saving clause.

Retroactive Applicability: Section 6, Ch. 223, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to contribution orders in existence on [the effective date of this act]." Effective April 16, 2009.

2005 Amendment: Chapter 21 in (5)(a) after "state" inserted "an Indian tribe, or a country"; and made minor changes in style. Amendment effective March 18, 2005.

Case Notes

No Authority to Extend Child Support Modification to Earlier Date: In a dispute over child support payments in which a motion for modification of child support was filed in 2009, the District Court correctly concluded that it did not have authority to extend the support modification to any date before the motion was filed, even though the father who sought modification signed an affidavit for his lawyer in 2008 in support of modification after certain events led to changes in the father's income. In re Marriage of Wyrick, 2012 MT 244, 366 Mont. 484, 288 P.3d 232.

Refusal to Credit Support Arrearage as Allowed by Child Support Enforcement Division — Abuse of Discretion: Father applied to the Child Support Enforcement Division for a credit against his past-due support obligations, and the Division determined that he was due a credit in the amount of $1,593.20. In its order modifying the child support obligation, the District Court's failure to acknowledge the Division's determination that the past-due arrearages should be reduced was a clear abuse of discretion. On remand, the Supreme Court ordered that the arrearages be reduced by $1,593.20, pursuant to the Division's determination. In re Marriage of Cowan, 279 M 491, 928 P2d 214, 53 St. Rep. 1250 (1996).

Agreement to Pay for Private Schooling — Unsupported Failure to Pay for Tutor: The District Court erroneously decided that the father, who was ordered by the divorce decree to share expenses of his son's private school tuition, could refuse to do so merely because he believed that a tutor was not doing the boy any good. The tutor was hired by the mother on the advice of education professionals, and the father was not a professional in the field. In re Marriage of Heath, 272 M 522, 901 P2d 590, 52 St. Rep. 915 (1995).

Attorney Fees Improper for Husband in Violation of Decree: Because findings favoring the husband as to claims of violation of the decree were reversed, the award of attorney fees to the husband was also reversed. In re Marriage of Heath, 272 M 522, 901 P2d 590, 52 St. Rep. 915 (1995).

Complying With Decree by Providing Health Insurance — Failure to Pay for Second Policy: The husband, who provided health insurance, as required by the decree, did not violate the decree by refusing to reimburse the wife for premiums on an additional health insurance policy. In re Marriage of Heath, 272 M 522, 901 P2d 590, 52 St. Rep. 915 (1995).

Effect of Father's Failure to Rebut Mother's Evidence of Day-Care Costs and Alternatives: Evidence did not support a District Court finding that the father's failure to reimburse the mother for day-care expenses did not violate the divorce decree requirement. The mother testified as to types and costs of available day care and as to her investigation of alternatives. The father presented no evidence and simply disagreed with the mother's choice and the policies and costs of the day-care center of her choice. In re Marriage of Heath, 272 M 522, 901 P2d 590, 52 St. Rep. 915 (1995).

Exception for Contempt Review in Family Law Cases: Although contempt orders are generally final and not reviewable on appeal, except by writ of certiorari, the Supreme Court has created an exception in family law cases. In such cases, the review is limited to examining the record to determine whether the District Court acted within its jurisdiction and whether the evidence supports the District Court's contempt findings. In re Marriage of Heath, 272 M 522, 901 P2d 590, 52 St. Rep. 915 (1995).

Failure of Financial Vehicles for Children's Education to Meet Requirements of Decree: The District Court erroneously found that the father, who was ordered by the divorce decree to set up a separate educational fund for the three children of the marriage and place $200 a month in it, satisfied that requirement with an employee stock option plan and a 401K retirement plan. The father and the adopted children of his subsequent marriage could use the plans for retirement, a home purchase, or education of the adopted children, and the plans did not meet the divorce decree requirements that the educational fund be in both parents' names and that both of their signatures be required for withdrawal. In re Marriage of Heath, 272 M 522, 901 P2d 590, 52 St. Rep. 915 (1995).

Life Insurance at Half Amount Required by Decree Inadequate: The decree requiring a $150,000 life insurance policy for three children of a first marriage was not complied with by a $125,000 policy benefiting the three children and also the two children of a second marriage and by not naming the first wife as the policyowner, as required by the decree. In re Marriage of Heath, 272 M 522, 901 P2d 590, 52 St. Rep. 915 (1995).

Propriety of Failure to Pay for Eyeglasses That Professional Decided Were Necessary: Although it was later determined that the son did not need eyeglasses, they were recommended by a professional and ultimately resulted in a diagnosis of epilepsy. Evidence did not support a District Court finding that they were neither necessary nor reasonable and that the father's failure to reimburse the mother for them did not violate the divorce decree, and the agreement incorporated in the decree, that stated that the father was to pay a portion of all medical expenses not covered by insurance. In re Marriage of Heath, 272 M 522, 901 P2d 590, 52 St. Rep. 915 (1995).

Part 7
Suspension of Licenses for Nonsupport

Part Compiler's Comments

Coordination Instruction: Section 13, Ch. 523, L. 1993, was a coordination instruction that provided: "If both Senate Bill No. 217 and [this act], containing [sections 3 through 11], are passed and approved, Senate Bill No. 217 [Ch. 348, L. 1993] is void." Pursuant to this provision, Ch. 348, L. 1993, is void.

40-5-701. Definitions.

Compiler's Comments

2023 Amendments — Composite Section: Section 5, Ch. 506, L. 2023, in definition of support debt or support obligation deleted former (d) that read: "(d) contributions ordered pursuant to 41-5-1525"; and made minor changes in style. Amendment effective October 1, 2023.

Section 3, Ch. 507, L. 2023, in definition of conservation activity before "conservation license" deleted "wildlife". Amendment effective July 1, 2023.

2017 Amendment: Chapter 397 inserted definition of conservation activity; in definition of license near middle substituted "conservation activity" for "recreational activity"; deleted definition that read: ""Recreational activity" means an activity for which a license or permit is issued by the department of fish, wildlife, and parks under Title 87, chapter 2, part 6 or 7, except 87-2-708 or 87-2-711, or under 87-2-505, 87-2-507, 87-2-508, or 87-2-510"; and made minor changes in style. Amendment effective July 1, 2017.

2009 Amendment: Chapter 223 in definition of support debt inserted (d) regarding failure to pay contributions ordered pursuant to 41-5-1525; and made minor changes in style. Amendment effective April 16, 2009.

Retroactive Applicability: Section 6, Ch. 223, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to contribution orders in existence on [the effective date of this act]." Effective April 16, 2009.

2005 Amendment: Chapter 21 in definition of child in (a)(iv)(D) near beginning after "referral for" substituted "IV-D services" for "interstate services from an agency of another state"; in definition of obligee in (b) after "state" inserted "or an Indian tribe"; in definition of subpoena near beginning after "issued by a" deleted "district"; in definition of support order in (a)(iv) after "state" inserted "or an Indian tribe"; in definition of warrant near middle after "issued by" substituted "a" for "the district"; in definition of IV-D case in (d) near beginning after "state" inserted "or an Indian tribe"; and made minor changes in style. Amendment effective March 18, 2005.

1999 Amendment: Chapter 579 in definition of support debt or support obligation inserted "the failure to provide or pay", at beginning of (a) deleted "the failure to provide", substituted language in (b) regarding court-ordered spousal maintenance or other court-ordered support for custodial parent for "a support order for spousal maintenance if the judgment or order requiring payment of maintenance also contains a judgment or order requiring payment of child support for a child for whom the person awarded maintenance is the custodial parent", and inserted (c) expanding definition to include fines, fees, penalties, interest, and other funds and costs collected for child support or spousal maintenance or support; in definition of support order inserted (b) to include judgments and orders for periodic payment and fines, fees, penalties, interest, and other funds and costs collected for support or spousal maintenance or support; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendments — Composite Section: Chapter 42 in definition of child, in (a)(iv)(D), and in definition of IV-D case, in (d), inserted reference to the Revised Uniform Reciprocal Enforcement of Support Act or the Uniform Interstate Family Support Act. Amendment effective March 12, 1997.

Chapter 552 in definition of child, in (a)(iv)(D), inserted "Uniform Interstate Family Support Act, the Revised" and "the Uniform Reciprocal Enforcement of Support Act"; in definition of IV-D case, in (d), inserted "the Revised Uniform Reciprocal Enforcement of Support Act, the Uniform Interstate Family Support Act"; in definition of license, after "registration", inserted "permit", after "profession" inserted "recreational activity", and after "termination" inserted "or a declaration of ineligibility to purchase"; in definition of obligor inserted "or who is subject to a subpoena or warrant in a paternity or child support proceeding"; inserted definitions of recreational activity, subpoena, suspension, and warrant; and made minor changes in style. Amendment effective July 1, 1997.

Style changes in the chapters were slightly different. In each case, the codifier chose the more appropriate.

1995 Amendment: Chapter 546 in definition of Department substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Case Notes

License Suspension for Nonpayment of Child Support Available Remedy Despite Child's Emancipation: A father was years in arrears in paying child support at the time that a license suspension hearing was held but nevertheless maintained that when the child was emancipated, the child support debt transformed into an ordinary civil debt that was not enforceable by a license suspension action. In general, child support that is due under a dissolution decree but that remains unpaid becomes a judgment debt similar to any other money judgment. As such, the collection of back child support is subject to the 10-year statute of limitations in 27-2-201, but other than that limit, a custodial parent to whom back child support is owed has recourse to any collection remedies provided by law, including the license suspension remedies, regardless of whether the child for whom support is owed has achieved emancipation. Although losing his licenses was a drastic remedy, the father's persistent failure to honor his child support obligations left the District Court with no alternative, and the Supreme Court affirmed the suspension of the father's driver's, hunting and fishing, and electrician's licenses on appeal. In re Marriage of Hopper, 1999 MT 310, 297 M 225, 991 P2d 960, 56 St. Rep. 1247 (1999), following Willoughby v. Loomis, 264 M 44, 869 P2d 271, 51 St. Rep. 138 (1994), and distinguishing In re Marriage of Mikesell, 276 M 403, 916 P2d 740, 53 St. Rep. 418 (1996).

Nature of Child Support Debt — Higher Order Than Ordinary Civil Debt: The legislative intent underlying the license suspension statutes was to emphasize, as a matter of public policy, that child support obligations have the highest priority in a parent's allocation of income to debt. Unpaid child support may not be analogized to ordinary civil debt because parents have not only a legal obligation, but a social and moral obligation, to support their children, so support of children transcends ordinary individualistic matters, rising to the level of a social obligation that a parent owes not only to the child, but to the state as well. Thus, the law does not look lightly upon those who fail to make a good faith effort to discharge their child support obligations when they are able to do so. The license suspension provisions are remedial in nature, rather than punitive, because they protect the public interest in having parents, not the state, shoulder financial responsibility for children. In the present case, the father was years in arrears in paying child support at the time that the license suspension hearing was held but nevertheless maintained that when the child was emancipated, the child support debt transformed into an ordinary civil debt. The Supreme Court disagreed, expressly approving the use of license suspension statutes as a remedy for the collection of child support arrearages. In re Marriage of Hopper, 1999 MT 310, 297 M 225, 991 P2d 960, 56 St. Rep. 1247 (1999), following Willoughby v. Loomis, 264 M 44, 869 P2d 271, 51 St. Rep. 138 (1994), and distinguishing In re Marriage of Mikesell, 276 M 403, 916 P2d 740, 53 St. Rep. 418 (1996).

40-5-702. Notice of intent to suspend license.

Compiler's Comments

1997 Amendment: Chapter 552 in (1) inserted "or upon the failure of an obligor to comply with a subpoena or warrant"; inserted (3)(c) providing "complies with the subpoena or warrant"; and made minor changes in style. Amendment effective July 1, 1997.

Case Notes

Suspension of Driver's License Contingent Upon Portion of Overdue Child Support Within Court Discretion: A child support enforcement agency issued a notice of intent to suspend an obligor's driver's license. The obligor appealed on hardship grounds. The District Court concluded that the obligor had shown that a significant hardship would result from a license suspension and issued a conditional stay if: (1) within 30 days, the obligor provided proof of payment of one-third of the total obligation; and (2) a fixed payment plan was entered for paying the remainder of the obligation. If the obligor failed to abide by the terms, the stay would terminate pursuant to 40-5-710. It was within the court's discretion to condition the stay upon substantial compliance by the obligor. Thus, the decision was affirmed. In re Child Support of Mason, 1998 MT 192, 290 M 253, 964 P2d 743, 55 St. Rep. 803 (1998).

40-5-703. Hearing — order suspending license.

Compiler's Comments

1997 Amendments: Chapter 482 inserted second sentence in (2) authorizing court hearing conducted by teleconferencing methods, third sentence requiring initial Department hearing conducted by teleconferencing pursuant to administrative rulemaking procedures, and fourth sentence requiring Department, following teleconferencing hearing, to grant de novo in-person hearing upon request or upon showing that party prejudiced by lack of in-person hearing. (See coordination instruction comment.) Amendment effective May 2, 1997.

Chapter 552 in (3) inserted "and whether or not the obligor failed to comply with a subpoena or warrant"; in (5), in first sentence, inserted "or that the obligor failed to comply with a subpoena or warrant", in second sentence before "the obligor", deleted "the licensing authority and" and after "the obligor", inserted "and shall notify the licensing authority in writing of the suspension", and inserted third sentence providing: "Notification to the licensing authority is not required if the support enforcement entity has previously suspended the license of the obligor and the suspension is still in effect"; and made minor changes in style. Amendment effective July 1, 1997.

Coordination Instruction: Section 100, Ch. 552, L. 1997, a coordination section, deleted the amendment in (2), inserting the fourth sentence, that read: "At the request of a party or upon a showing that the party's case was substantially prejudiced by the lack of an in-person hearing, the department shall, following a teleconferencing hearing, grant a de novo in-person hearing."

Case Notes

License Suspension for Nonpayment of Child Support Available Remedy Despite Child's Emancipation: A father was years in arrears in paying child support at the time that a license suspension hearing was held but nevertheless maintained that when the child was emancipated, the child support debt transformed into an ordinary civil debt that was not enforceable by a license suspension action. In general, child support that is due under a dissolution decree but that remains unpaid becomes a judgment debt similar to any other money judgment. As such, the collection of back child support is subject to the 10-year statute of limitations in 27-2-201, but other than that limit, a custodial parent to whom back child support is owed has recourse to any collection remedies provided by law, including the license suspension remedies, regardless of whether the child for whom support is owed has achieved emancipation. Although losing his licenses was a drastic remedy, the father's persistent failure to honor his child support obligations left the District Court with no alternative, and the Supreme Court affirmed the suspension of the father's driver's, hunting and fishing, and electrician's licenses on appeal. In re Marriage of Hopper, 1999 MT 310, 297 M 225, 991 P2d 960, 56 St. Rep. 1247 (1999), following Willoughby v. Loomis, 264 M 44, 869 P2d 271, 51 St. Rep. 138 (1994), and distinguishing In re Marriage of Mikesell, 276 M 403, 916 P2d 740, 53 St. Rep. 418 (1996).

Nature of Child Support Debt — Higher Order Than Ordinary Civil Debt: The legislative intent underlying the license suspension statutes was to emphasize, as a matter of public policy, that child support obligations have the highest priority in a parent's allocation of income to debt. Unpaid child support may not be analogized to ordinary civil debt because parents have not only a legal obligation, but a social and moral obligation, to support their children, so support of children transcends ordinary individualistic matters, rising to the level of a social obligation that a parent owes not only to the child, but to the state as well. Thus, the law does not look lightly upon those who fail to make a good faith effort to discharge their child support obligations when they are able to do so. The license suspension provisions are remedial in nature, rather than punitive, because they protect the public interest in having parents, not the state, shoulder financial responsibility for children. In the present case, the father was years in arrears in paying child support at the time that the license suspension hearing was held but nevertheless maintained that when the child was emancipated, the child support debt transformed into an ordinary civil debt. The Supreme Court disagreed, expressly approving the use of license suspension statutes as a remedy for the collection of child support arrearages. In re Marriage of Hopper, 1999 MT 310, 297 M 225, 991 P2d 960, 56 St. Rep. 1247 (1999), following Willoughby v. Loomis, 264 M 44, 869 P2d 271, 51 St. Rep. 138 (1994), and distinguishing In re Marriage of Mikesell, 276 M 403, 916 P2d 740, 53 St. Rep. 418 (1996).

40-5-704. Suspension, denial, and nonrenewal of licenses.

Compiler's Comments

2017 Amendment: Chapter 397 in (1)(d) and in (5) near beginning substituted "conservation activity" for "recreational activity". Amendment effective July 1, 2017.

1997 Amendment: Chapter 552 in (1), in introductory clause, substituted "the notice of suspension of the license under 40-5-703(5)" for "an order suspending a license"; in (1)(a) substituted "notice" for "order"; inserted (1)(d) providing: "making good faith efforts to deny recreational activity licenses for the next applicable license year"; in (2) inserted "and the notice of suspension given under 40-5-703(5)"; near beginning of (5) inserted "recreational activity"; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendments: Chapter 418 in (8) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (8), after "license issued by the department", deleted "of health and environmental sciences". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, and sec. 571, Ch. 546, L. 1995, were saving clauses.

40-5-709. Nondisciplinary suspension for failure to pay child support.

Compiler's Comments

1997 Amendment: Chapter 552 in first sentence substituted "support enforcement entity" for "department" and inserted "or privilege to obtain a license"; and in second sentence substituted "notice of suspension of the license under 40-5-703(5) from" for "an order issued by" and inserted "or privilege to obtain a license". Amendment effective July 1, 1997.

40-5-710. Stay of suspension of license — payment plan — hardship.

Compiler's Comments

2017 Amendment: Chapter 397 in (1) after "40-5-703 or" deleted "except for a recreational activity license"; and made minor changes in style. Amendment effective July 1, 2017.

1997 Amendment: Chapter 552 in (1) inserted "except for a recreational activity license"; in (5) inserted provision requiring the support enforcement entity to notify the licensing authority of a stay or reinstatement except in certain cases and at end, before "obligor", deleted "licensing authority and the"; in (6)(a), in introductory clause, substituted "a notice" for "an order"; and made minor changes in style. Amendment effective July 1, 1997.

Administrative Rules

Title 37, chapter 62, subchapter 13, ARM Suspension of licenses.

Case Notes

Suspension of Driver's License Contingent Upon Portion of Overdue Child Support Within Court Discretion: A child support enforcement agency issued a notice of intent to suspend an obligor's driver's license. The obligor appealed on hardship grounds. The District Court concluded that the obligor had shown that a significant hardship would result from a license suspension and issued a conditional stay if: (1) within 30 days, the obligor provided proof of payment of one-third of the total obligation; and (2) a fixed payment plan was entered for paying the remainder of the obligation. If the obligor failed to abide by the terms, the stay would terminate pursuant to this section. It was within the court's discretion to condition the stay upon substantial compliance by the obligor. Thus, the decision was affirmed. In re Child Support of Mason, 1998 MT 192, 290 M 253, 964 P2d 743, 55 St. Rep. 803 (1998).

40-5-711. Termination of order to suspend license.

Compiler's Comments

2017 Amendment: Chapter 397 in (3) in first sentence substituted "conservation activity" for "recreational activity". Amendment effective July 1, 2017.

1997 Amendment: Chapter 552 in (1), in first sentence, at beginning, inserted exception clause, and inserted "or the obligor has complied with the subpoena or warrant" and in second sentence, before "obligor", deleted "licensing authority and the"; in (2) inserted "or failure to comply with a subpoena or warrant"; and inserted (3) making suspension of a recreational activity license effective for the license year and providing that it does not terminate if obligor pays the debt or complies with the subpoena or warrant. Amendment effective July 1, 1997.

40-5-713. Rulemaking authority.

Compiler's Comments

1993 Statement of Intent: The statement of intent attached to Ch. 523, L. 1993, provided: "A statement of intent is required for this bill because [sections 2 and 11] [50-15-210 and 40-5-713] require the department of social and rehabilitation services [now department of public health and human services] to adopt rules necessary for the implementation and administration of [sections 2 through 10] [50-15-210, 40-5-701 through 40-5-704, and 40-5-709 through 40-5-712] and [section 11] [40-5-713] requires the licensing authority to adopt rules necessary for the implementation and administration of [sections 3 through 10] [40-5-701 through 40-5-704 and 40-5-709 through 40-5-712].

The rules may include provisions regarding:

(1) the provision of reimbursements to hospitals, institutions, and midwives for paternity acknowledgment costs;

(2) the notice of intent to suspend licenses;

(3) the hearing procedure used to review the cause for suspension of a license;

(4) the approval of payment plans agreed to by obligors for payment of support debts;

(5) the determination of circumstances creating a hardship that warrant a stay of action for suspension of a license; and

(6) the procedures for implementing and enforcing an order suspending a license."

Part 8
Medical Support Order Enforcement

Part Compiler's Comments

Preamble: The preamble attached to Ch. 504, L. 1995, provided: "WHEREAS, it is appropriate to draft a bill specifically to present proposed program improvements for medical support enforcement in a single, comprehensive bill that promotes the needs of legislative energy, efficiency, and economy by limiting the number of possible bills and by reducing the need for hearings and readings on those bills; and

WHEREAS, parents should be held responsible for providing medical care for their children, whether or not the parents voluntarily do so."

1995 Statement of Intent: The statement of intent attached to Ch. 504, L. 1995, provided: "A statement of intent is required for this bill because it grants rulemaking authority to the department of social and rehabilitation services to adopt rules for expedited procedures."

Severability: Section 33, Ch. 504, L. 1995, was a severability clause.

Effective Date: Section 35, Ch. 504, L. 1995, provided: "[This act] is effective July 1, 1995."

40-5-804. Definitions.

Compiler's Comments

2019 Amendment: Chapter 131 in definition of health benefit plan in (a) after "combination of plans" deleted "other than public assistance programs" and inserted (b) regarding public health coverage if other medical insurance is available to one or both of the parents at a reasonable cost and is accessible for the child; and made minor changes in style. Amendment effective October 1, 2019.

Code Commissioner Correction: In definition of payor substituted "Rule 4(b)" for "Rule 4B" to reflect revisions adopted by Supreme Court Order No. AF 07-0157 dated April 26, 2011.

2001 Amendment: Chapter 211 in definition of health benefit plan or plan in second sentence inserted "state or local government group health plan, church group plan"; at end of definition of payor or payor of income inserted "or any employer under the Uniform Interstate Family Support Act"; in definition of plan administrator inserted "including but not limited to a state or local government or church"; and made minor changes in style. Amendment effective October 1, 2001.

Code Commissioner Change: Pursuant to sec. 1, Ch. 546, L. 1995, the Code Commissioner substituted Department of Public Health and Human Services for Department of Social and Rehabilitation Services.

40-5-806. Contents of medical support order.

Compiler's Comments

2001 Amendment: Chapter 211 inserted (5) requiring department or tribunal to inform parent ordered to obtain health benefit plan of eligibility for state group health plan; deleted former (8) that read: "(8) (a) Individual insurance or a health benefit plan is presumed to be available at reasonable cost if:

(i) an amount payable for individual insurance or health benefit plan premiums does not exceed 25% of the obligated parent's total parental child support obligation when calculated under the child support guidelines without credit for the medical support obligation; or

(ii) a health benefit plan is available through an employer or other group organization for which the premium is partially or entirely paid by the employer or other group organization.

(b) The presumption under subsection (8)(a) may be rebutted by clear and convincing evidence, and the tribunal has the discretion to:

(i) order individual insurance or health benefit plan coverage when the amount of the premium may be greater than the presumptive amount; or

(ii) not order coverage when the amount of the premium is less than the presumptive amount"; inserted (9) requiring adoption of rules regarding availability of insurance or benefit plan at reasonable cost and requiring application of rules for medical support order proceeding; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 579 deleted former (7) that read: "(7) Except as provided in subsection (7)(b), if the cost of individual insurance or a health benefit plan is not reasonable or cost-beneficial or if a plan is not otherwise available and if the child is a recipient of medical assistance under Title XIX of the federal Social Security Act or later becomes a recipient of medical assistance:

(i) when the child is a recipient together with a parent, the medical support order must require the other parent to pay $50 per month;

(ii) when the child is not a recipient with a parent, the medical support order must require each parent to pay $50 per month; and

(iii) when the child is a recipient with both parents, neither parent has an obligation under this subsection (7)(a).

(b) The tribunal may order the parent or parents to pay a greater or lesser amount each month as the tribunal finds appropriate to the circumstances.

(c) The amounts ordered to be paid under this subsection (7) must be paid to the department for return to the appropriate state treasury fund to help offset the costs of the medical assistance program"; and made minor changes in style. Amendment effective October 1, 1999.

40-5-807. Mandatory provisions of medical support order.

Compiler's Comments

1999 Amendment: Chapter 579 in first sentence in (1) substituted "40-5-806(2) through (8)" for "40-5-806(2) through (9)". Amendment effective October 1, 1999.

40-5-809. Effect of order on health benefit plans.

Compiler's Comments

1997 Amendment: Chapter 482 at end of first sentence in (2), after "custodian", inserted "or by an employer-payor of either parent" and inserted fifth sentence authorizing service by certified mail of copy of medical support order on plan administrator; and made minor changes in style. Amendment effective May 2, 1997.

40-5-810. Notice of intent to enroll — order to enroll — authorization to enroll and participate in health benefit plan — rules.

Compiler's Comments

2005 Amendment: Chapter 431 in (6) at end inserted "or by electronic service upon an entity that has entered into an agreement with the department to accept electronic service of an order under this part"; in (9)(a)(i) near beginning after "transfer the" deleted "notice and" and near middle substituted "working days" for "days of service"; in (9)(b) near end substituted "working days of the date of receipt" for "days of receipt"; and made minor changes in style. Amendment effective April 28, 2005.

2001 Amendment: Chapter 211 inserted (1) authorizing notice of intent to enroll child in available health plan to be served on parent required by support order to obtain health benefits for child; inserted (2) outlining requirements for notice; inserted (3) requiring contested case hearings for issued notices; inserted (4) requiring notice and acknowledgment of service to be served on parent personally or by certified mail; inserted (5) outlining circumstances under which order requiring enrollment of child in plan may be issued; inserted (6) authorizing service of enrollment order on plan administrator, employer, or other individual or entity personally or by certified mail; in (7) in first sentence inserted "or an order to enroll the child issued under this section"; in middle of (8) inserted "or the receipt of an order to enroll the child issued under this section"; inserted (9) outlining instructions to employer and plan administrator required to be included in enrollment order; inserted (10) authorizing adoption of rules to establish priority of withholdings for financial and medical support and prohibiting amount withheld from exceeding amount permitted under federal Consumer Credit Protection Act; inserted (11) authorizing modification or replacement of order to enroll that is consistent with medical support obligation; inserted (12) authorizing department to terminate enrollment order under certain circumstances; and made minor changes in style. Amendment effective October 1, 2001.

40-5-812. Obligations of health benefit plan.

Compiler's Comments

2005 Amendment: Chapter 431 in (1), (3), and (7)(a) in first sentence inserted language regarding an order requiring enrollment of a child pursuant to 40-5-810; and in (5) near beginning inserted "or within 40 working days after the date of an order issued pursuant to 40-5-810". Amendment effective April 28, 2005.

40-5-813. Obligation of payor.

Compiler's Comments

2005 Amendment: Chapter 431 in (1) in first sentence near beginning inserted "or an order requiring enrollment of the child pursuant to 40-5-810" and substituted third through fifth sentences stating that if the total cost of the premium and child support to be withheld for current support and arrears exceeds the maximum amount permitted under the federal act, the current child support and full cost of the premium have priority before the arrears, if the total cost of the premium and current support exceed the amount of permissible garnishment, the current support and arrears take priority over the premium up to the maximum amount permitted under the federal act, and the payor may not withhold the part of the premium that is in excess of the maximum for "If the premium, together with child support to be withheld, exceeds the maximum, child support has priority and the payor may not withhold the part of the premium that is in excess of the maximum"; in (2), (3)(b) near end, (4)(a) at end, (4)(b) near middle, and (4)(c) in first sentence at end inserted reference to an order requiring enrollment of the child pursuant to 40-5-810; and made minor changes in style. Amendment effective April 28, 2005.

40-5-821. Penalty imposed by tribunal.

Compiler's Comments

1997 Amendment: Chapter 42 deleted former (2) that read: "The civil penalty must be deposited as provided in 40-5-813"; and made minor changes in style. Amendment effective March 12, 1997.

40-5-822. Duties of parents — consequences of noncompliance.

Case Notes

Indemnification Required for Medical Expenses Incurred Through Insurance Lapse — Payment of Expenses Proper Absent Evidence of Expenses Beyond Indemnification: The parties' dissolution decree required the mother to provide medical insurance for their children and to pay uninsured medical expenses, and the father was required to pay child support and dental and ocular expenses. The mother subsequently lost her medical insurance but failed to notify the father. The mother later sought to hold the father in contempt for failing to provide child support and for unpaid medical expenses. The father asserted that because the mother failed to maintain the required insurance or provide written notice, he was entitled to indemnity from the medical care expenses pursuant to subsection (4) of this section. The District Court held that indemnity did not apply and ordered the father to pay 4 months of disputed child support and his portion of uncovered medical expenses, plus the mother's attorney fees. The Supreme Court held that the mother was required by subsection (4) of this section to indemnify the father for health care costs unless she satisfied one of the exemptions in subsection (4) because she permitted the insurance to lapse without securing comparable insurance. Because the written notice required by subsection (4)(b) of this section was not given, the District Court erred as a matter of law in concluding that the mother was not required to indemnify the father for expenses incurred as a result of the failure to maintain insurance. However, the father's argument that he was not obligated to pay any medical expenses following the insurance lapse failed. Subsection (4) of this section did not require that the mother pay all the medical costs, but only that the father be indemnified, or made whole. Upon proof of the amount owed, the mother was required to pay the father for any additional medical costs incurred to the extent that those expenses were in excess of what the father's obligation would have been if the mother had maintained insurance coverage. The father presented no evidence of such expenses, while the mother presented evidence showing to the penny how much the father was obligated to pay. Thus, the District Court had nothing from which to determine an amount that should be deducted, so the court did not err in ordering the father to pay his share of the medical expenses. In re Marriage of Crone, 2003 MT 238, 317 M 256, 77 P3d 167 (2003).

40-5-824. Expedited enforcement procedures.

Compiler's Comments

1997 Amendment: Chapter 482 in third sentence in (5), after "scheduled", substituted "after service" for "within 15 days after the date of service" and inserted fourth sentence authorizing court hearing conducted by teleconferencing methods, fifth sentence requiring initial Department hearing conducted by teleconferencing pursuant to administrative rulemaking procedures, and sixth sentence requiring Department, following teleconferencing hearing, to grant de novo in-person hearing upon request or upon showing that party prejudiced by lack of in-person hearing. (See coordination instruction comment.) Amendment effective May 2, 1997.

Coordination Instruction: Section 100, Ch. 552, L. 1997, a coordination section, deleted the amendment in (5), inserting the sixth sentence, that read: "At the request of a party or upon a showing that the party's case was substantially prejudiced by the lack of an in-person hearing, the department shall, following a teleconferencing hearing, grant a de novo in-person hearing."

Case Notes

Improper Award of Attorney Fees Absent Findings of Necessity: Following resolution of a contempt of court case related to insurance and the payment of medical costs for the parties' children, the District Court awarded attorney fees to the wife. However, the court neglected to consider the parties' financial resources, considered no evidence regarding the amount of the fees, and made no findings related to reasonableness of the fees. After finding that 40-4-110 was the applicable statute rather than this section, which relates to expedited support enforcement and which this case did not address, the Supreme Court reversed the award because the District Court did not properly consider the necessity for the fees. In re Marriage of Crone, 2003 MT 238, 317 M 256, 77 P3d 167 (2003). See also In re Marriage of Pfeifer, 282 M 461, 938 P2d 684 (1997).

Part 9

Centralized Child Support Registration and Payment

40-5-901. Definitions.

Compiler's Comments

2013 Amendment: Chapter 203 in definition of rehire after "separations" inserted "of less than 60 days". Amendment effective October 1, 2013.

2005 Amendment: Chapter 21 in definition of IV-D or IV-D case near end after "state" inserted "or an Indian tribe". Amendment effective March 18, 2005.

1999 Amendment: Chapter 579 in definition of support order in (d) inserted "or other support" and after "paid" substituted "to a child's custodial parent" for "to a former spouse when the former spouse is the custodial parent of a child for whom child support is awarded". Amendment effective October 1, 1999.

Contingent Termination — Request for Federal Exemptions: Section 104, Ch. 552, L. 1997, contained the following contingent termination provisions and order that the Department of Public Health and Human Services seek federal exemptions:

"(1) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];
(b) [section 11] [40-5-924];
(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];
(d) [section 93] [50-15-403];
(e) [section 95] [61-5-107];
(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that the federal government has granted this state an exemption from one of the following provisions, the provision terminates on the date the exemption takes effect:

(a) [section 9] [40-5-922];
(b) [section 11] [40-5-924];
(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];
(d) [section 93] [50-15-403, certification filed April 24, 1998];
(e) [section 95] [61-5-107];
(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(5) (a) The department of public health and human services shall do everything reasonably within its power to obtain, as soon as possible, federal government exemptions from the provisions listed in subsection (4).

(b) Because section 395(c) of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) allows a grace period for states to amend their constitutions in order to comply with PRWORA and because the Montana legislature believes that the section of PRWORA prohibiting a jury trial in a paternity proceeding violates Article II, section 26, of the Montana constitution and is therefore rejected, the department of public health and human services shall seek a federal government exemption from the jury trial prohibition in PRWORA as the first exemption it seeks under subsection (5)(a). [This exemption was received on December 8, 1997.]

(6) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate July 1, 1999.

(7) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement."

40-5-906. Child support information and processing unit.

Compiler's Comments

2017 Amendment: Chapter 81 deleted former (9)(b) that read: "(b) there is a board to act in an advisory capacity to the case registry and payment processing unit. The board shall advise the department in the policy, direction, control, and management of the case registry and payment processing unit and in determining forms, data processing needs, terms of contracts and cooperative agreements, and other similar technical requirements. Board members who are not employed by the department shall serve without pay, but are entitled to reimbursement for travel, meals, and lodging while engaged in board business, as provided in 2-18-501 through 2-18-503. Except for members who represent the department, appointed board members shall serve for terms of 2 years. The board consists of six members as follows:

(i) a district court judge nominated by the district court judges' association;

(ii) a clerk of court nominated by the association of clerks of the district courts;

(iii) the supreme court administrator or the administrator's designee;

(iv) two members, appointed by the department director, one from the child support enforcement division and one from the operations and technology division; and

(v) a representative of a county data processing unit, nominated by the association of clerks of the district courts"; in (9)(b) in middle substituted "do not" for "may not"; and made minor changes in style. Amendment effective July 1, 2017.

2005 Amendments — Composite Section: Chapter 21 in (3) near middle of second sentence after "shared with" substituted "other IV-D agencies" for "child support enforcement agencies of this and other states". Amendment effective March 18, 2005.

Chapter 130 in (9)(b) at end substituted "six members" for "five members"; and made minor changes in style. Amendment effective October 1, 2005.

2003 Amendment: Chapter 114 in (9)(b) in first and second sentences after "registry and" inserted "payment"; and made minor changes in style. Amendment effective October 1, 2003.

1997 Statement of Intent: The statement of intent attached to Ch. 552, L. 1997, provided: "A statement of intent is required for this bill because [section 2] [40-5-906] grants the department of public health and human services authority to adopt rules to implement [sections 1 through 15] [19-2-909, 19-20-306, 40-5-157 (renumbered 40-5-1046 through 40-5-1051), 40-5-275, 40-5-901, 40-5-906 through 40-5-911, and 40-5-921 through 40-5-924]. The rules should address routine procedural and operational matters and supplementary information necessary for the efficient and effective operation of the child support information and processing unit. The department should weigh the need for the information against the personal intrusiveness of the requested information and the difficulty of obtaining the information and should adopt rules that minimize the personal intrusiveness of the requested information and that minimize the costs to the department, employers, and employees in response to any difficulties in obtaining the information."

Effective Date: Section 103(3), Ch. 552, L. 1997, provided that this section is effective October 1, 1998.

Contingent Termination — Request for Federal Exemptions: Section 104, Ch. 552, L. 1997, contained the following contingent termination provisions and order that the Department of Public Health and Human Services seek federal exemptions:

"(1) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];
(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];
(d) [section 93] [50-15-403];
(e) [section 95] [61-5-107];
(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that the federal government has granted this state an exemption from one of the following provisions, the provision terminates on the date the exemption takes effect:
(a) [section 9] [40-5-922];
(b) [section 11] [40-5-924];
(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];
(d) [section 93] [50-15-403, certification filed April 24, 1998];
(e) [section 95] [61-5-107];
(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(5) (a) The department of public health and human services shall do everything reasonably within its power to obtain, as soon as possible, federal government exemptions from the provisions listed in subsection (4).

(b) Because section 395(c) of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) allows a grace period for states to amend their constitutions in order to comply with PRWORA and because the Montana legislature believes that the section of PRWORA prohibiting a jury trial in a paternity proceeding violates Article II, section 26, of the Montana constitution and is therefore rejected, the department of public health and human services shall seek a federal government exemption from the jury trial prohibition in PRWORA as the first exemption it seeks under subsection (5)(a). [This exemption was received on December 8, 1997.]

(6) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate July 1, 1999.

(7) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement."

40-5-907. Case registry — abstracts — information required — mandatory updating.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 18, Ch. 685, L. 2023. Amendment effective October 1, 2023.

Severability: Section 42, Ch. 685, L. 2023, was a severability clause.

2009 Amendment: Chapter 184 in (2)(e)(i) after "insurance plan" inserted "and the information is available in an electronic format"; deleted former (2)(f) that read: "(f) any other information that the department considers relevant and requires by rule"; and made minor changes in style. Amendment effective October 1, 2009.

Saving Clause: Section 10, Ch. 184, L. 2009, was a saving clause.

Effective Date: Section 103(3), Ch. 552, L. 1997, provided that this section is effective October 1, 1998.

Contingent Termination — Request for Federal Exemptions: Section 104, Ch. 552, L. 1997, contained the following contingent termination provisions and order that the Department of Public Health and Human Services seek federal exemptions:

"(1) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];
(b) [section 11] [40-5-924];
(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];
(d) [section 93] [50-15-403];
(e) [section 95] [61-5-107];
(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that the federal government has granted this state an exemption from one of the following provisions, the provision terminates on the date the exemption takes effect:

(a) [section 9] [40-5-922];
(b) [section 11] [40-5-924];
(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];
(d) [section 93] [50-15-403, certification filed April 24, 1998];
(e) [section 95] [61-5-107];
(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(5) (a) The department of public health and human services shall do everything reasonably within its power to obtain, as soon as possible, federal government exemptions from the provisions listed in subsection (4).

(b) Because section 395(c) of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) allows a grace period for states to amend their constitutions in order to comply with PRWORA and because the Montana legislature believes that the section of PRWORA prohibiting a jury trial in a paternity proceeding violates Article II, section 26, of the Montana constitution and is therefore rejected, the department of public health and human services shall seek a federal government exemption from the jury trial prohibition in PRWORA as the first exemption it seeks under subsection (5)(a). [This exemption was received on December 8, 1997.]

(6) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate July 1, 1999.

(7) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement."

40-5-908. Registration procedures.

Compiler's Comments

Effective Date: Section 103(3), Ch. 552, L. 1997, provided that this section is effective October 1, 1998.

40-5-909. Centralized payment center — mandatory payments to center.

Compiler's Comments

2019 Amendment: Chapter 131 deleted former (6) that read: "(6) (a) An employer who receives an income-withholding order issued in another state, as defined in 40-5-1002, may contact the department to determine whether the withholding order was issued by the appropriate authority.

(b) The employer may elect to forward the funds to the department for distribution.

(c) If the employer elects under this section to forward the funds to the department for distribution, the employer shall immediately provide a copy of the income-withholding order to the department"; and made minor changes in style. Amendment effective October 1, 2019.

2005 Amendment: Chapter 21 inserted (12) providing that in cases when IV-D services for the enforcement of a tribal court order that expressly permits satisfaction of a child support obligation with noncash resources are provided by the department, this section applies to the portion of the support obligation paid or payable with cash resources. Amendment effective March 18, 2005.

2003 Amendment: Chapter 114 in (8) near end and (9)(a) near middle substituted "registry" for "management". Amendment effective October 1, 2003.

2001 Amendment: Chapter 352 inserted (6) concerning an income-withholding order issued in another state; inserted (7) providing restrictions on income-withholding orders issued in this state; and made minor changes in style. Amendment effective April 23, 2001.

Effective Date: Section 103(3), Ch. 552, L. 1997, provided that this section is effective October 1, 1998.

40-5-910. Distribution of payments.

Compiler's Comments

2001 Amendment: Chapter 352 in (2) at end inserted "notwithstanding an endorsement or other writing accompanying the payment that restricts disbursement or purports to direct disbursement in a manner contrary to the department's rules". Amendment effective April 23, 2001.

Effective Date: Section 103(3), Ch. 552, L. 1997, provided that this section is effective October 1, 1998.

40-5-911. Monitor payments — enforcement.

Compiler's Comments

Effective Date: Section 103(3), Ch. 552, L. 1997, provided that this section is effective October 1, 1998.

40-5-922. Directory of new hires — employer reporting requirements.

Compiler's Comments

Contingent Termination — Request for Federal Exemptions: Section 104, Ch. 552, L. 1997, contained the following contingent termination provisions and order that the Department of Public Health and Human Services seek federal exemptions:

"(1) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 93] [50-15-403];

(e) [section 95] [61-5-107];

(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that the federal government has granted this state an exemption from one of the following provisions, the provision terminates on the date the exemption takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 93] [50-15-403, certification filed April 24, 1998];
(e) [section 95] [61-5-107];
(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(5) (a) The department of public health and human services shall do everything reasonably within its power to obtain, as soon as possible, federal government exemptions from the provisions listed in subsection (4).

(b) Because section 395(c) of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) allows a grace period for states to amend their constitutions in order to comply with PRWORA and because the Montana legislature believes that the section of PRWORA prohibiting a jury trial in a paternity proceeding violates Article II, section 26, of the Montana constitution and is therefore rejected, the department of public health and human services shall seek a federal government exemption from the jury trial prohibition in PRWORA as the first exemption it seeks under subsection (5)(a). [This exemption was received on December 8, 1997.]

(6) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate July 1, 1999.

(7) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement."

40-5-923. Information and records — disclosure.

Compiler's Comments

2015 Amendment: Chapter 174 inserted (6) concerning other permitted uses; and made minor changes in style. Amendment effective July 1, 2015.

Transition: Section 70, Ch. 174, L. 2015, provided: "[This act] applies to proceedings begun on or after July 1, 2015, to establish a support order or determine parentage of a child or to register, recognize, enforce, or modify a prior support order, determination, or agreement, whenever issued or entered."

Severability: Section 72, Ch. 174, L. 2015, was a severability clause.

2005 Amendment: Chapter 21 in (1) near middle after "state" inserted "or an Indian tribe". Amendment effective March 18, 2005.

Contingent Termination — Request for Federal Exemptions: Section 104, Ch. 552, L. 1997, contained the following contingent termination provisions and order that the Department of Public Health and Human Services seek federal exemptions:

"(1) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:
(a) [section 9] [40-5-922];
(b) [section 11] [40-5-924];
(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];
(d) [section 93] [50-15-403];
(e) [section 95] [61-5-107];

(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that the federal government has granted this state an exemption from one of the following provisions, the provision terminates on the date the exemption takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 93] [50-15-403, certification filed April 24, 1998];

(e) [section 95] [61-5-107];

(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(5) (a) The department of public health and human services shall do everything reasonably within its power to obtain, as soon as possible, federal government exemptions from the provisions listed in subsection (4).

(b) Because section 395(c) of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) allows a grace period for states to amend their constitutions in order to comply with PRWORA and because the Montana legislature believes that the section of PRWORA prohibiting a jury trial in a paternity proceeding violates Article II, section 26, of the Montana constitution and is therefore rejected, the department of public health and human services shall seek a federal government exemption from the jury trial prohibition in PRWORA as the first exemption it seeks under subsection (5)(a). [This exemption was received on December 8, 1997.]

(6) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate July 1, 1999.

(7) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement."

40-5-924. Automated access to financial records — confidentiality — no liability — definitions.

Compiler's Comments

Effective Date: Section 103(1), Ch. 552, L. 1997, provided that this section is effective July 1, 1997.

Contingent Termination — Request for Federal Exemptions: Section 104, Ch. 552, L. 1997, contained the following contingent termination provisions and order that the Department of Public Health and Human Services seek federal exemptions:

"(1) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 93] [50-15-403];
(e) [section 95] [61-5-107];
(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that the federal government has granted this state an exemption from one of the following provisions, the provision terminates on the date the exemption takes effect:
(a) [section 9] [40-5-922];
(b) [section 11] [40-5-924];
(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];
(d) [section 93] [50-15-403, certification filed April 24, 1998];
(e) [section 95] [61-5-107];
(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(5) (a) The department of public health and human services shall do everything reasonably within its power to obtain, as soon as possible, federal government exemptions from the provisions listed in subsection (4).

(b) Because section 395(c) of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) allows a grace period for states to amend their constitutions in order to comply with PRWORA and because the Montana legislature believes that the section of PRWORA prohibiting a jury trial in a paternity proceeding violates Article II, section 26, of the Montana constitution and is therefore rejected, the department of public health and human services shall seek a federal government exemption from the jury trial prohibition in PRWORA as the first exemption it seeks under subsection (5)(a). [This exemption was received on December 8, 1997.]

(6) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate July 1, 1999.

(7) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement."

Part 10
Uniform Interstate Family Support Act

Part Compiler's Comments

Transition: Section 70, Ch. 174, L. 2015, provided: "[This act] applies to proceedings begun on or after July 1, 2015, to establish a support order or determine parentage of a child or to register, recognize, enforce, or modify a prior support order, determination, or agreement, whenever issued or entered."

Severability: Section 72, Ch. 174, L. 2015, was a severability clause.

Part Case Notes

Jurisdiction Over Modification of Child Support — UIFSA, not UCCJEA, Controls: In a matter involving only child support issues, jurisdiction is controlled by the Uniform Interstate Family Support Act (UIFSA), not the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The District Court erred in concluding it did not have jurisdiction over the matter based on Montana being an inconvenient forum under UCCJEA when the only issue before the court involved child support. Because the UIFSA, unlike the UCCJEA, does not provide an inconvenient forum provision, the Supreme Court reversed and remanded the matter to the District Court. Ervin v. Ervin, 2011 MT 309, 363 Mont. 80, 265 P.3d 1272.

Full Faith and Credit Afforded Out-of-State Renewable Child Support Judgment — Res Judicata Applicable: Article IV, sec. 1, U.S. Const., provides that full faith and credit be given in each state to the public acts, records, and judicial proceedings of every other state. As restated in Baker v. Gen. Motors Corp., 522 US 222, 139 L Ed 2d 580, 118 S Ct 657 (1998), a final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. When issues of jurisdiction have been determined by one court, the doctrine of res judicata precludes a second court from considering jurisdiction as long as the first court fully and fairly considered the issue, and that judgment, as to jurisdiction, is entitled to full faith and credit in the second court. In the present case, a Utah renewable child support judgment, in which the Utah court established jurisdiction of the parties, was entitled to full faith and credit in Montana, despite contentions by the husband that he no longer had minimum contacts with Utah after moving to Montana. The jurisdiction arguments raised before the Montana Supreme Court were identical to the arguments that were previously raised, fairly considered, and finally decided in Utah, precluding relitigation by the Montana court under res judicata. In re Child Support of Mason, 1998 MT 192, 290 M 253, 964 P2d 743, 55 St. Rep. 803 (1998), followed with regard to full faith and credit of a judgment by an out-of-state court following full and fair consideration of jurisdiction in Genuine Parts Co. v. Rascal's Auto Parts, Inc., 2008 MT 313, 346 M 56, 192 P3d 1153 (2008).

Ability of Attorney General to Appeal URESA Action Upheld — Construction of Pre-1993 Law Requiring County Attorney to Represent Obligee: When Carol Ann and Roland divorced, Roland was ordered to pay $125 a month in child support. Years later, Roland had paid nothing and had accumulated arrearages of $13,000. The County Attorney began a URESA (replaced by UIFSA) action to collect the arrearages. The District Court later held that because the arrearages had been reduced to a judgment and Carol Ann's daughter had reached the age of majority, the daughter was the real party in interest to collect the judgment. The Supreme Court held that under the version of URESA under which the case was prosecuted, especially 40-5-135 (now repealed), it was proper for the County Attorney to represent the obligee and for the Attorney General to appeal the case from the District Court. The Supreme Court also held that the District Court erred when it held that the arrearages had been merged with the District Court judgment. Willoughby v. Loomis, 264 M 44, 869 P2d 271, 51 St. Rep. 138 (1994).

Dismissal of State From URESA Action Held Erroneous — Construction of Pre-1993 Law Requiring County Attorney to Represent Obligee: When Carol Ann and Roland divorced, Roland was ordered to pay $125 a month in child support. Years later, Roland had paid nothing and had accumulated arrearages of $13,000. The County Attorney began a URESA (replaced by UIFSA) action to collect the arrearages. After a hearing, the District Court ordered that the state be dismissed from the action and warned that Carol Ann and her daughter should not try again to involve the state in the matter. The Supreme Court noted the definition of and use of the term "prosecuting attorney" throughout the URESA and noted that 40-5-134, 40-5-135, and 40-5-139, all repealed in 1993, required the County Attorney to represent the obligee in URESA cases. Thus, under that law, the Supreme Court held that it was error for the District Court to dismiss the state from the action. Willoughby v. Loomis, 264 M 44, 869 P2d 271, 51 St. Rep. 138 (1994).

URESA Action Not a Modification of Underlying Child Support Order: When Jody and Stephen were divorced, the District Court ordered Stephen to pay $125 a month in child support. Jody later brought a URESA (replaced by UIFSA) action against Stephen to enforce arrearages in child support payment. The parties stipulated that Stephen owed $16,425 in arrearages and that he would pay $60 a week until further ordered by the District Court. The District Court signed an order providing that the stipulation was enforceable by contempt. In a second attempt to collect arrearages, the District Court concluded that the URESA order did not modify the underlying child support order and ordered Stephen to pay $125 a month to pay off arrearages totaling more than $58,000. Citing In re Marriage of Petranek, 255 M 458, 843 P2d 784 (1992), the Supreme Court held that the first URESA action did not modify the underlying child support order. Because the first stipulation and order did not reference the original child support order and because neither party moved to amend the original child support order, the Supreme Court held that the first stipulation and order dealt only with the enforcement of the original obligation and that Stephen could be required to comply with that obligation. In re Marriage of Brown, 263 M 184, 867 P2d 381, 51 St. Rep. 7 (1994).

Child Support Obligation Not Dischargeable in Bankruptcy: The Bankruptcy Code, 11 U.S.C. 523(a)(5), specifically excludes child support obligations from debts that can be discharged in bankruptcy. State ex rel. Austin v. Austin, 221 M 488, 719 P2d 429, 43 St. Rep. 998 (1986).

URESA Action — Personal Jurisdiction Over Tribal Member — Motion to Dismiss Improperly Denied: Where the respondent had previously married the appellant, an enrolled member of the Crow Indian Tribe living on the Crow Indian Reservation, in Colorado and been separated from him there and brought a Uniform Reciprocal Enforcement of Support Act (URESA) (replaced by UIFSA) action in Colorado for enforcement of child support payments, the District Court erred in denying the appellant's motion to dismiss for lack of personal jurisdiction over the appellant. All of the appellant's off-reservation contacts are with Colorado, not with Montana. Under the reasoning of State ex rel. Flammond v. Flammond, 190 M 350, 621 P2d 471, 37 St. Rep. 1991 (1980), the court had neither subject matter nor personal jurisdiction. State ex rel. Three Irons v. Three Irons, 190 M 360, 621 P2d 476, 37 St. Rep. 2016 (1980).

No Jurisdiction in Montana Courts Over Reservation Indian — URESA: The wife appealed the dismissal of her action seeking to enforce child support payments under the Uniform Reciprocal Enforcement of Support Act (URESA) (replaced by UIFSA). The District Court ruled it had no jurisdiction, and the Supreme Court agreed there was neither subject matter jurisdiction nor personal jurisdiction. The husband was a Blackfeet Indian living on the reservation in Montana. Jurisdiction could not be found in federal enabling statutes because neither the tribe nor the state complied with them; there were no off-reservation acts in Montana sufficient to vest state courts with jurisdiction over the husband; and a reservation Indian's domicile on the reservation is not an in-state contact that grants jurisdiction to state courts. The father had not acquiesced in state jurisdiction and has challenged state court jurisdiction from the outset. The fact that there was no appeal from the tribal court, the only avenue open to the wife, to the federal court system was not an argument in favor of state court jurisdiction. There must be a legal basis supporting state jurisdiction. State ex rel. Flammond v. Flammond, 190 M 350, 621 P2d 471, 37 St. Rep. 1991 (1980).

Part Attorney General's Opinions

OPINIONS UNDER FORMER LAW

Duties of County Attorney in URESA Actions: A county attorney may not enter into an agreement compromising or satisfying a support order or an agreement to allow the sale of property on which a support order is a lien. 41 A.G. Op. 7 (1985).

40-5-1001. Short title.

Official Comments

Renaming the Act reflects the dramatic departure from the structure of the earlier interstate reciprocal support acts, URESA and RURESA.

Compiler's Comments

1993 Amendment: Chapter 328 substituted "Uniform Interstate Family Support Act" for "Revised Uniform Reciprocal Enforcement of Support Act (1968)".

Source: Section 902, UIFSA.

40-5-1002. Definitions.

Official Comments

Several additional terms are defined in this section as compared to the parallel RURESA § 2 [this section prior to 1993 amendment], which has fourteen entries. Many crucial definitions continue to be left to local law. For example, the definitions of "child" and "child support order" provided by subsections (1) and (2) refer to "the age of majority" without further elaboration. The exact age at which a child becomes an adult for different purposes is a matter for the law of each state, as is the age at which a parent's duty to furnish child support terminates. Similarly, a wide variety of other terms of art are implicitly left to state law. For example, subsection (21) [(23)] refers *inter alia* to "health care, arrearages, or reimbursement ...." All of these terms are subject to individualized definitions on a state-by-state basis.

Subsection (3) defines "duty of support" to mean the legal obligation to provide support before it has been reduced to judgment. It is broadly defined to include both prospective and retrospective obligations, to the extent they are imposed by the relevant state law.

In order to resolve certain conflicts in the exercise of jurisdiction, for limited purposes subsection (4) [(5)] borrows the concept of the "home state" of a child from the Uniform Child Custody Jurisdiction Act, versions of which have been adopted in all 50 states, and from the federal Parental Kidnapping Prevention Act, 42 U.S.C. § 1738A.

Subsection (6) [(7)] is written broadly so that states that direct income withholding by an obligor's employer based on "other legal process," as distinguished from an order of a tribunal, may have that "legal process" recognized as an "income-withholding order." Federal law requires that each state provide for income withholding "without the necessity of any application therefor ... or for any further action ... by the court or other entity which issued such order." 42 U.S.C. 666(b)(2). States have complied with this directive in a variety of ways. For example, New York provides a method for obtaining income withholding of court-ordered support by authorizing an attorney, clerk of court, sheriff or agent of the child support enforcement agency to serve upon the defaulting obligor's employer an "income execution for support enforcement." New York McKinney's C.P.L.R. 5241. This "other legal process" reportedly is the standard method for obtaining income withholding in that state, while the statutory provision for an income withholding order, C.P.L.R. 5242, is rarely used by either the courts or the litigants.

Subsections (7) [(8)] and (8) [(9)] define "initiating state" and "initiating tribunal" similarly to RURESA § 2(d) [subsection (4) of this section prior to 1993 amendment]. It is important to note, however, that this Act permits the direct filing of an interstate action in the responding state without an initial filing in an initiating tribunal. Thus, a petitioner in one state could seek to establish a support order in a second state by either filing in the second state's tribunal or seeking the assistance of the support enforcement agency in the second state.

The term "obligee" in subsection (12) [(13)] is defined in a broad manner similar to RURESA § 2(f) [subsection (6) of this section prior to 1993 amendment], which is consistent with common usage. In instances of spousal support, the person owed the duty of support and the person receiving the payments are almost always the same. Use of the term is more complicated in the context of a child support order. The child is the person to whom the duty of support is owed and therefore can be viewed as the ultimate obligee. However, "obligee" usually refers to the individual receiving the payments. While this is most commonly the custodial parent or other legal custodian, the "obligee" may be a support enforcement agency which has been assigned the right to receive support payments in order to recoup AFDC (Aid to Families with Dependent Children, 42 U.S.C. § 601 et seq.) [now temporary assistance for needy families block grant]. Even in the absence of such an assignment, a state may have an independent statutory claim for reimbursement for general assistance provided to a spouse, a former spouse, or a child of an obligor. The Act also uses "obligee" to identify an individual who is asserting a claim for support, not just for a person whose right to support is unquestioned, presumed, or has been established in a legal action. Subsection (13) [(14)] provides the correlative definition of an "obligor," which includes an individual who is alleged to owe a duty of support as well as a person whose obligation has previously been determined.

Note that the definitions of "responding state" and "responding tribunal" in subsections (16) [(18)] and (17) [(19)] accommodate the direct filing of a petition under this Act without the intervention of an initiating tribunal. Both definitions acknowledge the possibility that there might be a responding state or tribunal in a situation where there is no initiating state or tribunal.

Subsection (19) [(21)] withdraws the requirement of reciprocity demanded by RURESA and URESA. A state need not enact UIFSA in order for support orders issued by its tribunal to be enforced by other states. Public policy favoring such enforcement is sufficiently strong to warrant waiving any quid pro quo among the states. This policy extends to foreign jurisdictions, as well, which is intended to facilitate establishment and enforcement of orders from those jurisdictions. Specifically, if a support order from a Canadian province or Mexican state conforms to the principles of UIFSA, that order should be honored when it crosses the border in a spirit of comity.

Subsection (20) [(22)], "Support Enforcement Agency," includes the state IV-D agency (Part IV-D, Social Security Act, 42 U.S.C. § 651 et seq.), and other state or local governmental entities charged with establishing or enforcing support.

Subsection (22) [(24)] introduces a completely new term, "tribunal," which replaces the term "court" used in RURESA. With the advent of the federal IV-D program, a number of states have delegated various aspects of child support establishment and enforcement to quasi-judicial bodies and administrative agencies. UIFSA adopts the term "tribunal" to account for the breadth of state variations in dealing with support orders.

Throughout the Act the term refers to a tribunal of the enacting state unless expressly noted otherwise. To avoid confusion, however, when actions of tribunals of the enacting state and another state are contrasted in the same section or subsection, the phrases "tribunal of this State" and "tribunal of another state" are used for the sake of clarity.

Compiler's Comments

2019 Amendment: Chapter 131 in definition of income-withholding order before "to withhold support" deleted "or by a tribunal of another state"; and made minor changes in style. Amendment effective October 1, 2019.

2015 Amendment: Chapter 174 throughout section after "parentage" inserted "of a child"; at beginning inserted "In this part"; inserted definitions of convention, foreign country, foreign support order, foreign tribunal, issuing foreign country, outside this state, person, and record; deleted definitions that read: ""Governor" includes an individual performing the functions of governor or the executive authority of any state covered by this part" and ""Initiating state" means a state from which a proceeding is forwarded or in which a proceeding is filed for forwarding to a responding state pursuant to this part or a law or procedure substantially similar to this part, the Uniform Reciprocal Enforcement of Support Act, the Revised Uniform Reciprocal Enforcement of Support Act, or a law or procedure substantially similar to either of those acts or pursuant to a proceeding initiated by the department of public health and human services under 40-5-263"; in definition of child support order after "state" inserted "or foreign country"; in definition of home state in two places after "state" inserted "or foreign country" and in two places substituted "any of them" for "a parent or person acting as a parent"; substituted current definition of initiating tribunal for former definition that read: ""Initiating tribunal" means the authorized tribunal in an initiating state"; in definition of issuing tribunal after "tribunal" inserted "of a state or foreign country"; in definition of obligee in (b) at beginning substituted "a foreign country, state, or political subdivision of a state" for "a state or political subdivision" and after "obligee" inserted "in place of child support" and inserted (d) concerning creditors; in definition of obligor inserted (d) concerning debtors; substituted current definition of register for former definition that read: ""Register" means to file a support order or judgment determining parentage in the registry of foreign support orders"; in definition of registering tribunal after "order" inserted "or a judgment determining parentage of a child"; substituted current definition of responding state for former definition that read: ""Responding state" means a state in which a proceeding is filed or to which a proceeding is forwarded for filing from an initiating state under this part or a law or procedure substantially similar to this part, the Uniform Reciprocal Enforcement of Support Act, the Revised Uniform Reciprocal Enforcement of Support Act, or a law or procedure substantially similar to either of those acts or under a proceeding initiated by the department of public health and human services under 40-5-263"; in definition of responding tribunal after "state" inserted "or foreign country"; in definition of state in second sentence substituted "The term includes an Indian nation or tribe" for "The term "state" includes an Indian tribe or a foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders that are substantially similar to the procedures under this part, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act"; in definition of support enforcement agency in introductory clause inserted "governmental entity" and before "agency" inserted "private", in (c) substituted "request" for "seek", in (d) substituted "attempt" for "seek", inserted (e) concerning determination of controlling support order, and deleted former (b) that read: "Support enforcement agency includes: (i) in cases brought under Title IV-D of the Social Security Act, the department of public health and human services; and

(ii) in all other cases, the prosecutor"; substituted current definition of support order for former definition that read: ""Support order" means a judgment, decree, or order, whether temporary, final, or subject to modification, that:

(a) is for the benefit of a child, a spouse or a former spouse, or a state or political subdivision;

(b) provides for monetary support, health care, arrearages, or reimbursement; and

(c) may include related costs and fees, interest, income withholding, attorney fees, and other relief"; and made minor changes in style. Amendment effective July 1, 2015.

2001 Amendment: Chapter 352 deleted definition of prosecuting attorney that read: ""Prosecuting attorney" means the public official in the appropriate place who has the duty to enforce criminal laws relating to the failure to provide for the support of any person"; at end of definition of support enforcement agency substituted "prosecutor" for "prosecuting attorney"; and made minor changes in style. Amendment effective April 23, 2001.

1997 Amendment: Chapter 552 in definition of initiating state inserted language clarifying that the term means a state from which a proceeding is forwarded or in which a proceeding is filed, near middle, after "law", inserted "or procedure", and after second "Support Act" inserted "or a law or procedure substantially similar to either of those acts"; in definition of responding state inserted language clarifying that the term means a state in which a proceeding is filed or to which a proceeding is forwarded, near middle, after "law", inserted "or procedure", and after second "Support Act" inserted "or a law or procedure substantially similar to either of those acts"; in definition of state in first sentence, inserted reference to the Virgin Islands and in second sentence, before "established", inserted "enacted a law or" and inserted reference to the Uniform Reciprocal Enforcement of Support Act and the Revised Uniform Reciprocal Enforcement of Support Act; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 546 in definitions of initiating state, responding state, and support enforcement agency substituted "department of public health and human services" for "department of social and rehabilitation services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 328 inserted definitions of child, child support order, home state, income, income-withholding order, issuing state, issuing tribunal, spousal support order, support enforcement agency, and tribunal; deleted definition of court that read: ""Court" means the district court of this state and, when the context requires, means the court of any other state as defined in substantially similar reciprocal law"; in definition of duty of support, after "means", substituted "an obligation" for "a duty of support whether" and after "law" substituted "to provide support for a child, spouse, or former spouse; and (b) includes an unsatisfied obligation to provide support" for "or by order, decree, or judgment of any court, whether interlocutory or final, or whether incidental to an action for divorce, separation, separate maintenance, or otherwise and includes the duty to pay arrearages of support past due and unpaid"; in definition of Governor, after "includes", substituted "an individual" for "any person"; substituted definition of initiating state for former definition that read: ""Initiating state" means a state in which a proceeding pursuant to this or a substantially similar reciprocal law is commenced"; substituted definition of initiating tribunal for definition of initiating court that read: ""Initiating court" means the court in which a proceeding is commenced"; in definition of law, after "includes", substituted "decisional" for "both common" and after "statutory law" inserted "and rules and regulations having the force of law"; substituted definition of obligee for former definition that read: ""Obligee" means a person, including a state or political subdivision, to whom a duty of support is owed or a person, including a state or political subdivision, that has commenced a proceeding for enforcement of an alleged duty of support or for registration of a support order. It is immaterial if the person to whom a duty of support is owed is a recipient of public assistance"; substituted definition of obligor for former definition that read: ""Obligor" means any person owing a duty of support or against whom a proceeding for the enforcement of a duty of support or registration of a support order is commenced"; in definition of register, after "file", inserted "a support order or judgment determining parentage"; substituted definition of registering tribunal for definition of registering court that read: ""Registering court" means any court of this state in which a support order of a rendering state is registered"; substituted definition of responding state for definition of rendering state that read: ""Rendering state" means a state in which the court has issued a support order for which registration is sought or granted in the court of another state"; substituted definition of responding tribunal for definition of responding court that read: ""Responding court" means the court in which the responsive proceeding is commenced"; deleted former definition of responding state that read: ""Responding state" means a state in which any responsive proceeding pursuant to the proceeding in the initiating state is commenced"; substituted definition of state for former definition that read: ""State" includes a state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any foreign jurisdiction in which this or a substantially similar reciprocal law is in effect"; substituted definition of support order for former definition that read: ""Support order" means any judgment, decree, or order of support in favor of an obligee whether temporary or final or subject to modification, revocation, or remission, regardless of the kind of action or proceeding in which it is entered"; and made minor changes in style.

Source: Section 101, UIFSA.

Case Notes

DECISIONS UNDER FORMER LAW

Dismissal of State From URESA Action Held Erroneous — Construction of Pre-1993 Law Requiring County Attorney to Represent Obligee: When Carol Ann and Roland divorced, Roland was ordered to pay $125 a month in child support. Years later, Roland had paid nothing and had accumulated arrearages of $13,000. The County Attorney began a URESA (replaced by UIFSA) action to collect the arrearages. After a hearing, the District Court ordered that the state be dismissed from the action and warned that Carol Ann and her daughter should not try again to involve the state in the matter. The Supreme Court noted the definition of and use of the term "prosecuting attorney" throughout the URESA and noted that 40-5-134, 40-5-135, and 40-5-139, all repealed in 1993, required the County Attorney to represent the obligee in URESA cases. Thus, under that law, the Supreme Court held that it was error for the District Court to dismiss the state from the action. Willoughby v. Loomis, 264 M 44, 869 P2d 271, 51 St. Rep. 138 (1994).

40-5-1003. State tribunals and support enforcement agency.

Official Comments

The enacting state must identify the courts, administrative agencies, or the combination of those entities, which constitute the tribunal authorized to deal with family support. In a particular state there may be several different such entities authorized to determine family support matters. It should be emphasized that this provision is not designed to address questions of venue, which are left to otherwise applicable state law.

Compiler's Comments

2015 Amendment: Chapter 174 inserted (2) designating the department of public health and human services as support enforcement agency; and made minor changes in style. Amendment effective July 1, 2015.

1995 Amendment: Chapter 546 substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Source: Section 102, UIFSA.

40-5-1004. Remedies cumulative.

Official Comments

The existence of procedures for interstate establishment, enforcement, or modification of support or a determination of parentage in this Act does not preclude the application of general state law. For example, a petitioner may decide to file an action directly in the state of residence of the respondent under the generally applicable support law, thereby submitting to the personal jurisdiction of that forum, and forego reliance on the Act.

Compiler's Comments

2015 Amendment: Chapter 174 in (1) after "law" inserted "or the recognition of a foreign support order on the basis of comity"; inserted (2) concerning remedies not provided by part; and made minor changes in style. Amendment effective July 1, 2015.

1993 Amendment: Chapter 328 substituted current language concerning cumulative remedies for "The remedies herein provided are in addition to and not in substitution for any other remedies."

Source: Section 103, UIFSA.

40-5-1005. Application of part to resident of foreign country and foreign support proceeding.

Compiler's Comments

2019 Amendment: Chapter 131 in (1), (2), and (3) substituted "40-5-1001 through 40-5-1005" for "40-5-1001 through 40-5-1004"; in (1), (2), and (3) substituted "40-5-1008 through 40-5-1018" for "40-5-1008, 40-5-1010 through 40-5-1017"; in (1), (2), and (3) substituted "40-5-1055 through 40-5-1070" for "40-5-1055 through 40-5-1068"; and made minor changes in style. Amendment effective October 1, 2019.

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

40-5-1008. Bases for jurisdiction over nonresident.

Official Comments

Part A of Article 2 [Sections 40-5-145 and 40-5-146, renumbered 40-5-1004 and 40-5-1017] asserts what is commonly described as long-arm jurisdiction over a nonresident respondent for purposes of establishing a support order or determining parentage. Inclusion of this long-arm provision in this interstate Act is justified because even though the law of only the forum state is applicable, residents of two separate states are involved in the litigation and subject to the personal jurisdiction of the forum. The intent is to insure that every enacting state has a long-arm statute as broad as constitutionally permitted. In situations where the long-arm statute can be satisfied, the petitioner (either the obligor or the obligee) has two options under the Act: (1) utilize the long-arm statute to obtain personal jurisdiction over the respondent; or (2) initiate a two-state action under the succeeding provisions of UIFSA seeking to establish a support order in the respondent's state of residence.

Although not expressly stated, the long-arm statute provided by this section may be applied to spousal support as well as to child support. However, almost all of the specific provisions relate to child support orders or determinations of parentage. Only subsections (1), (2), and (8) [(7)] are applicable to an action for spousal support asserting long-arm jurisdiction over a nonresident. The first two subsections are wholly noncontroversial insofar as an assertion of personal jurisdiction is concerned. This accords with the fact that very few states have chosen to enact specific domestic relations long-arm statutes and that the focus of UIFSA is primarily on child support. Moreover, assertion of personal jurisdiction under subsection (1), (2), or (8) [(7)] will doubtless yield jurisdiction over all matters to be decided between the spouses, including division of property on divorce. Thus, the most obvious basis for asserting long-arm jurisdiction over spousal support, *i.e.*, "last matrimonial domicile," is not included in Section 201 [this section] to avoid the potential problem of another instance of bifurcated jurisdiction. That is, a situation in which a tribunal could order a nonresident to pay spousal support, while not being authorized to personally bind that nonresident to a division of property on divorce.

Under RURESA, multiple support orders affecting the same parties are commonplace. UIFSA creates a structure designed to provide for only one support order at a time. This one order regime is facilitated and combined with a broad assertion of personal jurisdiction under this long-arm provision. The frequency of a two-state procedure involving the participation of tribunals in both states should be substantially reduced by the introduction of this long-arm statute.

Subsection (1) codifies the holding of Burnham v. Superior Court, 495 U.S. 604 (1990), which reaffirms the constitutional validity of asserting personal jurisdiction based on personal service within a state. Subsection (2) expresses the principle that a nonresident party concedes personal jurisdiction by seeking affirmative relief or by submitting to the jurisdiction by answering or entering an appearance. However, the power to assert jurisdiction over support issues under the Act does not extend the tribunal's jurisdiction to other matters. Subsections (1) through (8) [(1) through (7)] are derived from a variety of sources, including the Uniform Parentage Act § 8, Texas Family Code § 11.051 (Vernon Supp. 1992), and New York Family Court Act § 154. Subsection (7) [not adopted in Montana] is bracketed because not all states maintain putative father registries. The factual situations catalogued in these subsections are appropriate and constitutionally acceptable grounds upon which to exercise personal jurisdiction over an individual.

Subsection (8) [(7)] tracks the broad, catch-all provisions found in many state statutes, including California, Civ. P. Code § 410.10 (1973); New York, *supra*; and Texas, *supra*. It should be noted, however, that this provision, standing alone, was found to be inadequate to sustain a child support order under the facts presented in Kulko v. Superior Court of California for San Francisco, 436 U.S. 84 (1978).

Compiler's Comments

2019 Amendment: Chapter 131 in (2) after "40-5-1065" deleted "40-5-1067, and 40-5-1068"; and made minor changes in style. Amendment effective October 1, 2019.

2015 Amendment: Chapter 174 in (1) in introductory clause after "enforce" deleted "or modify" and after "parentage" inserted "of a child"; in (1)(b) after "consent" inserted "in a record"; inserted (1)(g) concerning assertion of parentage in putative father registry; inserted (2) concerning acquisition of personal jurisdiction to modify child support order of another state; and made minor changes in style. Amendment effective July 1, 2015.

Source: Section 201, UIFSA.

40-5-1009. Duration of personal jurisdiction.

Compiler's Comments

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

40-5-1010. Initiating and responding tribunal of state.

Official Comments

Part B of Article 2 [Sections 40-5-147 through 40-5-150, renumbered 40-5-1010 through 40-5-1013] tracks the traditional RURESA action, involving residents of separate states. In this situation, the initiating state does not assert personal jurisdiction over the nonresident, but instead forwards the case to another, responding state, which is to assert personal jurisdiction over its resident.

This section identifies the roles a tribunal of the forum may serve; as appropriate, it may act as either an initiating or a responding tribunal under UIFSA. Note that a tribunal can serve as a responding tribunal when there is no initiating tribunal in another state. This is to accommodate the direct filing of an action in a responding tribunal by a nonresident.

Compiler's Comments

2015 Amendment: Chapter 174 after "proceedings to" inserted "a tribunal of" and at end after "state" inserted "or a foreign country". Amendment effective July 1, 2015.

Source: Section 203, UIFSA.

40-5-1011. Simultaneous proceedings.

Official Comments

This section is similar to Section 6 [40-7-107] of the Uniform Child Custody Jurisdiction Act. Under the one-order system established by UIFSA, it is necessary to provide a new procedure in order to eliminate the multiple orders so common under RURESA and URESA. This requires cooperation between, and deference by, sister-state tribunals in order to avoid issuance of competing support orders. To this end, tribunals are expected to take an active part in seeking out information about support proceedings in other states concerning the same child. Depending on the circumstances, one or the other of two tribunals considering the same support obligation should decide to defer to the other. In this regard, UIFSA makes a significant departure from the approach adopted by the UCCJA, which chooses "first filing" as the method for resolving competing jurisdictional disputes. In the analogous situation, the federal Parental Kidnapping Prevention Act chooses the home state of the child to establish priority. Given the preemptive nature of the PKPA and the likelihood that custody and support are both involved in most cases, UIFSA opts for the federal method of resolving disputes between competing jurisdictional assertions by establishing a priority for the tribunal in the child's home state. If there is no home state, "first filing" controls.

Compiler's Comments

2015 Amendment: Chapter 174 in (1) in introductory clause before "pleading" deleted "petition or comparable"; and throughout section after reference to another state inserted reference to foreign country. Amendment effective July 1, 2015.

Source: Section 204, UIFSA.

40-5-1012. Continuing, exclusive jurisdiction to modify child support order.

Official Comments

This section is perhaps the most crucial provision in UIFSA. It establishes the principle that the issuing tribunal retains continuing, exclusive jurisdiction over the support order except in very narrowly defined circumstances. If all parties and the child reside elsewhere, the issuing state loses its continuing, exclusive jurisdiction — which in practical terms means the issuing tribunal loses its authority to modify its order. The issuing state no longer has a nexus with the parties or child and, furthermore, the issuing tribunal has no current information about the circumstances of anyone involved. Note, however, that the one-order of the issuing tribunal remains valid and enforceable. That order is in effect not only in the issuing state and those states in which the order has been registered, but also may be enforced in additional states in which the one-order is registered for enforcement after the issuing state loses its power to modify the original order, see Sections 601-604 [40-5-184 through 40-5-187, renumbered 40-5-1055 through 40-5-1058] (Registration and Enforcement of Support Order), *infra.* The one-order remains in effect until it is properly modified in accordance with the narrow terms of the Act, see Sections 609-612 [40-5-192 through 40-5-195, renumbered 40-5-1063 through 40-5-1068] (Registration and Modification of Child Support Order), *infra.*

Child support orders may be modified under certain, specific conditions: (1) on the agreement of both parties; or, (2) if all the relevant persons, that is, the obligor, the individual obligee, and the child, have permanently left the issuing state. Note that while subsection (b)(2) [sic] [(3)] identifies the method for the release of continuing, exclusive jurisdiction by the issuing tribunal, it does not confer jurisdiction to modify on another tribunal. Modification requires that a tribunal have personal jurisdiction over both parties, as provided in Article 6, Part C [40-5-192 through 40-5-195, renumbered 40-5-1063 through 40-5-1068]. It should also be noted that nothing in this section is intended to deprive a court which has lost continuing, exclusive jurisdiction of the power to enforce arrearages which have accrued during the existence of a valid order.

With regard to spousal support, the issuing tribunal retains continuing, exclusive jurisdiction over an order of spousal support throughout the entire existence of the support obligation. The prohibition against a modification of an existing spousal support order of another state imposed by Sections 205 [this section] and 206 [40-5-150. renumbered 40-5-1013] marks a radical departure from RURESA, which treats spousal and child support orders identically. Under UIFSA, modification of spousal support is permitted in the interstate context only if an action is initiated outside of, and modified by the original issuing state. While UIFSA revises RURESA in this regard, in fact this will have a minimal effect on actual practice. Interstate modification of spousal support has been relatively rare under RURESA. Moreover, the prohibition of modification of spousal support is consistent with the basic principle that a tribunal should apply local law if at all possible to insure efficient handling of cases and to minimize choice of law problems. Avoiding conflict of law problems is almost impossible if spousal support orders are subject to modification in a second state. For example, there is wide variation among state laws on the effect on a spousal support order following the obligee's remarriage or nonmarital cohabitation with another person.

The distinction between spousal and child support is further justified because the standards for modification of child support and spousal support are so different. In most jurisdictions a dramatic improvement in the obligor's economic circumstances will have little or no relevance in an action seeking an upward modification of spousal support, while a similar change in an obligor's situation typically is a primary basis for an increase in child support. This disparity is founded on a policy choice that post-divorce success should benefit the obligor's child, but not an ex-spouse.

Compiler's Comments

2015 Amendment: Chapter 174 substituted current text for former text that read: "(1) A tribunal of this state issuing a support order consistent with the law of this state has continuing, exclusive jurisdiction over a child support order:

(a) as long as this state remains the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or

(b) until all of the parties who are individuals have filed written consent with the tribunal of this state for a tribunal of another state to modify the order and assume continuing, exclusive jurisdiction.

(2) A tribunal of this state issuing a child support order consistent with the law of this state may not exercise its continuing jurisdiction to modify the order if the order has been modified by a tribunal of another state pursuant to this part or a law substantially similar to this part.

(3) If a child support order of this state is modified by a tribunal of another state pursuant to this part or a law substantially similar to this part, a tribunal of this state loses its continuing, exclusive jurisdiction with regard to prospective enforcement of the order issued in this state and may only:

(a) enforce the order that was modified as to amounts accruing before the modification;

(b) enforce nonmodifiable aspects of that order; and

(c) provide other appropriate relief for violations of that order that occurred before the effective date of the modification.

(4) A tribunal of this state shall recognize the continuing, exclusive jurisdiction of a tribunal of another state that has issued a child support order pursuant to this part or a law substantially similar to this part.

(5) A temporary support order issued ex parte or pending resolution of a jurisdictional conflict does not create continuing, exclusive jurisdiction in the issuing tribunal.

(6) A tribunal of this state issuing a support order consistent with the law of this state has continuing, exclusive jurisdiction over a spousal support order throughout the existence of the support obligation. A tribunal of this state may not modify a spousal support order issued by a tribunal of another state having continuing, exclusive jurisdiction over that order under the law of that state." Amendment effective July 1, 2015.

1997 Amendment: Chapter 552 in (1)(b) substituted "all of the parties who are individuals have" for "each individual party has"; and in (2), the introductory clause of (3), and(4) inserted "this part or". Amendment effective July 1, 1997.

Source: Section 205, UIFSA.

Case Notes

Refusal to Terminate Parental Rights and Grant Petition for Adoption Proper: In an adoption proceeding, the stepfather petitioned to adopt his wife's child and sought to terminate the parental rights of the natural father of the child on the sole basis that the natural father was an unfit parent because he had failed to pay child support during the year prior to the filing of the petition for adoption. The District Court refused to terminate the parental rights of the natural father based on an existing child support order that set the amount of child support due at zero. On appeal, the Supreme Court affirmed, concluding that the natural father could not be declared unfit and have his parental rights terminated and his child adopted after complying with a valid court order specifying a child support obligation, albeit one of "zero". In re Adoption of P.T.H., 2015 MT 316, 381 Mont. 373, 364 P.3d 1235.

Jurisdiction Over Modification of Child Support — UIFSA, not UCCJEA, Controls: In a matter involving only child support issues, jurisdiction is controlled by the Uniform Interstate Family Support Act (UIFSA), not the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The District Court erred in concluding it did not have jurisdiction over the matter based on Montana being an inconvenient forum under UCCJEA when the only issue before the court involved child support. Because the UIFSA, unlike the UCCJEA, does not provide an inconvenient forum provision, the Supreme Court reversed and remanded the matter to the District Court. Ervin v. Ervin, 2011 MT 309, 363 Mont. 80, 265 P.3d 1272.

Full Faith and Credit Afforded Out-of-State Renewable Child Support Judgment — Res Judicata Applicable: Article IV, sec. 1, U.S. Const., provides that full faith and credit be given in each state to the public acts, records, and judicial proceedings of every other state. As restated in

Baker v. Gen. Motors Corp., 522 US 222, 139 L Ed 2d 580, 118 S Ct 657 (1998), a final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. When issues of jurisdiction have been determined by one court, the doctrine of res judicata precludes a second court from considering jurisdiction as long as the first court fully and fairly considered the issue, and that judgment, as to jurisdiction, is entitled to full faith and credit in the second court. In the present case, a Utah renewable child support judgment, in which the Utah court established jurisdiction of the parties, was entitled to full faith and credit in Montana, despite contentions by the husband that he no longer had minimum contacts with Utah after moving to Montana. The jurisdiction arguments raised before the Montana Supreme Court were identical to the arguments that were previously raised, fairly considered, and finally decided in Utah, precluding relitigation by the Montana court under res judicata. In re Child Support of Mason, 1998 MT 192, 290 M 253, 964 P2d 743, 55 St. Rep. 803 (1998), followed with regard to full faith and credit of a judgment by an out-of-state court following full and fair consideration of jurisdiction in Genuine Parts Co. v. Rascal's Auto Parts, Inc., 2008 MT 313, 346 M 56, 192 P3d 1153 (2008).

40-5-1013. Continuing jurisdiction to enforce child support order.

Official Comments

This section is the correlative of the continuing, exclusive jurisdiction asserted in the preceding section. In subsection (a) [(1)] the enacting state recognizes the continuing, exclusive jurisdiction of other tribunals over support orders and authorizes the initiation of requests for modification to the issuing state.

Subsection (b) [(2)] confirms the power to modify a child support order of the issuing state, provided it retains a sufficient nexus with its order. UIFSA defines that nexus as any situation in which the child or at least one of the parties continues to reside in the issuing state.

Subsection (c) [(3)] directs tribunals of the enacting state to adhere to the one-order-at-a-time system.

Compiler's Comments

2015 Amendment: Chapter 174 substituted current text for former text that read: "(1) A tribunal of this state may serve as an initiating tribunal to request a tribunal of another state to enforce or modify a support order issued in that state.

(2) A tribunal of this state that has continuing, exclusive jurisdiction over a support order may act as a responding tribunal to enforce or modify the order of another state. If a party subject to the continuing, exclusive jurisdiction of the tribunal no longer resides in the issuing state, in subsequent proceedings the tribunal may apply 40-5-175 to receive evidence from another state and 40-5-177 to obtain discovery through a tribunal of another state.

(3) A tribunal of this state that lacks continuing, exclusive jurisdiction over a spousal support order may not serve as a responding tribunal to modify a spousal support order of another state." Amendment effective July 1, 2015.

Source: Section 206, UIFSA.

Case Notes

Full Faith and Credit Afforded Out-of-State Renewable Child Support Judgment — Res Judicata Applicable: Article IV, sec. 1, U.S. Const., provides that full faith and credit be given in each state to the public acts, records, and judicial proceedings of every other state. As restated in Baker v. Gen. Motors Corp., 522 US 222, 139 L Ed 2d 580, 118 S Ct 657 (1998), a final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. When issues of jurisdiction have been determined by one court, the doctrine of res judicata precludes a second court from considering jurisdiction as long as the first court fully and fairly considered the issue, and that judgment, as to jurisdiction, is entitled to full faith and credit in the second court. In the present case, a Utah renewable child support judgment, in which the Utah court established jurisdiction of the parties, was entitled to full faith and credit in Montana, despite contentions by the husband that he no longer had minimum contacts with Utah after moving to Montana. The jurisdiction arguments raised before the Montana Supreme Court were identical to the arguments that were previously raised, fairly considered, and finally decided in Utah, precluding relitigation by the Montana court under res judicata. In re Child Support of Mason, 1998 MT 192, 290 M 253, 964 P2d 743, 55 St. Rep. 803 (1998), followed with regard to full faith and credit of a judgment by an out-of-state court following full and fair consideration of jurisdiction in Genuine Parts Co. v. Rascal's Auto Parts, Inc., 2008 MT 313, 346 M 56, 192 P3d 1153 (2008).

Attorney General's Opinions

OPINIONS UNDER FORMER LAW (URESA)

Registration and Enforcement by County Attorney: The County Attorney shall represent an obligee in registration and enforcement of a foreign support order under the Revised Uniform Reciprocal Enforcement of Support Act (1968) (replaced by UIFSA) when so requested pursuant to 40-5-139. 40 A.G. Op. 72 (1984).

40-5-1014. Determination of controlling child support order.

Official Comments

This section establishes a priority scheme for recognition and enforcement of existing multiple orders regarding the same obligor, obligee or obligees, and the same child. Even assuming universal enactment of UIFSA, many years will pass before its one-order system will be completely in place. Part C [Sections 40-5-151 and 40-5-152, renumbered 40-5-1014 and 40-5-1015] is designed to span the gulf between the one-order system and the multiple order system in place under RURESA. If only one order has been issued, it is to be treated as if it had been issued under UIFSA if it was issued under a statute which is consistent with the principles of UIFSA. But, multiple orders issued under RURESA number in the tens of thousands; it can be reasonably anticipated that those orders, covering the same parties and child, will continue in effect far into the future.

Assuming multiple orders exist, none of which can be distinguished as being in conflict with the principles of UIFSA, an order issued by a tribunal of the child's home state is given the higher priority. If more than one of these orders exists, priority is given to the order most recently issued. If none of the priorities apply, the forum tribunal is directed to issue a new order. Note, however, that multiple orders issued by different states may be entitled to full faith and credit. While this section cannot and does not attempt to interfere with that constitutional directive with regard to accrued arrearages, it may and does establish a system for prospective enforcement of competing orders.

Compiler's Comments

2015 Amendment: Chapter 174 in (2) in introduction substituted current text concerning proceedings involving two or more child support orders for "If a proceeding is brought under this part and two or more child support orders have been issued by tribunals of this state or another state with regard to the same obligor and child, a tribunal of this state shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction"; in (2)(a), (2)(b)(i), (2)(b)(ii), and (2)(c) at end deleted "and must be recognized"; in (2)(c) after "state" deleted "having jurisdiction over the parties"; substituted current text in (3) and (4) concerning controlling order for former (3) that read: "(3) If two or more child support orders have been issued for the same obligor and child and if the obligor or the individual obligee resides in this state, a party may request a tribunal of this state to determine which order controls and must be recognized under subsection (2). The request must be accompanied by a certified copy of each support order in effect. The requesting party shall give notice of the request to each party whose rights may be affected by the determination"; in (5) substituted "subsection (1), (2), or (3)" for "subsections (1) through (3)", after "continuing" deleted "exclusive", and substituted "to the extent provided in 40-5-149 [renumbered 40-5-1012] or 40-5-150 [renumbered 40-5-1013]" for "under 40-5-149"; in (6) in introductory clause after "(2)(b)" inserted "or (3)"; inserted (6)(b) concerning prospective support; inserted (6)(c) concerning consolidated arrears and accrued interest; in (7) in second sentence after "party" inserted "or support enforcement agency"; inserted (8) concerning recognition of certain orders or judgments under the part; and made minor changes in style. Amendment effective July 1, 2015.

1997 Amendment: Chapter 552 inserted (1) providing that if only one tribunal issues an order in a proceeding under this part, the order controls; in (2), in introductory clause substituted "two" for "one"; deleted former (2)(a) providing that if only one tribunal issued an order, that tribunal's order must be recognized; at beginning of (2)(a), (2)(b), and (2)(c), after "If", deleted "two or more tribunals have issued child support orders for the same obligor and child and"; in (2)(c) inserted "having jurisdiction over the parties shall"; inserted (3) providing what happens if two or more orders have been issued for the same obligor and child and the obligor or obligee resides in this state; in (4) substituted "the controlling order under subsections (1) through (3)" for "an order recognized under subsection (1)" and inserted "under 40-5-149"; inserted (5) providing that a tribunal of this state determining the identity of the controlling order under subsection (2)(a) or (2)(b) or issuing a new controlling order under subsection (2)(c) must state the basis for its determination; inserted (6) regarding filing of a copy of an order determining a controlling order and sanctions for failure to file; and made minor changes in style. Amendment effective July 1, 1997.

Source: Section 207, UIFSA.

40-5-1015. Child support orders for two or more obligees.

Official Comments

Multiple orders may involve two or more families of the same obligor. Although all such orders are entitled to future enforcement, practical difficulties are often presented. For example, full enforcement of all orders may exceed the maximum allowed for income withholding, *i.e.*, the federal statute, 42 U.S.C. 666(b)(1), requires that states cap the maximum to be withheld in accordance with the federal consumer credit code limitations on wage garnishment, 15 U.S.C. 1673(b). In order to allocate resources between competing families, the Act refers to state law. The basic principle is that one or more foreign orders for the support of the obligor's families are of equal dignity and should be treated as if all of the multiple orders had been issued by a tribunal of the forum state.

Compiler's Comments

2015 Amendment: Chapter 174 near beginning before "registrations" deleted "multiple", in middle after "state" inserted "or a foreign country", and near end before "orders" deleted "multiple"; and made minor changes in style. Amendment effective July 1, 2015.

Source: Section 208, UIFSA.

40-5-1016. Credit for payments.

Compiler's Comments

2015 Amendment: Chapter 174 substituted current text for former text that read: "An amount collected and credited for a particular period pursuant to a support order issued by a tribunal of another state must be credited against the amount accruing or accrued for the same period under a support order issued for the same obligation by a tribunal of this state." Amendment effective July 1, 2015.

40-5-1017. Application of part to nonresident subject to personal jurisdiction.

Official Comments

Assertion of long-arm jurisdiction over a nonresident essentially results in a one-state proceeding, notwithstanding the fact that the parties reside in different states. With two exceptions, the provisions of UIFSA are not applicable in these proceedings. The first exception allows the tribunal to apply the special rules of evidence and procedure of Section 316 [40-5-175, renumbered 40-5-1036] in order to facilitate decision-making when one party resides in another state, even though that party is subject to the personal jurisdiction of the tribunal. In other words, the one-state case may utilize two-state procedures in the interests of economy, efficiency, and fair play. The same considerations account for the second exception; the two-state discovery procedures of Section 318 [40-5-177, renumbered 40-5-1038] are made applicable to a one-state proceeding when a foreign tribunal can assist in that process. In all other situations, the substantive and procedural law of the state applies. However, to facilitate interstate exchange of information and to enable the nonresident to participate as fully as possible in the proceedings without the necessity of personally appearing in the forum state, this section expressly incorporates the special UIFSA rules on evidence and assistance with discovery procedures to long-arm cases.

Compiler's Comments

2019 Amendment: Chapter 131 in second sentence inserted "40-5-1043"; and made minor changes in style. Amendment effective October 1, 2019.

2015 Amendment: Chapter 174 substituted current text for former text that read: "A tribunal of this state exercising personal jurisdiction over a nonresident pursuant to 40-5-145 may apply 40-5-175 to receive evidence from another state and 40-5-177 to obtain discovery through a tribunal of another state. In all other respects, 40-5-158 through 40-5-166, 40-5-170 through 40-5-180, and 40-5-183 through 40-5-186 do not apply and the tribunal shall apply the procedural and substantive law of this state, including the rules on choice of law other than those established by this part." Amendment effective July 1, 2015.

Source: Section 202, UIFSA.

40-5-1018. Continuing, exclusive jurisdiction to modify spousal support order.

Compiler's Comments

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

40-5-1021. Proceedings under this part.

Official Comments

This section is a "road map" of the types of actions authorized by UIFSA. Although such a section may be unusual for a uniform act, it is especially justified in this instance because the majority of those persons administering the Act are not attorneys and will doubtless find such assistance to be useful.

Subsection (a) [(1)] mandates application of the general provisions of this article to all UIFSA actions.

Generally, subsection (b) [(2)] identifies the fact that orders for spousal support and child support are to be dealt with identically under the Act. However, subsection (b)(5) [(2)(e)] announces that the modification provisions are limited to child support orders; the Act does not provide for a second state to modify a spousal support order.

Subsection (c) [(4)] establishes the basic two-state procedure contemplated by the Act. The initiating responding procedure is derived from the two-state procedure under RURESA; the direct filing by either an individual or a support enforcement agency is new to this Act.

Compiler's Comments

2015 Amendment: Chapter 174 in (1) deleted reference to 40-5-180; deleted former (2) that read: "(2) This part provides for the following proceedings:

(a) establishment of an order for spousal support or child support pursuant to 40-5-179;

(b) enforcement of a support order and income-withholding order of another state without registration;

(c) registration of an order for spousal support or child support of another state for enforcement pursuant to 40-5-184 through 40-5-195;

(d) modification of an order for child support or spousal support issued by a tribunal of this state pursuant to 40-5-147 through 40-5-150;

(e) registration of an order for child support of another state for modification pursuant to 40-5-184 through 40-5-195;

(f) determination of parentage pursuant to 40-5-196; and

(g) assertion of jurisdiction over nonresidents pursuant to 40-5-145 and 40-5-146"; in (2) after "individual" inserted "petitioner", substituted "initiate" for "commence", before "initiating" deleted "appropriate", and after "state" inserted "or a foreign country"; and made minor changes in style. Amendment effective July 1, 2015.

2001 Amendment: Chapter 352 deleted former (3) providing that if the tribunal is the department of public health and human services, this part includes the administrative remedies under this chapter; and made minor changes in style. Amendment effective April 23, 2001.

1995 Amendment: Chapter 546 in (3) substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Source: Section 301, UIFSA.

Case Notes

DECISIONS UNDER FORMER LAW (URESA)

Earnings Exempt From Execution on Unpaid Alimony Judgment: Section 25-13-614, exempting earnings of a judgment debtor from execution, does not differentiate between different types of judgments, plainly provides an exemption of earnings against execution regardless of the nature of the underlying claim, and the Supreme Court cannot insert an exception for delinquent alimony payment judgments. Earnings are exempt from execution on a judgment for unpaid alimony, and though an alimony claim is not strictly a debt, when reduced to judgment it becomes merged in the judgment, loses its underlying character, and the judgment creates a debt the same as any other money judgment. White v. White, 195 M 470, 636 P2d 844, 38 St. Rep. 2041 (1981) (case of first impression).

Inaction by State as Voluntary Waiver: Where wife initiated proceedings under Uniform Reciprocal Enforcement of Support Act (URESA) (replaced by UIFSA) and claim was settled by agreement with former husband, it was error to allow state to recover claim, as this section only gives state right to initiate or join in URESA proceedings initiated by individual obligee but not an action against individual obligee over sums recovered. Since state did not choose to initiate or join in proceedings, it voluntarily waived rights granted under this section. St. v. Hultgren, 168 M 257, 541 P2d 1211 (1975).

40-5-1022. Proceeding by minor parent.

Official Comments

This section is derived from RURESA § 13 [40-5-114, now repealed]. A minor parent may maintain an action under UIFSA without the appointment of a guardian ad litem, even if the law of the jurisdiction requires a guardian for an in-state case. If a guardian or legal representative has been appointed, however, he or she may act on behalf of the minor's child in seeking support.

Compiler's Comments

2015 Amendment: Chapter 174 substituted "a guardian" for "the guardian"; and made minor changes in style. Amendment effective July 1, 2015.

Source: Section 302, UIFSA.

40-5-1023. Application of law of this state.

Official Comments

Historically states have insisted on application of forum law to support cases whenever possible. A key principle of UIFSA is that a tribunal will have the same powers in an action involving interstate parties as it has in an intrastate case. This inevitably means that the Act is not self-contained; rather, it is supplemented by the support law of the forum. To insure the efficient processing of the huge number of interstate support cases, it is vital that decision-makers apply familiar rules of substantive and procedural law to those cases.

Compiler's Comments

2015 Amendment: Chapter 174 in (1) after "law" deleted "including the rules on choice of law"; and made minor changes in style. Amendment effective July 1, 2015.

Source: Section 303, UIFSA.

40-5-1024. Duties of initiating tribunal.

Official Comments

Under RURESA § 14 [this section prior to 1993 amendment], the initiating tribunal is required to make a preliminary finding of the existence of a support obligation, but in fact, observance of this obligation is erratic across the nation. Under UIFSA, by contrast, the role of the initiating tribunal consists merely of the ministerial function of forwarding the documents. See Mossburg v. Coffman, 6 Kan. App. 2d 428, 629 P.2d 745 (1981); Neff v. Johnson, 391 S.W.2d 760 (Tex. Civ. App. 1965).

Compiler's Comments

2015 Amendment: Chapter 174 in (1) in introductory clause after "tribunal" inserted "of this state" and after "forward" deleted "three copies of"; and in (2) substituted current text providing duties of state tribunal if request made by responding tribunal for former text that read: "(2) If a responding state has not enacted the Uniform Interstate Family Support Act or another law or procedure substantially similar to that act, a tribunal of this state may issue a certificate or other documents and make findings required by the law or procedure of the responding state. If the responding state is a foreign jurisdiction, the tribunal may specify the amount of support sought and provide other documents necessary to satisfy the requirements of the responding state." Amendment effective July 1, 2015.

2001 Amendment: Chapter 352 deleted former (2) providing that the department of public health and human services is the initiating tribunal for any action or proceeding under Title 40, chapter 5, parts 2, 4, and 6, and the district court is the initiating tribunal in all other cases; and made minor changes in style. Amendment effective April 23, 2001.

1997 Amendments: Chapter 42 in (2), at end of first sentence, substituted reference to part 6 for reference to part 5. Amendment effective March 12, 1997.

Chapter 552 inserted (3) stating when a tribunal of this state may issue a certificate and make findings and what the tribunal may do if the responding state is a foreign jurisdiction. Amendment effective July 1, 1997.

1995 Amendment: Chapter 546 in (2) substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 328 substituted language regarding duties of initiating tribunal for former section that read: "If the initiating court finds that the petition sets forth facts from which it may be determined that the obligor owes a duty of support and that a court of the responding state may obtain jurisdiction of the obligor or his property, it shall so certify and cause three copies of the petition and its certificate and one copy of this part to be sent to the responding court. Certification shall be in accordance with the requirements of the initiating state. If the name and address of the responding court is unknown and the responding state has an information agency comparable to that established in the initiating state, it shall cause the copies to be sent to the state information agency or other proper official of the responding state, with a request that the agency or official forward them to the proper court and that the court of the responding state acknowledge their receipt to the initiating court."

Source: Section 304, UIFSA.

40-5-1025. Duties and powers of responding tribunal.

Official Comments

This section revises RURESA §§ 9 [40-5-110, now repealed], 18 [40-5-119, renumbered 40-5-1028], 19 [40-5-120, now repealed], 24 [40-5-125, now repealed], 25 [40-5-126, now repealed], and 26 [40-5-127, now repealed]. It contains both mechanical functions, such as those in subsection (a) [(1)]; judicial functions, as in subsection (b) [(2)], and substantive rules applicable to interstate cases, subsections (c)-(e) [(3) through (5)]. For example, subsection (b) [(2)] supplies much more detail than RURESA §§ 24 [40-5-125, now repealed] and 26 [40-5-127, now repealed] to make explicit the wide range of specific powers of the responding tribunal. Because a responding tribunal may be an administrative agency rather than a court, the Act explicitly states that a tribunal is not granted powers that it does not otherwise possess under state law. For example, often authority to enforce orders by contempt is limited to courts.

Subsection (b)(7) [(2)(g)] purposefully avoids mention of the priority of liens issued under UIFSA. As is generally true under the Act, that priority will be determined by the otherwise applicable state law concerning support liens.

Subsection (b)(9) [(2)(i)] replaces RURESA § 16 [40-5-117, now repealed] (Jurisdiction By Arrest), which authorizes the responding tribunal "to obtain the body of the obligor" if the tribunal "believes that the obligor may flee ...." Under UIFSA, the physical seizure of an obligor is left to the procedures available under state law in other civil cases.

Subsection (c) [(3)] clarifies that calculation sheets are to be included with the order in conjunction with the application of support guidelines. Local law generally requires that variation from the child support guidelines must be explained, see 42 U.S.C. § 667; this requirement is extended to all interstate cases.

Under subsection (d) [(4)], an interstate support order may not be conditioned on compliance with a visitation order. While this may be at variance from state law governing intrastate cases, under a UIFSA action the petitioner generally is not present in the tribunal. This distinction justifies prohibiting visitation issues from being litigated in the context of a support proceeding.

Subsection (e) [(5)] introduces the policy determination that the petitioner, the respondent, and the initiating tribunal, if any, shall be kept informed about actions taken by the responding tribunal. First class mail is sufficient for this purpose.

Compiler's Comments

2015 Amendment: Chapter 174 in (1) substituted "40-5-158(2) (renumbered 40-5-1021(2))" for "40-5-158(3)"; in (2) in introductory clause substituted "not prohibited by other law" for "otherwise authorized by law"; in (2)(a) substituted "establish" for "issue", substituted "determine the controlling child support order, or determine" for "or render a judgment to determine", and inserted "of a child"; in (2)(h) inserted "electronic mail address"; in (6) substituted current text concerning conversion of foreign currency amounts for former text that read: "The department of public health and human services is the responding tribunal for receipt of a petition or comparable proceedings from an initiating state as provided in 40-5-263. In all other cases, the district court is the responding tribunal"; and made minor changes in style. Amendment effective July 1, 2015.

2001 Amendment: Chapter 352 in (1) substituted "40-5-158(3)" for "40-5-158(4)". Amendment effective April 23, 2001.

1997 Amendment: Chapter 552 in (1) deleted requirement that notice be by first-class mail; and in (5) deleted requirement that a copy of the order be sent by first-class mail. Amendment effective July 1, 1997.

1995 Amendment: Chapter 546 in (6) substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Source: Section 305, UIFSA.

Case Notes

DECISIONS UNDER FORMER LAW (URESA)

No Equitable Modification of Child Support Decree Upon Agreement of Parties: Wife and husband were divorced after several years of marriage, and the District Court awarded custody of the couple's two children to the wife, with visitation awarded to the husband. The wife remarried a year later and shortly thereafter moved to Nebraska. At all times, the wife kept the Missoula County Attorney's Office informed of her whereabouts and brought a URESA (replaced by UIFSA) action against her former husband for back child support. Husband made few attempts to contact his children, even though he knew where they were living. Wife's new husband later adopted the children, and wife sought back child support for those payments up until the time the children were adopted, which payments the District Court awarded. The Supreme Court distinguished the case from State ex rel. Blakeslee v. Horton, 222 M 351, 722 P2d 1148 (1986), stating that there was no implicit agreement between the parties for one parent to give up child support in exchange for the other parent giving up visitation. Wife always sought to enforce her right to child support and made no attempt to discourage her former husband from exercising his right to visitation. Husband gave up visitation on his own, but the right to visitation is legally separate and distinct from the husband's enforceable duty to provide child support pursuant to the District Court's previous decree. In re Marriage of Bronzynski, 246 M 200, 806 P2d 8, 47 St. Rep. 1853 (1990).

Equity to Override Legally Correct Claim: The parties were divorced in 1970, and the father was ordered to pay $50 a month in child support through the Clerk of Court. No payments were ever made, and no visitation was ever sought. In 1984, the mother filed a URESA (replaced by UIFSA) action for back support. In defending the action, the father contended that the mother took the position that if he would stay out of her life and the child's life, they would stay out of his. He had no contact with either party during the ensuing 14 years. The District Court denied enforcement of the petition for child support. The Supreme Court on appeal upheld the District Court. Recognizing that the law is clear that an arrearage in child support payment cannot be modified on any retroactive basis and that child support and child visitation are separate incidents, neither being dependent or conditioned upon the other, the court found these legal principles rendered impotent when the parties mutually agreed that they be ignored and carried out the agreement in fact for 14 years. The court stated that equity could not allow the mother to participate in nullification of the purpose of the law in fact and, at the same time, allow her to claim the benefit of it in theory simply because there was a meter running which could total a dollar loss in child support but nothing to total the loss of a father-son association. The court stated that the principles of equity applied in this case did not reverse or modify any previous case law. State of Wash. ex rel. Blakeslee v. Horton, 222 M 351, 722 P2d 1148, 43 St. Rep. 1321 (1986), distinguished in In re Marriage of Bronzynski, 246 M 200, 806 P2d 8, 47 St. Rep. 1853 (1990).

Child Support Action — Affidavit of Officer of State Seeking Reimbursement: In North Dakota's action for a declaration of paternity and to obtain child support, it was proper to exclude the affidavit of a North Dakota welfare administrator setting forth what North Dakota had paid for public assistance to the mother, the child's medical costs, and blood tests to establish paternity, for which North Dakota sought reimbursement. The affidavit was hearsay, was made by a person not available for cross-examination, and did not fit within any of the hearsay exceptions. However, under 40-5-121 (now repealed) the welfare administrator's deposition as to his state's pleaded costs could be taken and the case was remanded to allow a deposition to be taken. Because North Dakota did not plead its expenditures for the child's medical costs, they could not be recovered and the deposition could not cover those costs. State of N. Dak. ex rel. B.J.D. v. S.P.R., 219 M 26, 710 P2d 702, 42 St. Rep. 1817 (1985).

District Court Adjudicating Action — No Authority to Modify Original Support Order: Even though the URESA (replaced by UIFSA) responding court and the court that issued the original child support order are the same, a request for modification of the divorce decree is separate from an enforcement action. State of Oregon ex rel. Worden v. Drinkwalter, 216 M 9, 700 P2d 150, 42 St. Rep. 599 (1985).

Evidence of Emancipation of Minor Child: When evidence in a URESA (replaced by UIFSA) action indicated that the minor child lived away from the obligee but was not earning enough money to support herself, the District Court's determination that the minor child was not emancipated was not clearly erroneous. State of Oregon ex rel. Worden v. Drinkwalter, 216 M 9, 700 P2d 150, 42 St. Rep. 599 (1985).

Payments Made Directly to Children: The obligation to pay child support is not discharged by payment to the children themselves when the support order directs that payment be made to the children's mother. State of Oregon ex rel. Worden v. Drinkwalter, 216 M 9, 700 P2d 150, 42 St. Rep. 599 (1985).

Scope of Responding Court's Authority — Undetermined: Because it was unnecessary in this action, the Supreme Court refused to decide whether to follow the majority rule that a URESA (replaced by UIFSA) responding court may make an independent review of the duty and amount of support due from an alleged obligor, or to follow the minority rule that the responding court is limited to examining the foreign court's order to see if it, on its face, states that the alleged obligor has a duty to support. State of Oregon ex rel. Worden v. Drinkwalter, 216 M 9, 700 P2d 150, 42 St. Rep. 599 (1985).

Obligation to Support Independent of Visitation Rights: A child's right to support and the parent's support obligation are not affected by misconduct of the parent or violations of visitation provisions of a custody decree. The District Court therefore was in error in making the enforcement of the child support payments, under a Uniform Reciprocal Enforcement of Support Act (URESA) (replaced by UIFSA) action, contingent upon visitation compliance by the custodial parent. State ex rel. Dewyea v. Knapp, 208 M 19, 674 P2d 1104, 41 St. Rep. 143 (1984), affirmed in In re Adoption of K.L.J.K., 224 M 418, 730 P2d 1135, 43 St. Rep. 2297 (1986).

Superseding Order: Nevada child support award was not modified by child support order of Idaho court entered at time the Uniform Reciprocal Enforcement of Support Act (replaced by UIFSA) in effect in Idaho specifically provided that no order of support issued by court of that state, when acting as responding state, should supersede any other order of support. Campbell v. Jenne, 172 M 219, 563 P2d 574 (1977).

Subsequent Order: Nevada child support award was not modified by child support order of Montana court. The Uniform Reciprocal Enforcement of Support Act (replaced by UIFSA) provided that support order entered by Montana court did not nullify support order made by court of any other state, unless specifically provided for. In absence of Montana support order referring to Nevada support award, the Nevada award was not modified. Campbell v. Jenne, 172 M 219, 563 P2d 574 (1977).

Order to Refer to Prior Orders: Uniform Reciprocal Enforcement of Support Act (replaced by UIFSA) court orders that do not refer to prior support awards do not modify them. Campbell v. Jenne, 172 M 219, 563 P2d 574 (1977).

Attorney General's Opinions

OPINIONS UNDER FORMER LAW (URESA)

County Attorney Not Authorized to Compromise Support Order on Behalf of Obligee: A County Attorney, in carrying out his responsibility under URESA (replaced by UIFSA) to represent obligees, may not enter into an agreement with an obligor or his agent to compromise a support order or to allow the sale of property on which a support order is a lien, since under 40-4-208 a support order may only be modified by a court. Further, 40-4-208 provides that a modification of a court support decree may affect only amounts that accrue subsequent to the motion for modification. 41 A.G. Op. 7 (1985).

40-5-1026. Inappropriate tribunal.

Official Comments

This section directs a tribunal that receives UIFSA documents in error to forward them to the appropriate tribunal, whether located in the enacting state or elsewhere. This section is intended to apply both to initiating and responding tribunals which receive petitions which should be sent to other tribunals. Thus, if a tribunal is inappropriately designated as the initiating tribunal it shall forward the petition to the appropriate initiating tribunal either in the enacting state or elsewhere. Likewise, if a tribunal is inappropriate as the responding tribunal it shall forward the petition to the appropriate responding tribunal either in the enacting state or elsewhere.

Compiler's Comments

2015 Amendment: Chapter 174 substituted "the tribunal" for "it"; and made minor changes in style. Amendment effective July 1, 2015.

1997 Amendment: Chapter 552 deleted requirement that notice be by first-class mail. Amendment effective July 1, 1997.

Source: Section 306, UIFSA.

40-5-1027. Duties of support enforcement agency.

Official Comments

This section is derived from RURESA §§ 12 [40-5-113, now repealed], 18 [40-5-119, renumbered 40-5-1028], and 19 [40-5-120, now repealed].

Subsection (a) [(1)] changes the focus of RURESA § 12 [40-5-113, now repealed] (Officials to Represent Obligee) from representation of an obligee to providing services to a [petitioner]. Care should be exercised in the use of terminology given this substantial alteration of past practice under RURESA. Not only may either the obligee or the obligor request services, but that request may be in the context of the establishment of an order, enforcement or review of an existing order, or a modification of that order (upwards or downwards). Thus, those states that use the term "petitioner" to refer to the "plaintiff" or "complainant" in the original caption of the case may wish to substitute the term "movant" in proceedings initiated after the establishment of a support order.

Subsection (b) [(2)] responds to the complaint of many RURESA petitioners that they are not properly kept informed about the progress of their requests for services.

Subsection (c) [(3)] neither creates nor rejects the establishment of an attorney-client or fiduciary relationship between the support enforcement agency and a petitioner receiving services from that agency. This controversial issue is left to otherwise applicable state law.

Compiler's Comments

2019 Amendment: Chapter 131 in (2) after "support enforcement agency" inserted "of this state". Amendment effective October 1, 2019.

2015 Amendment: Chapter 174 in (2)(a) inserted "or a foreign country"; in (2)(d) substituted "notice in a record" for "a written notice"; in (2)(e) substituted "communication in a record" for "written communication"; inserted (3), (4), and (5) concerning duties of support enforcement agency when requesting registration of child support order; deleted former (4) that read: "(4) For purposes of this part, the department of public health and human services is the support enforcement agency for this state as provided in Title 40, chapter 5, parts 2, 4, and 6. All the provisions of this part must be interpreted as supplemental to and cumulative with the department's powers and duties under those provisions. In all other cases, the county attorney in the county in which an action must be filed is the support enforcement agency"; and made minor changes in style. Amendment effective July 1, 2015.

2001 Amendment: Chapter 352 in (1) substituted "request" for "application"; and in (2)(d) and (2)(e) at beginning inserted "within 2 days, exclusive of Saturdays, Sundays, and legal holidays" and before "send a copy" deleted "promptly". Amendment effective April 23, 2001.

1997 Amendments: Chapter 42 in (4), at end of first sentence, substituted reference to part 6 for reference to part 5. Amendment effective March 12, 1997.

Chapter 552 in (2)(d) and (2)(e) deleted requirement that notice be by first-class mail. Amendment effective July 1, 1997.

1995 Amendment: Chapter 546 in (4) substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Preamble: The preamble attached to Ch. 328, L. 1993, provided: "WHEREAS, the United States Commission on Interstate Child Support and the National Conference of Commissioners on Uniform State Laws intend [section 21] [40-5-164, renumbered 40-5-1027] to require a state support enforcement agency, in a Uniform Interstate Family Support Act (UIFSA) proceeding, to provide locator services upon the request of any individual; and

WHEREAS, the Department of Social and Rehabilitation Services [now Department of Public Health and Human Services] is charged under [section 21] [40-5-164, renumbered 40-5-1027] with providing locator services and does not receive a state general fund appropriation for providing locator services; and

WHEREAS, in enacting [section 21] [40-5-164, renumbered 40-5-1027] the Legislature of the State of Montana intends the Department of Social and Rehabilitation Services [now Department of Public Health and Human Services] to establish a fee schedule under 40-5-210 for locator services provided to an individual under [section 21] [40-5-164, renumbered 40-5-1027]."

Source: Section 307, UIFSA.

Attorney General's Opinions

OPINIONS UNDER FORMER LAW (URESA)

County Attorney Not Authorized to Compromise Support Order on Behalf of Obligee: A County Attorney, in carrying out his responsibility under URESA (replaced by UIFSA) to represent obligees, may not enter into an agreement with an obligor or his agent to compromise a support order or to allow the sale of property on which a support order is a lien, since under 40-4-208 a support order may only be modified by a court. Further, 40-4-208 provides that a modification of a court support decree may affect only amounts that accrue subsequent to the motion for modification. 41 A.G. Op. 7 (1985).

40-5-1028. Duty of attorney general.

Official Comments

This section continues the principle of RURESA § 18(c) [40-5-119(3), renumbered 40-5-1028], under which the Attorney General of the State, or an alternative designated by the individual state statute, is given oversight responsibility for the diligent provision of services by the support enforcement agency and the power to seek compliance with the Act.

Compiler's Comments

2015 Amendment: Chapter 174 inserted (2) concerning determination of reciprocal arrangement for child support; and made minor changes in style. Amendment effective July 1, 2015.

1993 Amendment: Chapter 328 substituted language concerning duty of Attorney General for former section that read: "(1) After the responding court receives copies of the petition, certificate, and reciprocal enforcement of support act from the initiating court, the clerk of the court shall docket the case and notify the prosecuting attorney of his action.

(2) The prosecuting attorney shall prosecute the case diligently. He shall take all action necessary in accordance with the laws of this state to enable the court to obtain jurisdiction over the obligor or his property and shall request the court to set a time and place for a hearing and give notice thereof to the obligor in accordance with law.

(3) If the prosecuting attorney neglects or refuses to represent the obligee, the attorney general may order him to comply with the request of the court or may undertake the representation."

Source: Section 308, UIFSA.

Montana Changes: Montana omits the second bracketed sentence in subsection (3) of the proposed Act.

Attorney General's Opinions

OPINIONS UNDER FORMER LAW

County Attorney Not Authorized to Compromise Support Order on Behalf of Obligee: A County Attorney, in carrying out his responsibility under URESA (replaced by UIFSA) to represent obligees, may not enter into an agreement with an obligor or his agent to compromise a support order or to allow the sale of property on which a support order is a lien, since under 40-4-208 a support order may only be modified by a court. Further, 40-4-208 provides that a modification of a court support decree may affect only amounts that accrue subsequent to the motion for modification. 41 A.G. Op. 7 (1985).

40-5-1029. Private counsel.

Official Comments

The right of a party to retain private counsel in an action to be brought under UIFSA is explicitly recognized. RURESA's failure to clearly recognize that power has led to some confusion and inconsistent decisions.

Compiler's Comments

Source: Section 309, UIFSA.

40-5-1030. Duties of state information agency.

Official Comments

This section, based on RURESA § 17 [40-5-118, renumbered 40-5-1030] (State Information Agency), continues the information-gathering duties of the central agency.

Subsection (b)(4) [(2)(d)] does not provide independent access to the information sources or to the governmental documents listed. Because states have different requirements and limitations concerning such access based on differing views of the privacy interests of individual citizens, the agency is directed to use all lawful means under the relevant state law to obtain and disseminate information.

Compiler's Comments

2015 Amendment: Chapter 174 in (2) in introductory clause substituted "state information agency" for "department"; in (2)(b) before "tribunals" inserted "names and addresses of" and after "agencies" substituted "received from" for "of"; in (2)(c) substituted "obligee who is an individual" for "individual obligee" and substituted "another state or foreign country" for "an initiating tribunal or the state information agency of the initiating state"; and made minor changes in style. Amendment effective July 1, 2015.

1995 Amendment: Chapter 546 in (1) substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 328 substituted language regarding duties of state information agency for former section that read: "(1) The state department of social and rehabilitation services is designated as the state information agency under this part.

(2) It shall:

(a) compile a list of the courts and their addresses in this state having jurisdiction under this part and transmit it to the state information agency of every other state which has adopted this or a substantially similar law. Upon the adjournment of each session of the legislature the agency shall distribute copies of any amendments to this part and a statement of their effective date to all other state information agencies.

(b) maintain a register of lists of courts received from other states and transmit copies thereof promptly to every court in this state having jurisdiction under this part; and

(c) forward to the court in this state which has jurisdiction over the obligor or his property petitions, certificates, and copies of the reciprocal enforcement of support act it receives from courts or information agencies of other states.

(3) If the state information agency does not know the location of the obligor or his property in the state and no state location service is available, it shall use all means at its disposal to obtain this information, including the examination of official records in the state and other sources such as telephone directories, real property records, vital statistics records, police records, requests for the name and address from employers who are able or willing to cooperate, records of motor vehicle license offices, requests made to the tax offices both state and federal where such offices are able to cooperate, and requests made to the social security administration as permitted by the Social Security Act, as amended.

(4) After the deposit of three copies of the petition and certificate and one copy of the reciprocal enforcement of support act of the initiating state with the clerk of the appropriate court, if the state information agency knows or believes that the prosecuting attorney is not prosecuting the case diligently, it shall inform the attorney general who may undertake the representation."

Source: Section 310, UIFSA.

Federal Citation: The Social Security Act, as amended, referred to in this section, is compiled in the U.S.C., Title 42, sec. 1306, et seq.

40-5-1031. Pleadings and accompanying documents.

Official Comments

This section is derived from RURESA § 11 [40-5-112, now repealed]; it establishes the basic requirements for the drafting and filing of interstate pleadings and should be read in conjunction with § 312 [40-5-172, renumbered 40-5-1032], which provides for the confidentiality of certain information if disclosure is likely to result in harm to a party or a child.

Subsection (b) [(2)] provides authorization for the use of the federally authorized forms promulgated in connection with the IV-D child support enforcement program and mandates substantial compliance with those forms. Although the use of other forms is not prohibited, statutory preapproval of forms that substantially conform to those mandated by federal law will help to standardize documents, with a concomitant improvement in the efficient processing of UIFSA actions.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 19, Ch. 685, L. 2023. Amendment effective October 1, 2023.

Severability: Section 42, Ch. 685, L. 2023, was a severability clause.

2015 Amendment: Chapter 174 in (1) substituted current text concerning requirements for filing petition for former text that read: "(1) A petitioner who seeks to establish or modify a support order or to determine parentage in a proceeding under this part shall verify the petition.

Unless otherwise ordered under 40-5-172, the petition or accompanying documents must provide, so far as known, the name, residential address, and social security numbers of the obligor and the obligee and the name, sex, residential address, social security number, and date of birth of each child for whom support is sought. The petition must be accompanied by a certified copy of any support order in effect. The petition may include any other information that may assist in locating or identifying the respondent." Amendment effective July 1, 2015.

Source: Section 311, UIFSA.

40-5-1032. Nondisclosure of information in exceptional circumstances.

Official Comments

Public awareness of and sensitivity to the dangers of domestic violence has significantly increased since the promulgation of RURESA. This section authorizes confidentiality in instances where there is a serious risk of domestic violence or child abduction. Although local law generally governs the conduct of the forum tribunal, state law may not provide for maintaining secrecy about the exact whereabouts of a litigant or other information ordinarily required to be disclosed under state law, *e.g.*, Social Security number of the parties or the child. If so, this provision creates a confidentiality provision which is particularly appropriate in the light of the intractable problems associated with interstate (as opposed to intrastate) childnapping.

Compiler's Comments

2015 Amendment: Chapter 174 substituted current text for former text that read: "Upon a finding, which may be made ex parte, that the health, safety, or liberty of a party or child would be unreasonably put at risk by the disclosure of identifying information or if an existing order so provides, a tribunal shall order that the address of the child or party or other identifying information not be disclosed in a pleading or other document filed in a proceeding under this part." Amendment effective July 1, 2015.

Source: Section 312, UIFSA.

40-5-1033. Costs and fees.

Official Comments

This section is derived from RURESA § 15 [40-5-116, now repealed] (Costs and Fees), which authorizes fees and costs to be assessed against "the obligor." In recognition of the fact that under UIFSA either the obligor or the obligee may file suit, subsection (a) [(1)] permits either to file without payment of a filing fee or other costs. Subsection (b) [(2)], however, continues the RURESA rule that only the support obligor may be assessed the specified costs and fees.

Subsection (c) [(3)] provides a sanction to deal with a frivolous contest regarding compliance with an interstate withholding order, registration of a support order, or comparable delaying tactics regarding an appropriate enforcement remedy.

Compiler's Comments

2015 Amendment: Chapter 174 in (1) after "costs" deleted "to initiate a proceeding under this part"; in (2) in first sentence after "tribunal" inserted "of this state", in second sentence after "state" inserted "or foreign country", and in last sentence before "support" deleted "current"; in (3) in last sentence inserted reference to 40-5-1055 through 40-5-1070; and made minor changes in style. Amendment effective July 1, 2015.

2001 Amendment: Chapter 352 deleted former (4) providing that the standardized schedule of fees established by the department of public health and human services under 40-5-210 is conclusive in an action under this section and that fees or costs recoverable under subsection (2) that are not included in the schedule are recoverable under subsection (2). Amendment effective April 23, 2001.

1997 Amendment: Chapter 552 in second sentence of (3) deleted "40-5-271" from sections referenced. Amendment effective July 1, 1997.

1995 Amendment: Chapter 546 in (4) substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Source: Section 313, UIFSA.

Case Notes

DECISIONS UNDER FORMER LAW (URESA)

Child Support Action — Affidavit of Officer of State Seeking Reimbursement: In North Dakota's action for a declaration of paternity and to obtain child support, it was proper to exclude the affidavit of a North Dakota welfare administrator setting forth what North Dakota had paid for public assistance to the mother, the child's medical costs, and blood tests to establish paternity, for which North Dakota sought reimbursement. The affidavit was hearsay, was made by a person not available for cross-examination, and did not fit within any of the hearsay exceptions. However, under 40-5-121 (now repealed) the welfare administrator's deposition as to his state's pleaded costs could be taken and the case was remanded to allow a deposition to be taken. Because North Dakota did not plead its expenditures for the child's medical costs, they could not be recovered and the deposition could not cover those costs. State of N. Dak. ex rel. B.J.D. v. S.P.R., 219 M 26, 710 P2d 702, 42 St. Rep. 1817 (1985).

Denial of Costs and Attorney Fees for Claimed Frivolous Appeal: In North Dakota's action for a declaration of paternity and to obtain child support, the lower court excluded a North Dakota welfare official's affidavit as to his state's costs. Plaintiff appealed the exclusion, and defendant claimed on appeal that the lower court's disallowance of unpleaded expenses was proper. The Supreme Court held for plaintiff but remanded to allow the official's deposition to be taken on the support expenses of North Dakota. Defendant's argument that he should be awarded attorney fees and costs because the appeal was frivolous was totally without merit. State of N. Dak. ex rel. B.J.D. v. S.P.R., 219 M 26, 710 P2d 702, 42 St. Rep. 1817 (1985).

Attorney General's Opinions

OPINIONS UNDER FORMER LAW (URESA)

Appearance Fee Required of URESA Respondent — Affidavit Excusing Payment: The respondent in a URESA (replaced by UIFSA) action is required to pay a $40 appearance fee. However, the respondent may be excused from payment upon filing an affidavit in accordance with 25-10-404. 43 A.G. Op. 3 (1989).

40-5-1034. Limited immunity of petitioner.

Official Comments

This section significantly expands RURESA § 32 [40-5-133, renumbered 40-5-1034]. Under subsection (a) [(1)], direct or indirect participation in a UIFSA proceeding does not subject a petitioner to an assertion of personal jurisdiction over the petitioner by the forum state in other litigation between the parties. A petition for affirmative relief under UIFSA limits the jurisdiction of the tribunal to the boundaries of the support proceeding.

Similarly, subsection (b) [(2)] grants a litigant immunity from service of process during the time a party is physically present in a state for a UIFSA action. The immunity provided is limited, however, and is not comparable to diplomatic immunity. This is clear from reading subsection (c) [(3)] in conjunction with the other subsections; subsection (c) [(3)] withholds immunity from civil litigation unrelated to the support action stemming from contemporaneous acts committed by a party while present in the state for the support litigation. For example, if a petitioner is involved in an automobile accident or a contract dispute over the cost of lodging while present in the state, the immunity provided by this section is inapplicable.

Compiler's Comments

2015 Amendment: Chapter 174 in (1) near beginning after "proceeding" inserted "under this part" and before "jurisdiction" inserted "personal"; in (3) before "present" inserted "physically"; and made minor changes in style. Amendment effective July 1, 2015.

1993 Amendment: Chapter 328 substituted language concerning limited immunity of petitioner for former section that read: "Participation in any proceeding under this part does not confer jurisdiction upon any court over any of the parties thereto in any other proceeding."

Source: Section 314, UIFSA.

Case Notes

DECISIONS UNDER FORMER LAW

Obligation to Support Independent of Visitation Rights: A child's right to support and the parent's support obligation are not affected by misconduct of the parent or violations of visitation provisions of a custody decree. The District Court therefore was in error in making the enforcement of the child support payments, under a Uniform Reciprocal Enforcement of Support Act (URESA) (replaced by UIFSA) action, contingent upon visitation compliance by the custodial parent. State ex rel. Dewyea v. Knapp, 208 M 19, 674 P2d 1104, 41 St. Rep. 143 (1984), affirmed in In re Adoption of K.L.J.K., 224 M 418, 730 P2d 1135, 43 St. Rep. 2297 (1986).

40-5-1035. Nonparentage as defense.

Official Comments

Arguably this section does no more than restate the basic principle of res judicata. However, a great variety of state laws exists regarding presumptions of parentage and available defenses after a prior determination of parentage. This section is intended neither to discourage nor encourage collateral attacks in situations in which the law of a foreign jurisdiction is at significant odds with local law. For example, this section mandates that a parentage decree rendered by another tribunal is not subject to collateral attack in a UIFSA proceeding except on a fundamental constitutional ground such as lack of jurisdiction over a party or a comparable denial of due process in the previous proceeding. If a collateral attack is permissible on a parentage decree under the law of the issuing jurisdiction, such an action must be pursued in the appropriate forum and not in the UIFSA proceeding.

Similarly, the law of the issuing state may provide for a determination of parentage based on certain specific acts of the obligor acknowledging parentage as a substitute for a decree, *e.g.*, signing the child's birth certificate or publicly acknowledging a duty of support after receiving the child into his home. The Act also is neutral regarding a collateral attack on such a parentage determination; the responding tribunal must give the same effect to such an act of acknowledgment of parentage as it would receive in the issuing state. The consistent theme of this section is that a collateral attack cannot be made in a UIFSA proceeding.

Compiler's Comments

2015 Amendment: Chapter 174 after "determined" inserted "by or"; and made minor changes in style. Amendment effective July 1, 2015.

Source: Section 315, UIFSA.

40-5-1036. Special rules of evidence and procedure.

Official Comments

This section combines RURESA §§ 9 [40-5-110, now repealed], 19 [40-5-120, now repealed], 21 [40-5-122, now repealed], 22 [40-5-123, now repealed], and 23 [40-5-124, now repealed]; and, provides additional innovative methods for gathering evidence in interstate cases.

Subsections (b) through (f) [(2) through (6)] greatly expand on RURESA § 23 [40-5-124, now repealed] (Rules of Evidence). The intent is to eliminate as many potential hearsay problems as possible in interstate litigation because usually the out-of-state party and that party's witnesses do not appear in person at the hearing.

Subsection (d) [(4)] provides a simplified means for proving health care expenses related to the birth of the child. Because ordinarily these charges are not in dispute, this is designed to obviate the cost of having health care providers appear in person or of obtaining affidavits of business records from each provider.

Subsections (e) [(5)] and (f) [(6)] encourage tribunals and litigants to take advantage of modern methods of communication in interstate support litigation.

Subsection (g) [(7)] codifies the rule in effect in many states that in civil litigation an adverse inference may be drawn from a litigant's silence. See, *e.g.*, In re Matter of Joseph P., 487 N.Y.S.2d 685 (Fam. Ct. 1985); Pa. Cons. Stats. Ann., Tit. 23, § 5104(c) (1991) (if "any party refuses to submit to the tests, the court may resolve the question of paternity, parentage or identity of a child against the party...."); 9 N.J. Stats. Ann. 17-51(d) (1991) ("refusal to submit to blood tests or genetic tests, or both, may be admitted into evidence and shall give rise to the presumption that the results of the tests would have been unfavorable to the interests of the party refusing"); La. Rev. Stats., Tit. 9, § 396(A) (1992) ("if any party refuses to submit to such tests, the court may resolve the question of paternity against such party....").

Compiler's Comments

2015 Amendment: Chapter 174 in (1) substituted "a nonresident party who is an individual in a tribunal" for "the petitioner in a responding tribunal"; in (1) and (4) after "parentage" inserted "of a child"; in (2) at beginning deleted "A verified petition", substituted "penalty of perjury" for "oath", and substituted "outside this state" for "in another state"; in (5) substituted "outside this state" for "another state", before "means" inserted "electronic", and substituted "record" for "writing"; in (6) in first sentence substituted "shall" for "may", substituted "outside this state" for "in another state", after "testify" inserted "under penalty of perjury", and after "location" deleted "in that state" and in second sentence substituted "other tribunals" for "tribunals of other states"; inserted (10) concerning voluntary acknowledgment of paternity; and made minor changes in style. Amendment effective July 1, 2015.

Source: Section 316, UIFSA.

40-5-1037. Communications between tribunals.

Official Comments

This section is derived from UCCJA 7(d) [40-7-108(4)] (Inconvenient Forum), which authorizes communications between courts in order to facilitate determination under that Act. Much broader cooperation between tribunals is permitted under this Act to expedite establishment and enforcement of the support order of either the forum or of the sister state.

Compiler's Comments

2015 Amendment: Chapter 174 substituted current text for former text that read: "A tribunal of this state may communicate, in writing or by telephone or other means, with a tribunal of another state to obtain information concerning the laws of that state; the legal effect of a judgment, decree, or order of that tribunal; and the status of a proceeding in the other state. A tribunal of this state may furnish similar information by similar means to a tribunal of another state." Amendment effective July 1, 2015.

Source: Section 317, UIFSA.

40-5-1038. Assistance with discovery.

Official Comments

This section takes another logical step to facilitate interstate cooperation by enlisting the power of the forum to assist a tribunal of another state with the discovery process. The grant of authority is quite broad, enabling the tribunal of the enacting state to fashion its remedies to facilitate discovery consistent with local practice.

Compiler's Comments

2015 Amendment: Chapter 174 in (1) and (2) substituted "tribunal outside this state" for "tribunal of another state"; and made minor changes in style. Amendment effective July 1, 2015.

Source: Section 318, UIFSA.

40-5-1039. Receipt and disbursement of payments.

Official Comments

The first sentence of this section is derived from RURESA 29 [40-5-130, now repealed] (Additional Duty of Initiating Court). The second sentence confirms the duty of the agency or tribunal to furnish payment information in interstate cases.

Compiler's Comments

2015 Amendment: Chapter 174 in (1) at end of first sentence substituted "by the order" for "under this part" and in second sentence after "state" inserted "or a foreign country"; inserted (2) and (3) concerning redirected payments; and made minor changes in style. Amendment effective July 1, 2015.

Source: Section 319, UIFSA.

40-5-1042. Establishment of support order.

Official Comments

This section authorizes a tribunal of the responding state to issue temporary and permanent support orders binding on an obligor over whom the tribunal has personal jurisdiction. It should be emphasized that UIFSA does not permit such orders to be issued when another support order exists and another tribunal has continuing, exclusive jurisdiction over the matter. See § 205 [40-5-149, renumbered 40-5-1012] (Continuing, Exclusive Jurisdiction) and § 206 [40-5-150, renumbered 40-5-1013] (Enforcement and Modification of Support Order by Tribunal Having Continuing Jurisdiction).

Compiler's Comments

2015 Amendment: Chapter 174 in (1) in introductory clause before "responding" deleted "appropriate" and after "state" inserted "with personal jurisdiction over the parties"; in (1)(a) and (1)(b) substituted "outside this state" for "in another state"; substituted current text in (2) concerning issuance of temporary child support order for former text that read: "The tribunal may issue a temporary child support order if:

(a) the respondent has signed a verified statement acknowledging parentage;

(b) the respondent has been determined by or pursuant to law to be the parent; or

(c) there is other clear and convincing evidence that the respondent is the child's parent"; and made minor changes in style. Amendment effective July 1, 2015.

Source: Section 401, UIFSA.

40-5-1043. Proceeding to determine parentage.

Official Comments

This article [This section] authorizes a "pure" parentage action in the interstate context, *i.e.*, an action not joined with a claim for support. Either the mother or a man alleging to be the father of a child may bring such an action. More commonly, an action to determine parentage across state lines will also seek to establish a support order under the Act. See § 401 [40-5-179, renumbered 40-5-1042] ([Petition] to Establish Support Order).

Parentage actions under UIFSA are to be treated identically to such actions brought in the responding state.

Compiler's Comments

2019 Amendment: Chapter 131 at end inserted "to determine parentage of a child". Amendment effective October 1, 2019.

2015 Amendment: Chapter 174 substituted current text for former text that read: "(1) A tribunal of this state may serve as an initiating or responding tribunal in a proceeding brought under this part or a law or procedure substantially similar to this part, the Uniform Reciprocal Enforcement of Support Act, the Revised Uniform Reciprocal Enforcement of Support Act, or a law or procedure substantially similar to either of those acts to determine whether the petitioner is a parent of a particular child or to determine whether a respondent is a parent of that child.

(2) In a proceeding to determine parentage, a responding tribunal of this state shall apply the rules of this state on choice of law.

(3) A proceeding to determine parentage directed to:

(a) the department of public health and human services from an initiating state pursuant to 40-5-263 and this part is subject to the provisions of 40-5-231 through 40-5-237 or Title 40, chapter 6, part 1, as applicable; and

(b) a district court from an initiating state is subject to the provisions of Title 40, chapter 6, part 1." Amendment effective July 1, 2015.

1997 Amendment: Chapter 552 in (1), near middle after "law", inserted "or procedure" and after second "Support Act" inserted "or a law or procedure substantially similar to either of those acts". Amendment effective July 1, 1997.

1995 Amendment: Chapter 546 in (3)(a) substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Source: Section 701, UIFSA.

Case Notes

DECISIONS UNDER FORMER LAW (URESA)

Paternity Contested After Adjudication of Marital Dissolution — Relitigation Barred by Collateral Estoppel: When paternity was contested in response to an action to collect past child support payments, the District Court properly ruled that the issue of paternity had previously been adjudicated during the marriage dissolution proceeding and that relitigation of the issue was barred by collateral estoppel. In re Marriage of Holland, 224 M 414, 730 P2d 410, 43 St. Rep. 2293 (1986).

Rebuttal of Paternity Presumption: The issue of paternity in a Uniform Reciprocal Enforcement of Support Act (URESA) (replaced by UIFSA) action must be determined according to the provisions of the Uniform Parentage Act. Failure to rebut the presumption that petitioner's husband was the natural father of the child within 5 years of the child's birth bars a paternity action against a nonpresumed person. Borchers v. McCarter, 181 M 169, 592 P2d 941 (1979), followed, as to the necessity to rebut the presumption in seeking to establish paternity in someone other than the presumed parent, in In re Paternity of Vainio, 284 M 229, 943 P2d 1282, 54 St. Rep. 858 (1997).

Paternity Determination as Final Judgment: A jury verdict determining paternity is an appealable final judgment and, in effect, an action separate from a support determination. Borchers v. McCarter, 181 M 169, 592 P2d 941 (1979).

40-5-1046. Employer receipt of income-withholding orders of another state.

Compiler's Comments

2015 Amendment: Chapter 174 after "sent" inserted "by or on behalf of the obligee or by the support enforcement agency" and after "person" deleted "or entity"; and made minor changes in style. Amendment effective July 1, 2015.

2001 Amendment: Chapter 352 at end of (2)(a) deleted "and, if the employer elects under subsection (3) to forward the funds to the department for distribution, to the department"; at end of (2)(b) deleted sentence allowing an employer to contact the department to determine whether the withholding order was issued by the appropriate authority; in (3) in introductory clause deleted provision that the employer could "forward the funds to the department to be distributed by the department"; and made minor changes in style. Amendment effective April 23, 2001.

40-5-1047. Employer compliance with income-withholding orders of another state.

Compiler's Comments

2015 Amendment: Chapter 174 in (2)(b) after "person" deleted "or agency"; in (2)(e) in two places substituted "arrearages" for "arrears"; and made minor changes in style. Amendment effective July 1, 2015.

40-5-1048. Employer compliance with two or more income-withholding orders.

Compiler's Comments

2015 Amendment: Chapter 174 in two places substituted "two or more" for "multiple"; and made minor changes in style. Amendment effective July 1, 2015.

40-5-1049. Immunity from civil liability.

Compiler's Comments

2015 Amendment: Chapter 174 made minor changes in style. Amendment effective July 1, 2015.

40-5-1050. Penalties for noncompliance.

Compiler's Comments

2015 Amendment: Chapter 174 made minor changes in style. Amendment effective July 1, 2015.

40-5-1051. Contest by obligor.

Compiler's Comments

2019 Amendment: Chapter 131 in (1) substituted "40-5-1055 through 40-5-1070" for "40-5-1055 through 40-5-1065 and 40-5-1067 through 40-5-1070". Amendment effective October 1, 2019.

2015 Amendment: Chapter 174 in (1) at end after "employer in this state" substituted current text regarding registration and filing for "in the same manner as if the order had been issued by a tribunal of this state" and deleted former last sentence that read: "Choice of law under 40-5-187 applies to the contest"; in (2)(b) after "order" inserted "relating to the obligor"; in (2)(c) in two places after "person" deleted "or agency"; and made minor changes in style. Amendment effective July 1, 2015.

40-5-1052. Administrative enforcement of orders.

Official Comments

This section authorizes summary enforcement of a sister state child support order through any administrative means available for local orders. Under subsection (a) [(1)], any interested party in another state, necessarily including a private attorney or a support enforcement agency, may forward a support order or income-withholding order to a support enforcement agency of the enacting state.

Subsection (b) [(2)] directs the support enforcement agency in the enacting state to employ the enacting state's regular administrative procedures to process the out-of-state order. Thus, a local employer accustomed to dealing with the local agency need not learn a new procedure in order to comply with an out-of-state order.

Compiler's Comments

2015 Amendment: Chapter 174 in (1) after "party" inserted "or support enforcement agency" and substituted "issued in another state or a foreign support order" for "issued by a tribunal of another state". Amendment effective July 1, 2015.

Source: Section 502, UIFSA.

40-5-1055. Registration of order for enforcement.

Official Comments

Part A of Article 6 [Sections 40-5-184 through 40-5-187, renumbered 40-5-1055 through 40-5-1058] greatly expands the procedure for the registration of foreign support orders available under RURESA §§ 35-40 [40-5-136, now repealed; 40-5-137, renumbered 40-5-1055; 40-5-138, now repealed; 40-5-139, now repealed; 40-5-140, renumbered 40-5-1056; and 40-5-141, renumbered

40-5-1057]. The common practice of initiating a new suit for the establishment of a support order irrespective of the facthat there is an existing order for support will become obsolete under UIFSA. The fact that RURESA permits (really encourages) initiation of a new suit in those circumstances led to the multiple support order system that UIFSA is designed to eliminate.

Under the one-order system of UIFSA, the only existing order is to be enforced. Registration of that order in the responding state is the first step to enforcement by a tribunal of that state. Rather than being an optional device as is the case under RURESA, registration for enforcement under UIFSA is the primary method for interstate enforcement by a tribunal. If a prior support order has been validly issued, only that order is to be enforced against the obligor in the absence of very narrow strictly defined fact situations in which an existing order may be modified. See §§ 609 through 612 [40-5-192 through 40-5-195, renumbered 40-5-1063 through 40-5-1068]. Additionally, until that order is modified, it is fully enforceable in the responding state.

Registration should be employed if the purpose is enforcement. Although registration not accompanied by a request for affirmative relief is not prohibited, the Act does not contemplate registration as serving a purpose in itself.

Compiler's Comments

2015 Amendment: Chapter 174 substituted "issued in another state or a foreign support order" for "issued by a tribunal of another state"; and made minor changes in style. Amendment effective July 1, 2015.

1993 Amendment: Chapter 328 substituted language concerning registration of order for enforcement for former section that read: "The obligee may register the foreign support order in a court of this state in the manner, with the effect, and for the purposes herein provided."

Source: Section 601, UIFSA.

Attorney General's Opinions

OPINIONS UNDER FORMER LAW

Registration and Enforcement by County Attorney: The County Attorney shall represent an obligee in registration and enforcement of a foreign support order under the Revised Uniform Reciprocal Enforcement of Support Act (1968) (replaced by UIFSA) when so requested pursuant to 40-5-139. 40 A.G. Op. 72 (1984).

Registration and Enforcement by Private Attorney: A private attorney may register and enforce a foreign support order under the Revised Uniform Reciprocal Enforcement of Support Act (1968) (replaced by UIFSA) in Montana. 40 A.G. Op. 72 (1984).

40-5-1056. Procedure to register order for enforcement.

Official Comments

This section outlines the mechanics for registration of a sister state order. Subsection (c) [(3)] warns that if a particular enforcement remedy must be specifically sought under local law, the same is required in interstate cases. However, the authorization of a later request contemplates that interstate pleadings may be liberally amended to conform to local practice.

Compiler's Comments

2015 Amendment: Chapter 174 in (1) at beginning inserted exception clause, after "state" inserted "or a foreign support order", and substituted "records" for "documents and information"; in (1)(c) substituted "person requesting" for "party seeking"; in (1)(e) inserted exception clause; in (2) after "filed" inserted "as an order of a tribunal or another state or a foreign support order"; inserted (4) concerning two or more orders in effect; inserted (5) concerning request for determination of controlling order; and made minor changes in style. Amendment effective July 1, 2015.

1995 Amendment: Chapter 546 in (1) substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 328 substituted language concerning procedure to register order for former section that read: "(1) An obligee seeking to register a foreign support order in a court of this state shall transmit to the clerk of the court:

(a) three certified copies of the order with all modifications thereof;

(b) one copy of the reciprocal enforcement of support act of the state in which the order was made; and

(c) a statement, verified and signed by the obligee, showing the post-office address of the obligee, the last known place of residence and post-office address of the obligor, the amount of support remaining unpaid, a description and the location of any property of the obligor available upon execution, and a list of the states in which the order is registered.

(2) Upon receipt of these documents the clerk of the court, without payment of a filing fee or other cost to the obligee, shall file them in the registry of foreign support orders. The filing constitutes registration under this part.

(3) Promptly upon registration the clerk of the court shall send by certified or registered mail to the obligor at the address given a notice of the registration with a copy of the registered support order and the post-office address of the obligee. He shall also docket the case and notify the prosecuting attorney of his action. The prosecuting attorney shall proceed diligently to enforce the order."

Source: Section 602, UIFSA.

Attorney General's Opinions

OPINIONS UNDER FORMER LAW

Registration and Enforcement by County Attorney: The County Attorney shall represent an obligee in registration and enforcement of a foreign support order under the Revised Uniform Reciprocal Enforcement of Support Act (1968) (replaced by UIFSA) when so requested pursuant to 40-5-139. 40 A.G. Op. 72 (1984).

40-5-1057. Effect of registration for enforcement.

Official Comments

Subsection (a) [(1)] is derived from RURESA § 39(a) [40-5-140(2), renumbered 40-5-1056], which states that "filing constitutes registration ...." Although the registration procedure under UIFSA is nearly identical to that of RURESA, the underlying intent of registration is radically different. Under RURESA, once an order of State A is registered in State B, it becomes an order of the latter. Under UIFSA, the order continues to be a State A order, which is to be enforced by a tribunal of State B. Although State B's rules of evidence and procedure apply, except as supplemented or specifically superseded by the Act, the order itself remains subject to the continuing, exclusive jurisdiction of State A so long as the requirements for that authority set forth in Section 205 [40-5-149, renumbered 40-5-1012] remain intact.

Subsection (b) [(2)] is derived from RURESA § 40(a) [40-5-141(1), renumbered 40-5-1057]. Although RURESA specifically subjects a registered order to "proceedings for reopening, vacating, or staying as a support order of this State," these remedies are not authorized under UIFSA. While a foreign support order is to be enforced and satisfied in the same manner as if it had been issued by a tribunal of the registering state, the order to be enforced remains an order of the issuing state. Conceptually, the responding state is enforcing the order of another state, not its own order. Any request for relief that requires application of the continuing, exclusive jurisdiction of the issuing tribunal must be sought in the issuing forum.

Subsection (c) [(3)] mandates enforcement of the registered order. See §§ 606 through 608 [40-5-189 through 40-5-191, renumbered 40-5-1060 through 40-5-1062]. This is at sharp variance with the RURESA § 40 [40-5-141, renumbered 40-5-1057] practice, which states that "the registered foreign support order shall be treated in the same manner as a support order issued by a court of this State." This language was generally interpreted as converting the foreign order into an order of the registering state. Once the registering court concludes that it is enforcing its own order, the next logical step is the conclusion that the order may be modified, which results in another version of the multiple order system. UIFSA mandates an end to this process, except as modification is authorized in this article, see §§ 609 through 612 [40-5-192 through 40-5-195, renumbered 40-5-1063 through 40-5-1068].

Because under UIFSA there is only one order in existence at any one time, that order is enforceable in a responding state irrespective of whether such an order might be modified. That is, if neither the child nor the parties continue to reside in the issuing state, the issuing tribunal loses its continuing, exclusive jurisdiction over its child support order. Nonetheless, the order continues to be fully enforceable until the potential for modification actually occurs in accordance with the strict terms for such an action as set forth in Part C of this article, §§ 609-612 [40-5-192 through 40-5-195, renumbered 40-5-1063 through 40-5-1068].

Compiler's Comments

2015 Amendment: Chapter 174 in (1) after "another state" inserted "or a foreign support order"; in (2) after "registered" inserted "support" and after "another state" inserted "or a foreign country"; in (3) substituted "this part" for "40-5-184 through 40-5-195" and after "registered" inserted "support"; and made minor changes in style. Amendment effective July 1, 2015.

1993 Amendment: Chapter 328 substituted language concerning effect of registration for former section that read: "(1) Upon registration the registered foreign support order shall be treated in the same manner as a support order issued by a court of this state. It has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a support order of this state and may be enforced and satisfied in like manner.

(2) The obligor has 20 days after the mailing of notice of the registration in which to petition the court to vacate the registration or for other relief. If he does not so petition, the registered support order is confirmed.

(3) At the hearing to enforce the registered support order, the obligor may present only matters that would be available to him as defenses in an action to enforce a foreign money judgment. If he shows to the court that an appeal from the order is pending or will be taken or that a stay of execution has been granted, the court shall stay enforcement of the order until the appeal is concluded, the time for appeal has expired, or the order is vacated, upon satisfactory proof that the obligor has furnished security for payment of the support ordered as required by the rendering state. If he shows to the court any ground upon which enforcement of a support order of this state may be stayed, the court shall stay enforcement of the order for an appropriate period if the obligor furnishes the same security for payment of the support ordered that is required for a support order of this state."

Source: Section 603, UIFSA.

Case Notes

Refusal to Terminate Parental Rights and Grant Petition for Adoption Proper: In an adoption proceeding, the stepfather petitioned to adopt his wife's child and sought to terminate the parental rights of the natural father of the child on the sole basis that the natural father was an unfit parent because he had failed to pay child support during the year prior to the filing of the petition for adoption. The District Court refused to terminate the parental rights of the natural father based on an existing child support order that set the amount of child support due at zero. On appeal, the Supreme Court affirmed, concluding that the natural father could not be declared unfit and have his parental rights terminated and his child adopted after complying with a valid court order specifying a child support obligation, albeit one of "zero". In re Adoption of P.T.H., 2015 MT 316, 381 Mont. 373, 364 P.3d 1235.

Attorney General's Opinions

OPINIONS UNDER FORMER LAW

Registration and Enforcement by Private Attorney: A private attorney may register and enforce a foreign support order under the Revised Uniform Reciprocal Enforcement of Support Act (1968) (replaced by UIFSA) in Montana. 40 A.G. Op. 72 (1984).

40-5-1058. Choice of law.

Official Comments

This section identifies situations in which local law is inapplicable. For example, under subsection (a) [(1)] an order for the support of a child until age 21 must be recognized and enforced in that manner in a state in which the duty of support of a child ends at age 18. See Gonzalez-Goengaga v. Gonzalez, 426 So.2d 1106 (Fla. App. 1983); Taylor v. Taylor, 122 Cal. App. 3d 209, 175 Cal. Rptr. 716 (1981).

Subsection (b) [(2)] contains a similar choice of law provision that may diverge from local law. Whichever state's statute of limitations is longer is to be applied. In interstate cases arrearages will often have accumulated over a considerable period of time before enforcement is perfected. The obligor should not gain an undue benefit from the choice of residence if the forum state has a short statute of limitations for arrearages.

Compiler's Comments

2015 Amendment: Chapter 174 substituted current text for former text that read: "(1) The law of the issuing state governs the nature, extent, amount, and duration of current payments and other obligations of support and the payment of arrearages under the order.

(2) In a proceeding for arrearages, the statute of limitations under the laws of this state or of the issuing state, whichever is longer, applies." Amendment effective July 1, 2015.

Source: Section 604, UIFSA.

40-5-1059. Notice of registration of order.

Official Comments

Part B of Article 6 [Sections 40-5-188 through 40-5-191, renumbered 40-5-1059 through 40-5-1062] provides the procedure for the nonregistering party to contest registration of an order, either because the order is allegedly invalid, superseded, or no longer in effect, or because the enforcement remedy being sought is opposed by the nonregistering party.

This section provides that the nonregistering party must be fully informed of the effect of registration. After such notice is given, absent a successful contest by the nonregistering party, the order will be confirmed and future contest will be precluded.

Compiler's Comments

2019 Amendment: Chapter 131 in (2)(a) after "that a registered" inserted "support". Amendment effective October 1, 2019.

2015 Amendment: Chapter 174 in (1) in first sentence after "another state" inserted "or a foreign support order" and after "tribunal" inserted "of this state"; in (2)(b) substituted "notice unless the registered order is under 40-5-1079" for "the date of mailing or personal service of the notice"; deleted former (2)(c)(ii) that read: "(ii) precludes further contest of that order with respect to any matter that could have been asserted"; inserted (3) providing notice requirements if two or more orders are in effect; in (4) after "enforcement" inserted "the support enforcement agency or"; and made minor changes in style. Amendment effective July 1, 2015.

1997 Amendment: Chapter 552 in (1) deleted requirement that notice be by first-class or certified mail or by any type of personal service authorized by the law of this state; and in (3), at end, substituted "the income-withholding laws of this state" for "Title 40, Chapter 5, part 4". Amendment effective July 1, 1997.

Source: Section 605, UIFSA.

40-5-1060. Procedure to contest validity or enforcement of registered support order.

Official Comments

Subsection (a) [(1)] is derived in part from RURESA § 40(b) [40-5-141(2), renumbered 40-5-1057], under which the "obligor" is directed to contest the registration of a foreign order within a short period of time. This procedure is continued, but the terminology is changed to "nonregistering party" because either the obligor or the obligee may seek to register a foreign support order. Moreover, the subsection is philosophically very different from RURESA § 40 [40-5-141, renumbered 40-5-1057], which directs that a registered order "shall be treated in the same manner as a support order issued by a court of this state." A contest of the fundamental provisions of the registered order is not permitted "in this State." The nonregistering party must return to the issuing state to prosecute such a contest, and then only as the law of that state permits. The procedure adopted here is akin to the prohibition of the nonparentage defense found in Section 315 [40-5-174, renumbered 40-5-1035]; that is, raising the issue in a UIFSA proceeding is prohibited, but no attempt is made to preclude the issue from being litigated in another, more appropriate forum if otherwise allowable by that forum. On the other hand, the respondent may assert defenses such as "payment" or "the obligation has terminated" to allegations of past noncompliance with the registered order. Similarly, a constitutionally-based attack may always be asserted, *i.e.*, an alleged lack of personal jurisdiction over a party by the issuing tribunal. There is no defense, however, to the registration of a valid foreign support order.

Subsection (b) [(2)] precludes an untimely contest of a registered support order. As noted above, the nonregistering party is free to seek redress in the issuing state from the tribunal with continuing, exclusive jurisdiction over the support order.

Subsection (c) [(3)] directs that a hearing be scheduled when the nonregistering party contests some aspect of the registration. At present, federal regulations govern the allowable time frames for contesting income withholding in IV-D cases. See 42 U.S.C. § 666(b). Further codification of that process is unwise.

Compiler's Comments

2015 Amendment: Chapter 174 in (1) in first sentence at end substituted "the time required by 40-5-188 [renumbered 40-5-1059]" for "20 days after the date of mailing or personal service of notice of the registration", in third sentence substituted "support enforcement agency" for "department", and in last sentence after "may" deleted "pursuant to 40-5-190" and after "arrearages" inserted "pursuant to 40-5-190 [renumbered 40-5-1061]"; in (1), (2), and (3) substituted "registered support order" for "registered order"; and made minor changes in style. Amendment effective July 1, 2015.

1997 Amendments: Chapter 482 in (1) inserted second sentence authorizing court hearing conducted by teleconferencing methods, third sentence requiring initial Department hearing conducted by teleconferencing pursuant to administrative rulemaking procedures, and fourth sentence requiring Department, following teleconferencing hearing, to grant de novo in-person hearing upon request or upon showing that party prejudiced by lack of in-person hearing. (See coordination instruction comment.) Amendment effective May 2, 1997.

Chapter 552 in (3) deleted requirement that notice be by first-class mail. Amendment effective July 1, 1997.

Coordination Instruction: Section 100, Ch. 552, L. 1997, a coordination section, deleted the amendment in (1), inserting the fourth sentence, that read: "At the request of a party or upon a showing that the party's case was substantially prejudiced by the lack of an in-person hearing, the department shall, following a teleconferencing hearing, grant a de novo in-person hearing."

Source: Section 606, UIFSA.

40-5-1061. Contest of registration or enforcement.

Official Comments

Subsection (a) [(1)] places the burden on the nonregistering party to assert narrowly defined defenses to registration of a support order.

If the obligor is liable for current support, under subsection (b) [(2)] the tribunal must enter an order to enforce that obligation. Proof of arrearages must result in enforcement; under the Bradley Amendment, 42 U.S.C. § 666(a)(10), all states are required to treat child support payments as final judgments as they come due (or lose federal funding). Therefore, such arrearages are not subject to retroactive modification.

Compiler's Comments

2015 Amendment: Chapter 174 throughout section in four places substituted reference to registered support order for reference to registered order; in (1)(g) before "arrearages" inserted "alleged"; inserted (1)(h) concerning alleged controlling order; in (2) in first sentence substituted "a tribunal" for "the registering tribunal"; and made minor changes in style. Amendment effective July 1, 2015.

Source: Section 607, UIFSA.

40-5-1062. Confirmed order.

Official Comments

The policy determination that foreign support orders may need to be confirmed by the forum tribunal is found in URESA § 40 [40-5-141, renumbered 40-5-1057], but the process of confirmation is not explained. Under UIFSA, confirmation of an order may be the result of operation of law because of a failure to contest or an unsuccessful contest after a hearing. Either method precludes raising any issue that could have been asserted in a hearing. Confirmation of a foreign support order validates both the terms of the order and the asserted arrearages. See Chapman v. Chapman, 205 Cal. App. 3d 253, 252 Cal. Rptr. 359 (1988).

Compiler's Comments

2015 Amendment: Chapter 174 after "registered" inserted "support". Amendment effective July 1, 2015.

Source: Section 608, UIFSA.

40-5-1063. Procedure to register child support order of another state for modification.

Official Comments

Part C of Article 6 [Sections 40-5-192 through 40-5-195, renumbered 40-5-1063 through 40-5-1068] deals with situations in which it is necessary for a registering state to modify the existing child support order of another state. As long as the issuing state maintains its continuing, exclusive jurisdiction over its order, a registering sister state is precluded from modifying that order. This is a very significant departure from the multiple-order, multiple-modification system of RURESA. However, if the issuing state no longer has a sufficient interest in the modification of its order because neither the child nor the parties continue to reside there, under appropriate circumstances a registering state may assume the power to modify. Note that authority to modify is limited to child support orders; the Act does not contemplate modification of spousal support orders.

A petitioner wishing to register a support order of another state for purposes of modification must conform to the general requirements for pleadings in Section 311 [40-5-171, renumbered 40-5-1031] (Pleadings and Accompanying Documents), and follow the procedure for registration set forth in Section 602 [40-5-185, renumbered 40-5-1056] (Procedure To Register Order for Enforcement). If the tribunal has the requisite jurisdiction over the parties as established in § 611 [40-5-194, renumbered 40-5-1065, 40-5-1067, and 40-5-1068], modification may be sought in conjunction with registration and enforcement, or at a later date after the order has been registered, confirmed, and enforced.

Compiler's Comments

2019 Amendment: Chapter 131 in first sentence after "40-5-1062" deleted "and 40-5-271". Amendment effective October 1, 2019.

2015 Amendment: Chapter 174 in first sentence substituted "40-5-184 through 40-5-191 [renumbered 40-5-1055 through 40-5-1062]" for "40-5-184 through 40-5-186, 40-5-188"; and made minor changes in style. Amendment effective July 1, 2015.

Source: Section 609, UIFSA.

40-5-1064. Effect of registration for modification.

Official Comments

An order registered for purposes of modification may be enforced in the same manner as an order registered for purposes of enforcement. But, the power of the forum tribunal to modify a child support order of another tribunal is limited by the specific factual preconditions set forth in § 611 [40-5-194, renumbered 40-5-1065, 40-5-1067, and 40-5-1068].

Compiler's Comments

2019 Amendment: Chapter 131 substituted "40-5-1065 or 40-5-1067" for "40-5-1065, 40-5-1067, and 40-5-1068". Amendment effective October 1, 2019.

2015 Amendment: Chapter 174 substituted "registered support order" for "registered order"; and made minor changes in style. Amendment effective July 1, 2015.

Source: Section 610, UIFSA.

40-5-1065. Modification of child support order of another state.

Official Comments

When a foreign support order is enforced in a registering state under UIFSA, the rights of the parties affected have been litigated previously. Because the obligor already has had a day in court, an enforcement remedy may be summarily invoked. On the other hand, modification of an existing order presupposes a change in the rights of the parties. Therefore, even under RURESA more elaborate procedures were required by most states prior to the issuance of a modified order. These requirements are much more explicit and restrictive under UIFSA.

A support order registered under RURESA for the purpose of enforcement is treated as if originally issued by the registering tribunal. Most states have interpreted the RURESA registration provisions as also authorizing prospective modification of the registered order, see, *e.g.*, Lagerwey v. Lagerwey, 681 P.2d 309 (Alaska 1984); In re Marriage of Aron, 224 Cal. App. 3d 1086 (1990); MacFadden v. Martini, 119 Misc. 2d 94, 463 N.Y.S.2d 674 (1983); Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633 (1977). In sum, by its terms RURESA contemplates existence of multiple support orders, none of which is directly related to any of the others. Although the issuing tribunal under RURESA retains continuing jurisdiction to modify its own order, that power is not exclusive. Tribunals in other states often assume jurisdiction to enter new orders or to modify an out-of-state support order.

Under UIFSA a tribunal may modify an existing child support order of another state only if certain quite limited conditions are met. First, the tribunal must have all the prerequisites for the exercise of personal jurisdiction required for rendition of an original support order. Second, one of the restricted fact situations described in subsection (a) [(1)] must be present. This section, which is a counterpart to Section 205(b) [40-5-149(2), renumbered 40-5-1012(2)] (Continuing, Exclusive Jurisdiction), establishes the conditions under which the continuing jurisdiction of the issuing tribunal is released. The Uniform Child Custody Jurisdiction Act §§ 12-14 [40-7-113 through 40-7-115, all now repealed] provides general principles for the judicial determination of an appropriate fact situation for subsequent modification of an existing custody order by another court. In contrast, UIFSA establishes a set of "bright line" rules for modification of an existing child support order.

Under UIFSA, registration is subdivided into distinct categories: registration for enforcement, for modification, or both. Subsection (a) [(1)] contemplates modification of an existing child support order only under the limited circumstances described, thus eliminating multiple support orders to the maximum extent possible consistent with the principle of continuing, exclusive jurisdiction that pervades the Act. The continuing, exclusive jurisdiction of the issuing tribunal remains intact so long as one party or the child continue to reside in the issuing state, or unless the parties mutually agree to the contrary. This is also the standard for recognition of sister state custody orders under the federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A. Once every individual party and the child leave the issuing state, the continuing, exclusive jurisdiction of the tribunal terminates, although the order remains in effect and enforceable until it is modified. If and when the order is modified by a tribunal of another state, the principle of continuing, exclusive jurisdiction is further ratified; the order of the modifying tribunal becomes the operative "only-order-in-effect."

Under subsection (a)(1) [(1)(a)], all persons affected by the initial order must have moved from the issuing state before a tribunal in a new forum may modify. In virtually all cases, the new forum will be the state of residence of either obligor or obligee. Proof of this may be made directly in the forum state; no purpose would be served by requiring the petitioner to return to the original issuing state for a document to confirm the fact that none of the relevant persons still lives there.

Note that subsection (a)(1) [(1)(a)] requires that the petitioner be a nonresident of the forum in which modification is sought and the respondent to be subject to the jurisdiction of that forum. This contemplates that the issuing state has lost continuing, exclusive jurisdiction and that the obligee may seek modification in the obligor's state of residence, or that the obligor may seek a modification in the obligee's state of residence. This restriction attempts to achieve a rough justice between the parties in the majority of cases by preventing a litigant from choosing to seek modification in a local court to the marked disadvantage of the other party. For example, an obligor visiting the children at the residence of the obligee cannot be validly served with citation accompanied by a motion to modify the support order. Even though such personal service of the obligor in the obligee's home state is consistent with the jurisdictional requisites of Burnham v. Superior Court, 495 U.S. 604 (1990), the motion to modify does not fulfill the requirement of being brought by "a [petitioner] who is a nonresident of this State ...." The obligee is required to make that motion in a state other than that of his or her residence which has personal jurisdiction over the obligor. Most typically this will be the state of residence of the obligor. Similarly, fairness requires that an obligee seeking to modify or modify and enforce the existing order in the state of residence of the obligor will not be subject to a cross-motion to modify custody or visitation merely because the issuing state has lost its continuing, exclusive jurisdiction over the support order. The obligor is required to make that motion in a state other than that of his or her residence; most likely, the obligee's state of residence. Finally, note that if both parties have left the issuing state and now reside in the same state, this section is not applicable. Such a fact situation does not present an interstate matter and UIFSA does not apply. Rather, the issuing state has lost its continuing exclusive jurisdiction and the forum state, as the residence of both parties, should apply local law without regard to the interstate Act.

Subsection (a)(2) [(1)(b)] allows the parties to terminate the continuing jurisdiction of the issuing state by agreement even though one of the parties or the child maintains a significant nexus with the issuing state. In contrast to subsection (a)(1) [(1)(a)], this must be initiated and confirmed by the issuing state and a copy of such an agreement must be filed in the issuing tribunal.

Modification of child support under subsections (a)(1) [(1)(a)] and (a)(2) [(1)(b)] is distinct from custody modification under the federal Parental Kidnapping Prevention Act, 42 U.S.C. § 1738A, which provides that the court of continuing, exclusive jurisdiction may "decline jurisdiction." Similar provisions are found in the UCCJA, § 14 [40-7-115, now repealed]. In those statutes the methodology for the declination of jurisdiction is not spelled out, but rather is left to the discretion of possibly competing courts for case-by-case determination. The privilege of declining jurisdiction, thereby creating the potential for a vacuum, is not authorized under UIFSA. Once an initial child support order is established, at all times thereafter there is an existing order in effect to be enforced. Even if the issuing court no longer has continuing, exclusive jurisdiction, its order remains fully enforceable until a court with modification jurisdiction issues a new order in conformance with this article.

Subsection (b) [(2)] states that if the forum has modification jurisdiction because the issuing state has lost continuing jurisdiction, the proceedings will generally follow local law with regard to modification of child support orders. However, subsection (c) [(3)] prevents the modification of any final, nonmodifiable aspect of the original order. For example, if child support was ordered through age 21 in accordance with the law of the issuing state and the law of the forum state ends the support obligation at 18, modification by the forum tribunal may not affect the duration of the support order to age 21.

Subsection (d) [(4)] provides that upon modification the new order becomes the one-order to be recognized by all UIFSA states, and the issuing tribunal acquires continuing, exclusive jurisdiction.

Finally, subsection (e) [(5)] directs that the original issuing state be notified that it no longer is responsible to exercise its continuing, exclusive jurisdiction.

Compiler's Comments

2015 Amendment: Chapter 174 substituted current text in (1) concerning requirements for modifying child support order issued in another state for former text that read: "(1) After a child support order issued in another state has been registered in this state, the responding tribunal of this state may modify that order only if subsection (5) does not apply, and after notice and hearing, it finds that:

(a) the following requirements are met:

(i) the child, the individual obligee, and the obligor do not reside in the issuing state;

(ii) a petitioner who is a nonresident of this state seeks modification; and

(iii) the respondent is subject to the personal jurisdiction of the tribunal of this state; or

(b) the child or a party who is an individual is subject to the personal jurisdiction of the tribunal of this state and all of the parties who are individuals have filed written consents in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction over the order. However, if the issuing state is a foreign jurisdiction that has not enacted a law or established procedures substantially similar to the procedures under this part, the consent otherwise required of an individual residing in this state is not required for the tribunal to assume jurisdiction to modify the child support order"; in (3) at end of first sentence inserted "including the duration of the obligation of support"; inserted (4) concerning law governing duration of obligation of support; in (5) before "modifying" inserted "by a tribunal of this state" and substituted "becomes the tribunal having" for "has"; inserted (6) concerning retention of jurisdiction; and made minor changes in style. Amendment effective July 1, 2015.

1997 Amendment: Chapter 552 in introductory clause of (1) inserted "subsection (5) does not apply, and"; in (1)(b), after "jurisdiction of the tribunal", inserted "of this state" and substituted "have filed written consents in the issuing tribunal for a tribunal of this state to modify the support order and assume" for "have filed in the issuing tribunal a written consent providing that the appropriate tribunal of this state may modify the support order and that this state may assume" and inserted second sentence stating that the consent otherwise required of an individual in this state is not required for the tribunal to assume jurisdiction if the issuing state is a foreign jurisdiction that has not enacted a law or established procedures substantially similar to the procedures in this part; in (3) substituted "A tribunal of this state may not modify any aspect of a child support order that may not be modified under the laws of the issuing state" for "A tribunal of this state may modify only a child support order. A tribunal may not modify provisions, such as custody, visitation, or other provisions not related to support" and at end inserted sentence stating that if two or more tribunals have issued support orders for the same obligor and child, the order that controls under 40-5-151 establishes the aspects of the order that are nonmodifiable; inserted (5) regarding jurisdiction if all the parties who are individuals reside in this state and the child does not reside in the issuing state; in introductory clause of (6) substituted "party obtaining" for "tribunal issuing"; in (6)(b) substituted "party" for "modifying tribunal"; inserted (7) stating the sanctions and effect on a party who fails to file a copy of an order; and made minor changes in style. Amendment effective July 1, 1997.

Source: Section 611, UIFSA.

40-5-1066. Recognition of order modified in another state.

Official Comments

Independent support orders relating to the same parties, a hallmark of RURESA, are replaced in UIFSA by deference to the support order of a sister state. This applies not just to the original order, but also to a modified child support order issued by a second state under the standards established by Section 611 [40-5-194, renumbered 40-5-1065, 40-5-1067, and 40-5-1068] (Modification of Child Support Order of Another State). For the Act to function properly, the original issuing state must recognize and defer to such a modified order, and must regard its prior order as prospectively inoperative. Because the modifying tribunal lacks the authority to direct the original issuing state to release its continuing jurisdiction, each state must recognize this effect by enacting UIFSA.

Power is retained over post-modification by the original issuing tribunal for remedial actions directly connected to its now-modified order. A tribunal may enforce its subsequently modified order for violations of that order which occurred before the modification. Further, aspects of the original order that have become final or are not modifiable may be prospectively enforced by the issuing tribunal. For example, a contractual obligation to provide a college education trust fund for a child may be enforced under the law of the issuing state irrespective of the law of the modifying state.

Compiler's Comments

2015 Amendment: Chapter 174 substituted current text for former text that read: "A tribunal of this state shall recognize a modification of its earlier child support order by a tribunal of another state that assumed jurisdiction pursuant to this part or a law substantially similar to this part. Except as otherwise provided in this part, the tribunal of this state shall, upon request:

(1) enforce the order that was modified only as to amounts accruing before the modification;

(2) enforce only nonmodifiable aspects of that order;

(3) provide other appropriate relief only for violations of the order that occurred before the effective date of the modification; and

(4) recognize the modifying order of the other state, upon registration, for the purpose of enforcement." Amendment effective July 1, 2015.

1997 Amendment: Chapter 552 in first sentence of introductory clause inserted "this part or". Amendment effective July 1, 1997.

Source: Section 612, UIFSA.

40-5-1067. Jurisdiction to modify child support order of another state when individual parties reside in this state.

Compiler's Comments

2019 Amendment: Chapter 131 in (2) substituted "40-5-1046 through 40-5-1052" for "40-5-1052" and substituted "40-5-1073 through 40-5-1085" for "40-5-1073 through 40-5-1080". Amendment effective October 1, 2019.

2015 Amendment: Chapter 174 substituted current text in (2) concerning applicability of law to proceedings for former text that read: "A tribunal of this state exercising jurisdiction under subsection (5)(a) shall apply the provisions of 40-5-103, 40-5-143 through 40-5-152, 40-5-181, and 40-5-184 through 40-5-195 to the enforcement or modification proceeding. The remaining sections of this part do not apply." Amendment effective July 1, 2015.

40-5-1068. Notice to issuing tribunal of modification.

Compiler's Comments

2019 Amendment: Chapter 131 in (2) at end substituted "having continuing, exclusive jurisdiction" for "of continuing, exclusive jurisdiction". Amendment effective October 1, 2019.

2015 Amendment: Chapter 174 made minor changes in style. Amendment effective July 1, 2015.

40-5-1069. Jurisdiction to modify child support order of foreign country.

Compiler's Comments

2019 Amendment: Chapter 131 in (1) after "40-5-1065" deleted "40-5-1067, and 40-5-1068". Amendment effective October 1, 2019.

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

40-5-1070. Procedure to register child support order of foreign country for modification.

Compiler's Comments

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

40-5-1073. Definitions.

Compiler's Comments

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

40-5-1074. Applicability.

Compiler's Comments

2019 Amendment: Chapter 131 substituted "40-5-1001 through 40-5-1005" for "40-5-1001 through 40-5-1004", substituted "40-5-1008 through 40-5-1018" for "40-5-1008, 40-5-1010 through 40-5-1017", and substituted "40-5-1055 through 40-5-1070" for "40-5-1055 through 40-5-1068"; and made minor changes in style. Amendment effective October 1, 2019.

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

40-5-1075. Relationship of department of public health and human services to United States central authority.

Compiler's Comments

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

40-5-1076. Initiation by department of public health and human services of support proceeding under convention.

Compiler's Comments

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

40-5-1077. Direct request.

Compiler's Comments

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

40-5-1078. Registration of convention support order.

Compiler's Comments

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

40-5-1079. Contest of registered convention support order.

Compiler's Comments

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

Code Commissioner Correction: In (2), the code commissioner changed "content" to "contest" to correct a typographical error and to conform to the uniform act.

40-5-1080. Recognition and enforcement of registered convention support order.

Compiler's Comments

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

40-5-1081. Partial enforcement.

Compiler's Comments

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

40-5-1082. Foreign support agreement.

Compiler's Comments

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

40-5-1083. Modification of convention child support order.

Compiler's Comments

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

40-5-1084. Personal information — limit on use.

Compiler's Comments

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

40-5-1085. Record in original language — English translation.

Compiler's Comments

Effective Date: Sec. 73, Ch. 174, L. 2015, provided: "[This act] is effective July 1, 2015."

40-5-1088. Grounds for rendition.

Official Comments

This section tracks RURESA § 5 [40-5-106, renumbered 40-5-1088] (Interstate Rendition) with no substantive change. Virtually no controversy has been generated regarding this portion of RURESA. Arguably application of subsection (c) [(2)] is problematical in situations in which the obligor neither was present in the demanding state at the time of the commission of the crime nor fled from the demanding state. The possibility that an individual may commit a crime in a state without ever being physically present there has elicited considerable discussion and some case law. See L. Brilmayer, "An Introduction to Jurisdiction in the American Federal System," 329-335 (1986) (discussing minimum contacts theory for criminal jurisdiction); Rotenberg, "Extraterritorial Legislative Jurisdiction and the State Criminal Law," 38 Tex. L. Rev. 763, 784-87 (1960) (due process requires defendant's behavior must be predictably subject to state's criminal jurisdiction); cf. Ex parte Boetscher, 812 S.W.2d 600 (Tex. Crim. App. 1991) (Equal

Protection Clause limits disparate treatment of nonresident defendants); In re King, 3 Cal.3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 (1970, cert. denied 403 U.S. 931) (enhanced offense for nonresidents impacts constitutional right to travel).

Compiler's Comments

2015 Amendment: Chapter 174 inserted (1) defining governor; and made minor changes in style. Amendment effective July 1, 2015.

1993 Amendment: Chapter 328 in (2), in first sentence after "extradition of", substituted "individuals" for "criminals" and deleted second sentence providing that a demand, oath, and extradition proceeding need not show that the person has fled from justice or was in the demanding state at the time of the commission of the alleged crime; and made minor changes in style.

Source: Section 801, UIFSA.

Case Notes

DECISIONS UNDER FORMER LAW

Extradition for Criminal Nonsupport: Although a child support order issued by another state is a civil and not a criminal action, failure to pay the support may be a crime (felony criminal nonsupport) in that state, and the defendant is subject to extradition for criminal proceedings. Crabtree v. St., 186 M 340, 607 P2d 566 (1980).

Modification of Support Decree: When Montana and Idaho courts made child support awards without mention of original Nevada award under the Uniform Reciprocal Enforcement of Support Act (replaced by UIFSA), the initial decree remained valid and unmodified and was entitled to full faith and credit by the courts of Montana. Campbell v. Jenne, 172 M 219, 563 P2d 574 (1977).

40-5-1089. Conditions of rendition.

Official Comments

This section tracks RURESA § 6 [40-5-107, renumbered 40-5-1089] (Conditions of Interstate Rendition) without significant change. Interstate rendition remains the last resort for support enforcement, in part because a governor may exercise considerable discretion in deciding whether to honor a demand for an obligor.

Compiler's Comments

2015 Amendment: Chapter 174 in (1) after "support of" deleted "a child or to pay support to"; in (2) near beginning of first sentence after "part" deleted "the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act" and in middle after "child or" substituted "other individual to whom a duty of support is owed" for "to pay support to an obligee"; in (2) in two places and (3) in two places after "governor" deleted "of this state"; and made minor changes in style. Amendment effective July 1, 2015.

2001 Amendment: Chapter 352 in (1) near end of introductory clause and in (2) near end of first sentence substituted "prosecutor" for "prosecuting attorney". Amendment effective April 23, 2001.

1993 Amendment: Chapter 328 in (1) and (2), after "support of", substituted "a child or to pay support to an obligee" for "a person"; in (2) inserted references to the Uniform Reciprocal Enforcement of Support Act and Revised Uniform Reciprocal Enforcement of Support Act; in (3) substituted "petitioner" for "obligee"; and made minor changes in style.

Source: Section 802, UIFSA.

40-5-1092. Uniformity of application and construction.

Compiler's Comments

2015 Amendment: Chapter 174 substituted current text for former text that read: "This part must be so construed as to effectuate its general purpose to make uniform the law with respect to the subject of this part among states enacting it." Amendment effective July 1, 2015.

1993 Amendment: Chapter 328 after "law" substituted "with respect to the subject of this part among" for "of those"; and made minor changes in style.

Source: Section 901, UIFSA.

CHAPTER 6
PARENT AND CHILD

Chapter Case Notes

Purpose and Applicability of Federal Parental Kidnapping Prevention Act: The federal Parental Kidnapping Prevention Act of 1980 (28 U.S.C. 1738A), enacted by Congress to address the problems of interstate forum shopping and child snatching, established national standards under which jurisdictions could determine whether they had jurisdiction and what effect to give the decisions made by courts of other jurisdictions by requiring that full faith and credit be accorded to decisions of a jurisdiction if the court appropriately exercised jurisdiction under the federal standards. The Act's general purposes are to promote cooperation and the exchange of information between state courts, to facilitate the enforcement of custody decisions of sister states, and to discourage continuing interstate controversies over child custody. The Act does not apply in a case in which there is no other state competing for jurisdiction. In re Marriage of Erler, 261 M 65, 862 P2d 12, 50 St. Rep. 1195 (1993).

Chapter Law Review Articles

Family Mediation After Hendershott: The Case for Uniform Domestic Violence Screening and Opt-In Provision in Montana, Capulong, 74 Mont. L. Rev. 273 (2013).

Lesbian and Gay Parenting: The Last Thirty Years, Polikoff, 66 Mont. L. Rev. 51 (2005).

Family Law, Snyder & Sharrock, 40 Mont. L. Rev. 75 (1979).

Recent Developments in Family Law in Montana, Mahon, 39 Mont. L. Rev. 1 (1978).

Parent and Child—Statutes of Limitations, Special Issue Mont. L. Rev. 95 (1977).

Presumptions Concerning Parent and Child, Clarke, 37 Mont. L. Rev. 102 (1976).

Part 1
Uniform Parentage Act

Part Compiler's Comments

Severability Clause: Section 30, Ch. 512, L. 1975 read: "If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable."

Part Case Notes

No Award of Attorney Fees in Paternity Action: Montana statutes do not provide for the award of attorney fees in a paternity action, and failure of the trial court to do so did not constitute reversible error. In re Paternity of W.L., 259 M 187, 855 P2d 521, 50 St. Rep. 751 (1993).

Venue — Action for Approval of Parental Release: Section 40-6-109 does not provide significant guidance as to venue in an action to obtain court approval of a parental release. Venue in such an action was properly in Cascade County, since the child was born in Cascade County and the natural mother was a resident of Cascade County. The ends of justice would not be served by filing the petition in Missoula County, the residence of the prospective adoptive parents. In re Adoption of B.G.B., 183 M 347, 599 P2d 375 (1979).

Part Collateral References

Paternity, https://courts.mt.gov/Forms/Paternity.

Paternity, https://MontanaLawHelp.org.

40-6-101. Short title.

Compiler's Comments

Source: Section 26, Uniform Parentage Act.

40-6-102. Definitions.

Compiler's Comments

2019 Amendment: Chapter 364 deleted former definition of blood test (see 2019 Session Law for former text); inserted definition of paternity test (see former definition of blood test in 2019 Session Law for similar language); and made minor changes in style. Amendment effective October 1, 2019.

1997 Amendment: Chapter 552 in definition of blood test inserted second and third sentences stating how genetic markers may be identified and how a sample may be taken. Amendment effective July 1, 1997.

1995 Amendment: Chapter 70 inserted definitions of blood test and support judgment or support order; and made minor changes in style. Amendment effective July 1, 1995.

Source: Section 1, Uniform Parentage Act. See commissioners' comment to 40-6-103.

40-6-103. Relationship not dependent on marriage.

Commissioners' Comment

Sections 1 and 2 [40-6-102, 40-6-103], the major substantive sections of the Act, establish the principles that regardless of the marital status of the parents, all children and all parents have equal rights with respect to each other...[R]ecent U.S. Supreme Court decisions and lower federal and state court decisions require equality of treatment in most areas of substantive law. See, generally, H. Krause, Illegitimacy: Law and Social Policy 59-104 (1971).

The first two cases to reach the U.S. Supreme Court concerned Louisiana's wrongful death statute and held that statute unconstitutional insofar as it (1) discriminated against illegitimate children, holding them ineligible to recover for the wrongful death of their mother (Levy v. Louisiana, 88 S.Ct. 1509, 391 U.S. 68 (1968)) and (2) denied a mother recovery for the wrongful death of her child (Glona v. American Guarantee & Liability Insurance Co., 88 S.Ct. 1515, 391 U.S. 73 (1968)).

It was a surprise when, within three years of deciding Levy and Glona, the U.S. Supreme Court reached a conclusion seemingly at odds with Levy and Glona. The Court had occasion to reconsider the question of the illegitimate child's legal position in a case involving inheritance, and refused to extend Levy v. Glona to permit an acknowledged illegitimate child to inherit from his intestate father under Louisiana law. (Labine v. Vincent, 91 S.Ct. 1017, 401 U.S. 532 (1971).)

The surprise engendered by the Labine decision was surpassed when the Supreme Court again reversed its position on this subject in 1972. In a dramatic departure from Labine, the U.S. Supreme Court held that workmen's compensation benefits related to the death of their father are due dependent, unacknowledged, illegitimate children. (Weber v. Aetna Casualty & Surety Co., 92 S.Ct. 1400, 406 U.S. 164 (1972).) In January, 1973, the U.S. Supreme Court, finally substituting consistency for vacillation on this subject, decided that the illegitimate child is guaranteed a right of support from his father. (Gomez v. Perez, 93 S.Ct. 872 (1973).)

These decisions engendered a large number of decisions by lower federal courts and state courts at all levels which have broadly extended the legal relationship between the father and his child born out of wedlock. It should be noted, however, that several states had previously provided full (or nearly full) legal equality to illegitimates. To illustrate, Ore.Rev.Stat. § 109.060 (1969) provides:

"[t]he legal status and legal relationships and the rights and obligations between a person and his descendants, and between a person and his parents, their descendants and kindred, are the same for all persons, whether or not the parents have been married."

See, also, N.D.Cent.Code § 56-01-05 (Supp.1969); Ariz.Rev.Stat.Ann. § 14-206 (1956); Alaska Stat. 95.20.050(a) (1962).

Compiler's Comments

Source: Section 2, Uniform Parentage Act.

Case Notes

Failure to Object to Order for Paternity Testing Constituting Waiver of Presumption of Paternity and Right to Appeal: A woman had an extramarital affair and became pregnant. Her husband forgave her, and the couple asked the biological father to relinquish any paternity claim so that they could raise the baby in their family, but the father refused and petitioned for a determination of paternity. The District Court allowed the husband's presumption of paternity to be rebutted with genetic testing, and the couple did not object to the test. The couple later asserted that the District Court erred in allowing rebuttal of paternity. The Supreme Court held that the couple waived the presumption of paternity and did not preserve the issue for appeal when they failed to object at the paternity hearing that genetic testing take place. The District Court was affirmed. In re Parenting of K.P., 2005 MT 297, 329 M 337, 124 P3d 1091 (2005).

40-6-104. How parent and child relationship established.

Commissioners' Comment

This section introduces that portion of the act which deals with the ascertainment of parentage.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Source: Section 3, Uniform Parentage Act.

Montana Changes: In Montana, the reference in the Uniform Act to the Revised Uniform Adoption Act in subsection 3 is omitted.

Law Review Articles

Recognizing Parental Consortium: Montana Follows a National Trend in Pence v. Fox, Vannatta, 54 Mont. L. Rev. 149 (1993).

40-6-105. Presumption of paternity.

Commissioners' Comment

In the situations described in subsection (a) [(1)], substantial evidence points to a particular man as being the father of the child and formal proceedings to establish paternity are not necessary. A presumption of paternity arises in the described circumstances. Most of the situations correspond to the instances in which current state law imposes a presumption of legitimacy.

Subsection (b)[(2)] contemplates that a presumption raised under subsection (a)[(1)] may be rebutted in appropriate circumstances. In accordance with current law in most states relating to the rebuttal of a presumption of "legitimacy", the presumption is difficult to rebut in that proof must be made by "clear and convincing evidence." Other details are covered in sections 6(a) and (b) [40-6-107(1) and (2)].

Compiler's Comments

2019 Amendment: Chapter 364 in (1)(f) and 3(b) substituted "paternity test" for "blood test". Amendment effective October 1, 2019.

1997 Amendment: Chapter 552 in (1)(c)(i), at end, deleted "or with the district court for the county where the person resides or for any county where the child support enforcement division of the department of public health and human services maintains a regional office"; in (1)(e), at end of first sentence, deleted "and filed with the department or with the district court of the county where the person resides or for any county where the child support enforcement division of the department of public health and human services maintains a regional office", in third sentence substituted "make written and oral information available" for "provide information", and at end inserted "The presumption of paternity is created when the acknowledgment is filed with the department"; inserted (1)(g) providing "the person is presumed to be the child's natural father under the laws of the state or Indian territory in which the child was born"; inserted exception clause at beginning of (3); inserted (3)(b) providing "by scientific evidence resulting from a blood test that excludes the person as the child's natural parent"; inserted (4)(b) providing that one may only be relieved of support payments that follow the date that a presumption is rebutted or set aside; inserted (5)(a), (5)(b), and (5)(c) relating to rescinding of an acknowledgment of paternity, providing when an acknowledgment becomes an irrebuttable presumption of paternity, and stating the force and effect of an irrebuttable presumption of paternity, when it may be set aside, and the burden of proof; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendments — Composite Section: Chapter 70 at end of (1) inserted "any of the following occur"; at the beginning of (1)(c)(i) substituted "the child's mother and the child's alleged father have acknowledged the alleged father's paternity of the child in writing in accordance with subsection (1)(e) and the acknowledgment is filed" for "he has acknowledged his paternity in writing filed" and at end inserted "or for any county where the child support enforcement division of the department of social and rehabilitation services maintains a regional office"; at beginning of (1)(e) substituted "the child's mother and the child's alleged father acknowledge the alleged father's paternity of the child in a paternity acknowledgment form that is provided by the department of social and rehabilitation services and filed" for "he acknowledges his paternity of the child in a writing filed" and after "resides" substituted "or for any county where the child support enforcement division of the department of social and rehabilitation services maintains a regional office. The department of health and environmental sciences or the district court shall accept and file the completed form. As a part of a voluntary acknowledgment process, the department of social and rehabilitation services shall provide information to the parents regarding the rights and responsibilities of acknowledging paternity" for "which court or department shall promptly inform the mother of the filing of the acknowledgment, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the department of health and environmental sciences or with the district court of the county where the acknowledgment was filed"; inserted (1)(f) concerning the scientific evidence resulting from a blood test; inserted (2) providing that an acknowledgment is binding on a parent who executes it whether or not the parent is a minor; inserted (4) providing that a presumption of paternity established under this section is a sufficient basis for establishing a support order; and made minor changes in style. Amendment effective July 1, 1995. Pursuant to sec. 1, Ch. 546, L.

1995, the Code Commissioner has substituted references to the Department of Public Health and Human Services for references to the Department of Social and Rehabilitation Services.

Chapter 418 in (1)(c)(i) and two places in (1)(e) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (1)(c)(i) and (1)(e), in two places, substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, and sec. 571, Ch. 546, L. 1995, were saving clauses.

Source: Section 4, Uniform Parentage Act.

Montana Changes: The Montana act substitutes the presumptive language of subsection (2) for that in subsection (b) of the Uniform Act.

Case Notes

Speculation Insufficient to Rebut Presumption: Several years after the birth of their child, the mother claimed that the father was sterile and not the biological parent. The mother submitted personal observations, photographs, and Internet searches in support. The District Court ruled against the mother based on a DNA paternity test, the father's prior acknowledgment of paternity, and the mother's own acknowledgment of the father's paternity in a separate legal proceeding. On appeal, the mother argued that 40-6-105 does not require expert testimony to rebut the presumption of paternity. The Supreme Court ruled that while this section allows the presumption to be rebutted by a preponderance of the evidence, speculative evidence presented by the mother was insufficient to meet this standard. J.L.G. v. M.F.D., 2014 MT 114, 375 Mont. 16, 324 P.3d 355.

Failure to Object to Order for Paternity Testing Constituting Waiver of Presumption of Paternity and Right to Appeal: A woman had an extramarital affair and became pregnant. Her husband forgave her, and the couple asked the biological father to relinquish any paternity claim so that they could raise the baby in their family, but the father refused and petitioned for a determination of paternity. The District Court allowed the husband's presumption of paternity to be rebutted with genetic testing, and the couple did not object to the test. The couple later asserted that the District Court erred in allowing rebuttal of paternity. The Supreme Court held that the couple waived the presumption of paternity and did not preserve the issue for appeal when they failed to object at the paternity hearing that genetic testing take place. The District Court was affirmed. In re Parenting of K.P., 2005 MT 297, 329 M 337, 124 P3d 1091 (2005).

Mother Estopped From Denying Father's Paternity Also Precluded From Establishing Paternity in Another — No Equal Protection Violation Found — Standing to Establish Paternity: The Supreme Court held in In re Marriage of K.E.V. & M.L.V., 267 M 323, 883 P2d 1246 (1994), that after a common-law marriage to Kevin was dissolved, Margery, Kevin's former common-law wife, was estopped from denying Kevin's paternity of her daughter, Kathryn. After that decision, Margery brought a petition to have another man, Phillip, declared the father of Kathryn. The District Court dismissed the petition with prejudice and held that Margery was estopped from bringing the action, based upon the Supreme Court's decision in Marriage of K.E.V. and that Kathryn's siblings did not have standing to bring the action. The Supreme Court affirmed, holding that under Borchers v. McCarter, 181 M 169, 592 P2d 941 (1979), a person seeking to have Phillip named as the father of Kathryn must first rebut the presumption under this section that Kevin is the father. The Supreme Court held that under Marriage of K.E.V., Margery is equitably estopped from contesting the presumption of Kevin's paternity and therefore, under Borchers, Margery cannot establish Phillip's paternity. The Supreme Court noted that all of the cases raised by Margery in support of her argument that dismissal of her petition violates her right to equal protection were cases in which a parent asserted the the parent's own right to prove the parent's own paternity and not the paternity of someone else. Because Margery had shown no authority holding that one person had a fundamental right to establish the paternity of another, the Supreme Court held that Margery's right to equal protection had not been violated. Relying upon In re Estate of Goick, 275 M 13, 909 P2d 1165 (1996), the Supreme Court also held that because there was no evidence in the record showing how Kathryn's siblings would benefit from proving that Phillip is Kathryn's biological father, the siblings had no personal stake in the outcome of such a proceeding and therefore affirmed the District Court's holding that Kathryn's siblings did not have standing to petition the District Court. In re Paternity of Vainio, 284 M 229, 943 P2d 1282, 54 St. Rep. 858 (1997).

Biological Ties Not Controlling to Judicially Determine Parent/Child Relationship — "Best Interest of Child" Applied: The petitioner, who was recognized as the child's biological father, appealed from a District Court's determination that granting judicial paternity in the petitioner was not in the best interest of the child. In affirming the District Court decision denying paternity, the Supreme Court ruled that the best interest of the child test should be used in a paternity dispute under Montana's Uniform Parentage Act. The District Court correctly applied the best interest of the child test by considering the stability of the family relationship contrasted with the petitioner's failure to show any commitment in establishing a parental as opposed to a biological role. In re Paternity of "Adam", 273 M 351, 903 P2d 207, 52 St. Rep. 1026 (1995).

Equitable Estoppel of Presumption of Paternity: K.E.V. was told by M.L.V. that he was the father of her child. K.E.V. accepted his responsibilities and obligations as the child's father, purchasing maternity clothes for M.L.V., paying medical expenses related to the birth, being present at the birth, attempting to have his name listed as father on the birth certificate, and living with M.L.V. in a common-law marriage. Upon dissolution of the marriage, M.L.V. sought to deny that K.E.V. was the father of the child in order to secure sole custody, and uncontroverted medical tests in fact proved that K.E.V. was not the father. Nevertheless, the District Court properly applied the doctrine of equitable estoppel in preventing M.L.V. from contesting the presumed father-child relationship. To allow M.L.V. to assert a strict legal right in determining paternity would have allowed her to take unconscionable advantage of her own wrong. M.L.V. was properly estopped from bringing an action to rebut the presumption of paternity. In re Marriage of K.E.V. & M.L.V., 267 M 323, 883 P2d 1246, 51 St. Rep. 1055 (1994), followed in In re Paternity of Vainio, 284 M 229, 943 P2d 1282, 54 St. Rep. 858 (1997).

Paternity Contested After Adjudication of Marital Dissolution — Relitigation Barred by Collateral Estoppel: When paternity was contested in response to an action to collect past child support payments, the District Court properly ruled that the issue of paternity had previously been adjudicated during the marriage dissolution proceeding and that relitigation of the issue was barred by collateral estoppel. In re Marriage of Holland, 224 M 414, 730 P2d 410, 43 St. Rep. 2293 (1986).

Marriage After Birth — Father on Birth Certificate — Mutual Acknowledgment of Nonpaternity: The presumption that husband was the natural father of child arose when he married its mother after it was born and, with his consent, was named as the father on the birth certificate. This presumption was rebutted when, in proceeding upon mother's petition for dissolution of the marriage, she and her husband acknowledged under oath that he was not the natural father. Therefore, he could be granted custody of the child only in the capacity of a nonparent. The mother could be deprived of custody only upon a finding of unfitness, abuse, or neglect. The record supported the trial court's finding that the mother was unfit and unable to care for the child. Thus, the husband could be considered as a potential custodian and was granted custody. The trial court made no finding as to the wishes of the child because there was no evidence on this point. Though the wishes of the child would have little weight, as the child was only 4 years old, a remand was necessary for consideration of the child's wishes and a new custody determination. In re Custody of C.C., K.C., & B.C., 215 M 72, 695 P2d 816, 42 St. Rep. 190 (1985), overruled, with regard to use of marriage and divorce procedures in determination of appropriateness of custodianship for nonparent, in In re Marriage of Miller, 251 M 300, 825 P2d 189, 49 St. Rep. 36 (1992).

URESA Action — Rebuttal of Paternity Presumption: The issue of paternity in a Uniform Reciprocal Enforcement of Support Act (URESA) (replaced by UIFSA) action must be determined according to the provisions of the Uniform Parentage Act. Failure to rebut the presumption that petitioner's husband was the natural father of the child within 5 years of the child's birth bars a paternity action against a nonpresumed person. Borchers v. McCarter, 181 M 169, 592 P2d 941 (1979).

40-6-106. Artificial insemination.

Commissioners' Comment

This Act does not deal with many complex and serious legal problems raised by the practice of artificial insemination. It was thought useful, however, to single out and cover in this Act at least one fact situation that occurs frequently. Further consideration of other legal aspects of artificial insemination has been urged on the National Conference of Commissioners on Uniform

State Laws and is recommended to state legislators. A useful reference is Wadlington, Artificial Insemination: The Danger of a Poorly Kept Secret, 64 N.W.U.L.Rev. 777 (1970).

Compiler's Comments

1995 Amendments — Composite Section: Chapter 418 in third sentence of (1) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (1), in third sentence, substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, and sec. 571, Ch. 546, L. 1995, were saving clauses.

Source: Section 5, Uniform Parentage Act.

40-6-107. Determination of father and child relationship — who may bring action.

Commissioners' Comment

This section consists of two major parts. Subsections (a) [omitted in Montana] and (b) [(1)] deal with the action to declare or dispute the existence of the father and child relationship presumed under Section 4(a) [40-6-105(1)]. Attack on the presumptions based on marriage or on a relationship between the parents that resembles marriage is restricted to a limited circle of potential contestants and in point of time. Presumptions created in other circumstances may be attacked more freely.

Subsection (c) [(2)] defines who may bring the action to ascertain paternity when no presumption applies. It is made clear that the child may bring the action. Moreover, since the Act contemplates that the principal interest involved in the action is that of the child, Subsection (d) [(3)] does not permit an agreement between the mother and an alleged or presumed father to bar an action to ascertain paternity. Cf. Comment on Section 9 [40-6-110].

Compiler's Comments

1995 Amendment: Chapter 546 in (2) substituted "department of public health and human services" for "department of social and rehabilitation services or its appropriate local affiliate, the department of family services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1987 Amendment: Near middle of (2), after "affiliate", inserted "the department of family services or its appropriate local affiliate".

Source: Section 6, Uniform Parentage Act.

Montana Changes: The Montana version deleted subsection (a) of the Uniform Act and deleted the language "at any time" following the word "action" in subsection (b)[(1)]. See also 1987 amendment note.

Case Notes

Mother Estopped From Denying Father's Paternity Also Precluded From Establishing Paternity in Another — No Equal Protection Violation Found — Standing to Establish Paternity: The Supreme Court held in In re Marriage of K.E.V. & M.L.V., 267 M 323, 883 P2d 1246 (1994), that after a common-law marriage to Kevin was dissolved, Margery, Kevin's former common-law wife, was estopped from denying Kevin's paternity of her daughter, Kathryn. After that decision, Margery brought a petition to have another man, Phillip, declared the father of Kathryn. The District Court dismissed the petition with prejudice and held that Margery was estopped from bringing the action, based upon the Supreme Court's decision in Marriage of K.E.V. and that Kathryn's siblings did not have standing to bring the action. The Supreme Court affirmed, holding that under Borchers v. McCarter, 181 M 169, 592 P2d 941 (1979), a person seeking to have Phillip named as the father of Kathryn must first rebut the presumption under 40-6-105 that Kevin is the father. The Supreme Court held that under Marriage of K.E.V., Margery is equitably estopped from contesting the presumption of Kevin's paternity and therefore, under Borchers, Margery cannot establish Phillip's paternity. The Supreme Court noted that all of the cases raised by Margery in support of her argument that dismissal of her petition violates her right to equal protection were cases in which a parent asserted the the parent's own right to prove the parent's own paternity and not the paternity of someone else. Because Margery had shown no authority holding that one person had a fundamental right to establish the paternity of another, the Supreme Court held that Margery's right to equal protection had not been violated. Relying upon In re Estate of Goick, 275 M 13, 909 P2d 1165 (1996), the Supreme Court also held that because there was no evidence in the record showing how Kathryn's siblings would benefit from proving that Phillip is Kathryn's biological father, the siblings had no personal stake in the outcome of such a proceeding and therefore affirmed the District Court's holding that Kathryn's siblings did not have standing to petition the District Court. In re Paternity of Vainio, 284 M 229, 943 P2d 1282, 54 St. Rep. 858 (1997).

Paternity Contested After Adjudication of Marital Dissolution — Relitigation Barred by Collateral Estoppel: When paternity was contested in response to an action to collect past child support payments, the District Court properly ruled that the issue of paternity had previously been adjudicated during the marriage dissolution proceeding and that relitigation of the issue was barred by collateral estoppel. In re Marriage of Holland, 224 M 414, 730 P2d 410, 43 St. Rep. 2293 (1986).

URESA Action — Rebuttal of Paternity Presumption: The issue of paternity in a Uniform Reciprocal Enforcement of Support Act (URESA) (replaced by UIFSA) action must be determined according to the provisions of the Uniform Parentage Act. Failure to rebut the presumption that petitioner's husband was the natural father of the child within 5 years of the child's birth bars a paternity action against a nonpresumed person. Borchers v. McCarter, 181 M 169, 592 P2d 941 (1979).

40-6-108. Statute of limitations.

Compiler's Comments

1997 Amendment: Chapter 480 in (6), after "under", substituted "Title 42" for "Title 40, chapter 8"; and made minor changes in style.

Severability: Section 172, Ch. 480, L. 1997, was a severability clause.

Applicability: Section 173, Ch. 480, L. 1997 provided: "(1) [Sections 1 through 156] [Title 42, chapters 1 through 7, and Title 52, chapter 8, part 1] apply to proceedings commenced on or after October 1, 1997.

(2) A petition for adoption filed prior to October 1, 1997, is governed by the law in effect at the time the petition was filed.

(3) The putative father registry requirements apply to children born on or after October 1, 1997."

1993 Amendment: Chapter 373 in (1) near middle after "existence", inserted "or nonexistence"; deleted (1)(b) requiring that action for purpose of declaring nonexistence of presumed father and child relationship be brought within reasonable time after obtaining knowledge of relevant facts but not later than 5 years after child's birth; and made minor changes in style.

1991 Amendment: In (3)(b) inserted last two sentences relating to retroactively reviving previously barred paternity actions. Amendment effective March 29, 1991.

1987 Amendment: In (3)(b), at beginning, inserted "may be brought", after "state agency" substituted "at any time" for "later than 2 years", and at end inserted "and before the child attains the age of majority"; and inserted (4) limiting recoupment of public assistance payments.

1985 Amendment: In (3)(a) substituted "by the child later than 2 years after the child attains the age of majority" for "later than 3 years after the birth of the child"; and inserted (3)(b) that read: "by a state agency later than 2 years after the first application is made under Title IV-D of the Social Security Act for services to the child".

Source: Section 7, Uniform Parentage Act.

Montana Changes: This section varies significantly from the language and statutory periods of section 7 of the Uniform Act. See also 1985 and 1987 amendment notes.

Case Notes

Different Statute of Limitations Period for Illegitimate Child to Bring Paternity Action Unconstitutional: The lower court found that state law granting illegitimate children a shorter time to bring a paternity suit than legitimate children was unconstitutional. (See 1993 amendment.) The Supreme Court affirmed the decision on the basis that the state had no compelling reason to treat the two classes unequally. Ariz. v. Sasse, 245 M 340, 801 P2d 598, 47 St. Rep. 2171 (1990), affirmed, with regard to the unconstitutionality of the entire statutory discriminatory classification for all purposes, not simply limited in scope to support questions under the Uniform Reciprocal Enforcement of Support Act (now Uniform Interstate Family Support Act), in In re Marriage of K.E.V. & M.L.V., 267 M 323, 883 P2d 1246, 51 St. Rep. 1055 (1994).

Limitation on Action to Declare Nonexistence of Presumed Relationship — Statute Held Constitutional: Where the petitioner filed a petition based on a blood test to have the parentage of a child determined, the District Court did not err in dismissing the petition on the basis that the petitioner was barred by the 5-year Statute of Limitations from challenging the presumed father and child relationship between another man and the child in question. (See 1993 amendment.) The Statute of Limitations was not rendered unconstitutional by the U.S. Supreme Court's decisions in Mills v. Habluetzel, 456 US 91, 71 L Ed 2d 770, 102 S Ct 1549 (1982), and Pickett v. Brown, 462 US 1, 76 L Ed 2d 372, 103 S Ct 720 (1983). Those cases are inapplicable to the state Statute of Limitations and to the District Court's ruling because those cases involved the classification of legitimate and illegitimate children, which made it more difficult for illegitimate children to bring an action for support than it did for legitimate children. The Montana statutes do not differentiate between legitimate and illegitimate children and do not curtail either's right to support. In re W.C., 206 M 432, 671 P2d 621, 40 St. Rep. 1762 (1983).

Statute of Limitations — State — Child: A male child was born out of wedlock. The State obtained an assignment of the mother's claim for support from the putative father. The State brought an action against the father more than 3 years after the birth of the child. As to children born out of wedlock, the Statute of Limitations in 40-6-108 creates an unfair burden and unfairly discriminates against them and is therefore unconstitutional. Their guardian, guardian ad litem, or next friend cannot be barred access to the courts for them. However, in that the State's interest is economic, the paternal parent protection offered by the statute as against the State has a substantial relation to the intended purpose and therefore, as against the State, is constitutional. St. v. Wilson, 193 M 318, 631 P2d 1273, 38 St. Rep. 1299 (1981). See also In re W.C., 206 M 432, 671 P2d 621, 40 St. Rep. 1762 (1983), holding that Wilson did not overrule Borchers v. McCarter, 181 M 169, 592 P2d 941 (1979). (Statute amended by sec. 1, Ch. 442, L. 1985, to allow action to determine paternity to be brought by child no later than 2 years after the child attains the age of majority.)

Statute of Limitations Tolled for Minor Plaintiff: Where appellants brought suit against the respondent to establish paternity and for financial support, the District Court improperly held that 40-6-108(3) revived a claim previously barred by a Statute of Limitations. The claim of the appellants was never barred, as any Statute of Limitations was tolled during the time that the plaintiff child was a minor. Sutherland v. Hurin, 185 M 544, 605 P2d 1133 (1980).

URESA Action — Rebuttal of Paternity Presumption: The issue of paternity in a Uniform Reciprocal Enforcement of Support Act (URESA) (replaced by UIFSA) action must be determined according to the provisions of the Uniform Parentage Act. Failure to rebut the presumption that petitioner's husband was the natural father of the child within 5 years (see 1993 amendment) of the child's birth bars a paternity action against a nonpresumed person. Borchers v. McCarter, 181 M 169, 592 P2d 941 (1979). See also In re W.C., 206 M 432, 671 P2d 621, 40 St. Rep. 1762 (1983), holding that Borchers was not overruled by St. v. Wilson, 193 M 318, 631 P2d 1273, 38 St. Rep. 1299 (1981).

Attorney General's Opinions

No Revival of Previously Barred Paternity Actions by Adoption of New Statute of Limitations: In conformity with the general rule disfavoring retroactive application of legislation, the 1987 change in the statute of limitations for paternity actions initiated by a state agency did not revive actions barred under the previous statute of limitations. 42 A.G. Op. 99 (1988).

40-6-109. Jurisdiction — venue.

Commissioners' Comment

The court having jurisdiction over actions under this Act should be identified here. To avoid multiplicity of actions, the bracketed clause would allow joinder of the action to ascertain paternity with an action for divorce, annulment, separate maintenance, or support. This might be considered in choosing the court which is given jurisdiction over actions under this Act.

Subsection (b) [(2)] provides a novel, but not unheard of, extension of the "long arm" concept. Cf. Poindexter v. Willis, 87 Ill.App.2d 213, 23 N.E.2d 1 (5th Dist. 1967). The venue provision in Subsection (c) provides choices considered reasonable and convenient.

Compiler's Comments

Code Commissioner Correction: In (2)(a) substituted "Rule 4(b)" for "Rule 4B" to reflect revisions adopted by Supreme Court Order No. AF 07-0157 dated April 26, 2011.

1993 Amendment: Chapter 328 in (2) substituted language concerning jurisdiction over an individual or the individual's guardian or conservator by personal service in this state, by consent, by the individual residing with the child in this state or residing in this state and providing prenatal expenses or support for the child, by the child residing in this state as a result of the individual's acts or directives, by the individual possibly conceiving the child in this state, and by any other constitutional basis for jurisdiction for former text that read: "For purposes of an action brought under this part, personal jurisdiction is established in the courts of this state over any person who has had sexual intercourse in this state which has resulted in the birth of a child who is the subject of such proceedings. In addition to any other method provided by rule or statute, personal jurisdiction may be acquired by service in accordance with Rule 4B of the Montana Rules of Civil Procedure"; and made minor changes in style.

Source: Section 8, Uniform Parentage Act.

Montana Changes: Montana adds "adoption" in subsection (1), and changes the language without changing the substance of subsection (2).

Case Notes

Venue — Action for Approval of Parental Release: Section 40-6-109 does not provide significant guidance as to venue in an action to obtain court approval of a parental release. Venue in such an action was properly in Cascade County, since the child was born in Cascade County and the natural mother was a resident of Cascade County. The ends of justice would not be served by filing the petition in Missoula County, the residence of the prospective adoptive parents. In re Adoption of B.G.B., 183 M 347, 599 P2d 375 (1979).

40-6-110. Parties.

Commissioners' Comment

This Section emphasizes that the child is a party to the action. While this is a departure from the law of a number of states which have viewed the mother as the sole party in interest, this provision is considered a necessary consequence of the U.S. Supreme Court decisions establishing the child's substantive rights vis-a-vis his father. The mother or father may not represent the child in the action, since their interests may conflict with those of the child.

Compiler's Comments

1995 Amendment: Chapter 546 in fourth sentence substituted "department of public health and human services" for "department of family services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 434 in third sentence, after "may", inserted "not" and after "services" inserted "or any of its staff"; and made minor changes in style. Amendment effective April 21, 1993.

1987 Amendment: In fourth sentence deleted reference to Department of Social and Rehabilitation Services or appropriate county welfare department and inserted reference to Department of Family Services.

Source: Section 9, Uniform Parentage Act.

40-6-111. Pretrial proceedings.

Commissioners' Comment

Sections 10 through 13 [40-6-111 through 40-6-114] provide details concerning the pre-trial hearing. The purpose of the pre-trial hearing is to minimize inconvenience and embarrassment in the many cases which the Committee expects will be resolved on the basis of the voluntary compromise contemplated by Section 13 [40-6-114].

Compiler's Comments

2019 Amendment: Chapter 364 in (3) near end of first sentence substituted "paternity test" for "blood test". Amendment effective October 1, 2019.

1997 Amendment: Chapter 552 inserted (3) allowing a temporary support order at any time during a paternity action and stating the evidentiary test and how the order is established; and made minor changes in style. Amendment effective July 1, 1997.

Source: Section 10, Uniform Parentage Act.

Montana Changes: Montana has changed subsection (1) (subsection (a) of Uniform Act) by declaring that a record shall always be kept and omitting a statement that the Rules of Evidence need not be observed. Montana has also omitted subsection (c) of the Uniform Act.

Case Notes

"Reasonableness" of Search Prerequisite to Paternity Blood Test: The appellant in this case was charged with contempt of court for failure to submit to a blood test pursuant to 40-6-112. He alleged that the section violated his civil rights. The Supreme Court declined to consider the appellant's

attack on an isolated section of the Uniform Parentage Act as adopted in Montana. The Act must be construed as a whole. The "reasonableness" requirement of the fourth amendment and of Art. II, sec. 11, Mont. Const., could be established by an affirmative showing by the movant that there existed a prima facie case against the putative father. After that, a blood test could be taken. The failure to follow the statutory procedures to establish reasonableness prior to the ordering of the "search" rendered the search a violation of the accused's rights under the fourth amendment and the Montana Constitution to be secure from "unreasonable" search. The contempt order was vacated and the case remanded for further proceedings. Rose v. District Court, 192 M 341, 628 P2d 662, 38 St. Rep. 830 (1981).

40-6-112. Paternity tests.

Compiler's Comments

2019 Amendment: Chapter 364 in (1) at end of first sentence substituted "paternity tests" for "blood tests". Amendment effective October 1, 2019.

Source: Section 11, Uniform Parentage Act.

Case Notes

"Reasonableness" of Search Prerequisite to Paternity Blood Test: The appellant in this case was charged with contempt of court for failure to submit to a blood test pursuant to 40-6-112. He alleged that the section violated his civil rights. The Supreme Court declined to consider the appellant's attack on an isolated section of the Uniform Parentage Act as adopted in Montana. The Act must be construed as a whole. The "reasonableness" requirement of the fourth amendment and of Art. II, sec. 11, Mont. Const., could be established by an affirmative showing by the movant that there existed a prima facie case against the putative father. After that, a blood test could be taken. The failure to follow the statutory procedures to establish reasonableness prior to the ordering of the "search" rendered the search a violation of the accused's rights under the fourth amendment and the Montana Constitution to be secure from "unreasonable" search. The contempt order was vacated and the case remanded for further proceedings. Rose v. District Court, 192 M 341, 628 P2d 662, 38 St. Rep. 830 (1981).

40-6-113. Evidence relating to paternity.

Commissioners' Comment

It is expected that blood test evidence will go far toward stimulating voluntary settlements of actions to determine paternity. In this connection, proposed legislation currently pending in the U.S. Senate, should be considered. Senate Bill 2081, 93d Congress, 1st Sess. (June 27, 1973), looks toward the establishment of a national system of federally assisted child support enforcement and provides for an efficient system of blood typing:

"REGIONAL LABORATORIES TO ESTABLISH PATERNITY
THROUGH ANALYSIS AND CLASSIFICATION OF BLOOD

"Sec. 458. (a) The Secretary shall, after appropriate consultation and study of the use of blood typing as evidence in judicial proceedings to determine paternity, establish, or arrange for the establishment or designation of, in each region of the United States, a laboratory which he determines to be qualified to provide services in analyzing and classifying blood for the purpose of determining paternity, and which is prepared to provide such services to courts and public agencies in the region to be served by it.

"(b) Whenever a laboratory is established or designated for any region by the Secretary under this section, he shall take such measures as may be appropriate to notify appropriate courts and public agencies (including agencies administering any public welfare program within such region) that such laboratory has been so established or designated to provide services, in analyzing and classifying blood for the purpose of determining paternity, for courts and public agencies in such region.

"(c) The facilities of any such laboratory shall be made available without cost to courts and public agencies in the region to be served by it.

"(d) There is hereby authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section.

"SUPPORT COLLECTION SERVICES FOR OTHER INDIVIDUALS

"Sec. 459. The child support collection or paternity determination services established under this part shall be made available to any individual not otherwise eligible for such services under the preceding sections of this part upon application filed by such individual with the Attorney General or, if a State or political subdivision has a program approved under section 454, with such State or political subdivision as may be appropriate. The Attorney General (or a State or political subdivision) shall impose an application fee for furnishing such services. Any costs in excess of the fee so imposed shall be paid by such individual by deducting such costs from the amount of any recovery made."

Centralized blood typing facilities already exist in Oslo, Copenhagen and Stockholm and serve the whole of their respective countries. Over several decades, great expertise has been developed. (See generally, Henningsen, *Some Aspects of Blood Grouping in Cases of Disputed Paternity in Denmark*, 2 Methods of Forensic Science 209 (1963); Henningsen, *On the Application of Bloodtests to Legal Cases of Disputed Paternity*, 12 Revue de Transfusion 137 (1969); P. Andresen, The Human Blood Groups 73 (1952).) The Scandinavian laboratories are distinguished not only in terms of their use of complex and advanced blood typing systems, but also in terms of highly developed safety procedures which assure accuracy of the results they report. This latter point may be the most important element of blood typing. There can be little doubt that it would be better not to admit blood tests into evidence at all than to admit unreliable evidence under the halo of scientific truth—as has too often been done in the United States where a re-check of even relatively simple tests revealed about one-third of them to have been in error! (See Wiener, *Foreword*, L. Sussman, Blood Grouping Tests—Medicolegal Uses, ix (1968); See also Wiener, *Problems and Pitfalls in Blood Grouping Tests for Non-Parentage*, 15 Journal of Forensic Medicine 106, 126 (1968).) The Copenhagen laboratory (and the practice in Stockholm and Oslo is similar) employs two sets of systems in "layers", the routine blood group determination resulting in exclusion of paternity for about 70 per cent of non-fathers and an extended blood group determination which increases paternity exclusions to about 90 per cent of non-fathers. While an exclusion figure approximating 90 per cent of men falsely named as fathers is impressive, cases which do not produce an exclusion are pursued further on the basis of a "blood group paternity index" by means of which the "probability" of the named man's paternity is estimated. (See Gurtler, *Principles of Blood Group Statistical Evaluation of Paternity Cases at the University Institute of Forensic Medicine, Copenhagen*, 9 Acta Medicinae et Socialis 83 (1956).) That index compares the frequency of a given father-mother-child blood constellation in a sample of actual fathers with the blood constellation in a sample of non-fathers and is related to the constellation obtained in the case in question. If the resemblance exceeds 95 per cent or falls below 5 per cent, the result is reported to the court. At the outer limits, this approach produces *de facto* inclusions or exclusions. In less extreme cases, it produces interesting circumstantial evidence. It is of particular value, of course, when the relative likelihood of paternity of several possible fathers is to be compared. See generally, Krause, Illegitimacy: Law and Social Policy, 123-44 (1971).

Compiler's Comments

2019 Amendment: Chapter 364 in (3) at beginning substituted "paternity test results" for "blood test results". Amendment effective October 1, 2019.

Source: Section 12, Uniform Parentage Act.

Case Notes

Sufficient Evidence of Paternity to Qualify Person as Parent for Purposes of Charging Parenting Interference: A mother who appealed a parenting interference conviction contended that there was insufficient evidence of the crime because the purported father had not established paternity and therefore had no parental rights that could be interfered with. The Supreme Court disagreed. At trial, the purported father testified that: (1) he was the father; (2) the child had been conceived while the couple was living together after the couple discussed having a baby and made a deliberate decision to engage in sexual intercourse without using birth control; (3) the mother had told him that she had a surprise for him and handed him a positive pregnancy test; (4) the mother told him that he was the father; and (5) he had accompanied the mother on two prenatal visits and witnessed a sonogram revealing a baby girl and that the mother had given him the sonogram images. This testimony provided sufficient evidence of paternity under the Uniform Parentage Act. Although the state may not impose parenting obligations without a hearing, this does not necessarily mean that a natural parent possesses no parental rights without a hearing. The purported father in this case inherently possessed parental rights as a natural parent before a court had entered an order determining those rights, so the same evidence supporting paternity also established his parental rights and supported the jury's verdict that the mother interfered with those rights. St. v. Young, 2007 MT 323, 340 M 153, 174 P3d 460 (2007).

Failure to Object to Order for Paternity Testing Constituting Waiver of Presumption of Paternity and Right to Appeal: A woman had an extramarital affair and became pregnant. Her husband forgave her, and the couple asked the biological father to relinquish any paternity claim so that they could raise the baby in their family, but the father refused and petitioned for a determination of paternity. The District Court allowed the husband's presumption of paternity to be rebutted with genetic testing, and the couple did not object to the test. The couple later asserted that the District Court erred in allowing rebuttal of paternity. The Supreme Court held that the couple waived the presumption of paternity and did not preserve the issue for appeal when they failed to object at the paternity hearing that genetic testing take place. The District Court was affirmed. In re Parenting of K.P., 2005 MT 297, 329 M 337, 124 P3d 1091 (2005).

Paternity Contested After Adjudication of Marital Dissolution — Relitigation Barred by Collateral Estoppel: When paternity was contested in response to an action to collect past child support payments, the District Court properly ruled that the issue of paternity had previously been adjudicated during the marriage dissolution proceeding and that relitigation of the issue was barred by collateral estoppel. In re Marriage of Holland, 224 M 414, 730 P2d 410, 43 St. Rep. 2293 (1986).

40-6-114. Pretrial recommendations.

Commissioners' Comment

The settlement procedures contemplated by this Section are voluntary. If any party refuses to accept a settlement recommendation, the action will be set for trial. It is expected, however, that, as soon as reliable blood test evidence becomes available on a large scale, the great majority of cases will be settled consensually in the light of such evidence.

Compiler's Comments

2019 Amendment: Chapter 364 in (3) in first sentence in two places and in (4) substituted "paternity tests" for "blood tests". Amendment effective October 1, 2019.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Source: Section 13, Uniform Parentage Act.

Montana Changes: Subsection (4) was added to the Montana version of the Uniform Act.

40-6-115. Civil action.

Commissioners' Comment

Subsection (a)[(1)] makes it clear that the action to establish paternity is a civil action. A number of states have continued to view the action as criminal or quasi-criminal, although a majority of states now treats the paternity action as a civil proceeding.

Subsections (b)[(2)] and (c)[(3)] deal with the problem of the *exceptio plurium concumbentium* and, more specifically, the problem of perjured testimony concerning alleged sexual access to the mother offered by other men on behalf of the alleged father. It is recognized that in rare cases, these provisions may result in the exclusion of "honest" evidence. However, the Committee concluded that this is outweighed by the need for closing the door to the wanton attacks on the mother's character that characterize too many paternity suits under present laws.

The use of a jury is not desirable in the emotional atmosphere of cases of this nature. The clause eliminating the jury is bracketed only because in some states constitutions may prevent elimination of a jury trial in this context.

Compiler's Comments

2019 Amendment: Chapter 364 in (3), (4), and (5) substituted references to paternity test for references to blood tests; and in (5) at end substituted "paternity testing" for "blood testing". Amendment effective October 1, 2019.

1997 Amendment: Chapter 552 in (4), in second sentence, inserted "and upon the alleged father's advance payment for additional testing"; inserted (6) making bills for pregnancy, childbirth, and paternity blood tests admissible as prima facie evidence without third-party foundation testimony; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 70 inserted (4) concerning objection by a party and an additional blood test and admissibility of test results if no objection is made; inserted (5) providing that failure to answer or appear at a scheduled hearing or for a scheduled blood test results in declaring the alleged father the legal father of the child; and made minor changes in style. Amendment effective July 1, 1995.

Source: Section 14, Uniform Parentage Act.

Montana Changes: Subsection (d) of the Uniform Act eliminating the use of a jury was omitted in the Montana act.

Case Notes

Failure to Object to Order for Paternity Testing Constituting Waiver of Presumption of Paternity and Right to Appeal: A woman had an extramarital affair and became pregnant. Her husband forgave her, and the couple asked the biological father to relinquish any paternity claim so that they could raise the baby in their family, but the father refused and petitioned for a determination of paternity. The District Court allowed the husband's presumption of paternity to be rebutted with genetic testing, and the couple did not object to the test. The couple later asserted that the District Court erred in allowing rebuttal of paternity. The Supreme Court held that the couple waived the presumption of paternity and did not preserve the issue for appeal when they failed to object at the paternity hearing that genetic testing take place. The District Court was affirmed. In re Parenting of K.P., 2005 MT 297, 329 M 337, 124 P3d 1091 (2005).

Standard Governing Custody and Visitation Decisions — Best Interests of Child — Whether or Not Parents Married: In an action filed under 40-6-115, the father of a child sought to establish paternity of the child and petitioned for joint custody, visitation rights, and settlement of child support. The District Court awarded sole custody to the mother and granted the father limited visitation rights. The father appealed, claiming that it was a denial of equal protection of the law to determine his parental rights under the Uniform Parentage Act, Title 40, ch. 6, part 1, rather than under Title 40, ch. 4, the chapter that would have governed the case had he and the child's mother been married. The Supreme Court affirmed, ruling that the standard for determination of child custody and visitation, best interests of the child, was the same in both laws, and the legally proper result was the same. Schuman v. Bestrom, 214 M 410, 693 P2d 536, 42 St. Rep. 54 (1985).

40-6-116. Judgment or order.

Commissioners' Comment

This section allows a wide range of court orders to be made relating to the child's support, custody, guardianship, visitation privileges, as well as to the payment by the father of the mother's expenses of pregnancy and confinement. Since current state law often does not provide guidelines to help the judge in setting support obligations, Subsections (d) [(4)] and (e) [(5)] provide flexible standards based on criteria now generally accepted. [See 1989 amendment note.]

Compiler's Comments

2005 Amendment: Chapter 564 in (10) near end after "40-5-273" substituted "40-5-277, and" for "and 40-5-276 through"; and made minor changes in style. Amendment effective July 1, 2005.

2001 Amendment: Chapter 542 substituted (10) concerning modification of judgment, decree, or order establishing child support obligation for "(10) Each district court judgment, decree, or order establishing a final child support obligation under this part and each modification of a final order for child support must contain a statement that the order is subject to review and modification by the department of public health and human services upon the request of the department or a party under 40-5-271 through 40-5-273 when the department is providing services under Title IV-D of the Social Security Act for the enforcement of the order." Amendment effective July 1, 2001.

1997 Amendment: Chapter 552 inserted (6)(d) subjecting child support obligations established under this section to the registration and processing provisions of chapter 5, part 9; inserted (8)(c) providing that if an obligor is excepted from income withholding, the support order must provide that if the case is receiving Title IV-D services, support must be paid through the Department; inserted (9) requiring the parties to file and keep up-to-date certain information and requiring notice and service of process by mail in certain cases for former (9) that read: "For the purposes of income withholding as provided in subsection (8), whenever the district court establishes or modifies a child support obligation, the judgment, decree, or order must include a provision requiring the parent obligated to pay support to inform the court and, if the department of public health and human services is providing services under Title IV-D of the Social Security Act for the enforcement of the judgment, decree, or order, the department, of the following:

(a) the name and address of the parent's current employer;

(b) whether the parent has access to health insurance through an employer or other group; and

(c) if insurance coverage is available, the health insurance policy information"; inserted (11) requiring the Social Security number of a person subject to a paternity determination to be in the records and requiring the recordkeeper to keep the number from this source confidential except for providing it to the Department for Title IV-D purposes; and made minor changes in style. Amendment effective July 1, 1997.

Contingent Termination — Request for Federal Exemptions: Section 104, Ch. 552, L. 1997, contained the following contingent termination provisions and order that the Department of Public Health and Human Services seek federal exemptions:

"(1) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 93] [50-15-403];

(e) [section 95] [61-5-107];

(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that the federal government has granted this state an exemption from one of the following provisions, the provision terminates on the date the exemption takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 93] [50-15-403, certification filed April 24, 1998];

(e) [section 95] [61-5-107];

(f) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(5) (a) The department of public health and human services shall do everything reasonably within its power to obtain, as soon as possible, federal government exemptions from the provisions listed in subsection (4).

(b) Because section 395(c) of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) allows a grace period for states to amend their constitutions in order to comply with PRWORA and because the Montana legislature believes that the section of PRWORA prohibiting a jury trial in a paternity proceeding violates Article II, section 26, of the Montana constitution and is therefore rejected, the department of public health and human services shall seek a federal government exemption from the jury trial prohibition in PRWORA as the first exemption it seeks under subsection (5)(a). [This exemption was received on December 8, 1997.]

(6) [Sections 9, 11, 22 through 24, 93, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, 50-15-403, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate July 1, 1999.

(7) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement."

1995 Amendments: Chapter 504 in (7), after "or order", inserted "whether temporary or final" and after "include" substituted "a medical support order as defined in 40-5-804" for "a provision addressing health insurance coverage in the following cases:

(a) If either party has available through an employer or other organization health insurance coverage for the child or children for which the premium is partially or entirely paid by the employer or organization, the judgment or order may contain a provision requiring that coverage for the child or children be continued or obtained.

(b) In the event that health insurance required in a child support judgment or order becomes unavailable to the party who is to provide it, through loss or change of employment or otherwise, that party shall, in the absence of an agreement to the contrary, obtain comparable insurance or request that the court modify the requirement.

(c) The parties may by written agreement provide for the health care coverage required by this section, subject to the approval of the court.

(d) Unless otherwise provided in the decree, the health care coverage required by this section is in addition to and not in substitution, in whole or in part, for the child support obligation"; deleted former (10) that read: "(10) If the department of social and rehabilitation services is providing or later provides support enforcement services under Title IV-D of the Social Security Act, each district court order or modification of an order must contain a statement providing that the noncustodial parent, without further order of the court, is required to obtain and maintain health insurance coverage as provided in 40-5-208. Failure to include a warning statement in the judgment or order does not preclude the imposition of sanctions under 40-5-208"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (6)(a), (9), and (10) substituted "department of public health and human services" for "department of social and rehabilitation services"; and at beginning of (8)(b) deleted "After October 1, 1993". Amendment effective July 1, 1995.

Preamble: The preamble attached to Ch. 504, L. 1995, provided: "WHEREAS, it is appropriate to draft a bill specifically to present proposed program improvements for medical support enforcement in a single, comprehensive bill that promotes the needs of legislative energy, efficiency, and economy by limiting the number of possible bills and by reducing the need for hearings and readings on those bills; and

WHEREAS, parents should be held responsible for providing medical care for their children, whether or not the parents voluntarily do so."

1995 Statement of Intent: The statement of intent attached to Ch. 504, L. 1995, provided: "A statement of intent is required for this bill because it grants rulemaking authority to the department of social and rehabilitation services to adopt rules for expedited procedures."

Severability: Section 33, Ch. 504, L. 1995, was a severability clause.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendments: Chapter 294 in (6)(a), near middle, inserted second sentence requiring use of guidelines in all cases, inserted third sentence concerning verified representation of income, and in fourth sentence inserted first clause concerning presumption of adequate and reasonable support; in (6)(b), in first sentence, substituted "finds that the guideline amount is unjust or inappropriate in a particular case" for "does not apply these standards and guidelines to determine child support" and inserted last two sentences concerning agreement on support amount and statement of ordinary support amount when varied; and made minor changes in style. Amendment effective April 9, 1993.

Chapter 631 inserted (8)(b) regarding withholding on weekly or biweekly basis; and made minor changes in style.

1991 Amendments: Chapter 266 inserted (11) requiring statement relating to review and modification of orders by Department.

Chapter 635 deleted former (8) that read: "(8) (a) Except as provided in subsection (8)(b), each district court judgment or order establishing a child support obligation under this part, whether temporary or final, and each modification of an existing child support order must:

(i) provide that the amount of child support must be withheld from the obligor's income and paid to the department pursuant to procedures established by the department under Title 40, chapter 5, part 4; and

(ii) include the obligor's social security number and the name and address of the obligor's employer and of any other payor of income to the obligor.

(b) Income is not subject to automatic withholding if:

(i) the obligee or obligor demonstrates and the court finds that there is good cause not to require automatic income withholding; or

(ii) the obligee and obligor agree in writing to an alternative arrangement regarding the payment of child support that provides sufficient security to ensure compliance with their agreement. The security is in addition to the child support obligation.

(c) When a judgment or order for child support is entered or modified and automatic income withholding is ordered, an obligee who is not a recipient of public assistance shall apply for the support enforcement services of the department pursuant to Title IV-D of the Social Security Act for the collection of support through automatic income withholding under Title 40, chapter 5, part 4. The department shall accept the application. Pending an application, the department shall immediately implement automatic income withholding and hold any amounts collected in trust for the obligee until the obligee makes application.

(d) When automatic income withholding is ordered under subsection (8)(a), the clerk of court shall immediately forward a copy of the order to the department"; inserted (8) providing for enforcement of support obligation by immediate or delinquency income withholding; and inserted (9) requiring court to require an obligated parent to provide certain information. Amendment effective April 24, 1991.

Severability: Section 24, Ch. 635, L. 1991, was a severability section.

1989 Amendment: In (3)(a), after "concerning", deleted "the duty of support"; inserted (3)(b) requiring that judgment or order refer to child support; in (5)(a) inserted "including his medical needs"; inserted (5)(j) relating to cost of day care; inserted (5)(k) relating to custody arrangements; inserted (6) requiring application of standards and guidelines, stating that finding is required for nonapplication of standards and guidelines, and requiring court to state reasons for not ordering child support; inserted (7) relating to health insurance coverage; inserted (8) requiring automatic income withholding, stating circumstances when income is not subject to automatic withholding, and requiring application for and immediate implementation of automatic income withholding; inserted (9) relating to a warning statement concerning required health insurance coverage; and made minor changes in punctuation and form.

Applicability: Section 32, Ch. 702, L. 1989, provided: "[This act] applies to child support orders and modifications of child support orders issued after September 30, 1989."

Guidelines for Determining Child Support: On January 13, 1987, the Supreme Court adopted A Uniform District Court Rule on Child Support Guidelines proposed by the Montana Child Support Advisory Council as the result of a study prompted by the 1984 enactment of 42 U.S.C. 667. The federal statute required establishment of guidelines by each state as a condition for having the state plan approved for participation in Public Health and Welfare programs of the federal government. The guidelines may be found in the State Reporter, Vol. 44, pp. 828-842 (1987). See also 1989 amendment that provides the court shall apply the guidelines in determining the child support obligation.

Source: Section 15, Uniform Parentage Act.

Montana Changes: The Montana act provides for the issuance of a substitute birth certificate rather than an amended or new birth certificate in subsection (2). See also 1989 amendment note.

Case Notes

Order Vacating Initial Parental Rights Order — Abuse of Discretion: In an initial order, the District Court refused to grant parental rights to the biological father of a minor child, but in a second order, the District Court, relying upon former Rule 59(g), M.R.Civ.P. (now superseded), or, alternatively, 40-6-118, vacated the initial order and granted parental rights to the biological father. The biological mother and her husband appealed. The Supreme Court reversed, concluding the District Court erred in vacating the initial order under former Rule 59(g), as the biological father's argument constituted an improper "second bite at the apple". The District Court lacked jurisdiction to vacate the initial order under 40-6-118 because 40-6-118 does not authorize modifications to 40-6-116(1), which provides that a court's determination regarding the existence of the parent-child relationship is determinative for all purposes. In re Marriage of Johnson, 2011 MT 255, 362 Mont. 236, 262 P.3d 1105.

Recognition of Paternity in Child's Best Interests: A woman had an extramarital affair and became pregnant. After the biological father's paternity was determined, the District Court held that a father-child relationship was in the child's best interests and devised a parenting plan for the biological father's visitation and support. The mother and putative father disagreed and appealed, but the Supreme Court affirmed. The District Court properly applied the best interest of the child standard and did not abuse its discretion in extending to the biological father the opportunity uniquely afforded him by biology to parent his child. In re Parenting of K.P., 2005 MT 297, 329 M 337, 124 P3d 1091 (2005). See also In re Paternity of "Adam", 273 M 351, 903 P2d 207 (1995).

Findings of District Court Regarding Custody of Child With Mother Not Erroneous Despite Evidence of Inappropriate Physical Contact Between Child and Mother's Relative: As part of a paternity action, the mother was awarded primary physical custody, and the father appealed.

An amended parenting plan arrived at during mediation gave each parent physical custody of the child during alternating months. Near the end of one month's visit with the father, the child divulged that inappropriate physical contact with her stepgrandfather had occurred while in the mother's custody. The father moved for modification of the parenting plan. The District Court was faced with conflicting evidence in the case, receiving testimony from the stepgrandfather that no inappropriate touching occurred, as well as testimony from professionals who opined that sexual abuse had occurred. Additional expert testimony suggested that the child's constant travel was a possible cause of her troubling behavior and that the experts who suggested that sexual abuse occurred had not followed standard protocols when interviewing the child. Lay testimony indicated that it was unlikely that the stepgrandfather had an opportunity to commit the alleged abuse. The court ultimately determined that sexual abuse had not been proved. The father appealed on grounds that the court's findings were insufficient, that the court erred in not giving the father custody based on the evidence presented, and that the court erred by apparently rejecting the testimony of the child's clinical psychologist and the disclosures made by the child relating to sexual abuse. The Supreme Court noted that credibility determinations are within the province of the trier of fact and held that, in light of the conflicting testimony, the trial court's findings and conclusions were sufficient to support the court's decision. Although the trial court did not specifically articulate the elements of 40-4-212, it clearly made determinations that it considered to be in the child's best interests. Failure to list the contentions of a particular witness, such as the child's clinical psychologist, was not sufficient to determine a per se abuse of discretion on the part of the trial court. Without a clear showing of abuse of discretion, the Supreme Court declined to disturb the decision and affirmed the denial of the father's motion to modify the parenting plan. In re Paternity & Custody of A.D.V., 2001 MT 74, 305 M 62, 22 P3d 1124 (2001).

Waiver of Back Child Support — Court Retains Discretion Under Guidelines — Constitutional Challenge Raised for First Time on Appeal Not Considered: Following remand from the Supreme Court, the District Court recalculated a child support award but did not order the father to pay any back child support. When the District Court was presented with abundant evidence on the proper amount of past child support due under child support guidelines and the amount of additional back support (none) was within the range of the evidence presented, the District Court did not err in waiving past child support. When the mother's argument that child support statutes discriminate between legitimate and illegitimate children was raised for the first time on appeal, the Supreme Court did not consider argument. In re Paternity of W.L., 270 M 484, 893 P2d 332, 52 St. Rep. 301 (1995).

Application of Child Support Guidelines in Effect at Time of Decision: As set out in In re Marriage of Johnston & Turrin, 255 M 421, 843 P2d 760, 49 St. Rep. 1047 (1992), District Courts are to determine child support obligations according to the guidelines in effect at the time that the court makes its decision. The court has considerable discretion to deviate from the child support guidelines if it finds by clear and convincing evidence that application of the standards and guidelines is unjust to the child or any of the parties or is inappropriate to a particular case. If the court decides to apply an older version of the guidelines, it must state its reasons for finding that the guidelines are not applicable. In re Paternity of W.L., 259 M 187, 855 P2d 521, 50 St. Rep. 751 (1993). For the decision on remand, see In re Paternity of W.L., 270 M 484, 893 P2d 332, 52 St. Rep. 301 (1995).

Lost Wages Not Reasonable Expense of Pregnancy and Confinement: This section may not be interpreted so broadly as to include lost wages as a reasonable expense of the mother's pregnancy and confinement. In re Paternity of W.L., 259 M 187, 855 P2d 521, 50 St. Rep. 751 (1993).

Calculation of Support Obligation — "Carlson" Formula as Guideline Only: As in proceedings for the determination of support under 40-4-204, the formula set out in Carlson v. Carlson, 214 M 209, 693 P2d 496, 41 St. Rep. 2419 (1984), is only a guideline for determination of support in paternity actions. It was not an abuse of District Court discretion, considering the exigencies of the case, to fail to follow the formula. (See 1989 amendment that provides the court shall apply the Uniform Child Support Guidelines adopted by the Supreme Court in 1987 at 44 St. Rep. 828.) State ex rel. Sorenson v. Roske, 229 M 151, 745 P2d 365, 44 St. Rep. 1854 (1987).

Standard Governing Custody and Visitation Decisions — Best Interests of Child — Whether or Not Parents Married: In an action filed under 40-6-115, the father of a child sought to establish paternity of the child and petitioned for joint custody, visitation rights, and settlement of child support. The District Court awarded sole custody to the mother and granted the father limited visitation rights. The father appealed, claiming that it was a denial of equal protection of the law to determine his parental rights under the Uniform Parentage Act, Title 40, ch. 6, part 1, rather than under Title 40, ch. 4, the chapter that would have governed the case had he and the child's mother been married. The Supreme Court affirmed, ruling that the standard for determination of child custody and visitation, best interests of the child, was the same in both laws, and the legally proper result was the same. Schuman v. Bestrom, 214 M 410, 693 P2d 536, 42 St. Rep. 54 (1985).

40-6-117. Enforcement of judgment or order.

Commissioners' Comment

This section provides suitable enforcement remedies.

Compiler's Comments

1997 Amendment: Chapter 552 in (1), in middle, inserted "except as provided in 40-5-909 and 40-6-116(8)"; in (4)(a), near end of introductory clause, inserted "obligation" and inserted "without need for further order of the court"; substituted (4)(a)(ii) through (4)(a)(iv) concerning to whom the child support obligation must be paid for former (4)(a)(ii) through (4)(a)(iv)(see 1997 Session Law for former text); inserted (4)(b) providing for payment of support through the Department when the Department is providing Title IV-D services; and made minor changes in style. Amendment effective July 1, 1997.

1995 Amendment: Chapter 70 inserted (2) providing that full faith and credit be given to a determination of paternity made by any other state; and adjusted subsection references. Amendment effective July 1, 1995.

1993 Amendment: Chapter 631 inserted (3) requiring a provision that support be paid to the child's caretaker or other agency authorized to receive or collect support.

Source: Section 17, Uniform Parentage Act.

Montana Changes: The major portion of subsection (a) of the Uniform Act relating to persons enforcing proceedings has been omitted in the Montana act.

Case Notes

Recognition of Paternity in Child's Best Interests: A woman had an extramarital affair and became pregnant. After the biological father's paternity was determined, the District Court held that a father-child relationship was in the child's best interests and devised a parenting plan for the biological father's visitation and support. The mother and putative father disagreed and appealed, but the Supreme Court affirmed. The District Court properly applied the best interest of the child standard and did not abuse its discretion in extending to the biological father the opportunity uniquely afforded him by biology to parent his child. In re Parenting of K.P., 2005 MT 297, 329 M 337, 124 P3d 1091 (2005). See also In re Paternity of "Adam", 273 M 351, 903 P2d 207 (1995).

40-6-118. Modification of judgment or order.

Commissioners' Comment

In accordance with current state law on this subject, the court is given continuing jurisdiction to modify or revoke judgments relating to support, custody and related matters.

Compiler's Comments

1995 Amendment: Chapter 70 in (2) substituted "40-6-117(3)" for "40-6-117(2)". Amendment effective July 1, 1995.

Source: Section 18, Uniform Parentage Act.

Case Notes

Order Vacating Initial Parental Rights Order — Abuse of Discretion: In an initial order, the District Court refused to grant parental rights to the biological father of a minor child, but in a second order, the District Court, relying upon former Rule 59(g), M.R.Civ.P. (now superseded), or, alternatively, 40-6-118, vacated the initial order and granted parental rights to the biological father. The biological mother and her husband appealed. The Supreme Court reversed, concluding the District Court erred in vacating the initial order under former Rule 59(g), as the biological father's argument constituted an improper "second bite at the apple". The District Court lacked jurisdiction to vacate the initial order under 40-6-118 because 40-6-118 does not authorize modifications to 40-6-116(1), which provides that a court's determination regarding the existence of the parent-child relationship is determinative for all purposes. In re Marriage of Johnson, 2011 MT 255, 362 Mont. 236, 262 P.3d 1105.

Findings of District Court Regarding Custody of Child With Mother Not Erroneous Despite Evidence of Inappropriate Physical Contact Between Child and Mother's Relative: As part of a paternity action, the mother was awarded primary physical custody, and the father appealed. An amended parenting plan arrived at during mediation gave each parent physical custody of the child during alternating months. Near the end of one month's visit with the father, the child divulged that inappropriate physical contact with her stepgrandfather had occurred while in the mother's custody. The father moved for modification of the parenting plan. The District Court was faced with conflicting evidence in the case, receiving testimony from the stepgrandfather that no inappropriate touching occurred, as well as testimony from professionals who opined that sexual abuse had occurred. Additional expert testimony suggested that the child's constant travel was a possible cause of her troubling behavior and that the experts who suggested that sexual abuse occurred had not followed standard protocols when interviewing the child. Lay testimony indicated that it was unlikely that the stepgrandfather had an opportunity to commit the alleged abuse. The court ultimately determined that sexual abuse had not been proved. The father appealed on grounds that the court's findings were insufficient, that the court erred in not giving the father custody based on the evidence presented, and that the court erred by apparently rejecting the testimony of the child's clinical psychologist and the disclosures made by the child relating to sexual abuse. The Supreme Court noted that credibility determinations are within the province of the trier of fact and held that, in light of the conflicting testimony, the trial court's findings and conclusions were sufficient to support the court's decision. Although the trial court did not specifically articulate the elements of 40-4-212, it clearly made determinations that it considered to be in the child's best interests. Failure to list the contentions of a particular witness, such as the child's clinical psychologist, was not sufficient to determine a per se abuse of discretion on the part of the trial court. Without a clear showing of abuse of discretion, the Supreme Court declined to disturb the decision and affirmed the denial of the father's motion to modify the parenting plan. In re Paternity & Custody of A.D.V., 2001 MT 74, 305 M 62, 22 P3d 1124 (2001).

Failure to Provide Child Support for College Education — Continuing Jurisdiction Under Uniform Parentage Act: Mother contended that the District Court erred in failing to order father to pay child support for the child's college education, maintaining that the court could not later modify support to extend beyond the child's emancipation because it was not provided in an original decree. However, the case was brought under the Uniform Parentage Act; therefore, this section rather than 40-4-208 applies. Under this section, the court retains jurisdiction to modify its initial support order to provide for the child's educational needs, and failure to do so as part of the initial order was not error. In re Paternity of W.L., 259 M 187, 855 P2d 521, 50 St. Rep. 751 (1993), distinguishing Torma v. Torma, 198 M 161, 645 P2d 395 (1982). For the decision on remand, see In re Paternity of W.L., 270 M 484, 893 P2d 332, 52 St. Rep. 301 (1995).

40-6-119. Right to counsel — transcript on appeal.

Commissioners' Comment

This permits each party to be represented by counsel regardless of financial circumstances.

Compiler's Comments

2019 Amendment: Chapter 364 in (2) near middle substituted "paternity test" for "blood test". Amendment effective October 1, 2019.

2009 Amendment: Chapter 154 in (3) at end of second sentence substituted "3-5-604" for "3-5-604(4)". Amendment effective July 1, 2009.

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (1) in second sentence after "court shall" deleted "appoint" and inserted requirement to order office of state public defender to assign counsel; in (2) near beginning after "fees" deleted "of counsel"; in (3) inserted second sentence requiring fees to be paid as provided in 3-5-604(4); and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

1995 Amendment: Chapter 282 inserted (2) providing for the payment of counsel fees and costs, including blood test costs, in a paternity action; and made minor changes in style.

Applicability: Section 2, Ch. 282, L. 1995, provided: "[This act] [40-6-119] applies to actions filed after [the effective date of this act] [effective October 1, 1995]."

Source: Subsection (2), section 16, Uniform Parentage Act; generally, section 19, Uniform Parentage Act.

40-6-120. Hearings and records — confidentiality.

Commissioners' Comment

In view of the sensitive nature of paternity proceedings, the Committee considered it essential that such proceedings be kept in confidence.

Compiler's Comments

Source: Section 20, Uniform Parentage Act.

40-6-121. Action to declare mother and child relationship.

Commissioners' Comment

This Section permits the declaration of the mother and child relationship where that is in dispute. Since it is not believed that cases of this nature will arise frequently, Sections 4 to 20 [40-6-105 to 40-6-121] are written principally in terms of the ascertainment of *paternity*. While it is obvious that certain provisions in these Sections would not apply in an action to establish the mother and child relationship, the Committee decided not to burden these—already complex—provisions with references to the ascertainment of *maternity*. In any given case, a judge facing a claim for the determination of the mother and child relationship should have little difficulty deciding which portions of Sections 4 to 20 [40-6-105 to 40-6-121] should be applied.

Compiler's Comments

Source: Section 21, Uniform Parentage Act.

40-6-122. Promise to render support.

Commissioners' Comment

This permits any written promise to furnish support for a child based on a supposed or alleged father and child relationship to be enforced in accordance with its terms, with the exception of stipulations that seek to bar a paternity action. Since existing law adequately covers this area, it was considered unnecessary to spell out that the agreement may be avoided if it is shown that the agreement was based on a mutual mistake or fraud relating to the existence of the father and the child relationship. In view of the possibly sensitive nature of such a promise, the provision relating to confidentiality is considered useful.

Compiler's Comments

Source: Section 22, Uniform Parentage Act.

40-6-123. Birth records.

Commissioners' Comment

This provision permits the issuance of an amended or new birth certificate to assure confidentiality. It resembles provisions in many adoption acts which permit the issuance of a new or amended birth certificate after an adoption has been completed.

Compiler's Comments

1995 Amendments — Composite Section: Chapter 418 in (1) substituted "department of public health" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 546 in (1) substituted "department of public health and human services" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, and sec. 571, Ch. 546, L. 1995, were saving clauses.

Source: Section 23, Uniform Parentage Act.

Montana Changes: The Montana act provides for a substituted birth certificate rather than an amended or new birth certificate.

40-6-131. Uniformity of application and construction.

Compiler's Comments

Source: Section 25, Uniform Parentage Act.

Part 2
Obligations of Parents

Part Case Notes

No Standing by Former Parent to Object to Child's Placement or Assert Child's Rights: Once the parent-child relationship is terminated by the District Court, a former parent has no standing to object to the court's subsequent placement of the child with the Department or by adoption.

Similarly, a former parent has no standing to assert a violation of the child's rights as guardian ad litem because the former parent no longer represents the child. In re E.A.T. & T.A.T., 1999 MT 281, 296 M 535, 989 P2d 860, 56 St. Rep. 1133 (1999).

No Liability of Parent Guardian for Paternity by Minor Child: Defendants were sued in their capacity as guardians of their minor son for the expenses incurred in connection with the birth of an illegitimate child fathered by their son. A default judgment was rendered against the defendants. The Supreme Court reversed and vacated the default judgment, holding that the guardians' duty to safeguard the rights of their son during the legal proceeding did not subject them to personal liability for their son's allegedly wrongful acts. The Supreme Court also held that because the title of the case, the allegations in the complaint, and all motions at trial addressed the defendants in their capacity as guardians, they had insufficient notice of any likelihood of personal liability. Breuer v. Poe, 245 M 22, 797 P2d 944, 47 St. Rep. 1812 (1990).

Restitution of Child Support Overpayments: There can be no restitution where it was just that the payment should have been made and where, as between the parties, it would be inequitable to require any repayment. Here, however, restitution of overpayment of child support cannot be considered inequitable as between the parties since the defendant has apparently received more child support money than the divorce decree considered adequate. There is no allegation that the amounts decreed were inadequate, and the defendant has never attempted to modify the decree to increase the child support payments. Hereford v. Hereford, 183 M 104, 598 P2d 600 (1979).

Part Law Review Articles

Loss of Consortium and Loss of Services Actions: A Legacy of Separate Spheres, Ridgeway, 50 Mont. L. Rev. 349 (1989).

40-6-201. Legitimacy of children born in wedlock.

Case Notes

Legitimacy Presumed: A child is presumed to be legitimate if the mother and father were married. Spradlin v. U.S., 262 F. Supp. 502 (D.C. Mont. 1967).

Rebuttable Presumption May Be Overcome by a Preponderance of Conflicting Evidence: Disputable presumption that a child born in lawful wedlock is legitimate is successfully controverted by other evidence when the preponderance of the evidence is contrary thereto. In re Wray's Estate, 93 M 525, 19 P2d 1051 (1933).

Evidence Sufficient to Rebut Presumption to Be Strong, Distinct, and Wholly Satisfactory: A child conceived prior to marriage of mother but born in wedlock is presumed legitimate, as presumption cannot be overcome by circumstances which only create doubt or suspicion; to overcome it, the evidence must be strong, distinct, and wholly satisfactory. In re Thompson, 77 M 466, 251 P 163 (1926).

40-6-202. Legitimacy of children born after dissolution of marriage.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

40-6-203. Child legitimatized by marriage of parents.

Case Notes

Section to Apply Even if Mother Married to Another at Time of Birth: Child becomes legitimate for all purposes upon subsequent marriage of its parents, even where mother during marriage gave birth to child by man not her spouse, whom she later married after divorcing first husband. In re Wray's Estate, 93 M 525, 19 P2d 1051 (1933).

40-6-211. Obligations of parents for the support and education of their children.

Compiler's Comments

1997 Amendment: Chapter 343 near beginning, after "parents", deleted "entitled to the custody"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Case Notes

Sufficient Evidence of Paternity to Qualify Person as Parent for Purposes of Charging Parenting Interference: A mother who appealed a parenting interference conviction contended that there was insufficient evidence of the crime because the purported father had not established paternity and therefore had no parental rights that could be interfered with. The Supreme Court disagreed. At trial, the purported father testified that: (1) he was the father; (2) the child had been conceived while the couple was living together after the couple discussed having a baby and made a deliberate decision to engage in sexual intercourse without using birth control; (3) the mother had told him that she had a surprise for him and handed him a positive pregnancy test; (4) the mother told him that he was the father; and (5) he had accompanied the mother on two prenatal visits and witnessed a sonogram revealing a baby girl and that the mother had given him the sonogram images. This testimony provided sufficient evidence of paternity under the Uniform Parentage Act. Although the state may not impose parenting obligations without a hearing, this does not necessarily mean that a natural parent possesses no parental rights without a hearing. The purported father in this case inherently possessed parental rights as a natural parent before a court had entered an order determining those rights, so the same evidence supporting paternity also established his parental rights and supported the jury's verdict that the mother interfered with those rights. St. v. Young, 2007 MT 323, 340 M 153, 174 P3d 460 (2007).

Elements Necessary for Minor Child to Establish Claim for Loss of Parental Consortium: In Montana, the elements necessary for a minor child to establish a claim for loss of parental consortium are: (1) a third party tortiously causes the parent to suffer a serious, permanent, and disabling mental or physical injury compensable under Montana law; and (2) the parent's ultimate condition of mental or physical impairment must be so overwhelming and severe that it causes the parent-child relationship to be destroyed or nearly destroyed. If the tortfeasor is not subject to liability to the parent under tort principles, the child cannot sustain a cause of action for loss of parental consortium. If the parent could not recover from the tortfeasor for purely mental or emotional injury absent a physical component, the child cannot bring an action for consortium loss resulting from that injury. The destruction or near destruction of the parent-child relationship is a necessary element in establishing the cause of action, not merely a factor in computing damages. Keele v. St. Vincent Hosp. & Health Care Center, 258 M 158, 852 P2d 574, 50 St. Rep. 475 (1993), following Villareal v. Dept. of Transportation, 774 P2d 213 (Ariz. 1989). In North Pacific Ins. Co. v. Stucky, 2014 MT 299, 377 Mont. 25, 338 P.3d 56, the Supreme Court held that the elements necessary for an adult child to establish a claim for loss of parental consortium are the same as those for a minor child as adopted in Keele.

Right of Child to Cause of Action for Loss of Parental Consortium — Injury by Third Party: Minor children are entitled to the support, aid, protection, affection, society, discipline, guidance, and training of their parents. Therefore, a minor child who has been deprived of these rights by the tortious injury to a parent by a third party has a separate cause of action for loss of parental consortium. However, any one element of damages for the injury may be recovered only once. Pence v. Fox, 248 M 521, 813 P2d 429, 48 St. Rep. 550 (1991).

Noncustodial Parent Not Relieved of Support Obligation: Father argued that this section precluded relief for children seeking prospective child support unless there was a showing that the mother, as custodial parent, could no longer provide the minor children with support and education suitable to their circumstances. However, this statute does not relieve a noncustodial parent of obligations of support under Montana's child support laws. In re Support of Krug, 231 M 78, 751 P2d 171, 45 St. Rep. 446 (1988).

Interpretation of Decree Provision on Termination of Support Obligation: In the decree of dissolution, the paragraph immediately following the paragraph concerning payment of child support provided that "Upon termination of the child support obligation" the appellant must pay the respondent maintenance until her death or remarriage. A dispute arose over the meaning of "termination of the child support obligation". The Supreme Court held that the District Court's ruling that the obligation terminated when the appellant stopped making monthly child support payments, rather than when the youngest child turned 18, was not clearly erroneous. In re Marriage of Jones, 218 M 441, 709 P2d 158, 42 St. Rep. 1722 (1985).

Payments Made Directly to Children: The obligation to pay child support is not discharged by payment to the children themselves when the support order directs that payment be made to the children's mother. State of Oregon ex rel. Worden v. Drinkwalter, 216 M 9, 700 P2d 150, 42 St. Rep. 599 (1985).

"Child" Defined — Majority Age: Upon attaining the age of 18 a person is an adult and is no longer a "child" within the purview of 40-6-211 of whom parents are entitled to custody or to whom parents are obligated for support, despite the fact that at the time of the decree the legal age was 21. Chrestenson v. Chrestenson, 180 M 96, 589 P2d 148 (1979).

Child Support Money Decreed by District Court to Be Kept Current Until Final Determination of Appeal: Where husband was in arrears of child support payments, court held it will not sanction nonpayment of support money decreed in District Court on appeal where need for such funds are shown, but will require that such support payments be kept current until final determination of appeal. Court ordered appeal to be dismissed, unless payment of arrears was made within 10 days. Woolverton v. Woolverton, 169 M 490, 549 P2d 458 (1976).

Compliance With Section Need Only Be Reasonable: While this section would require a high school education, it is doubtful if the parent could be required to pay tuition at a parochial school. Certainly a parent is not required to provide a Scout automobile for his children, buy musical instruments, or give them music lessons in the name of education. Brooke v. U.S., 292 F. Supp. 571 (D.C. Mont. 1968), modified in 300 F. Supp. 465 (D.C. Mont. 1969), affirmed in 468 F2d 1155 (9th Cir. 1972).

Reasonable Compliance Required: This section clearly requires support for a high school education. Compliance need only be reasonable however, and parochial school and extravagances are not required. Brooke v. U.S., 292 F. Supp. 571 (D.C. Mont. 1968), modified in 300 F. Supp. 465 (D.C. Mont. 1969), affirmed in 468 F2d 1155 (9th Cir. 1972).

Omission to Perform Act of Support: Evidence that child, 5 months old, died due to starvation, that his weight at death was only 10 ounces over birthweight, and that father and mother had means with which to care for child was sufficient to support conviction of manslaughter. St. v. Bischert, 131 M 152, 308 P2d 969 (1957), distinguished in St. v. Rivers, 133 M 129, 320 P2d 1004 (1958).

Enforcement of Child Support Order: Divorce court possesses power to compel ex-husband to support his minor children. State ex rel. Lay v. District Court, 122 M 61, 198 P2d 761 (1948).

Father's Duty When Mother Has Custody: When mother has custody of children but cannot alone carry the burden of education and support, the burden must, at least in part, be borne by the father, and this may extend to expense of college education for the children. Refer v. Refer, 102 M 121, 56 P2d 750 (1936).

Agreement Between Husband and Wife: While agreement between husband and wife as to custody and child support will be enforced, it cannot, as against the children, divest either parent of the duty to support and educate them as the interest of the children is paramount. Brice v. Brice, 50 M 388, 147 P 164 (1915), explained in Refer v. Refer, 102 M 121, 56 P2d 750 (1936), and State ex rel. Tong v. District Court, 109 M 418, 96 P2d 918 (1939).

40-6-213. Remedy when parent dies without providing for support of child.

Law Review Articles

Recognizing Parental Consortium: Montana Follows a National Trend in Pence v. Fox, Vannatta, 54 Mont. L. Rev. 149 (1993).

40-6-214. Duties of parents to maintain children.

Compiler's Comments

2021 Amendment: Chapter 213 near beginning substituted "the father and the mother" for "the father, the mother, and the children"; after "person to the extent of" substituted "the parent's " for "their"; and deleted former last sentence that read: "The promise of an adult child to pay for necessaries previously furnished to that parent is binding." Amendment effective October 1, 2021.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Parent's Duty to Support Incapacitated Adult Child: A father appealed the District Court's determination that 40-6-214 required him to support his incapacitated adult twin sons, arguing that his obligation to provide child support terminated when the twins graduated from high school or when they turned 19 years old. The Supreme Court affirmed, concluding that 40-6-214 imposes a duty on the father to support the twins to the extent of his ability. The father's duty ran directly to the twins, not to the mother under the marital dissolution decree, and was properly enforced under the guardianship statutes. In re Guardianships of M.A.S. & C.M.S., 2011 MT 313, 363 Mont. 96, 266 P.3d 1267.

Performance of Legal Obligation: Performance by child of legal obligation to support indigent parent may be sufficient consideration to support a conveyance to the child but not such a consideration as to make the child a purchaser in good faith and, for a valuable consideration, so as to entitle her to precedence over another purchaser under the recording statute. Kelly v. Grainey, 113 M 520, 129 P2d 619 (1942).

Cumulative Effect and Operation of Code Sections: Father can recover, in action for death of minor son, for pecuniary benefits reasonably expected to be received from deceased after his majority, in view of cumulative effect of 27-1-512, 27-1-513, and 40-6-214. Gilman v. The G.W. Dart Hardware Co., 42 M 96, 111 P 550 (1910).

40-6-215. When parent responsible for necessities and financial assistance supplied to child.

Compiler's Comments

2001 Amendment: Chapter 352 in (1) substituted language allowing a relative or third person to supply necessities or financial assistance to a child for "If a parent neglects to provide articles necessary for his child under his charge, according to his circumstances, a third person may in good faith supply such necessities and recover the reasonable value thereof from the parent"; inserted (2) concerning a child who resides with and is supported in the home of a relative or third person; inserted (3) concerning a parent's duty to support and maintain a child not being abrogated by the child's abandoning the parent's home; and made minor changes in style. Amendment effective April 23, 2001.

Case Notes

State — Third "Person": Including the State as a "person" in the context of 40-6-215 was held proper in an action to recover amounts paid through Aid to Dependent Children (changed to Aid to Families With Dependent Children) for the support and necessaries of children, as it was beneficial to the State and general public. St. v. Hultgren, 168 M 257, 541 P2d 1211 (1975).

Wife Not Neglectful Parent: Where wife initiated proceedings under Uniform Reciprocal Enforcement of Support Act (now Uniform Interstate Family Support Act) and claim was settled by agreement with former husband, State cannot recover under this section from wife for reasonable value of necessaries supplied through payments by Social and Rehabilitation Services (now Department of Public Health and Human Services) as husband, not wife, was a neglectful parent in not making his child support payments. St. v. Hultgren, 168 M 257, 541 P2d 1211 (1975).

40-6-217. Married person not bound for support of spouse's children by former marriage.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Parent's Venture Into Temporarily Unprofitable Self-Employment Insufficient to Warrant Reduction in Child Support Payments: While the mother was employed as a trust officer, she was ordered to pay $544 a month in child support payments. She lost the job when the company closed the local office, decided to begin self-employment as an interior designer with substantial financial help from her new husband, and then moved for a reduction in support because the new business did not show a profit the first year, even though it gained over $92,000 in revenue and she anticipated making a profit the second year. In order to modify a child support obligation, the person seeking the modification must establish changed circumstances so substantial and continuing that to keep the existing obligation intact would be unconscionable. The District Court erred in annualizing the mother's previous trust-related salary in calculating her income because she did not return to customary self-employment as contemplated in ARM 37.62.108(3). The temporarily unprofitable state of her business was not of such a continuing nature as to warrant a change in support. The Supreme Court recognized that this section does not require a supporting parent's new spouse to contribute to the supporting parent's support obligations; however, when a supporting parent remarries and is in a position in which a contribution to the new family's finances is not required, the supporting parent is still required to do whatever is necessary to ensure that child support payments are made. In re Marriage of McDermott, 2003 MT 283, 318 M 13, 79 P3d 245 (2003).

Consideration of Support of Stepchildren in Divorce Proceeding: In an appeal of a decree of dissolution of marriage, the husband claimed District Court error in that the court did not find that the wife made a negative contribution to the marriage because the wife and her two sons consumed three-fourths of the marital income while she contributed only one-third of that income. The Supreme Court affirmed, ruling that evidence presented by the husband did not rebut the presumption set forth in 40-6-217 that his support of the wife's sons was given as a parent. In re Marriage of Peterson, 211 M 118, 683 P2d 1304, 41 St. Rep. 1252 (1984).

Child Support — Assets of Present Spouse Unavailable: In an action to increase child support payments, the trial court considered the income of the father's present wife in its determination of the father's ability to pay increased child support. The clear effect of the court's order is to make the father's present spouse's property or income indirectly available to pay child support for her husband's children by a previous marriage. This cannot be done. Duffey v. Duffey, 193 M 241, 631 P2d 697, 38 St. Rep. 1105 (1981).

Consideration of Support of Stepchildren in Divorce Proceeding: A stepparent who receives stepchildren into his family and supports them is presumed to do so as a parent. A parent is not bound to compensate the other parent for the voluntary support of his child without an agreement for compensation. Since no agreement was made, the husband's support of his stepchildren during the marriage could not properly be considered in the disposition of the marital estate. Schultz v. Schultz, 183 M 20, 597 P2d 1174 (1979).

Unreasonable Refusal to Return Home as Constituting Abandonment: Where for 4 years wife refused to return to home provided by husband because he declined to also receive into the family her son by a former marriage who was capable of caring for himself, which husband is not legally obligated to do, her refusal was unreasonable and constituted desertion on her part, and under this section husband was not liable for her support. Goodwin v. Elm Orlu Min. Co., 83 M 152, 269 P 403 (1928).

Separate Maintenance: In an action for separate maintenance court cannot under this section make provision for children of plaintiff by former marriage. Decker v. Decker, 56 M 338, 185 P 168 (1919).

40-6-218. Compensation and support of person after attaining majority.

Case Notes

Presumption That Services Provided by Relative Rendered Gratuitously — Compensation for Personal Care Services Provided by Decedent's Daughters Properly Denied: Following their father's death, three daughters presented a claim against the estate for personal care services that they provided to their father. Their claims were disallowed, and the daughters appealed. The Supreme Court affirmed. Generally, when services are provided to one person by another and the services are knowingly and voluntarily accepted, the law presumes that the services were provided in expectation of payment. However, a generally acknowledged exception applies when a relative seeks payment for services, and the presumption in those cases is that the services were rendered gratuitously unless there was an express agreement for payment or unless such an agreement can be inferred. In this case, the decedent determined prior to death how he wished his assets to be distributed and, despite several opportunities to do so, made no provision for compensation for the personal services that his daughters provided. The daughters were unable to rebut the general presumption of gratuity, and the Supreme Court declined to disturb the District Court's denial of their claims for services. In re Estate of Orr, 2002 MT 325, 313 M 179, 60 P3d 962 (2002). See also San Antonio v. Spencer, 82 M 9, 264 P 944 (1928), Ziegler v. Kramer, 175 M 236, 573 P2d 644 (1978), Donnes v. Orlando, 221 M 356, 720 P2d 233 (1986), and Neumann v. Rogstad, 232 M 24, 757 P2d 761 (1988).

Lack of Consideration When Services Are Gratuitous: Law regards personal services rendered by near relatives or members of the same family living together as one household in the conduct of the home and board or lodging or other necessaries or comforts furnished as gratuitous, and in absence of express or implied agreement to pay for same there can be no recovery therefor. San Antonio v. Spencer, 82 M 9, 264 P 944 (1928).

40-6-221. Parenting, services, and earnings of child.

Compiler's Comments

1997 Amendment: Chapter 343 near beginning, after "entitled to the", substituted "parenting" for "custody" and in second sentence, near middle after "refuses to", substituted "exercise parenting" for "take the custody", after "entitled to the" substituted "parenting" for "custody", and near end, before "is determined", substituted "care of the child" for "custody"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Case Notes

Child Returned to Out-of-State Mother After Removal From Father — Jurisdiction and Dismissal of Abuse and Neglect Case Proper. In re D.H., 2022 MT 37, 407 Mont. 424, 504 P.3d 1099.

Ineffective Assistance of Counsel — Termination of Parental Rights Improper — Remand for Consideration of Placement with Father: Although the out-of-state father had been the primary parent of the children, they were removed from the mother's care after she refused to return them to the father. The father's court-appointed attorney advised him to stipulate to the state's petitions, failed to object to the children being placed with their maternal grandparents, and never requested a placement hearing. Ultimately, the father's parental rights were terminated and the father appealed. The Supreme Court reversed, holding that the father's attorney had provided ineffective counsel, and remanded the matter to the District Court to consider the father as the first placement option for the children. In re B.H., 2020 MT 4, 398 Mont. 275, 456 P.3d 233.

Ineffective Assistance of Counsel: In protracted litigation, the Department of Public Health and Human Services would not give an out-of-state father, who was not unfit, custody of his child and the father's appointed counsel failed in many ways to advocate effectively for him. The District Court ultimately terminated the father's parental rights. Reviewing the case on the father's appeal, the Supreme Court laid out the course of actions the Department should have taken and found that the father's counsel had been ineffective, which prejudiced his case and violated the father's due process rights. The Supreme Court reversed and remanded. In re E.Y.R., 2019 MT 189, 396 Mont. 515, 446 P.3d 1117.

Best Interest of Child Standard Unconstitutional in Custody Award to Nonparent Over Natural Parent Absent Finding of Abuse, Neglect, or Dependency: The best interest of the child standard incorporated into 40-4-221 in determining the custody of a child whose custodial parent dies is unconstitutional to the extent that it allows the grant of a petition prior to the termination of the noncustodial parent's constitutional right to custody. Use of the standard is improper in that any showing that a nonparent may be able to provide a better environment than a natural parent is irrelevant to the question of custody between the two in view of the constitutional right of a parent to custody. Although 40-4-221 gives a nonparent standing to request a custody hearing, it does not give the District Court authority to deprive a natural parent of the right to custody absent a finding of abuse, neglect, or dependency on the part of the natural parent. In re A.R.A., 277 M 66, 919 P2d 388, 53 St. Rep. 543 (1996), following In re Doney, 174 M 282, 570 P2d 575 (1977), and overruling Brost v. Glasgow, 200 M 194, 651 P2d 32 (1982), and In re C.G., 228 M 118, 740 P2d 1139 (1987).

Jurisdiction to Terminate Parental Right to Custody — Error to Grant Custody to Great Aunt as Opposed to Father: Lisa and John were an unmarried couple who separated after the birth of their son, B.B. A court order established paternity and granted legal and physical custody to Lisa, with visitation by John. After Lisa was convicted of forgery and sentenced to the state prison, John petitioned the District Court for an order granting him physical full custody. At the hearing on the petition, a great aunt introduced substantial evidence of her ability to care for the child and temporary custody was awarded to the aunt. The Supreme Court found that under this section, John had an equal right with Lisa to the custody of B.B. and that before the District Court had jurisdiction to award custody to a great aunt, it must make a finding of abuse or neglect to terminate John's right of custody. Babcock v. Wonnacott, 268 M 149, 885 P2d 522, 51 St. Rep. 1224 (1994). See also In re J.B., 278 M 160, 923 P2d 1096, 53 St. Rep. 901 (1996).

Parent Generally Preferred to Nonparent in Award of Custody: The District Court did not abuse its discretion in finding that a parent was generally preferred to a nonparent in award of custody, given evidence of the parent's good character. Weber v. Van De Kop, 228 M 118, 740 P2d 1139, 44 St. Rep. 1388 (1987).

Providing Alternative Custody Not Considered Abandonment: Upon dissolution of marriage the father was awarded custody of the child. The father, a member of the United States Army, was reassigned to Oklahoma where he lived with the child. Upon discharge, he and the child returned to Great Falls. In May, 1978, the father transferred custody of the child to his brother and sister-in-law in Minnesota in order that he might attend vocational school and become employed. At that time, the father signed and delivered a custodial care authorization to his brother and later requested that his brother adopt the child. The mother contends that this action constituted abandonment and that she was therefore entitled to custody. The trial court held that the father's purpose was to provide a healthy environment for the child rather than to relinquish his parental duties, as his job as a truck driver required extended absences from the child. It was not error to find that no abandonment had occurred under this situation. McLean v. Seright, 187 M 194, 609 P2d 282 (1980).

Basis for Depriving Natural Parent of Custody: The father automatically assumes the right to custody of the children at the moment of the mother's death and a judicial hearing and finding of dependency and neglect under Title 41, ch. 3, part 4, or a judicial finding of willful abandonment or nonsupport under 40-8-111 (now repealed) are the exclusive means by which a natural parent may be involuntarily deprived of custody. Schultz v. Schultz, 184 M 245, 602 P2d 595 (1979), following Henderson v. Henderson, 174 M 1, 568 P2d 177 (1977); In re Guardianship of Doney, 174 M 282, 570 P2d 575 (1977).

Custody of Younger Children Awarded to Father: District Court did not abuse its discretion in awarding custody of two younger children to father who had moved to California, as they have a good home with their father and paternal grandparents, are well cared for and happy, their educational and religious training is being more than adequately fulfilled, and they have lived with their father for more than 5 years. Anderson v. Anderson, 145 M 244, 400 P2d 632 (1965).

"Waiver" as Defense to Habeas Corpus Proceeding: When decree of divorce was rendered in Utah and custody of children was granted to mother, she then had preference right. She waived this right when she offered to give up their custody and father took them to his home in Montana, and she could not deprive father of custody by habeas corpus proceedings in Montana unless he was an unfit person to have custody or unless it was shown that best welfare of children required that they be taken from him. State ex rel. Lessley v. District Court, 132 M 357, 318 P2d 571 (1957).

Presumption in Favor of Parent as Rebuttable: Where custody is in dispute, presumption that best interests of child require that it be awarded to parent is rebuttable; each case must be decided upon its own peculiar facts and circumstances. Haynes v. Fillner, 106 M 59, 75 P2d 802 (1938).

Right of Appeal on Writ of Habeas Corpus: There are two kinds of Writs of Habeas Corpus involving an infant: one directed toward freeing the infant from imprisonment, and the other to exercise powers of court of general equity jurisdiction over custody of person of infant; in the latter class the unsuccessful claimant has right of appeal to Supreme Court. Ex parte Reinhardt, 88 M 282, 292 P 582 (1930).

Favored Position of District Judge's Discretion in Custody Cases on Appeal: Decision of District Judge in a controversy affecting rights to custody of child of tender years ought not be overturned on appeal except upon clear showing of abuse of judicial discretion. Ex parte Bourquin, 88 M 118, 290 P 250 (1930).

Important Consideration as to Custody Preference: A mother who had two infant children sought to regain custody of one by habeas corpus. In determining custody, the court should not overlook the advantage flowing from the companionship of the two, which is important in the development of character and unselfish disposition. Ex parte Bourquin, 88 M 118, 290 P 250 (1930).

Preference of Infant Child as to Custody Between Parent and Grandparent: The law prefers the parent as custodian of an infant child unless parent is incompetent or unfit because of poverty or depravity to provide physical comforts and moral training essential to life and well-being of child. Ex parte Bourquin, 88 M 118, 290 P 250 (1930).

Conduct Which Constitutes Estoppel to Claim Earnings of Minor: While parent is entitled to earnings of minor resulting from obligation of support, privilege may be waived either expressly or by conduct, such as making no objection to employment or where parent testifies in support of claim presented by minor and assigned to and sued upon by another; by so doing parent estops himself from thereafter claiming minor's earnings. Schwab v. Peterson, 80 M 214, 260 P 711 (1927).

Surviving Parent Preferred Over Stranger and Child's Wish: While welfare of child is of paramount interest in determining custody, neither such interest nor the child's wish will justify denial of custody to surviving parent and award of custody to a stranger in absence of showing of unfitness or inability to support child. August v. Burns, 79 M 198, 255 P 737 (1927), followed in Girard v. Williams, 1998 MT 231, 291 M 49, 966 P2d 1155, 55 St. Rep. 965 (1998).

Rights of Custodial Agent in Habeas Corpus Proceeding — Same as Parent: Under this section, father and mother of legitimate, unmarried child are equally entitled to its custody; where father, considering mother unfit to have charge of child, had placed it in care of his sister and her husband, the latter were his agents empowered to resist attempts of mother to regain its custody by habeas corpus, and court could properly permit an investigation into facts which would have been available to father if attempt had been made to take child from him. In re Thompson, 77 M 466, 251 P 163 (1926), distinguished in Ex parte Reinhardt, 88 M 282, 292 P 582 (1930).

Law Review Articles

Mother's Right to Sue for Wrongful Death of Child, Luedke, 11 Mont. L. Rev. 81 (1950).

Parents' Right to Custody, Services, and Earnings, Luedke, 11 Mont. L. Rev. 85 (1950).

40-6-232. Parental control over property of child.

Case Notes

Child's Action for Personal Injuries as a Property Right Which Is Unaffected by Parents' Neglect of Notice: Neglect of parents of injured child to give required 60-day notice to city may not be imputed to child, and since statute provides a child is incapable of appointing an agent for any purpose, it is questionable whether statute can be complied with in that respect by anyone as agent. A child's cause of action for damages for personal injuries is a property right over which, under this section, a parent has no control. Lazich v. Belanger, 111 M 48, 105 P2d 738 (1940).

Law Review Articles

Mother's Right to Sue for Wrongful Death of Child, Luedke, 11 Mont. L. Rev. 81 (1950).

40-6-233. Remedy for parental abuse.

Compiler's Comments

1995 Amendment: Chapter 528 inserted last sentence relating to the giving of prescribed medicine to a child.

Case Notes

Mistake of Law — Aunt and Uncle Lack Standing to Petition for Termination of Parental Rights: In a case involving termination of parental rights, the Supreme Court assumed supervisory control to determine whether G.R. and P.R., the child's aunt and uncle, had standing to bring the amended petition to terminate parental rights and for adoption. A child's aunt and uncle are not parties authorized by 42-1-107 to place a child for adoption. A child may not be placed for adoption until the parental rights of the birth parents have been terminated by a court as provided in Title 41, chapter 3, or Title 42. G.R. and P.R. did not have standing to file a petition for termination of parental rights under 42-2-603(2). Under Title 41, chapter 3, a petition for the termination of parental right based upon abuse or neglect of a child may only be brought by the County Attorney, the Attorney General, or an attorney hired by the county. Section 40-6-233 refers to the abuse of parental authority for making decisions regarding the support and education of a child and is not the basis for terminating parental rights. Therefore, G.R. and P.R. do not have standing to petition for the termination of parental rights based upon abuse or neglect. J.C. v. Eleventh Judicial District Court, 2008 MT 358, 346 M 357, 197 P3d 907 (2008).

Child Custody — Remedy for Abuse — Jurisdiction: When a child was present in Montana, having been abandoned by both her natural parents, having been subjected to mistreatment and abuse, and having been threatened with further mistreatment and abuse, her situation met the test for jurisdiction expressed in 40-4-211. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Custody Action as Remedy: Section 40-7-108 describes several criteria by which a District Court may consider whether it is an inconvenient forum but does not create a mandatory duty on the court to dismiss the action upon such grounds. The section is entirely discretionary. The trial court, knowing that the child in question, apparently abandoned by her parents living in California, had been living with relatives in Montana for some time, did not abuse its full discretion in determining it was not an inconvenient forum. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Procedures to Be Rigorously Followed: While there is some overlap in the various statutory schemes governing the termination of parental rights and the custody of children as to general subject matter, each is used for a distinct purpose and sets forth specific procedures which must be rigorously followed before a valid judgment or order may be issued, to insure that the minors involved receive the full protection of these laws. In re Guardianship of Aschenbrenner, 182 M 540, 597 P2d 1156 (1979).

Only Methods by Which a Parent May Be Deprived of Custody — Statutory: Where a Sheriff without writ, warrant, or order of court took into custody a 17-year-old girl whose father and brother were charged with incest committed upon her person, his return alleging, inter alia, unfitness of mother to have custody was no defense to Writ of Habeas Corpus sued out by mother, as it is only by one of the methods provided by statute that parents may be deprived of right to custody of children, i.e., this section and 40-6-234. Ex parte Reinhardt, 88 M 282, 292 P 582 (1930), distinguished in Haynes v. Fillner, 106 M 59, 75 P2d 802 (1938).

Law Review Articles

Child Neglect, Jones, 31 Mont. L. Rev. 201 (1970).

40-6-234. When parental authority ceases.

Case Notes

Severance of Parental Rights — Counsel Not Absolutely Required at In-Chambers Interview of Children: In the trial court, a mother's parental rights to her two children were terminated and custody granted to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services). On appeal, the issue was whether the court had erred by interviewing the children in chambers without the presence of the mother and counsel. When the trial court announced to counsel and the mother that it wished to interview both children in chambers, neither counsel nor the mother objected. The mother claimed that the interview of the children without the presence of her counsel violated her rights to due process. She relied on a case in which it was stated that a child may testify out of the parents' presence in abuse and neglect cases subject to the cross-examination by the parents' attorney. The reviewing court noted that nothing in that opinion suggested that it was the duty of the trial judge to assert a parent's right to cross-examination if counsel for the parent does not. Here, in any event, there was no testimony in chambers, just an inquiry into the children's desires regarding custody. A record of the interviews was made and any claimed right of cross-examination was waived by failing to assert that right at the trial level. In re A.C.S. & E.S.S., 190 M 180, 619 P2d 1199, 37 St. Rep. 1868 (1980).

Procedures to Be Rigorously Followed: While there is some overlap in the various statutory schemes governing the termination of parental rights and the custody of children as to general subject matter, each is used for a distinct purpose and sets forth specific procedures which must be rigorously followed before a valid judgment or order may be issued, to insure that the minors involved receive the full protection of these laws. In re Guardianship of Aschenbrenner, 182 M 540, 597 P2d 1156 (1979).

Marriage of Female Minor as Not Changing Her Status for Purposes of Criminal Rehabilitation: In absence of statute to that effect, marriage of female minor, while releasing her from parental authority, does not change her status to that of an adult, and therefore, under juvenile delinquent law, a married female under age of 18 may properly be committed to state vocational school for girls until she attains age of 21 years. State ex rel. Foot v. District Court, 77 M 290, 250 P 973, 49 ALR 398 (1926).

40-6-235. Parent may relinquish services and custody of child.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Conduct Which Constitutes Estoppel to Claim Earnings of Minor: While parent is entitled to earnings of minor resulting from obligation of support, privilege may be waived, either expressly or by conduct, such as making no objection to employment, or where parent testifies in support of claim presented by minor and assigned to and sued upon by another; by so doing parent estops himself from thereafter claiming minor's earnings. Schwab v. Peterson, 80 M 214, 260 P 711 (1927).

40-6-236. Wages of minors.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

40-6-237. Destruction of property by minor — liability of parents.

Compiler's Comments

2013 Amendment: Chapter 4 substituted "$6,900" for "$2,500"; and made minor changes in style. Amendment effective October 1, 2013.

1981 Amendment: Increased the maximum amount that can be recovered under this section from $1,500 to $2,500.

Case Notes

Damage Done on Each of Three Succeeding Days Counts as One Act: When the Legislature enacted the parental liability statutes, it intended that parents not be exposed to substantial liability for their children's damages that were not the fault of the parents. The statutes are clear when they state that the recovery from parents is not to exceed $2,500, plus costs not to exceed $100. Therefore, when multiple acts occur at substantially the same time and to substantially the same property, the parents' maximum liability is $2,500, plus costs not to exceed $100, for each child of the parents. In this case, a child of the Dempseys and two children of the Doners entered Johnson's salvage yard on each of 3 succeeding days and damaged his property on each day, for a total of claimed damages in excess of $27,750. The Dempseys are liable for $2,500 plus costs for their child, and the Doners are liable for $2,500 plus costs for each of their two children. Johnson v. Dempsey, 273 M 26, 901 P2d 615, 52 St. Rep. 942 (1995).

40-6-238. Limitation on amount of recovery.

Compiler's Comments

2013 Amendment: Chapter 4 inserted "of damages under 40-6-237"; substituted "$6,900" for "$2,500" and "$1,800" for "$100"; and made minor changes in style. Amendment effective October 1, 2013.

1981 Amendment: Increased the maximum amount that can be recovered under this section from $1,500 to $2,500.

Case Notes

Damage Done on Each of Three Succeeding Days Counts as One Act: When the Legislature enacted the parental liability statutes, it intended that parents not be exposed to substantial liability for their children's damages that were not the fault of the parents. The statutes are clear when they state that the recovery from parents is not to exceed $2,500, plus costs not to exceed $100. Therefore, when multiple acts occur at substantially the same time and to substantially the same property, the parents' maximum liability is $2,500, plus costs not to exceed $100, for each child of the parents. In this case, a child of the Dempseys and two children of the Doners entered Johnson's salvage yard on each of 3 succeeding days and damaged his property on each day, for a total of claimed damages in excess of $27,750. The Dempseys are liable for $2,500 plus costs for their child, and the Doners are liable for $2,500 plus costs for each of their two children. Johnson v. Dempsey, 273 M 26, 901 P2d 615, 52 St. Rep. 942 (1995).

Part 4

Montana Safe Haven Newborn Protection Act

Part Compiler's Comments

Preamble: The preamble attached to Ch. 277, L. 2001, provided: "WHEREAS, Montana and the nation have experienced sorrow in the knowledge that newborn infants are sometimes abandoned in life-threatening situations and that some of these children have been harmed or have died as a consequence; and

WHEREAS, the parents of these newborn infants may be under severe emotional stress and may need a safe haven available to them and their child; and

WHEREAS, anonymity, confidentiality, and freedom from prosecution may encourage the parent to leave an infant safely and save the life of the infant; and

WHEREAS, Texas, Minnesota, Louisiana, Colorado, Connecticut, Florida, Indiana, Michigan, New Jersey, New York, South Carolina, and West Virginia have enacted similar laws in 1999 and 2000, and an additional 12 states have legislation under consideration; and

WHEREAS, infants at risk may be served by having this legislation in place, and this legislation is worthwhile if it saves even one infant's life."

Effective Date: Section 20, Ch. 277, L. 2001, provided: "[This act] is effective July 1, 2001."

40-6-402. Definitions.

Compiler's Comments

2023 Amendments — Composite Section: Section 1, Ch. 170, L. 2023, in definition of emergency services provider in (a) near end inserted "or is on duty responding to an emergency call"; inserted definition of newborn safety device; in definition of surrender inserted (b) concerning newborn safety devices and placing an emergency call; and made minor changes in style. Amendment effective July 1, 2023.

Section 4, Ch. 602, L. 2023, in definition of hospital at end inserted "and includes a rural emergency hospital". Amendment effective July 1, 2023.

2007 Amendment: Chapter 449 in definition of fire department after "means a" substituted "governmental fire agency organized" for "fire department organized by a city, town, or city-county consolidated local government". Amendment effective June 1, 2007.

2005 Amendment: Chapter 36 in definition of law enforcement agency substituted "sheriff's office" for "sheriff's department"; and made minor changes in style. Amendment effective October 1, 2005.

Source: This section is based partially upon Mich. Comp. Laws sec. 712.1 (2001).

40-6-405. Surrender of newborn to emergency services provider — temporary protective custody.

Compiler's Comments

2023 Amendments — Composite Section — Code Commissioner Correction: Section 2, Ch. 170, L. 2023, in (2) and (3) at beginning inserted "If a newborn is surrendered face to face"; inserted (2)(a) concerning anonymity; inserted (4) concerning newborn surrendered in newborn safety device; and made minor changes in style. Amendment effective July 1, 2023.

Section 19, Ch. 716, L. 2023, in (2)(d)(vi) near middle after "jurisdiction of the" inserted "federal" and at end inserted "and the Montana Indian Child Welfare Act provided for in Title 41, chapter 3, part 13"; and made minor changes in style. Amendment effective July 1, 2023, and terminates June 30, 2025.

In (3) the Code Commissioner substituted "subsection (2)" for "subsection (1)" to correct an erroneous internal reference.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

2005 Amendment: Chapter 102 in (2)(d)(v) near middle substituted "department" for "safe delivery line established under 40-6-415"; in (3)(b) near middle substituted "information" for "the pamphlet produced under 40-6-415 and inform the parent"; and made minor changes in style. Amendment effective March 24, 2005.

The amendment to this section made by sec. 53, Ch. 130, L. 2005, was rendered void by sec. 2, Ch. 102, L. 2005, a coordination section.

Source: Mich. Comp. Laws sec. 712.3 (2001).

40-6-406. Medical care — report of abuse or neglect — report to department.

Compiler's Comments

Source: Mich. Comp. Laws sec. 712.5 (2001).

40-6-407. Assumption of care, custody, and control by department — placement of child — presumptions — Montana birth certificate.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 20, Ch. 716, L. 2023. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

Source: Mich. Comp. Laws sec. 712.7 (2001).

40-6-411. Rights of parents — custody action.

Compiler's Comments

Source: Mich. Comp. Laws sec. 712.10 (2001).

40-6-412. Custody action — newborn's best interest.

Compiler's Comments

Source: Mich. Comp. Laws sec. 712.14 (2001).

40-6-413. Custody action — order.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 21, Ch. 716, L. 2023. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

Source: Mich. Comp. Laws sec. 712.15 (2001).

40-6-414. Presumption of waiver of parental rights — department to file petition.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 22, Ch. 716, L. 2023. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

Source: Mich. Comp. Laws sec. 712.17 (2001).

40-6-417. Surrender to emergency services provider as bar to criminal prosecution.

Compiler's Comments

Source: Mich. Comp. Laws sec. 750.135 (2001).

Part 5

Caretaker Relative — Authorization for Medical Care

40-6-501. Purpose — legislative intent — parental rights — definitions.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

Applicability: Section 7, Ch. 393, L. 2007, provided: "[This act] applies to a caretaker relative, as defined in [section 1] [40-6-501], to whom a child is given by a parent after October 1, 2007, for care by the relative."

40-6-502. Caretaker relative medical authorization affidavit — use — immunity — format.

Compiler's Comments

Effective Date: This section is effective October 1, 2007.

Applicability: Section 7, Ch. 393, L. 2007, provided: "[This act] applies to a caretaker relative, as defined in [section 1] [40-6-501], to whom a child is given by a parent after October 1, 2007, for care by the relative."

Part 6

Caretaker Relative — Child Custody Rights

Part Compiler's Comments

Effective Date: This part is effective October 1, 2007.

Two-Thirds Vote Required — Contingent Voidness: Section 4, Ch. 496, L. 2007, provided: "Because [section 2(8)(b)] [40-6-602(8)(b)] limits governmental liability, Article II, section 18, of the Montana constitution requires a vote of two-thirds of the members of each house of the legislature for its passage. If [this act] is not approved by at least two-thirds of the members of each house of the legislature, then the bracketed language in [section 2(8)] [40-6-602(8)(b)] is void." The two-thirds vote requirement was met. Final votes were 50 for passage and 0 against passage in the Senate and 98 for passage and 1 against passage in the House of Representatives.

Applicability: Section 5, Ch. 496, L. 2007, provided: "[This act] applies to the voluntary surrender of a child by the child's parent to a caretaker relative occurring on or after October 1, 2007."

Part Law Review Articles

Not the Cleavers Anymore: Third-Party Parental Interests in Minor Children and the Evolving American Family, Scott, 73 Mont. L. Rev. 97 (2012).

40-6-601. Legislative finding and purpose — definitions.

Compiler's Comments

2009 Amendment: Chapter 210 in (1) near middle of third sentence following "offers" inserted "continuity of care by providing", near middle of fourth sentence following "environment" inserted "and the related continuity of care it may provide"; and made minor changes in style. Amendment effective October 1, 2009.

40-6-602. Caretaker relative rights upon return of parent — continuing custody affidavit — review, finding, and order by district court — limited reconsideration — immunity.

Compiler's Comments

2009 Amendment: Chapter 210 in (2)(b)(iii)(A) near middle following "nature" inserted "and permanency or stability"; inserted (2)(c)(ii) concerning how the relative has offered continuity of care; and made minor changes in style. Amendment effective October 1, 2009.

Part 7
Rights of Parents

40-6-701. Interference with fundamental parental rights restricted — cause of action.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 527, L. 2023. Amendment effective May 18, 2023.

Applicability: Section 4, Ch. 502, L. 2021, provided: "[This act] applies to an interference with parental rights existing on or after [the effective date of this act]." Effective October 1, 2021.

Effective Date: This section is effective October 1, 2021.

Preamble: The preamble attached to Ch. 502, L. 2021, provided: "WHEREAS, the interests and role of parents in the care, custody, and control of their children are both implicit in the concept of ordered liberty and deeply rooted in our nation's history and tradition; and

WHEREAS, the right to parent is among the unalienable rights retained by the people under the Constitution of the United States; and

WHEREAS, the right to parent includes the high duty and right of parents to nurture and direct their children's destiny, including their upbringing, moral or religious training, health care, and education; and

WHEREAS, the State of Montana has independent authority to protect parents' fundamental right to nurture and direct their children's destiny, including their upbringing, moral or religious training, health care, and education; and

WHEREAS, parental rights are as fundamental to the human condition as to be considered inalienable. Termination of parental rights equals or exceeds the detriment of criminal sanctions. Therefore, parents whose parental rights are subject to termination must have the right to fundamental due process in all cases."

Case Notes

COVID-19 Pandemic — Fundamental Right of Parent to Make Decisions Regarding Care of Parent's Children — District Court's Interpretation of Statute Incorrect But Reversal of Its Denial of Preliminary Injunction Not Required — Stemming Spread of COVID-19 Virus Unquestionably Compelling Interest. Stand Up Mont. v. Missoula County Pub. Schools, 2022 MT 153, 409 Mont. 330, 514 P.3d 1062.

40-6-702. Medical care for children.

Compiler's Comments

Effective Date: Section 10, Ch. 527, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 18, 2023.

40-6-703. Parental involvement in education.

Compiler's Comments

Effective Date: Section 8, Ch. 693, L. 2023, provided that this section is effective July 1, 2023.

40-6-707. Construction.

Compiler's Comments

Effective Date: Section 10, Ch. 527, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 18, 2023.

40-6-708. Construction.

Compiler's Comments

Effective Date: Section 8, Ch. 693, L. 2023, provided that this section is effective July 1, 2023.

Part 10

Termination of Parent-Child Legal Relationship — Sexual Abuse

Part Compiler's Comments

Effective Date: This part is effective October 1, 2017.

40-6-1001. Petition for termination — criteria — process.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 23, Ch. 716, L. 2023. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

40-6-1002. Service of process — service by publication — effect.

Compiler's Comments

2019 Amendment: Chapter 3 in (1) substituted "part" for "chapter". Amendment effective October 1, 2019.

40-6-1003. Service by publication — summons — form.

Compiler's Comments

2019 Amendment: Chapter 3 in (4) substituted "part" for "chapter". Amendment effective October 1, 2019.

CHAPTER 7

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

Chapter Compiler's Comments

Application and Construction: Section 42, Ch. 91, L. 1999, provided: "In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it."

Transitional Provision: Section 44, Ch. 91, L. 1999, provided: "A motion or other request for relief made in a child custody proceeding or to enforce a child custody determination that was commenced before [the effective date of this act] [October 1, 1999] is governed by the law in effect at the time the motion or other request was made."

Chapter Case Notes

CASES DECIDED UNDER UCCJEA

Continuing Jurisdiction Under UCCJEA: Although full faith and credit may be acquired for the purpose of enforcing a child custody determination in any state that has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), a motion for full faith and credit does not automatically transfer jurisdiction over the matter. The District Court properly determined that Montana was the child's "home state" under UCCJEA and did not abuse its discretion in finding that the child had a significant connection to Montana and that Kentucky would not be a more convenient forum. In re Marriage of Lloyd, 2011 MT 133, 361 Mont. 22, 255 P.3d 166.

Uniform Child Custody Jurisdiction and Enforcement Act Not to Govern Statutory Grandparent-Grandchild Contact Proceedings: The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), codified in this chapter, is directed toward parties acting as parents and contains no directive that applies its jurisdictional provisions to grandparent-grandchild contact proceedings conducted under Title 40, ch. 9., nor does Title 40, ch. 9., include any textual indication that grandparent-grandchild contact proceedings are subject to the procedural or jurisdictional requirements of the UCCJEA. Therefore, the provisions of this chapter do not govern jurisdictional matters relating to grandparent-grandchild contact proceedings conducted under Title 40, ch. 9. In re Grandparent-Grandchild Contact of Stewart v. Evans, 2006 MT 102, 332 M 148, 136 P3d 524 (2006).

CASES DECIDED UNDER UCCJA

Full Faith and Credit Afforded Out-of-State Renewable Child Support Judgment — Res Judicata Applicable: Article IV, sec. 1, U.S. Const., provides that full faith and credit be given in each state to the public acts, records, and judicial proceedings of every other state. As restated in Baker v. Gen. Motors Corp., 522 US 222, 139 L Ed 2d 580, 118 S Ct 657 (1998), a final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. When issues of jurisdiction have been determined by one court, the doctrine of res judicata precludes a second court from considering jurisdiction as long as the first court fully and fairly considered the issue, and that judgment, as to jurisdiction, is entitled to full faith and credit in the second court. In the present case, a Utah renewable child support judgment, in which the Utah court established jurisdiction of the parties, was entitled to full faith and credit in Montana, despite contentions by the husband that he no longer had minimum contacts with Utah after moving to Montana. The jurisdiction arguments raised before the Montana Supreme Court were identical to the arguments that were previously raised, fairly considered, and finally decided in Utah, precluding relitigation by the Montana court under res judicata. In re Child Support of Mason, 1998 MT 192, 290 M 253, 964 P2d 743, 55 St. Rep. 803 (1998), followed with regard to full faith and credit of a judgment by an out-of-state court following full and fair consideration of jurisdiction in Genuine Parts Co. v. Rascal's Auto Parts, Inc., 2008 MT 313, 346 M 56, 192 P3d 1153 (2008).

Indians — Subject Matter Jurisdiction Over Dissolution of Marriage — Different Residences of Parties — Factors to Be Considered — Bertelson Followed: Stacey, an enrolled member of the Fort Peck Tribes, married Shane, a non-Indian. After the marriage ceremony, Stacey returned to the Fort Peck Indian Reservation and Shane went to Forsyth, where his parents lived and where he worked. Some time later, Stacey had a child who also became an enrolled member and lived with Stacey on the Fort Peck Indian Reservation. Still later, Shane filed a dissolution action in a state District Court. The District Court ordered joint custody and ordered that Shane would be the primary residential custodian. Approximately 1 month later, the Fort Peck Tribal Court awarded temporary custody to Stacey. She then filed a motion in District Court under former Rules 12(h) and 60, M.R.Civ.P. (now superseded), to dismiss Shane's dissolution action for lack of subject matter jurisdiction. The District Court held that it had subject matter jurisdiction over the case and issued a final decree of dissolution. In that decree, the District Court held that the parties' child had significant contacts both off and on the reservation, held that the District Court shared concurrent jurisdiction with the tribal court, and therefore denied Stacey's motion to dismiss. The Supreme Court reviewed its previous holdings regarding tribal jurisdiction and child custody jurisdiction under the Uniform Child Custody Jurisdiction Act. The Supreme Court also reviewed the purposes of the Indian Child Welfare Act, which, while not strictly applicable to the case before it, cautions that state courts should be careful not to erode the sovereignty of tribes and tribal courts. In reliance upon In re Bertelson, 189 M 524, 617 P2d 121 (1980), the Supreme Court held that the best interests of the child should be determined and followed in deciding whether a state or tribal court has jurisdiction for the purposes of awarding custody but that when an Indian child resides off the reservation, state courts and tribal courts share concurrent jurisdiction. The Supreme Court then held, in further reliance upon Bertelson, that even when jurisdiction is concurrent, it does not mean that states courts should exercise jurisdiction and that in deciding whether to exercise concurrent jurisdiction, the state courts should consider: (1) 40-4-102, 40-4-107, 40-4-211, and 40-7-108; (2) certain policy issues; and (3) the residence of the parties pursuant to 1-1-215. For this reason, the Supreme Court remanded the case to the District Court for a determination of the residence of Stacey and her child, saying that if the District Court determines that both reside on the reservation, the District Court must dismiss the case. However, if the District Court finds that Stacey's child is not a resident of the reservation and that the District Court shares jurisdiction with the tribal court, the District Court must then consider factors from Bertelson, previously discussed by the Supreme Court, to determine whether the District Court or the tribal court is better able to determine the best interests of the child. In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

Jurisdictional Requirements Not Met — Inapplicability of Uniform Child Custody Jurisdiction Act: The Uniform Child Custody Jurisdiction Act does not apply unless the jurisdictional conditions of 40-4-211 are met, including whether: (1) a determination of the child's home state has been made; (2) the child and parents or at least one contestant has a significant connection with Montana and substantial evidence is available in Montana concerning the child's present or future care, training, and personal relationships; (3) the child is physically present in this state and has been abandoned or an emergency situation necessitates the child's protection; or (4) another state has jurisdiction or has declined jurisdiction because Montana is a more appropriate forum and it is in the child's best interest that Montana assume jurisdiction. In re Marriage of Erler, 261 M 65, 862 P2d 12, 50 St. Rep. 1195 (1993).

Lack of Montana Residency and Significant Connections — No Montana Jurisdiction: The statutory considerations of 40-7-104 (now repealed) were not met and thus a Montana court had no jurisdiction over a child custody case when: (1) prior to commencement of the proceeding, the child lived in Pennsylvania for about 8 years, visiting Montana only briefly; (2) the child's significant connections were with Pennsylvania, with only minimal Montana connections; (3) Pennsylvania, under its version of the Uniform Child Custody Jurisdiction Act, had subject matter jurisdiction and, absent evidence that Pennsylvania had declined to exercise that jurisdiction, jurisdiction did not confer to Montana; and (4) the facts of the case did not constitute such an extraordinary or emergency situation as to confer custody jurisdiction to Montana. In re Marriage of Miller/Beam, 259 M 424, 856 P2d 1378, 50 St. Rep. 863 (1993).

Child Custody Jurisdiction: According to 40-7-104 (now repealed), the provisions of 40-4-211 determine whether a state has a sufficient interest in a child custody dispute to assume jurisdiction. In the present case, Montana does not have the authority under any of the provisions of 40-4-211 to hear the present custody proceeding. Even if Montana had such authority, several provisions of the Uniform Child Custody Jurisdiction Act (UCCJA), including 40-7-107 and 40-7-108, would confer jurisdiction in the Arizona court. In re Marriage of Brown, 218 M 14, 706 P2d 116, 42 St. Rep. 1360 (1985).

"Forum Non Conveniens" — "Clean Hands": In a proceeding to modify a Kentucky child custody decree, the "forum non conveniens" and "clean hands" provisions come into play only after the following findings are made: (1) Kentucky no longer has jurisdiction; (2) Montana has jurisdiction under 40-4-211; and (3) under 28 U.S.C. § 1738A(f), 40-4-211, and 40-7-114 (now repealed), Montana has jurisdiction to modify the Kentucky decree. Pierce v. Pierce, 197 M 16, 640 P2d 899, 39 St. Rep. 315 (1982).

Custody of Indian Children — Appropriate Forum: The District Court ordered Mr. and Mrs. Stanley, members of the Chippewa Cree Tribe, to return their grandchildren to Bertelson, the natural mother. On appeal, the Supreme Court remanded the case to develop a complete evidentiary record and to determine whether the tribal court is the appropriate forum. In re Bertelson, 189 M 524, 617 P2d 121, 37 St. Rep. 1682 (1980), followed in In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

Notice Requirements for Enforcement of Out-of-State Decree: Before the recognition and enforcement provisions of the Uniform Child Custody Jurisdiction Act (UCCJA) can be applied, the initial decree must be entered in conformity with strict notice requirements. If there is not compliance with the notice requirements of the UCCJA by the state entering the initial decree, Montana courts are not required to recognize and enforce the out-of-state decree. (Following Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).) Here notice of the Wyoming hearing was not given to the Raws, the persons in physical custody of Katherine, and the District Court therefore was not required to recognize or enforce the Wyoming order. Application of Pierce, 184 M 82, 601 P2d 1179 (1979).

Custody — Jurisdiction — Recognition of Foreign Decree: When a custody decree of another state is in force, a question of the applicability of the Full Faith and Credit Clause to custody decrees arises. When the California court heard no testimony on the best interests of the child, the precise question at issue in the Montana action, the Montana court was not bound to follow the California court's decree. Similarly, the Montana court was not prevented by the Uniform Child Custody Jurisdiction Act from modifying the California decree. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Jurisdiction to Modify a Foreign Custody Decree: There is no requirement that the Montana court recognize or enforce a foreign court's decree when the foreign court failed to give notice to the person in physical custody of the child as required by the Uniform Child Custody Jurisdiction Act. Further, the foreign state did not retain the jurisdiction it had at the time of initial custody proceedings because the foreign state had long since ceased to be the home of the child. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Punitive Order Subject to Modification: Where Montana modification order in custody case was made without any evidence as to circumstances of the children, and solely on the basis of the nonresident father's allegations of interference by the mother with his legal rights of visitation and periodic custody, the order was punitive and therefore subject to appropriate judicial inquiry and modification by court in state in which children were physically present. Brooks v. Brooks, 20 Or. App. 43, 530 P2d 547 (1975).

Chapter Law Review Articles

Race to Jurisdiction: Forum Determination in DV-Related Child Custody Actions When Survivors Flee Across State Lines, Barber, 82 Mont. L. Rev. 259 (2021).

" . . . and Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Williams, 46 Mont. L. Rev. 119, at 164, 165 (1985).

Family Law, Snyder & Sharrock, 40 Mont. L. Rev. 75 (1979).

Recent Developments in Family Law in Montana, Mahan, 39 Mont. L. Rev. 1 (1978).

Presumptions Concerning Family Law, Clarke, 37 Mont. L. Rev. 102 (1976).

Part 1
General Provisions

Part Case Notes

CASES DECIDED UNDER UCCJEA

Jurisdiction Over Modification of Child Support — UIFSA, not UCCJEA, Controls: In a matter involving only child support issues, jurisdiction is controlled by the Uniform Interstate Family Support Act (UIFSA), not the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The District Court erred in concluding it did not have jurisdiction over the matter based on Montana being an inconvenient forum under UCCJEA when the only issue before the court involved child support. Because the UIFSA, unlike the UCCJEA, does not provide an inconvenient forum provision, the Supreme Court reversed and remanded the matter to the District Court. Ervin v. Ervin, 2011 MT 309, 363 Mont. 80, 265 P.3d 1272.

CASES DECIDED UNDER UCCJA

No Conflict Between UCCJA and "Best Interests of Child" Test: Under the provisions of the Uniform Child Custody Jurisdiction Act (UCCJA) and 40-4-211, the Montana court properly declined to exercise its jurisdiction. The custody proceedings in Arizona, the children's residence, were filed prior to those in Montana, and Arizona had not stayed its proceedings. The provisions of the UCCJA which are rules for determining jurisdiction do not conflict with this state's rules for determining custody. The former is a procedural determination as to the proper forum, made prior to any substantive inquiry, and the latter is the application of substantive rules. No evidentiary hearing is required in a procedural determination as to the proper forum. In re Marriage of Brown, 218 M 14, 706 P2d 116, 42 St. Rep. 1360 (1985).

Custody — Jurisdiction — Recognition of Foreign Decree: When a custody decree of another state is in force, a question of the applicability of the Full Faith and Credit Clause to custody decrees arises. When the California court heard no testimony on the best interests of the child, the precise question at issue in the Montana action, the Montana court was not bound to follow the California court's decree. Similarly, the Montana court was not prevented by the Uniform Child Custody Jurisdiction Act from modifying the California decree. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

No Retroactive Application of UCCJA: Absent a clear expression of legislative purpose, retrospective application of even a procedural statute so as to affect prior proceedings of a pending action cannot be justified. Therefore, jurisdictional rulings entered before the effective date of the UCCJA (Uniform Child Custody Jurisdiction Act) are not subject to the UCCJA. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

40-7-101. Short title.

Commissioners' Note

Section 1 [former 40-7-102] of the UCCJA was a statement of the purposes of the Act [chapter]. Although extensively cited by courts, it was eliminated because Uniform Acts no longer contain such a section. Nonetheless, this Act [chapter] should be interpreted according to its purposes which are to:

(1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;

(2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;

(3) Discourage the use of the interstate system for continuing controversies over child custody;

(4) Deter abductions of children;

(5) Avoid relitigation of custody decisions of other States in this State;

(6) Facilitate the enforcement of custody decrees of other States.

Compiler's Comments

1999 Amendment: Chapter 91 after "Jurisdiction" inserted "and Enforcement". Amendment effective October 1, 1999.

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Source: Section 101, UCCJEA.

40-7-103. Definitions.

Commissioners' Note

The UCCJA did not contain a definition of "child." The definition here is taken from the PKPA.

The definition of "child-custody determination" now closely tracks the PKPA definition. It encompasses any judgment, decree or other order which provides for the custody of, or visitation with, a child, regardless of local terminology, including such labels as "managing conservatorship" or "parenting plan."

The definition of "child-custody proceeding" has been expanded from the comparable definition in the UCCJA. These listed proceedings have generally been determined to be the type of proceeding to which the UCCJA and PKPA are applicable. The list of examples removes any controversy about the types of proceedings where a custody determination can occur. Proceedings that affect access to the child are subject to this Act [chapter]. The inclusion of proceedings related to protection from domestic violence is necessary because in some States domestic violence proceedings may affect custody of and visitation with a child. Juvenile delinquency or proceedings to confer contractual rights are not "custody proceedings" because they do not relate to civil aspects of access to a child. While a determination of paternity is covered under the Uniform Interstate Family Support Act, the custody and visitation aspects of paternity cases are custody proceedings. Cases involving the Hague Convention on the Civil Aspects of International Child Abduction have not been included at this point because custody of the child is not determined in a proceeding under the International Child Abductions Remedies Act. Those proceedings are specially included in the Article 3 [part 3] enforcement process.

"Commencement" has been included in the definitions as a replacement for the term "pending" found in the UCCJA. Its inclusion simplifies some of the simultaneous proceedings provisions of this Act [chapter].

The definition of "home State" has been reworded slightly. No substantive change is intended from the UCCJA.

The term "issuing State" is borrowed from UIFSA. In UIFSA, it refers to the court that issued the support or parentage order. Here, it refers to the State, or the court, which made the custody determination that is sought to be enforced. It is used primarily in Article 3 [part 3].

The term "person" has been added to ensure that the provisions of this Act [chapter] apply when the State is the moving party in a custody proceeding or has legal custody of a child. The definition of "person" is the one that is mandated for all Uniform Acts.

The term "person acting as a parent" has been slightly redefined. It has been broadened from the definition in the UCCJA to include a person who has acted as a parent for a significant period of time prior to the filing of the custody proceeding as well as a person who currently has physical custody of the child. In addition, a person acting as a parent must either have legal custody or claim a right to legal custody under the law of this State. The reference to the law of this State means that a court determines the issue of whether someone is a "person acting as a parent" under its own law. This reaffirms the traditional view that a court in a child custody case applies its own substantive law. The court does not have to undertake a choice-of-law analysis to determine whether the individual who is claiming to be a person acting as a parent has standing to seek custody of the child.

The definition of "tribe" is the one mandated for use in Uniform Acts. Should a State choose to apply this Act [chapter] to tribal adjudications, this definition should be enacted as well as the entirety of Section 104 [40-7-135].

The term "contestant" as has been omitted from this revision. It was defined in the UCCJA § 2(1) [former 40-7-103(1)] as "a person, including a parent, who claims a right to custody or visitation rights with respect to a child." It seems to have served little purpose over the years, and whatever function it once had has been subsumed by state laws on who has standing to seek custody of or visitation with a child. In addition UCCJA § 2(5) [former 40-7-103(4)] of the which [sic] defined "decree" and "custody decree" has been eliminated as duplicative of the definition of "custody determination."

Compiler's Comments

1999 Amendment: Chapter 91 inserted definitions of abandoned, child, child custody determination, child custody proceeding, commencement, court, issuing court, issuing state, person, tribe, and warrant; deleted definition of contestant that read: ""Contestant" means a person, including a parent, who claims a right to custody or visitation rights with respect to a child"; deleted definition of custody determination that read: ""Custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights. It does not include a decision relating to child support or any other monetary obligation of any person"; deleted definition of custody proceeding that read: ""Custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes issues of custody in adoption proceedings. A "custody proceeding" is not a proceeding pursuant to Title 41, chapter 3 or 5"; deleted definition of decree or custody decree that read: ""Decree" or "custody decree" means a custody determination contained in a judicial decree or order made in a custody proceeding and includes an initial decree and a modification decree"; in definition of home state in first sentence after "child" deleted "immediately preceding the time involved" and at end inserted "immediately before the commencement of a child custody proceeding" and in third sentence at beginning substituted "A period" for "Periods" and at end before "period" deleted "6-month or other"; substituted definition of initial determination for definition of initial decree that read: ""Initial decree" means the first custody decree concerning a particular child"; substituted definition of modification for definition of modification decree that read: ""Modification decree" means a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court"; substituted definition of person acting as a parent for definition of person acting as parent that read: ""Person acting as parent" means a person other than a parent who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody"; in definition of physical custody substituted "means the physical care and supervision of a child" for "means actual possession and control of a child"; substituted present definition of state for former definition that read: ""State" means any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia"; and made minor changes in style. Amendment effective October 1, 1999.

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Source: Section 102, UCCJEA.

Montana Changes: Montana changed subsection (3) by including issues of custody in adoption proceedings and excluding the areas covered by Title 41, ch. 3 and 5.

Case Notes

CASES DECIDED UNDER UCCJEA

Montana Home State Despite Several-Month Absence of Child From State: The father appealed the District Court's conclusion that it had jurisdiction over a child custody proceeding filed by the mother in Montana. The child had been born in Montana in 2013 and had resided in Montana until the mother moved to Minnesota in late 2015 to live with the father during a temporary reconciliation. At the end of 8 to 9 months in Minnesota, the mother returned to Montana with the child. Shortly thereafter, the mother agreed to let the child vacation with the father's parents and visit the father with the expectation the child would be returned to Montana shortly. After the father told the mother he was not returning the child to her, the mother filed a petition for a parenting plan in Montana. Over the father's objection, the District Court ruled that Montana was the child's home state and, therefore, it had jurisdiction over the matter. The father appealed to the Supreme Court, which affirmed the ruling, finding that the totality of circumstances supported jurisdiction in the state. In re Parenting of B.K., 2018 MT 217, 392 Mont. 426, 425 P.3d 703.

Short Amount of Time Spent in Montana Not Enough for Jurisdiction — Meaning of Home State Under UCCJEA — Legislative Intent Analyzed — Totality of Circumstances Approach Adopted: A child moved to Montana with both of his parents toward the end of September 2013, but the mother and the child departed to Canada in October 2013. The child never returned. In February 2014, the mother traveled to Montana to retrieve her and her son's belongings and returned to Canada without the father's knowledge. In May 2014, the father sought resolution of parenting and custody in Montana, but the District Court determined that it lacked subject matter jurisdiction on the grounds that Montana was not the home state of the child. On appeal, the Supreme Court affirmed after determining that the Legislature's intent in adopting the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was to create a bright-line rule. Using a totality of the circumstances approach, the court concluded that an absence is not temporary if the character of the absence would make it unreasonable to assume a child would integrate into a community of Montana during the portions of the 6-month period when the child is not absent from the state. Consequently, the child did not live in Montana for the timeframe required by 40-7-201. In re Marriage of Sampley, 2015 MT 121, 379 Mont. 131, 347 P.3d 1281.

Retention of Parenting Plan Proceedings by State Making Initial Custody Determination: The state of Idaho dissolved the parties' marriage and granted residential custody of the parties' child to the mother, who subsequently moved to Montana. The mother later petitioned a Montana District Court to change jurisdiction of the parties' child custody proceedings to Montana and to modify the parenting plan. The Montana court denied the petition, and on appeal the Supreme Court affirmed. Except in cases involving temporary emergency jurisdiction, a Montana court may not modify a foreign court's child custody jurisdiction unless the Montana court has jurisdiction to make an initial child custody determination and either: (1) the court in the other state determines that it no longer has exclusive continuing jurisdiction or that Montana would be a more convenient forum; or (2) either court determines that all parties and the child no longer reside in the other state. In this case no emergency existed, and neither of the two conditions for modification of a parenting plan by a Montana court existed. The Idaho court did not relinquish jurisdiction, and the father continued to live in Idaho. Thus, the Idaho court that issued the existing parenting plan retained exclusive continuing jurisdiction. Koeplin v. Crandall, 2010 MT 70, 355 Mont. 510, 230 P.3d 797.

Parties No Longer Resident in Montana — Relinquishment of Montana Jurisdiction Proper: In 2000, a Montana District Court established child custody with the father, who lived in California, and held that the mother, a Montana resident, was not to have contact with the children until she addressed her psychological disorders. The father subsequently registered the Montana decision with the California courts to allow enforcement of the Montana decision in California, if necessary, and the mother moved to Minnesota. In 2007, the mother petitioned the Montana court to relinquish jurisdiction because none of the parties lived in Montana, but the court decided to retain jurisdiction and denied the petition, so the mother appealed. The father cited 41-3-103 in support of his contention that the Montana court retained jurisdiction because the case was a child abuse and neglect proceeding. However, Montana later adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which applies to and provides greater protections in child abuse and neglect proceedings, so the provisions of 40-7-103 prevail over 41-3-103. Under 40-7-202 of the UCCJEA, a Montana District Court retains exclusive, continuing jurisdiction of child custody proceedings until one of two specific events occurs, the second of which is a determination that none of the relevant parties presently reside in Montana. Thus, it was an abuse of discretion for the District Court to fail to make a determination whether the relevant parties lived in Montana. The Supreme Court reversed with instructions to relinquish jurisdiction over the Montana custody order. In re B.P. & A.P., 2008 MT 166, 343 M 345, 184 P3d 334 (2008).

Uniform Child Custody Jurisdiction and Enforcement Act Not to Govern Statutory Grandparent-Grandchild Contact Proceedings: The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Title 40, ch. 7, is directed toward parties acting as parents and contains no directive that applies its jurisdictional provisions to grandparent-grandchild contact proceedings conducted under Title 40, ch. 9., nor does Title 40, ch. 9., include any textual indication that grandparent-grandchild contact proceedings are subject to the procedural or jurisdictional requirements of the UCCJEA. Therefore, the provisions of Title 40, ch. 7, do not govern jurisdictional matters relating to grandparent-grandchild contact proceedings conducted under Title 40, ch. 9. In re Grandparent-Grandchild Contact of Stewart v. Evans, 2006 MT 102, 332 M 148, 136 P3d 524 (2006).

Analysis of Child's Home State for Purposes of Determining Jurisdiction: A child's home state, for purposes of determining jurisdiction under 40-7-201, is not limited to the time period of 6 months immediately before the commencement of a child custody proceeding. The applicable time period should be within 6 months before commencement of a child custody proceeding. In the present case, the mother moved the children back to Arkansas 4 months after moving to Montana, thereby stopping the clock for the time needed to establish Montana as the home state for jurisdictional purposes. The children had not lived in Montana for at least 6 months before the father began child custody proceedings, so Montana could not acquire home state status. Stephens v. District Court, 2006 MT 21, 331 M 40, 128 P3d 1026 (2006).

Error in Montana Court's Declination of Jurisdiction to Washington Court — Inconvenient Forum: Following several incidents of partner abuse over the years, the mother moved to Washington state and then requested that the Montana court decline jurisdiction as an inconvenient forum in order to allow the Washington court to assume jurisdiction. The request was denied, and the mother appealed. Under the Uniform Child Custody Jurisdiction and Enforcement Act, a Montana court has jurisdiction to make child custody determinations if Montana is the child's home state, as defined in this section, and Montana will continue to have exclusive continuing jurisdiction unless the Montana court declines to exercise its jurisdiction. In this case, the parties conceded that Montana was the home state. Jurisdiction may be declined at any time if the Montana court determines that it is an inconvenient forum and that a court of another state is a more appropriate forum to make custody determinations. The factors in 40-7-108 must be considered when evaluating a motion to decline jurisdiction, and the Act places domestic violence at the top of the list of factors to be considered. Although this factor alone is not dispositive, the Supreme Court held that, given the high propensity for recidivism in domestic violence, when a court finds that partner abuse or child abuse has occurred or that a party has fled Montana to avoid further violence or abuse, the court is authorized to consider whether the party and the child might be better protected if further custody proceedings are held in another state. Here, the District Court abused its discretion by failing to consider which forum would best protect the mother and children. The Supreme Court then went on to discuss the other statutory factors and concluded that the protection of the parties, the years that the children have resided in Washington, the significant distance between the courts, the parties' disparate financial circumstances, the location of evidence and convenience of witnesses, and the familiarity factors all supported the Montana court declining jurisdiction. None of the jurisdictional factors mitigated against declination, and no factor outweighed the concern for safety raised by the history of domestic violence. Thus, the Supreme Court ordered the District Court to decline jurisdiction as an inconvenient forum and arrange to transfer the case to Washington. In re Marriage of Stoneman v. Drollinger, 2003 MT 25, 314 M 139, 64 P3d 997 (2003).

Following remand, the District Court held that the issue of child support should be transferred to Washington state in conjunction with the custody and parenting issues. Nevertheless, the wife filed a cross-appeal in 2007 arguing that under 40-5-149 (renumbered 40-5-1012), Montana retained jurisdiction over the child support issue. However, the Supreme Court dismissed the claim as untimely. Under Rule 4, M.R.App.P. (Title 25, ch. 21), notice of appeal must be filed within 30 days of judgment or order, but the wife's notice of cross-appeal was filed more than 11 months after the District Court's order that finally settled the matter. In re Marriage of Stoneman & Drollinger, 2008 MT 448, 348 M 17, 199 P3d 232 (2008).

CASES DECIDED UNDER UCCJA

Adoption Proceeding in Foreign Jurisdiction — Applicability of Habeas Corpus: A child was born to petitioner in Wyoming in 1980. She relinquished custody to a couple and moved to Montana. Petitioner executed handwritten instruments that were notarized relinquishing custody to the couple and stating she did not know the natural father. The couple began adoption proceedings in Wyoming. Petitioner then executed a written revocation of custody and petitioned for a Writ of Habeas Corpus for the child in Yellowstone County. The District Court deferred jurisdiction to the Wyoming court having jurisdiction of the adoption proceeding. The habeas corpus petition was properly filed in Yellowstone County because the child was currently located there. The District Court properly deferred jurisdiction because although petitioner contended she executed the written instruments under fraud and duress, those issues were equally triable in Wyoming. Under 40-7-108, the District Court could not determine whether Wyoming was an inconvenient forum, only whether the court itself was. The Supreme Court in upholding the

District Court's action said in cases of simultaneous proceedings, the provisions of 40-7-107(3) should be followed. In re Application of Peterson, 203 M 305, 661 P2d 40, 40 St. Rep. 465 (1983).

Custody Jurisdiction Under UCCJA and Interstate Compact on Juveniles: Wyoming had jurisdiction over the runaway juvenile as it was her home state. The District Court in Montana therefore did not have jurisdiction to modify the Wyoming court's custody decree. The interaction of the Interstate Compact on Juveniles and the Uniform Child Custody Jurisdiction Act (UCCJA) placed the District Court in the following position: (1) under the Compact, it had the authority to deny Wyoming's requisition ordering the juvenile's return to Wyoming and to place her in the custody of her grandparents; and (2) under the UCCJA it was not required to recognize or enforce the Wyoming custody decree but was precluded from modifying the decree. The District Court concluded that the juvenile's best interest would be served by having her in the custody of her grandparents and denied the Wyoming requisition. The court did not modify the Wyoming custody order. This procedure appears to be allowed under the interaction of the Compact and the UCCJA. Application of Pierce, 184 M 82, 601 P2d 1179 (1979).

Notice Requirements for Enforcement of Out-of-State Decree: Before the recognition and enforcement provisions of the Uniform Child Custody Jurisdiction Act (UCCJA) can be applied, the initial decree must be entered in conformity with strict notice requirements. If there is no compliance with the notice requirements of the UCCJA by the state entering the initial decree, Montana courts are not required to recognize and enforce the out-of-state decree. (Following Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).) Here notice of the Wyoming hearing was not given to the Raws, the persons in physical custody of Katherine, and the District Court therefore was not required to recognize or enforce the Wyoming order. Application of Pierce, 184 M 82, 601 P2d 1179 (1979).

Child Custody — Home State — Jurisdiction: When a child was present in Montana, having been abandoned by both of her natural parents, having been subjected to mistreatment and abuse, and having been threatened with further mistreatment and abuse, her situation met the test for jurisdiction expressed in 40-4-211. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Attorney General's Opinions

Commencement Filing Fee Not Chargeable for Certain Postdissolution Proceedings: The Attorney General relied on the holding in In re Marriage of Billings, 189 M 520, 616 P2d 1104 (1980), in finding that a District Court Clerk may not charge a commencement filing fee for postdissolution of marriage action that is brought under the same cause number as the marital dissolution proceeding and that remains under the continuing jurisdiction of the District Court. 43 A.G. Op. 72 (1990).

40-7-105. Notice — opportunity to be heard — joinder.

Commissioners' Note

This section generally continues the notice provisions of the UCCJA. However, it does not attempt to dictate who is entitled to notice. Local rules vary with regard to persons entitled to seek custody of a child. Therefore, this section simply indicates that persons entitled to seek custody should receive notice but leaves the rest of the determination to local law. Parents whose parental rights have not been previously terminated and persons having physical custody of the child are specifically mentioned as persons who must be given notice. The PKPA, § 1738A(e), requires that they be given notice in order for the custody determination to be entitled to full faith and credit under that Act.

State laws also vary with regard to whether a court has the power to issue an enforceable temporary custody order without notice and hearing in a case without any interstate element. Such temporary orders may be enforceable, as against due process objections, for a short period of time if issued as a protective order or a temporary restraining order to protect a child from harm. Whether such orders are enforceable locally is beyond the scope of this Act [chapter]. Subsection (b) [(2)] clearly provides that the validity of such orders and the enforceability of such orders is governed by the law which authorizes them and not by this Act [chapter]. An order is entitled to interstate enforcement and nonmodification under this Act [chapter] only if there has been notice and an opportunity to be heard. The PKPA, § 1738A(e), also requires that a custody determination is entitled to full faith and credit only if there has been notice and an opportunity to be heard.

Rules requiring joinder of people with an interest in the custody of and visitation with a child also vary widely throughout the country. The UCCJA has a separate section on joinder of parties which has been eliminated. The issue of who is entitled to intervene and who must be joined in a custody proceeding is to be determined by local state law.

A sentence of the UCCJA § 4 [40-7-105] which indicated that persons outside the State were to be given notice and an opportunity to be heard in accordance with the provision of that Act has been eliminated as redundant.

Compiler's Comments

1999 Amendment: Chapter 91 in (1) substituted present language concerning notice in a child custody determination for former language that read: "Before making a decree under this chapter, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons are outside this state, notice and opportunity to be heard shall be given pursuant to 40-7-106"; inserted (2) regarding the enforceability of a child custody determination made without notice; and inserted (3) concerning the law governing the obligation or right of a person to intervene in a child custody determination. Amendment effective October 1, 1999.

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Source: Section 205, UCCJEA.

Case Notes

CASES DECIDED UNDER UCCJA

Jurisdiction to Modify a Foreign Custody Decree: There is no requirement that the Montana court recognize or enforce a foreign court's decree when the foreign court failed to give notice to the person in physical custody of the child as required by the Uniform Child Custody Jurisdiction Act. Further, the foreign state did not retain the jurisdiction it had at the time of initial custody proceedings because the foreign state had long since ceased to be the home of the child. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

40-7-106. Notice to persons outside state.

Commissioners' Note

This section authorizes notice and proof of service to be made by any method allowed by either the State which issues the notice or the State where the notice is received. This eliminates the need to specify the type of notice in the Act [chapter] and therefore the provisions of Section 5 of the UCCJA [see language of this section prior to 1999 amendment] which specified how notice was to be accomplished were eliminated. The change reflects an approach in this Act [chapter] to use local law to determine many procedural issues. Thus, service by facsimile is permissible if allowed by local rule in either State. In addition, where special service or notice rules are available for some procedures, in either jurisdiction, they could be utilized under this Act [chapter]. For example, if a case involves domestic violence and the statute of either State would authorize notice to be served by a peace officer, such service could be used under this Act [chapter].

Although Section 105 [40-7-136] requires foreign countries to be treated as States for purposes of this Act [chapter], attorneys should be cautioned about service and notice in foreign countries. Countries have their own rules on service which must usually be followed. Attorneys should consult the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 36, T.I.A.S. 6638 (1965).

Compiler's Comments

1999 Amendment: Chapter 91 in (1) substituted present language concerning the manner of giving notice for former language that read: "(1) Notice required for the exercise of jurisdiction over a person outside this state shall be given in a manner reasonably calculated to give actual notice and may be:

(a) by personal delivery outside this state in the manner prescribed for service of process within this state;

(b) in the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;

(c) by any form of mail addressed to the person to be served and requesting a receipt; or

(d) as directed by the court, including publication, if other means of notification are ineffective"; deleted former (2) that read: "(2) Notice under this section shall be served, mailed, or delivered or last published at least 10 days before any hearing in this state"; in (3) substituted language concerning proof of service for former (3) that read: "(3) Proof of service outside this state may be made by affidavit of the individual who made the service or in the manner prescribed by the law of this state, the order pursuant to which the service is made, or the law of the place in which the service is made. If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee"; in (3) substituted "required for the exercise of jurisdiction with respect to a person who" for "required if a person"; and made minor changes in style. Amendment effective October 1, 1999.

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Source: Section 108, UCCJEA.

Montana Changes: In subsection (2) Montana provides for at least 10 days' notice.

Case Notes

CASES DECIDED UNDER UCCJA

Jurisdiction to Modify a Foreign Custody Decree: There is no requirement that the Montana court recognize or enforce a foreign court's decree when the foreign court failed to give notice to the person in physical custody of the child as required by the Uniform Child Custody Jurisdiction Act. Further, the foreign state did not retain the jurisdiction it had at the time of initial custody proceedings because the foreign state had long since ceased to be the home of the child. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Custody — Jurisdiction: When a father who could not be served in California appeared voluntarily in Montana for a custody hearing involving his daughter then living in Montana, the Montana court obtained personal jurisdiction over him. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Custody — Personal Jurisdiction Unnecessary: Personal jurisdiction over a parent is not necessary to the termination of his parental rights to a minor child so long as the parent has actual notice of the termination or the District Court makes an effort reasonably calculated to provide notice to the parent. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Estoppel Effect of Res Judicata: Where mother of child born out of wedlock joined in and agreed to petition allowing father and his wife to adopt child, mother was estopped to later attack decree on grounds that father did not fit specifically any of the categories provided by this section, since the proceedings and resulting decree were res judicata as to her attack of the adoption. In re Adoption of Curtis, 143 M 330, 390 P2d 209 (1964).

40-7-107. Simultaneous proceedings.

Commissioners' Note

This section represents the remnants of the simultaneous proceedings provision of the UCCJA § 6 [see language of this section prior to 1999 amendment]. The problem of simultaneous proceedings is no longer a significant issue. Most of the problems have been resolved by the prioritization of home state jurisdiction under Section 201 [40-7-201]; the exclusive, continuing jurisdiction provisions of Section 202 [40-7-202]; and the prohibitions on modification of Section 203 [40-7-203]. If there is a home State, there can be no exercise of significant connection jurisdiction in an initial child custody determination and, therefore, no simultaneous proceedings. If there is a State of exclusive, continuing jurisdiction, there cannot be another State with concurrent jurisdiction and, therefore, no simultaneous proceedings. Of course, the home State, as well as the State with exclusive, continuing jurisdiction, could defer to another State under Section 207 [40-7-108]. However, that decision is left entirely to the home State or the State with exclusive, continuing jurisdiction.

Under this Act [chapter], the simultaneous proceedings problem will arise only when there is no home State, no State with exclusive, continuing jurisdiction and more than one significant connection State. For those cases, this section retains the "first in time" rule of the UCCJA.

Subsection (b) [(2)] retains the UCCJA's policy favoring judicial communication. Communication between courts is required when it is determined that a proceeding has been commenced in another State.

Subsection (c) [(3)] concerns the problem of simultaneous proceedings in the State with modification jurisdiction and enforcement proceedings under Article 3 [part 3]. This section authorizes the court with exclusive, continuing jurisdiction to stay the modification proceeding pending the outcome of the enforcement proceeding, to enjoin the parties from continuing with the enforcement proceeding, or to continue the modification proceeding under such conditions as it determines are appropriate. The court may wish to communicate with the enforcement court. However, communication is not mandatory. Although the enforcement State is required by the PKPA to enforce according to its terms a custody determination made consistently with the PKPA, that duty is subject to the decree being modified by a State with the power to do so under the PKPA. An order to enjoin the parties from enforcing the decree is the equivalent of a temporary modification by a State with the authority to do so. The concomitant provision addressed to the enforcement court is Section 306 of this Act [40-7-306]. That section requires the enforcement court to communicate with the modification court in order to determine what action the modification court wishes the enforcement court to take.

The term "pending" that was utilized in the UCCJA section on simultaneous proceeding has been replaced. It has caused considerable confusion in the case law. It has been replaced with the term "commencement of the proceeding" as more accurately reflecting the policy behind this section. The latter term is defined in Section 102(5) [40-7-103(5)].

Compiler's Comments

1999 Amendment: Chapter 91 substituted present language concerning the exercise of jurisdiction by a court of this state if a proceeding concerning the custody of the child has been previously commenced in another state for former language that read: "(1) A court of this state may not exercise its jurisdiction under this chapter if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this chapter unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

(2) Before hearing the petition in a custody proceeding, the court shall examine the pleadings and other information supplied by the parties under 40-7-110 and shall consult the child custody registry established under 40-7-117 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state, it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction, it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with 40-7-120 through 40-7-123. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state, it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction, it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum." Amendment effective October 1, 1999.

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Source: Section 206, UCCJEA.

Case Notes

CASES DECIDED UNDER UCCJEA

Retention of Parenting Plan Proceedings by State Making Initial Custody Determination: The state of Idaho dissolved the parties' marriage and granted residential custody of the parties' child to the mother, who subsequently moved to Montana. The mother later petitioned a Montana District Court to change jurisdiction of the parties' child custody proceedings to Montana and to modify the parenting plan. The Montana court denied the petition, and on appeal the Supreme Court affirmed. Except in cases involving temporary emergency jurisdiction, a Montana court may not modify a foreign court's child custody jurisdiction unless the Montana court has jurisdiction to make an initial child custody determination and either: (1) the court in the other state determines that it no longer has exclusive continuing jurisdiction or that Montana would be a more convenient forum; or (2) either court determines that all parties and the child no longer reside in the other state. In this case no emergency existed, and neither of the two conditions for modification of a parenting plan by a Montana court existed. The Idaho court did not relinquish jurisdiction, and the father continued to live in Idaho. Thus, the Idaho court that issued the existing parenting plan retained exclusive continuing jurisdiction. Koeplin v. Crandall, 2010 MT 70, 355 Mont. 510, 230 P.3d 797.

Assumption of Child Custody and Parenting Case by Court of Another State Proper — Neither Parent Living in Montana When Proceeding Commenced: A child was born to the parties in Montana, and a parenting plan was adopted in Montana. However, when the father sought to enforce the plan, the mother was living in Pennsylvania and the father was living in Washington. The Pennsylvania court concluded that it had jurisdiction. The Montana court disagreed, but ceded temporary emergency jurisdiction to the Pennsylvania court while refusing to cede jurisdiction. The mother appealed. The Supreme Court concluded that because 40-7-202 allows either a Montana court or a court of another state to determine that neither parents nor the child reside in the original state, the Pennsylvania court had jurisdiction to make that determination.

Once that determination was made, on the basis of ample, credible, and essentially undisputed evidence, the Montana court no longer had exclusive continuing jurisdiction, and the Montana court therefore erred in retaining jurisdiction. In re Parenting of A.B.A.M., 2004 MT 222, 322 M 406, 96 P3d 1139 (2004). See also Vannatta v. Boulds, 2003 MT 343, 318 M 472, 81 P3d 480 (2003).

Continuing Custody Jurisdiction in North Dakota Court — Modification by Montana Court Improper: When the parties were divorced in North Dakota, that state properly exercised jurisdiction in entering divorce and custody decrees. A Montana District Court subsequently modified the custody decree. The Supreme Court reversed. Under the Uniform Child Custody Jurisdiction and Enforcement Act and the Parental Kidnapping Prevention Act of 1980 (PKPA), full faith and credit must ordinarily be given to child custody determinations made by another state's court if that court appropriately exercised jurisdiction under PKPA standards. Further, under Thompson v. Thompson, 484 US 174 (1988), once a state exercises appropriate PKPA jurisdiction, no other state may exercise concurrent jurisdiction even if it would have been empowered to exercise original jurisdiction. Absent a determination by the North Dakota court that it no longer had exclusive and continuing jurisdiction or that a Montana court would be a more convenient forum, the Montana court had no jurisdiction to modify the North Dakota decree. Vannatta v. Boulds, 2003 MT 343, 318 M 472, 81 P3d 480 (2003), following In re Marriage of Shupe, 276 M 409, 916 P2d 744 (1996).

Improper Use of Best Interest of Child Standard in Determining Jurisdiction Under UCCJEA — Hearing Required to Determine Jurisdiction Between States Based on Inconvenient Forum: As part of a dissolution action, both parties filed for child custody. The mother filed in Montana where she resided, and the father filed in Louisiana where he resided. The Louisiana court took jurisdiction based on the assumption that an emergency situation existed. The Montana District Court applied the best interest of the child standard and transferred custody to Louisiana. The mother appealed to the Montana Supreme Court, which noted that the best interest standard was eliminated from the inconvenient forum statutes when Montana adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in 1999. Rather than the best interest standard, the UCCJEA provides that a Montana court may decline to exercise its jurisdiction if the court determines that Montana is an inconvenient forum under the circumstances and a court of another state is a more appropriate forum based on various factors, including: (1) whether domestic violence has occurred; (2) the length of time the child has resided outside Montana; (3) the distance between the Montana court and the court in the state that would assume jurisdiction; (4) the relative financial circumstances of the parties; (5) any agreement of the parties as to which state would assume jurisdiction; (6) the nature and location of any evidence regarding the issues; (7) the ability of the court of each state to decide the issues expeditiously; and (8) the familiarity of each state with the facts and issues. Further, a hearing is required under 40-7-108 to allow the parties to submit information regarding the factors and for the court to make determinations of fact and law. The husband's argument that this section required no hearing or input from the parties before the Montana court communicated with Louisiana also failed because this section specifically excludes a temporary emergency jurisdiction proceeding, which was the basis for the Louisiana action, and because this section addresses simultaneous custody proceedings in Montana and another state. However, Louisiana had not adopted the UCCJEA as of the date of this action and still operated under the Uniform Child Custody Jurisdiction Act (UCCJA). Thus, the Montana court erred by applying the former best interest standard rather than the current inconvenient forum standard, and by failing to hold a hearing to consider the jurisdictional factors. The case was remanded for further proceedings. In re Marriage of Fontenot, 2003 MT 242, 317 M 298, 77 P3d 206 (2003).

Following remand of the 2003 Fontenot case (Fontenot I), the District Court determined that under Fontenot I, the Louisiana court could not divest the Montana court of jurisdiction because the Louisiana court was not operating under the UCCJEA. The District Court then concluded that it had jurisdiction, awarded custody to the mother, and held the father in contempt for failing to abide by the Montana ruling. The father appealed, and the Supreme Court reversed and remanded. The part of the Fontenot I decision that the District Court relied on was nonbinding dicta. In fact, Fontenot I did not determine jurisdiction, but rather held that the District Court did not conduct proper factfinding through a hearing to determine whether Montana had jurisdiction and noted that Louisiana applies the best interests of the child standard of the UCCJA, while Montana does not apply that standard under the UCCJEA. The Supreme Court noted that the federal Parental Kidnapping Prevention Act of 1980 (PKPA), 28 U.S.C. 1738A, sets forth the jurisdictional guidelines to be applied in the face of competing decisions by sister states, and the District Court was directed to apply the PKPA standards on remand to determine which state had jurisdiction. In addition, because no determination was made establishing Montana jurisdiction, the contempt charges against the father were dismissed. In re Marriage of Fontenot, 2006 MT 324, 335 M 79, 149 P3d 28 (2006). See also In re Marriage of Stoneman v. Drollinger, 2003 MT 25, 314 M 139, 64 P3d 997 (2003), and In re Custody of N.G.H., 2004 MT 162, 322 M 20, 92 P3d 1215 (2004).

On a third appeal of this jurisdictional issue, the Supreme Court affirmed that even if Montana was a more appropriate forum in 2004, Louisiana was the more appropriate forum in 2010. Louisiana previously held hearings on the merits of the custody issue, while Montana had addressed only jurisdictional issues. The court agreed with the District Court that it was in the child's best interests to litigate the proceedings in Louisiana, given the child's home, school, community, and developmental needs and the continuity and stability of care in Louisiana. In re Marriage of Fontenot, 2010 MT 86, 356 Mont. 123, 232 P.3d 358.

CASES DECIDED UNDER UCCJA

Concurrent State Jurisdiction Under UCCJA Determined by PKPA: Pamela Shupe obtained a divorce decree from Utah granting her sole custody of the couple's child. The father, Yancy, petitioned for a change of custody in Montana. The Supreme Court determined that each state had adopted the UCCJA and therefore each state had jurisdiction to make a custody determination. The Supreme Court stated that the PKPA had been enacted to remedy problems of concurrent state jurisdiction under the UCCJA. The Supreme Court held that because Utah had jurisdiction and had not declined to exercise its jurisdiction, then under the PKPA, Montana was not authorized to modify the original custody determination of Utah. In re Marriage of Shupe, 276 M 409, 916 P2d 744, 53 St. Rep. 447 (1996), followed in Vannatta v. Boulds, 2003 MT 343, 318 M 472, 81 P3d 480 (2003).

Child Custody Proceeding Pending in Other State: Proceedings for a child custody action were filed in Arizona, the children's state of residence, prior to those filed in Montana. Arizona had not stayed its proceedings. Therefore, under 40-7-107 the Montana District Court properly declined to exercise its jurisdiction. In re Marriage of Brown, 218 M 14, 706 P2d 116, 42 St. Rep. 1360 (1985).

Adoption Proceeding in Foreign Jurisdiction — Applicability of Habeas Corpus: A child was born to petitioner in Wyoming in 1980. She relinquished custody to a couple and moved to Montana. Petitioner executed handwritten instruments that were notarized relinquishing custody to the couple and stating she did not know the natural father. The couple began adoption proceedings in Wyoming. Petitioner then executed a written revocation of custody and petitioned for a Writ of Habeas Corpus for the child in Yellowstone County. The District Court deferred jurisdiction to the Wyoming court having jurisdiction of the adoption proceeding. The habeas corpus petition was properly filed in Yellowstone County because the child was currently located there. The District Court properly deferred jurisdiction because although petitioner contended she executed the written instruments under fraud and duress, those issues were equally triable in Wyoming. Under 40-7-108, the District Court could not determine whether Wyoming was an inconvenient forum, only whether the court itself was. The Supreme Court in upholding the District Court's action said in cases of simultaneous proceedings, the provisions of 40-7-107(3) should be followed. In re Application of Peterson, 203 M 305, 661 P2d 40, 40 St. Rep. 465 (1983).

Improper Venue as Not Affecting Jurisdiction: This section relates to venue and not jurisdiction; even though only one of joint petitioners in an adoption proceeding was resident of county in which proceeding was held, that was sufficient to confer jurisdiction. In re Adoption of Curtis, 143 M 330, 390 P2d 209 (1964).

40-7-108. Inconvenient forum.

Commissioners' Note

This section retains the focus of Section 7 of the UCCJA [see language of this section prior to 1999 amendment]. It authorizes courts to decide that another State is in a better position to make the custody determination, taking into consideration the relative circumstances of the parties. If so, the court may defer to the other State.

The list of factors that the court may consider has been updated from the UCCJA. The list is not meant to be exclusive. Several provisions require comment. Subparagraph (1) [subsection (2)(a)] is concerned specifically with domestic violence and other matters affecting the health and safety of the parties. For this purpose, the court should determine whether the parties are located in different States because one party is a victim of domestic violence or child abuse. If domestic violence or child abuse has occurred, this factor authorizes the court to consider which State can best protect the victim from further violence or abuse.

In applying subparagraph (3) [subsection (2)(c)], courts should realize that distance concerns can be alleviated by applying the communication and cooperation provisions of Sections 111 and 112 [40-7-119 and 40-7-140].

In applying subsection (7) [(2)(g)] on expeditious resolution of the controversy, the court could consider the different procedural and evidentiary laws of the two States, as well as the flexibility of the court dockets. It also should consider the ability of a court to arrive at a solution to all the legal issues surrounding the family. If one State has jurisdiction to decide both the custody and support issues, it would be desirable to determine that State to be the most convenient forum. The same is true when children of the same family live in different States. It would be inappropriate to require parents to have custody proceedings in several States when one State could resolve the custody of all the children.

Before determining whether to decline or retain jurisdiction, the court of this State may communicate, in accordance with Section 110 [40-7-139], with a court of another State and exchange information pertinent to the assumption of jurisdiction by either court.

There are two departures from Section 7 of the UCCJA [see language of this section prior to 1999 amendment]. First, the court may not simply dismiss the action. To do so would leave the case in limbo. Rather the court shall stay the case and direct the parties to file in the State that has been found to be the more convenient forum. The court is also authorized to impose any other conditions it considers appropriate. This might include the issuance of temporary custody orders during the time necessary to commence a proceeding in the designated State, dismissing the case if the custody proceeding is not commenced in the other State or resuming jurisdiction if a court of the other State refuses to take the case.

Second, UCCJA, § 7(g) [former subsection (7)] which allowed the court to assess fees and costs if it was a clearly inappropriate court, has been eliminated. If a court has jurisdiction under this Act [chapter], it could not be a clearly inappropriate court.

Compiler's Comments

1999 Amendment: Chapter 91 substituted present language pertaining to the determination by a court of this state of whether it is an inconvenient forum for former language that read: "(1) A court which has jurisdiction under this chapter to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(2) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(a) if another state is or recently was the child's home state;

(b) if another state has a closer connection with the child and his family or with the child and one or more of the contestants;

(c) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(d) if the parties have agreed on another forum which is no less appropriate; and

(e) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in 40-7-102.

(4) Before determining whether to decline or retain jurisdiction, the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(5) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

(6) The court may decline to exercise its jurisdiction under this chapter if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(7) If it appears to the court that it is clearly an inappropriate forum, it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(8) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact or, if the court which would have jurisdiction in the other state is not certainly known, transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(9) Any communication received from another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction, the court of this state shall inform the original court of this fact." Amendment effective October 1, 1999.

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Source: Section 207, UCCJEA.

Case Notes

CASES DECIDED UNDER UCCJEA

State Subject Matter Jurisdiction Relationship to Tribal Court Jurisdiction — No Abuse of Discretion for District Court Amendment of Parenting Plan — Mother Failed to Establish Definite Fixed Residence on Reservation — Proper Exercise of Jurisdiction Despite Allegation of Inconvenient Forum — Concurrent State Jurisdiction Proper. In re Parenting of L.D.C., 2022 MT 161, 409 Mont. 439, 516 P.3d 631.

Determination of Parental Interest — Montana as Inconvenient Forum: A mother allowed the petitioner to care for her 1-year-old child for a 6-month period. At the end of the period, the petitioner refused to return the child. Nearly a year later, the child was returned to her mother, who then moved to Oklahoma. The petitioner filed a petition requesting a parental interest determination and interim custody. Ultimately, a District Court concluded that Montana was an inconvenient forum. On appeal, the Supreme Court affirmed, holding that although Montana could exercise jurisdiction over the matter because the petition had been filed while the child was still living in Montana, proceedings in Montana would place a heavy burden of time, travel, and dislocation on the mother and her family. In re Parenting of M.M.K., 2016 MT 81, 383 Mont. 161, 369 P.3d 344.

Jurisdiction Over Termination of Parental Rights Proper: A mother appealed the termination of her parental rights, arguing that the District Court erred in not staying the proceedings because once the mother left Montana for Utah and the child was placed with a Utah foster family, Montana was an inconvenient forum and no longer held exclusive and continuing jurisdiction over the proceedings. The Supreme Court affirmed, concluding that Montana was not an inconvenient forum under 40-7-108 because the evidence required for the proceeding was not located in Utah and did not require any evidence from Utah and that because there was not an ongoing proceeding in Utah, the District Court did not err in refusing to relinquish jurisdiction under the continuing jurisdiction provision of the Uniform Child Custody Jurisdiction and Enforcement Act, 40-7-202, which requires a pending proceeding in another state. In addition, absent any pending Utah proceeding, Article V of the Interstate Compact on the Placement of Children, codified at 41-4-101, dictated that Montana retain jurisdiction after the child was placed in Utah in order to adjudicate the proceeding. In re A.R.B., 2013 MT 310, 372 Mont. 274, 312 P.3d 425.

Jurisdiction Over Modification of Child Support — UIFSA, not UCCJEA, Controls: In a matter involving only child support issues, jurisdiction is controlled by the Uniform Interstate Family Support Act (UIFSA), not the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The District Court erred in concluding it did not have jurisdiction over the matter based on Montana being an inconvenient forum under UCCJEA when the only issue before the court involved child support. Because the UIFSA, unlike the UCCJEA, does not provide an inconvenient forum provision, the Supreme Court reversed and remanded the matter to the District Court. Ervin v. Ervin, 2011 MT 309, 363 Mont. 80, 265 P.3d 1272.

Determination of Inconvenient Forum — Consideration of Statutory Factors Required: The District Court determined, based on the best interests of the child standard in the 1977 Uniform Child Custody Jurisdiction Act (UCCJA), that Montana was not a convenient forum for a child custody proceeding. The Supreme Court noted that the proper standard under the 1999 Uniform Child Custody Jurisdiction and Enforcement Act, which replaced the UCCJA, is whether Montana is the child's home state, in which case Montana has continuing jurisdiction unless a Montana court determines that this state is an inconvenient forum and another state is a more appropriate forum. To determine whether Montana is an inconvenient forum, the Montana court must apply the factors in subsection (2) of this section. Thus, the District Court erred by applying the old UCCJA standard, and the Supreme Court reversed for a hearing under present law to address the factors in subsection (2) of this section regarding jurisdiction. In re Custody of N.G.H., 2004 MT 162, 322 M 20, 92 P3d 1215 (2004), following In re Marriage of Fontenot, 2003 MT 242, 317 M 298, 77 P3d 206 (2003), and followed in In re Marriage of Myrland, 2010 MT 286, 359 Mont. 1, 248 P.3d 290.

Improper Use of Best Interest of Child Standard in Determining Jurisdiction Under UCCJEA — Hearing Required to Determine Jurisdiction Between States Based on Inconvenient Forum: As part of a dissolution action, both parties filed for child custody. The mother filed in Montana where she resided, and the father filed in Louisiana where he resided. The Louisiana court took jurisdiction based on the assumption that an emergency situation existed. The Montana District Court applied the best interest of the child standard and transferred custody to Louisiana. The mother appealed to the Montana Supreme Court, which noted that the best interest standard was eliminated from the inconvenient forum statutes when Montana adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in 1999. Rather than the best interest standard, the UCCJEA provides that a Montana court may decline to exercise its jurisdiction if the court determines that Montana is an inconvenient forum under the circumstances and a court of another state is a more appropriate forum based on various factors, including: (1) whether domestic violence has occurred; (2) the length of time the child has resided outside Montana; (3) the distance between the Montana court and the court in the state that would assume jurisdiction; (4) the relative financial circumstances of the parties; (5) any agreement of the parties as to which state would assume jurisdiction; (6) the nature and location of any evidence regarding the issues; (7) the ability of the court of each state to decide the issues expeditiously; and (8) the familiarity of each state with the facts and issues. Further, a hearing is required under this section to allow the parties to submit information regarding the factors and for the court to make determinations of fact and law. The husband's argument that 40-7-107 required no hearing or input from the parties before the Montana court communicated with Louisiana also failed because 40-7-107 specifically excludes a temporary emergency jurisdiction proceeding, which was the basis for the Louisiana action, and because 40-7-107 addresses simultaneous custody proceedings in Montana and another state. However, Louisiana had not adopted the UCCJEA as of the date of this action and still operated under the Uniform Child Custody Jurisdiction Act (UCCJA). Thus, the Montana court erred by applying the former best interest standard rather than the current inconvenient forum standard, and by failing to hold a hearing to consider the jurisdictional factors. The case was remanded for further proceedings. In re Marriage of Fontenot, 2003 MT 242, 317 M 298, 77 P3d 206 (2003).

Following remand of the 2003 Fontenot case (Fontenot I), the District Court determined that under Fontenot I, the Louisiana court could not divest the Montana court of jurisdiction because the Louisiana court was not operating under the UCCJEA. The District Court then concluded that it had jurisdiction, awarded custody to the mother, and held the father in contempt for failing to abide by the Montana ruling. The father appealed, and the Supreme Court reversed and remanded. The part of the Fontenot I decision that the District Court relied on was nonbinding dicta. In fact, Fontenot I did not determine jurisdiction, but rather held that the District Court did not conduct proper factfinding through a hearing to determine whether Montana had jurisdiction and noted that Louisiana applies the best interests of the child standard of the UCCJA, while Montana does not apply that standard under the UCCJEA. The Supreme Court noted that the federal Parental Kidnapping Prevention Act of 1980 (PKPA), 28 U.S.C. 1738A, sets forth the jurisdictional guidelines to be applied in the face of competing decisions by sister states, and the District Court was directed to apply the PKPA standards on remand to determine which state had jurisdiction. In addition, because no determination was made establishing Montana jurisdiction, the contempt charges against the father were dismissed. In re Marriage of Fontenot, 2006 MT 324, 335 M 79, 149 P3d 28 (2006). See also In re Marriage of Stoneman v. Drollinger, 2003 MT 25, 314 M 139, 64 P3d 997 (2003), and In re Custody of N.G.H., 2004 MT 162, 322 M 20, 92 P3d 1215 (2004).

On a third appeal of this jurisdictional issue, the Supreme Court affirmed that even if Montana was a more appropriate forum in 2004, Louisiana was the more appropriate forum in 2010. Louisiana previously held hearings on the merits of the custody issue, while Montana had addressed only jurisdictional issues. The court agreed with the District Court that it was in the child's best interests to litigate the proceedings in Louisiana, given the child's home, school, community, and developmental needs and the continuity and stability of care in Louisiana. In re Marriage of Fontenot, 2010 MT 86, 356 Mont. 123, 232 P.3d 358.

Error in Montana Court's Declination of Jurisdiction to Washington Court — Inconvenient Forum: Following several incidents of partner abuse over the years, the mother moved to Washington state and then requested that the Montana court decline jurisdiction as an inconvenient forum in order to allow the Washington court to assume jurisdiction. The request was denied, and the mother appealed. Under the Uniform Child Custody Jurisdiction and Enforcement Act, a Montana court has jurisdiction to make child custody determinations if Montana is the child's home state, as defined in 40-7-103, and Montana will continue to have exclusive continuing jurisdiction unless the Montana court declines to exercise its jurisdiction. In this case, the parties conceded that Montana was the home state. Jurisdiction may be declined at any time if the Montana court determines that it is an inconvenient forum and that a court of another state is a more appropriate forum to make custody determinations. The factors in this section must be considered when evaluating a motion to decline jurisdiction, and the Act places domestic violence at the top of the list of factors to be considered. Although this factor alone is not dispositive, the Supreme Court held that, given the high propensity for recidivism in domestic violence, when a court finds that partner abuse or child abuse has occurred or that a party has fled Montana to avoid further violence or abuse, the court is authorized to consider whether the party and the child might be better protected if further custody proceedings are held in another state. Here, the District Court abused its discretion by failing to consider which forum would best protect the mother and children. The Supreme Court then went on to discuss the other statutory factors and concluded that the protection of the parties, the years that the children have resided in Washington, the significant distance between the courts, the parties' disparate financial circumstances, the location of evidence and convenience of witnesses, and the familiarity factors all supported the Montana court declining jurisdiction. None of the jurisdictional factors mitigated against declination, and no factor outweighed the concern for safety raised by the history of domestic violence. Thus, the Supreme Court ordered the District Court to decline jurisdiction as an inconvenient forum and arrange to transfer the case to Washington. In re Marriage of Stoneman v. Drollinger, 2003 MT 25, 314 M 139, 64 P3d 997 (2003).

Following remand, the District Court held that the issue of child support should be transferred to Washington state in conjunction with the custody and parenting issues. Nevertheless, the wife filed a cross-appeal in 2007 arguing that under 40-5-149 (renumbered 40-5-1012), Montana retained jurisdiction over the child support issue. However, the Supreme Court dismissed the claim as untimely. Under Rule 4, M.R.App.P., notice of appeal must be filed within 30 days of judgment or order, but the wife's notice of cross-appeal was filed more than 11 months after the District Court's order that finally settled the matter. In re Marriage of Stoneman & Drollinger, 2008 MT 448, 348 M 17, 199 P3d 232 (2008).

Jurisdictional Requirement Over Dissolution Proceeding Satisfied by Party's Residence — Inconvenient Forum Improperly Applied Absent Opportunity to Respond to Motion: After several years of a difficult relationship, the husband was charged with partner or family member assault and the wife moved to Oregon with the four children. An Oregon court determined that it had temporary emergency jurisdiction over the children, issued a restraining order against the husband, and granted residential custody to the wife. The husband subsequently filed for dissolution and a parenting plan in Montana. The District Court ordered the wife to show cause why the parenting plan should not be adopted. The wife moved to vacate the hearing, claiming that the Montana court did not have jurisdiction and that it was an inconvenient forum. The District Court vacated the show cause hearing without allowing the husband to respond to the motion and dismissed the dissolution petition without explanation. The husband appealed and the Supreme Court reversed. Oregon's exercise of temporary emergency jurisdiction over the children did not automatically divest Montana of jurisdiction over the same parenting issues. Neither party had initiated dissolution proceedings at the time that the husband's petition was filed, so no concurrent jurisdiction issue existed regarding dissolution. Because the husband resided in Montana for 90 days prior to filing the petition, the jurisdiction requirements of 40-4-104 were satisfied. However, jurisdiction over a dissolution of marriage does not necessarily confer jurisdiction over related child custody issues. Once the Montana court was notified of the child custody proceedings in Oregon, the Montana court was obligated by 40-7-204 to contact the Oregon court regarding potential jurisdictional conflicts, but that was not done, so the Montana court's decision to decline to address the parenting issues in the husband's petition because the Oregon court had already exercised jurisdiction was reversed. Further, the inconvenient forum argument was also inappropriate because the husband was not given the opportunity to submit arguments on the issue as required under this section. In re Marriage of Vanlaarhoven, 2002 MT 222, 311 M 368, 55 P3d 942 (2002).

CASES DECIDED UNDER UCCJA

Consideration of Statutory Factors Not Mandatory in Determining Continuing Jurisdiction: Mother argued that the District Court erred in failing to address all the factors in subsection (3) of this section as relevant to determining whether Montana was an inconvenient forum for a child custody case. During the pendency of the case, she had moved the child to North Dakota and filed a motion to decline Montana jurisdiction as an inconvenient forum. However, nowhere does subsection (3) of this section mandate that the court consider each of the five factors set forth in the subsection. Instead, the statute simply lists a number of elements that the court may consider in making an inconvenient forum determination. Here, the court considered the first factor and concluded that because the child had not lived in another state for 6 months, Montana was the appropriate forum. Absent any indication that the exercise of continuing jurisdiction by the Montana court contravened any of the general purposes of the Uniform Child Custody Jurisdiction Act stated in 40-7-102 (now repealed), among which is the deterrence of unilateral removals of children undertaken to obtain custody awards, the District Court's denial of mother's motion to decline jurisdiction was not an abuse of the court's discretion. In re B.E.S., 1998 MT 190, 290 M 188, 963 P2d 449, 55 St. Rep. 773 (1998).

Indians — Subject Matter Jurisdiction Over Dissolution of Marriage — Different Residences of Parties — Factors to Be Considered — Bertelson Followed: Stacey, an enrolled member of the Fort Peck Tribes, married Shane, a non-Indian. After the marriage ceremony, Stacey returned to the Fort Peck Indian Reservation and Shane went to Forsyth, where his parents lived and where he worked. Some time later, Stacey had a child who also became an enrolled member and lived with Stacey on the Fort Peck Indian Reservation. Still later, Shane filed a dissolution action in a state District Court. The District Court ordered joint custody and ordered that Shane would be the primary residential custodian. Approximately 1 month later, the Fort Peck Tribal Court awarded temporary custody to Stacey. She then filed a motion in District Court under former Rules 12(h) and 60, M.R.Civ.P. (now superseded), to dismiss Shane's dissolution action for lack of subject matter jurisdiction. The District Court held that it had subject matter jurisdiction over the case and issued a final decree of dissolution. In that decree, the District Court held that the parties' child had significant contacts both off and on the reservation, held that the District Court shared concurrent jurisdiction with the tribal court, and therefore denied Stacey's motion to dismiss. The Supreme Court reviewed its previous holdings regarding tribal jurisdiction and child custody jurisdiction under the Uniform Child Custody Jurisdiction Act. The Supreme Court also reviewed the purposes of the Indian Child Welfare Act, which, while not strictly applicable to the case before it, cautions that state courts should be careful not to erode the sovereignty of tribes and tribal courts. In reliance upon In re Bertelson, 189 M 524, 617 P2d 121 (1980), the Supreme Court held that the best interests of the child should be determined and followed in deciding whether a state or tribal court has jurisdiction for the purposes of awarding custody but that when an Indian child resides off the reservation, state courts and tribal courts share concurrent jurisdiction. The Supreme Court then held, in further reliance upon Bertelson, that even when jurisdiction is concurrent, it does not mean that states courts should exercise jurisdiction and that in deciding whether to exercise concurrent jurisdiction, the state courts should consider: (1) 40-4-102, 40-4-107, 40-4-211, and this section; (2) certain policy issues; and (3) the residence of the parties pursuant to 1-1-215. For this reason, the Supreme Court remanded the case to the District Court for a determination of the residence of Stacey and her child, saying that if the District Court determines that both reside on the reservation, the District Court must dismiss the case. However, if the District Court finds that Stacey's child is not a resident of the reservation and that the District Court shares jurisdiction with the tribal court, the District Court must then consider factors from Bertelson, previously discussed by the Supreme Court, to determine whether the District Court or the tribal court is better able to determine the best interests of the child. In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

Family Moved From State — Inconvenient Forum for Ongoing Custody Determinations: Shortly after the marriage was dissolved in a Montana court, the mother moved with the children to California and the father moved to Washington. When the need for further child custody determinations arose, the father maintained that Montana remained the proper forum and that mother created any inconvenience by putting 2,000 miles between herself and the Montana court. The District Court, after careful consideration of where evidence regarding the children's environment and welfare was most readily available, properly exercised its discretion by determining that Montana was an inconvenient forum and that the children's interests would be best served by having a California court assume jurisdiction. This is consistent with the purpose espoused in the U.C.C.J.A. that litigation involving minor children occur in the state in which the child has the closest connection and in which significant evidence concerning the child's care, protection, training, and personal relationships is most readily available. In re Marriage of Irwin, 259 M 176, 855 P2d 525, 50 St. Rep. 741 (1993).

Adoption Agency Placement and Refusal to Consent to Adoption by Foster Parents as Reasonable — No Court Authority to Place Child: An adoption agency placed a child with foster parents for a period of time that, although initially to be of short duration, turned out to be 27 months because of prolonged court proceedings regarding termination of parental rights. The agency had always sought to place the child out of state because of potential threat posed by the birth father and made no indications that the foster parents could adopt the child; nevertheless, they began adoption proceedings and sought preliminary injunctive relief to prevent the child from being removed from their home. In denying the injunction, the District Court held, and the Supreme Court subsequently affirmed, that this section restricts who may place a child for adoption and does not include courts in that designation. Because the agency did not consent to the foster parents' request for adoption or did not place the child for adoption in Montana, the foster parents could not adopt the child. The District Court further reasoned that allowing the injunction could have the broader effect of making agencies fearful of placing children with foster parents if there was no certainty that the child could be placed with the family of the agency's choice. The agency's actions in refusing consent to adoption and placing the child out of state were not unreasonable. Lewis v. Catholic Social Serv. for Mont., 253 M 369, 833 P2d 1023, 49 St. Rep. 448 (1992).

Parental Proclivity to Relocate — Montana Jurisdiction Proper: Mother argued that the Montana District Court should have declined jurisdiction as an inconvenient forum under this section, contending the court overlooked the likelihood that the child's present or future care, protection, training, and personal relationships would be more readily available in California. The Supreme Court disagreed and held that Montana was the best arena for jurisdiction after finding that: (1) the mother and child had only recently moved to California; (2) the mother showed a proclivity to relocate; (3) the mother testified at the final hearing that she intended to make her home in Oregon; and (4) the only stable, permanent home environment for the child was the father's home in Montana. In re Marriage of Klose, 243 M 211, 793 P2d 1311, 47 St. Rep. 1156 (1990).

District Court Deferral of Child Custody to Tribal Court: The District Court properly dismissed a petition for modification of child custody on grounds that the Crow Tribal Court was a more appropriate forum. In re Custody of Zier, 230 M 464, 750 P2d 1083, 45 St. Rep. 356 (1988).

Custody — Factors Considered: Section 40-7-108 permits a court to decline to exercise jurisdiction if it finds that another state is a more appropriate forum. The factors that may be considered include which state is or recently was the child's home state and the availability of evidence in the other state. The Montana District Court's decision in this case to stay proceedings in this state was proper under 40-7-108. The children's residence was in the other state, and any evidence regarding their prior care, protection, training, and personal relationships would have been in their resident state. In re Marriage of Brown, 218 M 14, 706 P2d 116, 42 St. Rep. 1360 (1985).

Adoption Proceeding in Foreign Jurisdiction — Applicability of Habeas Corpus: A child was born to petitioner in Wyoming in 1980. She relinquished custody to a couple and moved to Montana. Petitioner executed handwritten instruments that were notarized relinquishing custody to the couple and stating she did not know the natural father. The couple began adoption proceedings in Wyoming. Petitioner then executed a written revocation of custody and petitioned for a Writ of Habeas Corpus for the child in Yellowstone County. The District Court deferred jurisdiction to the Wyoming court having jurisdiction of the adoption proceeding. The habeas corpus petition was properly filed in Yellowstone County because the child was currently located there. The District Court properly deferred jurisdiction because although petitioner contended she executed the written instruments under fraud and duress, those issues were equally triable in Wyoming. Under 40-7-108, the District Court could not determine whether Wyoming was an inconvenient forum, only whether the court itself was. The Supreme Court in upholding the District Court's action said in cases of simultaneous proceedings, the provisions of 40-7-107(3) should be followed. In re Application of Peterson, 203 M 305, 661 P2d 40, 40 St. Rep. 465 (1983).

Communication With Court of Another State: Prior to a proceeding to determine jurisdiction in a modification of a Kentucky child custody decree, the Montana and Kentucky trial court judges informally communicated to facilitate the decisionmaking process. Such communication was untimely because subsection (4) is intended for situations where it has been determined that two states have concurrent jurisdiction. It serves as a second check on jurisdiction after the other prerequisites have been met. Pierce v. Pierce, 197 M 16, 640 P2d 899, 39 St. Rep. 315 (1982).

Modification of Out-of-State Custody Decree: In a proceeding to modify a Kentucky child custody decree, the "forum non conveniens" and "clean hands" provisions come into play only after the following findings are made: (1) Kentucky no longer has jurisdiction; (2) Montana has jurisdiction under 40-4-211; and (3) under 28 U.S.C. § 1738A(f), 40-4-211, and 40-7-114 (now repealed), Montana has jurisdiction to modify the Kentucky decree. Pierce v. Pierce, 197 M 16, 640 P2d 899, 39 St. Rep. 315 (1982).

Custody — Court Discretion, Inconvenient Forum Question: Section 40-7-108 describes several criteria by which a District Court may consider whether it is an inconvenient forum but does not create a mandatory duty on the court to dismiss the action upon such grounds. The section is entirely discretionary. The trial court, knowing that the child in question, apparently abandoned by her parents living in California, had been living with relatives in Montana for some time, did not abuse its full discretion in determining it was not an inconvenient forum. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979). See also In re Marriage of Cook, 223 M 293, 725 P2d 562, 43 St. Rep. 1732 (1986).

40-7-109. Jurisdiction declined by reason of conduct.

Commissioners' Note

The "Clean Hands" section of the UCCJA has been truncated in this Act [chapter]. Since there is no longer a multiplicity of jurisdictions which could take cognizance of a child-custody proceeding, there is less of a concern that one parent will take the child to another jurisdiction in an attempt to find a more favorable forum. Most of the jurisdictional problems generated by abducting parents should be solved by the prioritization of home State in Section 201 [40-7-201]; the exclusive, continuing jurisdiction provisions of Section 202 [40-7-202]; and the ban on modification in Section 203 [40-7-203]. For example, if a parent takes the child from the home State and seeks an original custody determination elsewhere, the stay-at- home parent has six months to file a custody petition under the extended home state jurisdictional provision of Section 201 [40-7-201], which will ensure that the case is retained in the home State. If a petitioner for a modification determination takes the child from the State that issued the original custody determination, another State cannot assume jurisdiction as long at the first State exercises exclusive, continuing jurisdiction.

Nonetheless, there are still a number of cases where parents, or their surrogates, act in a reprehensible manner, such as removing, secreting, retaining, or restraining the child. This section ensures that abducting parents will not receive an advantage for their unjustifiable conduct. If the conduct that creates the jurisdiction is unjustified, courts must decline to exercise jurisdiction that is inappropriately invoked by one of the parties. For example, if one parent abducts the child pre-decree and establishes a new home State, that jurisdiction will decline to hear the case. There are exceptions. If the other party has acquiesced in the court's jurisdiction, the court may hear the case. Such acquiescence may occur by filing a pleading submitting to the jurisdiction, or by not filing in the court that would otherwise have jurisdiction under this Act [chapter]. Similarly, if the court that would have jurisdiction finds that the court of this State is a more appropriate forum, the court may hear the case.

This section applies to those situations where jurisdiction exists because of the unjustified conduct of the person seeking to invoke it. If, for example, a parent in the State with exclusive, continuing jurisdiction under Section 202 [40-7-202] has either restrained the child from visiting with the other parent, or has retained the child after visitation, and seeks to modify the decree, this section in inapplicable. The conduct of restraining or retaining the child did not create jurisdiction. Jurisdiction existed under this Act [chapter] without regard to the parent's conduct. Whether a court should decline to hear the parent's request to modify is a matter of local law. The focus in this section is on the unjustified conduct of the person who invokes the jurisdiction of the court. A technical illegality or wrong is insufficient to trigger the applicability of this section. This is particularly important in cases involving domestic violence and child abuse. Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal. Thus, if a parent flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under this section. An inquiry must be made into whether the flight was justified under the circumstances of the case. However, an abusive parent who seizes the child and flees to another State to establish jurisdiction has engaged in unjustifiable conduct and the new State must decline to exercise jurisdiction under this section.

Subsection (b) [(2)] authorizes the court to fashion an appropriate remedy for the safety of the child and to prevent a repetition of the unjustified conduct. Thus, it would be appropriate for the court to notify the other parent and to provide for foster care for the child until the child is returned to the other parent. The court could also stay the proceeding and require that a custody proceeding be instituted in another State that would have jurisdiction under this Act [chapter]. It should be noted that the court is not making a forum non conveniens analysis in this section. If the conduct is unjustifiable, it must decline jurisdiction. It may, however, retain jurisdiction until a custody proceeding is commenced in the appropriate tribunal if such retention is necessary to prevent a repetition of the wrongful conduct or to ensure the safety of the child.

The attorney's fee standard for this section is patterned after the International Child Abduction Remedies Act, 42 U.S.C. § 11607(b)(3). The assessed costs and fees are to be paid to the respondent who established that jurisdiction was based on unjustifiable conduct.

Compiler's Comments

2019 Amendment: Chapter 98 in (1) in beginning in exception clause substituted "40-7-204" for "40-7-202"; in (1)(b) substituted "40-7-201 through 40-7-203" for "40-7-139, 40-7-140, and 40-7-201"; and in (2) near middle substituted "unjustifiable conduct" for "wrongful conduct". Amendment effective March 21, 2019.

1999 Amendment: Chapter 91 inserted present language concerning a court of this state declining to take jurisdiction due to unjustifiable conduct on the part of the person invoking jurisdiction for former language that read: "(1) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct, the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

(2) Unless required in the interest of the child, the court may not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state, the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(3) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses." Amendment effective October 1, 1999.

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Source: Section 208, UCCJEA.

Case Notes

CASES DECIDED UNDER UCCJEA

Misinterpretation of Statute — Jurisdiction Determined by Residence of Child 6 Months Before Initial Pleading: A mother took her child from Montana on April 24, 2006, after the child had resided in Montana for about 4 years, and filed for a dissolution of her marriage and a custody determination in Texas on May 26, 2006. The child's father filed a petition for dissolution in Montana on October 2, 2006, resulting in a default judgment and parenting plan that the mother later moved to set aside, which the District Court did. The Supreme Court held that the District Court misinterpreted 40-7-201 as providing that a child's home state is the state in which the child has resided for "the last" 6 months and erred when it set aside the parenting plan in favor of the action filed in Texas; the Supreme Court clarified that the home state for purposes of jurisdiction is the child's home state within 6 months before commencement of the proceeding. The Texas court could not have had jurisdiction over the child for more than a few weeks, and the District Court's interpretation did not further the purpose of the Uniform Child Custody Jurisdiction and Enforcement Act to prevent kidnapping of a child by a parent. In re Marriage of Myrland, 2010 MT 286, 359 Mont. 1, 248 P.3d 290.

CASES DECIDED UNDER UCCJA

Section Discretionary in Determining Wrongful Taking: Application of this section is discretionary with the court as to whether the moving of a child by a parent claiming custody constitutes a wrongful taking. In re Marriage of Cox, 226 M 176, 736 P2d 97, 44 St. Rep. 567 (1987).

Modification of Out-of-State Custody Decree: In a proceeding to modify a Kentucky child custody decree, the "forum non conveniens" and "clean hands" provisions come into play only after the following findings are made: (1) Kentucky no longer has jurisdiction; (2) Montana has jurisdiction under 40-4-211; and (3) under 28 U.S.C. § 1738A(f), 40-4-211, and 40-7-114 (now repealed), Montana has jurisdiction to modify the Kentucky decree. Pierce v. Pierce, 197 M 16, 640 P2d 899, 39 St. Rep. 315 (1982).

Jurisdiction to Modify a Foreign Custody Decree: There is no requirement that the Montana court recognize or enforce a foreign court's decree when the foreign court failed to give notice to the person in physical custody of the child as required by the Uniform Child Custody Jurisdiction Act. Further, the foreign state did not retain the jurisdiction it had at the time of initial custody proceedings because the foreign state had long since ceased to be the home of the child. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Custody — Jurisdiction — Recognition of Foreign Decree: When a custody decree of another state is in force, a question of the applicability of the Full Faith and Credit Clause to custody decrees arises. When the California court heard no testimony on the best interests of the child, the precise question at issue in the Montana action, the Montana court was not bound to follow the California court's decree. Similarly, the Montana court was not prevented by the Uniform Child Custody Jurisdiction Act from modifying the California decree. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

40-7-110. Information to be submitted to court.

Commissioners' Note

The pleading requirements from Section 9 of the UCCJA [see language of this section prior to 1999 amendment] are generally carried over into this Act [chapter]. However, the information is made subject to local law on the protection of names and other identifying information in certain cases. A number of States have enacted laws relating to the protection of victims in domestic violence and child abuse cases which provide for the confidentiality of victims names, addresses, and other information. These procedures must be followed if the child-custody proceeding of the State requires their applicability. See, e.g., California Family Law Code § 3409(a). If a State does not have local law that provides for protecting names and addresses, then subsection (e) [not adopted in Montana] or a similar provision should be adopted. Subsection (e) [not adopted in Montana] is based on the National Council of Juvenile and Family Court Judge's, Model Code on Domestic and Family Violence § 304(c). There are other models to choose from, in particular UIFSA § 312.

In subsection (a)(2) [(1)(b)], the term "proceedings" should be read broadly to include more than custody proceedings. Thus, if one parent was being criminally prosecuted for child abuse or custodial interference, those proceedings should be disclosed. If the child is subject to the Interstate Compact on the Placement of Children, facts relating to compliance with the Compact should be disclosed in the pleading or affidavit.

Subsection (b) [(2)] has been added. It authorizes the court to stay the proceeding until the information required in subsection (a) [(1)] has been disclosed, although failure to provide the information does not deprive the court of jurisdiction to hear the case. This follows the majority of jurisdictions which held that failure to comply with the pleading requirements of the UCCJA did not deprive the court of jurisdiction to make a custody determination.

Compiler's Comments

1999 Amendment: Chapter 91 in (1) at beginning of first sentence substituted "In a child custody proceeding, each party" for "Each party in a custody proceeding" and near middle after "information" inserted "if reasonably ascertainable" and in second sentence after "affidavit" substituted "must state" for "each party shall further declare under oath"; in (1)(a) near beginning after "other" substituted "proceeding" for "litigation", after "custody of" inserted "or visitation with", after "child" deleted "in this or any other state", and inserted "and, if so, identify the court, the case number of the proceeding, and the date of the child custody determination, if any"; in (1)(b) substituted present language concerning knowledge of other proceedings that could affect a current proceeding for former language that read: "he has information of any custody proceeding concerning the child pending in a court of this or any other state"; in (1)(c) at beginning after "knows" inserted "the name and address", near middle after "claims" substituted "rights of legal custody or physical custody of" for "to have custody", and after "child" inserted "and, if so, the party shall provide the names and addresses of those persons"; inserted (2) providing for a stay of the proceedings until required information is furnished; in (4) near middle substituted "proceeding" for "custody proceeding concerning the child" and at end after "state" substituted "that could affect the current proceeding" for "of which he obtained information during this proceeding"; and made minor changes in style. Amendment effective October 1, 1999.

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Source: Section 209, UCCJEA.

40-7-112. Appearance of parties and child.

Commissioners' Note

No major changes have been made to this section which was Section 11 of the UCCJA [see language of this section prior to 1999 amendment]. Language was added to subsection (a) [(1)] to authorize the court to require a non-party who has physical custody of the child to produce the child.

Subsection (c) [(3)] authorizes the court to enter orders providing for the safety of the child and the person ordered to appear with the child. If safety is a major concern, the court, as an alternative to ordering a party to appear with the child, could order and arrange for the party's testimony to be taken in another State under Section 111 [40-7-119]. This alternative might be important when there are safety concerns regarding requiring victims of domestic violence or child abuse to travel to the jurisdiction where the abuser resides.

Compiler's Comments

1999 Amendment: Chapter 91 in (1) substituted language regarding a court ordering a party to appear with or without the child in a custody proceeding for former language that read: "(1) The court may order any party to the proceeding who is in this state to appear personally before the court. If that party has physical custody of the child, the court may order that he appear personally with the child"; in (2) near beginning before "proceeding" inserted "a child custody"; inserted (3) authorizing a court to enter orders necessary for the safety of persons appearing before the court; in (4) near beginning before "proceeding" inserted "a child custody", near middle after "pay" substituted "reasonable and necessary travel and other expenses" for "to the clerk of the court travel and other necessary expenses", and at end after "child" deleted "if this is just and proper under the circumstances"; and made minor changes in style. Amendment effective October 1, 1999.

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Source: Section 210, UCCJEA.

Case Notes

CASES DECIDED UNDER UCCJA

No Duty of Attorney to Nonclient in Child Custody Case: An attorney must be able to vigorously advocate a client's interests in litigation without being compromised by obligations to nonclients. If an attorney were considered to owe the same duty of care to both a parent and child in an adversarial custody case, neither parent nor child would be served effectively. Because the interests of a parent and those of a child may not be identical, the attorney's duty runs solely to the client except if the conduct rises to the level of deceit or collusion or is intentionally reckless. Rhode v. Adams, 1998 MT 73, 288 M 278, 957 P2d 1124, 55 St. Rep. 303 (1998).

40-7-119. Taking testimony in another state.

Commissioners' Note

No substantive changes have been made to subsection (a) [(1)] which was Section 18 of the UCCJA [see language of this section prior to 1999 amendment].

Subsections (b) and (c) [(2) and (3)] merely provide that modern modes of communication are permissible in the taking of testimony and the transmittal of documents. See UIFSA § 316.

Compiler's Comments

1999 Amendment: Chapter 91 in (1) near beginning after "available to a party" substituted "a party to a child custody proceeding may offer testimony of witnesses who are located in another state" for "any party to the proceeding or a guardian ad litem or other representative of the child may adduce testimony of witnesses"; inserted (2) allowing a deposition of a person in another state to testify by telephone, audiovisual, or electronic means; inserted (3) allowing for an objection to documentary evidence transmitted from another state by technological means; and made minor changes in style. Amendment effective October 1, 1999.

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Source: Section 111, UCCJEA.

40-7-125. Priority.

Commissioners' Note

No substantive change was made to this section which was Section 24 of the UCCJA [see language of this section prior to 1999 amendment]. The section is placed toward the beginning of Article 1 [part 1] to emphasize its importance.

The language change from "case" to "question" is intended to clarify that it is the jurisdictional issue which must be expedited and not the entire custody case. Whether the entire custody case should be given priority is a matter of local law.

Compiler's Comments

1999 Amendment: Chapter 91 substituted reference to a child custody proceeding for former reference to a custody proceeding; and made minor changes in style. Amendment effective October 1, 1999.

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Source: Section 107, UCCJEA.

40-7-134. Proceedings governed by other law.

Commissioners' Note

Two proceedings are governed by other acts. Adoption cases are excluded from this Act [chapter] because adoption is a specialized area which is thoroughly covered by the Uniform Adoption Act (UAA) (1994). Most States either will adopt that Act or will adopt the jurisdictional provisions of that Act. Therefore the jurisdictional provisions governing adoption proceeding are generally found elsewhere.

However, there are likely to be a number of instances where it will be necessary to apply this Act [chapter] in an adoption proceeding. For example, if a State adopts the UAA then Section 3-101 of the Act specifically refers in places to the Uniform Child Custody Jurisdiction Act which will become a reference to this Act [chapter]. Second, the UAA requires that if an adoption is denied or set aside, the court is to determine the child's custody. UAA § 3-704. Those custody proceedings would be subject to this Act [chapter]. See Joan Heifetz Hollinger, The Uniform Adoption Act: Reporter's Ruminations, 30 Fam.L.Q. 345 (1996).

Children that are the subject of interstate placements for adoption or foster care are governed by the Interstate Compact on the Placement of Children (ICPC). The UAA § 2-107 provides that the provisions of the compact, although not jurisdictional, supply the governing rules for all children who are subject to it. As stated in the Comments to that section: "Once a court exercises jurisdiction, the ICPC helps determine the legality of an interstate placement." For a discussion of the relationship between the UCCJA and the ICPC see J.D.S. v. Franks, 893 P.2d 732 (Ariz. 1995).

Proceedings pertaining to the authorization of emergency medical care for children are outside the scope of this Act [chapter] since they are not custody determinations. All States have procedures which allow the State to temporarily supersede parental authority for purposes of emergency medical procedures. Those provisions will govern without regard to this Act [chapter].

Compiler's Comments

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Effective Date: This section is effective October 1, 1999.

Source: Section 103, UCCJEA.

40-7-135. Application to Indian tribes.

Commissioners' Note

This section allows States the discretion to extend the terms of this Act [chapter] to Indian tribes by removing the brackets. The definition of "tribe" is found at Section 102(16) [40-7-103(16)]. This Act [chapter] does not purport to legislate custody jurisdiction for tribal courts. However, a Tribe could adopt this Act [chapter] as enabling legislation by simply replacing references to "this State" with "this Tribe."

Subsection (a) [(1)] is not bracketed. If the Indian Child Welfare Act requires that a case be heard in tribal court, then its provisions determine jurisdiction.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 24, Ch. 716, L. 2023. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Effective Date: This section is effective October 1, 1999.

Source: Section 104, UCCJEA.

Case Notes

CASES DECIDED UNDER UCCJA

Indians — Subject Matter Jurisdiction Over Dissolution of Marriage — Different Residences of Parties — Factors to Be Considered — Bertelson Followed: Stacey, an enrolled member of the Fort Peck Tribes, married Shane, a non-Indian. After the marriage ceremony, Stacey returned to the Fort Peck Indian Reservation and Shane went to Forsyth, where his parents lived and where he worked. Some time later, Stacey had a child who also became an enrolled member and lived with Stacey on the Fort Peck Indian Reservation. Still later, Shane filed a dissolution action in a state District Court. The District Court ordered joint custody and ordered that Shane would be the primary residential custodian. Approximately 1 month later, the Fort Peck Tribal Court awarded temporary custody to Stacey. She then filed a motion in District Court under former Rules 12(h) and 60, M.R.Civ.P. (now superseded), to dismiss Shane's dissolution action for lack of subject matter jurisdiction. The District Court held that it had subject matter jurisdiction over the case and issued a final decree of dissolution. In that decree, the District Court held that the parties' child had significant contacts both off and on the reservation, held that the District Court shared concurrent jurisdiction with the tribal court, and therefore denied Stacey's motion to dismiss. The Supreme Court reviewed its previous holdings regarding tribal jurisdiction and child custody jurisdiction under the Uniform Child Custody Jurisdiction Act. The Supreme Court also reviewed the purposes of the Indian Child Welfare Act, which, while not strictly applicable to the case before it, cautions that state courts should be careful not to erode the sovereignty of tribes and tribal courts. In reliance upon In re Bertelson, 189 M 524, 617 P2d 121 (1980), the Supreme Court held that the best interests of the child should be determined and followed in deciding whether a state or tribal court has jurisdiction for the purposes of awarding custody but that when an Indian child resides off the reservation, state courts and tribal courts share concurrent jurisdiction. The Supreme Court then held, in further reliance upon Bertelson, that even when jurisdiction is concurrent, it does not mean that states courts should exercise jurisdiction and that in deciding whether to exercise concurrent jurisdiction, the state courts should consider: (1) 40-4-102, 40-4-107, 40-4-211, and 40-7-108; (2) certain policy issues; and (3) the residence of the parties pursuant to 1-1-215. For this reason, the Supreme Court remanded the case to the District Court for a determination of the residence of Stacey and her child, saying that if the District Court determines that both reside on the reservation, the District Court must dismiss the case. However, if the District Court finds that Stacey's child is not a resident of the reservation and that the District Court shares jurisdiction with the tribal court, the District Court must then consider factors from Bertelson, previously discussed by the Supreme Court, to determine whether the District Court or the tribal court is better able to determine the best interests of the child. In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

40-7-136. International application.

Commissioners' Note

The provisions of this Act [chapter] have international application to child custody proceedings and determinations of other countries. Another country will be treated as if it were a State of the United States for purposes of applying Articles 1 and 2 of this Act [parts 1 and 2 of this chapter]. Custody determinations of other countries will be enforced if the facts of the case indicate that jurisdiction was in substantial compliance with the requirements of this Act [chapter].

In this section, the term "child-custody determination" should be interpreted to include proceedings relating to custody or analogous institutions of the other country. See generally, Article 3 of The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. 35 I.L.M. 1391 (1996).

A court of this State may refuse to apply this Act [chapter] when the child custody law of the other country violates basic principles relating to the protection of human rights and fundamental freedoms. The same concept is found in of the Section 20 of the Hague Convention on the Civil Aspects of International Child Abduction (return of the child may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms). In applying subsection (c) [(3)], the court's scrutiny should be on the child custody law of the foreign country and not on other aspects of the other legal system. This Act [chapter] takes no position on what laws relating to child custody would violate fundamental freedoms. While the provision is a traditional one in international agreements, it is invoked only in the most egregious cases.

This section is derived from Section 23 of the UCCJA [former 40-7-124].

Compiler's Comments

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Effective Date: This section is effective October 1, 1999.

Source: Section 105, UCCJEA.

Case Notes

CASES DECIDED UNDER UCCJEA

Removal of Child Across State Lines While Custody Proceedings Pending in Montana — Continuing Jurisdiction Versus Pending Jurisdiction Under Federal Parental Kidnapping Prevention Act: When the parties were divorced, an Oregon court granted a parenting plan. The mother later moved to Montana, and the Montana District Court properly assumed jurisdiction. The mother then fled with her son to American Samoa. A Samoan court assumed jurisdiction and awarded custody to the mother. The father petitioned the Montana District Court to enforce the earlier parenting plan, and the petition was granted. The mother appealed the Montana court's failure to recognize the jurisdiction of the Samoan court. The Supreme Court applied the provisions of the federal Parental Kidnapping Prevention Act of 1980 (PKPA), holding that a sister state may modify a child custody determination when the sister state has jurisdiction to make a child custody determination under its own laws, which the Samoan court had, and when the first state no longer has jurisdiction by having lost or given up its continuing or pending jurisdiction. A state has continuing jurisdiction if it has jurisdiction under its own law and it remains the residence of the child or any of the contestants. A state has pending jurisdiction if that state is engaged in proceedings that will ultimately impact the custody and visitation of a child. In this case, Montana did not have continuing jurisdiction because none of the parties were residing in Montana once the mother moved with the child to American Samoa. However, Montana did have pending jurisdiction at the time that the mother initiated the action in American Samoa. The PKPA was designed to prevent precisely what occurred here, namely the removal of a child from one jurisdiction to another in order to obtain a different result regarding custody or other matters affecting a minor child. The mother could not divest Montana of jurisdiction simply by removing the child to American Samoa in an effort to restart the entire issue. Because the Montana court did not decline jurisdiction, the Samoan court was without authority to assume jurisdiction and instead was required to enforce the Montana custody determination. Paslov v. Cox, 2004 MT 325, 324 M 94, 104 P3d 1025 (2004).

40-7-137. Binding force of child custody determination.

Commissioners' Note

No substantive changes have been made to this section which was Section 12 of the UCCJA [former 40-7-113].

Compiler's Comments

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Effective Date: This section is effective October 1, 1999.

Source: Section 106, UCCJEA.

40-7-138. Appearance and limited immunity.

Commissioners' Note

This section establishes a general principle that participation in a custody proceeding does not, by itself, give the court jurisdiction over any issue for which personal jurisdiction over the individual is required. The term "participate" should be read broadly. For example, if jurisdiction is proper under Article 2 [part 2], a respondent in an original custody determination, or a party in a modification determination, should be able to request custody without this constituting the seeking of affirmative relief that would waive personal jurisdictional objections. Once jurisdiction is proper under Article 2 [part 2], a party should not be placed in the dilemma of choosing between seeking custody or protecting a right not to be subject to a monetary judgment by a court with no other relationship to the party.

This section is comparable to the immunity provision of UIFSA § 314. A party who is otherwise not subject to personal jurisdiction can appear in a custody proceeding or an enforcement action without being subject to the general jurisdiction of the State by virtue of the appearance. However, if the petitioner would otherwise be subject to the jurisdiction of the State, appearing in a custody proceeding or filing an enforcement proceeding will not provide immunity. Thus, if the non-custodial parent moves from the State that decided the custody determination, that parent is still subject to the state's jurisdiction for enforcement of child support if the child or an individual obligee continues to reside there. See UIFSA § 205. If the non-custodial parent returns to enforce the visitation aspects of the custody determination, the State can utilize any appropriate means to collect the back-due child support. However, the situation is different if both parties move from State A after the determination, with the custodial parent and the child establishing a new home State in State B, and the non-custodial parent moving to State C. The non-custodial parent is not, at this point, subject to the jurisdiction of State B for monetary matters. See Kulko v. Superior Court, 436 U.S. 84 (1978). If the non-custodial parent comes into State B to enforce the visitation aspects of the determination, the non-custodial parent is not subject to the jurisdiction of State B for those proceedings and issues requiring personal jurisdiction by filing the enforcement action.

A party also is immune from service of process during the time in the State for an enforcement action except for those claims for which jurisdiction could be based on contacts other than mere physical presence. Thus, when the non-custodial parent comes into State B to enforce the visitation aspects of the decree, State B cannot acquire jurisdiction over the child support aspects of the decree by serving the non-custodial parent in the State. Cf. UIFSA § 611 (personally serving the obligor in the State of the residence of the obligee is not by itself a sufficient jurisdictional basis to authorize a modification of child support). However, a party who is in this State and subject to the jurisdiction of another State may be served with process to appear in that State, if allowable under the laws of that State.

As the Comments to UIFSA § 314 note, the immunity provided by this section is limited. It does not provide immunity for civil litigation unrelated to the enforcement action. For example, a party to an enforcement action is not immune from service regarding a claim that involves an automobile accident occurring while the party is in the State.

Compiler's Comments

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Effective Date: This section is effective October 1, 1999.

Source: Section 109, UCCJEA.

40-7-139. Communication between courts.

Commissioners' Note

This section emphasizes the role of judicial communications. It authorizes a court to communicate concerning any proceeding arising under this Act [chapter]. This includes communication with foreign tribunals and tribal courts. Communication can occur in many different ways such as by telephonic conference and by on-line or other electronic communication. The Act [chapter] does not preclude any method of communication and recognizes that there will be increasing use of modern communication techniques.

Communication between courts is required under Sections 204, 206, and 306 [40-7-107, 40-7-204, and 40-7-306] and strongly suggested in applying Section 207 [40-7-108]. Apart from those sections, there may be less need under this Act [chapter] for courts to communicate concerning jurisdiction due to the prioritization of home state jurisdiction. Communication is authorized, however, whenever the court finds it would be helpful. The court may authorize the parties to participate in the communication. However, the Act [chapter] does not mandate participation. Communication between courts is often difficult to schedule and participation by the parties may be impractical. Phone calls often have to be made after-hours or whenever the schedules of judges allow.

This section does require that a record be made of the conversation and that the parties have access to that record in order to be informed of the content of the conversation. The only exception to this requirement is when the communication involves relatively inconsequential matters such as scheduling, calendars, and court records. Included within this latter type of communication would be matters of cooperation between courts under Section 112 [40-7-140]. A record includes notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum or an electronic record of the communication between the courts, or a memorandum or an electronic record made by a court after the communication.

The second sentence of subsection (b) [(2)] protects the parties against unauthorized ex parte communications. The parties' participation in the communication may amount to a hearing if there is an opportunity to present facts and jurisdictional arguments. However, absent such an opportunity, the participation of the parties should not to be considered a substitute for a hearing and the parties must be given an opportunity to fairly and fully present facts and arguments on the jurisdictional issue before a determination is made. This may be done through a hearing or, if appropriate, by affidavit or memorandum. The court is expected to set forth the basis for its jurisdictional decision, including any court-to-court communication which may have been a factor in the decision.

Compiler's Comments

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Effective Date: This section is effective October 1, 1999.

Source: Section 110, UCCJEA.

40-7-140. Cooperation between courts — preservation of records.

Commissioners' Note

This section is the heart of judicial cooperation provision of this Act [chapter]. It provides mechanisms for courts to cooperate with each other in order to decide cases in an efficient manner without causing undue expense to the parties. Courts may request assistance from courts of other States and may assist courts of other States.

The provision on the assessment of costs for travel provided in the UCCJA § 19 [former 40-7-120] has been changed. The UCCJA provided that the costs may be assessed against the parties or the State or county. Assessment of costs against a government entity in a case where the government is not involved is inappropriate and therefore that provision has been removed. In addition, if the State is involved as a party, assessment of costs and expenses against the State must be authorized by other law. It should be noted that the term "expenses" means out-of-pocket costs. Overhead costs should not be assessed as expenses.

No other substantive changes have been made. The term "social study" as used in the UCCJA was replaced with the modern term: "custody evaluation." The Act [chapter] does not take a position on the admissibility of a custody evaluation that was conducted in another State. It merely authorizes a court to seek assistance of, or render assistance to, a court of another State.

This section combines the text of Sections 19-22 of the UCCJA [former 40-7-120 through 40-7-123].

Compiler's Comments

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Effective Date: This section is effective October 1, 1999.

Source: Section 112, UCCJEA.

Part 2

Jurisdiction

Part Compiler's Comments

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Effective Date: This part is effective October 1, 1999.

40-7-201. Initial child custody jurisdiction.

Commissioners' Note

This section provides mandatory jurisdictional rules for the original child custody proceeding. It generally continues the provisions of the UCCJA § 3 [former 40-7-104]. However, there have been a number of changes to the jurisdictional bases.

1. Home State Jurisdiction. The jurisdiction of the home State has been prioritized over other jurisdictional bases. Section 3 of the UCCJA [former 40-7-104] provided four independent and concurrent bases of jurisdiction. The PKPA provides that full faith and credit can only be given to an initial custody determination of a "significant connection" State when there is no home State. This Act [chapter] prioritizes home state jurisdiction in the same manner as the PKPA thereby eliminating any potential conflict between the two acts.

The six-month extended home state provision of subsection (a)(1) [(1)(a)] has been modified slightly from the UCCJA. The UCCJA provided that home state jurisdiction continued for six months when the child had been removed by a person seeking the child's custody or for other reasons and a parent or a person acting as a parent continues to reside in the home State. Under this Act [chapter], it is no longer necessary to determine why the child has been removed. The only inquiry relates to the status of the person left behind. This change provides a slightly more refined home state standard than the UCCJA or the PKPA, which also requires a determination that the child has been removed "by a contestant or for other reasons." The scope of the PKPA's provision is theoretically narrower than this Act [chapter]. However, the phrase "or for other reasons" covers most fact situations where the child is not in the home State and, therefore, the difference has no substantive effect.

In another sense, the six-month extended home state jurisdiction provision is this Act [chapter] is narrower than the comparable provision in the PKPA. The PKPA's definition of extended home State is more expansive because it applies whenever a "contestant" remains in the home State. That class of individuals has been eliminated in this Act [chapter]. This Act [chapter] retains the original UCCJA classification of "parent or person acting as parent" to define who must remain for a State to exercise the six-month extended home state jurisdiction. This eliminates the undesirable jurisdictional determinations which would occur as a result of differing state substantive laws on visitation involving grandparents and others. For example, if State A's law provided that grandparents could obtain visitation with a child after the death of one of the parents, then the grandparents, who would be considered "contestants" under the PKPA, could file a proceeding within six months after the remaining parent moved and have the case heard in State A. However, if State A did not provide that grandparents could seek visitation under such circumstances, the grandparents would not be considered "contestants" and State B where the child acquired a new home State would provide the only forum. This Act [chapter] bases jurisdiction on the parent and child or person acting as a parent and child relationship without regard to grandparents or other potential seekers of custody or visitation. There is no conflict with the broader provision of the PKPA. The PKPA in § (c)(1) authorizes States to narrow the scope of their jurisdiction.

2. Significant connection jurisdiction. This jurisdictional basis has been amended in four particulars from the UCCJA. First, the "best interest" language of the UCCJA has been eliminated. This phrase tended to create confusion between the jurisdictional issue and the substantive custody determination. Since the language was not necessary for the jurisdictional issue, it has been removed.

Second, the UCCJA based jurisdiction on the presence of a significant connection between the child and the child's parents or the child and at least one contestant. This Act [chapter] requires that the significant connections be between the child, the child's parents or the child and a person acting as a parent.

Third, a significant connection State may assume jurisdiction only when there is no home State or when the home State decides that the significant connection State would be a more appropriate forum under Section 207 or 208 [40-7-108 or 40-7-109]. Fourth, the determination of significant connections has been changed to eliminate the language of "present or future care." The jurisdictional determination should be made by determining whether there is sufficient evidence in the State for the court to make an informed custody determination. That evidence might relate to the past as well as to the "present or future."

Emergency jurisdiction has been moved to a separate section. This is to make it clear that the power to protect a child in crisis does not include the power to enter a permanent order for that child except as provided by that section.

Paragraph (a)(3) [subsection (1)(c)] provides for jurisdiction when all States with jurisdiction under paragraphs (a)(1) and (2) [subsections (1)(a) and (1)(b)] determine that this State is a more appropriate forum. The determination would have to be made by all States with jurisdiction under subsection (a)(1) and (2) [subsections (1)(a) and (2)]. Jurisdiction would not exist under this paragraph because the home State determined it is a more appropriate place to hear the case if there is another State that could exercise significant connection jurisdiction under subsection (a)(2) [subsection (1)(b)].

Paragraph (a)(4) [subsection (1)(d)] retains the concept of jurisdiction by necessity as found in the UCCJA and in the PKPA. This default jurisdiction only occurs if no other State would have jurisdiction under subsections (a)(1) through (a)(3) [(1)(a) through (1)(c)].

Subsections (b) and (c) [(2) and (3)] clearly State the relationship between jurisdiction under this Act [chapter] and other forms of jurisdiction. Personal jurisdiction over, or the physical presence of, a parent or the child is neither necessary nor required under this Act [chapter]. In other words neither minimum contacts nor service within the State is required for the court to have jurisdiction to make a custody determination. Further, the presence of minimum contacts or service within the State does not confer jurisdiction to make a custody determination. Subject to Section 204 [40-7-204], satisfaction of the requirements of subsection (a) [(1)] is mandatory.

The requirements of this section, plus the notice and hearing provisions of the Act [chapter], are all that is necessary to satisfy due process. This Act [chapter], like the UCCJA and the PKPA is based on Justice Frankfurter's concurrence in May v. Anderson, 345 U.S. 528 (1953). As pointed out by Professor Bodenheimer, the reporter for the UCCJA, no "workable interstate custody law could be built around [Justice] Burton's plurality opinion...". Bridgette Bodenheimer, The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws, 22 Vand.L.Rev. 1207,1233 (1969). It should also be noted that since jurisdiction to make a child custody determination is subject matter jurisdiction, an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act [chapter] is ineffective.

Compiler's Comments

Source: Section 201, UCCJEA.

Case Notes

CASES DECIDED UNDER UCCJEA

Montana Home State Despite Several-Month Absence of Child From State: The father appealed the District Court's conclusion that it had jurisdiction over a child custody proceeding filed by the mother in Montana. The child had been born in Montana in 2013 and had resided in Montana until the mother moved to Minnesota in late 2015 to live with the father during a temporary reconciliation. At the end of 8 to 9 months in Minnesota, the mother returned to Montana with the child. Shortly thereafter, the mother agreed to let the child vacation with the father's parents and visit the father with the expectation the child would be returned to Montana shortly. After the father told the mother he was not returning the child to her, the mother filed a petition for a parenting plan in Montana. Over the father's objection, the District Court ruled that Montana was the child's home state and, therefore, it had jurisdiction over the matter. The father appealed to the Supreme Court, which affirmed the ruling, finding that the totality of circumstances supported jurisdiction in the state. In re Parenting of B.K., 2018 MT 217, 392 Mont. 426, 425 P.3d 703.

Short Amount of Time Spent in Montana Not Enough for Jurisdiction — Meaning of Home State Under UCCJEA — Legislative Intent Analyzed — Totality of Circumstances Approach Adopted: A child moved to Montana with both of his parents toward the end of September 2013, but the mother and the child departed to Canada in October 2013. The child never returned. In February 2014, the mother traveled to Montana to retrieve her and her son's belongings and returned to Canada without the father's knowledge. In May 2014, the father sought resolution of parenting and custody in Montana, but the District Court determined that it lacked subject matter jurisdiction on the grounds that Montana was not the home state of the child. On appeal, the Supreme Court affirmed after determining that the Legislature's intent in adopting the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was to create a bright-line rule. Using a totality of the circumstances approach, the court concluded that an absence is not temporary if the character of the absence would make it unreasonable to assume a child would integrate into a community of Montana during the portions of the 6-month period when the child is not absent from the state. Consequently, the child did not live in Montana for the timeframe required by 40-7-201. In re Marriage of Sampley, 2015 MT 121, 379 Mont. 131, 347 P.3d 1281.

Misinterpretation of Statute — Jurisdiction Determined by Residence of Child 6 Months Before Initial Pleading: A mother took her child from Montana on April 24, 2006, after the child had resided in Montana for about 4 years, and filed for a dissolution of her marriage and a custody determination in Texas on May 26, 2006. The child's father filed a petition for dissolution in Montana on October 2, 2006, resulting in a default judgment and parenting plan that the mother later moved to set aside, which the District Court did. The Supreme Court held that the District Court misinterpreted 40-7-201 as providing that a child's home state is the state in which the child has resided for "the last" 6 months and erred when it set aside the parenting plan in favor of the action filed in Texas; the Supreme Court clarified that the home state for purposes of jurisdiction is the child's home state within 6 months before commencement of the proceeding. The Texas court could not have had jurisdiction over the child for more than a few weeks, and the District Court's interpretation did not further the purpose of the Uniform Child Custody Jurisdiction and Enforcement Act to prevent kidnapping of a child by a parent. In re Marriage of Myrland, 2010 MT 286, 359 Mont. 1, 248 P.3d 290.

Retention of Parenting Plan Proceedings by State Making Initial Custody Determination: The state of Idaho dissolved the parties' marriage and granted residential custody of the parties' child to the mother, who subsequently moved to Montana. The mother later petitioned a Montana District Court to change jurisdiction of the parties' child custody proceedings to Montana and to modify the parenting plan. The Montana court denied the petition, and on appeal the Supreme Court affirmed. Except in cases involving temporary emergency jurisdiction, a Montana court may not modify a foreign court's child custody jurisdiction unless the Montana court has jurisdiction to make an initial child custody determination and either: (1) the court in the other state determines that it no longer has exclusive continuing jurisdiction or that Montana would be a more convenient forum; or (2) either court determines that all parties and the child no longer reside in the other state. In this case no emergency existed, and neither of the two conditions for modification of a parenting plan by a Montana court existed. The Idaho court did not relinquish jurisdiction, and the father continued to live in Idaho. Thus, the Idaho court that issued the existing parenting plan retained exclusive continuing jurisdiction. Koeplin v. Crandall, 2010 MT 70, 355 Mont. 510, 230 P.3d 797.

Analysis of Child's Home State for Purposes of Determining Jurisdiction: A child's home state, for purposes of determining jurisdiction under this section, is not limited to the time period of 6 months immediately before the commencement of a child custody proceeding. The applicable time period should be within 6 months before commencement of a child custody proceeding. In the present case, the mother moved the children back to Arkansas 4 months after moving to Montana, thereby stopping the clock for the time needed to establish Montana as the home state for jurisdictional purposes. The children had not lived in Montana for at least 6 months before the father began child custody proceedings, so Montana could not acquire home state status. Stephens v. District Court, 2006 MT 21, 331 M 40, 128 P3d 1026 (2006).

Removal of Child Across State Lines While Custody Proceedings Pending in Montana — Continuing Jurisdiction Versus Pending Jurisdiction Under Federal Parental Kidnapping Prevention Act: When the parties were divorced, an Oregon court granted a parenting plan. The mother later moved to Montana, and the Montana District Court properly assumed jurisdiction. The mother then fled with her son to American Samoa. A Samoan court assumed jurisdiction and awarded custody to the mother. The father petitioned the Montana District Court to enforce the earlier parenting plan, and the petition was granted. The mother appealed the Montana court's failure to recognize the jurisdiction of the Samoan court. The Supreme Court applied the provisions of the federal Parental Kidnapping Prevention Act of 1980 (PKPA), holding that a sister state may modify a child custody determination when the sister state has jurisdiction to make a child custody determination under its own laws, which the Samoan court had, and when the first state no longer has jurisdiction by having lost or given up its continuing or pending jurisdiction. A state has continuing jurisdiction if it has jurisdiction under its own law and it remains the residence of the child or any of the contestants. A state has pending jurisdiction if that state is engaged in proceedings that will ultimately impact the custody and visitation of a child. In this case, Montana did not have continuing jurisdiction because none of the parties were residing in Montana once the mother moved with the child to American Samoa. However, Montana did have pending jurisdiction at the time that the mother initiated the action in American Samoa. The PKPA was designed to prevent precisely what occurred here, namely the removal of a child from one jurisdiction to another in order to obtain a different result regarding custody or other matters affecting a minor child. The mother could not divest Montana of jurisdiction simply by removing the child to American Samoa in an effort to restart the entire issue. Because the Montana court did not decline jurisdiction, the Samoan court was without authority to assume jurisdiction and instead was required to enforce the Montana custody determination. Paslov v. Cox, 2004 MT 325, 324 M 94, 104 P3d 1025 (2004).

Determination of Inconvenient Forum — Consideration of Statutory Factors Required: The District Court determined, based on the best interests of the child standard in the 1977 Uniform Child Custody Jurisdiction Act (UCCJA), that Montana was not a convenient forum for a child custody proceeding. The Supreme Court noted that the proper standard under the 1999 Uniform Child Custody Jurisdiction and Enforcement Act, which replaced the UCCJA, is whether Montana is the child's home state, in which case Montana has continuing jurisdiction unless a Montana court determines that this state is an inconvenient forum and another state is a more appropriate forum. To determine whether Montana is an inconvenient forum, the Montana court must apply the factors in 40-7-108(2). Thus, the District Court erred by applying the old UCCJA standard, and the Supreme Court reversed for a hearing under present law to address the factors in 40-7-108(2) regarding jurisdiction. In re Custody of N.G.H., 2004 MT 162, 322 M 20, 92 P3d 1215 (2004), following In re Marriage of Fontenot, 2003 MT 242, 317 M 298, 77 P3d 206 (2003).

Error in Montana Court's Declination of Jurisdiction to Washington Court — Inconvenient Forum: Following several incidents of partner abuse over the years, the mother moved to Washington state and then requested that the Montana court decline jurisdiction as an inconvenient forum in order to allow the Washington court to assume jurisdiction. The request was denied, and the mother appealed. Under the Uniform Child Custody Jurisdiction and Enforcement Act, a Montana court has jurisdiction to make child custody determinations if Montana is the child's home state, as defined in 40-7-103, and Montana will continue to have exclusive continuing jurisdiction unless the Montana court declines to exercise its jurisdiction. In this case, the parties conceded that Montana was the home state. Jurisdiction may be declined at any time if the Montana court determines that it is an inconvenient forum and that a court of another state is a more appropriate forum to make custody determinations. The factors in 40-7-108 must be considered when evaluating a motion to decline jurisdiction, and the Act places domestic violence at the top of the list of factors to be considered. Although this factor alone is not dispositive, the Supreme Court held that, given the high propensity for recidivism in domestic violence, when a court finds that partner abuse or child abuse has occurred or that a party has fled Montana to avoid further violence or abuse, the court is authorized to consider whether the party and the child might be better protected if further custody proceedings are held in another state. Here, the District Court abused its discretion by failing to consider which forum would best protect the mother and children. The Supreme Court then went on to discuss the other statutory factors and concluded that the protection of the parties, the years that the children have resided in Washington, the significant distance between the courts, the parties' disparate financial circumstances, the location of evidence and convenience of witnesses, and the familiarity factors all supported the Montana court declining jurisdiction. None of the jurisdictional factors mitigated against declination, and no factor outweighed the concern for safety raised by the history of domestic violence. Thus, the Supreme Court ordered the District Court to decline jurisdiction as an inconvenient forum and arrange to transfer the case to Washington. In re Marriage of Stoneman v. Drollinger, 2003 MT 25, 314 M 139, 64 P3d 997 (2003).

Following remand, the District Court held that the issue of child support should be transferred to Washington state in conjunction with the custody and parenting issues. Nevertheless, the wife filed a cross-appeal in 2007 arguing that under 40-5-149 (renumbered 40-5-1012), Montana retained jurisdiction over the child support issue. However, the Supreme Court dismissed the claim as untimely. Under Rule 4, M.R.App.P. (Title 25, ch. 21), notice of appeal must be filed within 30 days of judgment or order, but the wife's notice of cross-appeal was filed more than 11 months after the District Court's order that finally settled the matter. In re Marriage of Stoneman & Drollinger, 2008 MT 448, 348 M 17, 199 P3d 232 (2008).

Jurisdictional Requirement Over Dissolution Proceeding Satisfied by Party's Residence — Inconvenient Forum Improperly Applied Absent Opportunity to Respond to Motion: After several years of a difficult relationship, the husband was charged with partner or family member assault and the wife moved to Oregon with the four children. An Oregon court determined that it had temporary emergency jurisdiction over the children, issued a restraining order against the husband, and granted residential custody to the wife. The husband subsequently filed for dissolution and a parenting plan in Montana. The District Court ordered the wife to show cause why the parenting plan should not be adopted. The wife moved to vacate the hearing, claiming that the Montana court did not have jurisdiction and that it was an inconvenient forum. The District Court vacated the show cause hearing without allowing the husband to respond to the motion and dismissed the dissolution petition without explanation. The husband appealed and the Supreme Court reversed. Oregon's exercise of temporary emergency jurisdiction over the children did not automatically divest Montana of jurisdiction over the same parenting issues. Neither party had initiated dissolution proceedings at the time that the husband's petition was filed, so no concurrent jurisdiction issue existed regarding dissolution. Because the husband resided in Montana for 90 days prior to filing the petition, the jurisdiction requirements of 40-4-104 were satisfied. However, jurisdiction over a dissolution of marriage does not necessarily confer jurisdiction over related child custody issues. Once the Montana court was notified of the child custody proceedings in Oregon, the Montana court was obligated by 40-7-204 to contact the Oregon court regarding potential jurisdictional conflicts, but that was not done, so the Montana court's decision to decline to address the parenting issues in the husband's petition because the Oregon court had already exercised jurisdiction was reversed. Further, the inconvenient forum argument was also inappropriate because the husband was not given the opportunity to submit arguments on the issue as required under 40-7-108. In re Marriage of Vanlaarhoven, 2002 MT 222, 311 M 368, 55 P3d 942 (2002).

40-7-202. Exclusive, continuing jurisdiction.

Commissioners' Note

This is a new section addressing continuing jurisdiction. Continuing jurisdiction was not specifically addressed in the UCCJA. Its absence caused considerable confusion, particularly because the PKPA, § 1738(d), requires other States to give Full Faith and Credit to custody determinations made by the original decree State pursuant to the decree State's continuing jurisdiction so long as that State has jurisdiction under its own law and remains the residence of the child or any contestant.

This section provides the rules of continuing jurisdiction and borrows from UIFSA as well as recent UCCJA case law. The continuing jurisdiction of the original decree State is exclusive. It continues until one of two events occurs:

1. If a parent or a person acting as a parent remains in the original decree State, continuing jurisdiction is lost when neither the child, the child and a parent, nor the child and a person acting as a parent continue to have a significant connection with the original decree State and there is no longer substantial evidence concerning the child's care, protection, training and personal relations in that State. In other words, even if the child has acquired a new home State, the original decree State retains exclusive, continuing jurisdiction, so long as the general requisites of the "substantial connection" jurisdiction provisions of Section 201 [40-7-201] are met. If the relationship between the child and the person remaining in the State with exclusive, continuing jurisdiction becomes so attenuated that the court could no longer find significant connections and substantial evidence, jurisdiction would no longer exist.

The use of the phrase "a court of this State" under subsection (a)(1) [(1)(a)] makes it clear that the original decree State is the sole determinant of whether jurisdiction continues. A party seeking to modify a custody determination must obtain an order from the original decree State stating that it no longer has jurisdiction.

2. Continuing jurisdiction is lost when the child, the child's parents, and any person acting as a parent no longer reside in the original decree State. The exact language of subparagraph (a)(2) [subsection (1)(b)] was the subject of considerable debate. Ultimately the Conference settled on the phrase that "a court of this State or a court of another State determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State" to determine when the exclusive, continuing jurisdiction of a State ended. The phrase is meant to be identical in meaning to the language of the PKPA which provides that full faith and credit is to be given to custody determinations made by a State in the exercise of its continuing jurisdiction when that "State remains the residence of...". The phrase is also the equivalent of the language "continues to reside" which occurs in UIFSA § 205(a)(1) to determine the exclusive, continuing jurisdiction of the State that made a support order. The phrase "remains the residence of" in the PKPA has been the subject of conflicting case law. It is the intention of this Act [chapter] that paragraph (a)(2) of this section [subsection (1)(b)] means that the named persons no longer continue to actually live within the State. Thus, unless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents physically leave the State to live elsewhere, the exclusive, continuing jurisdiction ceases.

The phrase "do not presently reside" is not used in the sense of a technical domicile. The fact that the original determination State still considers one parent a domiciliary does not prevent it from losing exclusive, continuing jurisdiction after the child, the parents, and all persons acting as parents have moved from the State.

If the child, the parents, and all persons acting as parents have all left the State which made the custody determination prior to the commencement of the modification proceeding, considerations of waste of resources dictate that a court in State B, as well as a court in State A, can decide that State A has lost exclusive, continuing jurisdiction.

The continuing jurisdiction provisions of this section are narrower than the comparable provisions of the PKPA. That statute authorizes continuing jurisdiction so long as any "contestant" remains in the original decree State and that State continues to have jurisdiction under its own law. This Act [chapter] eliminates the contestant classification. The Conference decided that a remaining grandparent or other third party who claims a right to visitation, should not suffice to confer exclusive, continuing jurisdiction on the State that made the original custody determination after the departure of the child, the parents and any person acting as a parent. The significant connection to the original decree State must relate to the child, the child and a parent, or the child and a person acting as a parent. This revision does not present a conflict with the PKPA. The PKPA's reference in § 1738(d) to § 1738(c)(1) recognizes that States may narrow the class of cases that would be subject to exclusive, continuing jurisdiction. However, during the transition from the UCCJA to this Act [chapter], some States may continue to base continuing jurisdiction on the continued presence of a contestant, such as a grandparent. The PKPA will require that such decisions be enforced. The problem will disappear as States adopt this Act [chapter] to replace the UCCJA.

Jurisdiction attaches at the commencement of a proceeding. If State A had jurisdiction under this section at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the State prior to the conclusion of proceeding. State B would not have jurisdiction to hear a modification unless State A decided that State B was more appropriate under Section 207 [40-7-108].

Exclusive, continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as parents leave the State, the non- custodial parent returns. As subsection (b) [(3)] provides, once a State has lost exclusive, continuing jurisdiction, it can modify its own determination only if it has jurisdiction under the standards of Section 201 [40-7-201]. If another State acquires exclusive continuing jurisdiction under this section, then its orders cannot be modified even if this State has once again become the home State of the child.

In accordance with the majority of UCCJA case law, the State with exclusive, continuing jurisdiction may relinquish jurisdiction when it determines that another State would be a more convenient forum under the principles of Section 207 [40-7-108].

Compiler's Comments

Source: Section 202, UCCJEA.

Case Notes

CASES DECIDED UNDER UCCJEA

State Subject Matter Jurisdiction Relationship to Tribal Court Jurisdiction — No Abuse of Discretion for District Court Amendment of Parenting Plan — Mother Failed to Establish Definite Fixed Residence on Reservation — Proper Exercise of Jurisdiction Despite Allegation of Inconvenient Forum — Concurrent State Jurisdiction Proper. In re Parenting of L.D.C., 2022 MT 161, 409 Mont. 439, 516 P.3d 631.

Jurisdiction Over Termination of Parental Rights Proper: A mother appealed the termination of her parental rights, arguing that the District Court erred in not staying the proceedings because once the mother left Montana for Utah and the child was placed with a Utah foster family, Montana was an inconvenient forum and no longer held exclusive and continuing jurisdiction over the proceedings. The Supreme Court affirmed, concluding that Montana was not an inconvenient forum under 40-7-108 because the evidence required for the proceeding was not located in Utah and did not require any evidence from Utah and that because there was not an ongoing proceeding in Utah, the District Court did not err in refusing to relinquish jurisdiction under the continuing jurisdiction provision of the Uniform Child Custody Jurisdiction and Enforcement Act, 40-7-202, which requires a pending proceeding in another state. In addition, absent any pending Utah proceeding, Article V of the Interstate Compact on the Placement of Children, codified at 41-4-101, dictated that Montana retain jurisdiction after the child was placed in Utah in order to adjudicate the proceeding. In re A.R.B., 2013 MT 310, 372 Mont. 274, 312 P.3d 425.

Parties No Longer Resident in Montana — Relinquishment of Montana Jurisdiction Proper: In 2000, a Montana District Court established child custody with the father, who lived in California, and held that the mother, a Montana resident, was not to have contact with the children until she addressed her psychological disorders. The father subsequently registered the Montana decision with the California courts to allow enforcement of the Montana decision in California, if necessary, and the mother moved to Minnesota. In 2007, the mother petitioned the Montana court to relinquish jurisdiction because none of the parties lived in Montana, but the court decided to retain jurisdiction and denied the petition, so the mother appealed. The father cited 41-3-103 in support of his contention that the Montana court retained jurisdiction because the case was a child abuse and neglect proceeding. However, Montana later adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which applies to and provides greater protections in child abuse and neglect proceedings, so the provisions of 40-7-103 prevail over 41-3-103. Under 40-7-202 of the UCCJEA, a Montana District Court retains exclusive, continuing jurisdiction of child custody proceedings until one of two specific events occurs, the second of which is a determination that none of the relevant parties presently reside in Montana. Thus, it was an abuse of discretion for the District Court to fail to make a determination whether the relevant parties lived in Montana. The Supreme Court reversed with instructions to relinquish jurisdiction over the Montana custody order. In re B.P. & A.P., 2008 MT 166, 343 M 345, 184 P3d 334 (2008).

Uniform Child Custody Jurisdiction and Enforcement Act Not to Govern Statutory Grandparent-Grandchild Contact Proceedings: The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is directed toward parties acting as parents and contains no directive that applies its jurisdictional provisions to grandparent-grandchild contact proceedings conducted under Title 40, ch. 9., nor does Title 40, ch. 9., include any textual indication that grandparent-grandchild contact proceedings are subject to the procedural or jurisdictional requirements of the UCCJEA. Therefore, the provisions of Title 40, ch. 7, do not govern jurisdictional matters relating to grandparent-grandchild contact proceedings conducted under Title 40, ch. 9. In re Grandparent-Grandchild Contact of Stewart v. Evans, 2006 MT 102, 332 M 148, 136 P3d 524 (2006).

Assumption of Child Custody and Parenting Case by Court of Another State Proper — Neither Parent Living in Montana When Proceeding Commenced: A child was born to the parties in Montana, and a parenting plan was adopted in Montana. However, when the father sought to enforce the plan, the mother was living in Pennsylvania and the father was living in Washington. The Pennsylvania court concluded that it had jurisdiction. The Montana court disagreed, but ceded temporary emergency jurisdiction to the Pennsylvania court while refusing to cede jurisdiction. The mother appealed. The Supreme Court concluded that because this section allows either a Montana court or a court of another state to determine that neither parents nor the child reside in the original state, the Pennsylvania court had jurisdiction to make that determination. Once that determination was made, on the basis of ample, credible, and essentially undisputed evidence, the Montana court no longer had exclusive continuing jurisdiction, and the Montana court therefore erred in retaining jurisdiction. In re Parenting of A.B.A.M., 2004 MT 222, 322 M 406, 96 P3d 1139 (2004). See also Vannatta v. Boulds, 2003 MT 343, 318 M 472, 81 P3d 480 (2003).

Determination of Inconvenient Forum — Consideration of Statutory Factors Required: The District Court determined, based on the best interests of the child standard in the 1977 Uniform Child Custody Jurisdiction Act (UCCJA), that Montana was not a convenient forum for a child custody proceeding. The Supreme Court noted that the proper standard under the 1999 Uniform Child Custody Jurisdiction and Enforcement Act, which replaced the UCCJA, is whether Montana is the child's home state, in which case Montana has continuing jurisdiction unless a Montana court determines that this state is an inconvenient forum and another state is a more appropriate forum. To determine whether Montana is an inconvenient forum, the Montana court must apply the factors in 40-7-108(2). Thus, the District Court erred by applying the old UCCJA standard, and the Supreme Court reversed for a hearing under present law to address the factors in 40-7-108(2) regarding jurisdiction. In re Custody of N.G.H., 2004 MT 162, 322 M 20, 92 P3d 1215 (2004), following In re Marriage of Fontenot, 2003 MT 242, 317 M 298, 77 P3d 206 (2003).

Error in Montana Court's Declination of Jurisdiction to Washington Court — Inconvenient Forum: Following several incidents of partner abuse over the years, the mother moved to Washington state and then requested that the Montana court decline jurisdiction as an inconvenient forum in order to allow the Washington court to assume jurisdiction. The request was denied, and the mother appealed. Under the Uniform Child Custody Jurisdiction and Enforcement Act, a Montana court has jurisdiction to make child custody determinations if Montana is the child's home state, as defined in 40-7-103, and Montana will continue to have exclusive continuing jurisdiction unless the Montana court declines to exercise its jurisdiction. In this case, the parties conceded that Montana was the home state. Jurisdiction may be declined at any time if the Montana court determines that it is an inconvenient forum and that a court of another state is a more appropriate forum to make custody determinations. The factors in 40-7-108 must be considered when evaluating a motion to decline jurisdiction, and the Act places domestic violence at the top of the list of factors to be considered. Although this factor alone is not dispositive, the Supreme Court held that, given the high propensity for recidivism in domestic violence, when a court finds that partner abuse or child abuse has occurred or that a party has fled Montana to avoid further violence or abuse, the court is authorized to consider whether the party and the child might be better protected if further custody proceedings are held in another state. Here, the District Court abused its discretion by failing to consider which forum would best protect the mother and children. The Supreme Court then went on to discuss the other statutory factors and concluded that the protection of the parties, the years that the children have resided in Washington, the significant distance between the courts, the parties' disparate financial circumstances, the location of evidence and convenience of witnesses, and the familiarity factors all supported the Montana court declining jurisdiction. None of the jurisdictional factors mitigated against declination, and no factor outweighed the concern for safety raised by the history of domestic violence. Thus, the Supreme Court ordered the District Court to decline jurisdiction as an inconvenient forum and arrange to transfer the case to Washington. In re Marriage of Stoneman v. Drollinger, 2003 MT 25, 314 M 139, 64 P3d 997 (2003).

Following remand, the District Court held that the issue of child support should be transferred to Washington state in conjunction with the custody and parenting issues. Nevertheless, the wife filed a cross-appeal in 2007 arguing that under 40-5-149 (renumbered 40-5-1012), Montana retained jurisdiction over the child support issue. However, the Supreme Court dismissed the claim as untimely. Under Rule 4, M.R.App.P., notice of appeal must be filed within 30 days of judgment or order, but the wife's notice of cross-appeal was filed more than 11 months after the District Court's order that finally settled the matter. In re Marriage of Stoneman & Drollinger, 2008 MT 448, 348 M 17, 199 P3d 232 (2008).

40-7-203. Jurisdiction to modify determination.

Commissioners' Note

This section complements Section 202 [40-7-202] and is addressed to the court that is confronted with a proceeding to modify a custody determination of another State. It prohibits a court from modifying a custody determination made consistently with this Act [chapter] by a court in another State unless a court of that State determines that it no longer has exclusive, continuing jurisdiction under Section 202 [40-7-202] or that this State would be a more convenient forum under Section 207 [40-7-108]. The modification State is not authorized to determine that the original decree State has lost its jurisdiction. The only exception is when the child, the child's parents, and any person acting as a parent do not presently reside in the other State. In other words, a court of the modification State can determine that all parties have moved away from the original State. The court of the modification State must have jurisdiction under the standards of Section 201 [40-7-201].

Compiler's Comments

Source: Section 203, UCCJEA.

Case Notes

CASES DECIDED UNDER UCCJEA

Retention of Parenting Plan Proceedings by State Making Initial Custody Determination: The state of Idaho dissolved the parties' marriage and granted residential custody of the parties' child to the mother, who subsequently moved to Montana. The mother later petitioned a Montana District Court to change jurisdiction of the parties' child custody proceedings to Montana and to modify the parenting plan. The Montana court denied the petition, and on appeal the Supreme Court affirmed. Except in cases involving temporary emergency jurisdiction, a Montana court may not modify a foreign court's child custody jurisdiction unless the Montana court has jurisdiction to make an initial child custody determination and either: (1) the court in the other state determines that it no longer has exclusive continuing jurisdiction or that Montana would be a more convenient forum; or (2) either court determines that all parties and the child no longer reside in the other state. In this case no emergency existed, and neither of the two conditions for modification of a parenting plan by a Montana court existed. The Idaho court did not relinquish jurisdiction, and the father continued to live in Idaho. Thus, the Idaho court that issued the existing parenting plan retained exclusive continuing jurisdiction. Koeplin v. Crandall, 2010 MT 70, 355 Mont. 510, 230 P.3d 797.

Removal of Child Across State Lines While Custody Proceedings Pending in Montana — Continuing Jurisdiction Versus Pending Jurisdiction Under Federal Parental Kidnapping Prevention Act: When the parties were divorced, an Oregon court granted a parenting plan. The mother later moved to Montana, and the Montana District Court properly assumed jurisdiction. The mother then fled with her son to American Samoa. A Samoan court assumed jurisdiction and awarded custody to the mother. The father petitioned the Montana District Court to enforce the earlier parenting plan, and the petition was granted. The mother appealed the Montana court's failure to recognize the jurisdiction of the Samoan court. The Supreme Court applied the provisions of the federal Parental Kidnapping Prevention Act of 1980 (PKPA), holding that a sister state may modify a child custody determination when the sister state has jurisdiction to make a child custody determination under its own laws, which the Samoan court had, and when the first state no longer has jurisdiction by having lost or given up its continuing or pending jurisdiction. A state has continuing jurisdiction if it has jurisdiction under its own law and it remains the residence of the child or any of the contestants. A state has pending jurisdiction if that state is engaged in proceedings that will ultimately impact the custody and visitation of a child. In this case, Montana did not have continuing jurisdiction because none of the parties were residing in Montana once the mother moved with the child to American Samoa. However, Montana did have pending jurisdiction at the time that the mother initiated the action in American Samoa. The PKPA was designed to prevent precisely what occurred here, namely the removal of a child from one jurisdiction to another in order to obtain a different result regarding custody or other matters affecting a minor child. The mother could not divest Montana of jurisdiction simply by removing the child to American Samoa in an effort to restart the entire issue. Because the Montana court did not decline jurisdiction, the Samoan court was without authority to assume jurisdiction and instead was required to enforce the Montana custody determination. Paslov v. Cox, 2004 MT 325, 324 M 94, 104 P3d 1025 (2004).

Continuing Custody Jurisdiction in North Dakota Court — Modification by Montana Court Improper: When the parties were divorced in North Dakota, that state properly exercised jurisdiction in entering divorce and custody decrees. A Montana District Court subsequently modified the custody decree. The Supreme Court reversed. Under the Uniform Child Custody Jurisdiction and Enforcement Act and the Parental Kidnapping Prevention Act of 1980 (PKPA), full faith and credit must ordinarily be given to child custody determinations made by another state's court if that court appropriately exercised jurisdiction under PKPA standards. Further, under Thompson v. Thompson, 484 US 174 (1988), once a state exercises appropriate PKPA jurisdiction, no other state may exercise concurrent jurisdiction even if it would have been empowered to exercise original jurisdiction. Absent a determination by the North Dakota court that it no longer had exclusive and continuing jurisdiction or that a Montana court would be a more convenient forum, the Montana court had no jurisdiction to modify the North Dakota decree. Vannatta v. Boulds, 2003 MT 343, 318 M 472, 81 P3d 480 (2003), following In re Marriage of Shupe, 276 M 409, 916 P2d 744 (1996).

CASES DECIDED UNDER UCCJA

Concurrent State Jurisdiction Under UCCJA Determined by PKPA: Pamela Shupe obtained a divorce decree from Utah granting her sole custody of the couple's child. The father, Yancy, petitioned for a change of custody in Montana. The Supreme Court determined that each state had adopted the UCCJA and therefore each state had jurisdiction to make a custody determination. The Supreme Court stated that the PKPA had been enacted to remedy problems of concurrent state jurisdiction under the UCCJA. The Supreme Court held that because Utah had jurisdiction and had not declined to exercise its jurisdiction, then under the PKPA, Montana was not authorized to modify the original custody determination of Utah. In re Marriage of Shupe, 276 M 409, 916 P2d 744, 53 St. Rep. 447 (1996), followed in Vannatta v. Boulds, 2003 MT 343, 318 M 472, 81 P3d 480 (2003).

40-7-204. Temporary emergency jurisdiction.

Commissioners' Note

The provisions of this section are an elaboration of what was formerly Section 3(a)(3) of the UCCJA [see former 40-7-104]. It remains, as Professor Bodenheimer's comments to that section noted, "an extraordinary jurisdiction reserved for extraordinary circumstances."

This section codifies and clarifies several aspects of what has become common practice in emergency jurisdiction cases under the UCCJA and PKPA. First, a court may take jurisdiction to protect the child even though it can claim neither home State nor significant connection jurisdiction. Second, the duties of States to recognize, enforce and not modify a custody determination of another State do not take precedence over the need to enter a temporary emergency order to protect the child.

Third, a custody determination made under the emergency jurisdiction provisions of this section is a temporary order. The purpose of the order is to protect the child until the State that has jurisdiction under Sections 201-203 [40-7-201 through 40-7-203] enters an order.

Under certain circumstances, however, subsection (b) [(2)] provides that an emergency custody determination may become a final custody determination. If there is no existing custody determination, and no custody proceeding is filed in a State with jurisdiction under Sections 201-203 [40-7-201 through 40-7-203], an emergency custody determination made under this section becomes a final determination, if it so provides, when the State that issues the order becomes the home State of the child.

Subsection (c) [(3)] is concerned with the temporary nature of the order when there exists a prior custody order that is entitled to be enforced under this Act [chapter] or when a subsequent custody proceeding is filed in a State with jurisdiction under Sections 201-203 [40-7-201 through 40-7-203]. Subsection (c) [(3)] allows the temporary order to remain in effect only so long as is necessary for the person who obtained the determination under this section to present a case and obtain an order from the State with jurisdiction under Sections 201-203 [40-7-201 through 40-7-203]. That time period must be specified in the order. If there is an existing order by a State with jurisdiction under Sections 201-203 [40-7-201 through 40-7-203], that order need not be reconfirmed. The temporary emergency determination would lapse by its own terms at the end of the specified period or when an order is obtained from the court with jurisdiction under Sections 202-203 [40-7-202 and 40-7-203]. The court with appropriate jurisdiction also may decide, under the provisions of 207 [40-7-108], that the court that entered the emergency order is in a better position to address the safety of the person who obtained the emergency order, or the child, and decline jurisdiction under Section 207 [40-7-108].

Any hearing in the State with jurisdiction under Sections 201-203 [40-7-201 through 40-7-203] on the temporary emergency determination is subject to the provisions of Sections 111 and 112 [40-7-119 and 40-7-140]. These sections facilitate the presentation of testimony and evidence taken out of State. If there is a concern that the person obtaining the temporary emergency determination under this section would be in danger upon returning to the State with jurisdiction under Sections 201-203 [40-7-201 through 40-7-203], these provisions should be used.

Subsection (d) [(4)] requires communication between the court of the State that is exercising jurisdiction under this section and the court of another State that is exercising jurisdiction under Sections 201-203 [40-7-201 through 40-7-203]. The pleading rules of Section 209 [40-7-110] apply fully to determinations made under this section. Therefore, a person seeking a temporary emergency custody determination is required to inform the court pursuant to Section 209(d) [40-7-110(4)] of any proceeding concerning the child that has been commenced elsewhere. The person commencing the custody proceeding under Sections 201-203 [40-7-201 through 40-7-203] is required under Section 209(a) [40-7-110(1)] to inform the court about the temporary emergency proceeding. These pleading requirements are to be strictly followed so that the courts are able to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

Relationship to the PKPA. The definition of emergency has been modified to harmonize it with the PKPA. The PKPA's definition of emergency jurisdiction does not use the term "neglect." It defines an emergency as "mistreatment or abuse." Therefore "neglect" has been eliminated as a basis for the assumption of temporary emergency jurisdiction. Neglect is so elastic a concept that it could justify taking emergency jurisdiction in a wide variety of cases. Under the PKPA, if a State exercised temporary emergency jurisdiction based on a finding that the child was neglected without a finding of mistreatment or abuse, the order would not be entitled to federal enforcement in other States.

Relationship to Protective Order Proceedings. The UCCJA and the PKPA were enacted long before the advent of state procedures on the use of protective orders to alleviate problems of domestic violence. Issues of custody and visitation often arise within the context of protective order proceedings since the protective order is often invoked to keep one parent away from the other parent and the children when there is a threat of violence. This Act [chapter] recognizes that a protective order proceeding will often be the procedural vehicle for invoking jurisdiction by authorizing a court to assume temporary emergency jurisdiction when the child's parent or sibling has been subjected to or threatened with mistreatment or abuse.

In order for a protective order that contains a custody determination to be enforceable in another State it must comply with the provisions of this Act [chapter] and the PKPA. Although the Violence Against Women's Act (VAWA), 18 U.S.C. § 2265, does provide an independent basis for the granting of full faith and credit to protective orders, it expressly excludes "custody" orders from the definition of "protective order," 22 U.S.C. § 2266.

Many States authorize the issuance of protective orders in an emergency without notice and hearing. This Act [chapter] does not address the propriety of that procedure. It is left to local law to determine the circumstances under which such an order could be issued, and the type of notice that is required, in a case without an interstate element. However, an order issued after the assumption of temporary emergency jurisdiction is entitled to interstate enforcement and nonmodification under this Act [chapter] and the PKPA only if there has been notice and a reasonable opportunity to be heard as set out in Section 205 [40-7-105]. Although VAWA does require that full faith and credit be accorded to ex parte protective orders if notice will be given and there will be a reasonable opportunity to be heard, it does not include a "custody" order within the definition of "protective order."

VAWA does play an important role in determining whether an emergency exists. That Act [chapter] requires a court to give full faith and credit to a protective order issued in another

State if the order is made in accordance with the VAWA. This would include those findings of fact contained in the order. When a court is deciding whether an emergency exists under this section, it may not relitigate the existence of those factual findings.

Compiler's Comments

Source: Section 204, UCCJEA.

Case Notes

CASES DECIDED UNDER UCCJEA

Children in Montana Subject to Exclusive Continuing Jurisdiction in Florida — Montana Protective Order Upheld: A Montana family moved to Florida, where the parents later divorced and agreed to a parenting plan. The mother moved back to Montana with the children, who resided with her in Montana during the school year and for 1 week after school ends. Several years later, the mother sought a protective order in Montana to prevent the father from contacting her and her children. The District Court granted the order, specifying that it would last until 1 week after school ends and could be modified or superseded by an order in the custody case by a court of competent jurisdiction. The father appealed that the District Court erroneously modified the parties' prior Florida parenting plan in violation of the Uniform Child Custody Jurisdiction and Enforcement Act. The Supreme Court affirmed the District Court, finding the order minimally sufficient to comply with 40-7-204. In re Marriage of Kirkman, 2020 MT 17, 398 Mont. 389, 456 P.3d 1028.

No Standing for Grandparents to Bring Emergency Child Custody Case: The father physically abused the mother while the family lived in Maine. The mother moved the children to her parents' home in Oregon, and the grandparents, mother, and children subsequently moved to Montana. Meanwhile, the father filed for divorce and child custody in Maine, and the Maine court ordered that the children be returned to Maine. The grandparents filed for an emergency custody determination in Montana, seeking to block the Maine court's order. A Montana District Court initially accepted jurisdiction of the children, but after communicating with the Maine court, the Montana court declined jurisdiction, dismissed the grandparents' case, and remanded to the Maine court. The grandparents appealed. The Supreme Court determined the issue based on the question of standing, noting that 40-4-211 allows a parenting plan to be commenced in District Court by a person other than a parent if the person has established a parent-child relationship and has filed a parenting petition in the county where the child resides or is found. However, in this case, no petition to establish parenting rights was filed, and neither parent voluntarily relinquished custody to the grandparents or had their parental rights terminated, so the grandparents could not make the predicate showing that they were entitled to custody. Because the grandparents lacked standing to gain custody of the children, the petition for emergency custody was properly denied and remand to the Maine court was affirmed. In re Parenting of D.A.H. & G.M.H. v. C.P.H., 2005 MT 68, 326 M 296, 109 P3d 247 (2005).

Removal of Child Across State Lines While Custody Proceedings Pending in Montana — Continuing Jurisdiction Versus Pending Jurisdiction Under Federal Parental Kidnapping Prevention Act: When the parties were divorced, an Oregon court granted a parenting plan. The mother later moved to Montana, and the Montana District Court properly assumed jurisdiction. The mother then fled with her son to American Samoa. A Samoan court assumed jurisdiction and awarded custody to the mother. The father petitioned the Montana District Court to enforce the earlier parenting plan, and the petition was granted. The mother appealed the Montana court's failure to recognize the jurisdiction of the Samoan court. The Supreme Court applied the provisions of the federal Parental Kidnapping Prevention Act of 1980 (PKPA), holding that a sister state may modify a child custody determination when the sister state has jurisdiction to make a child custody determination under its own laws, which the Samoan court had, and when the first state no longer has jurisdiction by having lost or given up its continuing or pending jurisdiction. A state has continuing jurisdiction if it has jurisdiction under its own law and it remains the residence of the child or any of the contestants. A state has pending jurisdiction if that state is engaged in proceedings that will ultimately impact the custody and visitation of a child. In this case, Montana did not have continuing jurisdiction because none of the parties were residing in Montana once the mother moved with the child to American Samoa. However, Montana did have pending jurisdiction at the time that the mother initiated the action in American Samoa. The PKPA was designed to prevent precisely what occurred here, namely the removal of a child from one jurisdiction to another in order to obtain a different result regarding custody or other matters affecting a minor child. The mother could not divest Montana of jurisdiction simply by removing the child to American Samoa in an effort to restart the entire issue. Because the Montana court did not decline jurisdiction, the Samoan court was without authority to assume jurisdiction and instead was required to enforce the Montana custody determination. Paslov v. Cox, 2004 MT 325, 324 M 94, 104 P3d 1025 (2004).

Jurisdictional Requirement Over Dissolution Proceeding Satisfied by Party's Residence — Inconvenient Forum Improperly Applied Absent Opportunity to Respond to Motion: After several years of a difficult relationship, the husband was charged with partner or family member assault and the wife moved to Oregon with the four children. An Oregon court determined that it had temporary emergency jurisdiction over the children, issued a restraining order against the husband, and granted residential custody to the wife. The husband subsequently filed for dissolution and a parenting plan in Montana. The District Court ordered the wife to show cause why the parenting plan should not be adopted. The wife moved to vacate the hearing, claiming that the Montana court did not have jurisdiction and that it was an inconvenient forum. The District Court vacated the show cause hearing without allowing the husband to respond to the motion and dismissed the dissolution petition without explanation. The husband appealed and the Supreme Court reversed. Oregon's exercise of temporary emergency jurisdiction over the children did not automatically divest Montana of jurisdiction over the same parenting issues. Neither party had initiated dissolution proceedings at the time that the husband's petition was filed, so no concurrent jurisdiction issue existed regarding dissolution. Because the husband resided in Montana for 90 days prior to filing the petition, the jurisdiction requirements of 40-4-104 were satisfied. However, jurisdiction over a dissolution of marriage does not necessarily confer jurisdiction over related child custody issues. Once the Montana court was notified of the child custody proceedings in Oregon, the Montana court was obligated by this section to contact the Oregon court regarding potential jurisdictional conflicts, but that was not done, so the Montana court's decision to decline to address the parenting issues in the husband's petition because the Oregon court had already exercised jurisdiction was reversed. Further, the inconvenient forum argument was also inappropriate because the husband was not given the opportunity to submit arguments on the issue as required under 40-7-108. In re Marriage of Vanlaarhoven, 2002 MT 222, 311 M 368, 55 P3d 942 (2002).

Part 3
Enforcement

Part Compiler's Comments

Severability: Section 47, Ch. 91, L. 1999, was a severability clause.

Effective Date: This part is effective October 1, 1999.

40-7-301. Definitions.

Commissioners' Note

For purposes of this article [part], "petitioner" and "respondent" are defined. The definitions clarify certain aspects of the notice and hearing sections.

Compiler's Comments

Source: Section 301, UCCJEA.

40-7-302. Enforcement under Hague convention.

Commissioners' Note

This section applies the enforcement remedies provided by this article [part] to orders requiring the return of a child issued under the authority of the International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 et seq., implementing the Hague Convention on the Civil Aspects of International Child Abduction. Specific mention of ICARA proceedings is necessary because they often occur prior to any formal custody determination. However, the need for a speedy enforcement remedy for an order to return the child is just as necessary.

Compiler's Comments

Source: Section 302, UCCJEA.

40-7-303. Duty to enforce.

Commissioners' Note

This section is based on Section 13 of the UCCJA [former 40-7-114] which contained the basic duty to enforce. The language of the original section has been retained and the duty to enforce is generally the same.

Enforcement of custody determinations of issuing States is also required by federal law in the PKPA, 28 U.S.C. § 1738A(a). The changes made in Article 2 of this Act [part 2] now make a State's duty to enforce and not modify a child custody determination of another State consistent with the enforcement and nonmodification provisions of the PKPA. Therefore custody determinations made by a State pursuant to the UCCJA that would be enforceable under the PKPA will generally be enforced under this Act [chapter]. However, if a State custody determination made pursuant to the UCCJA would not be enforceable under the PKPA, it will also not be enforceable under this Act [chapter]. Thus a custody determination made by a "significant connection" jurisdiction when there is a home State is not enforceable under the PKPA regardless of whether a proceeding was ever commenced in the home State. Even though such a determination would be enforceable under the UCCJA with its four concurrent bases of jurisdiction, it would not be enforceable under this Act [chapter]. This carries out the policy of the PKPA of strongly discouraging a State from exercising its concurrent "significant connection" jurisdiction under the UCCJA when another State could exercise "home state" jurisdiction.

This section also incorporates the concept of Section 15 of the UCCJA [former 40-7-116] to the effect that a custody determination of another State will be enforced in the same manner as a custody determination made by a court of this State. Whatever remedies are available to enforce a local determination can be utilized to enforce a custody determination of another State. However, it remains a custody determination of the State that issued it. A child-custody determination of another State is not subject to modification unless the State would have jurisdiction to modify the determination under Article 2 [part 2].

The remedies provided by this article [part] for the enforcement of a custody determination will normally be used. This article [part] does not detract from other remedies available under other local law. There is often a need for a number of remedies to ensure that a child-custody determination is obeyed. If other remedies would easily facilitate enforcement, they are still available. The petitioner, for example, can still cite the respondent for contempt of court or file a tort claim for intentional interference with custodial relations if those remedies are available under local law.

Compiler's Comments

Source: Section 303, UCCJEA.

40-7-304. Temporary visitation.

Commissioners' Note

This section authorizes a court to issue a temporary order if it is necessary to enforce visitation rights without violating the rules on nonmodification contained in Section 303 [40-7-303]. Therefore, if there is a visitation schedule provided in the custody determination that was made in accordance with Article 2 [part 2], a court can issue an order under this section implementing the schedule. An implementing order may include make-up or substitute visitation.

A court may also issue a temporary order providing for visitation if visitation was authorized in the custody determination, but no specific schedule was included in the custody determination. Such an order could include a substitution of a specific visitation schedule for "reasonable and seasonable."

However, a court may not, under subsection (a)(2) [(1)(b)] provide for a permanent change in visitation. Therefore, requests for a permanent change in the visitation schedule must be addressed to the court with exclusive, continuing jurisdiction under Section 202 [40-7-202] or modification jurisdiction under Section 203 [40-7-203]. As under Section 204 [40-7-204], subsection (b) [(2)] of this section requires that the temporary visitation order stay in effect only long enough to allow the person who obtained the order to obtain a permanent modification in the State with appropriate jurisdiction under Article 2 [part 2].

Compiler's Comments

Source: Section 304, UCCJEA.

40-7-305. Registration of child custody determination.

Commissioners' Note

This remainder of this article [part] provides enforcement mechanisms for interstate child custody determinations.

This section authorizes a simple registration procedure that can be used to predetermine the enforceability of a custody determination. It parallels the process in UIFSA for the registration of child support orders. It should be as much of an aid to pro se litigants as the registration procedure of UIFSA.

A custody determination can be registered without any accompanying request for enforcement. This may be of significant assistance in international cases. For example, the custodial parent under a foreign custody order can receive an advance determination of whether that order would be recognized and enforced before sending the child to the United States for visitation. Article 26 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 35 I.L.M. 1391 (1996), requires those States which accede to the Convention to provide such a procedure.

Compiler's Comments

Source: Section 305, UCCJEA.

40-7-306. Enforcement of registered determination.

Commissioners' Note

A registered child-custody determination can be enforced as if it was a child-custody determination of this State. However, it remains a custody determination of the State that issued it. A registered custody order is not subject to modification unless the State would have jurisdiction to modify the order under Article 2 [part 2].

Compiler's Comments

Source: Section 306, UCCJEA.

40-7-307. Simultaneous proceedings.

Commissioners' Note

The pleading rules of Section 308 [40-7-308], require the parties to disclose any pending proceedings. Normally, an enforcement proceeding will take precedence over a modification action since the PKPA requires enforcement of child custody determinations made in accordance with its terms. However, the enforcement court must communicate with the modification court in order to avoid duplicative litigation. The courts might decide that the court with jurisdiction under Article 2 [part 2] shall continue with the modification action and stay the enforcement proceeding. Or they might decide that the enforcement proceeding shall go forward. The ultimate decision rests with the court having exclusive, continuing jurisdiction under Section 202 [40-7-202], or if there is no State with exclusive, continuing jurisdiction, then the decision rests with the State that would have jurisdiction to modify under Section 203 [40-7-203]. Therefore, if that court determines that the enforcement proceeding should be stayed or dismissed, the enforcement court should stay or dismiss the proceeding. If the enforcement court does not do so, the court with exclusive, continuing jurisdiction under Section 202 [40-7-202], or with modification jurisdiction under Section 203 [40-7-203], could enjoin the parties from continuing with the enforcement proceeding.

Compiler's Comments

Source: Section 307, UCCJEA.

40-7-308. Expedited enforcement of child custody determination.

Commissioner's Note

This section provides the normal remedy that will be used in interstate cases: the production of the child in a summary, remedial process based on habeas corpus.

The petition is intended to provide the court with as much information as possible. Attaching certified copies of all orders sought to be enforced allows the court to have the necessary information. Most of the information relates to the permissible scope of the court's inquiry. The petitioner has the responsibility to inform the court of all proceedings that would affect the current enforcement action. Specific mention is made of certain proceedings to ensure that they are disclosed. A "procedure relating to domestic violence" includes not only protective order proceedings but also criminal prosecutions for child abuse or domestic violence.

The order requires the respondent to appear at a hearing on the next judicial day. The term "next judicial day" in this section means the next day when a judge is at the courthouse. At the hearing, the court will order the child to be delivered to the petitioner unless the respondent is prepared to assert that the issuing State lacked jurisdiction, that notice was not given in accordance with Section 108 [40-7-106], or that the order sought to be enforced has been vacated, modified, or stayed by a court with jurisdiction to do so under Article 2 [part 2]. The court is also to order payment of the fees and expenses set out in Section 312 [40-7-312]. The court may set another hearing to determine whether additional relief available under this state's law should be granted.

If the order has been registered and confirmed in accordance with Section 304 [40-7-304], the only defense to enforcement is that the order has been vacated, stayed or modified since the registration proceeding by a court with jurisdiction to do so under Article 2 [part 2].

Compiler's Comments

Source: Section 308, UCCJEA.

40-7-309. Service of petition and order.

Official Comments

In keeping with other sections of this Act [chapter], the question of how the petition and order should be served is left to local law.

Compiler's Comments

Source: Section 309, UCCJEA.

40-7-310. Hearing and order.

Commissioners' Note

The scope of inquiry for the enforcing court is quite limited. Federal law requires the court to enforce the custody determination if the issuing state's decree was rendered in compliance with the PKPA, 28 U.S.C. § 1738A(a). This Act [chapter] requires enforcement of custody determinations that are made in conformity with Article 2's [part 2's] jurisdictional rules.

The certified copy, or a copy of the certified copy, of the custody determination entitling the petitioner to the child is prima facie evidence of the issuing court's jurisdiction to enter the order. If the order is one that is entitled to be enforced under Article 2 [part 2] and if it has been violated, the burden shifts to the respondent to show that the custody determination is not entitled to enforcement.

It is a defense to enforcement that another jurisdiction has issued a custody determination that is required to be enforced under Article 2 [part 2]. An example is when one court has based its original custody determination on the UCCJA § 3(a)(2) [former 40-7-104(1)(b)] (significant connections) and another jurisdiction has rendered an original custody determination based on the UCCJA § 3(a)(1) [former 40-7-104(1)(a)] (home State). When this occurs, Article 2 of this Act [part 2], as well as the PKPA, mandate that the home state determination be enforced in all other States, including the State that rendered the significant connections determination.

Lack of notice in accordance with Section 108 [40-7-106] by a person entitled to notice and opportunity to be heard at the original custody determination is a defense to enforcement of the custody determination. The scope of the defense under this Act [chapter] is the same as the defense would be under the law of the State that issued the notice. Thus, if the defense of lack of notice would not be available under local law if the respondent purposely hid from the petitioner, took deliberate steps to avoid service of process or elected not to participate in the initial proceedings, the defense would also not be available under this Act [chapter].

There are no other defenses to an enforcement action. If the child would be endangered by the enforcement of a custody or visitation order, there may be a basis for the assumption of emergency jurisdiction under Section 204 of this Act [40-7-204]. Upon the finding of an emergency, the court issues a temporary order and directs the parties to proceed either in the court that is exercising continuing jurisdiction over the custody proceeding under Section 202 [40-7-202], or the court that would have jurisdiction to modify the custody determination under Section 203 [40-7-203].

The court shall determine at the hearing whether fees should be awarded under Section 312 [40-7-312]. If so, it should order them paid. The court may determine if additional relief is appropriate, including requesting law enforcement officers to assist the petitioner in the enforcement of the order. The court may set a hearing to determine whether further relief should be granted.

The remainder of this section is derived from UIFSA § 316 with regard to the privilege of self-incrimination, spousal privileges, and immunities. It is included to keep parallel the procedures for child support and child custody proceedings to the extent possible.

Compiler's Comments

Source: Section 310, UCCJEA.

40-7-311. Warrant to take physical custody of child.

Commissioners' Note

The section provides a remedy for emergency situations where there is a reason to believe that the child will suffer imminent, serious physical harm or be removed from the jurisdiction once the respondent learns that the petitioner has filed an enforcement proceeding. If the court finds such harm exists, it should temporarily waive the notice requirements and issue a warrant to take physical custody of the child. Immediately after the warrant is executed, the respondent is to receive notice of the proceedings.

The term "harm" cannot be totally defined and, as in the issuance of temporary retraining orders, the appropriate issuance of a warrant is left to the circumstances of the case. Those circumstances include cases where the respondent is the subject of a criminal proceeding as well as situations where the respondent is secreting the child in violation of a court order, abusing the child, a flight risk and other circumstances that the court concludes make the issuance of notice a danger to the child. The court must hear the testimony of the petitioner or another witness prior to issuing the warrant. The testimony may be heard in person, via telephone, or by any other means acceptable under local law. The court must state the reasons for the issuance of the warrant. The warrant can be enforced by law enforcement officers wherever the child is found in the State. The warrant may authorize entry upon private property to pick up the child if no less intrusive means are possible. In extraordinary cases, the warrant may authorize law enforcement to make a forcible entry at any hour.

The warrant must provide for the placement of the child pending the determination of the enforcement proceeding. Since the issuance of the warrant would not occur absent a risk of serious harm to the child, placement cannot be with the respondent. Normally, the child would be placed with the petitioner. However, if placement with the petitioner is not indicated, the court can order any other appropriate placement authorized under the laws of the court's State. Placement with the petitioner may not be indicated if there is a likelihood that the petitioner also will flee the jurisdiction. Placement with the petitioner may not be practical if the petitioner is proceeding through an attorney and is not present before the court.

This section authorizes the court to utilize whatever means are available under local law to ensure the appearance of the petitioner and child at the enforcement hearing. Such means might include cash bonds, a surrender of a passport, or whatever the court determines is necessary.

Compiler's Comments

Source: Section 311, UCCJEA.

40-7-312. Costs, fees, and expenses.

Commissioners' Note

This section is derived from the International Child Abduction Remedies Act, 42 U.S.C. § 11607(b)(3). Normally the court will award fees and costs against the non-prevailing party. Included as expenses are the amount of investigation fees incurred by private persons or by public officials as well as the cost of child placement during the proceedings.

The non-prevailing party has the burden of showing that such an award would be clearly inappropriate. Fees and costs may be inappropriate if their payment would cause the parent and child to seek public assistance.

This section implements the policies of Section 8(c) of Pub.L. 96-611 (part of the PKPA) which provides that:

In furtherance of the purposes of section 1738A of title 28, United States Code [this section], as added by subsection (a) of this section, State courts are encouraged to-

(2) award to the person entitled to custody or visitation pursuant to a custody determination which is consistent with the provisions of such section 1738A [this section], necessary travel expenses, attorneys' fees, costs of private investigations, witness fees or expenses, and other expenses incurred in connection with such custody determination....

The term "prevailing party" is not given a special definition for this Act [chapter]. Each State will apply its own standard.

Subsection (b) [(2)] was added to ensure that this section would not apply to the State unless otherwise authorized. The language is taken from UIFSA § 313 (court may assess costs against obligee or support enforcement agency only if allowed by local law).

Compiler's Comments

Source: Section 312, UCCJEA.

40-7-313. Recognition and enforcement.

Commissioners' Note

The enforcement order, to be effective, must also be enforced by other States. This section requires courts of this State to enforce and not modify enforcement orders issued by other States when made consistently with the provisions of this Act [chapter].

Compiler's Comments

Source: Section 313, UCCJEA.

40-7-314. Appeals.

Commissioners' Note

The order may be appealed as an expedited civil matter. An enforcement order should not be stayed by the court. Provisions for a stay would defeat the purpose of having a quick enforcement procedure. If there is a risk of serious mistreatment or abuse to the child, a petition to assume emergency jurisdiction must be filed under Section 204 [40-7-204]. This section leaves intact the possibility of obtaining an extraordinary remedy such as mandamus or prohibition from an appellate court to stay the court's enforcement action. In many States, it is not possible to limit the constitutional authority of appellate courts to issue a stay. However, unless the information before the appellate panel indicates that emergency jurisdiction would be assumed under Section 204 [40-7-204], there is no reason to stay the enforcement of the order pending appeal.

Compiler's Comments

Source: Section 314, UCCJEA.

40-7-315. Role of prosecutor.

Commissioners' Note

Sections 315-317 [40-7-315 through 40-7-317] are derived from the recommendations of the Obstacles Study that urge a role for public authorities in civil enforcement of custody and visitation determinations. One of the basic policies behind this approach is that, as is the case with child support, the involvement of public authorities will encourage the parties to abide by the terms of the court order. The prosecutor usually would be the most appropriate public official to exercise authority under this section. However, States may locate the authority described in the section in the most appropriate public office for their governmental structure. The authority could be, for example, the Friend of the Court Office or the Attorney General. If the parties know that prosecutors and law enforcement officers are available to help secure the return of a child, the parties may be deterred from interfering with the exercise of rights established by court order.

The use of public authorities should provide a more effective method of remedying violations of the custody determination. Most parties do not have the resources to enforce a custody determination in another jurisdiction. The availability of the prosecutor or other government official as an enforcement agency will help ensure that remedies of this Act [chapter] can be made available regardless of income level. In addition, the prosecutor may have resources to draw on that are unavailable to the average litigant.

The role of the public authorities should generally not begin until there is a custody determination that is sought to be enforced. The Act [chapter] does not authorize the public authorities to be involved in the action leading up to the making of the custody determination, except when requested by the court, when there is a violation the Hague Convention on the Civil Aspects of International Child Abduction, or when the person holding the child has violated a criminal statute. This Act [chapter] does not mandate that the public authorities be involved in all cases referred to it. There is only so much time and money available for enforcement proceedings. Therefore, the public authorities eventually will develop guidelines to determine which cases will receive priority.

The use of civil procedures instead of, or in addition to, filing and prosecuting criminal charges enlarges the prosecutor's options and may provide a more economical and less disruptive means of solving problems of criminal abduction and retention. With the use of criminal proceedings alone, the procedure may be inadequate to ensure the return of the child. The civil options would permit the prosecutor to resolve that recurring and often frustrating problem.

A concern was expressed about whether allowing the prosecutor to use civil means as a method of settling a child abduction violated either DR 7-105(A) of the Code of Professional Responsibility or Model Rule of Professional Responsibility 4.4. Both provisions either explicitly or implicitly disapprove of a lawyer threatening criminal action to gain an advantage in a civil case. However, the prohibition relates to threats that are solely to gain an advantage in a civil case. If the prosecutor has a good faith reason for pursuing the criminal action, there is no ethical violation. See Committee on Legal Ethics v. Printz, 416 S.E. 2d 720 (W.Va. 1992) (lawyer can threaten to press criminal charges against a client's former employee unless employee made restitution).

It must be emphasized that the public authorities do not become involved in the merits of the case. They are authorized only to locate the child and enforce the custody determination. The public authority is authorized by this section to utilize any civil proceeding to secure the enforcement of the custody determination. In most jurisdictions, that would be a proceeding under this Act [chapter]. If the prosecutor proceeds pursuant to this Act [chapter], the prosecutor is subject to its provisions. There is nothing in this Act [chapter] that would prevent a State from authorizing the prosecutor or other public official to use additional remedies beyond those provided in this Act [chapter].

The public authority does not represent any party to the custody determination. It acts as a "friend of the court." Its role is to ensure that the custody determination is enforced.

Sections 315-317 [40-7-315 through 40-7-317] are limited to cases covered by this Act [chapter], i.e. interstate cases. However, States may, if they wish, extend this part of the Act [chapter] to intrastate cases.

It should also be noted that the provisions of this section relate to the civil enforcement of child custody determinations. Nothing in this section is meant to detract from the ability of the prosecutor to use criminal provisions in child abduction cases.

Compiler's Comments

Source: Section 315, UCCJEA.

40-7-316. Role of law enforcement.

Commissioners' Note

This section authorizes law enforcement officials to assist in locating a child and enforcing a custody determination when requested to do so by the public authorities. It is to be read as an enabling provision. Whether law enforcement officials have discretion in responding to a request by the prosecutor or other public official is a matter of local law.

Compiler's Comments

Source: Section 316, UCCJEA.

40-7-317. Costs and expenses.

Commissioners' Note

One of the major problems of utilizing public officials to locate children and enforce custody and visitation determinations is cost. This section authorizes the prosecutor and law enforcement to recover costs against the non-prevailing party. The use of the term "direct" indicates that overhead is not a recoverable cost. This section cannot be used to recover the value of the time spent by the public authorities' attorneys.

Compiler's Comments

Source: Section 317, UCCJEA.

CHAPTER 9
GRANDPARENT-GRANDCHILD CONTACT

Chapter Case Notes

Grandparent Visitation — Application of Statutes: When considering a grandparent's visitation request, a District Court is required to apply 40-9-102, which specifically pertains to grandparent visitation, rather than 40-4-228, which pertains to parenting and visitation between a natural parent and a third party. (However, see Title 40, ch. 9, part 2, which was enacted in response to In re Parenting of L.R.S. and provides that a grandparent is not precluded from seeking relief in lieu of or in addition to relief under Title 40, ch. 9.) In re Parenting of L.R.S., 2018 MT 48, 390 Mont. 366, 414 P.3d 285.

Uniform Child Custody Jurisdiction and Enforcement Act Not to Govern Statutory Grandparent-Grandchild Contact Proceedings: The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Title 40, ch. 7, is directed toward parties acting as parents and contains no directive that applies its jurisdictional provisions to grandparent-grandchild contact proceedings conducted under this chapter, nor does this chapter include any textual indication that grandparent-grandchild contact proceedings are subject to the procedural or jurisdictional requirements of the UCCJEA. Therefore, the provisions of Title 40, ch. 7, do not govern jurisdictional matters relating to grandparent-grandchild contact proceedings conducted under this chapter. In re Grandparent-Grandchild Contact of Stewart v. Evans, 2006 MT 102, 332 M 148, 136 P3d 524 (2006).

Chapter Law Review Articles

Not the Cleavers Anymore: Third-Party Parental Interests in Minor Children and the Evolving American Family, Scott, 73 Mont. L. Rev. 97 (2012).

Chapter Collateral References
Grandparents' Rights, https://MontanaLawHelp.org.

Part 1
General Provisions

40-9-101. Application of Montana Rules of Civil Procedure.

Compiler's Comments

1997 Amendment: Chapter 343 in (2), near beginning after "proceeding for", substituted "grandparent-grandchild contact" for "grandparent visitation" and at end substituted "grandparent-grandchild contact" for "visitation"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

40-9-102. Grandparent-grandchild contact.

Compiler's Comments

2015 Amendment: Chapter 112 inserted (7) allowing a court to appoint a guardian ad litem; and made minor changes in style. Amendment effective October 1, 2015.

2009 Amendment: Chapter 92 in (2) inserted third sentence establishing adequate parental care as the basis for a determination of fitness; deleted former (3) that read: "(3) A determination of unfitness may be made only if the court, based upon clear and convincing evidence, makes one or more of the determinations provided in 42-2-608(1) or finds that one or more of the events provided for in that subsection have occurred"; and made minor changes in style. Amendment effective October 1, 2009.

Applicability: Section 2, Ch. 92, L. 2009, provided: "[This act] applies to petitions for grandparent-grandchild contact filed in accordance with Title 40, chapter 9, part 1, on or after October 1, 2009."

2007 Amendment: Chapter 495 inserted (2), (3), and (4) concerning determination by court of unfitness of parent; in (5) after "section" inserted "over the objections of a fit parent", near middle substituted "based upon clear and convincing evidence" for "after a hearing", after "contact" inserted "with the grandparent", and at end inserted "and that the presumption in favor of the parent's wishes has been rebutted"; inserted (9) concerning effect of court's determination of unfitness of parent; and made minor changes in style. Amendment effective October 1, 2007.

Preamble: The preamble attached to Ch. 495, L. 2007, provided: "WHEREAS, the Legislature enacted the principal grandparent-grandchild contact statute, section 40-9-102, MCA, in 1979 and has not amended that statute since 1997; and

WHEREAS, since 1997, the statute has provided that a grandparent wanting to have contact with a grandchild could petition a District Court to grant that contact and that the court must grant the petition if it found that the contact was "in the best interest of the child"; and

WHEREAS, since 1997, the United States Supreme Court and the Montana Supreme Court have both held that a parent's right to the custody, care, and control of a child is founded upon a parent's constitutional right to liberty and have also held that it is the constitutionally protected right of a fit parent to determine who the parent's child may or may not associate with; and

WHEREAS, the Montana Supreme Court held on May 9, 2006, in the case of Polasek v. Omura, that a District Court for Cascade County committed reversible error when the District Court granted a petition for grandparent-grandchild contact under section 40-9-102, MCA, against the wishes of the custodial parent who had not been found to be an unfit parent, based upon the single statutory criteria that the contact was "in the best interest of the child"; and

WHEREAS, the Montana Supreme Court held in Polasek v. Omura that before a District Court could use the "best interest of the child" standard, the District Court must first determine whether the child's parent was a fit parent and, if the District Court determines the parent to be a fit parent and an objecting fit parent, that the presumption in favor of the parent's wishes has been rebutted; and

WHEREAS, because of the rulings of the U.S. Supreme Court and the Montana Supreme Court, section 40-9-102, MCA, is now misleading to grandparents in that the statute implies that a grandparent may petition a District Court to award, and the District Court may grant, grandparent-grandchild contact without consideration of the wishes of a custodial parent, or even over the objection of a custodial parent, and without consideration of the fitness of that parent; and

WHEREAS, the Legislature believes in the constitutional right of parents to control the actions and conduct of their children and believes that third parties should not be allowed, through the courts, to control the actions of those children if the parents are fit and proper parents; and

WHEREAS, the Legislature believes that both parents and grandparents must have a clear understanding or "road map" of parental rights and a grandparent's right to contact with a grandchild and that those rights should be clear in state law and easily located in state statutes by both parents and grandparents alike.

THEREFORE, it is the purpose of the Legislature to make Montana statutes reflect the holding of the U.S. Supreme Court in Troxel v. Granville and of the Montana Supreme Court in Polasek v. Omura regarding the constitutional rights of custodial parents to determine who a child may or may not have contact with by providing that before a District Court may grant grandparent-grandchild contact over the objection of a custodial parent, the District Court must inquire into the fitness of the parent and approve the petition for contact only if the parent is found to be unfit and the contact is in the best interest of the child or, if the court determines the parent to be a fit parent, the contact petitioned for is in the best interest of the child and the presumption in favor of the parent's wishes has been rebutted."

Applicability: Section 2, Ch. 495, L. 2007, provided: "[This act] applies to a petition for grandparent-grandchild contact filed in accordance with Title 40, chapter 9, part 1, after October 1, 2007."

1997 Amendment: Chapter 343 throughout section changed reference to grandparent visitation to "grandparent-grandchild contact"; in (1), near beginning after "reasonable", substituted "rights to contact with the child" for "visitation rights"; in (2), near middle before "would be", substituted "contact" for "visitation"; and made minor changes in style.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

1995 Amendment: Chapter 546 in (1), in second sentence, substituted "department of public health and human services" for "department of family services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: At end of first sentence of (1) inserted language clarifying extent of grandparent's right to visit grandchildren and inserted second sentence providing for notice in certain cases to Department of Family Services.

1983 Amendment: In (1), substituted language allowing court to grant visitation to a grandparent for former text that read: "If the father or mother of an unmarried child is deceased, the district court may grant to the parents of the deceased person reasonable visitation rights with the child"; inserted (3) stating how often one may petition under the section; and inserted (4) allowing court to appoint an attorney to represent child's interests.

Case Notes

Termination of Visitation Agreement — Correctly Classified as Grandparent Visitation Agreement and Not Parental Visitation Agreement: The grandparents filed a petition for a parental interest determination after the mother moved to North Dakota with the child. Following mediation, the parties signed an agreement that allowed the child to live with the mother and gave day-to-day decisionmaking to the mother, but specifying certain visitation rights for the grandparents. Years later, the grandparents filed contempt motions, requesting that the District Court enforce the parties' agreement. The District Court eventually terminated the agreement, finding that it was a grandparent visitation agreement subject to modification and termination and not a parental visitation agreement. On appeal, the Supreme Court affirmed, holding that the agreement was correctly classified and that the District Court correctly terminated the grandparents' visitation. King v. Chilcott, 2020 MT 224, 401 Mont. 204, 472 P.3d 155.

Grandparent Visitation — Application of Statutes: When considering a grandparent's visitation request, a District Court is required to apply 40-9-102, which specifically pertains to grandparent visitation, rather than 40-4-228, which pertains to parenting and visitation between a natural parent and a third party. (However, see Title 40, ch. 9, part 2, which was enacted in response to In re Parenting of L.R.S. and provides that a grandparent is not precluded from seeking relief in lieu of or in addition to relief under Title 40, ch. 9.) In re Parenting of L.R.S., 2018 MT 48, 390 Mont. 366, 414 P.3d 285.

Mother's Wishes Supersede Grandparents'—Fit Parent: The appellant grandparents requested regular and unsupervised visitation rights with their grandchild. The mother objected, allowing only supervised visits due to the grandparents' beliefs and prior actions. The District Court ruled that the grandparents did not present clear and convincing evidence to overcome the wishes of the fit parent under 40-9-102. On appeal, the Supreme Court upheld the determination, finding that the wishes of the parent overcame those of the grandparents. Glueckert v. Glueckert, 2015 MT 107; 378 Mont. 507, 347 P.3d 1216.

Burden on Grandparent to Overcome Presumption — Parenting Plan Terminology Not Fatal to Grandparent-Grandchild Contract Plan: The mother of two children did not oppose a grandmother's petition for grandparent-grandchild contact, but the mother did oppose extended visits in Washington state. The District Court incorrectly adopted extended out-of-state visitation provisions over the mother's objections because the grandmother had the burden of overcoming the objections of the fit parent and the grandmother did not supply evidence to overcome the presumption. However, except for the out-of-state visitation provisions, the District Court properly interpreted and applied this section because, although the grandparent-grandchild contact plan used parenting plan terminology, the objectives of the plan properly provided for a relationship between the grandmother and the children, rather than improperly establishing a parent-child relationship. Furthermore, information-sharing requirements within the plan merely required the parties to keep each other informed so that the children could be appropriately cared for during visits, rather than showing that the grandmother had been allocated improper parental decisionmaking powers. In re Grandparent/Grandchild Contact of C.A.G. and E.J.M.G., 2014 MT 290, 376 Mont. 540, 337 P.3d 751.

Preponderance of the Evidence Standard Used to Modify or Terminate Grandparent Visitation — Fit Parent's Views Given Deference: The District Court applied an incorrect standard of review in evaluating a parent's request to modify or terminate a stipulated court order for grandparent-grandchild contact. In order to adequately protect a parent's fundamental constitutional right to make decisions concerning the care, custody, and control of a child, a parent must be allowed to present any evidence that bears on those decisions as they relate to the nonparent. If the court finds that a parent is fit, then the parent's views on continued visitation and the best interest of the child must be given deference in the court's analysis. When a parent seeks to modify or terminate a previously issued contact order, the burden of proof is on the parent to make a showing by a preponderance of the evidence, rather than by clear and convincing evidence. In re Grandparent-Grandchild Contact of Snyder, 2010 MT 151, 357 Mont. 34, 235 P.3d 578.

Initial Best Interest Standard Applicable to Grandparent-Grandchild Proceedings: When a grandparent petitions for contact with a grandchild, the first inquiry is whether a parent adequately cares for the child. If the parent is fit, a presumption arises in favor of the parent's wishes because due process does not permit the state to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a better decision could be made. If the parent is not fit, no presumption arises and the parent's wishes are due no deference. The close scrutiny applied to the fundamental parenting right requires that a petitioning grandparent prove by clear and convincing evidence that it is in the child's best interest to have contact with the grandparent and that, in the case of a fit objecting parent, the presumption in favor of the parent's wishes has been rebutted. Here, it was reversible error for the District Court to neglect to inquire into the parent's fitness prior to judging whether a grandparent's request for contact should be granted. Polasek v. Omura, 2006 MT 103, 332 M 157, 136 P3d 519 (2006), following Troxel v. Granville, 530 US 57 (2000), and explained in In re Grandparent-Grandchild Contact of Snyder, 2010 MT 151, 357 Mont. 34, 235 P.3d 578. In In re C.T.C., 2014 MT 306, 377 Mont. 106, 339 P.3d 54, the Supreme Court applied the analysis in Polasek to stepparent visitation when the stepparent's spouse, the biological parent of the child, is deceased. See also King v. Chilcott, 2020 MT 224, 401 Mont. 204, 472 P.3d 155.

District Court Jurisdiction Over Grandparent-Grandchild Contact Proceedings: In the case of a petition for grandparent-grandchild contact brought under Title 40, ch. 9, the District Court retains jurisdiction to hear the petition and to issue a ruling on it. In re Grandparent-Grandchild Contact of Stewart v. Evans, 2006 MT 102, 332 M 148, 136 P3d 524 (2006).

Great-Grandparent Visitation: Mother challenged the award of visitation rights to a child's great-grandmother and great-great-grandmother when the child was in the father's custody on grounds that the grandparent visitation statutes do not address great-grandparent visitation.

Absent allegations of attempted independent great-grandparent visitation or a trial court finding on independent great-grandparent visitation rights, the issue was moot. In re Marriage of Dreesbach, 265 M 216, 875 P2d 1018, 51 St. Rep. 374 (1994).

Conditional Exercise of Grandparent Visitation: It was not an abuse of District Court discretion to grant grandparents the right of visitation only if the visitation was simultaneous with that of the father. In re Marriage of Kovash, 260 M 44, 858 P2d 351, 50 St. Rep. 934 (1993).

Adoption by Stepparent — No Mandatory Termination of Grandparents' Visitation: There is no clear legislative intent or public policy that mandates termination of visitation for natural grandparents when a grandchild is adopted by a stepparent. Kanvick v. Reilly, 233 M 324, 760 P2d 743, 45 St. Rep. 1524 (1988).

Grant of Grandparents' Visitation in Child's Best Interest Only: This section allows a court to grant a grandparent visitation rights only after a finding that the visitation would be in the child's best interest. The District Court properly refused adoption of a visitation schedule in the grandparents' home, which would subject the child to contact with her father, yet allowed the grandparents to visit the child in her mother's home. Kanvick v. Reilly, 233 M 324, 760 P2d 743, 45 St. Rep. 1524 (1988).

Reasonableness of Grandparent Visitation Schedule: The trial court granted to grandparents a total of 4 weeks per year of visitation, plus holidays, and allowed additional visitation conditioned on the mother's approval. Such a schedule was reasonable and provided adequate access to the child by the grandparents. In re Marriage of Jacobson, 228 M 458, 743 P2d 1025, 44 St. Rep. 1678 (1987).

40-9-103. Grandparents include great-grandparents.

Compiler's Comments

Effective Date: Section 3, Ch. 220, L. 2009, provided: "[This act] is effective on passage and approval." Approved April 15, 2009.

Part 2
Nonexclusive Remedy

Part Case Notes

Grandparent Visitation — Application of Statutes: When considering a grandparent's visitation request, a District Court is required to apply 40-9-102, which specifically pertains to grandparent visitation, rather than 40-4-228, which pertains to parenting and visitation between a natural parent and a third party. (However, see Title 40, ch. 9, part 2, which was enacted in response to In re Parenting of L.R.S. and provides that a grandparent is not precluded from seeking relief in lieu of or in addition to relief under Title 40, ch. 9.) In re Parenting of L.R.S., 2018 MT 48, 390 Mont. 366, 414 P.3d 285.

40-9-201. Purpose — legislative intent.

Compiler's Comments

Effective Date: Section 4, Ch. 199, L. 2019, provided: "[This act] is effective on passage and approval." Approved April 26, 2019.

Preamble: The preamble attached to Ch. 199, L. 2019, provided: "WHEREAS, the Legislature recognizes that the rights of parents to the custody and control of a child are based on liberties secured by the United States and Montana constitutions and that a parent's rights to custody and control of a child are therefore normally superior to the interests of other persons; and

WHEREAS, the Legislature also recognizes the Montana Constitution affords a child the same fundamental rights as a parent, including, at a minimum, the inalienable right to a clean and healthful environment, the right to pursue life's basic necessities, the right to enjoy a safe, healthy, and happy life, and the right to basic human dignity as provided in Article II, sections 3, 4, and 15, of the Montana Constitution, and that in appropriate circumstances, a parent's rights should yield to the child's; and

WHEREAS, the Legislature recognized in 1997 the importance of a child's contact with grandparents and subsequently in 2007 with the passage of section 40-6-501, MCA, a growing phenomenon in which absent or otherwise unavailable parents have temporarily surrendered the custody and care of their children to a grandparent or other relative for lengthy periods of time; and

WHEREAS, the Legislature acknowledges that the federal Supporting Grandparents Raising Grandchildren Act (Public Law 115-196, adopted July 7, 2018) establishes an advisory council to support grandparents raising grandchildren, and the legislation further establishes a number of federal agencies having responsibilities or administering programs related to grandparents or other older relatives raising children, with particular emphasis on those impacted by the opioid epidemic; and

WHEREAS, most importantly, the Legislature acknowledges the Montana Supreme Court's recent decision in In re Parenting of L.R.S., 2018 MT 48, in which the court held that a grandparent seeking contact with a child could do so only through an action brought under Title 40, chapter 9, MCA, precluding a grandparent who met the necessary prerequisites from seeking visitation under section 40-4-228, MCA."

40-9-202. Nonexclusive remedy.

Compiler's Comments

Effective Date: Section 4, Ch. 199, L. 2019, provided: "[This act] is effective on passage and approval." Approved April 26, 2019.

Preamble: The preamble attached to Ch. 199, L. 2019, provided: "WHEREAS, the Legislature recognizes that the rights of parents to the custody and control of a child are based on liberties secured by the United States and Montana constitutions and that a parent's rights to custody and control of a child are therefore normally superior to the interests of other persons; and

WHEREAS, the Legislature also recognizes the Montana Constitution affords a child the same fundamental rights as a parent, including, at a minimum, the inalienable right to a clean and healthful environment, the right to pursue life's basic necessities, the right to enjoy a safe, healthy, and happy life, and the right to basic human dignity as provided in Article II, sections 3, 4, and 15, of the Montana Constitution, and that in appropriate circumstances, a parent's rights should yield to the child's; and

WHEREAS, the Legislature recognized in 1997 the importance of a child's contact with grandparents and subsequently in 2007 with the passage of section 40-6-501, MCA, a growing phenomenon in which absent or otherwise unavailable parents have temporarily surrendered the custody and care of their children to a grandparent or other relative for lengthy periods of time; and

WHEREAS, the Legislature acknowledges that the federal Supporting Grandparents Raising Grandchildren Act (Public Law 115-196, adopted July 7, 2018) establishes an advisory council to support grandparents raising grandchildren, and the legislation further establishes a number of federal agencies having responsibilities or administering programs related to grandparents or other older relatives raising children, with particular emphasis on those impacted by the opioid epidemic; and

WHEREAS, most importantly, the Legislature acknowledges the Montana Supreme Court's recent decision in In re Parenting of L.R.S., 2018 MT 48, in which the court held that a grandparent seeking contact with a child could do so only through an action brought under Title 40, chapter 9, MCA, precluding a grandparent who met the necessary prerequisites from seeking visitation under section 40-4-228, MCA."

CHAPTER 15

PARTNER AND FAMILY MEMBER ASSAULT, SEXUAL ASSAULT, AND STALKING — VICTIM PROTECTION

Chapter Compiler's Comments

Severability: Section 31, Ch. 350, L. 1995, was a severability clause.

Chapter Case Notes

Discovery Not Condoned Under Temporary Order of Protection Proceedings: After the petitioner obtained a temporary order of protection (TOP) against the respondent for stalking, the respondent proceeded to conduct extensive discovery. After the respondent was charged criminally for stalking, the petitioner moved to dismiss the TOP without prejudice, which the District Court granted. On appeal, the respondent argued that the petition should have been dismissed with prejudice as a discovery sanction against the petitioner for failing to appear at depositions. The Supreme Court disagreed, noting that the breadth of discovery allowed in the case was antithetical to the purpose of a TOP, and concluded that unless extraordinary circumstances exist, courts should not compel a petitioner in a stalking matter to be subjected to discovery by a respondent. Because the need for a TOP may arise in the future, the District Court did not abuse its discretion in dismissing the TOP without prejudice. Lear v. Jamrogowicz, 2013 MT 147, 370 Mont. 320, 303 P.3d 790, followed in Boushie v. Windsor, 2014 MT 153, 375 Mont. 301, 328 P.3d 631.

Chapter Law Review Articles

Severing Ties: The Case for Indefinite Orders of Protection for Survivors of Domestic Violence, Driscoll, 75 Mont. L. Rev. 315 (2014).

Attorney Fees as Necessaries of Life: Expanding a Domestic Violence Victim's Access to Safety and Justice, Zielinski, 60 Mont. L. Rev. 201 (1999).

Chapter Collateral References

Forms for Victims, Office of Victim Services, https://dojmt.gov/victims/forms.

Protective Orders, https://courts.mt.gov/Forms/domestic.

Part 1
General Provisions

40-15-102. Eligibility for order of protection.

Compiler's Comments

2021 Amendment: Chapter 255 inserted (4) concerning persons that may file a petition for an order of protection on behalf of an adult; and made minor changes in style. Amendment effective July 1, 2021.

2019 Amendment: Chapter 255 in (2)(a) inserted references to sexual abuse of children as defined in 45-5-625 and human trafficking as defined in 45-5-701; and made minor changes in style. Amendment effective May 2, 2019.

2017 Amendment: Chapter 394 inserted (1)(b)(ix) concerning strangulation of partner or family member; and made minor changes in style. Amendment effective May 19, 2017.

2007 Amendment: Chapter 465 in (2)(a) inserted references to assault as defined in 45-5-201, aggravated assault as defined in 45-5-202, and assault on minor as defined in 45-5-212. Amendment effective May 8, 2007.

2001 Amendment: Chapter 503 inserted (2)(b) allowing a partner or family member of a victim of deliberate or mitigated deliberate homicide to file for a protection order; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 432 inserted (1)(b)(vii) concerning assault on a minor; inserted (1)(b)(viii) concerning assault with a weapon; and made minor changes in style. Amendment effective October 1, 1999.

Case Notes

Internet Dispute Turned Personal — Temporary Order of Protection Proper — No Additional Discovery — No Right to Jury Trial — No Right to Substitute Judge: A dispute arose from heated Internet-based correspondence between the petitioner, a Montana resident, and the respondent, a nonresident, who drove from Georgia to Montana, where he repeatedly drove past the petitioner's residence, showed up at his workplace, videotaped his vehicle, and created a website containing false and defamatory information about the petitioner and his wife. Based on this behavior, the petitioner sought and received a temporary order of protection (TOP) against the respondent, in Municipal Court. The District Court affirmed the TOP and denied the respondent's requests for discovery, a jury trial, and a substitute judge. On appeal, the Supreme Court affirmed the District Court, reasoning that all the TOP conditions that were imposed are permitted in 40-15-201, discovery would be antithetical to the purpose of a TOP, a jury trial would defeat the purpose of a TOP to provide swift and efficient protection of the victim, and a substitute judge is not a right in a TOP proceeding. Boushie v. Windsor, 2014 MT 153, 375 Mont. 301, 328 P.3d 631.

Jurisdiction Conferred on District Court When Acts of Stalking Committed Partly Within State: The District Court had jurisdiction over a petition for a temporary order of protection because the petition alleged that acts of stalking were committed partly within Montana. There is no statutory requirement under 40-15-102 or 45-5-220 that repeated acts of stalking must occur in Montana in order to confer jurisdiction on the District Court. Jordan v. Kalin, 2011 MT 142, 361 Mont. 50, 256 P.3d 909.

Failure to Enter Findings and Conclusions Regarding Continuation of Protective Order — Protective Order to Remain in Effect Pending Remand: Following the breakup of the parties, plaintiff obtained a temporary protective order in Justice's Court prohibiting contact by defendant. The court subsequently held a hearing on whether to make the protective order permanent and determined that good cause existed to continue the protective order. Defendant appealed to the District Court, which determined that defendant caused plaintiff substantial emotional distress, if not reasonable apprehension of bodily injury, by repeatedly harassing, threatening, and intimidating plaintiff. However, the court did not enter findings of fact and conclusions of law as required by former Rule 52(a), M.R.Civ.P. (now superseded), precluding appellate review absent a complete order. The Supreme Court remanded for the required findings and conclusions, but left the protective order in place during remand. Edelen v. Bonamarte, 2007 MT 138, 337 M 407, 162 P3d 847 (2007).

Failure to Appoint Guardian Ad Litem for Minor — Abuse of Discretion: Petitioners were granted a temporary protective order against a minor. The District Court scheduled a hearing to make the order permanent. The minor was unable to attend the hearing and was not represented by counsel or by a guardian. Nevertheless, the District Court made the order permanent. On appeal, the Supreme Court held that the District Court abused its discretion by not appointing a guardian ad litem for the minor as required by former Rule 17(c), M.R.Civ.P. (now superseded), and this section. The Supreme Court remanded for appointment of a guardian ad litem to represent the minor's interests. In re Keller v. Trull, 2007 MT 108, 337 M 188, 158 P3d 439 (2007).

40-15-110. Partner and family member assault intervention and treatment fund account.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 6, Ch. 62, L. 2023. Amendment effective October 1, 2024.

Termination Provision Repealed: Section 3, Ch. 311, L. 1999, repealed sec. 14, Ch. 484, L. 1997, which terminated this section June 30, 1999.

Severability: Section 11, Ch. 484, L. 1997, was a severability clause.

Effective Date: Section 13, Ch. 484, L. 1997, provided that this section is effective July 1, 1997.

Termination: Section 14, Ch. 484, L. 1997, provided: "[Sections 1 and 9 [40-15-110]] terminate June 30, 1999."

40-15-115. Policy — program.

Compiler's Comments

Effective Date: This section is effective October 1, 2005.

40-15-116. Definitions.

Compiler's Comments

2021 Amendment: Chapter 255 in definition of applicant near middle inserted "of a minor or a person described in 40-15-102(4)"; and made minor changes in style. Amendment effective July 1, 2021.

Effective Date: This section is effective October 1, 2005.

40-15-117. Substitute address for participant — application — duties of department — penalty.

Compiler's Comments

Effective Date: This section is effective October 1, 2005.

40-15-118. Designation of substitute address — forwarding of mail — disclosure of confidential address.

Compiler's Comments

Effective Date: This section is effective October 1, 2005.

40-15-119. Cancellation of substitute address — cessation of duty.

Compiler's Comments

Effective Date: This section is effective October 1, 2005.

40-15-120. Rules.

Compiler's Comments

Effective Date: This section is effective October 1, 2005.

Administrative Rules

Title 23, chapter 15, subchapter 5, ARM Address confidentiality program.

40-15-121. Implementation by state and local government agencies.

Compiler's Comments

Effective Date: This section is effective October 1, 2005.

Part 2
Order of Protection

Part Law Review Articles

Severing Ties: The Case for Indefinite Orders of Protection for Survivors of Domestic Violence, Driscoll, 75 Mont. L. Rev. 315 (2014).

40-15-201. Temporary order of protection.

Compiler's Comments

2011 Amendment: Chapter 37 inserted (5) regarding language of temporary order of protection. Amendment effective October 1, 2011.

Case Notes

Internet Dispute Turned Personal — Temporary Order of Protection Proper — No Additional Discovery — No Right to Jury Trial — No Right to Substitute Judge: A dispute arose from heated Internet-based correspondence between the petitioner, a Montana resident, and the respondent, a nonresident, who drove from Georgia to Montana, where he repeatedly drove past the petitioner's residence, showed up at his workplace, videotaped his vehicle, and created a website containing false and defamatory information about the petitioner and his wife. Based on this behavior, the petitioner sought and received a temporary order of protection (TOP) against the respondent, in Municipal Court. The District Court affirmed the TOP and denied the respondent's requests for discovery, a jury trial, and a substitute judge. On appeal, the Supreme Court affirmed the District Court, reasoning that all the TOP conditions that were imposed are permitted in 40-15-201, discovery would be antithetical to the purpose of a TOP, a jury trial would defeat the purpose of a TOP to provide swift and efficient protection of the victim, and a substitute judge is not a right in a TOP proceeding. Boushie v. Windsor, 2014 MT 153, 375 Mont. 301, 328 P.3d 631.

Denial of Motion to Vacate Permanent Order of Protection — No Abuse of Discretion: By waiting 13 years to challenge an underlying permanent order of protection, the respondent failed to preserve issues related to the constitutionality of 40-15-201 on appeal, and the Supreme Court declined to review these issues. Furthermore, when granting a temporary order of protection in 1997, the District Court found that the petitioner might be in danger of harm if the court did not act immediately, and when considering the permanent order of protection in 1999, the court found good cause to make the temporary order of protection permanent. When reconsidering the issue in the context of the respondent's motion to vacate the permanent order of protection, the District Court ultimately found that the petitioner's concerns were more persuasive, and the Supreme Court affirmed because the respondent had failed to prove that the District Court acted "without conscientious judgment or in a way that exceeded the bounds of reason". In re Marriage of Lockhead, 2013 MT 368, 373 Mont. 120, 314 P.3d 915.

Temporary Order of Protection Not Appealable Final Order: The petitioner and respondent were in the middle of a custody dispute when the respondent sought a temporary order of protection (TOP) in the Justice's Court against the petitioner. The petitioner responded by removing the TOP proceeding to the District Court, which was the venue for the parenting plan proceeding. After an order of protection hearing, the District Court dissolved the TOP and reserved the parenting plan petition for a later date. The respondent appealed the dissolution of the TOP. The Supreme Court dismissed the appeal, holding that the District Court, because it had essentially merged the TOP and parenting plan matters, had not issued a final resolution for all of the issues raised in the parenting plan, and thus the order dissolving the TOP was not immediately appealable. LeProwse v. Garrett, 2012 MT 275, 367 Mont. 161, 291 P.3d 110.

40-15-202. Order of protection — hearing — evidence.

Compiler's Comments

1999 Amendment: Chapter 311 inserted second and third sentences in (1) authorizing continuation of hearing date at request of either party for good cause or by court and, if continued, providing that temporary order of protection remains in effect until court hearing; and made minor changes in style. Amendment effective April 15, 1999.

1997 Amendment: Chapter 484 inserted (4) providing evidence concerning victim's sexual conduct generally inadmissible at hearing and providing exception to inadmissibility for victim's past conduct with offender or specific evidence of activity showing semen origin, pregnancy, or disease if sexual conduct at issue in hearing; and inserted (5) requiring judge to order separate hearing on admissibility if respondent proposes to offer evidence of victim's past sexual conduct. Amendment effective July 1, 1997.

Severability: Section 11, Ch. 484, L. 1997, was a severability clause.

Case Notes

Amended Permanent Order of Protection Improperly Issued — Opportunity to Be Heard Required: In an easement dispute, the District Court sua sponte expanded a permanent order of protection to include one of the plaintiffs that was not previously included in the order from crossing an alleged easement. On appeal, the Supreme Court concluded that the District Court erred when it issued an expanded order of protection against one of the plaintiffs when that plaintiff was not provided with an opportunity to be heard at a hearing. The District Court did not receive or review evidence regarding the plaintiff's conduct or provide the plaintiff notice of the hearing. Bardsley v. Pluger, 2015 MT 301, 381 Mont. 284, 358 P.3d 907, following In re Keller v. Trull, 2007 MT 108, 337 Mont. 188, 158 P.3d 439, and In re Marriage of Coogler, 2004 MT 122, 321 Mont. 243, 90 P.3d 414.

Temporary Order of Protection Not Appealable Final Order: The petitioner and respondent were in the middle of a custody dispute when the respondent sought a temporary order of protection (TOP) in the Justice's Court against the petitioner. The petitioner responded by removing the TOP proceeding to the District Court, which was the venue for the parenting plan proceeding. After an order of protection hearing, the District Court dissolved the TOP and reserved the parenting plan petition for a later date. The respondent appealed the dissolution of the TOP. The Supreme Court dismissed the appeal, holding that the District Court, because it had essentially merged the TOP and parenting plan matters, had not issued a final resolution for all of the issues raised in the parenting plan, and thus the order dissolving the TOP was not immediately appealable. LeProwse v. Garrett, 2012 MT 275, 367 Mont. 161, 291 P.3d 110.

Reversible Error for District Court to Adopt Terms of Protective Order Unrelated to Those Agreed to at Hearing or by Stipulation: Wife Lundstrom received a protective order in Justice's Court requiring husband Scholz to notify her when he intended to access the parties' property for business purposes. Lundstrom then filed a marriage dissolution petition in District Court, and Scholz subsequently petitioned the District Court under the same cause number to dismiss or modify the protective order. The District Court held a hearing to consider Scholz's petition and agreed to modify the protective order to allow Scholz more liberal access to the property, requesting both parties to submit proposed orders memorializing the terms agreed upon at the hearing. The court then signed the order prepared by Lundstrom's counsel. Scholz moved to reconsider, asserting that the order contained terms contradictory to those agreed upon at the hearing, and later moved for the District Court to dismiss the protective order, but Lundstrom did not answer either motion. Both motions were denied, and Scholz appealed. The Supreme Court first considered whether the District Court properly exercised its jurisdiction over the Justice's Court protective order. Although Justices' Courts and District Courts have concurrent jurisdiction to hear and issue protective orders, a District Court may not take jurisdiction of a Justice's Court case on its own initiative. However, in this case, Scholz availed himself of the District Court's jurisdiction by petitioning to dismiss or modify the protective order and could not then challenge the District Court's jurisdiction. However, the District Court committed reversible error by adopting verbatim Lundstrom's proposed modification of the protective order because the modification order contained significant deviations from the issues covered at the hearing and the court lacked authority to order terms contradictory to matters discussed or completely absent at the hearing. The District Court should have deviated from its original determination at the hearing to no greater extent than the parties actually agreed by stipulation. The case was remanded for further proceedings. In re Marriage of Lundstrom & Scholz, 2007 MT 304, 340 M 83, 172 P3d 588 (2007), following In re Custody of C.S.F., 232 M 204, 755 P2d 578 (1988). In re Custody of C.S.F. was clarified in Steab v. Luna, 2010 MT 125, 356 Mont. 372, 233 P.3d 351.

Minor Unrepresented and Absent From Hearing on Order of Protection — Abuse of Discretion — Reversible Error: Petitioners were granted a temporary protective order against a minor. The District Court scheduled a hearing to make the order permanent. The minor was unable to attend the hearing and was not represented by counsel or by a guardian. Nevertheless, the District Court made the order permanent. On appeal, the Supreme Court held that the District Court abused its discretion by conducting the hearing without the minor's presence or representation and without taking or reviewing any evidence and by basing the permanent order on nothing more than statements presented by the petitioners in their petition. The hearing did not satisfy the requirements of a mandatory hearing under this section, and the Supreme Court remanded for a hearing to be attended by the petitioners, the minor, and their respective representatives, if applicable, to determine whether there was sufficient evidence to justify granting the request for a permanent order of protection. In re Keller v. Trull, 2007 MT 108, 337 M 188, 158 P3d 439 (2007).

Dismissal, Without Hearing, of Order Supported by Allegations and Fears of Child Abuse: A mother obtained two temporary orders of protection from two different judges after her child complained about sexual and physical abuse by the father. The mother and father were separated. The first judge's dismissal of both orders without granting the mother an evidentiary hearing was a manifest abuse of discretion. The judge had twice ordered the father to obtain a mental health evaluation and a sexual offender evaluation in order to protect the child, and the father refused. He was rewarded by dismissal of the temporary protection orders. The dismissal was reversed, and the case was remanded for a hearing on the merits of the father's motion to vacate the orders. K.D.R.-M. v. R.E.M., 2004 MT 292, 323 M 340, 100 P3d 150 (2004).

Abuse of Discretion to Issue Permanent Protective Orders in Light of Failure to Hold Show Cause Hearing: The District Court issued a temporary protective order to the wife and subsequently granted a permanent protective order, amending the permanent order the next day to include additional restraints on the husband. The court noted that the husband was not present at a show cause hearing. The husband appealed on grounds that he was not given notice and that no hearing was conducted. The Supreme Court noted that under this section, a show cause hearing must be held within 20 days after issuance of a temporary protection order, but the record did not indicate that a hearing was ever held. Thus, the District Court abused its discretion, and the Supreme Court reversed and directed that the permanent protective orders be vacated. In re Marriage of Coogler, 2004 MT 122, 321 M 243, 90 P3d 414 (2004).

Discretion of District Court to Amend Temporary Protective Order — Evidence of Domestic Violence Prior to Birth of Child Irrelevant to Determination of Child Custody: Following incidents of domestic abuse unwitnessed by the parties' child, the father received a temporary protective order prohibiting contact by the mother with both the husband and child. The court subsequently held a hearing regarding the temporary order pursuant to this section and amended the protective order by extending it for an additional 6 months as to the husband, but found that the child was not in substantial danger, so the order was not extended to the child. Rather, the court issued an interim parenting plan that provided primary residential custody to the mother. The father appealed, but the Supreme Court affirmed. It is within the discretion of the District Court, upon a showing of good cause, to continue, amend, or make permanent a protection order, and its decision will not be overturned absent an abuse of that discretion. Here, the District Court properly considered the child's best interests in fashioning the interim parenting plan, and correctly declined to limit the mother's contact with the child through the protective order. Evidence of alleged incidents of domestic violence prior to the couple's marriage and the birth of the child was irrelevant. In re Schiller, 2002 MT 103, 309 M 431, 47 P3d 816 (2002), distinguishing Stoneman v. Drollinger, 2000 MT 274, 302 M 107, 14 P3d 12 (2000). However, while Schiller established that a change to a protective order is appealable, see LeProwse v. Garrett, 2012 MT 275, 367 Mont. 161, 291 P.3d 110, in which the Supreme Court dismissed an appeal of the dissolution of a temporary order of protection because the order was not the only issue in the case and the District Court had not yet ordered a final decision and resolution of the other issues.

40-15-204. Written orders of protection.

Compiler's Comments

2001 Amendment: Chapter 153 in (8) at end inserted "whether served inside or outside the jurisdiction of the court issuing the order". Amendment effective October 1, 2001.

1997 Amendment: Chapter 186 in (8), after "cost", inserted "to file a petition for an order of protection or"; and made minor changes in style. Amendment effective July 1, 1997.

Case Notes

Dissolution of Protective Order — District Court's Denial of Appeal Incorrectly Interpreted Appeal: The petitioner obtained an order of protection against the respondent in 2015. In 2017, the respondent moved to dissolve the order. The Justice Court denied the respondent's motion and the respondent appealed to the District Court. The District Court denied the respondent's appeal, stating that the respondent's motion to appeal the order was untimely as it should have been filed within 30 days of November 23, 2015. On appeal to the Supreme Court, the respondent argued that the District Court incorrectly treated his appeal of the court's 2017 order as an appeal of the 2015 order of protection itself. The Supreme Court agreed with the respondent, holding that the respondent timely filed his appeal. Anderson v. Larson, 2018 MT 155, 392 Mont. 29, 420 P.3d 1018.

Internet Dispute Turned Personal — Temporary Order of Protection Proper — No Additional Discovery — No Right to Jury Trial — No Right to Substitute Judge: A dispute arose from heated Internet-based correspondence between the petitioner, a Montana resident, and the respondent, a nonresident, who drove from Georgia to Montana, where he repeatedly drove past the petitioner's residence, showed up at his workplace, videotaped his vehicle, and created a website containing false and defamatory information about the petitioner and his wife. Based on this behavior, the petitioner sought and received a temporary order of protection (TOP) against the respondent, in Municipal Court. The District Court affirmed the TOP and denied the respondent's requests for discovery, a jury trial, and a substitute judge. On appeal, the Supreme Court affirmed the District Court, reasoning that all the TOP conditions that were imposed are permitted in 40-15-201, discovery would be antithetical to the purpose of a TOP, a jury trial would defeat the purpose of a TOP to provide swift and efficient protection of the victim, and a substitute judge is not a right in a TOP proceeding. Boushie v. Windsor, 2014 MT 153, 375 Mont. 301, 328 P.3d 631.

Order of Protection — District Court's Authority to Continue or Terminate: A District Court has the authority to continue or terminate an order of protection, regardless of the protected party's desires. Albrecht v. Albrecht, 2011 MT 316, 363 Mont. 117, 266 P.3d 1275.

Substantial Though Conflicting Evidence of Abuse by Father — Award of Custody to Mother Affirmed: The father contested an award of primary residential care of the children to the mother because she had been unable to provide the children with a stable home, to keep a stable job, and to consistently get the children to school on time, was going to regular counseling, and opposed the father's visitation with the children. The father also contended that findings of his possible abuse of the mother and children were erroneous. Nevertheless, the Supreme Court affirmed custody to the mother, noting that the deficiencies cited by the father were at least partially caused by his own actions and that although the testimony regarding abuse was conflicting, the record contained sufficient evidence detailing the father's history of violence to warrant making a protection order permanent and to support the finding that the children's best interests were served by primary custody with the mother. In re Marriage of Bock, 2005 MT 40, 326 M 123, 107 P3d 488 (2005).

Discretion of District Court to Amend Temporary Protective Order — Evidence of Domestic Violence Prior to Birth of Child Irrelevant to Determination of Child Custody: Following incidents of domestic abuse unwitnessed by the parties' child, the father received a temporary protective order prohibiting contact by the mother with both the husband and child. The court subsequently held a hearing regarding the temporary order pursuant to 40-15-202 and amended the protective order by extending it for an additional 6 months as to the husband, but found that the child was not in substantial danger, so the order was not extended to the child. Rather, the court issued an interim parenting plan that provided primary residential custody to the mother. The father appealed, but the Supreme Court affirmed. It is within the discretion of the District Court, upon a showing of good cause, to continue, amend, or make permanent a protection order, and its decision will not be overturned absent an abuse of that discretion. Here, the District Court properly considered the child's best interests in fashioning the interim parenting plan, and correctly declined to limit the mother's contact with the child through the protective order. Evidence of alleged incidents of domestic violence prior to the couple's marriage and the birth of the child was irrelevant. In re Schiller, 2002 MT 103, 309 M 431, 47 P3d 816 (2002), distinguishing Stoneman v. Drollinger, 2000 MT 274, 302 M 107, 14 P3d 12 (2000). However, while Schiller established that a change to a protective order is appealable, see LeProwse v. Garrett, 2012 MT 275, 367 Mont. 161, 291 P.3d 110, in which the Supreme Court dismissed an appeal of the dissolution of a temporary order of protection because the order was not the only issue in the case and the District Court had not yet ordered a final decision and resolution of the other issues.

Law Review Articles

Severing Ties: The Case for Indefinite Orders of Protection for Survivors of Domestic Violence, Driscoll, 75 Mont. L. Rev. 315 (2014).

Part 3
Jurisdiction, Venue, and Appeal — Registration of Orders

40-15-301. Jurisdiction and venue.

Compiler's Comments

1999 Amendment: Chapter 311 in (2) at beginning of first sentence substituted "dissolution of marriage or parenting action" for "divorce or custody action", inserted fourth sentence requiring court to conduct hearing unless both parties and courts agree hearing may be conducted in limited jurisdiction court, in fifth sentence substituted "shall" for "may" and after "receipt" inserted "of the pleadings, unless the hearing is continued at the request of either party for good cause or by the court", and inserted sixth sentence requiring order of protection to remain in effect until hearing if hearing continued; inserted (3) providing procedure when one party to protection order files for dissolution of marriage of parenting action after filing of protection order but before occurrence of hearing; and made minor changes in style. Amendment effective April 15, 1999.

Case Notes

Reversible Error for District Court to Adopt Terms of Protective Order Unrelated to Those Agreed to at Hearing or by Stipulation: Wife Lundstrom received a protective order in Justice's Court requiring husband Scholz to notify her when he intended to access the parties' property for business purposes. Lundstrom then filed a marriage dissolution petition in District Court, and Scholz subsequently petitioned the District Court under the same cause number to dismiss or modify the protective order. The District Court held a hearing to consider Scholz's petition and agreed to modify the protective order to allow Scholz more liberal access to the property, requesting both parties to submit proposed orders memorializing the terms agreed upon at the hearing. The court then signed the order prepared by Lundstrom's counsel. Scholz moved to reconsider, asserting that the order contained terms contradictory to those agreed upon at the hearing, and later moved for the District Court to dismiss the protective order, but Lundstrom did not answer either motion. Both motions were denied, and Scholz appealed. The Supreme Court first considered whether the District Court properly exercised its jurisdiction over the Justice's Court protective order. Although Justices' Courts and District Courts have concurrent jurisdiction to hear and issue protective orders, a District Court may not take jurisdiction of a Justice's Court case on its own initiative. However, in this case, Scholz availed himself of the District Court's jurisdiction by petitioning to dismiss or modify the protective order and could not then challenge the District Court's jurisdiction. However, the District Court committed reversible error by adopting verbatim Lundstrom's proposed modification of the protective order because the modification order contained significant deviations from the issues covered at the hearing and the court lacked authority to order terms contradictory to matters discussed or completely absent at the hearing. The District Court should have deviated from its original determination at the hearing to no greater extent than the parties actually agreed by stipulation. The case was remanded for further proceedings. In re Marriage of Lundstrom & Scholz, 2007 MT 304, 340 M 83, 172 P3d 588 (2007), following In re Custody of C.S.F., 232 M 204, 755 P2d 578 (1988).

40-15-302. Appeal to district court — order to remain in effect.

Compiler's Comments

1997 Amendment: Chapter 484 inserted (3) providing that temporary or protection order issued by court of limited jurisdiction remains in effect during appeal or during removal to appellate court unless modified by appellate court. Amendment effective July 1, 1997.

Severability: Section 11, Ch. 484, L. 1997, was a severability clause.

Case Notes

Dissolution of Protective Order — District Court's Denial of Appeal Incorrectly Interpreted Appeal: The petitioner obtained an order of protection against the respondent in 2015. In 2017, the respondent moved to dissolve the order. The Justice Court denied the respondent's motion and the respondent appealed to the District Court. The District Court denied the respondent's appeal, stating that the respondent's motion to appeal the order was untimely as it should have been filed within 30 days of November 23, 2015. On appeal to the Supreme Court, the respondent argued that the District Court incorrectly treated his appeal of the court's 2017 order as an appeal of the 2015 order of protection itself. The Supreme Court agreed with the respondent, holding that the respondent timely filed his appeal. Anderson v. Larson, 2018 MT 155, 392 Mont. 29, 420 P.3d 1018.

40-15-303. Registration of orders.

Compiler's Comments

2001 Amendment: Chapter 223 at end of (1) after "designated in the order" inserted requirement for entering order in databases within 24 hours after receipt; in (2) after "verification" inserted "and the database of the national crime information center of the United States department of justice"; and made minor changes in style. Amendment effective April 12, 2001.

Severability: Section 14, Ch. 223, L. 2001, was a severability clause.

Part 4
Uniform Interstate Enforcement of Domestic Violence Protection Orders

Part Compiler's Comments

Transitional Provisions: Section 11, Ch. 223, L. 2001, provided: "[Sections 1 through 8] [Title 40, chapter 15, part 4] apply to protection orders issued before [the effective date of this act] [effective April 12, 2001] and to continuing actions for enforcement of foreign protection orders commenced before [the effective date of this act] [effective April 12, 2001]. A request for enforcement of a foreign protection order made on or after [the effective date of this act] [effective April 12, 2001] for violations of a foreign protection order occurring before [the effective date of this act] [effective April 12, 2001] is governed by [sections 1 through 8] [Title 40, chapter 15, part 4]."

Severability: Section 14, Ch. 223, L. 2001, was a severability clause.

Effective Date: Section 16, Ch. 223, L. 2001, provided that this part is effective on passage and approval. Approved April 12, 2001.

40-15-402. Definitions.

Compiler's Comments

2003 Amendment: Chapter 259 in definition of protection order near middle after "family violence" inserted "sexual assault, or stalking"; and made minor changes in style. Amendment effective April 9, 2003.

40-15-403. Judicial enforcement of order.

Compiler's Comments

2003 Amendment: Chapter 259 in (5)(d) near middle after "given notice and had" inserted "an opportunity to be heard before the order was issued or had". Amendment effective April 9, 2003.

CHAPTER 16
FAMILY LAW ARBITRATION

Part 1
Uniform Family Law Arbitration Act

Part Official Comments

The official comments for the Uniform Family Law Arbitration Act are available at www.uniformlaws.org.

Part Compiler's Comments

Effective Date: This part is effective October 1, 2021.

TITLE 41
MINORS

CHAPTER 1
RIGHTS AND OBLIGATIONS OF MINORS

Part 1
Minority

41-1-101. Minors and adults defined.

Case Notes

Interpretation of Decree Provision on Termination of Support Obligation: In the decree of dissolution, the paragraph immediately following the paragraph concerning payment of child support provided that "Upon termination of the child support obligation" the appellant must pay the respondent maintenance until her death or remarriage. A dispute arose over the meaning of "termination of the child support obligation". The Supreme Court held that the District Court's ruling that the obligation terminated when the appellant stopped making monthly child support payments, rather than when the youngest child turned 18, was not clearly erroneous. In re Marriage of Jones, 218 M 441, 709 P2d 158, 42 St. Rep. 1722 (1985).

Custody and Support — "Child" Defined — Majority Age: Upon attaining the age of 18 a person is an adult and is no longer a "child" within the purview of 40-6-211 of whom parents are entitled to custody or to whom parents are obligated for support, despite the fact that at the time of the decree the legal age was 21. Chrestenson v. Chrestenson, 180 M 96, 589 P2d 148 (1979).

Family Allowance From Estate: When daughter became 18 years old, her right to receive a family allowance under sections 91-2401 through 91-2403, R.C.M. 1947 (now repealed), terminated. In re Hall's Estate, 124 M 355, 224 P2d 138 (1950).

Admission to State School for Girls: The controlling element in juvenile laws is age, not minority. Hence, contention that female cannot be committed to State Vocational School for Girls (Mountain View School) after she reaches age of majority cannot be sustained. State ex rel. Foot v. District Court, 77 M 290, 250 P 973, 49 ALR 398 (1926).

Attorney General's Opinions

Residence of Minor for Voting Purposes: Unemancipated minors are residents of the place their parents reside and may register to vote in that place if they will be 18 years of age at the time of the election. 34 A.G. Op. 13 (1971).

41-1-102. Periods of minority — how calculated.

Case Notes

No Wrongful Death Action for Death of Unborn Child: In view of the rule for calculating the periods of minority set forth in 41-1-102, an unborn fetus is not a "minor child" within the meaning of 27-1-512 and thus an action for the wrongful death of an unborn child cannot be maintained under present state law. Kuhnke v. Fisher, 210 M 114, 683 P2d 916, 41 St. Rep. 952 (1984). See also Strzelczyk v. Jett, 264 M 153, 870 P2d 730, 51 St. Rep. 206 (1994).

41-1-103. Unborn children.

Case Notes

Supreme Court Recognizes Wrongful Death Claim for Stillborn Fetus: Alexa Strzelczyk brought a wrongful death action against her physician for the death of her full-term, stillborn fetus. The defendant, Jett, removed the case to federal court because neither party still resided in Montana. The federal court certified the case to the state Supreme Court because of the state court's decision in Kuhnke v. Fisher, 210 M 114, 683 P2d 916 (1984), holding that under state law at that time, wrongful death statutes did not support a claim for the death of a stillborn fetus. The federal court noted that the statutes had been revised since the 1984 decision. The Supreme Court ruled that the revised statutes provided for an action for the wrongful death of a "person", rather than "minor child", and that a child conceived but not yet born is defined as an "existing person" under the law, so far as may be necessary for its interest in the event of its subsequent birth. The Supreme Court noted that "live" birth is not statutorily required. The Supreme Court also held that each case must be considered carefully to determine if the circumstances make it “necessary” for the fetus to be determined to be a person in order to protect some interest. Strzelczyk v. Jett, 264 M 153, 870 P2d 730, 51 St. Rep. 206 (1994).

Part 2

Civil Actions Concerning Minors

Part Law Review Articles

Recognizing Parental Consortium: Montana Follows a National Trend in Pence v. Fox, Vannatta, 54 Mont. L. Rev. 149 (1993).

The Contributory Negligence of Children: Ranard v. O’Neil, Troland, 37 Mont. L. Rev. 257 (1976).

Due Process Rights and High School Suspensions After Goss v. Lopez, Townsend, 36 Mont. L. Rev. 333 (1975).

41-1-201. Liability of minors for wrongs — exemplary damages.

Compiler’s Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Law Review Articles

Legislative Summary—Parental Liability for Vandalism, 18 Mont. L. Rev. 134 (1957).

41-1-202. Enforcement of minor’s rights.

Compiler’s Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Appointment of Guardian Ad Litem for Minor’s Claims Against Father Upheld — Best Interests of Children to Include Insurance Claims: The father of three minor children was involved in a motor vehicle accident that killed the mother. The father was charged with vehicular homicide while under the influence; however, the charge was eventually dismissed. The father owned a motor vehicle insurance policy, which proposed to pay the policy limits of $300,000 to the children. During this process, an attorney appointed to represent the minor children with respect to the insurance settlement indicated that the children may have additional claims against the father’s business insurance policy. Ultimately, over the father’s objection, the District Court appointed a guardian ad litem for the children and an attorney to pursue any legal claims in the best interests of the children. On appeal, the Supreme Court found that the appointment for the purpose of pursuing insurance claims was appropriate and that it was in the best interests of the children despite being against the father’s business insurance policy. In re Conservatorship of J.S., 2015 MT 335, 381 Mont. 462, 362 P.3d 76.

Appointment of GAL and Conservator — Inability of Parents to Choose Counsel for Child: The custodial parents of a minor child appealed the District Court’s order denying their motion to disqualify counsel for their child in a personal injury matter, arguing that they had the right to choose counsel over the opposition of the guardian ad litem (GAL) and conservator, that 37-61-403 and 72-5-427 were unconstitutional, and that 37-61-403 conflicts with the Montana Rules of Professional Conduct. The Supreme Court affirmed, concluding that once the parents consented to the appointment of a GAL and conservator, they divested themselves of the right to choose who would represent their child’s personal injury claims. Assuming that the parents were clients under 37-61-403, their failure to comply with the statute by not securing consent of the attorney of record or applying to the District Court to change the attorney of record did not render the statute unconstitutional. Because the parents voluntarily consented to the appointment of the GAL and conservator and, thus, divested themselves of control over the child’s legal action, their unhappiness with the decisions of the GAL and conservator did not render 72-5-427 unconstitutional. Rule 1.16, Montana Rules of Professional Conduct, and 37-61-403 work in conjunction: Rule 1.16 provides that an attorney shall withdraw from representation if discharged by a client and 37-61-403 provides the method for how discharge can be accomplished. In re Estate of C.K.O., 2013 MT 72, 369 Mont. 297, 297 P.3d 1217.

No Attorney Appointed in Estate-Related Proceeding — Minors’ Interests Amply Protected: Section 91-4316, R.C.M. 1947 (now repealed), imposed on the court the responsibility to look after the interests of minors. In a proceeding for the sale of realty brought by the administrator, the interests of the adults were the same as those of the minor heirs. The court might reasonably conclude that the interests of the heirs were amply protected by their adult sisters and that the additional expense of appointing an attorney to represent the minor heirs was unwarranted. That decision was in the court's sound discretion, and the fact that no attorney was appointed did not affect the validity of the proceedings. Haugan v. Yale Oil Corp., 124 M 1, 217 P2d 1084 (1950), following State ex rel. Hamilton v. District Court, 102 M 341, 57 P2d 1227 (1936), and State ex rel. Cotter v. District Court, 34 M 306, 87 P 615 (1906).

Infant Not to Appear Without Guardian: Sections 93-2805 and 93-2806, R.C.M. 1947 (now repealed), provided that an infant must appear in an action either by his general guardian or by a guardian ad litem appointed by the court. An infant defendant without a general guardian cannot appear until a guardian is appointed. Here, where a default judgment was taken against infant defendant, he could not be held responsible for his counsel's inadvertent failure to appear after consultation with his father prior to the appointment of a guardian. Maloney v. Schandelmier, 65 M 531, 212 P 493 (1923).

Appearance by General Guardian: At common law an infant plaintiff sues by guardian ad litem, but under statutes of this state he appears by his general guardian or his guardian ad litem. Melzner v. N. Pac. Ry., 46 M 162, 127 P 146 (1912); Flaherty v. Butte Elec. Ry., 40 M 454, 107 P 416 (1910).

Emancipation as Not Removing Minority: The emancipation of a minor by his parents does not render him capable of suing without a guardian. Where the complaint showed the plaintiff to be a minor, it was not subject to demurrer (demurrer abolished, former Rule 7(c), M.R.Civ.P. (now superseded), and 25-31-503, now repealed) because of a plaintiff's want of capacity to sue. A guardian should be appointed and his name inserted. Hoskins v. White, 13 M 70, 32 P 163 (1893).

Part 3
Power to Contract

41-1-301. Delegation of power by minors forbidden.

Case Notes

Agency — Parents' Neglect to Give Notice Not Imputable to Child — Child Incapable of Appointing Agent: Neglect of parents of injured child to give 60-day notice under section 11-1305, R.C.M. 1947 (now repealed), may not be imputed to the child, and since, under this section, a child is incapable of appointing an agent for any purpose, it is questionable whether the statute can be complied with in that respect by anyone as agent. Child's cause of action for personal injuries is a property right over which a parent has no control. Lazich v. Belanger, 111 M 48, 105 P2d 738 (1940).

41-1-302. Contracts of minors — disaffirmance.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

Case Notes

Workers' Compensation — Disaffirmation of Settlement Agreement by Minor: A minor was injured while working and filed for workers' compensation benefits. He subsequently signed a settlement agreement after negotiating with a claims adjuster. The claimant's filing of a petition to reopen his claim resulted in a hearing and the conclusion that the case was closed. The claimant appealed, based on his minority status at the time of the settlement and his concomitant right to disaffirm contracts. The Supreme Court held that the close relationship and continuing awareness of the claimant's mother during the claims negotiations were of no avail to the defendants because only the minor claimant had signed the settlement. The defendants should have required the claimant's legal guardian to sign as well as the claimant. Accordingly, the final compromise settlement was set aside. Parrent v. Midway Toyota, 192 M 118, 626 P2d 848, 38 St. Rep. 559 (1981).

No Form Prescribed: A minor who had purchased an automobile on time redelivered it to the seller in substantially the same condition and waived any claim for the amount paid on the purchase price. He notified the seller of his intention to disaffirm the contract in two notes. No particular form of disaffirmance is prescribed by law. The unequivocal acts on the minor's part by which his intentions were made known to the seller were sufficient. Stanhope v. Shambow, 54 M 360, 170 P 752 (1918).

Contract for Conveyance Upon Majority: The defendants purchased a tract of land from the plaintiff when he was a minor, taking a written obligation from him that he would execute a deed to them when he became of age. The obligation stated that he would execute the deed in consideration of $150 paid to him. The consideration, however, was paid to his father, from whom defendants received a written guaranty that the son would execute said deed when he became of age. Plaintiff upon reaching majority disaffirmed the contract. He was not required to restore the consideration or give notice of disaffirmance prior to the beginning of the suit, as the suit itself was sufficient notice of disaffirmance. Clark v. Tate, 7 M 171, 14 P 761 (1887).

41-1-303. Capacity of minors to borrow money for education.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

41-1-304. When minors may disaffirm.

Compiler's Comments

1997 Amendment: Chapter 21 in (1), at beginning, inserted exception clause; inserted (2) providing that a minor does not need to compensate for consideration gained through an improperly issued credit card or similar loan advance access device; and made minor changes in style. Amendment effective July 1, 1997.

Applicability: Section 4, Ch. 21, L. 1997, provided: "[This act] applies to credit cards or similar loan advance access devices issued after [the effective date of this act]." Effective July 1, 1997.

Case Notes

Workers' Compensation — Disaffirmation of Settlement Agreement by Minor: A minor was injured while working and filed for workers' compensation benefits. He subsequently signed a settlement agreement after negotiating with a claims adjuster. The claimant's filing of a petition to reopen his claim resulted in a hearing and the conclusion that the case was closed. The claimant appealed, based on his minority status at the time of the settlement and his concomitant right to disaffirm contracts. The Supreme Court held that the close relationship and continuing awareness of the claimant's mother during the claims negotiations were of no avail to the defendants because only the minor claimant had signed the settlement. The defendants should have required the claimant's legal guardian to sign as well as the claimant. Accordingly, the final compromise settlement was set aside. Parrent v. Midway Toyota, 192 M 118, 626 P2d 848, 38 St. Rep. 559 (1981).

Restoration of Consideration:

Minor may disaffirm contract without restoring consideration to other party when, from the very nature of the consideration, it cannot be returned (as in case of services performed by attorneys under contract of employment to institute an action). Downey v. N. Pac. Ry., 72 M 166, 232 P 531 (1924).

When infant purchaser of automobile disaffirmed contract of purchase and made complete restoration by redelivering it in substantially the same condition as when he bought it, both he and his sureties were discharged from further liability. Stanhope v. Shambow, 54 M 360, 170 P 753 (1918).

An infant may disaffirm contracts made by him, other than those for necessaries and those entered into under express statutory authority or direction, during infancy or within a reasonable time after reaching majority, provided he first makes restoration of consideration, thus placing the other party in status quo. Stanhope v. Shambow, 54 M 360, 170 P 753 (1918).

Law Review Articles

From the Mouths of Babes: Protecting Child Authors From Themselves, Young, 112 W. Va. L. Rev. 431 (2010).

41-1-305. Minor may not disaffirm contract for necessaries.

Compiler's Comments

2021 Amendment: Chapter 47 inserted (2) concerning housing; and made minor changes in style. Amendment effective March 2, 2021.

Applicability: Section 3, Ch. 47, L. 2021, provided: "[This act] applies to contracts entered into after [the effective date of this act]." Effective March 2, 2021.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Attorney Employment Contract: Quaere: Is employment of attorney by minor to prosecute action for false imprisonment a "necessary" within this section? Right to disaffirm contract employing counsel is not dependent on impossibility of returning consideration. But, attorney may collect by lien on cause of action after judgment. Downey v. N. Pac. Ry., 72 M 166, 232 P 531 (1924).

Pleading: Party desiring to rely upon exception provided by this section must plead that things furnished were necessaries. Downey v. N. Pac. Ry., 72 M 166, 232 P 531 (1924).

41-1-306. Minor may not disaffirm certain obligations.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 179 near end after "under" substituted "41-1-503" for "41-1-501"; and made minor changes in style. Amendment effective October 1, 2009.

1983 Amendment: At end of section added "or when he has been granted limited emancipation, including a specific right to enter into contracts, under 41-3-406 and 41-3-408".

Part 4
Consent for Health Services

41-1-401. Definitions.

Compiler's Comments

2005 Amendment: Chapter 519 in definition of health professional substituted "physician assistants" for "physician assistants-certified". Amendment effective October 1, 2005.

2003 Amendment: Chapter 396 inserted definitions of emancipated minor and health care facility; in definition of health professional after "psychologists" inserted "advanced practice registered nurses" and after "dentists" inserted "physician assistants-certified, professional counselors, or social workers"; and made minor changes in style. Amendment effective April 18, 2003.

41-1-402. Validity of consent of minor for health services.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 4, Ch. 527, L. 2023. Amendment effective May 18, 2023.

2003 Amendment: Chapter 396 inserted (1) providing that this part does not limit the right of an emancipated minor to consent to the provision of health services or to control access to protected health care information; in (2) near beginning of introductory clause after "provision of" substituted "health services and to control access to protected health care information by a health care facility" for "medical or surgical care or services by a hospital or public clinic" and after "performance of" substituted "health services by a health professional" for "medical or surgical care or services by a physician licensed to practice medicine in this state"; in (2)(a) after "minor who" substituted "professes to be or to have been" for "is or was ever" and at end after "school" deleted "or is emancipated"; in (2)(b) after "minor who" substituted "professes to be or is found to be" for "has been"; and made minor changes in style. Amendment effective April 18, 2003.

1997 Amendment: Chapter 42 in (1)(c), in second full sentence after "sexually transmitted disease", substituted "or drug and substance abuse" for "and drug and substance abuse"; and made minor changes in style. Amendment effective March 12, 1997.

1989 Amendment: In (1)(c), in two places, substituted "sexually transmitted" for "venereal".

Saving Clause: Section 21, Ch. 440, L. 1989, was a saving clause.

Severability: Section 22, Ch. 440, L. 1989, was a severability clause.

41-1-403. Release of information by health professional.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 5, Ch. 527, L. 2023. Amendment effective May 18, 2023.

2003 Amendment: Chapter 396 in (1) at beginning of introductory clause substituted "Except with regard to an emancipated minor" for "A treating physician or other" and after "inform the" deleted "spouse"; in (1)(e) at beginning substituted "health professional or health care facility providing treatment" for "hospital"; in (2) near beginning of first sentence after "disclosure to the" deleted "spouse"; and made minor changes in style. Amendment effective April 18, 2003.

1989 Amendment: In (2) substituted "a sexually transmitted" for "venereal".

Saving Clause: Section 21, Ch. 440, L. 1989, was a saving clause.

Severability: Section 22, Ch. 440, L. 1989, was a severability clause.

41-1-405. Emergencies and special situations.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 6, Ch. 527, L. 2023. Amendment effective May 18, 2023.

2013 Amendment: Chapter 307 in (4) at end substituted "Title 50, chapter 20, part 5" for "Title 50, chapter 20, part 2". Amendment effective July 1, 2013.

Severability: Section 16, Ch. 307, L. 2013, was a severability clause.

2012 Amendment by Referendum — Purported Amendment: Referendum No. 120, proposed by Ch. 307, L. 2011, and approved at the general election held November 6, 2012, in (4) substituted "[sections 1 through 9]" for "Title 50, chapter 20, part 2". Because Title 50, chapter 20, part 2, was repealed by Ch. 307 and the new sections were codified in that part, the reference is the same and the section remains unchanged. Amendment effective January 1, 2013.

1995 Amendment: Chapter 469 in (4), at end, inserted exception clause referring to Title 50, chapter 20, part 2.

Severability: Section 15, Ch. 469, L. 1995, was a severability clause.

41-1-407. Immunity and responsibility of physician or health care facility.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 7, Ch. 527, L. 2023. Amendment effective May 18, 2023.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Part 5
Limited Emancipation

Part Collateral References

Emancipation, https://courts.mt.gov/Forms/emancipation.

Emancipation of Minors, https://MontanaLawHelp.org/resource/emancipation-minor-youth-young-adult-legal-issues-edition.

41-1-501. Petition for limited emancipation.

Compiler's Comments

2009 Amendment: Chapter 179 in (1) at beginning deleted "The court may, upon the request of" and near end after "services" substituted "may petition the court for" for "enter"; in (2) in introductory clause substituted "The petition for limited emancipation must be in writing and must set forth" for "Limited emancipation may be granted only if the court has found"; inserted (2)(a) and (2)(b) regarding information set forth in the petition; deleted former (3) through (5) that read: "(3) An order of limited emancipation must specifically set forth the rights and responsibilities that are being conferred upon the youth. These may include but are not limited to one or more of the following:

(a) the right to live independently of in-house supervision;

(b) the right to live in housing of the youth's choice;

(c) the right to directly receive and expend money to which the youth is entitled and to conduct the youth's own financial affairs;

(d) the right to enter into contractual agreements and incur debts;

(e) the right to obtain access to medical treatment and records upon the youth's own authorization; and

(f) the right to obtain a license to operate equipment or perform a service.

(4) An order of limited emancipation must include a provision requiring that the youth make periodic reports to the court upon terms prescribed by the court.

(5) The court, on its own motion or on the motion of the county attorney or any parties to the dispositional hearing, may modify or revoke the order upon a showing that:

(a) the youth has committed a material violation of the law;

(b) the youth has violated a condition of the limited emancipation order; or

(c) the best interests of the youth are no longer served by limited emancipation"; and made minor changes in style. Amendment effective October 1, 2009.

2001 Amendment — Coordination: Pursuant to sec. 17(3)(b), Ch. 281, L. 2001, a coordination section, the code commissioner in (1) after "department" inserted "of public health and human services". Amendment effective October 1, 2001.

1995 Amendment: Chapter 458 in (1), after "The court", deleted "after the dispositional hearing provided for in 41-3-406" and after "older" inserted "the youth's parent, or the department"; in (2)(g) inserted "if it is considered necessary by the court"; deleted former (5) regarding provision of funds by Department to finance transition to limited emancipation status (see 1995 Session Law for text); in (5), after "motion of", inserted "the county attorney or"; deleted former (6)(b) that read: "(b) the youth is failing to diligently pursue graduation from high school"; deleted (6)(e) that read: "(e) the youth has discontinued periodic counseling with approved advisors"; deleted (7) that read: "(7) The department shall mail a copy of this part to all high school counseling offices"; and made minor changes in style. Amendment effective April 14, 1995.

1991 Amendment: In (5), near beginning after "If", deleted "no order for contribution is made under 41-3-1124 and". Amendment effective July 1, 1991.

Case Notes

Limited Emancipation Decisions Not Subject to Appellate Mediation Requirements: Former Rule 54, M.R.App.P. (now superseded), provided that certain domestic relations cases are subject to appellate mediation, but those cases do not include limited emancipation decisions, which are more akin to severing parental rights than to delineating how, when, and under what circumstances parental rights may be exercised. Thus, limited emancipation actions are not subject to appellate mediation requirements. In re Emancipation of Dammarell, 2000 MT 46, 298 M 391, 3 P3d 597, 57 St. Rep. 230 (2000).

41-1-502. Hearing and notice.

Compiler's Comments

Effective Date: This section is effective October 1, 2009.

41-1-503. Order of limited emancipation.

Compiler's Comments

Effective Date: This section is effective October 1, 2009.

CHAPTER 2
CHILD LABOR

Chapter Attorney General's Opinions

Employment of Children Permitted: The child labor laws of Montana allow employment of children if such employment is not in the prohibited areas of employment specified in 41-2-101 (now repealed). 33 A.G. Op. 29 (1970).

Scope of Workers' Compensation Coverage: A minor, whether lawfully or unlawfully employed, is considered an employee under the Montana Workers' Compensation Act and thus is able to receive benefits if the employer has elected to be bound by the Act and the employee has not affirmatively elected not to be bound by the Act. 33 A.G. Op. 29 (1970).

Chapter Law Review Articles

The Eighteenth Birthday of the Convention of Rights of the Child: Achievements and Challenges (Looking Ahead to the Next 30 Years of Child Advocacy Symposium), Doek, 41 U. Mich. J.L. Ref. 61 (2007).

Under My Roof: Parents' Rights to Children's Earnings, Benbow, 16 J. Contemp. Legal Issues 71 (2007).

Part 1
Child Labor Standards Act

Part Compiler's Comments

Severability: Section 16, Ch. 391, L. 1993, was a severability clause.

Part Case Notes

CASES PRIOR TO 1993 ACT

Immunity of Employer Under Workers' Compensation Act: When a 13 year-old girl, unlawfully employed as operator of a passenger elevator, was killed in the performance of her duties and had failed to serve upon the employer a written notice of her election not to be bound by Workers' Compensation Act, she being an "employee" under 39-71-118 expressly including minors "whether lawfully or unlawfully employed", it was held that her insured employer was immune from common-law or statutory suits for damages brought by her mother as administratrix. Tarrant v. Helena Bldg. & Realty Co., 116 M 319, 156 P2d 168 (1944).

Defenses Not Available: In an action such as this the defenses of contributory negligence and assumption of risk are not available. Daly v. Swift & Co., 90 M 52, 300 P 265 (1931), distinguished in Shaw v. Kendall, 114 M 323, 136 P2d 748 (1943).

Knowledge: Since a corporate defendant in an action based on a violation of the Child Labor Law can only have vicarious knowledge of any fact, the knowledge of its managing officers that a minor of the prohibited age was being employed in a proscribed labor constitutes the knowledge required by the act. Daly v. Swift & Co., 90 M 52, 300 P 265 (1931).

Negligence Per Se: Violation of the child labor law is negligence per se. Daly v. Swift & Co., 90 M 52, 300 P 265 (1931).

Responsibility for Independent Contractor: The fact that a boy under the age of 16 years was employed by an independent contractor in making repairs on a freight elevator when injured was immaterial, it having been defendant company's duty, being in full possession of the building and elevator and with knowledge that he was engaged in forbidden labor, to see to it that he was not permitted to continue therein. Daly v. Swift & Co., 90 M 52, 300 P 265 (1931).

What Constitutes Cause of Action: Complaint in an action to recover damages for the death of a boy under the age of 12 years alleging, inter alia, that defendant company knowingly and negligently permitted the boy to be employed by an independent contractor in and about heavy elevator machinery while being moved, contrary to the provisions of the child labor law, it was held not open to the objection that it did not state a cause of action in that it showed on its face that deceased was not in the employ of defendant but that of the contractor. Daly v. Swift & Co., 90 M 52, 300 P 265 (1931).

Invalidity of Act as to Dangerous Occupations Not Specifically Enumerated: When the Legislature undertakes to define a new offense, the statute must be so explicit that all persons subject to its penalty may know what acts to avoid, and under that rule the provision of 41-2-101 (now repealed) making it a misdemeanor to employ a child under the age of 16 years "in any occupation ... known to be dangerous" is so uncertain as to the kind and nature of occupations intended to come within the prohibited class as to render it void. Burk v. Mont. Power Co., 79 M 52, 255 P 337 (1927), distinguished in Shaw v. Kendall, 114 M 323, 136 P2d 748 (1943).

Requisites of Complaint for Damages: The complaint in an action by a minor against a railway company to recover damages for personal injuries, making it negligence per se for an employer to hire a child under 16, must allege that defendant employed plaintiff knowing him to have been under that age. Fallon v. Chicago, Milwaukee & St. Paul Ry., 61 M 130, 200 P 453 (1921).

Part Attorney General's Opinions

OPINIONS PRIOR TO 1993 ACT

Employment of Children Permitted: The child labor laws of Montana allow employment of children if such employment is not in the prohibited areas of employment specified in 41-2-101 (now repealed). 33 A.G. Op. 29 (1970).

Scope of Workers' Compensation Coverage: A minor, whether lawfully or unlawfully employed, is considered an employee under the Montana Workers' Compensation Act and thus is able to receive benefits if the employer has elected to be bound by the Act and the employee has not affirmatively elected not to be bound by the Act. 33 A.G. Op. 29 (1970).

41-2-103. Definitions.

Compiler's Comments

2021 Amendment: Chapter 135 inserted (6)(c) regarding a student-employee; and made minor changes in style. Amendment effective October 1, 2021.

2015 Amendment: Chapter 55 in (6)(a) substituted "a high school equivalency diploma" for "has received a passing score on the general educational development examination". Amendment effective October 1, 2015.

2009 Amendment: Chapter 2 in definition of minor in (a) near end after "general" substituted "educational" for "education"; and made minor changes in style. Amendment effective October 1, 2009.

41-2-104. Exemptions.

Compiler's Comments

1995 Amendment: Chapter 89 inserted (9) concerning an official or referee for a nonprofit athletic organization and prohibiting a minor under the age of 14 from officiating at adult events or activities; and made minor changes in style. Amendment effective March 9, 1995.

41-2-107. Prohibited employment of minors who are 16 and 17 years of age.

Compiler's Comments

2021 Amendment: Chapter 135 in (1) after "student learner" inserted "or student-employee"; and made minor changes in style. Amendment effective October 1, 2021.

41-2-109. Exemptions from prohibited occupations in agriculture.

Compiler's Comments

2021 Amendment: Chapter 135 in (1)(b)(ii) after "the work is" deleted "intermittent, for short periods of time, and". Amendment effective October 1, 2021.

2001 Amendment: Chapter 133 in (1)(a) substituted "K-12 career and vocational/technical education" for "vocational education". Amendment effective July 1, 2001.

Effective Date — Applicability: Section 15, Ch. 133, L. 2001, provided: "[This act] is effective July 1, 2001, and applies to school budgets for school fiscal years beginning on or after July 1, 2001."

41-2-110. Exemptions from prohibited employment of minors who are 16 or 17 years of age.

Compiler's Comments

2021 Amendment — Code Commissioner Correction: Chapter 135 in (1) after "student-learner" inserted "or student-employee"; in (1)(a)(iii) and (1)(b)(ii)(B) after "the work is" deleted "intermittent, for short periods of time, and"; inserted (1)(c) regarding a student-employee; inserted (2) regarding performance of work functions by a student-employee; and made minor changes in style. Amendment effective October 1, 2021. Because of an outlining error in Chapter 135, the code commissioner reoutlined the section following (1)(b) to the end.

41-2-117. Power to adopt rules.

Compiler's Comments

2003 Amendment: Chapter 260 near beginning before "adopt" substituted "may" for "shall". Amendment effective April 9, 2003.

1993 Statement of Intent: The statement of intent attached to Ch. 391, L. 1993, provided: "A statement of intent is required for this bill because [section 12] [41-2-117] requires the department of labor and industry to adopt rules to define terms, to implement the purposes of the child labor laws, and to prevent the circumvention or evasion of the child labor laws."

CHAPTER 3
CHILD ABUSE AND NEGLECT

Chapter Compiler's Comments

Task Force on Dependency and Neglect Court Systems: Section 1, Ch. 659, L. 2023, and sec. 2, Ch. 659, L. 2023, established a task force on dependency and neglect court systems to study whether a separate dependency and neglect court system or the existing court system, with enhancements, would best serve children, families, and other participants involved in dependency and neglect court proceedings; to report to the governor, the chief justice of the supreme court, and the 69th legislature; and to prepare draft legislation, if appropriate. Sections 1 and 2 were effective May 19, 2023, and terminate June 30, 2025.

Preamble: The preamble to SB 301 (Ch. 543, L. 1979) provided: "WHEREAS, Governor Judge appointed a task force to recommend ways in which services to families in which abuse and neglect are occurring could be improved; and

WHEREAS, the task force recognizes that the most crucial actions toward improving services to families must be taken by the local community; and

WHEREAS, the task force recognizes that child abuse and neglect is a multifaceted problem and that no one agency or discipline, by itself, has the resources or perspective to resolve or contain the problem; and

WHEREAS, the task force has heard testimony from numerous individuals, legislative staff, and other persons who deal with abused and neglected children and their families; and

WHEREAS, existing child abuse and neglect laws do not meet requirements allowing Montana to qualify for federal grants under Public Law 93-247.

THEREFORE, it is the intent of this bill to address the problems facing the children, families, and communities of this state regarding child abuse and neglect."

Chapter Administrative Rules

Title 37, chapter 47, subchapter 3, ARM Child protective services.

Title 37, chapter 47, subchapter 6, ARM Confidentiality of case records.

Title 37, chapter 50, ARM Foster care services and guardianship services.

Chapter Case Notes

ADA Reasonable Accommodations Requirement Generally Subsumed by Requirements to Make Reasonable Efforts and Develop Appropriate Treatment Plan: A mother appealed the termination of her parental rights on the grounds that the Department of Public Health and Human Services (DPHHS) had failed to provide reasonable accommodations for her disability and that the District Court had failed to properly apply the federal Americans With Disabilities Act of 1990 (ADA) in its termination order. The Supreme Court affirmed, finding that the ADA's requirement that a public entity make reasonable accommodations for a person's disabilities is satisfied if DPHHS has fulfilled its existing obligations to make reasonable efforts and develop an appropriate treatment plan for the parent. Similarly, the Supreme Court found that the District Court is already required to make findings in consideration of a disabled parent in approving a treatment plan and no additional requirements above and beyond this are imposed by the ADA. In re K.L.N., 2021 MT 56, 403 Mont. 342, 482 P.3d 650.

Qualifications to Be Considered Party or Interested Person in Child Abuse and Neglect Proceedings: In a child abuse and neglect proceeding, the mother's longtime boyfriend, who was not biologically related to the child but was identified by the child as his "dad", appealed the District Court's determination that the boyfriend was neither a party nor an interested person to the child's case and, therefore, was not entitled to continued notice or the right to appear in any subsequent proceedings related to the child. On appeal, the Supreme Court determined that the Department of Public Health and Human Services, the child, and a parent, guardian, or individual with legal custody of the child are all parties to child abuse and neglect proceedings. In addition, a foster parent, a preadoptive parent, a relative caring for the child, or a relative who has cared for the child is allowed to file a motion to intervene and may also be a party to the proceedings. Therefore, because the boyfriend did not meet the above criteria, the District Court did not err in dismissing him as a party to the proceedings. However, the Supreme Court determined that under 41-3-422(9)(a), the boyfriend is a person interested in the child's case and has a right to appear at hearings pertaining to the child but does not have the right to notice or the right to be heard. The District Court erred when it denied the boyfriend's request to appear at the child's proceedings. In re J.B., 2015 MT 342, 381 Mont. 525, 362 P.3d 859.

Imposition of Child Custody Change in Criminal Sentence — Moot: After the defendant was convicted of assault on a minor and aggravated assault based on acts committed against her child, the District Court ordered as part of the defendant's criminal sentence that the child be temporarily placed with the father while civil dependency and neglect proceedings progressed against the defendant and stated in its judgment that it should be presumed that the father should have legal custody of the child unless the defendant could demonstrate otherwise. On appeal, the Supreme Court concluded that the defendant's appeal challenging the District Court's temporary placement of the child with the father was moot because the mother had regained custody of the child through the civil dependency and neglect proceedings. However, the District Court's statement regarding the presumption that the father should have custody of the child had no place in the judgment and was ordered stricken. St. v. MacDonald, 2013 MT 105, 370 Mont. 1, 299 P.3d 839.

Termination of Parental Rights — Requirements of Indian Child Welfare Act: Under the Indian Child Welfare Act, 25 U.S.C. 1901, et seq., the party seeking termination of an individual's parental rights to an Indian child under state law must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the efforts have proved unsuccessful. The party seeking termination has the burden of proving beyond a reasonable doubt that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. In re Custody of A.L.R., A.A.R., & T.C.R., 2002 MT 183, 311 M 76, 54 P3d 17 (2002). See also In re I.B., 2011 MT 82, 360 Mont. 132, 255 P.3d 56, In re D.A. and M.A., 2013 MT 191, 371 Mont. 46, 305 P.3d 824, and In re A.L.D., 2018 MT 112, 391 Mont. 273, 417 P.3d 342.

No Authority to Grant Third-Party Petition for Parenting Plan Absent Termination of Parental Rights: A young, single mother left her child in the temporary care of the Knopps, her aunt and uncle, while she sought employment and a place to live. About 2 months after the child was left with them, the Knopps petitioned for a parenting plan and support for the child. Although the document was referred to as a petition for a parenting plan, child support, and medical support, it was the functional equivalent of a petition for permanent custody. The Knopps applied for temporary custody and received it, ex parte, so that when the mother returned and tried to remove the child to their new home, she was not allowed to do so. The mother then sought termination of the guardianship and the return of her child. The mother's parental rights were never terminated or suspended by the state or county, nor were any proceedings ever commenced to demonstrate that the child was abused, dependent, or neglected. The District Court dismissed the petition, relying on In re Guardianship of D.T.N., 275 M 480, 914 P2d 579 (1996), in holding that the mother had a constitutional right to custody of her child and that permanent guardianship could not be granted because the mother's parental rights had not been terminated or suspended. The Knopps appealed, but the Supreme Court affirmed. The rule of law does not permit destruction of a natural parent's fundamental right to the custody of a child based simply on the subjective determination of the child's best interests. Rather, a natural parent cannot be denied custody of a child absent termination of parental rights for abuse or neglect pursuant to this chapter. In re Parenting of J.N.P., 2001 MT 120, 305 M 351, 27 P3d 953 (2001). See also In re A.R.A., 276 M 66, 919 P2d 388 (1996), and Girard v. Williams, 1998 MT 231, 291 M 49, 966 P2d 1155 (1998). However, see In re Parenting of M.M.G., 2012 MT 228, 366 Mont. 386, 287 P.3d 952, in which the Supreme Court held that the petitioners could seek a parenting plan if the petitioners could establish a child-parent relationship, even though the mother's parental rights had not been terminated, distinguishing this case from In re Parenting of J.N.P.

Best Interest of Child Standard Unconstitutional in Custody Award to Nonparent Over Natural Parent Absent Finding of Abuse, Neglect, or Dependency: The best interest of the child standard incorporated into 40-4-221 in determining the custody of a child whose custodial parent dies is unconstitutional to the extent that it allows the grant of a petition prior to the termination of the noncustodial parent's constitutional right to custody. Use of the standard is improper in that any showing that a nonparent may be able to provide a better environment than a natural parent is irrelevant to the question of custody between the two in view of the constitutional right of a parent to custody. Although 40-4-221 gives a nonparent standing to request a custody hearing, it does not give the District Court authority to deprive a natural parent of the right to custody absent a finding of abuse, neglect, or dependency on the part of the natural parent. In re A.R.A., 276 M 66, 919 P2d 388, 53 St. Rep. 543 (1996), following In re Doney, 174 M 282, 570 P2d 575 (1977), and overruling Brost v. Glasgow, 200 M 194, 651 P2d 32 (1982), and In re C.G., 228 M 118, 740 P2d 1139 (1987).

Indian Child Welfare Act — Burden of Proof for Placement in Foster Care: D.F and L.F., natural children of appellant who is an enrolled member of the Three Affiliated Tribes, were taken from appellant and placed in a foster home by the Department of Family Services (now Department of Health and Human Services). The Supreme Court found that the District Court had properly applied the standard of the Indian Child Welfare Act of 1978 requiring "clear and convincing" evidence that continued custody by appellant was likely to result in emotional or physical harm to her children and that clear and convincing evidence was shown to the District Court. All of the expert witnesses who testified gave examples of actions by appellant or her live-in male roommate that endangered the psychological or physical well-being of the children. Therefore, even though the District Court did not specifically state the burden of proof, the proof required by 25 U.S.C. 1912(e) was satisfied. In re L.F. & D.F., 266 M 461, 880 P2d 1365, 51 St. Rep. 900 (1994), cited in In re G.S., 2002 MT 245, 312 M 108, 59 P3d 1063 (2002), in which the Supreme Court upheld the District Court, concluding that the District Court applied the "clear and convincing evidence" standard in ruling that the state agency employed active, yet unsuccessful, efforts to provide remedial and rehabilitative services designed to prevent the breakup of an Indian family prior to granting the state agency temporary custody of the Indian children.

Marriage and Divorce Law Inapplicable to Nonparent Seeking Child Custody: As part of a change in custody proceeding conducted under the marriage and divorce statutes, the District Court erred in granting to a nonparent the custody of a child who was neither a natural child nor adopted. The proper procedure to be followed is contained in the child abuse, neglect, and dependency statutes. Although the nonparent apparently fit the requirements for custodian under either scenario, the case was remanded for correct procedural consideration under this chapter. In re Marriage of Miller, 251 M 300, 825 P2d 189, 49 St. Rep. 36 (1992), following In re Doney, 174 M 282, 570 P2d 575 (1977), and overruling a contrary prior holding in In re Custody of C.C., K.C., & B.C., 215 M 72, 695 P2d 816 (1985).

Exclusion of Evidence on Child Abuse Proceeding Concerning Father — Harmless Error: It was harmless error, in a child custody modification proceeding, for a District Court judge to exclude evidence that a petition for temporary investigative authority (see 2001 amendment to 41-3-427), alleging sexual abuse by the father, had been filed under Title 41, ch. 3, and dismissed for lack of evidence after being heard by the same judge who made the custody modification determination. In re Marriage of Stout, 216 M 342, 701 P2d 729, 42 St. Rep. 856 (1985).

No Requirement for Determination on Exact Cause and Nature of Child's Problems: Title 41, ch. 3, does not require a determination of the exact nature and cause of a child's problems before reaching a proper decision. When the trial court's findings were supported by substantial and credible evidence after a thorough and intense examination of all factors presented, the mother cannot prevail under the theory that the evidence did not support the court's findings that her child was a youth in need of care or under the contention that, at most, the nature and cause of her child's problems could not be determined. In re B.L.O., 213 M 164, 689 P2d 1246, 41 St. Rep. 2024 (1984).

Dependent and Neglected Finding Invalid When Entered in Guardianship Proceeding: A District Court finding that children were dependent and neglected was invalid since it was rendered in a guardianship proceeding instituted by the paternal grandparents rather than in a proceeding instituted to have the children declared dependent and neglected, as it must be, by the County Attorney under Title 41, ch. 3. In re Guardianship of Aschenbrenner, 182 M 540, 597 P2d 1156 (1979). However, see also In re L.E.B., 259 M 492, 856 P2d 1382, 50 St. Rep. 895 (1993), in which Aschenbrenner was distinguished in a case brought under adoption proceedings rather than guardianship proceedings.

Procedures to Be Rigorously Followed: While there is some overlap in the various statutory schemes governing the termination of parental rights and the custody of children as to general subject matter, each is used for a distinct purpose and sets forth specific procedures which must be rigorously followed before a valid judgment or order may be issued, to insure that the minors involved receive the full protection of these laws. In re Guardianship of Aschenbrenner, 182 M 540, 597 P2d 1156 (1979).

Termination of Parental Rights: The State may not terminate a parent's right to raise his or her own child merely because a court or state agency feels that a nonparent has more financial resources or pursues a preferable lifestyle. In re Inquiry into J.L.B., Youth in Need of Care, 182 M 100, 594 P2d 1127 (1979).

Names of Parties: The Supreme Court directed that in this and in future cases under 41-3-101, et seq., in both the District and Supreme Courts, all names of parties involved be removed to avoid publicity of the minor parties involved. In re Gore, Youth in Need of Care, 174 M 321, 570 P2d 1110 (1977).

Chapter Attorney General's Opinions

Child Abuse, Neglect, and Dependency Proceedings — Duty of County Attorney: It is the duty of the County Attorney to represent the Department of Family Services (now Department of Public Health and Human Services) in child abuse, neglect, and dependency proceedings brought under Title 41, ch. 3. 42 A.G. Op. 45 (1987).

Chapter Law Review Articles

Tribal Nations and Congress's Power to Define Offences Against the Law of Nations, Dossett, 80 Mont. L. Rev. 41 (2019).

The Analysis is Simple: A Child's Right to Counsel in Dependency and Neglect Proceedings Under the Montana Constitution, Shannon, 79 Mont. L. Rev. 231 (2018).

A Look at Kulstad v. Maniaci in Light of Changing Cultural Norms, Neilson, 71 Mont. L. Rev. 449 (2010).

The Indian Child Welfare Act of 1978: A Montana Analysis, DuMartier-Pierre, 56 Mont. L. Rev. 505 (1995).

Expert Testimony in Child Sexual Abuse Cases in Montana: A Proposal for Change, Harrison, 54 Mont. L. Rev. 297 (1993).

Family Law, Mattix, 44 Mont. L. Rev. 329 (1983).

Family Law, Winnie, 41 Mont. L. Rev. 135 (1980).

Family Law, Snyder & Sharrock, 40 Mont. L. Rev. 75 (1979).

Montana's Child Neglect Law—A Need for Revision, Jones, 31 Mont. L. Rev. 201 (1970).

Chapter Collateral References

Child Abuse and Neglect, https://MontanaLawHelp.org.

Kids in Care: Analysis of Population Trends and Management Processes in Montana's Foster Care System, Performance Audit, Mont. Leg. Audit Div. (December 2021).

Strengthening the Response to Childhood Trauma in Montana, Mont. Leg. Serv. Div. (2013).

Part 1
General

Part Compiler's Comments

Saving Clause: Section 16, Ch. 543, L. 1979, was a saving clause.

41-3-101. Declaration of policy.

Compiler's Comments

2023 Amendments — Composite Section: Section 1, Ch. 174, L. 2023, inserted (1)(c) concerning the impact of court-ordered support payments on efforts to reunify families; and made minor changes in style. Amendment effective October 1, 2023.

Section 3, Ch. 674, L. 2023, in (3) near end of first sentence substituted "place the child in accordance with 41-3-450 and 41-3-451" for "place the child with the child's noncustodial birth parent or with the child's extended family, including adult siblings, grandparents, great-grandparents, aunts, and uncles, when placement with the extended family is approved by the department, prior to placing the child in an alternative protective or residential facility". Amendment effective October 1, 2023.

Preamble: The preamble attached to Ch. 174, L. 2023, provided: "WHEREAS, it is the policy of the State of Montana to support and preserve the family as the single most powerful influence for ensuring the healthy social development and mental and physical well-being of Montana's children pursuant to section 41-7-102, MCA; and

WHEREAS, it is the policy of the State of Montana to preserve the unity and welfare of the family whenever possible pursuant to section 41-3-101, MCA; and

WHEREAS, the federal Children's Bureau released new guidance to states on June 8, 2022, that under 42 U.S.C. 671(a)(17), an assignment of rights to child support for children in foster care receiving maintenance payments under Title IV-E of the Social Security Act "is not required except in very rare instances where there will be positive or no adverse effects on the child, or the assignment will not impede successful achievement of the child's permanency plan.""

Preamble: The preamble attached to Ch. 674, L. 2023, provided: "WHEREAS, the federal Indian Child Welfare Act requires active efforts that are affirmative, active, and thorough and timely efforts that are tailored, in a manner consistent with prevailing social and cultural conditions, to each case to maintain or reunite an Indian child with the child's family; and

WHEREAS, the federal Indian Child Welfare Act outlines placement preferences for foster care, preadoptive, or adoptive placements of Indian children, prioritizing placement with members of a child's extended family; and

WHEREAS, the Legislature desires to incorporate the federal Indian Child Welfare Act's requirements regarding active efforts and placement preferences into Montana's existing child abuse and neglect laws."

2009 Amendment: Chapter 196 inserted (4) creating a voluntary registry for close relatives of a child removed from its home; inserted (5) concerning consulting registry and notifying relatives; inserted (6) concerning fee for operating registry; and made minor changes in style. Amendment effective October 1, 2009.

2003 Amendment: Chapter 504 substituted (1)(a) concerning protection of children for former text that read: "ensure that all youth are afforded an adequate physical and emotional environment to promote normal development"; deleted former (1)(b) that read: "(b) compel in proper cases the parent or guardian of a youth to perform the moral and legal duty owed to the youth"; in (1)(b) after "environment" inserted "and preserve the unity and welfare of the family"; deleted former (1)(d) that read: "(d) preserve the unity and welfare of the family whenever possible"; in (1)(c) before "allegation" deleted "unsubstantiated" and at end inserted language concerning reasonable cause to suspect imminent risk of harm; at end of (1)(e) substituted "permanent placement" for "nurturing permanent family or in the closest possible substitute"; deleted former (1)(h) and (1)(i) that read: "(h) provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for their care and protection;

(i) require a department social worker to interview the parents of a child to which a petition pertains, if they are reasonably available, before the state may file a petition for temporary investigative authority or a petition for immediate protection and emergency protective services and to require that a judge may not issue an order granting a petition, except an order for immediate protection of the youth, until the parents, if they are reasonably available, are given the opportunity to appear before the judge or have their statements, if any, presented to the judge for consideration before an order is granted"; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendments — Composite Section: Chapter 281 deleted former (2)(a) that read: "(a) protect, whenever possible, family unity"; inserted (1)(g) stating the policy to ensure that all children have a right to a healthy and safe childhood in a nurturing permanent family or in the closest possible substitute; in (1)(i) near middle after "investigative authority" substituted "or a petition for immediate protection and emergency protective services" for "and protective services"; inserted (4) clarifying that the child's health and safety are of paramount concern in implementing state policy; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 311 in (3) at beginning of first sentence substituted "In implementing this chapter" for "In implementing the policy of this section", near middle substituted "place the child with the child's noncustodial birth parent or with the child's extended family" for "and when the home is approved by the department, place the child with the child's extended family", and near end inserted "when placement with the extended family is approved by the department" and in last sentence substituted "approving a placement" for "approving a home". Amendment effective October 1, 2001.

Saving Clause: Section 19, Ch. 281, L. 2001, was a saving clause.

1999 Amendment: Chapter 566 inserted (1)(f) relating to child's constitutional rights; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendment: Chapter 501 inserted (2)(c) concerning interview of parents and presentation of parents' testimony to judge; and made minor changes in style. Amendment effective May 2, 1997.

1995 Amendments: Chapter 494 inserted (4) requiring placement of a child with the child's extended family prior to placement in an alternative protective or residential facility; and made minor changes in style.

Chapter 564 inserted (1)(e) expanding state policy to ensure no forced removal of a child from the family based solely on an unsubstantiated allegation of abuse or neglect; inserted (2)(a) expanding state policy to protect, whenever possible, family unity; inserted (2)(c) expanding state policy to ensure that whenever removal of a child is necessary, the child is entitled to maintain ethnic, cultural, and religious heritage, when appropriate; and made minor changes in style.

Preamble: The preamble attached to Ch. 564, L. 1995, provided: "WHEREAS, the Legislature finds it necessary to restore public confidence in the child protective system and to provide protection of individual and family civil rights as guaranteed by the state and federal constitutions."

Statement of Intent: See compiler's comment to 41-3-208.

Case Notes

No Fundamental Liberty Interest by Foster Parents in Foster Child During Neglect and Dependency Proceedings. In re U.A.C., 2022 MT 230, 410 Mont. 493, 520 P.3d 295.

Questioning by Guardian Ad Litem at Hearing Allowed — Partial Compliance — Extension of Temporary Legal Custody Proper: The Department of Public Health and Human Services petitioned for emergency protective services following reports of inappropriate behavior by the minors' parents. Eventually, at a hearing to terminate the father's parental rights, the District Court allowed the minors' guardian ad litem to question a child protection specialist and therapist over the objections of the father. The District Court subsequently terminated the father's parental rights. On appeal, the Supreme Court found that the District Court did not err in allowing the children's guardian ad litem to cross-examine witnesses, although some lines of questioning lacked foundation and should have not been permitted. The Supreme Court also found that the Department provided reasonable efforts to reunify the father with the children, that the father's partial compliance with the treatment plan was not sufficient for compliance, that while the Department did not file for a formal motion to extend an order for temporary legal custody the Department nevertheless requested it, and that the father failed to identify which of his three attorneys he believed were ineffective over the course of his 4-year case. In re B.F., 2020 MT 223, 401 Mont. 185, 472 P.3d 142.

Ineffective Assistance of Counsel — Termination of Parental Rights Improper — Remand for Consideration of Placement with Father: Although the out-of-state father had been the primary parent of the children, they were removed from the mother's care after she refused to return them to the father. The father's court-appointed attorney advised him to stipulate to the state's petitions, failed to object to the children being placed with their maternal grandparents, and never requested a placement hearing. Ultimately, the father's parental rights were terminated and the father appealed. The Supreme Court reversed, holding that the father's attorney had provided ineffective counsel, and remanded the matter to the District Court to consider the father as the first placement option for the children. In re B.H., 2020 MT 4, 398 Mont. 275, 456 P.3d 233.

Termination of Parental Rights After Thirty Months — Parent's Relapse, Improvement, and Subsequent Relapse — Reasonableness of Treatment Plan Challenged: The father had his children removed after the Department of Public Health and Human Services found that he used drugs, failed to adequately supervise his children, kept an unsanitary home, and did not ensure that his children received medical care. The District Court granted a petition for emergency protective services and the father stipulated to a treatment plan. Over the course of the proceeding, the father relapsed, improved for a time, relapsed again, and finally showed signs of improvement. Ultimately, the District Court terminated the father's parental rights, finding that the children could not wait any longer for the father to complete his treatment plan. On appeal, the father argued that the treatment plan was not appropriate because it did not provide him with a reasonable amount of time to complete certain tasks and that it erred in determining that he was unfit and not likely to change within a reasonable amount of time. The Supreme Court affirmed, holding that the father failed to completely comply with his treatment plan, despite coming close, and that the children spending 30 consecutive months in kinship foster care required termination of the father's rights. In re X.B., 2018 MT 153, 392 Mont. 15, 420 P.3d 538.

Parent in Long-Term Federal Incarceration Unable to Comply With Treatment Plan — Termination of Parental Rights Affirmed: The District Court terminated the parental rights of a father who was incarcerated in federal prison for a long-term sentence. The father asserted that the District Court erred in terminating his parental rights because it was not in the children's best interests and that the court should have allowed the children to continue their relationship with their loving, but temporarily absent, father. The Supreme Court disagreed. The best interests of the child are of paramount importance and take precedence over parental rights, and the need for permanent placement of children in a loving and stable home supersedes the parents' interests. The District Court kept informed about the children's placements and placement failures and made arrangements for their placement in a stable home. Given the fact that the father's long-term incarceration would not provide the opportunity for adequate parenting, and the father's failure to comply with a court-ordered parenting plan, the District Court did not abuse its discretion by terminating the father's parental rights and placing the children in permanent foster care. In re B.S. & G.S., 2009 MT 98, 350 M 86, 206 P3d 565 (2009).

Termination Hearing Held Wrong Time to Consider Placement With Grandparents — Failure of Other State to Accept Jurisdiction: When parents of a child whom the husband had abused opposed termination of parental rights at the termination hearing by alleging that the Department of Public Health and Human Services should have sought placement with the grandparents pursuant to this section (see 2023 amendment to 41-3-101), the District Court held that the termination hearing was the wrong time to adjudicate a placement of the children with the grandparents. The Supreme Court upheld the District Court, noting that the Department had inquired into such a placement with its counterpart state agency in North Carolina, where the grandparents lived, but after interviewing the grandmother, the North Carolina state agency refused to consider the placement and thereby declined to accept jurisdiction over the children. In re O.A.W., 2007 MT 13, 335 M 304, 153 P3d 6 (2007).

Liability of Parent for Child's Injury to Third Person Based on Parent's Failure to Exercise Reasonable Care of Child — Restatement of Torts as Reasonable Expression of Parent's Duty — Kienenberger Reversed: Crisafulli attended an auction conducted by Bass's auction company and was injured when Bass's son rode a bicycle through the crowd of spectators while handling auction tickets and hit Crisafulli. The District Court applied J.L. v. Kienenberger, 257 M 113, 848 P2d 472 (1993), granting summary judgment to Bass on grounds that parents have no independent duty to control the behavior of their children. Crisafulli contended that Kienenberger was distinguishable and that the District Court should instead have followed Restatement (Second) of Torts 316 (1965). That section of the Restatement does not make a parent liable for the torts of a child, but imposes liability on the parent for the parent's own failure to exercise a duty of reasonable care, then narrowly defines the circumstances under which that duty arises by requiring that the parent knows of the ability to control the child and understands the necessity for doing so, and then further conditions liability on a finding that the parent's failure created an unreasonable risk of harm to a third person. The Supreme Court concluded that imposition of liability under these limited and exceptional circumstances, in the absence of any legislative policy to the contrary, was a reasonable expression of a parent's duty in Montana and adopted the Restatement, overruling Kienenberger to the extent that it was inconsistent. The District Court's order granting summary judgment to Bass on the issue was reversed. Crisafulli v. Bass, 2001 MT 316, 308 M 40, 38 P3d 842 (2001). See also Mitchell v. Wiltfong, 604 P2d 79 (Kans. Ct. App. 1979).

Appropriateness of Treatment Plan Requirement That Parents Provide Explanation of Child's Injuries: Four treatment plans were developed with the parents, the purpose of all of which was to: (1) return the child to parental custody; (2) enable the parents to provide a safe and nurturing environment for the child; (3) enable the parents to develop an awareness of the child's needs and an ability to meet those needs; (4) help the parents develop minimal parenting skills; and (5) resolve the issues that led to the child's abuse, which included a requirement that the parents provide a reasonable and consistent explanation for the child's injuries. The parents were subsequently convicted of endangering the welfare of the child, and the state petitioned for custody. Prior to the permanent custody hearing, the mother moved to strike the task that required an explanation of the child's injuries, but the state never filed a brief in response to the motion. Nevertheless, the motion was denied. Following the termination of the mother's parental rights, she challenged the appropriateness of that task on grounds that the task placed her in the untenable position of having to choose between incriminating herself and failing to complete the treatment plan, in violation of her right against self-incrimination, relying on In re A.N., 2000 MT 35, 298 M 237, 995 P2d 427 (2000). The Supreme Court found her reliance on In re A.N. misplaced. The mother waived her self-incrimination privileges by voluntarily testifying regarding her knowledge of the child's injuries at both the permanent custody hearing and during the criminal proceeding and could not argue later that the disputed task impinged on her constitutional privilege against self-incrimination. Further, the state's duty to protect children, as set out in this section, necessitated that the parents come to terms with the reasons why the child was abused, and without demonstrable willingness from the parents to resolve the abuse issues, the District Court had no assurance that the child would not be abused again. Thus, the task was a fair requirement in the treatment plan, and the District Court did not err in concluding that the plan was appropriate or in denying the motion to strike the task from the plan. Denying the motion was within the court's discretion regardless of whether the state filed a brief in response to the motion. In re A.C., 2001 MT 126, 305 M 404, 27 P3d 960 (2001).

No Duty to Third Party: This section describes a duty parents owe to their children, not to third parties. The rule in Montana is that a parent is not liable for a child's tort except as provided in 27-1-718 and 40-6-237. J.L. v. Kienenberger, 257 M 113, 848 P2d 472, 50 St. Rep. 182 (1993), overruled in Crisafulli v. Bass, 2001 MT 316, 308 M 40, 38 P3d 842 (2001), to the extent that Restatement (Second) of Torts 316 (1965) is adopted as a reasonable expression of a parent's duty in Montana, imposing liability on a parent, not for the torts of a child, but for the parent's own failure to exercise reasonable care.

County Properly Dismissed From Suit — State Assumption of Responsibility: A county was properly dismissed from a civil rights action brought by father whose children were removed from the state by social workers because the county retained no enforcement authority under an agreement with the state whereby the state assumed all responsibility for enforcement of the dependent and neglected child statutes. Caldwell v. LeFaver, 928 F2d 331 (9th Cir. 1991).

Qualified Immunity of Department Social Workers in Removing Children to Out-of-State Placement: Social workers who removed minor children from father's home without notice or hearing and arranged for them to stay in another state with their mother, who had joint custody, were not entitled to absolute immunity in father's civil rights action because their actions were neither quasi-prosecutorial nor quasi-judicial in nature. However, the social workers were entitled to qualified immunity because of the emergency nature of their actions and because they did not violate any clearly established constitutional or statutory right. Caldwell v. LeFaver, 928 F2d 331 (9th Cir. 1991).

Preservation of Family Unity as Long-Term Goal — Temporary Out-of-State Custody in Furtherance of Goal: The trial court satisfied the policy to preserve family life set forth in this section (see 1995 amendment) even though temporary custody was awarded the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) for treatment of the child outside of Montana. The trial court made its determination after considering all factors and adopted a treatment plan with ultimate goals of assisting the mother in working to regain physical custody of her child and aiding her in establishing herself as capable of providing the type and quality of care that her child requires. In re B.L.O., 213 M 164, 689 P2d 1246, 41 St. Rep. 2024 (1984).

Abuse and Neglect — Custody With Intervening Divorce: Where a couple voluntarily surrendered their child to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) because of abuse and neglect by the mother, the District Court was correct in continuing with the abuse and neglect custody proceeding rather than dismissing it and allowing custody to be determined in the couple's divorce action. Once a determination of abuse and neglect has been made, the court proceeds to a dispositional hearing to determine the custody of the child. In re M.M., 200 M 244, 650 P2d 784, 39 St. Rep. 1716 (1982).

Family Unity Not to Be Preserved at Expense of Children's Best Interests: After an adjudicatory hearing, the District Court terminated the parental rights of the parents of five children and granted custody with authority to consent to adoption to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services). Under Department placement, the children would be separated from each other. The paternal grandmother appealed to the Supreme Court, claiming that the state policy of preserving the unity and welfare of the family as set forth in this section was violated by the separation of the children and by the District Court's refusal to award the children to her. The Supreme Court affirmed because the District Court's findings indicated that it had considered the grandmother's request but that the overriding concern was and ought to have been the best interests of the children. In re M.N., 199 M 407, 649 P2d 749, 39 St. Rep. 1487 (1982).

Protection of Family Unit: Although it is the function of the court to protect the unity of the family, family unity was not a factor when the child's only known natural parent had been confined to a state hospital and the child had been placed in a foster home since birth. The child had never had a viable parent-child relationship with her mother and had never seen or been associated with her natural mother. In re C.M.S., A Dependent and Neglected Child, 187 M 115, 609 P2d 240 (1979).

Voluntary Statements Made to Civilians in Criminal Case — No Invasion of Privacy: On two occasions while the defendant and his stepson were alone, the stepson received serious injuries. On both occasions the defendant made statements to his wife and to several doctors explaining how the injuries occurred. The defendant was charged with aggravated assault and filed a motion to suppress his statements. The defendant contended that the statements violated his right of privacy guaranteed by the Montana Constitution. The court found that there was no element of surreptitious obtaining of the information. Additionally, constitutional provisions on right of privacy permit its invasion upon a showing of a compelling state interest. That compelling state interest is clearly shown in child abuse cases by the declaration of policy contained in 41-3-101. St. v. Hall, 183 M 511, 600 P2d 1180 (1979).

Termination of Parental Rights: When the following things were considered, the record supported the conclusion that the father's rights were adequately considered prior to termination of parental rights and that the decision to terminate them was supported by credible evidence: (1) the father was notified of the hearing, was present, and was represented by counsel; (2) professional testimony indicated the father would not be able to provide enough influence to offset the marked deprivation anticipated to continue for the child; (3) the father was found to have made no effort to assist the mother in learning to become a good parent; (4) the father had visited the child only once in 6 months when the child was in a foster home and had been reported to have abused the child. In re L.F.G., 183 M 239, 598 P2d 1125 (1979).

Youth in Need — Best Interest of Child — Mental Condition of Parent as Sole Factor: When the District Court considered the best interests of a child only after first determining that the child was in fact abused or neglected, it met the required standard. Considering the mental condition of the mother as the primary if not the sole factor, but having evidence that the child would not receive even minimally satisfactory maternal care and would be exposed to extremely high chances of developing a mental condition similar to that of the mother, sufficient credible evidence was before the District Court to support the District Court's decision that the child was a youth in need of care. The Supreme Court rejected the view that mental condition of a parent could not be the sole factor supporting a severance of parental rights. In re L.F.G., 183 M 239, 598 P2d 1125 (1979).

Grounds for Removal From Parents: Under 41-3-102, abuse or neglect can take many forms, some violent, others more passive but just as injurious. The court cannot hold the children hostage while awaiting the good behavior of the parents. It must protect the children's rights as well as the parents. In re T.Y.K., 183 M 91, 598 P2d 593 (1979).

Protection of All Children When Abuse of One Less Than Another: A parent does not have the privilege of inflicting brutal treatment upon each of his children in succession before they individually obtain the protection of the state by virtue of 41-3-101. Section 41-3-101, et seq., grants to the District Court the ability to make a determination of neglect and abuse as to all children in a family based on the policy that abuse of one child has a detrimental effect on the other children's development. In re T.Y.K., 183 M 91, 598 P2d 593 (1979), followed in In re B.T.,

B.T., M.T., & M.T., 223 M 287, 725 P2d 230, 43 St. Rep. 1728 (1986), In re T.C. & R.C., 240 M 308, 784 P2d 392, 46 St. Rep. 2148 (1989), In re J.A.B., 1999 MT 173, 295 M 227, 983 P2d 387, 56 St. Rep. 675 (1999), and In re M.B., J.B., & W.B., 2004 MT 304, 323 M 468, 100 P3d 1006 (2004).

Preservation of Family Unity: When proof shows a minor child is neglected, it is not possible to preserve family unity. It is when there is a failure of proof that the legislative policy to preserve the unity and welfare of the family must prevail. (See 1995 amendment.) Therefore, the judgment of the District Court awarding permanent custody to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) was proper. Family unity need not be preserved at the expense of a child's best interests. In re Inquiry Into J.J.S., Youth in Need of Care, 176 M 202, 577 P2d 378 (1978).

Insufficient Evidence to Overcome Policy to Preserve Family: Mother's failure to find suitable housing and a decent job after death of father is insufficient adversity to dissolve the family absent a concrete showing that it would be in the best interest of the children. It was a clear abuse of discretion by District Court to award permanent custody to Department of Social and Rehabilitation Services (now Department of Public and Human Services) because policy of the State of Montana as declared by the Legislature is to preserve the unity and welfare of the family whenever possible. (See 1995 amendment.) Div. of Child Welfare Serv. v. Fisher, 169 M 254, 545 P2d 654 (1976).

Attorney General's Opinions

Balance of Competing State Interests in Prevention and Reporting of Child Abuse — Abrogation of Communication Privileges by Statute: Although the state has competing interests in the prevention of child abuse and neglect and in protecting the communication privileges between physicians or mental health practitioners and their patients, the communication privilege is abrogated under 41-3-201 in cases where the professional obtains the information as a result of his treatment of the child. 42 A.G. Op. 7 (1987).

County Power — "4-C's": Counties, jointly with the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services), may contract with local "4-C's" projects to provide coordination and support of child abuse prevention and treatment services. 37 A.G. Op. 105 (1978).

41-3-102. Definitions.

Compiler's Comments

2023 Amendments — Composite Section: Section 5, Ch. 167, L. 2023, in definition of sexual exploitation in (a) after "45-5-601" deleted "through 45-5-603" and in (c) substituted "sex trafficking as described in 45-5-702, 45-5-705, 45-5-706, or 45-5-711" for "sexual servitude as described in 45-5-704 or 45-5-705"; and made minor changes in style. Amendment effective April 19, 2023.

Section 2, Ch. 195, L. 2023, inserted definition of decline to prosecute; and made minor changes in style. Amendment effective October 1, 2023.

Section 1, Ch. 324, L. 2023, in definition of child abuse or neglect inserted (d)(ii) concerning youth not receiving supervision; in definition of physical neglect inserted (d) concerning sexual abuse or exploitation of the child and inserted (e) concerning malnutrition or failure to thrive; substituted current definition of physical or psychological harm to a child and current definition of psychological abuse or neglect for former definitions (see sec. 1, Ch. 324, L. 2023, for former text); and made minor changes in style. Amendment effective October 1, 2023.

Section 25, Ch. 716, L. 2023, in definition of child abuse or neglect in (c) inserted reference to the Montana Indian Child Welfare Act; substituted current definitions of Indian child, Indian child's tribe, Indian custodian, and Indian tribe for former definitions (see sec. 25, Ch. 716, L. 2023, for former text); in definition of qualified expert witness in introductory clause inserted reference to the Montana Indian Child Welfare Act; and made minor changes in style. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

Severability: Section 38, Ch. 167, L. 2023, was a severability clause.

2021 Amendments — Composite Section: Chapter 19 substituted "family engagement meeting" for "family group decisionmaking meeting" as defined term; and in definition of protective services in (b) substituted "written prevention plans" for "voluntary protective services". Amendment effective July 1, 2021.

Chapter 202 inserted definitions of qualified individual and therapeutic needs assessment; and made minor changes in style. Amendment effective July 1, 2021.

Chapter 520 inserted definition of child protection specialist; deleted definition of social worker (see 2021 Session Law for former text); in definition of safety and risk assessment substituted "child protection specialist" for "social worker"; and made minor changes in style. Amendment effective October 1, 2021.

2019 Amendments — Composite Section: Chapter 367 in definition of sexual abuse in (a) inserted "aggravated sexual intercourse without consent"; in definition of sexual exploitation inserted (c) regarding allowing, permitting, or encouraging sexual servitude as described in 45-5-704 or 45-5-705; and made minor changes in style. Amendment effective May 7, 2019.

Chapter 382 inserted definition of safety and risk assessment; deleted definitions of unfounded and unsubstantiated; and made minor changes in style. Amendment effective October 1, 2019.

Chapter 468 in definition of child abuse or neglect inserted (b)(i)(C) including child sex trafficking and human trafficking; and made minor changes in style. Amendment effective October 1, 2019.

Applicability: Section 9, Ch. 382, L. 2019, provided: "[This act] applies to all reports received on or after [the effective date of this act]." Effective October 1, 2019.

Preamble: The preamble attached to Ch. 367, L. 2019, provided: "WHEREAS, childhood sexual abuse is an epidemic in Montana, and there are many instances in recent years of victims of childhood sexual abuse being unable to seek criminal or civil justice as the result of short statute of limitations windows in Montana law; and

WHEREAS, the sexual abuse of children is despicable conduct that must be reported, investigated, and prosecuted to create specific deterrence; and

WHEREAS, the State of Montana must ensure appropriate action when mandatory reporters and others report childhood sexual abuse; and

WHEREAS, regardless of the location of the crime, to protect Montana's children, the Department of Public Health and Human Services and the Department of Justice, working closely with local law enforcement and prosecutors, must respond to allegations of sexual abuse with effective investigations and, when viable, effective prosecutions; and

WHEREAS, childhood sexual abuse causes lifelong trauma to survivors of the same; and

WHEREAS, the average reporting age of victims of childhood sexual abuse is 52 years old, requiring the Legislature to take a meaningful look into the time periods presently allowed in Montana law to pursue criminal and civil court action; and

WHEREAS, upon review, the Legislature has determined that the current truncated time periods to bring criminal prosecutions and civil litigation related to allegations of sexual abuse are not in line with mental health science as to reporting of childhood sexual abuse, are too narrow, and should be extended."

Saving Clause: Section 15, Ch. 367, L. 2019, was a saving clause.

Severability: Section 16, Ch. 367, L. 2019, was a severability clause.

2013 Amendment: Chapter 225 in definition of sexual abuse after "exposure" deleted "deviate sexual conduct" and after "ritual abuse" inserted "of a minor"; and made minor changes in style. Amendment effective October 1, 2013.

2009 Amendment: Chapter 179 in definition of limited emancipation near middle substituted "41-1-503" for "41-1-501". Amendment effective October 1, 2009.

2005 Amendment: Chapter 349 in definition of child abuse or neglect inserted (c) concerning proceedings under the Indian Child Welfare Act; inserted definitions of Indian child, Indian child's tribe, Indian custodian, Indian tribe, and qualified expert witness; and made minor changes in style. Amendment effective October 1, 2005.

2003 Amendments — Composite Section: Chapter 398 in definition of psychological abuse or neglect in (a) after "including" inserted "the commission of" and inserted (b) prohibiting term from being construed to hold victim responsible for failing to prevent crime; and made minor changes in style. Amendment effective April 18, 2003.

Chapter 406 inserted definition of unsubstantiated; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 458 in definition of child abuse or neglect inserted (b)(i)(B) providing that exposure of child to criminal distribution, production, or manufacture of dangerous drugs or operation of unlawful clandestine laboratory constitutes child abuse or neglect and inserted (b)(ii) defining dangerous drugs; and made minor changes in style. Amendment effective April 22, 2003.

Chapter 504 in definition of abandon inserted (b) excluding voluntary surrender because of inability to access public services; in definition of child abuse or neglect in (a)(i), (a)(ii), and (c) substituted "physical or psychological harm to a child" for "harm to a child's health or welfare" and in (b)(i)(A) in two places substituted "physical or psychological harm to a child" for "harm"; substituted family group decisionmaking meeting for family group conference as defined term; deleted definition of harm to a child's health or welfare that read: ""Harm to a child's health or welfare" means the harm that occurs whenever the parent or other person responsible for the child's welfare:

(a) inflicts or allows to be inflicted upon the child physical abuse, physical neglect, or psychological abuse or neglect;

(b) commits or allows to be committed sexual abuse or exploitation of the child;

(c) induces or attempts to induce a child into giving untrue testimony that the child or another child was abused or neglected by a parent or person responsible for the child's welfare;

(d) causes malnutrition or failure to thrive or otherwise fails to supply the child with adequate food or fails to supply clothing, shelter, education, or adequate health care, though financially able to do so or offered financial or other reasonable means to do so;

(e) exposes or allows the child to be exposed to an unreasonable risk to the child's health or welfare by failing to intervene or eliminate the risk; or

(f) abandons the child"; in definition of limited emancipation substituted "41-1-501" for "41-3-438"; in definition of physical neglect at end inserted language concerning exposure to unreasonable physical or psychological risk; inserted definition of physical or psychological harm to a child; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 555 inserted definition of protective services; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendments — Composite Section: Chapter 194 in definition of child abuse or neglect inserted (a)(iii) regarding abandonment; in definition of youth in need of care at end after "neglected" inserted "or abandoned"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 277 in definition of abandon, abandoned, and abandonment inserted (d) regarding voluntary surrender of newborn to emergency services provider; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 311 inserted definitions of concurrent planning, family group conference, permanent placement, and physical neglect; at end of definition of youth in need of care inserted "or abandoned"; and made minor changes in style. Amendment effective October 1, 2001.

Applicability: Section 8, Ch. 194, L. 2001, provided: "[This act] applies to proceedings on petitions filed pursuant to 41-3-401 [now 41-3-422] after October 1, 2001."

1999 Amendment: Chapter 566 inserted definition of abandon, abandoned, and abandonment; in definition of best interests of the child substituted "psychological conditions" for "emotional conditions"; in definition of child abuse or neglect in (a)(i) before "harm" inserted "actual", in (a)(ii) substituted "substantial risk of harm" for "threatened harm", and in (b) substituted "actual harm or substantial risk of harm" for "harm or threatened harm to a child's health or welfare"; deleted definition of emotional abuse that read: ""Emotional abuse" means injury to the emotional well-being or intellectual or psychological capacity of a child, as evidenced by an identifiable and substantial impairment of a child's physical, mental, or emotional ability to function"; in definition of harm to a child's health or welfare in (a) substituted "psychological abuse or neglect" for "emotional abuse", in (f) after "abandons the child" deleted "by leaving the child under circumstances that make reasonable the belief that the parent or other person does not intend to resume care of the child in the future or willfully surrenders physical custody for a period of 6 months and during that period does not manifest to the child and the person having physical custody of the child a firm intention to resume physical custody or to make permanent legal arrangements for the care of the child", and deleted former (g) that read: "(g) is unknown and has been unknown for a period of 90 days and reasonable efforts to identify and locate the parent or other person have failed"; in definition of limited emancipation after "court" deleted "after a dispositional hearing"; in definition of physical abuse after "means" inserted "an intentional act, an intentional omission, or gross negligence resulting in", before "burns" deleted "intentional", and after "death" deleted "if the injury or death is not accidental"; inserted definition of psychological abuse or neglect; in definition of sexual abuse inserted "sexual abuse, ritual abuse" and at end after "chapter 5" deleted "part 5"; in definition of social worker after "trained" deleted "or is receiving education or training"; deleted definition of threatened harm to a child's health or welfare that read: ""Threatened harm to a child's health or welfare" means substantial risk of harm to the child's health or welfare"; inserted definition of unfounded; in definition of youth in need of care substituted "who has been adjudicated or determined, after a hearing, to be or to have been abused or neglected" for "who is abused or neglected"; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendments: Chapter 514 at end of definition of a person responsible for a child's welfare inserted "or an adult who resides in the same home in which the child resides"; in definition of adequate health care, in first sentence of (a), inserted "or nonmedical remedial health care recognized by an insurer licensed to provide disability insurance under Title 33" and in first sentence of (b) inserted "or legal guardian" and substituted "adequate health" for "medical"; inserted definition of emotional abuse; in definition of harm to a child's health or welfare, in (d) near beginning, inserted "malnutrition" and inserted (e) providing "exposes or allows the child to be exposed to an unreasonable risk to the child's health or welfare by failing to intervene or eliminate the risk"; deleted definition of mental injury that read: ""Mental injury" means an identifiable and substantial impairment of the child's intellectual or psychological functioning"; in definition of parent, at end, deleted "or stepparent"; substituted physical abuse for physical injury as defined term, in the definition substituted "substantial skin bruising, internal bleeding, substantial injury to skin, subdural hematoma, intentional burns, bone fractures, extreme pain" for "death", at end inserted "or death if the injury or death is not accidental", and deleted sentence that read: "The term includes death, permanent or temporary disfigurement, and impairment of a bodily organ or function sustained as a result of excessive corporal punishment"; inserted definitions of reasonable cause to suspect and residential setting; and made minor changes in style. Amendment effective May 2, 1997.

Chapter 516 in definition of a person responsible for a child's welfare, at end of (a) after "foster parent", inserted "or an adult who resides in the same home in which the child resides"; in definition of adequate health care, in first sentence of (b) after "parent", inserted "or guardian", and in second sentence, after "imminent", deleted "or" and after "risk of" inserted "serious"; inserted definition of best interests of the child; in definition of harm to a child's health or welfare, in (g) after "locate the", substituted "parent or other person" for "parents"; inserted definition of parent-child legal relationship; in definition of sexual abuse, at end of (b) after "parent", inserted "or other person responsible for the child's welfare"; inserted definition of treatment plan; adjusted subsection references; and made minor changes in style.

Coordination: Section 19(1), Ch. 516, L. 1997, provided: "If House Bill No. 163 is passed and approved and if 40-8-109 and 40-8-117 are repealed, a reference to [sections 1 through 156 of House Bill No. 163] [codified as Title 42], the "Montana Adoption Act", should be substituted for the reference to "40-8-109, 40-8-117" in 41-3-102 under the definition of "parent-child legal relationship"." House Bill No. 163 was approved as Ch. 480, L. 1997, and included the repeal of 40-8-109 and 40-8-117; therefore, the references to 40-8-109 and 40-8-117 in 41-3-102 under the definition of parent-child legal relationship have been changed to reflect the enactment of Ch. 480.

Applicability: Section 20, Ch. 516, L. 1997, provided that this section applies to proceedings commenced on or after October 1, 1997.

1995 Amendments: Chapter 458 deleted definition of dependent youth (see 1995 Session Law for text); in definition of limited emancipation, after "conferred on a", deleted "dependent"; inserted definition of parent; in definition of youth in need of care, after "who is", deleted "dependent"; adjusted subsection references; and made minor changes in style. Amendment effective April 14, 1995.

Chapter 528 in definition of child abuse or neglect inserted (c) exempting self-defense, defense of others, or action taken to prevent a child from self-harm; and made minor changes in style.

Chapter 546 in definition of Department substituted "department of public health and human services provided for in 2-15-2201" for "department of family services provided for in 2-15-2401"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 564 in definition of child abuse or neglect, in (a)(i) after "welfare", deleted "as defined in subsection (8)" and in (a)(ii), after "welfare", deleted "as defined in subsection (15)"; in definition of harm to a child's health or welfare inserted (c) expanding definition to include person who induces or attempts to induce child into giving untrue testimony of abuse or neglect by parent or responsible person; in definition of sexual abuse inserted (b) providing that sexual abuse does not include necessary touching of infant or toddler while attending to sanitary or health care needs; in definition of social worker, after "department", substituted current definition of social worker for ""Social worker" means an employee of the department whose duties generally involve the provision of either child or adult protective services, or both"; and made minor changes in style.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Preamble: The preamble attached to Ch. 564, L. 1995, provided: "WHEREAS, the Legislature finds it necessary to restore public confidence in the child protective system and to provide protection of individual and family civil rights as guaranteed by the state and federal constitutions."

1993 Amendment: Chapter 439 substituted present definition of abused or neglected for former definition that read: ""Abused or neglected child" means a child whose normal physical or mental health or welfare is harmed or threatened with harm by the acts or omissions of his parent or other person responsible for his welfare"; in (a) of definition of adequate health care, near beginning after "medical", deleted "or nonmedical remedial health" and inserted (b) regarding failure to provide medical care for a child based on religious beliefs; inserted definition of child abuse or neglect; near middle of (c) of definition of harm to a child's health or welfare, before "health", inserted "adequate"; and made minor changes in style.

1989 Amendment: In definition of harm to a child's health or welfare, in (a) after "injury", deleted "including injuries sustained as a result of excessive corporal punishment" and in (b), after "committed", substituted "sexual abuse or exploitation of the child" for "a sexual assault against the child or exploits the child or allows the child to be exploited for sexual purposes or commits or allows to be committed the act of sexual abuse of children as defined in subsection (1) of 45-5-625"; substituted definition of threatened harm to a child's health or welfare for former definition that read: ""Threatened harm" means imminent risk of harm"; in definition of person responsible for a child's welfare, after "foster parent", inserted "a staff person providing care in a day-care facility"; near middle of definition of physical injury inserted "and includes death, permanent or temporary disfigurement, and impairment of a bodily organ or function sustained as a result of excessive corporal punishment"; inserted definitions of sexual abuse and sexual exploitation; and made minor changes in phraseology. Amendment effective April 8, 1989.

Effective Date — Applicability: Section 3, Ch. 474, L. 1989, provided: "[This act] is effective on passage and approval and applies to proceedings begun on or after that date." Approved April 8, 1989.

1987 Amendments: Chapter 463 in (4), after "treatment", inserted "or medically indicated psychological care".

Chapter 609 deleted former (12) that read: "(12) "Supervision" means the authority granted by a youth court or by a voluntary agreement of a parent to determine the foster care placement of a child and the length of stay of a child in foster care and provide for the needs of a child under subsection (1) of 41-3-1122"; in (12) changed definition of department from Department of Social and Rehabilitation Services to Department of Family Services and corrected internal reference; and inserted definition of social worker.

1985 Amendment: In (4) inserted "including the prevention of the withholding of medically indicated treatment"; and inserted definition of "withholding of medically indicated treatment".

Source: Chapter 626, L. 1985, was based on the federal law entitled the Child Abuse Amendments of 1984 (Public Law 98-457).

1983 Amendments: Chapter 465, in (11), changed 41-3-104 to 41-3-1122.

Chapter 564 inserted definition of limited emancipation.

1981 Amendment: Added "or commits or allows to be committed the act of sexual abuse of children as defined in subsection (1) of 45-5-625" at the end of (3)(b); added the language relating to willful surrender of custody at the end of (3)(d); inserted subsection (3)(e) relating to 90-day time period and failure to locate parents; and added definitions of supervision and department.

Case Notes

Procedure 1342
Abuse and Neglect 1348
Abandonment 1353

PROCEDURE

No Error in Finding Inapplicability of Indian Child Welfare Act to Parental Rights Termination Proceeding: At a hearing to terminate a father's parental rights, the father listed three Indian tribes that he thought either he or the children's mother was affiliated with. The District Court found that although the father was an enrolled member of one of the tribes, the children were not eligible or enrolled with that tribe. The father also asserted that he might have connections to a second tribe because of the mother's alleged membership, but in order for the Indian Child Welfare Act (ICWA) to apply, the child must be either a tribal member or eligible for tribal membership and be the biological child of a tribal member. Because the father could not assert that he was a member of the second tribe, the children could not qualify as members of the second tribe. The father also contended that there was possible heritage with a third tribe through the mother's father, but neither he nor the mother was a tribal member, so the children could not be biological children of a member of the third tribe. Additionally, any connection the children had with the third tribe through their maternal grandfather was preserved by their mother's continued custody and care. Therefore, the District Court did not err in finding that ICWA did not apply. In re J.J.L., D.J.L., and R.D.L.L., 2010 MT 4, 355 Mont. 23, 223 P.3d 921.

Children Relinquished Voluntarily — Finding That Youths in Need of Care Not Clearly Erroneous: A mother who had voluntarily relinquished her children to the state because of an inability to parent the children, even in the safety of a home for domestically abused women, contended that the District Court committed clear error in subsequently adjudicating the children as youths in need of care (YINC) because the court based its decision solely on the children's observations of domestic abuse and violence between the parents and because no psychological evaluations had been conducted on the children and no expert medical testimony was introduced at the termination hearing. The Supreme Court found no clear error on the part of the District Court. The mother cited no authority requiring psychological evaluations or expert medical testimony before a YINC adjudication. Further, the evidence of abuse or neglect necessary to support a YINC adjudication may be actual physical or psychological harm or a substantial risk of physical or psychological harm to the child by acts or omissions of a parent responsible for the child's welfare. Here, the District Court heard testimony at the initial hearing that several incidents had occurred in which the children were directly exposed to domestic abuse and that the father was incarcerated and the mother was unable to parent the children. One of the children had to be placed at a children's receiving home following removal from two foster homes for violent behavior. The mother was shown to have serious mental health issues, including anger issues, that negatively impacted the mother's parenting ability and that remained unaddressed. Under these circumstances, the District Court's conclusion that the children were YINC was affirmed. In re B.S. & G.S., 2009 MT 113, 350 M 132, 206 P3d 74 (2009).

Sufficient Evidence to Adjudicate Children as Youths in Need of Care: The District Court properly adjudicated children as youths in need of care based on evidence that: (1) there was a significant prior history of domestic violence and domestic abuse between the parents in the presence of the children; (2) one of the children exhibited various behavior and developmental problems, including running away, violent behavior, anger control problems, and poor language skills; (3) the father could not care for the children because of his long-term federal incarceration; (4) the mother, who was living at a shelter for domestic abuse victims and dealing with mental health issues, had voluntarily surrendered the children to state care because of her inability to adequately parent them; and (5) the state had made reasonable efforts to avoid placement of the children or to make it possible to safely return the children to the home, but protective placement was required. In re B.S. & G.S., 2009 MT 98, 350 M 86, 206 P3d 565 (2009). See also In re K.H. and K.M., 2012 MT 175, 366 Mont. 18, 285 P.3d 474, in which the Supreme Court concluded that there was insufficient evidence to adjudicate children as youths in need of care and that the District Court properly considered the mother's past conduct, including her choice of intimate partners, in the context of how that conduct affected the children.

Parent's Acquiescence in Adjudicatory Proceedings — Finding That Child Is Youth in Need of Care Based on Parent's Admissions — Stipulation Not Required: A mother contested termination of her parental rights on grounds that her child was not properly adjudicated as a youth in need of care. The mother was incarcerated at the time of the hearing and contended that although she agreed to a treatment plan, she never admitted that the child met the definition of a youth in need of care or stipulated that the child was in need of care. The Supreme Court noted that the trial court should have specifically inquired of the mother or her counsel whether the mother stipulated that the child was a youth in need of care, but it was not error for the District Court to make that finding based on the mother's own admissions that she was addicted to methamphetamine and needed treatment and that her addiction impacted the child unfairly. The mother was not placed at an unfair disadvantage during the termination proceedings and was represented by counsel at all stages. She never questioned the regularity of the proceedings until appeal. The court held that because 35 months had passed between the adjudicatory hearing and the notice of appeal, it would not be in the child's best interests to prolong the matter, particularly when much of the delay was caused by the mother's repeated relapses and her failure to put the child's interests above her desire to indulge her addiction. The adjudication was proper and did not prejudice the mother, and the District Court was affirmed. In re A.S., 2006 MT 281, 334 M 280, 146 P3d 778 (2006).

District Court Not Limited to Consideration of Only Physical Neglect in Termination of Parental Rights: The final petition for termination of a mother's parental rights specifically cited physical neglect as its basis, and the mother contended that the District Court was thus barred from considering any evidence beyond physical neglect, such as psychological abuse, as demonstrated by the living conditions in her home. The District Court did not rule on the issue, but simply made the underlying findings necessary to terminate the mother's parental rights. On appeal, the Supreme Court affirmed. Although it may have been better if the final petition had listed other grounds, it is proper for the state to consider other causes of abuse and neglect during proceedings because the purpose of the proceedings is to protect the child. The final petition also cited failure to comply with the treatment plan as another basis for termination. The treatment plan addressed the mother's psychological issues related to her parenting skills, so the mother was clearly on notice that psychological issues could be considered. Based on the record, parental rights were properly terminated because the mother failed to comply with the treatment plan, she was unable to properly and consistently parent her children by understanding and meeting each of their needs, her conduct was unlikely to change within a reasonable time relevant to the developmental needs of the children, and termination was in the best interests of the children. In re J.G., C.G., & M.G.-E., 2004 MT 104, 321 M 54, 89 P3d 11 (2004). See also In re T.D.H., 2015 MT 244, 380 Mont. 401, 356 P.3d 457.

Failure to Adjudicate Youth in Need of Care Precluding Termination of Parental Rights: A parent contended that parental rights were improperly terminated because the child was not properly adjudicated as a youth in need of care. The Supreme Court noted that such adjudication is a threshold requirement before a court may grant temporary legal custody, order a parental treatment plan, or terminate parental rights. The state argued that the child was found to be a youth in need of care during earlier guardianship proceedings in a different District Court. The Supreme Court cited In re F.M., 2002 MT 180, 311 M 35, 53 P3d 368 (2002), for the holding that evidence received at a hearing on a collateral matter, such as a guardianship proceeding, did not satisfy the adjudicatory requirements of 41-3-404 (renumbered 41-3-437). Further, it was improper for the District Court to approve a treatment plan 10 months prior to proper adjudication of the child as a youth in need of care, in violation of 41-3-406 (renumbered 41-3-438) and 41-3-420 (renumbered 41-3-443), which also rendered the requirements of 41-3-609 unsatisfied. Because the child was not properly adjudicated a youth in need of care, court approval of a treatment plan was improper and termination of parental rights was reversed. In re B.N.Y., 2003 MT 241, 317 M 291, 77 P3d 189 (2003).

Attempt to Use Writ of Habeas Corpus to Demand Physical Presence of Children Removed From Parent in Abuse and Neglect Proceeding — Petition Properly Denied: The mother petitioned the District Court for a writ of habeas corpus demanding that her children be physically present for an abuse and neglect hearing because they were material witnesses and had been removed from her custody unlawfully. The petition was denied. On appeal, the mother cited In re Bertelson, 189 M 524, 617 P2d 121 (1980), for the proposition that a writ of habeas corpus was the appropriate procedural device to bring the custody matter before a court. The Supreme Court disagreed and distinguished Bertelson because the mother's position ignored the substantial differences between dissolution proceedings and abuse and neglect proceedings, differences that were not at issue in Bertelson. The court also cited its earlier holding in In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982 (2000), in which it was held that the children were properly removed from the mother's home. Because temporary custody of the children with the state was legal, relief pursuant to habeas corpus premised on illegal restraint was not available to the mother under these circumstances. In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

Denial of Writ of Habeas Corpus to Compel Attendance of Children in Abuse and Neglect Hearing Not Violative of Due Process Rights or Right to Confront Witnesses: The mother petitioned the District Court for a writ of habeas corpus demanding that her children be physically present for an abuse and neglect hearing because they were material witnesses and claiming that the writ was necessary to ensure her due process rights by having the children available to rebut allegations against her at the hearing. The petition was denied. On appeal, the Supreme Court affirmed. Although the mother was entitled to an opportunity for a meaningful hearing, that opportunity need not be provided at the expense of the children whose best interests were the paramount focus of the proceeding, and subjecting the children to direct and cross-examination could exacerbate the abuse that they had already experienced. Denial of the petition did not violate the mother's right to confront witnesses because the children were not her accusers and she had no right to confront them. Rather, the abuse and neglect case was brought by the state, and the mother had ample opportunity to confront and examine the state's witnesses and experts at the hearing, so her due process rights were met. In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

Parties in Dissolution Proceeding Not Same as Parties in Abuse and Neglect Proceeding — Res Judicata Inapplicable: During marriage dissolution proceedings, the mother was granted custody of the children, but during a subsequent abuse and neglect proceeding, permanent custody was granted to the father. The mother appealed the placement on grounds that it constituted a readjudication of the earlier custody order in her favor in the dissolution action, in violation of the doctrine of res judicata. The Supreme Court disagreed. Four criteria must be met for res judicata to apply, the first of which is that the parties or their privies are the same. The mother failed to meet this criteria because in the dissolution action, the parties were the mother and father, while in the abuse and neglect proceeding, the parties were the state, the children, and the mother. Despite the fact that the state was investigating claims of abuse within the family during the dissolution action, it was not a party to that action and did not petition for investigative authority and protective services (see 2001 amendment to 41-3-427) for the children until the dissolution was final. In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

No Treatment Plan Required to Terminate Parental Rights When Child Abandoned: A mother's parental rights were terminated based on the determination that she had abandoned her children, and the mother appealed. The children had been in out-of-home placement for longer than 1 year, and the mother had no contact with the children for almost 6 years, so no court-approved treatment plan was ever devised for the mother. The Supreme Court found that the mother's minimal efforts to contact the Department of Public Health and Human Services after termination proceedings were initiated were not sufficient to show the mother's intent to resume the care of her children, so the District Court did not err when it terminated the mother's parental rights on grounds of abandonment. A treatment plan is not required when the District Court finds that a parent has abandoned a child. In re J.J. & C.J., 2001 MT 131, 305 M 431, 28 P3d 1076 (2001).

Stipulation Not Considered Sufficient Adjudication of Youth in Need of Care — Lack of Jurisdictional Prerequisite to Terminate Parental Rights: The mother entered into a stipulation with the state that her children were youths in need of care only upon several conditions: (1) her parental rights would remain intact; (2) the children would reside with their grandmother; (3) the Casey Family Program would manage the children's cases; (4) the mother would always have contact with the children even if the program was required to intervene between the mother and grandmother; and (5) at an appropriate time when the mother was ready, the program, the Department, and the mother would devise a treatment plan that would be completed by the mother in order to regain custody of the children. At a subsequent hearing, the Department proposed a permanency plan that involved removing the children from their grandmother. The mother contended that the proposal amounted to a failure to abide by the conditions of the stipulation, thereby voiding the conditional stipulation that the children were youths in need of care and precluding the District Court's authority to terminate her parental rights. The Supreme Court agreed. Although a stipulation may be an acceptable alternative to an adjudicatory hearing in many circumstances, the fundamental nature of the rights of a parent requires that the process by which a stipulation is drafted and signed needs to be closely scrutinized. In this case, the stipulation was drafted by the County Attorney and signed by the mother without the benefit of legal counsel and essentially allowed the court to determine that the youths were in need of care without a finding that they were abused or neglected and without a hearing as required by 41-3-402 (renumbered 41-3-427). The mother had conflicting feelings about the removal of the children from their grandmother's care and relied on her understanding from the stipulation that the Department would not remove the children or terminate her parental rights, so she did not complete her treatment plan. Only a few days after the initial hearing, she promptly began work toward completion of the treatment plan and had made significant progress, particularly considering the unexpected death of her mother, by the time of the next hearing. Despite the change in circumstances resulting from the death, the Department did not grant the mother any additional time to complete the treatment plan, nor did the Department offer any evidence that the mother had abused or neglected the children. Under the unique facts of this case, the Supreme Court held that the District Court incorrectly found that the stipulation sufficed as an adjudication that the children were youths in need of care. Without that adjudication, the District Court lacked the jurisdictional prerequisite to terminate the mother's parental rights, so the Supreme Court reversed. In Re Custody and Parental Rights of M.W. & C.S., 2001 MT 78, 305 M 80, 23 P3d 206 (2001).

Finding That Child Is Youth in Need of Care Prerequisite to Transfer of Custody: The exigent protection of the health and welfare of a child is paramount when the state's initial intervention into otherwise private family matters reveals an actual or potentially dangerous or unhealthy environment requiring the removal of the child from a custodial caregiver. The legal determination that a child is a youth in need of care is a jurisdictional prerequisite for a court-ordered transfer of custody. The first question in a termination proceeding is whether the District Court correctly adjudicated the child as a youth in need of care, and the state need only offer clear and convincing evidence that the court properly adjudicated the child as a youth in need of care in order for the court to inquire into the actual fitness of the parent. In re A.M., 2001 MT 60, 304 M 379, 22 P3d 185 (2001).

Parent Not Represented by Counsel During Show Cause Hearing Regarding Whether Child a Youth in Need of Care — Due Process Rights Not Violated: At the time of a show cause hearing on whether her child was a youth in need of care, the mother was an indigent mental patient civilly committed to the state hospital. She appeared at the hearing without representation of counsel. The mother contended that the District Court violated her due process rights by making that critical determination regarding the child when she was unrepresented. Although in In re A.S.A., J.L.A., G.A., & A.J.A., 258 M 194, 852 P2d 127 (1993), the Supreme Court held that the constitutional right to due process guarantees an indigent parent the right to court-appointed counsel in parental rights termination proceedings, the court has not extended the right to counsel to a pretermination proceeding in which the focal issue is whether a child is a youth in need of care. Rather, appointment of counsel at any time prior to the initiation of termination proceedings is within the discretion of the District Court. In this case, the initial determination that the child was a youth in need of care was made by order pursuant to a finding of probable cause even before the mother's first appearance in any proceedings when the District Court relied on a report submitted by a social worker showing that the child was abused or neglected or in danger of abuse or neglect and that removal from the home was necessary to protect the child's welfare. Subsequent to the initial determination, the District Court reached the same conclusion on at least three separate occasions when the mother was represented by counsel, including one hearing when the social worker was subjected to cross-examination by the mother's counsel. The Supreme Court applied In re M.F., 201 M 277, 653 P2d 1205 (1982), and in re D.S., H.S., R.S., R.S., J.S., R.S., & K.S., 253 M 484, 833 P2d 1090 (1992), and in holding that the state is not required to provide counsel at proceedings concerning temporary investigative authority or temporary custody. Thus, the mother's due process rights were not violated when the District Court made the determination that the child was a youth in need of care at a time when the mother was not represented by counsel. In re A.M., 2001 MT 60, 304 M 379, 22 P3d 185 (2001).

Petition Need Not Allege Abuse or Neglect — Facts Establishing Probable Cause Sufficient to Issue Order for Protective Services: A petition for temporary investigative authority (TIA) and protective services (see 2001 amendment to 41-3-427) must state the authority requested and facts establishing probable cause that the youth is abused or neglected or in danger of being so and must be accompanied by an affidavit or Department report stating in detail the facts on which the request is based. There is no statutory requirement that the petition contain an allegation of abuse or neglect or the evidence that the Department would present in support of its petition. The fact that the mother stipulated to a 90-day TIA, but not to protective services or the removal of the children from the home, believing that she would retain custody of the children during the 90-day period, did not preclude the District Court from ordering removal of the children from the home. The best interests of the child is paramount and takes precedence over parental rights in abuse and neglect proceedings. In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982, 57 St. Rep. 179 (2000).

Threatened Harm to Child — Denial of Motion to Dismiss Proper: When the mother surreptitiously contacted the father, who had had his parental rights terminated after being convicted of murdering the couple's other child, the state petitioned to terminate the mother's parental rights as well. Although witnesses unanimously agreed that the mother and child enjoyed a caring, nurturing, well-bonded mother-son relationship, there was also evidence that the mother would require a period of years to overcome her tendency to enter into addictive relationships with men in which she would not keep her child safe from abuse by her partner. The mother moved to dismiss the petition as inadequate as a matter of law, contending that there was not a sufficient basis to find that the child was a youth in need of care or evidence that she had abused the child. A youth in need of care is one who is abused or neglected, which means that the child has suffered harm or threatened harm to the child's health or welfare. Harm means, inter alia, harm that occurs when a parent exposes or allows the child to be exposed to an unreasonable risk by failing to intervene or eliminate the risk. Threatened harm means substantial risk of harm to the child's health or welfare. The absence of proof of physical abuse by the mother did not mean that the petition must fail because a parent does not have the privilege of inflicting brutal treatment upon each child in succession before the children may individually obtain the protection of the state. Under the circumstances, the motion to dismiss the petition was properly denied. In re J.A.B., 1999 MT 173, 295 M 227, 983 P2d 387, 56 St. Rep. 675 (1999), following In re T.Y.K., 183 M 91, 598 P2d 593 (1979).

Statute Constitutional — Abandonment by Noncustodial Parent: Father whose parental rights were terminated questioned the constitutionality of 41-3-609 with regard to noncustodial parents. The Supreme Court found that the legal relationship between father and child did not change despite the facts that the mother was awarded custody and that the father failed to continue in his obligations to the child. In determining what constitutes abandonment, this section considers the action of the parent responsible for the child's welfare, not the action of the custodial or noncustodial parent. In re M.W., 234 M 530, 764 P2d 1279, 45 St. Rep. 2107 (1988).

Finding of Abuse, Neglect, or Dependency Necessary Before Consideration of Best Interests of the Child: M.G.M. was born out of wedlock and had little contact with her natural father until the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) placed M.G.M. in a foster home and terminated her mother's parental rights. The Department then sought to terminate the father's parental rights. To terminate his parental rights, the court must first find that the child is abused, neglected, or dependent (see 1995 amendment). Only when such a finding has been made can the court apply the best interests of the child test. In re M.G.M., 201 M 400, 654 P2d 994, 39 St. Rep. 2191 (1982).

Prior Felony Conviction — Factor to Be Considered in Parental Termination Proceedings: Although a criminal background does not disqualify one from having custody of his children, it is a factor and should be considered in child abuse and neglect proceedings under 41-3-102. Although the crime itself may not be relevant to the proceeding, the conduct of the father on parole may be, thus the admission of a prior felony conviction at such a hearing was not error. In re T.J.D., J.L.D. & R.J.W., 189 M 147, 615 P2d 212 (1980).

Standard of Proof: The State must show by clear and convincing evidence that the child is neglected or abused before parental rights may be terminated. This standard more adequately furthers the policy of family unity than does the preponderance of evidence standard. In re T.J.D., J.L.D. & R.J.W., 189 M 147, 615 P2d 212 (1980); In re Inquiry Into J.L.B., Youth in Need of Care, 182 M 100, 594 P2d 1127 (1979), followed in In re T.A., 249 M 186, 814 P2d 994, 48 St. Rep. 634 (1991).

Removal of Children Warranted: The District Court did not abuse its discretion when it granted the Department of Social and Rehabilitation Services' (now Department of Public Health and Human Services) petition for permanent custody and authority to consent to adoption of three children since they were adjudged dependent (see 1995 amendment) and neglected and there was ample evidence to warrant removal from their parents. In re G., Youth in Need of Care, 174 M 321, 570 P2d 1110 (1977).

Failure to Make Required Findings: The District Court abused its discretion in awarding permanent custody to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) because it patently failed to make the required findings that the child was "abused, dependent [see 1995 amendment], or neglected" and therefore was without power to effect a permanent transfer of custody to a nonparent. In re Fish, 174 M 201, 569 P2d 924 (1977).

Custody Awarded Nonparent: Permanent custody cannot be awarded to a nonparent on the basis of the "best interest" test, it being appropriate only to determine custody rights between natural parents, but rather when natural parents forfeit their rights by not meeting the minimum standards of the child abuse, neglect, and dependent (see 1995 amendment) statutes. Henderson v. Henderson, 174 M 1, 568 P2d 177 (1977).

Constitutionality: This section is not unconstitutionally vague, ambiguous, or uncertain. In re Burgdorf, 170 M 116, 551 P2d 656 (1976).

Constitutionality — Due Process — Least Drastic Alternative: This section is not unconstitutionally vague. When no showing of prejudice is made, mother is represented by counsel in neglect proceeding, and when no demand for a hearing is made, there is not a denial of due process. Mother's attitude may cause court to dispense with evaluation of least restrictive alternative. In re Burgdorf, 170 M 116, 551 P2d 656 (1976).

Sufficiency of Evidence: When the record clearly reflects an established, continuing pattern of abuse and neglect, the decision of the court declaring children to be abused and neglected and awarding custody to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) with the right to grant an adoption will be sustained. In re Bessette, 170 M 122, 551 P2d 653 (1976).

Insufficient Evidence to Overcome Policy to Preserve Family: Mother's failure to find suitable housing and a decent job after death of father is insufficient adversity to dissolve the family absent a concrete showing that it would be in the best interest of the children. It was a clear abuse of discretion by District Court to award permanent custody to Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) because policy of the State of Montana as declared by the Legislature is to preserve the unity and welfare of the family whenever possible. Div. of Child Welfare Serv. v. Fisher, 169 M 254, 545 P2d 654 (1976).

"Dependent" and "Neglected" Distinguished: A "dependent child" (see 1995 amendment) is one who must be supported by someone other than its natural or legal guardians, while a "neglected child", which is a broader term, describes a situation where there has been parental failure to exercise the degree of care demanded by family circumstances. In re Vikse, 147 M 417, 413 P2d 876 (1966).

ABUSE AND NEGLECT

Continued Neglect of Children Sufficient Basis for Termination of Mother's Parental Rights Without Reunification Efforts: A mother appealed the District Court's termination of her parental rights to her two children under 41-3-423 on the basis of neglect. The Supreme Court held that the District Court did not abuse its discretion in terminating the mother's parental rights without requiring reunification efforts because the record established that the mother's history of continued and worsening drug use and neglect of her children amounted to "chronic, severe neglect" under 41-3-423(2)(a) and that reunification efforts and treatment plans were not in the best interests of the children. In re E.Z.C., 2013 MT 123, 370 Mont. 116, 300 P.3d 1174. See also In re J.A.B. and L.M.F., 2015 MT 28, 378 Mont. 119, 342 P.3d 35.

Chronic, Severe Neglect — Termination of Parental Rights Affirmed — Consideration of Prior Petition Proper: The parents appealed the District Court's finding that they had subjected their children to chronic, severe neglect and its order terminating their parental rights. The parents argued that the Department of Public Health and Human Services was collaterally estopped from introducing evidence contained in a prior petition for temporary legal custody of the children to establish chronic, severe neglect in the present petition. The parents also argued that their conduct did not rise to the level of chronic, severe neglect. The Supreme Court affirmed, concluding the elements of collateral estoppel were not met because the issues in the current and prior petitions were not identical and the prior petition was not dismissed as a final judgment on the merits. The Supreme Court upheld the District Court's finding of chronic, severe neglect, noting that discrete instances of neglect, when viewed within a consistent pattern of similar behavior, provide a clear basis for a finding of chronic, severe neglect. In re M.N., J.N., Jr., & R.N., 2011 MT 245, 362 Mont. 186, 261 P.3d 1047. See also In re E.Z.C., 2013 MT 123, 370 Mont. 116, 300 P.3d 1174, and In re L.N., 2014 MT 187, 375 Mont. 480, 329 P.3d 598, in which the Supreme Court affirmed the termination of parental rights to L.N., the fourth child of the parents of J.N., M.N., and R.N. (see above), on the basis that the parents had previously subjected their older children to chronic and severe neglect.

Defendant's Fathering of Own Child Following Assault of Child — Sentencing Condition That Defendant Not Engage in Contact With Children Under 15 Years of Age Affirmed: Rowe was convicted of felony criminal endangerment and misdemeanor negligent endangerment after assaulting a 2-year-old child whom Rowe was babysitting. As a condition of sentence, the District Court prohibited Rowe from having contact with any child under 15 years of age unless supervised by an approved adult. Rowe appealed the sentencing condition on grounds that because he married and fathered a child following conviction, the sentencing condition effectively precluded him from contact with his own child and violated his fundamental right to parent. Nevertheless, the Supreme Court affirmed. Citing In re A.M., 2001 MT 60, 304 M 379, 22 P3d 185 (2001), the court noted that the child abuse and neglect statutes reflect the tension between the need to protect family unity whenever possible and the need to provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for their care and protection, including a parent. Undisputedly, Rowe had an anger problem, and he participated in anger management for several years before the assault but voluntarily stopped taking his medications 2 to 3 weeks prior to the assault. Rowe also committed other incidents of violence in addition to the assault and posed a substantial risk of harm to his own child, so the District Court did not abuse its discretion by imposing a sentencing condition precluding Rowe's contact with his own child. St. v. Rowe, 2009 MT 225, 351 M 334, 217 P3d 471 (2009).

Out-of-State Conviction of Indecency With Child Considered Aggravating Circumstance for Purposes of Terminating Parental Rights: A father was convicted in Texas of indecency with a child. A Montana District Court considered the Texas conviction as an aggravating circumstance in terminating the father's parental rights. On appeal, the father contended that in Texas, the crime of indecency with a child was analogous to indecent exposure and asserted that the state did not introduce clear and convincing evidence that the Texas crime would constitute sexual abuse under Montana law to qualify as an aggravating circumstance. The Supreme Court disagreed. In Montana, the definition of child abuse includes indecent exposure, and the District Court properly concluded that the Texas conviction constituted an aggravating circumstance under Montana law. In re. M.A.L., D.L., & T.L., 2006 MT 299, 334 M 436, 148 P3d 606 (2006). See also In re L.M.A.T. & B.L.F.T., 2002 MT 163, 310 M 422, 51 P3d 504 (2002).

Chronic and Severe Neglect Inclusive of Emotional Neglect: In terminating parental rights without reunification services, the state relied on 41-3-423 and 41-3-609 in a case of chronic, severe neglect of a child. A parent asserted that parental rights may not be terminated based on a finding of severe emotional neglect, but the Supreme Court held that by definition, neglect includes psychological harm to a child. (See 2023 amendment to 41-3-102.) Here, the parent's ongoing drug use and repeated incarceration resulted in the parent's unavailability to the child and inconsistent caregiving, and this neglect in turn produced high anxiety and emotional disturbance in the child. Parental rights were thus properly terminated based on chronic, severe emotional neglect. In re Custody & Parental Rights of D.S., 2005 MT 275, 329 M 180, 122 P3d 1239 (2005). See also In re M.N., J.N., Jr., & R.N., 2011 MT 245, 362 Mont. 186, 261 P.3d 1047, which held that discrete instances of neglect, when viewed within a consistent pattern of similar behavior, provide a clear basis by which a District Court can find chronic, severe neglect, and In re E.Z.C., 2013 MT 123, 370 Mont. 116, 300 P.3d 1174.

Failure to Protect Child From Physical Abuse and to Feed Child — Sufficient Evidence of Abuse: Following termination of her parental rights, a mother contended that there was insufficient evidence to find that she had abused her child. The Supreme Court disagreed. There was convincing testimony that the mother failed to protect the child from physical abuse by her boyfriend and that on at least one occasion, she neglected to feed the child until 4:30 p.m. This evidence met the statutory definition of child abuse or neglect, and the characterization of her treatment of the child as abuse was not clearly erroneous. In re Custody & Parental Rights of C.J.K., 2005 MT 67, 326 M 289, 109 P3d 232 (2005).

Proper Finding That Youths in Need of Care — Expert Testimony Based in Part on Hearsay — Adequate Exercise of Independent Factfinding Judgment: The District Court found that two youths were in need of care. The mother appealed on grounds of insufficient evidence and contended that the District Court erroneously adopted the state's findings of fact and conclusions of law without substantial change, but the Supreme Court affirmed. The record contained sufficient credible evidence to support the findings that the children were abused and neglected by the mother's actions that injured the children's capacity to function emotionally or psychologically and thus were youths in need of care. Additionally, it was not error for the District Court to rely on the testimony of a psychology expert, even though the testimony was based in part on hearsay, because the facts and data relied on by the expert were of the type typically relied on by experts in the field of psychology. Moreover, although the verbatim adoption of findings and conclusions of the prevailing party is not favored, the District Court in this case did not in fact adopt the state's findings and conclusions verbatim, but rather exercised independent factfinding judgment. In re A.R. & I.R., 2005 MT 23, 326 M 7, 107 P3d 457 (2005), distinguishing In re Inquiry Into J.L. & D.L., 2000 MT 289, 302 M 254, 14 P3d 473 (2000).

Adjudication of Child as Youth in Need of Care Based on Prospective Abuse Proper: A mother relinquished custody of her three children after the District Court determined that the children were in need of care. When she became pregnant again, the state moved for emergency protective services for the fourth child upon its birth. The father contended that because the child was removed from the parents at birth, it was never abuse or neglected and thus could not properly have been adjudicated as a youth in need of care. Citing In re C.P., 2001 MT 187, 306 M 238, 32 P3d 754 (2001), the Supreme Court disagreed. The circumstances related to the prior termination of the mother's parental rights to her three children had not changed, and because she would also be the primary caregiver for the fourth child, there was substantial risk to the health and welfare of the newborn child as well, so the District Court did not err in adjudicating the fourth child as a youth in need of care based on prospective abuse. In re K.C.H., 2003 MT 125, 316 M 13, 68 P3d 788 (2003).

Failure to Hold Adjudicatory Hearing to Determine Whether Children in Need of Care — Termination of Parental Rights Improper Absent Adjudication of Status of Children: The District Court held several hearings concerning temporary investigative authority, granting several extensions, and also held several hearings concerning granting temporary legal custody, which was extended twice. The state then filed a petition to terminate the mother's parental rights. Temporary legal custody was extended a third time pending a hearing on the termination hearing. At the hearing, the mother's parental rights were terminated, and she appealed. The Supreme Court found that there had never been an adjudicatory hearing at which the District Court heard testimony or received evidence concerning whether the children were abused or neglected. The hearing for temporary legal custody did not equate to an adjudication by the court that the children were youths in need of care, even in light of an alleged stipulation by the mother to that effect. Absent an adjudicatory hearing and an adjudication that the children were youths in need of care, termination of parental rights was improper, and the order was reversed. In re M.O., M.O., & M.O., 2003 MT 4, 314 M 13, 62 P3d 265 (2003).

Substantial Risk of Harm to Child — Parental Rights Terminated Despite Lack of Evidence of Abuse or Neglect: A girl was born to a mother who was later divorced and remarried. When the girl was 15, she had sexual intercourse with her stepfather and conceived a baby. The state petitioned for temporary investigative authority (TIA) and emergency protective services (see 2001 amendment to 41-3-427) over both the girl and her baby, pursuant to 41-3-402 (renumbered 41-3-427). The mother then agreed to divorce the stepfather so that he could marry the girl. The petition regarding the girl was dismissed because she was married and was no longer subject to the mother's parental control. At the show cause hearing on the petition regarding protection of the baby, a state social worker testified that, although there was no indication of actual abuse or neglect of the baby, there was concern for the baby's safety should the baby be placed in the home with the girl and stepfather. The state ultimately petitioned to terminate the girl's parental rights to the baby. The District Court determined that the baby was a youth in need of care and terminated the girl's parental rights. The girl appealed on grounds that the court's determination that the baby was a youth in need of care was erroneous, absent any evidence of abuse, neglect, or abandonment, and that the petition for TIA (see 2001 amendment to 41-3-427) was insufficient on its face because it contained no allegations that the baby was abused or neglected. However, the definition of abuse or neglect in this section includes either actual harm or the substantial risk of harm. Thus, the report required by 41-3-427 need set forth in detail only facts supporting the petition's request for TIA (see 2001 amendment to 41-3-427) based on the assertion that a child is abused or neglected or is in danger of being abused or neglected. The social worker's testimony was considered sufficient to support a finding that there was substantial risk of harm to the baby if returned to the girl's custody; therefore, the District Court's determination that the baby was a youth in need of care was correct. The court's finding that under the circumstances, the baby had little hope of a normal emotional, moral, and psychological development with his parents was also supported by substantial evidence and was not clearly erroneous, based on the social worker's testimony that the girl's relationship with the stepfather was unhealthy, that the family unit exhibited extremely poor boundaries, and that the girl had obvious psychological damage from being sexually abused by her father and would, without successful treatment, be unable to set appropriate boundaries for the baby or be able to understand the risk of harm that her relationship with the stepfather posed to the baby. The Supreme Court affirmed. In re D.T.H., 2001 MT 138, 305 M 502, 29 P3d 1003 (2001).

Child in Danger of Abuse and Neglect Subject to Adjudication Regardless of Whether Actual Abuse or Neglect Occurred: A child who is in danger of being abused or neglected may be considered a youth in need of care regardless of whether actual abuse or neglect occurred, irrespective of a parent's care for the child prior to the parent's incarceration or commitment to a mental hospital. In re A.M., 2001 MT 60, 304 M 379, 22 P3d 185 (2001).

Source of Children's PTSD Not Traceable to Father — No Abuse of Discretion by Court That Held Children Not Suffering From Abuse and Neglect Caused by Father — Temporary Investigative Authority (See 2001 Amendment to 41-3-427) and Temporary Legal Custody Properly Terminated: John, who pleaded guilty to negligent homicide in the death of his psychotic wife, Nancy, petitioned the District Court for the termination of temporary investigative authority (see 2001 amendment to 41-3-427) and temporary legal custody of the Department of Public Health and Human Services, and the petition was granted. The Supreme Court held that the Department's authority was properly terminated because the District Court could not and did not find that the posttraumatic stress disorder (PTSD) suffered by John's children was caused by their father's behavior. The expert testimony given at trial showed that the children's PTSD could have been caused by living with their psychotic mother and not by their father's killing of their mother and his subsequent attempt to cover up the murder. The Supreme Court held that the District Court properly found that the children were not abused or neglected by their father and that the District Court therefore did not abuse its discretion when it granted John's petition and terminated the Department's authority. In re Inquiry Into J.L. & D.L., 2000 MT 289, 302 M 254, 14 P3d 473, 57 St. Rep. 1219 (2000).

Failure to Detect and Prevent Abuse: In an action to terminate a mother's parental rights, although the District Court found that the mother knew of her daughters' sexual abuse, the court specifically stated that her knowledge of the abuse was irrelevant to its ultimate determination because the mother failed to notice what was occurring and repeatedly left the children with persons who were not competent or safe caretakers. Such conduct satisfies the requirements of this section. In re Inquiry Into M.M., 274 M 166, 906 P2d 675, 52 St. Rep. 1170 (1995).

Proof of Sexual Abuse Not Necessary to Conclusion That Child Is Youth in Need of Care: A finding that a child was sexually abused was not a prerequisite to a conclusion that the child was a youth in need of care warranting placement of the child with the Department of Family Services (now Department of Public Health and Human Services). The conclusion was proper in light of the combination of the testimony of four expert witnesses, a video deposition of the child, a series of nude photos of the child taken by the parents, evidence of spousal physical abuse in the presence of the child, and the fact that the father did not provide as evidence the results of his court-ordered psychological evaluation. In re H.D., 256 M 70, 844 P2d 114, 49 St. Rep. 1141 (1992).

Evidence of Abuse and Neglect Sufficient to Find Youth in Need of Care: When a mother's actions over a 4-year period were marked by indifference to and neglect of her parental responsibilities, including failure to assume physical care of her son and insensitivity to his emotional needs, the District Court did not err in determining that the child was a youth in need of care and that his well-being would be best served by remaining in the custody of his grandparents. In re R.T.L.P., 238 M 384, 777 P2d 892, 46 St. Rep. 1354 (1989).

Custody Transfer Supported by Evidence of Substantial Impairment: A psychologist testified that a child suffered substantial impairment of psychological function during her stay with her natural father and would be at risk of increased emotional stress if the placement continued. The evidence presented was sufficient to prove that the child was a youth in need of care and to support the lower court transfer of custody to the state, with reasonable visitation rights maintained by the father. In re M.G.M., 228 M 184, 741 P2d 770, 44 St. Rep. 1443 (1987).

Three Prerequisites for Termination of Parental Rights: The Supreme Court found substantial credible evidence that the three prerequisites for termination of parental rights were met: (1) that S.B. was a youth in need of care under the statutory definitions of 41-3-102 since the child failed to thrive due to carelessness of the parent (citing In re C.A.R. & P.J.R., 214 M 174, 693 P2d 1214, 41 St. Rep. 2395 (1984)); (2) that a court-approved treatment plan was unsuccessful (citing In re R.J.W., 197 M 286, 642 P2d 1072, 39 St. Rep. 568 (1982)); and (3) that the conduct or condition rendering the parent unfit to provide adequate care was unlikely to change within a reasonable time (citing In re R.J.W., supra). In re S.B., 223 M 36, 724 P2d 168, 43 St. Rep. 1512 (1986).

Mother's Lack of Care — Harm Caused to Children's Physical and Mental Welfare — Children Abused and Neglected: In applying the applicable definitions to the present case, the trial court properly determined the two children were youths in need of care because they had been abused and neglected by their mother. This abuse and neglect resulted from their mother's failure to care for and attend to the children, causing serious physical problems and injury to their cognitive and emotional development. Also, their mother allowed a sexual assault to be committed against one of the children, which resulted in harm to the child's welfare. The mother's conduct was unlikely to change significantly in the future. Under these circumstances, the court properly terminated the mother's parental rights and awarded permanent custody with the authority to consent to adoption to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services). In re C.A.R. & P.J.R., 214 M 174, 693 P2d 1214, 41 St. Rep. 2395 (1984).

Evidence Supporting Designation as Youth in Need of Care: Evidence that the child failed to thrive in the family home, that both parents refused to comply with recommended drug and alcohol abuse treatment programs, and that the mother had been unsuccessful in learning how to care properly for her child was sufficient to support designation of the child as a youth in need of care. In re R.J.W., 197 M 286, 642 P2d 1072, 39 St. Rep. 568 (1982).

Extreme and Prolonged Uncleanliness: Regardless of any actual proof that a parent intentionally inflicted injuries upon his child, the occurrence of serious and frequent, yet unexplained, physical injuries to the child is sufficient to properly bring the child within the statutory definition of abuse or neglect. Additionally, the statute is broad enough to include extreme and prolonged uncleanliness under the definition of neglect. In re A.J.S., 193 M 79, 630 P2d 217, 38 St. Rep. 947 (1981).

Substantial Evidence to Support Finding of Neglect or Abuse: Where the evidence offered in a proceeding to declare youths in need of care included testimony by two clinical psychologists that the mental and physical state of appellant's offspring deteriorated when the offspring was in the care of appellant and that appellant's newborn child would also suffer the same consequences, and also testimony to the effect that appellant was physically abusive, there is substantial credible evidence to support the District Court's conclusion that appellant's offspring were in need of care and termination of parental rights was justified. Based upon examination of the offered evidence, in relation to the declared policy of this state to promote normal childhood development and to provide for the protection of children whose health and welfare are or may be adversely affected by the conduct of those responsible for their care, the District Court found the offspring abused or neglected as those terms are defined in 41-3-102. In re J.L.F. and H.A.F., 192 M 63, 626 P2d 253, 38 St. Rep. 533 (1981). See also In re C.A.R. & P.J.R., 214 M 174, 693 P2d 1214, 41 St. Rep. 2395 (1984).

Declaration of Child as Youth in Need of Care — Custody Awarded to Agency — Evidence of Abuse or Neglect: A child diagnosed as failing to thrive was given to foster parents. Professional personnel all agreed that the child in question was failing to thrive and that the child's condition deteriorated while in the care of the natural mother. The child's condition improved dramatically while in foster care. The District Court's finding and conclusion that the child was a neglected child was supported by "clear and convincing" evidence and the court was justified in permanently depriving the natural mother of the child and transferring legal custody to SRS (now Department of Public Health and Human Services). In re M.R.L., 186 M 468, 608 P2d 134 (1980).

Termination of Parental Rights — Factors Considered: When the following things were considered, the record supported the conclusion that the father's rights were adequately considered prior to termination of parental rights and that the decision to terminate them was supported by credible evidence: (1) the father was notified of the hearing, was present, and was represented by counsel; (2) professional testimony indicated the father would not be able to provide enough influence to offset the marked deprivation anticipated to continue for the child; (3) the father was found to have made no effort to assist the mother in learning to become a good parent; (4) the father had visited the child only once in 6 months when the child was in a foster home and had been reported to have abused the child. In re L.F.G., 183 M 239, 598 P2d 1125 (1979).

Youth in Need — Best Interests of Child — Mental Condition of Parent as Sole Factor: When the District Court considered the best interests of a child only after first determining that the child was in fact abused or neglected, it met the required standard. Considering the mental condition of the mother as the primary if not the sole factor, but having evidence that the child would not receive even minimally satisfactory maternal care and would be exposed to extremely high chances of developing a mental condition similar to that of the mother, sufficient credible evidence was before the District Court to support the District Court's decision that the child was a youth in need of care. The Supreme Court rejected the view that mental condition of a parent could not be the sole factor supporting a severance of parental rights. In re L.F.G., 183 M 239, 598 P2d 1125 (1979).

Protection of All Children When Abuse of One Less Than Another: A parent does not have the privilege of inflicting brutal treatment upon each of his children in succession before they individually obtain the protection of the state by virtue of 41-3-101. Section 41-3-101, et seq., grants to the District Court the ability to make a determination of neglect and abuse as to all children in a family based on the policy that abuse of one child has a detrimental effect on the other children's development. In re T.Y.K., 183 M 91, 598 P2d 593 (1979), followed in In re B.T., B.T., M.T., & M.T., 223 M 287, 725 P2d 230, 43 St. Rep. 1728 (1986), In re T.C. & R.C., 240 M 308, 784 P2d 392, 46 St. Rep. 2148 (1989), In re J.A.B., 1999 MT 173, 295 M 227, 983 P2d 387, 56 St. Rep. 675 (1999), and In re M.B., J.B., & W.B., 2004 MT 304, 323 M 468, 100 P3d 1006 (2004).

Definition of Neglect: The definition of neglect includes emotional deprivation, inadequate nutrition, and extreme and prolonged uncleanliness of the child. In re Inquiry Into J.L.B., Youth in Need of Care, 182 M 100, 594 P2d 1127 (1979).

Termination of Parental Rights: The state may not terminate a parent's right to raise his or her own child merely because a court or state agency feels that a nonparent has more financial resources or pursues a preferable lifestyle. In re Inquiry Into J.L.B., Youth in Need of Care, 182 M 100, 594 P2d 1127 (1979).

Absence of Abuse or Neglect: Judgment was reversed and custody of two children taken from their maternal aunt and returned to the natural father since there was no showing that the children were abused or neglected. The court improperly deprived the father of custody by means of the subterfuge of a guardianship that had outlived the purpose for which it was created. In re Guardianship of Doney, 174 M 282, 570 P2d 575 (1977), followed in Babcock v. Wonnacott, 268 M 149, 885 P2d 522, 51 St. Rep. 1224 (1994). See also In re J.B., 278 M 160, 923 P2d 1096, 53 St. Rep. 901 (1996).

Youth in Need of Care — Transfer of Custody: It was clear from the record that appellant was unwilling or unable to provide care necessary for the physical and emotional well-being of her children, and testimony supported the court's finding that the children were abused and neglected youths in need of care within the meaning of this section and its judgment transferring permanent legal custody of the children to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) pursuant to 41-3-406 (renumbered 41-3-438). In re Moyer, 173 M 208, 567 P2d 47 (1977).

Children's Best Interest and Welfare Paramount Concern: Substantial credible evidence that father maltreated children and was incompetent, coupled with evidence mother did not provide proper or sufficient food, clothing, or sanitary or medical care was sufficient to support finding and judgment that children were dependent and neglected, awarding permanent care, custody, and control to proper state agency, with right to consent to children's adoption. In re Jones, 168 M 1, 539 P2d 1193 (1975).

Mental Retardation Due to Emotional Deprivation: Children who have become mentally retarded due to emotional deprivation and lack of environmental stimulation are neglected children within the meaning of the law. In re Olson, 164 M 431, 524 P2d 779 (1974).

Fitness of Parents:

Minor children were dependent (see 1995 amendment) and neglected within meaning of the statutory definition, notwithstanding possible fitness of natural mother for their custody, when she had acquiesced and permitted them to remain in care and custody of welfare department. In re Bad Yellow Hair, 162 M 107, 509 P2d 9 (1973).

A child was properly found dependent and neglected based on mother's declaration in waiver and the consent to adoption that she could not provide care and guidance and could not perform duties of a parent. Application of Hendrickson, 159 M 217, 496 P2d 1115 (1972).

Evidence of mother's use of welfare funds to supply her alcoholic needs, lack of medical care for her children, threats to kill the children, and other failures to make proper provision for the children warranted a finding that the children were neglected and the entry of an order committing them to custody of the state. In re Corneliusen, 159 M 6, 494 P2d 908 (1972).

ABANDONMENT

Termination of Parental Rights — Willful Surrender of Children to Other Parent Without Maintaining Contact for 3 Years — Abandonment of Children: In 2001, the parties divorced and the mother received custody of their two children. In 2006, to avoid termination proceedings against her, the mother stipulated with the Department of Health and Human Services (the Department) to transfer custody of the children to the father. Three years later, the Department removed the children from the father and petitioned to terminate the parental rights of both parents. The District Court ultimately terminated the mother's parental rights, finding that the mother had willfully abandoned the children. The mother appealed, alleging that she could not have abandoned the children when she did not have custody of them. The Supreme Court affirmed the District Court's ruling that the mother had abandoned her children because she had surrendered custody and had not maintained any contact with the children since 2008. In re E.M.S. and C.A.S., 2011 MT 307, 363 Mont. 68, 265 P.3d 1258.

No Evidence of Willful Parental Abandonment — Termination of Parental Rights Not Warranted: After only sporadic contact between a father and his child over a period of several years and failure of the father to fully comply with child support obligations, the mother petitioned to terminate the father's parental rights on grounds that the father had abandoned the child. The District Court denied the petition and the mother appealed, but the Supreme Court affirmed. Termination of parental rights based on abandonment of a child is not appropriate unless there is clear and convincing evidence that the child was willfully abandoned. In this case, the totality of the circumstances showed that the father's conduct was more in the character of immature, ignorant, uncertain, and lacking in diligent attention to his parenting responsibilities rather than a willful manifestation of intent to abandon the child. The mere fact that the father may have violated a court order within the meaning of 42-2-608 by failing to meet child support obligations in full did not mean that, as a matter of law, his parental rights must be terminated. Thus, although the father was not a model parent, the mother failed to meet the burden of demonstrating by clear and convincing evidence that the father was unfit. Therefore, the District Court properly applied its discretion in denying the petition. In re Stepparent Adoption of B.W.Z.-S., 2009 MT 433, 354 M 116, 222 P3d 613 (2009).

District Court's Finding of Abandonment Not Supported by Substantial Credible Evidence: The District Court terminated the parental rights of the natural father, holding that the father left the child under circumstances making it reasonable to believe that he did not intend to assume the child's care, thereby abandoning her. The Supreme Court stated that a parent's right of custody, though secondary to the child's best interests, is a fundamental liberty interest and must be protected by fundamentally fair procedures. The Supreme Court noted that the father, although in prison, had contacted the caseworker, County Attorney, and mother, among others, conveying that he was interested in parenting the child. In addition, the father had completed, parenting and anger management programs in prison even though the Department of Public Health and Human Services had not set up a treatment plan for the father as ordered by the District Court. The Supreme Court held that in light of the circumstances, the action of the District Court in finding abandonment was clearly erroneous and remanded the case. In re S.S., K.C., & J.C., 2002 MT 270, 312 M 343, 59 P3d 393 (2002).

Improper Termination of Rights of Noncustodial Parent on Grounds of Abandonment Absent Showing of Willful Surrender of Custody: The District Court terminated a father's parental rights after finding that he abandoned his children by willfully surrendering physical custody for a period of 6 months without manifesting a firm intention to resume physical custody or making permanent physical arrangements for care of the children. The father appealed on grounds that he could not have willfully surrendered custody because he did not have physical custody of the children, who were initially with the mother and then in state foster care. The Supreme Court agreed. Acknowledging that pursuant to In re M.W., 234 M 530, 764 P2d 1279 (1988), it is possible for a court to find that a noncustodial parent has abandoned children, that finding must be based on evidence that the parent did not intend to resume the children's care, which was not the case here. Rather, the District Court in this case found that the father willfully surrendered physical custody, which was directly controverted by the fact that the father could not surrender custody that he did not have. Termination of the father's parental rights under that theory of abandonment was reversible error. In re T.C. & W.C., 2001 MT 264, 307 M 244, 37 P3d 70 (2001).

Abandonment Held to Constitute Abuse or Neglect: The father appealed the termination of his parental rights, arguing that the trial court's finding of abandonment did not constitute a finding of abuse or neglect required by statute to terminate parental rights. The Supreme Court ruled that in the past, it had implicitly upheld terminations on the basis of abandonment and that it was clarifying its earlier rulings by holding that abandonment is "harm to a child's welfare" and that "harm to a child's welfare" is a statutory ground for a finding of "child abuse or neglect" upon which a termination of parental rights may be founded. In re M.J.W., 1998 MT 142, 289 M 232, 961 P2d 105, 55 St. Rep. 563 (1998), followed in In re T.H. & C.D.F., 2005 MT 237, 328 M 428, 121 P3d 541 (2005).

Father Objects to Wrong Period Used to Determine Abandonment: The father appealed the termination of his parental rights on the basis that the court relied on statements by a social worker that pertained to a period before she had any personal knowledge of the case and therefore the statements were hearsay. The Supreme Court upheld the lower court's ruling, stating that only one sentence of the social worker's statement pertained to the early period and the rest of the report dealt with the period after the social worker had personal knowledge of the case. In re M.J.W., 1998 MT 142, 289 M 232, 961 P2d 105, 55 St. Rep. 563 (1998).

Evidence of Intent to Remedy Child's Situation During Time of Alleged Abandonment — Finding of Abandonment Reversed: The state alleged abandonment by father from September 1994 to January 1995. Evidence showed that father had an unimpressive history as a parent, offering little or no financial or emotional support during the first 5 years of his son's life. Nevertheless, father's actions during the time in question, including a petition to modify the dissolution decree to allow him visitation, contact with the mother to arrange visitation, and a trip from Wisconsin to visit his son, precluded a finding of abandonment during that finite period. In re W.Z., 285 M 16, 946 P2d 125, 54 St. Rep. 1019 (1997).

Termination of Parental Rights Based on Abandonment — Sporadic Attempts to Maintain Custody of Child Held Insufficient: Linda, the natural mother of P.E., left P.E. at a camping site with persons barely known to Linda. For the next 14 months, Linda traveled with persons with known criminal records, failed to give social workers her address and phone number on several occasions, failed to accept or maintain gainful employment, and failed to keep appointments with social workers or to appear at hearings to determine the status of P.E. Despite her expressed intent to resume physical custody, the District Court terminated her parental rights. Citing In re Adoption of C.R.D., 240 M 106, 782 P2d 1280 (1989), the Supreme Court affirmed, holding that Linda's sporadic attempts to maintain physical custody of P.E. did not constitute "a firm intention to resume physical custody" pursuant to this section. In re P.E., 282 M 52, 934 P2d 206, 54 St. Rep. 237 (1997).

Record to Reflect Parent's Intention to Abandon Child: The District Court held that the mother had been in prison for more than 6 months prior to the adoption hearing and that absence constituted abandonment. The Supreme Court reversed, holding that nothing in the record showed any intention on the mother's part to abandon her children and that a showing of such an intention was required in addition to an absence exceeding 6 months. In re Adoption of Jane, John, & Mary Doe, 277 M 251, 921 P2d 875, 53 St. Rep. 631 (1996).

Inability to Contribute Financial Support to Child Not Abandonment — Third-Party Petition to Adopt Properly Dismissed: Parents of S.P.M. were divorced and granted joint custody of the child. After a period of time, the father took sole custody after a Department of Family Services (now Department of Health and Human Services) worker filed a report concluding that the mother's new partner was abusing the child. The original joint custody decree was not modified. The father and child moved out of state for 4 years. On their return, the mother petitioned for custody and visitation. In response, the father's new wife petitioned to adopt the child. The District Court dismissed the wife's petition on the grounds that the mother's consent to adoption was required and that the mother had not abandoned the child. The 6-month requirement for abandonment in this section applies only to the willful surrender of custody, and even though the mother had not supported the child for 4 years, this did not constitute abandonment when the mother was not capable of providing financial support. Adoption of S.P.M., 266 M 269, 880 P2d 297, 51 St. Rep. 808 (1994).

Six-Month Abandonment Requirement Applicable Only to Willful Surrender of Physical Custody: The requirement in this section that applies a 6-month period to the definition of abandonment that is part of the definition of harm to a child's health or welfare is applicable only to the willful surrender of physical custody of the child. It was therefore proper to terminate the parental rights of a parent who left children for a 5-month period under circumstances that made reasonable the belief that the parent did not intend to resume care of them. In re A.E., C.E., S.R., & J.R., 255 M 56, 840 P2d 572, 49 St. Rep. 877 (1992), followed in In re W.Z., 285 M 16, 946 P2d 125, 54 St. Rep. 1019 (1997).

Natural Father's Consent to Adoption Not Required When Evidence Clear He Abandoned Child: The father had only visited with his daughter twice and called her on the telephone twice in 8 years and during that time never paid support. The Supreme Court affirmed the lower court's finding that the record contained clear and convincing evidence that the natural father had willfully abandoned his daughter, and therefore his consent to the child's adoption by her grandparents was not required. Adoption of C.R.D., 240 M 106, 782 P2d 1280, 46 St. Rep. 1979 (1989), followed in In re P.E., 282 M 52, 934 P2d 206, 54 St. Rep. 237 (1997).

Lack of Contact for Three Years Constituting Abandonment: The District Court did not abuse its discretion in terminating the parental rights of a father who abandoned his child by having no contact for 3 years and by indicating at no time his intention to resume custody until he learned his parental rights had been terminated. In re M.W., 234 M 530, 764 P2d 1279, 45 St. Rep. 2107 (1988).

Question of Abandonment Not Within Subject Matter Jurisdiction Regarding Modification: Husband was served a petition for adoption of his children by wife's new husband. The petition alleged abandonment. The District Court improperly considered the question of abandonment during the postdissolution hearing, which centered around the issues of visitation and unpaid child support. The question was outside the scope of issues included within the original dissolution decree, was to be decided by the court hearing the adoption proceedings, and should have been dismissed under former Rule 12(h)(3), M.R.Civ.P. (now superseded). In re Marriage of Callahan, 233 M 465, 762 P2d 205, 45 St. Rep. 1639 (1988).

Sufficiency of Evidence of Abused or Neglected Child: Evidence of failure to supply an adequate home environment and of abandonment for a 6-month period, plus evidence that a parent never complied with a court-approved treatment plan, was sufficient to warrant finding a youth to be abused or neglected and to allow temporary custody with the state. In re C.G., 230 M 117, 747 P2d 1369, 45 St. Rep. 63 (1988).

Evidence of Abandonment — Termination Proper: Evidence of abandonment warranting termination of parental rights was sufficient when the father had no contact and did not state any intention of resuming care of his children for a period of 2 years and did not make known his intention to acquire custody until 3 months after he was informed of the custody proceedings filed by the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services). In re M.J.D., C.K.D., & A.R.D., 225 M 200, 731 P2d 937, 44 St. Rep. 167 (1987).

Abandonment — Termination Proceedings to Be Fundamentally Fair: Termination of a natural parent's right to care and custody of a child is a fundamental liberty interest in Montana, which must be protected by fundamentally fair procedures. In a proceeding to terminate parental rights, the mother testified that on the advice of a social worker she refused to disclose to the father, who was in prison, the name of the child's foster parents; the father testified that while in prison he had tried to contact his son and see how he was doing. The Supreme Court held that this testimony contradicted the District Court's finding that father had abandoned child, and the Supreme Court remanded the case to the District Court for additional findings of fact and conclusions in light of specific requirements of 41-3-102. The Supreme Court also found the District Court record insufficient to conclude whether or not implementation of a treatment plan was attempted or feasible. The rights of parents cannot be terminated unless the parents have failed to comply with a court-approved treatment plan. In re R.B., 217 M 99, 703 P2d 846, 42 St. Rep. 1055 (1985), followed in In re W.Z., 285 M 16, 946 P2d 125, 54 St. Rep. 1019 (1997), and In re A.W-M., 1998 MT 157, 289 M 333, 960 P2d 779, 55 St. Rep. 628 (1998).

Child Custody — Normal Development — Jurisdiction: When a child was present in Montana, having been abandoned by both of her natural parents, having been subjected to mistreatment and abuse, and having been threatened with further mistreatment and abuse, her situation met the test for jurisdiction expressed in 40-4-211. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Abandonment: Mother leaving infant with babysitter for 1 night and not returning for approximately 1 month supports a finding of abandonment and a dependency upon the public for support when 2 days after mother's departure welfare department was awarded temporary custody. In re Henderson, 168 M 329, 542 P2d 1204 (1975).

Attorney General's Opinions

Authority to Prevent Withholding of Treatment: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) has authority to initiate legal proceedings to prevent the withholding of medically indicated treatment for disabled infants with life-threatening conditions under the 1985 amendments to the child abuse, neglect, and dependency statutes. 41 A.G. Op. 85 (1986).

Law Review Articles

Family Law, Winnie, 41 Mont. L. Rev. 135 (1980).

Lawyers Were Children Once: An Ethical Approach to Strengthening Child Abuse and Neglect Legislation, Richardson, 31J. Legal Prof. 357 (2007).

41-3-103. Jurisdiction and venue.

Compiler's Comments

2023 Amendments — Composite Section: Section 26, Ch. 716, L. 2023, in (1) in middle of introductory clause inserted reference to the Montana Indian Child Welfare Act. Amendment effective July 1, 2023, and terminates June 30, 2025.

Section 1, Ch. 779, L. 2023, inserted (2)(b) concerning denial of a motion to change venue; and made minor changes in style. Amendment effective October 1, 2023.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

2011 Amendment: Chapter 223 at beginning of (1) inserted exception clause and near middle inserted "a person is subject to a proceeding under this chapter and"; inserted (1)(d) and (1)(e) relating to youth or guardian residing in Montana; at beginning of (2) substituted "Venue is proper in" for "Either", after "located" inserted "or has resided within 180 days before the filing of a petition under this part", and near end after "resides" substituted "or has resided within 180 days before the filing of a petition under this part" for "has initial jurisdiction over a youth alleged to be a youth in need of care"; and made minor changes in style. Amendment effective October 1, 2011.

2003 Amendment: Chapter 504 in (2) at beginning inserted "Either" and after "located" inserted language concerning county where parent or guardian resides and deleted former second sentence that read: "Venue may be transferred to the county of residence of the youth's parent or guardian." Amendment effective October 1, 2003.

2001 Amendment: Chapter 114 in (1) substituted "the district court has jurisdiction" for "the youth court has concurrent jurisdiction with the district court"; and substituted (2) giving initial jurisdiction over youth alleged to be in need of care to county where youth is located and authorizing venue transfer to youth's parent's or guardian's county of residence for former (2) that read: "(2) Venue is determined pursuant to 41-5-204." Amendment effective October 1, 2001.

1995 Amendment: Chapter 458 in (1)(c), after "neglected", deleted "or caused the dependency of"; and made minor changes in style. Amendment effective April 14, 1995.

Case Notes

Termination of Parental Rights — Removal of Infant — Mother Located in Another State — Department Policies Not Followed — Evidentiary Admissions Clarified: The Montana Department of Public Health and Human Services, Child and Family Services Division, became involved with a mother and child when the mother tested positive for methamphetamine and marijuana at the child's birth. During portions of the proceeding, the mother lived in different states, did not own a vehicle, did not have a driver's license, and could not make it to Montana due to weather. The District Court ultimately terminated the mother's parental rights, finding that the mother did not successfully complete her treatment plan and the condition rendering her unfit, unable, or unwilling to parent was unlikely to change. On appeal, the Supreme Court reversed, holding that the Department failed to provide reasonable efforts to place the child as close as possible to the mother's home in violation of the Department's policies, that it did not implement a service provision plan that could successfully address the mother's substance abuse problem, that the removal of an infant implicates different services than the removal of an older child, that it failed to take efforts to identify or locate a potential kinship placement, that it failed to provide reasonable efforts designed to reunify the mother and her child, and that the presumption in favor of termination in 41-3-604 was misplaced. The court then clarified In re M.C., 2017 MT 252, 389 Mont. 78, 403 P.3d 1266, to hold that it did not intend that case to be interpreted to permit courts to admit any and all written reports or evaluations or service-related documents over otherwise valid hearsay or foundation objections. In re R.J.F., 2019 MT 113, 395 Mont 454, 443 P.3d 387.

Youth in Need of Care — Subject Matter Jurisdiction for Termination Proceedings: A child was designated a youth in need of care after being removed from her mother's care. Following a termination hearing, the District Court terminated the father's rights. On appeal, the father argued that the District Court lacked subject matter jurisdiction over the termination proceedings because it had approved a "checklist" instead of a treatment plan for him. The Supreme Court affirmed, holding that as long as the child had been designated a youth in need of care, the District Court had subject matter jurisdiction over the proceedings. The court also clarified that there is no requirement that a parent be designated as an "offending parent" before a court can make decisions regarding the best interests of a child who is suspected of being abused or neglected. In re K.B., 2016 MT 73, 383 Mont. 85, 368 P.3d 722.

Parties No Longer Resident in Montana — Relinquishment of Montana Jurisdiction Proper: In 2000, a Montana District Court established child custody with the father, who lived in California, and held that the mother, a Montana resident, was not to have contact with the children until she addressed her psychological disorders. The father subsequently registered the Montana decision with the California courts to allow enforcement of the Montana decision in California, if necessary, and the mother moved to Minnesota. In 2007, the mother petitioned the Montana court to relinquish jurisdiction because none of the parties lived in Montana, but the court decided to retain jurisdiction and denied the petition, so the mother appealed. The father cited 41-3-103 in support of his contention that the Montana court retained jurisdiction because the case was a child abuse and neglect proceeding. However, Montana later adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which applies to and provides greater protections in child abuse and neglect proceedings, so the provisions of 40-7-103 prevail over 41-3-103. Under 40-7-202 of the UCCJEA, a Montana District Court retains exclusive, continuing jurisdiction of child custody proceedings until one of two specific events occurs, the second of which is a determination that none of the relevant parties presently reside in Montana. Thus, it was an abuse of discretion for the District Court to fail to make a determination whether the relevant parties lived in Montana. The Supreme Court reversed with instructions to relinquish jurisdiction over the Montana custody order. In re B.P. & A.P., 2008 MT 166, 343 M 345, 184 P3d 334 (2008).

Jurisdiction Based on Presence of Child in Montana: In a case in which the natural parents were residents of Wyoming but the child was born in Montana and present in Montana, the District Court had jurisdiction in an action to terminate parental rights under the abuse and neglect statutes, based on the presence of the child in Montana. In re Parental Rights of Baby Girl W., 249 M 206, 814 P2d 976, 48 St. Rep. 643 (1991).

Youth Court Jurisdiction Concurrent With District Court: The Youth Court has concurrent jurisdiction with the District Court over all youths who are within the state for any purpose. (See 2001 amendment.) Upon the petition for temporary custody filed by the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services), the Youth Court had the authority to determine that the child in question was a youth in need of care, to remove her from her mother's abusive home, and, following a dispositional hearing, to place her in the custody of her natural father. In re C.C., 237 M 246, 772 P2d 857, 46 St. Rep. 773 (1989).

Voluntary Relinquishment of Custody — Intervening Divorce — Custody Determined in Abuse and Neglect Proceeding: The District Court did not abuse its discretion in awarding custody of a child to his father after the parents, while still married, surrendered temporary custody to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) because of the actions of the mother. Subsequent to the surrender of the child but prior to the award of custody, the couple began dissolution proceedings. The mother contended the court should have terminated the abuse and neglect proceeding. There was substantial evidence that the father was stable and nonabusive and the mother had potential for further abuse. Once a determination of abuse or neglect has been made, the court proceeds to a dispositional hearing. The intervening divorce and collateral custody matter were not relevant to the court in this matter. In re M.M., 200 M 244, 650 P2d 784, 39 St. Rep. 1716 (1982).

Jurisdiction Based on Service: The District Court lacked jurisdiction to find a minor child dependent and neglected and to award her to the care of the child welfare service when service of citation was by publication and there was no service of notice of the action on the father who was a resident of the county. In re Young, 143 M 230, 388 P2d 379 (1964).

Residence of Petitioner:

Since the District Court's jurisdiction had to be determined as of the time a proceeding was commenced, the issue of the petitioner's residence did not become moot even though the petitioner had established the necessary residence since the hearing in the proceeding. (See 2001 amendment.) State ex rel. Cowan v. District Court, 131 M 502, 312 P2d 119 (1957).

Where petitioner was not domiciled and thus not a resident of the county where the child resided, the District Court was without power to attempt to confer jurisdiction by an amendment to conform to the alleged proof that petitioner was domiciled in such county. State ex rel. Cowan v. District Court, 131 M 502, 312 P2d 119 (1957).

41-3-106. Prosecution of offenders.

Compiler's Comments

2001 Amendment: Chapter 311 inserted (2) relating to a criminal charge; and made minor changes in style. Amendment effective October 1, 2001.

Attorney General's Opinions

County Power — "4-C's": Counties, jointly with the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services), may contract with local "4-C's" projects to provide coordination and support of child abuse prevention and treatment services. 37 A.G. Op. 105 (1978).

41-3-107. Interagency cooperation.

Compiler's Comments

1995 Amendment: Chapter 546 in (1) substituted "department of public health and human services" for "department of family services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: Inserted (2) relating to cooperative agreements. Amendment effective July 1, 1991.

1987 Amendment: Substituted "department of family services" for "county welfare department".

41-3-108. Child protective teams.

Compiler's Comments

2021 Amendment: Chapter 520 in (1) substituted "child protection specialist" for "social worker. Amendment effective October 1, 2021.

1999 Amendment: Chapter 566 near beginning of introductory clause inserted "county commissioners, guardian ad litem" and after "department" deleted "of public health and human services"; inserted (4) requiring representative of public school system on team; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 546 substituted "department of public health and human services" for "department of family services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1989 Amendment: At end required team to include member knowledgeable about Indian culture and family matters when Indian child involved; and made minor changes in form.

1987 Amendment: In first sentence substituted reference to Department of Family Services for reference to county welfare department and in third sentence, after "services", substituted "in a local service area" for "of the county welfare department".

41-3-109. Proceedings subject to Indian Child Welfare Acts.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 27, Ch. 716, L. 2023. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

Case Notes

No Findings on Active Efforts and Improper Evidentiary Standard Applied in Youth in Need of Care and Temporary Legal Custody Proceeding — Invalidation Not Required: The District Court adjudicated a child as a youth in need of care and granted temporary legal custody to the Department of Public Health and Human Services. No qualified expert witness testified at the hearing, and the District Court failed to apply the clear and convincing evidence standard required by the federal Indian Child Welfare Act of 1978 (ICWA). On appeal, the Supreme Court acknowledged that the District Court had not complied with the requirements of the ICWA, but the Supreme Court found that it was not required or appropriate to invalidate the proceedings as a result because the mother had stipulated to the adjudication of the child as a youth in need of care and the grant of temporary legal custody and the District Court had found that the child would suffer serious emotional or physical harm if placed in the mother's care. In re K.L.N., 2021 MT 56, 403 Mont. 342, 482 P.3d 650.

Determination of Children's Membership and Eligibility for Enrollment in Tribe — Requirements of Indian Child Welfare Act: The mother in a termination proceeding claimed that she and her two daughters were "direct descendant[s] of the Rocky Boy Band of Chippewa Indians" and that they qualified for enrollment. After the District Court terminated the mother's parental rights, she appealed. The Supreme Court found that the District Court had failed to confirm that the Department of Public Health and Human Services had sent notice of the involuntary child custody proceedings by certified mail, that the Chippewa Cree Tribe had received notice of the proceedings, or that verification of the status of one of the children had been requested. Concluding that the Department had failed to meet standards of the Indian Child Welfare Act, the court reversed and remanded for an appropriate threshold determination of the children's membership and eligibility for enrollment. In re L.A.G. & N.L., 2018 MT 255, 393 Mont. 146, 429 P.3d 629.

Active Efforts by State to Preserve Indian Families — Success Not Guaranteed: The Indian Child Welfare Act, 25 U.S.C. 1912(d), requires active efforts by the state to prevent the breakup of the Indian family. The family in this proceeding did not dispute the increased level of services but alleged that the state set up the family to fail. The Supreme Court found that the record did not show that the state actually caused the termination of the parents' parental rights; the outcome of remedial services depends on the parents' ability and willingness to develop the necessary skills to provide the child with a safe living environment, and the state cannot guarantee a successful outcome. In re I.B., 2011 MT 82, 360 Mont. 132, 255 P.3d 56.

Termination of Parental Rights — Requirements of Indian Child Welfare Act: Under the Indian Child Welfare Act of 1978, 25 U.S.C. 1901, et seq., the party seeking termination of an individual's parental rights to an Indian child under state law must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the efforts have proved unsuccessful. The party seeking termination has the burden of proving beyond a reasonable doubt that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. In re Custody of A.L.R., A.A.R., & T.C.R., 2002 MT 183, 311 M 76, 54 P3d 17 (2002). See also In re I.B., 2011 MT 82, 360 Mont. 132, 255 P.3d 56, In re D.A. and M.A., 2013 MT 191, 371 Mont. 46, 305 P.3d 824, and In re A.L.D., 2018 MT 112, 391 Mont. 273, 417 P.3d 342.

Law Review Articles

Administering Justice in Montana's Rural Courts, McKeon & Rice, 70 Mont. L. Rev. 201 (2009).

41-3-110. Audio or video testimony allowed.

Compiler's Comments

Effective Date: Section 10, Ch. 166, L. 2007, provided that this section is effective July 1, 2007.

41-3-112. Appointment of court-appointed special advocate — guardian ad litem.

Compiler's Comments

2017 Amendment: Chapter 132 in (1) in first sentence inserted "court-appointed special advocate as the" and inserted second sentence concerning appointment of guardian ad litem if court-appointed special advocate is not available; and made minor changes in style. Amendment effective October 1, 2017.

2005 Amendment: Chapter 382 in (1) in second sentence after "staff" inserted "who has a direct conflict of interest"; inserted (2) requiring a guardian ad litem to have appropriate training; and made minor changes in style. Amendment effective April 25, 2005.

1999 Amendment: Chapter 566 in (2)(a) after "investigations" deleted "that the guardian ad litem considers necessary"; inserted (2)(g) relating to filing of motions; inserted (3) providing that guardian's information is not hearsay; inserted (4) authorizing petition to remove or replace guardian; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendment: Chapter 516 in (2), near end of first sentence after "child's", inserted "best".

Applicability: Section 20, Ch. 516, L. 1997, provided that this section applies to proceedings commenced on or after October 1, 1997.

1993 Amendment: Chapter 434 in (1) inserted second sentence precluding appointment of the Department or its staff as guardian ad litem; and made minor changes in style. Amendment effective April 21, 1993.

1985 Amendment: At end of first sentence of (1) after "guardian ad litem", deleted "who, whenever possible, shall be an attorney"; and inserted (2) outlining duties of guardian ad litem.

Case Notes

Questioning by Guardian Ad Litem at Hearing Allowed — Partial Compliance — Extension of Temporary Legal Custody Proper: The Department of Public Health and Human Services petitioned for emergency protective services following reports of inappropriate behavior by the minors' parents. Eventually, at a hearing to terminate the father's parental rights, the District Court allowed the minors' guardian ad litem to question a child protection specialist and therapist over the objections of the father. The District Court subsequently terminated the father's parental rights. On appeal, the Supreme Court found that the District Court did not err in allowing the children's guardian ad litem to cross-examine witnesses, although some lines of questioning lacked foundation and should have not been permitted. The Supreme Court also found that the Department provided reasonable efforts to reunify the father with the children, that the father's partial compliance with the treatment plan was not sufficient for compliance, that while the Department did not file for a formal motion to extend an order for temporary legal custody the Department nevertheless requested it, and that the father failed to identify which of his three attorneys he believed were ineffective over the course of his 4-year case. In re B.F., 2020 MT 223, 401 Mont. 185, 472 P.3d 142.

Abuse of Discretion to Allow CASA to Subpoena Father's Therapy Notes and to Cross-Examine Him — Harmless Error: In a parental termination proceeding, the District Court allowed the child's court-appointed special advocate (CASA) to subpoena the father's therapy notes and allowed her to cross-examine him. After his parental rights were terminated, the father appealed. The Supreme Court agreed that the District Court had abused its discretion and that the CASA had exceeded the scope of her authority; however, based on other evidence in the record, it concluded the error to be harmless. In re J.D., 2019 MT 63, 395 Mont. 141, 437 P.3d 131.

Admission of Drug Results at Termination Hearing Improper — Sufficient Evidence in Support of Termination of Parental Rights: During a parental rights termination hearing, the District Court, citing 41-3-112(4), admitted the parents' drug test results through a court-appointed special advocate (CASA) and subsequently terminated the parents' rights. On appeal, the Supreme Court concluded that admitting the drug test results through the CASA was erroneous. The Supreme Court stated that 41-3-112(4) was enacted to allow a guardian ad litem to gather information from collateral sources to form and make recommendations as to the best interest of the child and that the subsection was not enacted as a bypass for the Department of Public Health and Human Services to admit evidence that would otherwise be inadmissible or to cure a party's failure to call a witness to testify. However, the Supreme Court affirmed, finding that admitting the drug test results was harmless and reversal was not warranted because substantial evidence supported the District Court's determination that the parents had failed to complete their treatment plans and that their conduct or the conditions rendering them unfit were unlikely to change within a reasonable time. In re I.M., 2018 MT 61, 391 Mont. 42, 414 P.3d 797.

Party Entitled to Cross-Examine GAL Issuing Report — Violation of Due Process — Harmless Error: In a termination of parental rights proceeding, the District Court did not allow the father to cross-examine the child's guardian ad litem (GAL) who had prepared and submitted a written report. The Supreme Court held that a court violates a party's due process rights when it does not allow the party to cross-examine a witness who has issued a written report to the court. In this case, the failure to allow the father to examine the GAL constituted harmless error, as the report did not contain any information not already before the District Court. In re R.M.T., 2011 MT 164, 361 Mont. 159, 256 P.3d 935.

No Denial of Fair Procedures in Grant of Long-Term Custody of Child to State — Failure of Parent to Properly Object to Procedures at Hearing: Long-term custody of a child was granted to the state. The father appealed on grounds that he was denied fundamentally fair procedures in the custody proceedings, contending that: (1) the District Court failed to hold a permanency hearing within the statutory deadline; (2) the state failed to submit the statutorily required prehearing report to the District Court; (3) the state failed to develop a plan with any elements of permanency; (4) the state tried to terminate his visitation rights without satisfying the requisite statutory criteria and burden of proof; and (5) the District Court erroneously granted the state a second chance to prove its case. The Supreme Court considered each claim in turn, and affirmed. Although the permanency hearing occurred after the statutory deadline in 41-3-412 (renumbered 41-3-445), the father did not raise the issue in District Court or advise the District Court of the appropriate remedy as required, and raising the issue in a proposed conclusion of law did not constitute a proper objection. The father also neglected to object to the absence of a prehearing report either at the hearing or by pretrial motion, so those issues were not properly preserved for appeal. The contention that the state failed to develop a plan with any elements of permanency was belied by evidence showing that the child had made reasonable progress toward a settled placement. The question of whether there was any merit to the state's attempt to terminate visitation was moot because the District Court reinstated visitation at the permanency hearing. Moreover, disallowing the state a second opportunity to present its case would have required that the District Court overlook the best interests of the child by ignoring substantial evidence that the child continued to suffer both emotionally and mentally. It was the father who objected to the form of the evidence as first offered, and because the evidence was originally offered in a form authorized by statute, the child's best interests were paramount, and the father could not demonstrate prejudice in the District Court's granting of another hearing to hear the evidence. In re M.W. & L.W., 2002 MT 126, 310 M 103, 49 P3d 31 (2002).

Denial of Request to Remove Guardian Ad Litem Not Error: At the hearing on the petition for TIA and protective services (see 2001 amendment to 41-3-427), the mother requested removal of the guardian ad litem who had worked with the family for 2 years. The District Court declined, which was not error in light of the lack of evidence that the guardian had not performed the required statutory duties. In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982, 57 St. Rep. 179 (2000), affirmed in In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

No Standing by Former Parent to Object to Child's Placement or Assert Child's Rights: Once the parent-child relationship is terminated by the District Court, a former parent has no standing to object to the court's subsequent placement of the child with the Department or by adoption. Similarly, a former parent has no standing to assert a violation of the child's rights as guardian ad litem because the former parent no longer represents the child. In re E.A.T. & T.A.T., 1999 MT 281, 296 M 535, 989 P2d 860, 56 St. Rep. 1133 (1999).

No Requirement That Parent Pay Fees and Costs of Guardian Ad Litem: Pursuant to a petition for temporary investigative authority and protective services (see 2001 amendment to 41-3-427), three minor children were removed from their home and later returned to their parents' care. The District Court ordered the parents to reimburse the county for the fees and costs of the guardian ad litem appointed to represent the children. However, neither the plain language of 41-3-303 (renumbered 41-3-112), its legislative history, nor its statutory context suggest any intent by the Legislature to require parents to pay for guardian ad litem representation following a petition for protective services. The District Court order constituted reversible error. In re Inquiry Into A.W., D.G., & M.G., Jr., 1999 MT 42, 293 M 358, 975 P2d 1250, 56 St. Rep. 186 (1999).

Failure to Notify Guardian Ad Litem of Adoption Proceedings — Reversible Error: A guardian ad litem is required to represent a child in every case in which child abuse or neglect is alleged, and that representation continues until the child is permanently placed. Therefore, failure by the court to notify an unplaced child's guardian ad litem of a hearing on a petition for permanent adoption constituted reversible error. In re F.H., 272 M 342, 901 P2d 96, 52 St. Rep. 791 (1995).

41-3-113. Appeals.

Compiler's Comments

2003 Amendment: Chapter 504 in (2) at end of first sentence inserted language concerning not divesting jurisdiction for child's best interest and protection of health and safety; inserted (3) concerning child's legal status when there is a reversal of order appealed; and made minor changes in style. Amendment effective October 1, 2003.

Case Notes

Mother Lacked Standing to Challenge Placement of Indian Child After Parental Rights Terminated: The District Court issued an order terminating the parental rights of the appellant mother and ordering the placement of two children, C.B.D. and P.M.P., in separate placements. On appeal, the mother challenged the placement of P.M.P. only and did not challenge the termination itself. The Supreme Court held that the mother lacked standing to appeal P.M.P.'s placement. Because her appeal came after the District Court terminated her parental rights, she no longer had any legal status relative to P.M.P. and therefore she was alleging an injury to a civil right that she no longer had and made no effort to regain. The appeal of P.M.P.'s placement did not stay the termination of her parental rights, and therefore she lacked standing to maintain her appeal. In re C.B.D. & P.M.P., 2017 MT 108, 387 Mont. 347, 394 P.3d 202.

Standing to Appeal Dismissal of Petition for Adjudication: After the District Court dismissed the state's petition for the adjudication of two children as youths in need of care, counsel for the children appealed although the children wished to return to their mother. The mother argued that the children did not have standing to appeal and that counsel for the children should have advocated only for what the children desired. The Supreme Court concluded that the children had standing to appeal and that counsel acted appropriately by advocating for adjudication despite the children's contrary desires. In re K.H. and K.M., 2012 MT 175, 366 Mont. 18, 285 P.3d 474.

41-3-115. Foster care review committee — foster care reviews — permanency hearings.

Compiler's Comments

2007 Amendment: Chapter 166 inserted (3)(c) requiring the committee to consider the appropriateness of placement of a child out of state and to consider both in-state and out-of-state placement when a child will not be returned to the parent; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendment: Chapter 382 in (1) inserted second sentence pertaining to foster care reviews; in (2)(a) in second sentence decreased minimum number of committee members from five to three and inserted third sentence pertaining to the socioeconomic, racial, and ethnic makeup of the committee; in (2)(b)(i) after "department" inserted "who may not be responsible for the placement of the child or have any other direct conflict of interest"; deleted former (2)(b) that read: "(b) a representative of the youth court"; deleted former (2)(d) that read: "(d) a representative of a local school district"; deleted former (2)(f) that read: "(f) if there is one, the foster parent of the child whose care is under review. The foster parent's appointment is effective only for and during that review"; inserted (2)(c) listing optional members who may be on the committee; in (3)(a) at end of second sentence after "established" substituted "under the Adoption and Safe Families Act of

1997, 42 U.S.C. 675(5)" for "by the department. The time limit must comply with the Adoption and Safe Families Act of 1997, as enacted"; inserted (3)(b) requiring the committee to hear cases for each child in foster care and outlining factors to be considered by the committee; inserted (3)(c) allowing the committee to hear cases of children remaining or returning to their homes; deleted former (3) and (4) that read: "(3) The department shall provide the committee with guidelines for operation of the committee. Within 30 days of the foster care review, the committee shall provide the youth court and the department with a written report of its findings and recommendations for further action by the youth court or the department.

(4) The department shall adopt rules necessary to carry out the purposes of this section. The rules must provide for policies and procedures consistent with the provisions regarding notice, written findings and recommendations, conflict of interest, recordkeeping, sibling reviews, disclosure and immunity under 41-3-1010, and the deliberation provisions of 41-3-1012"; inserted (4) providing guidelines for sending notice prior to a review; inserted (5) authorizing the committee to hold joint or separate reviews for siblings; inserted (6) requiring the committee to prepare findings and recommendations after a permanency hearing; inserted (7) pertaining to a party objecting to the committee's findings in a permanency hearing and obtaining a hearing on the objections by the court; in (9) in two places substituted "district court" for "youth court"; and made minor changes in style. Amendment effective April 25, 2005.

2001 Amendments — Composite Section: Chapter 311 in (1) substituted "district court judge" for "youth court judge"; and in (2) at end substituted "the Adoption and Safe Families Act of 1997, as enacted" for "federal law and may not be later than the 12-month anniversary date of the child's placement into foster care". Amendment effective October 1, 2001.

Chapter 570 in (2) in third sentence after "comply with" substituted "the Adoption and Safe Families Act of 1997" for "federal law and may not be later than the 12-month anniversary date of the child's placement into foster care"; in (4) inserted second sentence requiring that rules be consistent with provisions regarding notice, written findings and recommendations, conflict of interest, recordkeeping, sibling reviews, disclosure and immunity, and deliberation; and made minor changes in style. Amendment effective July 1, 2001.

1993 Amendment: Chapter 610 at beginning of (1) inserted exception clause; and made minor changes in style. Amendment effective July 1, 1993.

1987 Amendments: Chapter 260 inserted (1)(e) requiring that, for Indian child whose care is under review, foster care review committee appoint, if possible, Indian person knowledgeable about Indian culture.

Chapter 609 in first sentence of (2), after "department", deleted "or the youth court" and after "41-3-1122" deleted "or 41-3-1121(2)".

1983 Amendment: Chapter 201, in (1), increased minimum committee membership from four to five; inserted (1)(e) requiring appointment of foster parent to foster care review committee.

Chapter 465, in (2), changed "41-3-104" to "41-3-1122" and "41-5-801(2)" to "41-3-1121(2)".

Statement of Intent: The statement of intent attached to SB 228 [Ch. 297, L. 1981] provided: "A statement of intent is required for this bill because in addition to amending sections 41-3-104, 41-3-501, 41-5-801 [renumbered 41-3-1122; 41-3-1102; and 41-3-1121, now repealed], and 53-4-112 [renumbered 52-2-112], the bill creates rulemaking authority for the Department of Social and Rehabilitation Services [now Department of Public Health and Human Services] to administer a review of children in foster care under the department's supervision or for whom the department is making payment under section 41-3-104(2) or 41-5-801(2) [renumbered 41-3-1122(2); and 41-3-1121(2), now repealed].

It is the intent of this bill to indicate the legislature's support of permanency planning for children in foster care and to direct the department to continue its efforts in this area. This bill is intended to encourage reduction of the numbers of children in foster care; to expediently return children to their natural homes when possible, or to free the children for alternate permanent placements; thereby assuring the appropriate utilization of public funds and that the best interest of children in placement in Montana are being met by the department's program.

Rulemaking is primarily necessary to implement Section 2 [41-5-807] [renumbered 41-3-1115] and subsection (3) of Section 1 of the bill [41-3-104] [renumbered 41-3-1122]. These sections require that a foster care review committee be established by the court to conduct reviews of children in foster care and provide written reports to the youth court and the department. Rules would identify which children are to be reviewed, and would list precisely what information is to be shared with the review committee, when the committees are to conduct business, the general guidelines for the committees' operation, the time limitations for conducting the reviews, and who may participate in the review. As for the information to be reported, the rules will ask for:

(1) summary reports of the review to include the recommendations of the committee regarding the continuation or discontinuation of foster care and reasons; treatment needs of the child; and court action;

(2) sufficient information to allow the tracking of the reviews; to facilitate: follow-up services, compliance with court orders, agency decisions, and response to committee recommendations; and to provide necessary reports on the department's foster care program."

Administrative Rules

Title 37, chapter 50, subchapter 4, ARM Foster care review committee.

41-3-118. Purpose.

Compiler's Comments

Effective Date: Section 5, Ch. 127, L. 1999, provided: "[This act] is effective July 1, 1999."

41-3-119. Foster parent counseling services.

Compiler's Comments

Effective Date: Section 5, Ch. 127, L. 1999, provided: "[This act] is effective July 1, 1999."

41-3-120. Liability insurance for foster parents.

Compiler's Comments

Effective Date: Section 4, Ch. 165, L. 2007, provided that this section is effective July 1, 2007.

41-3-127. Certification required for use of title — exceptions.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 22, Ch. 713, L. 2023. Amendment effective October 1, 2023.

Effective Date: This section is effective October 1, 2021.

41-3-128. Certificate requirements — supervision — fees.

Compiler's Comments

2023 Amendments — Composite Section: Section 1, Ch. 384, L. 2023, in (1)(a)(v) inserted "including research on the trauma a child experiences when removed from the home"; and made minor changes in style. Amendment effective July 1, 2023.

Section 28, Ch. 716, L. 2023, in (1)(a)(vii) inserted reference to the Montana Indian Child Welfare Act; and made minor changes in style. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

Effective Date: This section is effective October 1, 2021.

41-3-129. Certificate renewal — continuing education.

Compiler's Comments

Effective Date: This section is effective October 1, 2021.

41-3-130. Implementation of certification requirement for child protection specialists.

Compiler's Comments

Effective Date: This section is effective October 1, 2021.

41-3-131. Rulemaking authority — management of court-ordered child support.

Compiler's Comments

2023 Enactment — Coordination — Codification Change: The enactment of sec. 1, Ch. 657, L. 2023, was replaced by sec. 4, Ch. 657, L. 2023, a coordination section.

Section 3, Ch. 657, L. 2023, provided that sec. 1 was to be codified in Title 41, chapter 3, part 1. The Code Commissioner has codified the replacement language as the new subsection (2) in this section.

Effective Date: Section 5, Ch. 657, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 19, 2023.

Transition: Section 2, Ch. 657, L. 2023, provided: "The department of public health and human services shall adopt rules pursuant to [section 1] [41-3-131(2)] by September 1, 2023."

Effective Date: This section is effective October 1, 2001.

41-3-132. Volunteer program — rulemaking — report.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

41-3-135. Vaccination status prohibited as grounds for action.

Compiler's Comments

Effective Date: Section 7, Ch. 286, L. 2023, provided: "[This act] is effective on passage and approval." Approved April 26, 2023.

Severability: Section 6, Ch. 286, L. 2023, was a severability clause.

Part 2
Reports and Investigations

Part Administrative Rules

Title 37, chapter 47, subchapter 3, ARM Child protective services.
Title 37, chapter 47, subchapter 6, ARM Confidentiality of case records.
Title 37, chapter 50, ARM Foster care services and guardianship services.

Part Case Notes

No Standing by Former Parent to Object to Child's Placement or Assert Child's Rights: Once the parent-child relationship is terminated by the District Court, a former parent has no standing to object to the court's subsequent placement of the child with the Department or by adoption. Similarly, a former parent has no standing to assert a violation of the child's rights as guardian ad litem because the former parent no longer represents the child. In re E.A.T. & T.A.T., 1999 MT 281, 296 M 535, 989 P2d 860, 56 St. Rep. 1133 (1999).

Part Law Review Articles

Expert Testimony in Child Sexual Abuse Cases in Montana: A Proposal for Change, Harrison, 54 Mont. L. Rev. 297 (1993).

Parents as Mandatory Reporters of Child Abuse and Neglect: Establishing an Explicit Duty to Protect, Martinez, 51 Wayne L. Rev. 467 (2005).

41-3-201. Reports.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 382, L. 2023. Amendment effective October 1, 2023.

2021 Amendments — Composite Section: Chapter 216 inserted (5)(a)(ii) regarding limited sharing of information; and made minor changes in style. Amendment effective October 1, 2021.

Chapter 520 in (2)(e) after "social worker" inserted "licensed pursuant to Title 37, child protection specialist". Amendment effective October 1, 2021.

2019 Amendment: Chapter 367 inserted (2)(k) including an employee of the department while in conduct of the employee's duties; and made minor changes in style. Amendment effective May 7, 2019.

Preamble: The preamble attached to Ch. 367, L. 2019, provided: "WHEREAS, childhood sexual abuse is an epidemic in Montana, and there are many instances in recent years of victims of childhood sexual abuse being unable to seek criminal or civil justice as the result of short statute of limitations windows in Montana law; and

WHEREAS, the sexual abuse of children is despicable conduct that must be reported, investigated, and prosecuted to create specific deterrence; and

WHEREAS, the State of Montana must ensure appropriate action when mandatory reporters and others report childhood sexual abuse; and

WHEREAS, regardless of the location of the crime, to protect Montana's children, the Department of Public Health and Human Services and the Department of Justice, working closely with local law enforcement and prosecutors, must respond to allegations of sexual abuse with effective investigations and, when viable, effective prosecutions; and

WHEREAS, childhood sexual abuse causes lifelong trauma to survivors of the same; and

WHEREAS, the average reporting age of victims of childhood sexual abuse is 52 years old, requiring the Legislature to take a meaningful look into the time periods presently allowed in Montana law to pursue criminal and civil court action; and

WHEREAS, upon review, the Legislature has determined that the current truncated time periods to bring criminal prosecutions and civil litigation related to allegations of sexual abuse are not in line with mental health science as to reporting of childhood sexual abuse, are too narrow, and should be extended."

Saving Clause: Section 15, Ch. 367, L. 2019, was a saving clause.

Severability: Section 16, Ch. 367, L. 2019, was a severability clause.

2017 Amendment: Chapter 235 inserted (5)(a)(iii) relating to the child abuse and neglect review commission; and made minor changes in style. Amendment effective April 25, 2017, and terminates September 30, 2021.

Effective Date — Applicability: Section 11, Ch. 235, L. 2017, provided: "[This act] is effective on passage and approval and applies to child abuse and neglect cases resulting in a fatality or near fatality that occurred on or after [the effective date of this act]." Approved April 25, 2017.

2013 Amendment: Chapter 337 inserted (5) concerning sharing of information with persons required to report; and made minor changes in style. Amendment effective October 1, 2013.

2011 Amendments — Composite Section: Chapter 223 near end of (1) after "neglected" inserted "by anyone regardless of whether the person suspected of causing the abuse or neglect is a parent or other person responsible for the child's welfare". Amendment effective October 1, 2011.

Chapter 278 in (2)(h) substituted "15-6-201(2)(b)" for "15-6-201(2)(a)". Amendment effective October 1, 2011.

Applicability: Section 6, Ch. 278, L. 2011, provided: "[This act] applies to tax years beginning after December 31, 2011."

2007 Amendment: Chapter 166 in (2)(c) at beginning deleted "Christian Science practitioners and"; in (2)(h) after "clergy" inserted "as defined in 15-6-201(2)(a)"; inserted (3) requiring a professional involved in the delivery or care of an infant to report to the department any infant known to be affected by a dangerous drug; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendment: Chapter 382 in (1) at end after "services" deleted "or its local affiliate"; and made minor changes in style. Amendment effective April 25, 2005.

2001 Amendment: Chapter 311 inserted (2)(j) relating to employees of certain department contractors; and made minor changes in style. Amendment effective October 1, 2001.

1997 Amendment: Chapter 514 at end of (1) deleted "which then shall notify the county attorney of the county where the child resides"; in (2)(e) inserted "staff of a resource and referral grant program organized under 52-2-711 or of a child and adult food care program"; and made minor changes in style. Amendment effective May 2, 1997.

1995 Amendments — Composite Section: Chapter 458 inserted (2)(i) regarding guardian or advocate; and made minor changes in style. Amendment effective April 14, 1995.

Chapter 546 in (1) substituted "department of public health and human services" for "department of family services"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: Inserted (2)(h) including clergy in list of professionals and officials required to report suspected child abuse or neglect; at beginning of (4) inserted exception clause; inserted (4)(b) and (4)(c) concerning clergyperson or priest not being required to report if knowledge of abuse is result of confidential communication or confession and if person making statement does not authorize disclosure or if communication is required to be confidential by church law, doctrine, or practice; and made minor changes in style.

1989 Amendment: In (1), after "cause to suspect", substituted "as a result of information they receive in their professional or official capacity that a child is abused or neglected" for "that a child known to them in their professional or official capacity is an abused or neglected child"; and at end of (4) deleted "if the person came into possession of such information as a result of his treatment of the child".

1987 Amendment: Substituted "department of family services" for "department of social and rehabilitation services".

1981 Amendment: Substituted present subsection (2)(e) for former subsection (2)(e), which read: "(e) a social worker, licensed day-care center or any other licensed child-care facility;".

Case Notes

Claims Alleging Negligence Based on Failure to Report Child Abuse — Church Exception Applied: The plaintiffs, all of whom were members of the defendant church, were victims of sexual abuse by their stepfather. The victims reported the abuse to church elders as it was ongoing. Although church elders investigated, none of them reported the abuse to the police. Later, the plaintiffs sued the church for negligence for the elders' failure to report the abuse to the authorities. The District Court granted the plaintiffs partial summary judgment on their negligence per se claim, and the plaintiffs were awarded $35 million by the jury. On appeal, the defendant argued that the District Court erred as a matter of law because church elders are excepted from general mandatory reporting requirements under 41-3-201. The Supreme Court agreed that the elders were not mandatory reporters because the church had a doctrine, canon, or practice that required its clergy to keep reports of child abuse confidential. Accordingly, the Supreme Court reversed and entered summary judgment in favor of the defendant. Nunez v. Watchtower Bible & Tract Soc'y, 2020 MT 3, 398 Mont. 261, 455 P.3d 829. See also Watchtower Bible & Tract Soc'y of N.Y., Inc. v. 20th Judicial District Court, 2021 MT 13, 403 Mont. 57, 479 P.3d 946, in which the Supreme Court determined it was within the District Court's discretion on remand to allow the plaintiff to amend her complaint to revive her common law negligence claim.

Findings of District Court Regarding Custody of Child With Mother Not Erroneous Despite Evidence of Inappropriate Physical Contact Between Child and Mother's Relative: As part of a paternity action, the mother was awarded primary physical custody, and the father appealed. An amended parenting plan arrived at during mediation gave each parent physical custody of the child during alternating months. Near the end of one month's visit with the father, the child divulged that inappropriate physical contact with her stepgrandfather had occurred while in the mother's custody. The father moved for modification of the parenting plan. The District Court was faced with conflicting evidence in the case, receiving testimony from the stepgrandfather that no inappropriate touching occurred, as well as testimony from professionals who opined that sexual abuse had occurred. Additional expert testimony suggested that the child's constant travel was a possible cause of her troubling behavior and that the experts who suggested that sexual abuse occurred had not followed standard protocols when interviewing the child. Lay testimony indicated that it was unlikely that the stepgrandfather had an opportunity to commit the alleged abuse. The court ultimately determined that sexual abuse had not been proved. The father appealed on grounds that the court's findings were insufficient, that the court erred in not giving the father custody based on the evidence presented, and that the court erred by apparently rejecting the testimony of the child's clinical psychologist and the disclosures made by the child relating to sexual abuse. The Supreme Court noted that credibility determinations are within the province of the trier of fact and held that, in light of the conflicting testimony, the trial court's findings and conclusions were sufficient to support the court's decision. Although the trial court did not specifically articulate the elements of 40-4-212, it clearly made determinations that it considered to be in the child's best interests. Failure to list the contentions of a particular witness, such as the child's clinical psychologist, was not sufficient to determine a per se abuse of discretion on the part of the trial court. Without a clear showing of abuse of discretion, the Supreme Court declined to disturb the decision and affirmed the denial of the father's motion to modify the parenting plan. In re Paternity & Custody of A.D.V., 2001 MT 74, 305 M 62, 22 P3d 1124 (2001).

Jury to Be Informed of Duty to Report: In a negligence action alleging abuse of a foster child, the Supreme Court reversed, ruling that the District Court erred in refusing to instruct the jury of the Department's statutory duty to notify the County Attorney of a child abuse report. Newville v. St., 267 M 237, 883 P2d 793, 51 St. Rep. 758 (1994).

Reporting Mandate and Immunity Applied to Social Worker Reporting Event Sixteen Years Previous: A clinical social worker running a therapy group was subject to the reporting mandate of this section, despite assurances of strict confidentiality and despite the fact that alleged incidents of sexual abuse occurred 16 years earlier. Absent evidence that the social worker acted in bad faith or with malicious purpose, the immunity granted by 41-3-203 was properly extended. Gross v. Myers, 229 M 509, 748 P2d 459, 44 St. Rep. 2176 (1987).

Ability to Support Child: Since ability of parents to support children was not determined in compliance with sections 10-506 and 10-507, R.C.M. 1947 (now repealed), but was left to testimony to be elicited at a later hearing, order compelling parents to pay support costs in action depriving them of the children was set aside. In re Phelps, 145 M 557, 402 P2d 593 (1965).

Attorney General's Opinions

Centralized Intake System Authorized — Fulfillment of Reporting Requirements Absent Properly Adopted Administrative Rule: By amendment in 2001, the Legislature required the Department of Public Health and Human Services to assess reports of child abuse or neglect in order to determine whether investigation or some lesser response is appropriate and granted the

Department the authority to determine the appropriate response time, but did not specify how the Department was to implement the legislation. The Department developed the centralized intake system as the method to meet the statutory directive. However, the Department established the system without formal adoption as an administrative rule. Because the centralized intake system implements a law and affects private rights or procedures available to the public, the Attorney General held that the system is a rule, subject to the Montana Administrative Procedure Act. Thus, until adopted as an administrative rule, the centralized intake system may not be used to restrict which Department personnel may receive a report. Further, counties are no longer involved in providing child protective services, so they are no longer local affiliates of the Department, as the term is used in this section. Therefore, mandatory reporters may fulfill their reporting obligations by reporting child abuse and neglect to a local child protective services worker or supervisor or to the Department through the Centralized Intake Bureau. 50 A.G. Op. 4 (2004).

Balance of Competing State Interests in Prevention and Reporting of Child Abuse — Abrogation of Communication Privileges by Statute: Although the state has competing interests in the prevention of child abuse and neglect and in protecting the communication privileges between physicians or mental health practitioners and their patients, the communication privilege is abrogated under 41-3-201 in cases where the professional obtains the information as a result of his treatment of the child. 42 A.G. Op. 7 (1987).

Statutory Reporting Requirements Not Preempted by Federal Confidentiality Provisions: The provisions of this section requiring disclosure of child abuse or neglect known by a chemical dependency counselor are not preempted by the confidentiality provisions of the federal Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act amendments of 1974, 42 U.S.C. 290dd-3. 42 A.G. Op. 7 (1987).

41-3-202. Action on reporting.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 195, L. 2023. Amendment effective October 1, 2023.

2021 Amendments — Composite Section: Chapter 19 in (5)(a) in middle of first sentence substituted "enter into a written prevention plan" for "voluntary protective services". Amendment effective July 1, 2021.

Chapter 364 in (1)(b)(i) in two places after "sexual abuse or sexual exploitation" inserted "when the alleged perpetrator of the sexual abuse or sexual exploitation was 12 years of age or older". Amendment effective October 1, 2021.

Chapter 520 throughout section substituted "child protection specialist" for "social worker". Amendment effective October 1, 2021.

2019 Amendments — Composite Section — Coordination: Chapter 367 inserted (1)(b) regarding action upon receipt of a report involving alleged or suspected sexual abuse or sexual exploitation unless the victim has sought services under a condition that criminal conduct not be reported; in (5)(b) after "social worker" deleted "county attorney" (rendered void by Ch. 382); in (6) at end inserted sentence regarding 25-year retention period; and made minor changes in style. Amendment effective May 7, 2019.

Section 14, Ch. 367, L. 2019, a coordination section, in (6) in last sentence substituted "safety and risk assessment" for "report".

Chapter 382 in (1)(c) in first sentence near beginning substituted "an investigation and a safety and risk assessment are required, a social worker shall" for "an investigation is required, a social worker, the county attorney, or a peace officer shall" and at end inserted "and perform a safety and risk assessment to determine whether the living arrangement presents an unsafe environment for the child" and in second and third sentences in three places substituted reference to safety and risk assessment for reference to investigation; in (2) substituted current second and third sentences for former text that read: "However, the investigation must within 48 hours result in the development of independent, corroborative, and attributable information in order for the investigation to continue. Without the development of independent, corroborative, and attributable information, a child may not be removed from the home"; in (3) at end of first sentence substituted "conducting the safety and risk assessment" for "assessing the family and planning for the child"; in (5)(a) substituted "safety and risk assessment" for "investigation" and substituted "child is suffering abuse or neglect" for "child suffered abuse or neglect"; in (5)(a)(i) at end substituted "the determinations of the safety and risk assessment" for "its determination regarding abuse or neglect of a child"; in (5)(a)(ii) substituted "the determinations of the safety and risk assessment" for "its investigation and determination"; in (5)(b) and (5)(c) substituted current text concerning destruction and maintenance of records for former (5)(b) and (5)(c) (see 2019 Session Law for former text); in (6) in first sentence substituted "safety and risk assessment" for "report", in second sentence after "Subject to" inserted "time periods set forth in", and at end substituted "safety and risk assessment determinations" for "determinations of child abuse and neglect cases"; and made minor changes in style. Amendment effective October 1, 2019.

Applicability: Section 9, Ch. 382, L. 2019, provided: "[This act] applies to all reports received on or after [the effective date of this act]." Effective October 1, 2019.

Preamble: The preamble attached to Ch. 367, L. 2019, provided: "WHEREAS, childhood sexual abuse is an epidemic in Montana, and there are many instances in recent years of victims of childhood sexual abuse being unable to seek criminal or civil justice as the result of short statute of limitations windows in Montana law; and

WHEREAS, the sexual abuse of children is despicable conduct that must be reported, investigated, and prosecuted to create specific deterrence; and

WHEREAS, the State of Montana must ensure appropriate action when mandatory reporters and others report childhood sexual abuse; and

WHEREAS, regardless of the location of the crime, to protect Montana's children, the Department of Public Health and Human Services and the Department of Justice, working closely with local law enforcement and prosecutors, must respond to allegations of sexual abuse with effective investigations and, when viable, effective prosecutions; and

WHEREAS, childhood sexual abuse causes lifelong trauma to survivors of the same; and

WHEREAS, the average reporting age of victims of childhood sexual abuse is 52 years old, requiring the Legislature to take a meaningful look into the time periods presently allowed in Montana law to pursue criminal and civil court action; and

WHEREAS, upon review, the Legislature has determined that the current truncated time periods to bring criminal prosecutions and civil litigation related to allegations of sexual abuse are not in line with mental health science as to reporting of childhood sexual abuse, are too narrow, and should be extended."

Saving Clause: Section 15, Ch. 367, L. 2019, was a saving clause.

Severability: Section 16, Ch. 367, L. 2019, was a severability clause.

2013 Amendment: Chapter 61 inserted (8) requiring sharing of information with reporters of child abuse or neglect. Amendment effective October 1, 2013.

2005 Amendment: Chapter 382 in (7) at end after "department" deleted "through its local office"; and made minor changes in style. Amendment effective April 25, 2005.

2003 Amendments — Composite Section: Chapter 406 inserted (5)(c) requiring department and social worker conducting investigation to destroy unsubstantiated child abuse or neglect reports 30 days after end of 3 years of unsubstantiated determination unless person has previous or subsequent unsubstantiated report or order issued and allowing person who is subject of unsubstantiated report and has no subsequent report or order issued prior to October 1, 2003, and after elapse of 3-year time period to request destruction of records; in (6) inserted reference to subsection (5)(c); and made minor changes in style. Amendment effective October 1, 2003.

Chapter 555 in (5)(a) near middle before "protective services" inserted "emergency" and inserted "or voluntary protective services, pursuant to 41-3-302"; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 311 in (1) near beginning of first sentence inserted "the department shall promptly assess the information contained in the report and make a determination regarding the level of response required and the timeframe within which action must be initiated. If the department determines that an investigation is required". Amendment effective October 1, 2001.

1999 Amendment: Chapter 566 near beginning of (1) after "report" deleted "as required by 41-3-201"; in (3) at beginning of third sentence substituted "If a child interview is considered necessary" for "If considered appropriate by" and after "peace officer" substituted "may conduct an interview" for "conducting an interview of the child, an employee of the school attended by the child involved may participate in any interview" and inserted fourth sentence authorizing interview to be conducted in presence of parent, guardian, or employee of school or facility; in (4) at beginning inserted reference to 41-3-205(3) and in two places inserted reference to audiotape; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendments: Chapter 514 in (1), in first sentence, inserted "the circumstances surrounding the allegations of abuse or neglect of the child, which may include an investigation at", inserted "the child's school or day-care facility", and after "or any other place where the child is present" deleted "into the circumstances surrounding the injury of the child" and near end of second sentence inserted "state or"; in (2), near beginning of first sentence, substituted "of alleged abuse or neglect" for "into the home of the child"; in (3), in third sentence after "employee of the", deleted "public" and at end deleted "if the child is enrolled in kindergarten through 8th grade"; in (5)(a), in first sentence, substituted "the department has reasonable cause to suspect" for "it appears" and after "abuse or neglect" substituted "the department may provide" for "the department shall provide" and in second sentence deleted provision that the Department shall advise the County Attorney of its investigation; inserted (5)(a)(i) requiring the Department, after interviewing the parent or guardian, if reasonably available, to document its determination regarding abuse or neglect; in (5)(a)(ii), at beginning, inserted "notify" and at end inserted "and determination, unless the notification can reasonably be expected to result in harm to the child or other person"; in (5)(b), in first sentence near beginning, substituted "is determined" for "appears", after "department" inserted "and the social worker, county attorney, or peace officer who conducted the investigation into the circumstances surrounding the allegations of abuse or neglect", and after "destroy all" inserted "of their" and in second sentence increased the completion date from 20 days to 30 days; in (6), in second sentence, substituted "documenting investigations and determinations of" for "containing"; and in (7), at end, substituted "through its local office" for "its local affiliate, and the county attorney of the county in which the facility is located". Amendment effective May 2, 1997.

Chapter 516 in (1), at end of second sentence, substituted "41-3-411" for "41-3-406".

Applicability: Section 20, Ch. 516, L. 1997, provided that this section applies to proceedings commenced on or after October 1, 1997.

1995 Amendments — Composite Section: Chapter 146 inserted (3)(b) (now (5)(b)) requiring destruction of records of reports of child abuse or neglect if the child is determined not to have been abused or neglected and the initial report is unfounded; in (4) (now (6)) at beginning of second sentence, inserted reference to subsection (3)(b) (now (5)(b)); and made minor changes in style. The Code Commissioner has renumbered the reference in (6) to subsection (5)(b) to reflect the amendments made by Ch. 564.

Chapter 546 in (5) substituted "department of public health and human services" for "department of family services"; and made minor changes in style. Amendment effective July 1, 1995. The amendment by Ch. 546 in (5) was rendered void by a style change in Ch. 146.

Chapter 564 inserted (2) authorizing initial investigation into child's home upon receipt of anonymous report, but prohibiting removal from home unless independent, corroborative information is developed within 48 hours of investigation; inserted (4) requiring unedited videotape to be made available to child's family upon request; in (5), in first sentence after "child", inserted "pursuant to 41-3-301" and in second sentence, after "county attorney", inserted "and the child's family"; in (6), after "department", inserted "and, upon request, to the family"; and made minor changes in style.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Preamble: The preamble attached to Ch. 564, L. 1995, provided: "WHEREAS, the Legislature finds it necessary to restore public confidence in the child protective system and to provide protection of individual and family civil rights as guaranteed by the state and federal constitutions."

1993 Amendment: Chapter 329 at end of (1) inserted "except as necessary to ascertain eligibility for federal assistance programs or to comply with the provisions of 41-3-406". Amendment effective April 13, 1993.

1989 Amendment: In (2) inserted last sentence relating to a public school employee's participation in an interview of the child. Amendment effective July 1, 1989.

1987 Amendment: Substituted "department of family services" for "department of social and rehabilitation services".

Case Notes

Effective Assistance of Counsel — Exclusion of Statements Contained in Report Regarding Child Abuse Investigation: After a jury convicted the defendant of incest, sexual intercourse without consent, and sexual assault, the defendant filed a petition for postconviction relief, claiming numerous instances of ineffective assistance of counsel. In one instance, the defendant claimed counsel should have moved to exclude several statements the defendant made in connection with a Department of Public Health and Human Services investigation of child abuse. The defendant argued 41-3-202(5)(b), which requires the destruction of an "unfounded" report, required the destruction of the report, including the defendant's statements, well before his trial. The Supreme Court disagreed, concluding that although a detective had used the word "unfounded" in the report, the department closed the investigation as "unsubstantiated". Because 41-3-202(5)(c) provides that "unsubstantiated" reports must be destroyed within 30 days after the end of the 3-year period starting from the date the report was determined unsubstantiated, the destruction date of the report would have been after the defendant's trial. Therefore, counsel was not ineffective for not attempting to exclude the defendant's statements under 41-3-202(5)(b). Riggs v. St., 2011 MT 239, 362 Mont. 140, 264 P.3d 693.

Unsubstantiated Reports From Another Jurisdiction — Prohibition on Use Not Retroactive: In an abuse and neglect proceeding in 2001, the court ordered the physician doing psychological evaluations of the parents to consider historical documents, including the father's unsubstantiated child neglect history from California from 1997 and a 1990 conviction for exhibiting a firearm. On appeal of the termination of parental rights, the mother asserted that the use of the information violated the spirit of the Montana statute requiring unsubstantiated reports to be destroyed after 3 years. The requirement to destroy unsubstantiated records was enacted in 2003 and was not retroactive. Without legislative intent, statutes do not apply retroactively, so the 2003 statute did not apply to the District Court's 2001 decision. The court did not err in requiring the physician to consider unsubstantiated allegations from California. In re D.B., 2004 MT 371, 325 M 13, 103 P3d 1026 (2004).

Home Visit Not Required: An investigation into the home under this section is not inadequate merely because the social worker did not visit the home. The parents refused to cooperate with the welfare department. Therefore, they will not be allowed to now complain that information is missing from the record. In re S.L.T., 215 M 289, 697 P2d 472, 42 St. Rep. 366 (1985).

Attorney General's Opinions

Centralized Intake System Authorized — Fulfillment of Reporting Requirements Absent Properly Adopted Administrative Rule: By amendment in 2001, the Legislature required the Department of Public Health and Human Services to assess reports of child abuse or neglect in order to determine whether investigation or some lesser response is appropriate and granted the Department the authority to determine the appropriate response time, but did not specify how the Department was to implement the legislation. The Department developed the centralized intake system as the method to meet the statutory directive. However, the Department established the system without formal adoption as an administrative rule. Because the centralized intake system implements a law and affects private rights or procedures available to the public, the Attorney General held that the system is a rule, subject to the Montana Administrative Procedure Act. Thus, until adopted as an administrative rule, the centralized intake system may not be used to restrict which Department personnel may receive a report. Further, counties are no longer involved in providing child protective services, so they are no longer local affiliates of the Department, as the term is used in 41-3-201. Therefore, mandatory reporters may fulfill their reporting obligations by reporting child abuse and neglect to a local child protective services worker or supervisor or to the Department through the Centralized Intake Bureau. 50 A.G. Op. 4 (2004).

Investigatory Interview — Presence of School Staff Member Prohibited: A school district policy requiring that an individual investigating a child abuse or neglect case have a school staff member present at the child's interview if the interview is conducted without parental notification is prohibited. 42 A.G. Op. 2 (1987).

County Power — "4-C's": Counties, jointly with the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services), may contract with local "4-C's" projects to provide coordination and support of child abuse prevention and treatment services. 37 A.G. Op. 105 (1978).

41-3-203. Liability — immunity from liability — damages.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 656, L. 2023. Amendment effective May 19, 2023.

2019 Amendment: Chapter 382 in (2) after "41-3-201" and "41-3-205" deleted "that is substantiated by the department" and near end after "unsupervised contact with children" inserted "and who may pose a risk to children". Amendment effective October 1, 2019.

Applicability: Section 9, Ch. 382, L. 2019, provided: "[This act] applies to all reports received on or after [the effective date of this act]." Effective October 1, 2019.

1999 Amendment: Chapter 566 at end of (1) inserted "or provided information knowing the information to be false". Amendment effective October 1, 1999.

1995 Amendment: Chapter 458 in (1), near end after "person", inserted "was grossly negligent" and deleted former last sentence that read: "There is a rebuttable presumption that the person acted in good faith and with no malicious purpose"; inserted (2) regarding liability of person who provides or uses information; and made minor changes in style. Amendment effective April 14, 1995.

1993 Amendment: Chapter 181 near beginning of first sentence, after "neglect", inserted "under 41-3-201 or 41-3-202" and inserted second sentence creating rebuttable presumption of good faith. Amendment effective March 25, 1993.

Applicability: Section 2, Ch. 181, L. 1993, provided: "[This act] applies to reports made or records furnished after [the effective date of this act]." Effective March 25, 1993.

Case Notes

Negligence Claim for Improper Removal of Children Rejected — State Entitled to Immunity — No Evidence Employees Were Grossly Negligent or Provided False Information: Plaintiff alleged that the state and Broadwater County negligently failed to adequately investigate a social worker's report before removing her children from her care. The state moved for summary judgment, arguing that it was immune from suit under 41-3-203. The District Court denied the state's immunity claim but granted summary judgment to the state on the grounds that the plaintiff had not provided expert testimony necessary to establish that the investigator was subject to and violated a standard of care. On appeal, the Supreme Court held that the state is entitled as a matter of law to immunity from the plaintiff's claims under 41-3-203. The court reasoned that the plaintiff failed to establish a genuine issue of material fact to support her claim that the state employees involved in the investigation were grossly negligent or knowingly provided false information. Weber v. St., 2015 MT 161, 379 Mont. 388, 352 P.3d 8.

Reporting Mandate and Immunity Applied to Social Worker Reporting Event Sixteen Years Previous: A clinical social worker running a therapy group was subject to the reporting mandate of 41-3-201, despite assurances of strict confidentiality and despite the fact that alleged incidents of sexual abuse occurred 16 years earlier. Absent evidence that the social worker acted in bad faith or with malicious purpose, the immunity granted by this section was properly extended. (See 1995 amendment.) Gross v. Myers, 229 M 509, 748 P2d 459, 44 St. Rep. 2176 (1987).

41-3-204. Admissibility and preservation of evidence.

Compiler's Comments

2019 Amendment: Chapter 382 in (5) at end substituted "The initial report and associated evidence must be handled in accordance with 41-3-202" for "If a confirmation report is not made, the evidence and the initial report must be destroyed as provided in 41-3-202". Amendment effective October 1, 2019.

Applicability: Section 9, Ch. 382, L. 2019, provided: "[This act] applies to all reports received on or after [the effective date of this act]." Effective October 1, 2019.

1997 Amendments: Chapter 42 in (5), at end, substituted "41-3-202(5)(b)" for "41-3-202(3)(b)"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 514 at end of (5) substituted "41-3-202" for "41-3-202(3)(b)". Amendment effective May 2, 1997.

Chapter 516 in (5), at end, substituted "41-3-202(5)(b)" for "41-3-202(3)(b)".

Applicability: Section 20, Ch. 516, L. 1997, provided that this section applies to proceedings commenced on or after October 1, 1997.

1995 Amendment: Chapter 146 in (5) inserted second sentence requiring destruction of evidence and initial report if confirmation report is not made; and made minor changes in style.

1987 Amendment: At end of (2) substituted "department" for "county child protective service agency"; and in (5), after "local", substituted "affiliate of the department" for "child protective services agency".

Case Notes

Use of Color Slides as Evidence: The probative value of the use of color slides to portray degree of injury in negligent homicide case outweighed any prejudicial effect they may have had, where the reasonableness of the failure to provide medical attention was the controlling issue and where pathologist testified to the need for color photographs in order to accurately explain his findings. St. v. Hoffman, 196 M 268, 639 P2d 507, 39 St. Rep. 79 (1982).

Law Review Articles

The Child Victim as a Witness in Sexual Abuse Cases, McGrath & Clemens, 46 Mont. L. Rev. 229 (1985).

41-3-205. Confidentiality — disclosure exceptions.

Compiler's Comments

2023 Amendment: Section 1, Ch. 651, L. 2023, in (3) near end of introductory clause after "records" substituted "must, upon request" for "may"; in (4)(a)(iii)(B) inserted second sentence concerning orientation checklist; in (4)(b) substituted current text concerning confidentiality of records for former (4)(b) (see sec. 1, Ch. 651, L. 2023, for former text); in (9) at end of first sentence inserted reference to subsection (4)(b)(iii); and made minor changes in style. Amendment effective May 19, 2023.

Section 29, Ch. 716, L. 2023, in (3)(r) at end inserted reference to the Montana Indian Child Welfare Act; and made minor changes in style. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

2021 Amendments — Composite Section: Chapter 19 in (3)(k) substituted "family engagement meeting" for "family group decisionmaking meeting". Amendment effective July 1, 2021.

Chapter 520 in (3)(v) before "county attorney" substituted " child protection specialist" for "social worker". Amendment effective October 1, 2021.

2019 Amendments — Composite Section — Code Commissioner Correction: Chapter 248 in (3)(w), (5)(b), and (5)(c)(i) substituted "county or regional interdisciplinary child information and school safety team" for "county interdisciplinary child information and school safety team". Amendment effective May 2, 2019.

Chapter 367 inserted (5)(d) regarding release of records to county attorney. Amendment effective May 7, 2019. Pursuant to sec. 43, Ch. 3, L. 2019, the code commissioner changed "county interdisciplinary child information and school safety team" to "county or regional interdisciplinary child information and school safety team" to reflect amendments made by Ch. 248, L. 2019.

Chapter 382 in (3)(o) in last sentence after "risk to children" deleted "persons with developmental disabilities, or older persons"; in (4)(b) in middle after "member to view" deleted "at a location determined by the department" and inserted last sentence concerning viewing records in a local office; and made minor changes in style. Amendment effective October 1, 2019.

Applicability: Section 9, Ch. 382, L. 2019, provided: "[This act] applies to all reports received on or after [the effective date of this act]." Effective October 1, 2019.

Preamble: The preamble attached to Ch. 367, L. 2019, provided: "WHEREAS, childhood sexual abuse is an epidemic in Montana, and there are many instances in recent years of victims of childhood sexual abuse being unable to seek criminal or civil justice as the result of short statute of limitations windows in Montana law; and

WHEREAS, the sexual abuse of children is despicable conduct that must be reported, investigated, and prosecuted to create specific deterrence; and

WHEREAS, the State of Montana must ensure appropriate action when mandatory reporters and others report childhood sexual abuse; and

WHEREAS, regardless of the location of the crime, to protect Montana's children, the Department of Public Health and Human Services and the Department of Justice, working closely with local law enforcement and prosecutors, must respond to allegations of sexual abuse with effective investigations and, when viable, effective prosecutions; and

WHEREAS, childhood sexual abuse causes lifelong trauma to survivors of the same; and

WHEREAS, the average reporting age of victims of childhood sexual abuse is 52 years old, requiring the Legislature to take a meaningful look into the time periods presently allowed in Montana law to pursue criminal and civil court action; and

WHEREAS, upon review, the Legislature has determined that the current truncated time periods to bring criminal prosecutions and civil litigation related to allegations of sexual abuse are not in line with mental health science as to reporting of childhood sexual abuse, are too narrow, and should be extended."

Saving Clause: Section 15, Ch. 367, L. 2019, was a saving clause.

Severability: Section 16, Ch. 367, L. 2019, was a severability clause.

2017 Amendments — Composite Section: Chapter 99 inserted (5)(c) regarding disclosure of investigation results to certain individuals or a county interdisciplinary child information and school safety team if a child has been exposed to certain Schedule I or Schedule II drugs or drug paraphernalia. Amendment effective July 1, 2017.

Chapter 180 in (3)(p) after "news media" deleted "a member of the United States congress, or a state legislator"; inserted (4) regarding disclosure of records to a member of the United States congress or a member of the Montana legislature; and made minor changes in style. Amendment effective October 1, 2017.

2015 Amendment: Chapter 354 inserted (4)(a)(iv) relating to the office of the child and family ombudsman; and made minor changes in style. Amendment effective July 1, 2015.

2013 Amendments — Composite Section: Chapter 61 in (3)(d) inserted "grandparent, aunt, uncle, brother, sister" and "mandatory reporter provided for in 41-3-201(2)"; in (11) inserted "grandparent, aunt, uncle, brother, sister"; and made minor changes in style. Amendment effective October 1, 2013.

Chapter 332 in (3)(t) at beginning deleted "a county attorney, peace officer, or"; inserted (4) regarding release and disclosure of records; in (8) substituted "subsections (3)(a) and (4)" for "subsection (3)(a)"; and made minor changes in style. Amendment effective October 1, 2013.

Chapter 333 in (3)(a) near beginning inserted "ombudsman"; and in (5) inserted "the office of the child and family ombudsman provided for in 41-3-1201". Amendment effective July 1, 2013, and terminates June 30, 2015.

Chapter 337 in (3)(d) substituted "a parent, grandparent, aunt, uncle, brother, sister, guardian, mandatory reporter provided for in 41-3-201(2) and (5), or person" for "a parent, guardian, or person". Amendment effective October 1, 2013.

Chapter 364 in (3)(w) after "information" inserted "and school safety". Amendment effective July 1, 2013.

Code Commissioner Correction: Pursuant to sec. 28, Ch. 123, L. 2013, the code commissioner in (4)(b) substituted "county interdisciplinary child information and school safety team established pursuant to 52-2-211" for "county interdisciplinary child information team established pursuant to 52-2-211" to reflect the change made to 52-2-211 by Ch. 364, L. 2013.

2009 Amendment: Chapter 2 in (3)(f) at end substituted "42 U.S.C. 15043(a)(2)" for "42 U.S.C. 6042(a)(2)(B)"; and in (3)(s) at beginning substituted "juvenile" for "youth". Amendment effective October 1, 2009.

2007 Amendment: Chapter 166 inserted (6) allowing the sharing of information between courts when necessary to expedite interstate placement of children; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendments — Composite Section: Chapter 349 in (3)(r) after "tribe" inserted "a qualified expert witness"; and made minor changes in style. Amendment effective October 1, 2005.

(Version effective July 1, 2006) Chapter 449 in (4) after "child's" deleted "court-appointed" and inserted "assigned". Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

2003 Amendment: Chapter 504 in (3)(k) substituted "family group decisionmaking meeting" for "family group conference"; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendments — Composite Section: Chapter 281 inserted (4) allowing a school district to disclose certain personally identifiable information without consent; inserted (5) allowing disclosure of information identifying a person as a participant in or recipient of substance abuse treatment services only as allowed by federal substance abuse confidentiality laws; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 311 in (3)(p) inserted references to members of congress and state legislators; in (8) at end inserted "or medical records covered by state or federal disclosure limitations"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 570 in (1) near middle of second sentence after "person who" inserted "purposely or knowingly"; and in (3)(u) near middle before "citizen review" deleted "local". Amendment effective July 1, 2001.

Saving Clause: Section 19, Ch. 281, L. 2001, was a saving clause.

Code Commissioner Instruction: Pursuant to sec. 45, Ch. 571, L. 2001, in (1) the code commissioner changed "county welfare department" to "local office of public assistance".

1999 Amendment: Chapter 566 in (3) after "Records" inserted language regarding types of records and exempted records protected by this section and records whose disclosure would be detrimental to child or harmful to another; inserted (7) requiring copies to be provided without cost; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendments: Chapter 514 in (3)(b), at end, inserted "or to a person authorized by the department to receive relevant information for the purpose of determining the best interests of a child with respect to an adoptive placement"; in (3)(k) inserted "or of a family group conference"; in (3)(o), in second full sentence, inserted "persons with developmental disabilities, or older persons"; and made minor changes in style. Amendment effective May 2, 1997.

Chapter 550 inserted (3)(z) allowing disclosure of Department of Public Health and Human Services case records to schools; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

1995 Amendments: Chapter 458 in (3), in introductory clause after first "state", substituted "and" for "or" and at end inserted "or country"; in (3)(a) inserted "military enclave, or Indian tribal organization, that is" and at end inserted "and that otherwise meets the disclosure criteria contained in this section"; in (3)(c), at beginning before "health or mental health", deleted "licensed"; in (3)(e), after "or the", inserted "child's legal guardian or legal representative, including the" and at end inserted reference to attorney or advocate for a pending case; inserted (3)(f) through (3)(j), (3)(l), (3)(m), (3)(o), (3)(p), and (3)(y) specifying other persons or entities to whom disclosure may be permitted; in (3)(n), after "license", inserted "or registration that is required" and at end deleted "if the investigation is based on a substantiated report and the applicant is notified of the investigation"; in (3)(q), after "department", inserted "or other state agency"; in (3)(t), after "officer", inserted "or attorney who is hired by or represents the department" and after "investigation" inserted "defense"; in (3)(w), at end, deleted "who is not listed in subsection (3)"; and made minor changes in style. Amendment effective April 14, 1995.

Chapter 546 in (1) substituted "department of public health and human services" for "department of social and rehabilitation services, the department of family services"; and made minor changes in style. Amendment effective July 1, 1995.

Chapter 564 at beginning of second sentence in (1) inserted exception clause; in (3)(d) inserted "or person designated by a parent or guardian"; inserted second sentence in (4) prohibiting use of subsection to compel confidentiality; inserted (5) exempting news organization or its employee from liability for reporting facts or statements made by family member if child's confidentiality is maintained; and made minor changes in style.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Preamble: The preamble attached to Ch. 564, L. 1995, provided: "WHEREAS, the Legislature finds it necessary to restore public confidence in the child protective system and to provide protection of individual and family civil rights as guaranteed by the state and federal constitutions."

1993 Amendment: Chapter 610 in (3)(l), after "41-3-1115", inserted "or, when applicable, a local citizen review board established under Title 41, chapter 3, part 10"; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendments: Chapter 510 inserted (3)(n) relating to county interdisciplinary child information team; and made minor changes in style. Amendment effective July 1, 1991.

Chapter 655 inserted (3)(o) relating to local interagency staffing group; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendments: Chapter 110 inserted (3)(j) authorizing disclosure to youth probation officer; and made minor changes in form. Amendment effective March 15, 1989.

Chapter 126 inserted (3)(m) relating to a school employee participating in an interview of a child. Amendment effective July 1, 1989.

1987 Amendments: Chapter 287 deleted former (2) that read: "(2) Records may be used by interagency interdisciplinary child protective teams as authorized under 41-3-108 for the purposes of assessing the needs of the child and family, formulating a treatment plan, and monitoring the plan. Members of the team are required to keep information about the subject individuals confidential"; inserted (3) listing persons or entities authorized to receive confidential records concerning child abuse and neglect; and inserted (4) requiring a person authorized to receive records concerning child abuse and neglect to maintain confidentiality and prohibiting disclosure to anyone other than authorized persons or entities.

Chapter 609 near beginning of (1), after "rehabilitation services", inserted "the department of family services".

1987 Statement of Intent: The statement of intent attached to Ch. 287, L. 1987, provided: "This bill requires a statement of intent because it authorizes the department of social and rehabilitation services [now department of public health and human services] to adopt rules to govern the disclosure of case records on reports of child abuse and neglect. The legislature intends that the rules should include procedures or criteria for:

(1) requesting and disclosing information in the records;

(2) protecting the identity of person named in the records if rights of privacy require such protection;

(3) preparing records or reports (psychological, psychiatric, and medical) written by persons other than employees of the department;

(4) documenting disclosure of the records;

(5) amending, correcting, or expunging information in the records;

(6) approving or denying requests for disclosure of the records."

Case Notes

Closure of Mazurek Hearing — No Violation of Right to Public Trial: The defendant was accused of molesting his girlfriend's 11-year-old daughter. At trial, the defendant wanted to introduce evidence of the daughter accusing two other men of sexual assault when she was 4 years old. The District Court closed the hearing to determine whether that evidence would be allowed, a process also known as a Mazurek hearing after State ex. rel. Mazurek v. 4th Judicial District Court, 277 Mont. 349, 922 P.2d 474 (1996). After the District Court disallowed the evidence, a jury convicted the defendant. On appeal, the defendant claimed that the District Court had violated his right to a public trial when it closed the Mazurek hearing. The Supreme Court disagreed and affirmed, ruling that the factors of the victim's age and her well-being, as well as the statutory safeguards in 41-3-205 and 45-5-511, weighed in favor of closing the hearing. St. v. Hoff, 2016 MT 244, 385 Mont. 85, 385 P.3d 945.

Denial of Motion to Compel Without In Camera Inspection — District Court Error — Remanded for Review of Records: The defendant was charged with incest. His counsel filed a motion to compel the discovery of records about the victims that could contain exculpatory information and that were in the possession of the Department of Public Health and Human Services. The District Court denied the motion without conducting an in camera review of the records and the defendant appealed following his conviction. The Supreme Court ruled that the District Court had a duty to review the records to determine whether they contained exculpatory evidence and dismissed the appeal without prejudice to allow the District Court to perform the in camera review and rule accordingly. St. v. Johnston, 2014 MT 329, 377 Mont. 291, 339 P.3d 829.

No Error in Conducting In Camera Inspection of Abuse of Minor Investigative File: During a trial in which the defendant was charged with assault with a weapon for injuries sustained by one of the defendant's minor sons, the District Court did not err in denying the defendant access to a Child and Family Services Division investigative file. The District Court appropriately conducted an in camera inspection of the file pursuant to 41-3-205(2) and determined that the entire contents of the file should not be released. Evidence that a social worker failed to take notes during a meeting with the minor would not have bolstered the defendant's testimony. St. v. Knowles, 2010 MT 186, 357 Mont. 272, 239 P.3d 129.

Statute Not Facially Unconstitutional: Plaintiff, an entity authorized to obtain child abuse information pursuant to 41-3-205, reported allegations of child abuse and neglect at the Swan Valley Youth Academy, which prompted an investigation. Plaintiff was provided a final report and wished to disseminate the report without seeking a court order. Plaintiff filed an action to allow public dissemination and to invalidate 41-3-205(7) as facially unconstitutional because of the alleged failure of the statute to balance the public's right to know against the right of individual privacy. The District Court determined that disclosure of child abuse and neglect records required a case-by-case analysis and review of redacted materials. The court refused to provide plaintiff with prospective relief and granted summary judgment to the state, so plaintiff appealed. The Supreme Court noted that any future report prepared by the state regarding alleged abuse or neglect will present a unique factual scenario that requires a careful balancing of the constitutional provisions at issue, to be conducted according to the mechanism for balancing of interests provided in 41-3-205(2), which then properly permits public disclosure following in camera inspection and further redaction of private information. Thus, in light of the myriad of future factual scenarios to which 41-3-205 must be applied, the statute could not be determined to be facially unconstitutional. Disability Rights Mont. v. St., 2009 MT 100, 350 M 101, 207 P3d 1092 (2009). See also Havre Daily News, LLC v. Havre, 2006 MT 215, 333 M 331, 142 P3d 864 (2006).

Judicial Notice of Mother's Prior Termination Proceeding in Action to Terminate Father's Parental Rights — No Error: The District Court terminated a father's parental rights after taking judicial notice of the sealed record of the mother's prior termination proceeding. The father asserted error because the court took notice of facts that were not known and could not be discovered by the father. The Supreme Court disagreed. Rules 201 and 202, M.R.Ev. (Title 26, ch. 10), allow the District Court to take judicial notice of certain facts of record. Although sealed, the record was not entirely inaccessible because the father could have petitioned for disclosure of the records under this section, but he did not, even though he was aware of the prior proceeding. In re K.C.H., 2003 MT 125, 316 M 13, 68 P3d 788 (2003).

Denial of Defendant's Access to Rape Victim's Counselor and Counselor's Records Upheld: Muir was convicted of sexual intercourse without consent with a victim under 16 years of age. Prior to and during trial, Muir requested access to the victim's psychological counselor and to the counselor's records because the counselor was listed as a potential witness. However, after an in camera review of the records by the District Court, Muir was given access only to an investigator's note of an interview with the victim's counselor. The Supreme Court held that Muir was properly denied access to the counselor and the counselor's records because the victim's conversations with the counselor are privileged and the District Court found no exculpatory evidence in the records. Citing St. v. Reynolds, 243 M 1, 792 P2d 1111 (1990), the Supreme Court also reasoned that a defendant's right to pretrial discovery is not equivalent to a defendant's constitutional right of confrontation and that Muir had shown no correlation between the victim's emotional problems and her consent to sexual intercourse. St. v. Muir, 263 M 241, 867 P2d 1094, 51 St. Rep. 19 (1994).

Termination of Parental Rights — Father Not Allowed "In Camera" Inspection of Entire File: In proceedings to terminate a father's parental rights, when the father moved for an "in camera" inspection of the entire Department of Family Services (now Department of Public Health and Human Services) file and the Department objected to disclosure of reports prepared by the foster parents, it was not clearly erroneous for the District Court to deny disclosure of evidence in view of failure on the part of the father's counsel to attempt to limit or specify in any manner the information requested. (See 41-3-431 enacted in 2023.) In re M.A.W. & K.M.W., 256 M 296, 846 P2d 985, 50 St. Rep. 64 (1993).

Limited Discovery of Department Files Proper: It was proper for the District Court to conduct its own inspection of the Department of Family Services' (now Department of Public Health and Human Services) files and to produce for defendant's use those documents the court felt were relevant and necessary to the defense. Limited discovery, rather than complete disclosure, was warranted under this section. (See 41-3-431 enacted in 2023.) St. v. Goodwin, 249 M 1, 813 P2d 953, 48 St. Rep. 539 (1991).

Examination of Social Worker's File Not Allowed — No Violation of Constitutional Rights: Defendant in a child abuse case claimed his constitutional rights were violated by the District Court's refusal to allow him to examine the file of the social worker assigned to his case. The Supreme Court relied on Pa. v. Ritchie, 480 US 39, 94 L Ed 2d 40, 107 S Ct 989 (1987), in holding that Montana's child abuse confidentiality statute, this section, as it applies to file review, does not violate a defendant's right to confront his accusers. Further, as long as the trial court has the statutory authority to review the file in camera and to release material information from the file to the accused, defendant's right to a fair trial is fully protected. (See 41-3-431 enacted in 2023.) St. v. Thiel, 236 M 63, 768 P2d 343, 46 St. Rep. 182 (1989), followed in St. v. Donnelly, 244 M 371, 798 P2d 89, 47 St. Rep. 1600 (1990), and in St. v. Little, 260 M 460, 861 P2d 154, 50 St. Rep. 1124 (1993). See also St. v. Imlay, 249 M 82, 813 P2d 979, 48 St. Rep. 588 (1991), which overruled Donnelly with regard to augmentation of sentence for failure to admit guilt.

Censure of Attorney Disseminating Confidential Information Protected by Statute: A lawyer was publicly censured by the Montana Supreme Court for obtaining confidential information from his law firm's files and from the files of the County Attorney and for disseminating the information to parties not entitled to it, notwithstanding the confidentiality requirements of this section. Censure was changed from oral censure in the Supreme Court's courtroom to censure in writing by that court and placed in the court's records, because it would be a financial burden for him to appear in court as he lived out of state. In re Wyse, 215 M 82, 697 P2d 94, 42 St. Rep. 198 (1985).

Confidentiality of Records on Child Abuse and Neglect — Not Violative of Confrontation Rights: An attorney being disciplined for violating the confidentiality provisions of 41-3-205 did not prevail in his contention that the section conflicted with the right of confrontation guaranteed by Art. II, sec. 24, Mont. Const., and the sixth amendment to the United States Constitution because the attorney, in his zeal to get information relevant to his client, did not make an application to the court for permission to disseminate the information. In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984).

"Unauthorized Dissemination" and "Public Disclosure" Not Synonymous: The terms "unauthorized dissemination" in subsection (1) and "public disclosure" in subsection (3) are not synonymous. Any unauthorized dissemination, public or private, is prohibited under subsection (1); the term "public disclosure" comes into play if a request is made to the court to permit the same and the court finds such public disclosure necessary for the fair resolution of the issue before it. In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984).

Contempt for Violation — Defense Barred: Attorney charged with contempt of court for unauthorized dissemination, in violation of this section, of information in records of dependent and neglected child proceeding could not argue this section was vague where he admitted that he knew such a statute existed and that a court order was probably needed to obtain the information but did not bother to look up the statute prior to his dissemination. Wyse v. District Court, 195 M 434, 636 P2d 865, 38 St. Rep. 2005 (1981). See also In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984).

Contempt for Violation — Standards for Attorneys: Attorney charged with contempt of court for violating this section was a licensed professional and an officer of the court and was not subject to the reasonable man standard but to a higher standard, one dictated by the nature of his profession. Wyse v. District Court, 195 M 434, 636 P2d 865, 38 St. Rep. 2005 (1981). See also In re Wyse, 212 M 339, 688 P2d 758, 41 St. Rep. 1780 (1984).

Inclusion of Juvenile Record in Presentence Report: Section 41-3-205 does not support appellant's contention that it was improper to include his juvenile record in a presentence report since that section applies only to dependence and neglect situations and not to proceedings for delinquents under the Montana Youth Court Act. Section 41-5-604 (renumbered 41-5-216) does not support appellant's contention either, because the prevention of public dissemination of a juvenile record once that individual attains an age of majority is accomplished by sealing the presentence report. St. v. Radi, 185 M 38, 604 P2d 318 (1979).

Exception to Confidentiality: The confidentiality of privileged communications did not prevent disclosure of information obtained by school nurse, public nurse, and social welfare workers as evidence at custody hearing for dependent and neglected children. In re Jones & Peterson Children, 168 M 1, 539 P2d 1193 (1975).

Attorney General's Opinions

Investigatory Interview — Presence of School Staff Member Prohibited: A school district policy requiring that an individual investigating a child abuse or neglect case have a school staff member present at the child's interview if the interview is conducted without parental notification is prohibited. 42 A.G. Op. 2 (1987).

Disclosure of Case Records and Reports of Child Abuse and Neglect: Absent a court order, 41-3-205 prohibits the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) from disclosing case records and reports of child abuse and neglect to: (1) the natural parents or parent or other person having legal custody of a child who is the subject of a dependency and neglect action filed under 41-3-401; (2) health care professionals who are treating a child suspected of being abused or neglected; (3) the noncustodial parent of a child who has been removed from the custodial parent following an incident of abuse or neglect; and (4) the natural parents or parent or other person having legal custody of a child who has been abused or neglected while in the care of foster parents. 41 A.G. Op. 49 (1986); followed in 42 A.G. Op. 2 (1987).

41-3-206. Procedure in case of child's death.

Compiler's Comments

1995 Amendment: Chapter 564 in (2), after "service", inserted "the family of the deceased child"; and made minor changes in style.

Preamble: The preamble attached to Ch. 564, L. 1995, provided: "WHEREAS, the Legislature finds it necessary to restore public confidence in the child protective system and to provide protection of individual and family civil rights as guaranteed by the state and federal constitutions."

41-3-207. Penalties — failure to report — false reporting.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 656, L. 2023. Amendment effective May 19, 2023.

2019 Amendment: Chapter 367 in (1) near beginning after "required by" substituted "41-3-201" for "law" and at end substituted "the act or omission" for "such failure or prevention"; in (2) at beginning inserted "Except as provided in subsection (3)", after "required by" substituted

"41-3-201" for "law", and near end after "another person from" substituted "making a report" for "doing so"; inserted (3) regarding punishment for failure to report known sexual abuse or sexual exploitation of a child or preventing another person from making a report; and made minor changes in style. Amendment effective May 7, 2019.

Applicability: Section 19(1), Ch. 367, L. 2019, provided that subsection (3) of this section applies to offenses committed on or after May 7, 2019.

Preamble: The preamble attached to Ch. 367, L. 2019, provided: "WHEREAS, childhood sexual abuse is an epidemic in Montana, and there are many instances in recent years of victims of childhood sexual abuse being unable to seek criminal or civil justice as the result of short statute of limitations windows in Montana law; and

WHEREAS, the sexual abuse of children is despicable conduct that must be reported, investigated, and prosecuted to create specific deterrence; and

WHEREAS, the State of Montana must ensure appropriate action when mandatory reporters and others report childhood sexual abuse; and

WHEREAS, regardless of the location of the crime, to protect Montana's children, the Department of Public Health and Human Services and the Department of Justice, working closely with local law enforcement and prosecutors, must respond to allegations of sexual abuse with effective investigations and, when viable, effective prosecutions; and

WHEREAS, childhood sexual abuse causes lifelong trauma to survivors of the same; and

WHEREAS, the average reporting age of victims of childhood sexual abuse is 52 years old, requiring the Legislature to take a meaningful look into the time periods presently allowed in Montana law to pursue criminal and civil court action; and

WHEREAS, upon review, the Legislature has determined that the current truncated time periods to bring criminal prosecutions and civil litigation related to allegations of sexual abuse are not in line with mental health science as to reporting of childhood sexual abuse, are too narrow, and should be extended."

Saving Clause: Section 15, Ch. 367, L. 2019, was a saving clause.

Severability: Section 16, Ch. 367, L. 2019, was a severability clause.

1985 Amendment: Near middle of (1) after "neglect", deleted "or required to perform any other act"; and inserted (2) establishing criminal penalty for failure to report child abuse.

41-3-208. Rulemaking authority.

Compiler's Comments

2019 Amendments — Composite Section: Chapter 248 in (3) near end substituted "county or regional interdisciplinary child information and school safety teams" for "county interdisciplinary child information and school safety teams". Amendment effective May 2, 2019.

Chapter 382 in (1) substituted "conducting investigations and safety and risk assessments" for "making investigations"; in (2) substituted current text requiring the department to adopt rules for former (2) that read: "The department may adopt rules to govern the disclosure of case records containing reports of child abuse and neglect"; and made minor changes in style. Amendment effective October 1, 2019.

Applicability: Section 9, Ch. 382, L. 2019, provided: "[This act] applies to all reports received on or after [the effective date of this act]." Effective October 1, 2019.

2017 Amendment: Chapter 180 in (3) at end of first sentence substituted "41-3-205(5)" for "41-3-205(4)". Amendment effective October 1, 2017.

2015 Amendment: Chapter 354 in (3) in second sentence inserted "the office of the child and family ombudsman"; and made minor changes in style. Amendment effective July 1, 2015.

2013 Amendment: Chapter 332 inserted (3) requiring adoption of rule specifying procedure for release and disclosure of certain records. Amendment effective October 1, 2013.

Code Commissioner Correction: Pursuant to sec. 28, Ch. 123, L. 2013, the code commissioner in (3) substituted "county interdisciplinary child information and school safety teams established pursuant to 52-2-211" for "county interdisciplinary child information teams established pursuant to 52-2-211" to reflect the change made to 52-2-211 by Ch. 364, L. 2013.

1995 Amendment: Chapter 546 in (1) substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendment: At end of (1) deleted "or 41-3-1123". Amendment effective July 1, 1991.

1987 Amendments: Chapter 287 inserted (2) authorizing Department to adopt rules governing disclosure of records of child abuse and neglect.

Chapter 609 at beginning substituted "department of family services" for "department of social and rehabilitation services" and after "personnel" deleted "and by employees of county welfare departments".

1987 Statement of Intent: The statement of intent attached to Ch. 287, L. 1987, provided: "This bill requires a statement of intent because it authorizes the department of social and rehabilitation services [now department of public health and human services] to adopt rules to govern the disclosure of case records on reports of child abuse and neglect. The legislature intends that the rules should include procedures or criteria for:

(1) requesting and disclosing information in the records;

(2) protecting the identity of person named in the records if rights of privacy require such protection;

(3) preparing records or reports (psychological, psychiatric, and medical) written by persons other than employees of the department;

(4) documenting disclosure of the records;

(5) amending, correcting, or expunging information in the records;

(6) approving or denying requests for disclosure of the records."

1983 Amendment: Changed 41-5-805 to 41-3-1123.

1979 Statement of Intent: The statement of intent attached to HB 813 (Ch. 567, L. 1979) provided: "The provision of law dealing with abused, neglected, or dependent children; delinquent youths; and youths in need of supervision [now youth in need of intervention] recognize the principle that the parents or guardian of the minor is responsible for a fair share of the costs of supporting the minor when the minor is placed in a foster home, group home, or other form of custodial care. This bill is intended to provide a mechanism for determining the parents' or guardians' share of financial support in those situations involving the department of social and rehabilitation services [now department of public health and human services]. Three guiding principles interact to provide the thrust of the legislation. First, the welfare of the minor is of utmost concern. The focus is on the youth, and the law is designed to provide an opportunity for the youth to realize his potential. Secondly, the traditional privacy and security of the family are to be preserved. Thirdly and referred to above, the parents or guardian of a minor is responsible for the financial support of the minor. These three principles can and often do conflict with one another. This bill addresses investigations as to the ability of the parents or guardian to bear all or part of the cost of supporting a youth taken from their custody and attempts to strike a balance between these three principles by requiring that an investigation by the county welfare department [now local office of public assistance] into matters of financial status may not be made until a court, or, in the case of an informal adjustment under the Youth Court Act, a probation officer places the child in a foster home, child care agency, group home, or private treatment facility.

Rules developed pursuant to authority granted under this bill should provide procedures that insure the parents or guardian have access to the reports and data developed by both the department of social and rehabilitation services [now department of public health and human services] and the county welfare department and that guarantee investigations into financial and other matters will not intrude into private lives beyond the level necessary to protect the welfare of the child."

41-3-209. Reports to office of child and family ombudsman.

Compiler's Comments

2021 Amendments — Composite Section: Chapter 19 in (1)(d) substituted "written prevention plan" for "voluntary protective services agreement". Amendment effective July 1, 2021.

Chapter 411 inserted (3) requiring the department to report on its response to findings, conclusions, and recommendations; and made minor changes in style. Amendment effective October 1, 2021.

Effective Date: Section 12, Ch. 354, L. 2015, provided: "[This act] is effective July 1, 2015."

41-3-210. County attorney duties — certification — retention of records — reports to attorney general and legislature — attorney general report.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 4, Ch. 195, L. 2023. Amendment effective October 1, 2023.

2021 Amendment: Chapter 364 in (1)(a) at end of first sentence inserted "when the alleged perpetrator of the sexual abuse or sexual exploitation is 12 years of age or older"; in (3) at beginning of first sentence inserted "By June 1 of each year" and after "shall report" deleted "every 6 months"; and made minor changes in style. Amendment effective October 1, 2021.

Effective Date: Section 17, Ch. 367, L. 2019, provided: "[This act] is effective on passage and approval." Approved May 7, 2019.

Code Commissioner Correction: Pursuant to sec. 43, Ch. 3, L. 2019, the code commissioner in (1)(a)(iii) changed "county interdisciplinary child information and school safety team" to "county or regional interdisciplinary child information and school safety team" to reflect amendments made by Ch. 248, L. 2019.

Preamble: The preamble attached to Ch. 367, L. 2019, provided: "WHEREAS, childhood sexual abuse is an epidemic in Montana, and there are many instances in recent years of victims of childhood sexual abuse being unable to seek criminal or civil justice as the result of short statute of limitations windows in Montana law; and

WHEREAS, the sexual abuse of children is despicable conduct that must be reported, investigated, and prosecuted to create specific deterrence; and

WHEREAS, the State of Montana must ensure appropriate action when mandatory reporters and others report childhood sexual abuse; and

WHEREAS, regardless of the location of the crime, to protect Montana's children, the Department of Public Health and Human Services and the Department of Justice, working closely with local law enforcement and prosecutors, must respond to allegations of sexual abuse with effective investigations and, when viable, effective prosecutions; and

WHEREAS, childhood sexual abuse causes lifelong trauma to survivors of the same; and

WHEREAS, the average reporting age of victims of childhood sexual abuse is 52 years old, requiring the Legislature to take a meaningful look into the time periods presently allowed in Montana law to pursue criminal and civil court action; and

WHEREAS, upon review, the Legislature has determined that the current truncated time periods to bring criminal prosecutions and civil litigation related to allegations of sexual abuse are not in line with mental health science as to reporting of childhood sexual abuse, are too narrow, and should be extended."

Saving Clause: Section 15, Ch. 367, L. 2019, was a saving clause.

Severability: Section 16, Ch. 367, L. 2019, was a severability clause.

41-3-211. Department report to attorney general.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

41-3-212. Department procedures for reports — recording — notifications.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

41-3-215. Right of aggrieved party.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

41-3-216. Provision of information about investigation procedure and rights to parents.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

Part 3
Protective Care

Part Law Review Articles

Fixing Foster Care or Reducing Child Poverty: The Pew Commission Recommendations and the Transracial Adoption Debate, Ramsey, 66 Mont. L. Rev. 21 (2005).

The Foster Care Ombudsman: Applying an International Concept to Help Prevent Institutional Abuse of America's Foster Youth, Marzick, 45 Fam. Ct. Rev. 506 (2007).

41-3-301. Emergency protective services.

Compiler's Comments

2023 Amendments — Composite Section: Section 1, Ch. 323, L. 2023, in (1)(b)(ii) substituted current text concerning emergency protective services and show cause hearings for former text that read: "include information regarding the emergency protective services and show cause hearings and the purpose of the hearings"; inserted (1)(b)(iii) requiring the provision of contact information; inserted (1)(b)(iv)(A),(1)(b)(iv)(B), and (1)(b)(iv)(D) describing the rights of individuals from whom a child has been removed; and made minor changes in style. Amendment effective July 1, 2023.

Section 1, Ch. 711, L. 2023, in (1)(b)(iv)(C) in middle substituted "meeting" for "in-person meeting" and near end inserted "including the emergency protective services hearing provided for in 41-3-306"; inserted (1)(c) requiring that notification be provided to the public defender; in (6) near end of first sentence substituted "provide a copy of the affidavit to the office of state public defender and, if possible, the parents or guardian" for "provide a copy of the affidavit to the parents or guardian, if possible"; and made minor changes in style. Amendment effective May 22, 2023.

Section 30, Ch. 716, L. 2023, in (7) in exception clause inserted reference to Montana ICWA. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

2021 Amendments — Composite Section — Code Commissioner Correction: Chapter 19 in both versions in (6) near end of last sentence substituted "a written prevention plan has been entered into" for "voluntary protective services are provided". Amendment effective July 1, 2021.

Chapter 383 in version effective July 1, 2023, in (1)(b) substituted "include information regarding the emergency protective services and show cause hearings and the purpose of the hearings" for "information regarding the show cause hearing, and the purpose of the show cause hearing"; in (1)(c) at beginning deleted "must"; in (6) near middle inserted "in accordance with 41-3-422"; and made minor changes in style. Amendment effective July 1, 2023.

Chapter 520 in both versions in (1) in first sentence and (6) in first sentence substituted "child protection specialist" for "child protective social worker"; in (1) near end and in (8) substituted "child protection specialist" for "social worker"; in (2) near beginning substituted "child protection specialist" for "social worker of the department"; and made minor changes in style. Amendment effective October 1, 2021.

Chapter 529 in temporary version in (1)(b) substituted "include information regarding the option for an emergency protective services hearing within 5 days under 41-3-306, the required show cause hearing within 20 days, and the purpose of the hearings" for "information regarding the show cause hearing, and the purpose of the show cause hearing"; inserted (1)(c) concerning providing the specified contact information; inserted (1)(d)(i) concerning the right to receive a copy of the affidavit; inserted (1)(d)(ii) concerning the right to attend and participate in an emergency protective services hearing and the show cause hearing; inserted (1)(d)(iv) concerning the right to request that the child be placed in a kinship foster home; and made minor changes in style. Amendment effective July 1, 2021, and terminates June 30, 2023.

In the temporary version in (1)(c), the Code Commissioner substituted the references to child protection specialists for the references to social workers to reflect the changes contained in Ch. 520, L. 2021, which deleted social worker as a defined term and inserted child protection specialist as a defined term.

2017 Amendment: Chapter 394 throughout (2) and (3) inserted references to strangulation of partner or family member; and made minor changes in style. Amendment effective May 19, 2017.

Extension of Termination Date: Section 5, Ch. 141, L. 2017, amended sec. 7, Ch. 376, L. 2015, by extending the termination date imposed by Ch. 376 to June 30, 2019. Effective April 3, 2017.

2015 Amendment: Chapter 376 in (6) inserted exception clause; and made minor changes in style. Amendment effective July 1, 2015, and terminates June 30, 2017.

2011 Amendments — Composite Section: Chapter 11 inserted (5) regarding department contact with extended family members; and made minor changes in style. Amendment effective March 16, 2011.

Chapter 223 in (1) in five places substituted "child" for "youth" and in two places after "physical" inserted "or legal"; in (7) before "petition" deleted "initial"; in (8) at end deleted "The district court may not order further relief until the parents, if they are reasonably available, are given the opportunity to appear before the court or have their statements, if any, presented to the court for consideration before entry of an order granting the petition"; and made minor changes in style. Amendment effective October 1, 2011.

2007 Amendment: Chapter 212 in (5) inserted first sentence requiring that when a child is removed from the child's home by the department, a child protective social worker shall submit an affidavit regarding the circumstances of the emergency removal and in second sentence near beginning after "within" substituted "5 working days" for "2 working days" and after "emergency" substituted "removal" for "placement"; and made minor changes in style. Amendment effective October 1, 2007.

2005 Amendment: Chapter 422 in (1) in second sentence at beginning inserted "After ensuring that the child is safe" and in fourth sentence after second "show cause hearing" inserted requirement to inform parent or other person of right to have support person present during in-person meeting with social worker; and made minor changes in style. Amendment effective October 1, 2005.

2003 Amendments — Composite Section: Chapter 398 inserted (2) requiring department to make reasonable efforts to protect child or provide services to protect child from placement or unsupervised visitation with alleged abuser if investigation determines child in danger because of partner or family member assault against adult member of household; inserted (3) requiring department to provide adult victim with referral to domestic violence program upon determination that adult is victim of partner or family member assault; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 504 in (1) in third sentence near middle substituted "physical custody" for "legal custody"; in (6) at beginning inserted exception clause and near middle substituted "20 days" for "10 days, excluding weekends and holidays"; inserted (7) concerning petition for immediate and emergency protective services; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 555 in (5) at end inserted reference to voluntary protective services; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 281 in (1) near beginning of first sentence after "department" deleted "of public health and human services" and inserted fourth sentence requiring that notification include the reason for removal, information regarding the show cause hearing, and the purpose of the show cause hearing; in (3) at beginning of first sentence substituted "An abuse and neglect petition" for "A petition" and after "filed within" substituted "2 working days, excluding weekends and holidays" for "48 hours" and inserted second sentence requiring that a show cause hearing be held within 10 days of filing of the initial petition; in (4) at beginning after "department" deleted "of public health and human services"; and made minor changes in style. Amendment effective October 1, 2001.

Saving Clause: Section 19, Ch. 281, L. 2001, was a saving clause.

1995 Amendment: Chapter 546 in (1) and (4) substituted "department of public health and human services" for "department of family services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1987 Amendment: Near beginning of (1) and in (4) substituted "department of family services" for references to Department of Social and Rehabilitation Services and county welfare department.

1985 Amendment: In (1) inserted last sentence requiring notice of protective placement to child's legal custodian.

Case Notes

Qualifications to Be Considered Party or Interested Person in Child Abuse and Neglect Proceedings: In a child abuse and neglect proceeding, the mother's longtime boyfriend, who was not biologically related to the child but was identified by the child as his "dad", appealed the District Court's determination that the boyfriend was neither a party nor an interested person to the child's case and, therefore, was not entitled to continued notice or the right to appear in any subsequent proceedings related to the child. On appeal, the Supreme Court determined that the Department of Public Health and Human Services, the child, and a parent, guardian, or individual with legal custody of the child are all parties to child abuse and neglect proceedings. In addition, a foster parent, a preadoptive parent, a relative caring for the child, or a relative who has cared for the child is allowed to file a motion to intervene and may also be a party to the proceedings. Therefore, because the boyfriend did not meet the above criteria, the District Court did not err in dismissing him as a party to the proceedings. However, the Supreme Court determined that under 41-3-422(9)(a), the boyfriend is a person interested in the child's case and has a right to appear at hearings pertaining to the child but does not have the right to notice or the right to be heard. The District Court erred when it denied the boyfriend's request to appear at the child's proceedings. In re J.B., 2015 MT 342, 381 Mont. 525, 362 P.3d 859.

Treatment Plan Executed in Good Faith Despite Case Worker Turnover — Due Process Not Violated in Termination Proceedings: The mother appealed the termination of her parental rights, arguing that she was denied due process of law when the Department of Public Health and Human Services did not execute her treatment plan in good faith because it did not adequately account for her history as a victim of domestic violence and because she was assigned six different child protection specialists during the course of her case. The Supreme Court affirmed, concluding that the Department took notice of the mother's history as a victim of domestic violence and, given the Department's provision of numerous services and its efforts to reunite the family, the fact that the mother was assigned numerous case workers did not in itself establish a due process violation. In re T.D.H., 2015 MT 244, 380 Mont. 401, 356 P.3d 457.

Removal of Children Without Parental Notification — State's Failure to Notify Mother Not Improper: Plaintiff's claim that the state was required under 41-3-301 to interview her before removing her children from her care was properly rejected. The court reasoned that the plaintiff offered no evidence to establish, in the face of a report that the plaintiff may flee with her children and cause harm to them, that the state's failure to interview the plaintiff amounted to the absence of slight care or diligence in the investigation. Weber v. St., 2015 MT 161, 379 Mont. 388, 352 P.3d 8.

Father's Motion to Have Parental Rights Termination Proceeding Dismissed Because of Failure to Hold Timely Show Cause Hearing Not Considered on Appeal: The show cause hearing in a proceeding to terminate the father's parental rights was timely set within the required 20 days of the filing of the petition. At the hearing, the County Attorney requested a continuance to which the father did not object. The Supreme Court refused to consider the issue of whether the show cause hearing was timely on the basis that the father did not object to the continuance. In re M.H. & G.H., 2006 MT 208, 333 M 286, 143 P3d 103 (2006).

Erroneous Award of Custody at Adjudicatory Hearing Cured by Immediate Scheduling of Dispositional Hearing to Address Dispositional Issue Separately: The District Court failed to structure dispositional issues apart from adjudicatory issues when it granted temporary legal custody of two children to the state during an adjudicatory hearing. However, upon discovering the error, the court immediately scheduled a dispositional hearing to address the dispositional issue separately. Although not excusing the error, the Supreme Court held that holding a second dispositional hearing made the initial order placing the children with the state during the adjudicatory hearing the functional equivalent to an order of placement pending the dispositional hearing because temporary placement outside the home is allowed at every stage of the proceeding pursuant to 41-3-432, 41-3-437, and this section. The error was harmless and nonprejudicial and did not warrant reversal. In re S.C. & L.Z., 2005 MT 241, 328 M 476, 121 P3d 552 (2005).

Judicial Notice of Mother's Prior Termination Proceeding in Action to Terminate Father's Parental Rights — No Error: The District Court terminated a father's parental rights after taking judicial notice of the sealed record of the mother's prior termination proceeding. The father asserted error because the court took notice of facts that were not known and could not be discovered by the father. The Supreme Court disagreed. Rules 201 and 202, M.R.Ev. (Title 26, ch. 10), allow the District Court to take judicial notice of certain facts of record. Although sealed, the record was not entirely inaccessible because the father could have petitioned for disclosure of the records under 41-3-205, but he did not, even though he was aware of the prior proceeding. In re K.C.H., 2003 MT 125, 316 M 13, 68 P3d 788 (2003).

Failure to Dismiss Petition Not Reversible Error Despite Failure to Follow Forty-Eight-Hour Rule: Even though a petition for termination (now abuse and neglect petition—see 2001 amendment) and permanent custody was not filed until 13 days after emergency placement of the children, in violation of the 48-hour rule of this section, any error in not following the strict statutory procedure was harmless since the best interest of the children was the primary concern and the parent's due process rights were not violated. In re F.H., J.K., & B.K., 266 M 36, 878 P2d 890, 51 St. Rep. 649 (1994). See also In re B.W.S., 2014 MT 198, 376 Mont. 43, 330 P.3d 467, in which the Supreme Court concluded that missed procedural deadlines did not extinguish the District Court's jurisdiction over a parental termination proceeding.

Qualified Immunity of Department Social Workers in Removing Children to Out-of-State Placement: Social workers who removed minor children from father's home without notice or hearing and arranged for them to stay in another state with their mother, who had joint custody, were not entitled to absolute immunity in father's civil rights action because their actions were neither quasi-prosecutorial nor quasi-judicial in nature. However, the social workers were entitled to qualified immunity because of the emergency nature of their actions and because they did not violate any clearly established constitutional or statutory right. Caldwell v. LeFaver, 928 F2d 331 (9th Cir. 1991).

Timely Filing of Petition: The filing of a petition for temporary investigative authority and protective services (see 2001 amendment to 41-3-427) as to children who may be abused and neglected was timely and proper because of the exclusion of intermediate Saturdays, Sundays, and holidays from the computation time (see 2003 amendment). In re T.Y.K., 183 M 91, 598 P2d 593 (1979).

Duty to Adhere: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) has a duty to strictly adhere to the requirements of this section. In re G., Youth in Need of Care, 174 M 321, 570 P2d 1110 (1977).

Attorney General's Opinions

Exclusive Tribal Jurisdiction of Indian Children — No Departmental Jurisdiction: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) has no jurisdiction to provide child protection services to Indian children who are subject to exclusive tribal jurisdiction under the Indian Child Welfare Act, 25 U.S.C. 1901, et seq., or to children residing on the reservation and eligible for tribal membership. The scope of the Department's responsibility is unaffected by the child's eligibility, or lack thereof, for participation in Bureau of Indian Affairs programs, and the Department is not obligated to provide child protective services and benefits to the extent the federal program offers comparable assistance. 41 A.G. Op. 76 (1986).

41-3-302. Responsibility of providing protective services — written prevention plans.

Compiler's Comments

2021 Amendment: Chapter 19 throughout section in eight places substituted "written prevention plan" for "written voluntary protective services agreement"; and in (4)(a) substituted "family engagement meeting" for "family group decisionmaking meeting". Amendment effective July 1, 2021.

2017 Amendment: (Temporary version) In (1) at end after "adoption" inserted clause concerning taking temporary custody of a child as part of a person's participation in the child abuse and neglect court diversion pilot project and in (6) at end after "department" inserted clause concerning participation in the child abuse and neglect court diversion pilot project . Amendment effective April 3, 2017, and terminates June 30, 2019.

(Both versions) In (3) throughout subsection substituted references to parent, guardian, or other person having physical or legal custody of the child for references to a parent or other person responsible for a child's welfare; in (3)(a) after "home" inserted "or for the purpose of returning the child to the home within a 30-day temporary out-of-home protective placement"; in (4)(b) after "treatment of" substituted "the parent, guardian, or other person having physical or legal custody of the child or of the child, or both" for "a parent or child, or both"; in (4)(e) after "parent" inserted "guardian, or other person having physical or legal custody of the child"; in (6) near beginning after "out-of-home" inserted "protective" and before "within 2 working days" substituted "parent, guardian, or other person having physical or legal custody of the child" for "parents"; and made minor changes in style. Amendment effective April 3, 2017.

2005 Amendment: Chapter 130 in (4)(a) at end substituted "meeting" for "conference". Amendment effective October 1, 2005.

2003 Amendment: Chapter 555 inserted (3) through (6) relating to voluntary protective services. Amendment effective October 1, 2003.

Code Commissioner Change: Pursuant to sec. 138, Ch. 114, L. 2003, in (4)(a) substituted "family group decisionmaking meeting" for "family group conference" to reflect change of definition made by Ch. 504, L. 2003.

1995 Amendment: Chapter 546 substituted "department of public health and human services" for "department of family services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1987 Amendment: At beginning of (1) substituted "department of family services" for references to Department of Social and Rehabilitation Services and county welfare department; and in (2), after "The", deleted "county welfare".

1981 Amendment: Deleted ", limited," after "temporary" in (1).

Administrative Rules

Title 37, chapter 47, subchapter 3, ARM Child protective services.

Title 37, chapter 50, ARM Foster care services and guardianship services.

Attorney General's Opinions

Determination of Staffing Patterns of County Public Assistance Offices: Both the Department of Public Health and Human Services and county welfare boards have an interest in staffing patterns for county public assistance offices, and when possible, staffing patterns should be determined through a process of consultation and negotiation between the Department and the county welfare board. However, if an agreement cannot be reached through that process, the Department has the final authority for determining staffing patterns for the county public welfare office in a nonassumed county. (See 2001 amendments.) 48 A.G. Op. 18 (2000).

Retroactive Foster Care Payments: In the absence of a determination that foster care assistance was improperly denied, neither a County Department of Public Welfare nor the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) is required to retroactively pay foster care costs on behalf of a relinquished child. Where there is a determination made that foster care assistance was improperly denied, only the foster home involved is entitled to foster care payments. 38 A.G. Op. 11 (1979).

Public and Private Placement Agencies: County Departments of Public Welfare may not deny foster care payments solely because the child receiving foster care has been relinquished to a private rather than public placement agency. If eligibility is established, County Departments of Public Welfare are required to approve foster care payments to a foster home on behalf of a child who has been relinquished to a private placement agency. 38 A.G. Op. 11 (1979).

County Power — "4-C's": Counties, jointly with the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services), may contract with local "4-C's" projects to provide coordination and support of child abuse prevention and treatment services. 37 A.G. Op. 105 (1978).

41-3-304. Criminal background checks of adults residing in potential emergency placements authorized — rulemaking.

Compiler's Comments

Effective Date: This section is effective October 1, 2013.

Administrative Rules

ARM 37.47.305 Disqualifying criminal offense for adults residing in potential emergency placement.

41-3-306. Emergency protective services hearing — exception.

Compiler's Comments

2023 Amendments — Composite Section: Section 2, Ch. 711, L. 2023, in (7) substituted current text providing that emergency protective services hearings are not subject to the notice requirements of federal ICWA for former text that read: "This section does not apply to cases involving an Indian child who is subject to the Indian Child Welfare Act." Amendment effective May 22, 2023.

Section 31, Ch. 716, L. 2023, inserted (8) providing that emergency protective services hearings are not subject to the notice requirements of Montana ICWA; and made minor changes in style. Amendment effective May 12, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

Effective Dates — Termination: Sections 7(1) and 8, Ch. 529, L. 2021, provided that the temporary version of this section is effective July 1, 2021, and terminates June 30, 2023.

Section 5, Ch. 383, L. 2021, provided that the permanent version of this section is effective July 1, 2023.

Case Notes

Mother's Request for Emergency Protective Services Hearing Denied Based on Indian Child Welfare Act Exception — Writ of Supervisory Control Granted — Parents of Indian Children Similarly Situated to Parents For Whom ICWA Does Not Apply — 41-3-306(7)(b)Unenforceable *(see 2023 amendment to 41-3-306) — Violation of Equal Protection.* A.J.B. v. 18th Judicial District Court, 2023 MT 7, 411 Mont. 201, 523 P.3d 519.

41-3-307. Availability of prehearing conferences.

Compiler's Comments

2023 Amendment — Purported Amendment: Section 3, Ch. 711, L. 2023, in (1) near end substituted "before an emergency protective services hearing held by the court pursuant to 41-3-306" for "before a show cause hearing held by the court if the court is participating in a pilot project testing the effectiveness of prehearing conferences"; in (2) at end of introductory clause substituted "must include the following parties" for "may be held under this section only if it involves"; and deleted former (5) and (6) (see sec. 3, Ch. 711, L. 2023, for former text). Amendment effective July 1, 2023.

Although sec. 32, Ch. 716, L. 2023, purported to amend this section by inserting a reference to Montana ICWA in (5), the amendment was rendered ineffective by sec. 3, Ch. 711, L. 2023, which deleted that subsection.

Termination Provision Removed: Section 5, Ch. 711, L. 2023, amended sec. 8, Ch. 529, L. 2021, to remove the termination of this section. Effective May 22, 2023.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

Effective Date: Section 7, Ch. 529, L. 2021, provided that this section is effective on passage and approval. Approved May 14, 2021.

Termination: Section 8, Ch. 529, L. 2021, provided: "[This act] terminates June 30, 2023."

Part 4

Abuse or Neglect Proceedings

Part Case Notes

Procedural Deadlines Missed — Best Interests of Child: The mother's parenting rights were terminated. The initial hearing was scheduled 18 days after the 20-day statutory deadline, which the mother did not object to. Then the Department of Public Health and Human Services requested a continuance, which the mother objected to. Following her objection to the first continuance, the mother failed to object to subsequent motions. On appeal, the mother argued that the District Court committed reversible error when it failed to hold a show cause hearing within 20 days of the filing of the abuse and neglect petition and when it failed to hold a dispositional hearing 20 days after the show cause hearing. The Supreme Court held that pursuant to legislative intent, in cases involving abused and neglected children, a District Court may act to protect a child's best interests despite procedural interests. In re A.H., 2015 MT 75, 378 Mont. 351, 344 P.3d 403.

Standing to Appeal Dismissal of Petition for Adjudication: After the District Court dismissed the state's petition for the adjudication of two children as youths in need of care, counsel for the children appealed although the children wished to return to their mother. The mother argued that the children did not have standing to appeal and that counsel for the children should have advocated only for what the children desired. The Supreme Court concluded that the children had standing to appeal and that counsel acted appropriately by advocating for adjudication despite the children's contrary desires. In re K.H. and K.M., 2012 MT 175, 366 Mont. 18, 285 P.3d 474.

Dismissal of Petition for Temporary Investigative Authority (See 2001 Amendment to 41-3-427) Without Review of Guardianship Action — Harmless Error in Light of Requirements of Indian Child Welfare Act: In compliance with 41-3-403 (renumbered 41-3-423), the District Court ordered a show cause hearing at which to consider a petition for temporary investigative authority (TIA) (see 2001 amendment to 41-3-427) regarding two Indian children. At the hearing, the Deputy County Attorney offered an order and memorandum from a previously dismissed guardianship proceeding as evidence. The court did not admit the documentation as evidence, but took judicial notice of it. However, at the end of the hearing, the court dismissed the petition for TIA (see 2001 amendment to 41-3-427) without reviewing any records from the guardianship proceeding and ordered the Department of Public Health and Human Services to immediately place the children with their father. The mother contended that it was error to dismiss the petition without reviewing the guardianship file. In order for courts to grant TIA (see 2001 amendment to 41-3-427) petitions when Indian children are involved, the requirements of the Indian Child Welfare Act must be met. Under 25 U.S.C. 1912, active efforts must be made to provide remedial services and rehabilitation programs to prevent the breakup of the Indian family. In addition, any finding that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child must be based on the testimony of qualified expert witnesses. Because these requirements were not met, the court could not have granted TIA (see 2001 amendment to 41-3-427) even if it had reviewed the guardianship file, so its failure to do so, if erroneous, was harmless. In re M.P.M. & A.R.M., 1999 MT 78, 294 M 87, 976 P2d 988, 56 St. Rep. 327 (1999).

Error in Placing Custody With One Parent Following Dismissal of Petition for Temporary Investigative Authority (See 2001 Amendment to 41-3-427): In compliance with 41-3-403 (renumbered 41-3-423), the District Court ordered a show cause hearing at which to consider a petition for temporary investigative authority (TIA) (see 2001 amendment to 41-3-427) regarding two Indian children. At the end of the hearing, the court dismissed the petition for TIA (see 2001 amendment to 41-3-427) and ordered the Department of Public Health and Human Services to immediately place the children with their father. The Department argued on appeal that the court exceeded its authority in ordering transfer of custody to the father after the petition for TIA (see 2001 amendment to 41-3-427) was dismissed. The Supreme Court held that when the District Court vacated the orders issued following filing of the petition for TIA (see 2001 amendment to 41-3-427), it did not have authority to place custody with the father because nothing in the statutory framework or legislative intent authorizes the placement of a child with one parent, as opposed to the other, following dismissal of a petition for TIA (see 2001 amendment to 41-3-427). The order transferring custody to the father was reversed. In re M.P.M. & A.R.M., 1999 MT 78, 294 M 87, 976 P2d 988, 56 St. Rep. 327 (1999).

Federal Indian Child Welfare Act — Temporary Custody Not in Compliance With Act — Otherwise Valid Parental Termination Not Invalidated: Child of Indian parents was placed in the temporary custody of the state in proceedings that may not have complied with the federal Indian Child Welfare Act (25 U.S.C. § 1901, et seq.). Later, in proceedings that complied with the Act and before a different judge with different witnesses, the parents' rights were terminated and permanent custody was granted the state. The Supreme Court held that any failure to comply with the Act in the temporary proceedings would not invalidate the later termination because the proceedings are separate actions involving separate petitions and statutory guidelines. In re M.E.M., 209 M 192, 679 P2d 1241, 41 St. Rep. 636 (1984). See also In re S.P., 241 M 190, 786 P2d 642, 47 St. Rep. 190 (1990).

Indian Child Welfare Act — Effective Date: A proceeding for termination of parental rights initiated in state court prior to May 7, 1979, the effective date of the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901, et seq.) continues as a state proceeding, not subject to the transfer provisions to tribal court under the Act, even though, due to a bifurcation of hearings involving several fathers, one of these hearings was held after the effective date of the Act. In re T.J.D., J.L.D. & R.J.W., 189 M 147, 615 P2d 212 (1980).

Part Attorney General's Opinions

Tribal Court Judgment Not to Be Filed as Foreign Judgment — Exception: A judgment, decree, or order of an Indian tribal court may not be filed as a foreign judgment under the Uniform Enforcement of Foreign Judgments Act unless the judgment, decree, or order concerns an Indian child custody proceeding. 44 A.G. Op. 15 (1991).

Exclusive Tribal Jurisdiction of Indian Children — No Departmental Jurisdiction: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) has no jurisdiction to provide child protection services to Indian children who are subject to exclusive tribal jurisdiction under the Indian Child Welfare Act, 25 U.S.C. 1901, et seq., or to children residing on the reservation and eligible for tribal membership. The scope of the Department's responsibility is unaffected by the child's eligibility, or lack thereof, for participation in Bureau of Indian Affairs programs, and the Department is not obligated to provide child protective services and benefits to the extent the federal program offers comparable assistance. 41 A.G. Op. 76 (1986).

Foster Care or Adoption Placement of Indian Children — No Department Payments Under Social Security Act: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) may not make payments under Title IV-E of the Social Security Act (42 U.S.C. 670 through 676) to Indian children whose foster care or adoption placement is subject to exclusive tribal jurisdiction under the Indian Child Welfare Act (25 U.S.C. 1901, et seq.). 41 A.G. Op. 76 (1986).

Transfer of Child Custody Proceeding to Tribal Jurisdiction — No Continuance of State Child Protection Services: Once a child custody proceeding has been transferred from state District Court to tribal jurisdiction under sec. 101(b) of the Indian Child Welfare Act (25 U.S.C. 1911(b)), the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) may not continue to provide child protection services or benefits to the Indian child. 41 A.G. Op. 76 (1986).

Part Law Review Articles

Lawyers Were Children Once: An Ethical Approach to Strengthening Child Abuse and Neglect Legislation, Richardson, 31 J. Legal Prof. 357 (2007).

41-3-422. Abuse and neglect petitions — burden of proof.

Compiler's Comments

2023 Amendments — Composite Section: Section 1, Ch. 333, L. 2023, inserted (9)(c) concerning notice of the foster parent's, preadoptive parent's, and relative's rights. Amendment effective October 1, 2023.

Section 33, Ch. 716, L. 2023, in (5)(b) inserted references to 41-3-1303 and Montana ICWA; in (6)(a) and (13)(a) inserted references to Montana ICWA; and made minor changes in style. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

2021 Amendment: Chapter 19 in (12) in second sentence substituted "family engagement meeting" for "family group decisionmaking meeting". Amendment effective July 1, 2021.

2017 Amendment: Chapter 52 in (7) inserted last sentence regarding no appointment or assignment of counsel if service cannot be made upon a putative father; and made minor changes in style. Amendment effective March 1, 2017.

2007 Amendment: Chapter 166 in (9)(a) near end of second sentence before "to be heard" substituted "has the right" for "must be given an opportunity". Amendment effective July 1, 2007.

2005 Amendments — Composite Section: Chapter 118 in (6)(b) in first sentence near middle inserted "upon the person or the person's attorney of record" and at end inserted "by personal service, or by publication as provided in 41-3-428 and 41-3-429"; and made minor changes in style. Amendment effective October 1, 2005.

Chapter 449 in (7) after "shall" deleted "appoint" and inserted reference to appointment or assignment and after "attorney" inserted reference to 41-3-425; deleted former (11) that read: "(11) The court may at any time on its own motion or the motion of any party appoint counsel for any indigent party. If an indigent parent is not already represented by counsel, counsel must be appointed for an indigent parent at the time that a request is made for a determination that preservation or reunification services need not be provided"; inserted (11) relating to right to counsel as provided in 41-3-425; in (13)(a) after "right" inserted reference to 41-3-425, after "to" deleted "request the", and in two places after "appointment" inserted "or assignment"; and made minor changes in style. Amendment effective April 28, 2005.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

2003 Amendments — Composite Section: Chapter 189 inserted (2)(b) requiring that a separate notice stating any statutory time deadline for a hearing accompany a petition; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 504 inserted (1)(a)(iv) concerning long-term custody; inserted (5)(a)(iii) concerning evidentiary standard for long-term custody; in (6)(a) near middle of first sentence substituted "the initial petition and a petition to terminate the parent-child legal relationship" for "all petitions"; inserted (6)(b) concerning service by certified mail; in (12) in second sentence substituted "family group decisionmaking meeting" for "family group conference"; in (14) at beginning inserted "If appropriate"; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendments — Composite Section — Coordination: Chapter 83 in (6) at end after "publication" substituted "as provided in 41-3-428 and 41-3-429" for "in the manner provided by the Montana Rules of Civil Procedure for other types of proceedings". Amendment effective March 20, 2001.

Chapter 194 in (2) in second sentence near end after "or neglected" deleted "or abandoned"; inserted (9)(b) regarding intervention by certain individuals in action if court determines intervention is in best interests of child; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 281 inserted (1) setting out kinds of relief that may be sought in a petition; in (3) deleted former first sentence that read: "Upon receipt of a petition, except a petition for temporary investigative authority, the court shall set a date for an adjudicatory hearing on the petition" and before "preference" inserted "highest"; inserted (5) providing which party has the burden of establishing probable cause and presenting evidence; in (6) at beginning of first sentence inserted exception clause and after "served personally with a copy of" substituted "all petitions" for "the petition and summons"; in (10)(a) at end inserted "and of the relief requested"; deleted former (10) through (12) that read: "(10) The petition may ask for the following relief:

(a) temporary investigative authority and protective services, as provided in 41-3-402;

(b) temporary legal custody, as provided in 41-3-406;

(c) appointment of a guardian pursuant to 41-3-421;

(d) termination of the parent-child legal relationship and either:

(i) permanent legal custody with the right to consent to adoption, as provided in 41-3-607; or

(ii) appointment of a guardian; or

(e) any combination of the provisions of subsections (10)(a) through (10)(d) or any other relief that may be required for the best interests of the child.

(11) A request for a determination that reunification services need not be provided pursuant to 41-3-403 may be made in conjunction with the filing of a petition requesting relief, as provided for in subsection (10) of this section.

(12) The petition may be modified for different relief at any time within the discretion of the court"; in (11) inserted second sentence requiring appointment of counsel for an indigent parent; inserted (12) regarding alternative dispute resolution proceedings; inserted (13) requiring written notice of certain rights and timelines; inserted (14) requiring that an order contain notice of a possible permanency hearing, notice of a possible petition of termination of parental rights, and notification that completion of a treatment plan does not guarantee return of a child; inserted (15) regarding appointment of a standing master; and made minor changes in style. Amendment effective October 1, 2001.

Section 18(2), Ch. 281, L. 2001, a coordination instruction, provided: "(2) If House Bill No. 223 and [this act] are both passed and approved, then 41-3-401(6) [renumbered 41-3-422(6)] contained in [this act] must read as follows:

"(6) Except as provided in the federal Indian Child Welfare Act, if applicable, the parents or parent, guardian, or other person or agency having legal custody of the child named in the petition, if residing in the state, must be served personally with a copy of all petitions at least 5 days before the date set for hearing. If the person or agency cannot be served personally, the person or agency may be served by publication as provided in [sections 1 and 2 of House Bill 223] [41-3-428 and 41-3-429]."" House Bill No. 223 was approved as Ch. 83, L. 2001, and the appropriate change in text was made.

Chapter 311 in (4) in second sentence inserted reference to Montana Rules of Evidence and substituted "chapter" for "part"; deleted former (8) that read: "(8) Except when the proceeding is instituted or commenced at the request of the department, a citation must be issued and served upon a representative of the department before the court hearing"; and made minor changes in style. Amendment effective October 1, 2001.

Saving Clause: Section 8, Ch. 83, L. 2001, was a saving clause.

Section 19, Ch. 281, L. 2001, was a saving clause.

Applicability: Section 8, Ch. 194, L. 2001, provided: "[This act] applies to proceedings on petitions filed pursuant to 41-3-401 [now 41-3-422] after October 1, 2001."

1999 Amendments — Composite Section: Chapter 428 inserted (10)(c) relating to appointment of a guardian pursuant to 41-3-421; inserted (10)(d)(ii) relating to appointment of a guardian; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 566 in (1) at end of first sentence after "petitions" substituted "under this chapter" for "alleging abuse or neglect", deleted former second sentence that read: "The county attorney, the attorney general, or an attorney hired by the department with the written consent of the county attorney or the attorney general may require all state, county, and municipal agencies, including law enforcement agencies, to conduct the investigations and furnish reports that may be necessary", and inserted second sentence requiring petition to be accompanied by department's affidavit; in (7) inserted second, third, and fourth sentences requiring that notice of judicial hearings and reviews be given to foster parents, preadoptive parents, or relatives caring for the child and providing that right to appear does not make person a party to action; inserted (11) providing that request for determination that reunification services need not be provided may be filed with petition requesting relief; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendment: Chapter 516 in (2), near middle of first sentence, inserted "except a petition for temporary investigative authority"; in (4), in first sentence after "5", inserted "working"; in (10)(a), at end, inserted "as provided in 41-3-402"; in (10)(b), at end, inserted "as provided in 41-3-406"; in (10)(c), at end, inserted "as provided in 41-3-607"; in (10)(d), at end, substituted "interests of the child" for "interest of the youth"; and made minor changes in style.

Applicability: Section 20, Ch. 516, L. 1997, provided that this section applies to proceedings commenced on or after October 1, 1997.

1995 Amendments — Composite Section: Chapter 458 in (1), after "by the county", deleted "welfare department or office of human services" and after "hired by the" substituted "department" for "county welfare department or office of human services"; in first sentence of (1), in (3), and in (9)(a), after "neglect", deleted "or dependency"; and made minor changes in style. Amendment effective April 14, 1995.

Chapter 546 in (8) substituted "department of public health and human services" for "department of family services"; and made minor changes in style. Amendment effective July 1, 1995.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 329 in (1) deleted former last sentence that read: "Investigations as to financial status may not be made prior to the adjudicatory hearing provided for in 41-3-404." Amendment effective April 13, 1993.

1987 Amendments: Chapter 463 at end of (2), after "dates", deleted "and must be heard within 20 days of the filing of the petition"; in (4), after "agency", substituted remainder of subsection, authorizing service by publication if personal service not possible, for former language that read: "resides out of state or is not found within the state, the rules of civil procedure relating to service of process in such cases shall apply"; near beginning of (5), after "event", inserted "personal"; and in (10)(c), after "relationship", inserted language concerning termination of permanent legal custody.

Chapter 609 in (8), after "commenced", substituted "at the request of" for "by a representative of" and substituted "department of family services" for "department of social and rehabilitation services".

1985 Amendment: In (1) near beginning, after "county attorney", inserted "attorney general, or an attorney hired by the county welfare department or office of human services", in second sentence at beginning substituted "The county attorney or attorney general, or an attorney hired by the county welfare department or office of human services with the written consent of the county attorney or attorney general" for "He"; in (2) near end of second sentence, after "dates", inserted "and must be heard within 20 days of the filing of the petition"; deleted former (10)(d) and (e) that read: "(d) permanent legal custody, including the right to consent to adoption;

(e) appointment of guardian ad litem"; in (12) near middle, after "appoint", deleted "a guardian ad litem for the youth or"; and deleted former (13) that read: "This section does not apply to a petition for temporary investigative authority and protective services."

1981 Amendment: Substituted present subsection (10)(c), relating to termination of parental rights and permanent custody, for former subsection (10)(c), which read: "(c) limited legal custody".

Case Notes

General 1391
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GENERAL

Foster Parents Precluded From Intervening — No Allegation of Abandonment — Rule 24, M.R.Civ.P., Displaced by Title 41 in Abuse and Neglect Case. In re U.A.C., 2022 MT 230, 410 Mont. 493, 520 P.3d 295.

Consolidation of Show Cause and Termination Hearing Not Violative of Due Process: On appeal from an order terminating the mother's parental rights, the Supreme Court held that, although the District Court consolidated the show cause hearing and termination hearing, and the initial show cause notice failed to inform the mother that her parental rights could be terminated at the show cause hearing, the mother's due process rights were not violated. The mother received additional notice that her parental rights were at stake in communications that included the original petition to terminate her parental rights and grant permanent legal custody of the child to the Department of Public Health and Human Services, the order setting the hearing on the Department's petition, and the original hearing scheduled on the Department's petition, for which the mother attended the hearing and was granted a two-week continuance. Because the mother had notice and an opportunity to be heard, neither the consolidation of the show cause and termination hearings nor the lack of notice of the risk of terminated parental rights in the initial show cause order violated the mother's due process rights. In re C.B., 2019 MT 294, 398 Mont. 176, 454 P.3d 1195.

Qualifications to Be Considered Party or Interested Person in Child Abuse and Neglect Proceedings: In a child abuse and neglect proceeding, the mother's longtime boyfriend, who was not biologically related to the child but was identified by the child as his "dad", appealed the District Court's determination that the boyfriend was neither a party nor an interested person to the child's case and, therefore, was not entitled to continued notice or the right to appear in any subsequent proceedings related to the child. On appeal, the Supreme Court determined that the Department of Public Health and Human Services, the child, and a parent, guardian, or individual with legal custody of the child are all parties to child abuse and neglect proceedings. In addition, a foster parent, a preadoptive parent, a relative caring for the child, or a relative who has cared for the child is allowed to file a motion to intervene and may also be a party to the proceedings. Therefore, because the boyfriend did not meet the above criteria, the District Court did not err in dismissing him as a party to the proceedings. However, the Supreme Court determined that under 41-3-422(9)(a), the boyfriend is a person interested in the child's case and has a right to appear at hearings pertaining to the child but does not have the right to notice or the right to be heard. The District Court erred when it denied the boyfriend's request to appear at the child's proceedings. In re J.B., 2015 MT 342, 381 Mont. 525, 362 P.3d 859.

Improper Termination of Parental Rights by Default Judgment — Abuse of Discretion — Action to Terminate Other Parent's Rights Inappropriate: A mother filed a petition to terminate the parental rights of her infant daughter's father, who was incarcerated at the time. Despite the father's efforts to respond timely, the District Court, without a hearing, evidence, or findings, entered default judgment. The father appealed the termination to the Supreme Court, which reversed, concluding that parental rights cannot be terminated pursuant to a default judgment. The Supreme Court also emphasized that a natural parent cannot petition to terminate the parental rights of the other natural parent except in the case of a stepparent adoption. In re K.J.B., 2014 MT 327, 377 Mont. 270, 339 P.3d 824, distinguished in In re A.M.S., 2016 MT 22, 382 Mont. 145, 364 P.3d 1261.

Adjudication of Youth in Need of Care Without Specific Request Affirmed: A parent asserted that the District Court lacked authority to adjudicate a child as a youth in need of care because there was no request for such adjudication contained in the initial petitions for emergency protective services and temporary investigative authority. The Supreme Court disagreed. The relief sought in a petition filed under 41-3-422 may include any relief required for the best interests of the child, and 41-3-432 allows a court to adjudicate a child as a youth in need of care at the show cause hearing for immediate protection and emergency protective services. Thus, the District Court was not foreclosed from adjudicating the child as a youth in need of care following filing of the initial petitions for emergency protective services and temporary investigative authority. In re B.S. & G.S., 2009 MT 98, 350 M 86, 206 P3d 565 (2009).

Dismissal Motion Properly Denied When Statutory Criteria Not Met: Based on the Supreme Court's prior holding in In re D.B. & D.B., 2007 MT 246, 339 M 240, 168 P3d 691 (2007) (In re D.B. I), the mother moved to dismiss a parental rights termination case on grounds that the District Court proceedings did not contain sufficient evidence to apply the proper statutory criteria required by In re D.B. I. The court denied the dismissal motion and the mother appealed. The Supreme Court affirmed. Only when the criteria of 41-3-424 are met may a petition be properly dismissed, and the mother failed to satisfy those criteria. The children remained youths in need of care and the District Court was required to provide some form of relief as established in 41-3-422, so dismissal was inappropriate and unavailable to the mother. In re D.B. & D.B., 2008 MT 272, 345 M 225, 190 P3d 1072 (2008). See also In re K.A., 2016 MT 27, 382 Mont. 165, 365 P.3d 478.

Requirement That Child Be Adjudicated Youth in Need of Care Met by Parents' Stipulation in Adoption of Treatment Plans — Harmless Error: A father contended that all proceedings related to a parental rights termination were invalid because the children had never been formally adjudicated as youths in need of care. The Supreme Court found that in this case, the absence of a formal adjudication was harmless error because the parents previously agreed that their children were abused or neglected when the parents stipulated to that fact during the adoption of four separate treatment plans. The evidence of abuse and neglect was overwhelming, and if the parents had objected to temporary legal custody or to subsequent District Court findings or if they had disputed the status of the children as youths in need of care, the District Court could have easily made a ruling on the children's status at that time. The parents were afforded full due process at every stage and had ample opportunity to object to the proceedings and findings, yet they stipulated and agreed to the District Court findings through counsel at every turn. Although failure to adhere to statutory requirements governing termination proceedings will generally constitute grounds for reversal, this case was one of the rare occasions that application of the harmless error doctrine was warranted. The procedural error did not affect the outcome of the termination proceedings or substantively prejudice the parents, and termination was affirmed. In re J.C. & A.D., 2008 MT 127, 343 M 30, 183 P3d 22 (2008), distinguishing In re M.O., M.O., & M.O., 2003 MT 4, 314 M 13, 62 P3d 265 (2003), and In re B.N.Y., 2003 MT 241, 317 M 291, 77 P3d 189 (2003).

Hearsay Evidence and Parental Rights Termination — Admission of Hearsay Evidence at Show Cause, Adjudicatory, and Termination Hearings Held Proper Because Children "Unavailable" — J.C.E. Case Distinguished — No Offer of Proof Made: Hearsay evidence in the form of videotaped interviews of young children talking with investigators about sexual abuse by their parents was admitted after the District Court found that the children were "unavailable" to testify because they would be traumatized by testifying against their parents in a courtroom setting. The Supreme Court held that the videotaped testimony was properly admitted by the District Court, based upon the thorough findings by the District Court, at the show cause hearing, the adjudicatory hearing, and the parental rights termination hearing. The Supreme Court distinguished St. v. J.C.E., 235 M 264, 767 P2d 309 (1988), because that case was a criminal case in which the right of confrontation under Art. II, sec. 24, Mont. Const., applied, whereas the case now before the Supreme Court was a civil case. The Supreme Court also held that the District Court properly analyzed the mother's attempt to call the children as witnesses as one of relevance, and because no offer of proof was made under Rule 103, M.R.Ev. (Title 26, ch. 10), by the mother, the Supreme Court could not conclude that the District Court acted arbitrarily. In re O.A.W., 2007 MT 13, 335 M 304, 153 P3d 6 (2007).

Standards Applicable to Termination of Indian Parental Rights — Active Department Efforts to Provide Services Required: The District Court terminated the parental rights of an Indian father after the children were removed from the father's custody a fourth time because of the father's abuse and neglect. The father appealed on grounds that: (1) the state did not make active efforts to provide remedial services; (2) the District Court relied on expert testimony based on the Department file rather than personal interviews; and (3) it was error not to grant the father's request for an extension of temporary legal custody. The Supreme Court affirmed on all issues. The father left no phone number or address with the social worker and moved multiple times. Without any involvement, the father prevented the Department from making active efforts at providing more intensive services. Second, the federal Indian Child Welfare Act requires testimony from a qualified expert witness, but does not require a specific form of that testimonial evidence or personal interviews, and a District Court need not conform its decision to a particular piece of evidence or a particular expert's report or testimony as long as a reasonable person could have found beyond a reasonable doubt that continued custody by an Indian parent or custodian is likely to result in serious emotional or physical damage to the child. Last, the District Court did not abuse its discretion in refusing to extend temporary custody because the Department had already provided active efforts and did not need more time to assist the father in attaining his goals. The District Court had an accurate perspective on the father's parenting abilities, and refusal to extend the temporary placement did not make the court's decision any less reasonable. In re A.N. & M.N., 2005 MT 19, 325 M 379, 106 P3d 556 (2005). See also In re Marriage of McKenna, 2000 MT 58, 299 M 13, 996 P2d 386 (2000), In re I.B., 2011 MT 82, 360 Mont. 132, 255 P.3d 56, In re D.S.B., 2013 MT 112, 370 Mont. 37, 300 P.3d 702, and In re S.B., 2019 MT 279, 398 Mont. 27, 459 P.3d 214, holding that the Department made active efforts beyond a reasonable doubt.

Misdiagnosis of Rare Skin Disease as Evidence of Parental Sexual Misconduct — Newly Acquired Evidence Did Not Undermine Validity of Adjudication of Children as Youths in Need of Care — Termination of Parental Rights Upheld: After the parents' 4-year-old daughter was diagnosed as a probable victim of parental sexual misconduct, the court ordered a TIA and protective services for all five children, who were all under 5 years of age. Both parents were criminally charged with abuse and neglect of their children. The father remained in jail for 1 year. The children were tested and found to be developmentally delayed in their speech, and both parents were diagnosed with psychological disorders. Both parents were ordered to complete treatment plans, which they failed to complete. Eventually, their parental rights were terminated. Two years after the initial diagnosis, it was determined that the daughter's physical symptoms were the result of a rare skin disease called lichens sclerosis et atrophicus (LSA) rather than sexual abuse. The parents appealed the termination of their parental rights and argued that the District Court had erred in adjudicating the children as youths in need of care based on the misdiagnosis. The parents further argued that the allegations of sexual molestation because of the misdiagnosis tainted the entire proceedings to such a degree that they were deprived of their rights to due process and fundamental fairness, thereby invalidating the subsequent termination ruling. The Supreme Court upheld the District Court and held that, based on the developmental delays and psychological disorders, the District Court had adequate grounds independent of the LSA misdiagnosis for adjudicating the children as youths in need of care under this section and that the subsequent termination under 41-3-609 was valid. In re D.B., 2004 MT 371, 325 M 13, 103 P3d 1026 (2004).

Failure to Hold Adjudicatory Hearing to Determine Whether Children in Need of Care — Termination of Parental Rights Improper Absent Adjudication of Status of Children: The District Court held several hearings concerning temporary investigative authority, granting several extensions, and also held several hearings concerning granting temporary legal custody, which was extended twice. The state then filed a petition to terminate the mother's parental rights. Temporary legal custody was extended a third time pending a hearing on the termination hearing. At the hearing, the mother's parental rights were terminated, and she appealed. The Supreme Court found that there had never been an adjudicatory hearing at which the District Court heard testimony or received evidence concerning whether the children were abused or neglected. The hearing for temporary legal custody did not equate to an adjudication by the court that the children were youths in need of care, even in light of an alleged stipulation by the mother to that effect. Absent an adjudicatory hearing and an adjudication that the children were youths in need of care, termination of parental rights was improper, and the order was reversed. In re M.O., M.O., & M.O., 2003 MT 4, 314 M 13, 62 P3d 265 (2003).

Attempt to Use Writ of Habeas Corpus to Demand Physical Presence of Children Removed From Parent in Abuse and Neglect Proceeding — Petition Properly Denied: The mother petitioned the District Court for a writ of habeas corpus demanding that her children be physically present for an abuse and neglect hearing because they were material witnesses and had been removed from her custody unlawfully. The petition was denied. On appeal, the mother cited In re Bertelson, 189 M 524, 617 P2d 121 (1980), for the proposition that a writ of habeas corpus was the appropriate procedural device to bring the custody matter before a court. The Supreme Court disagreed and distinguished Bertelson because the mother's position ignored the substantial differences between dissolution proceedings and abuse and neglect proceedings, differences that were not at issue in Bertelson. The court also cited its earlier holding in In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982 (2000), in which it was held that the children were properly removed from the mother's home. Because temporary custody of the children with the state was legal, relief pursuant to habeas corpus premised on illegal restraint was not available to the mother under these circumstances. In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

Denial of Writ of Habeas Corpus to Compel Attendance of Children in Abuse and Neglect Hearing Not Violative of Due Process Rights or Right to Confront Witnesses: The mother petitioned the District Court for a writ of habeas corpus demanding that her children be physically present for an abuse and neglect hearing because they were material witnesses and claiming that the writ was necessary to ensure her due process rights by having the children available to rebut allegations against her at the hearing. The petition was denied. On appeal, the Supreme Court affirmed. Although the mother was entitled to an opportunity for a meaningful hearing, that opportunity need not be provided at the expense of the children whose best interests were the paramount focus of the proceeding, and subjecting the children to direct and cross-examination could exacerbate the abuse that they had already experienced. Denial of the petition did not violate the mother's right to confront witnesses because the children were not her accusers and she had no right to confront them. Rather, the abuse and neglect case was brought by the state, and the mother had ample opportunity to confront and examine the state's witnesses and experts at the hearing, so her due process rights were met. In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

Parties in Dissolution Proceeding Not Same as Parties in Abuse and Neglect Proceeding — Res Judicata Inapplicable: During marriage dissolution proceedings, the mother was granted custody of the children, but during a subsequent abuse and neglect proceeding, permanent custody was granted to the father. The mother appealed the placement on grounds that it constituted a readjudication of the earlier custody order in her favor in the dissolution action, in violation of the doctrine of res judicata. The Supreme Court disagreed. Four criteria must be met for res judicata to apply, the first of which is that the parties or their privies are the same. The mother failed to meet this criteria because in the dissolution action, the parties were the mother and father, while in the abuse and neglect proceeding, the parties were the state, the children, and the mother. Despite the fact that the state was investigating claims of abuse within the family during the dissolution action, it was not a party to that action and did not petition for investigative authority and protective services (see 2001 amendment to 41-3-427) for the children until the dissolution was final. In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

Parent Not Represented by Counsel During Show Cause Hearing Regarding Whether Child a Youth in Need of Care — Due Process Rights Not Violated: At the time of a show cause hearing on whether her child was a youth in need of care, the mother was an indigent mental patient civilly committed to the state hospital. She appeared at the hearing without representation of counsel. The mother contended that the District Court violated her due process rights by making that critical determination regarding the child when she was unrepresented. Although in In re A.S.A., J.L.A., G.A., & A.J.A., 258 M 194, 852 P2d 127 (1993), the Supreme Court held that the constitutional right to due process guarantees an indigent parent the right to court-appointed counsel in parental rights termination proceedings, the court has not extended the right to counsel to a pretermination proceeding in which the focal issue is whether a child is a youth in need of care. Rather, appointment of counsel at any time prior to the initiation of termination proceedings is within the discretion of the District Court. In this case, the initial determination that the child was a youth in need of care was made by order pursuant to a finding of probable cause even before the mother's first appearance in any proceedings when the District Court relied on a report submitted by a social worker showing that the child was abused or neglected or in danger of abuse or neglect and that removal from the home was necessary to protect the child's welfare. Subsequent to the initial determination, the District Court reached the same conclusion on at least three separate occasions when the mother was represented by counsel, including one hearing when the social worker was subjected to cross-examination by the mother's counsel. The Supreme Court applied In re M.F., 201 M 277, 653 P2d 1205 (1982), and in re D.S., H.S., R.S., R.S., J.S., R.S., & K.S., 253 M 484, 833 P2d 1090 (1992), and in holding that the state is not required to provide counsel at proceedings concerning temporary investigative authority or temporary custody. Thus, the mother's due process rights were not violated when the District Court made the determination that the child was a youth in need of care at a time when the mother was not represented by counsel. (See 2005 amendment.) In re A.M., 2001 MT 60, 304 M 379, 22 P3d 185 (2001).

Retroactive Application of Amendment: Subsection (2) of 41-3-401 (renumbered 41-3-422) was amended in 1985 to require adjudicatory hearing within 20 days of filing of petition but was amended in 1987 to remove the 20-day requirement. Hearing in this case was held after effective date of 1985 amendment but not within 20 days of filing petition. Appellant contended 1985 amendment was procedural and applied retroactively to require hearing within 20 days. The Supreme Court, citing Boehm v. Alanon Club, 222 M 373, 722 P2d 1160, 43 St. Rep. 1341 (1986), held that even though this provision may be procedural and therefore not subject to 1-2-109 (which states no law is retroactive unless expressly so declared), the 1987 amendment was likewise retroactive and therefore voided the 20-day requirement. Custody of R.A.D., 44 St. Rep. 2018 (1987). Opinion withdrawn but issue affirmed in Custody of R.A.D. & J.D., 231 M 143, 753 P2d 862, 45 St. Rep. 496 (1988).

Evidence of Sexual Abuse — Treatment Plan Ordered: Acting on evidence of sexual abuse and other problems within the family, the trial court properly found S.L.T. to be an abused and neglected child. The court granted temporary custody to the county welfare department and required that the child and her parents follow a treatment plan submitted by the welfare department. Section 41-3-404 (renumbered 41-3-437) gives the trial court authority to order any of the forms of relief listed in 41-3-403 (renumbered 41-3-423) once the court determines a child is abused or neglected. This includes the relief ordered in this case. In re S.L.T., 215 M 289, 697 P2d 472, 42 St. Rep. 366 (1985).

Failure to Serve Natural Father — Mother's Lack of Standing to Contest: In a youth in need of care proceeding, the mother has no standing to contest the failure to serve the natural father when she has not shown a personal interest that would be adversely affected by such failure to serve. In re B.L.O., 213 M 164, 689 P2d 1246, 41 St. Rep. 2024 (1984).

Finding of Abuse, Neglect, or Dependency Necessary Before Consideration of Best Interests of the Child: M.G.M. was born out of wedlock and had little contact with her natural father until the Department of Social and Rehabilitation Services (now Department of Family Services) placed M.G.M. in a foster home and terminated her mother's parental rights. The Department then sought to terminate the father's parental rights. To terminate his parental rights, the court must first find that the child is abused, neglected, or dependent. Only when such a finding has been made can the court apply the best interests of the child test. In re M.G.M., 201 M 400, 654 P2d 994, 39 St. Rep. 2191 (1982).

Matter Submitted With Petition: The Department of Social and Rehabilitation Services (SRS) (now Department of Family Services) first had contact with the mother of three minor children in 1967. During the period from 1976 through 1981, SRS received numerous complaints alleging abuse and neglect of the children. In 1981, proceedings were begun to terminate the mother's parental rights. The mother contended that the submission of a social worker's report to the court, along with the petition for permanent custody, was error. The Supreme Court held that where the report contained information essentially the same as that testified to by the author, who was cross-examined at the hearing, there is a presumption that the trial court has disregarded all inadmissible material in making its decision. The decision of the lower court was upheld. In re M.F., J.F., & R.W., 201 M 277, 653 P2d 1205, 39 St. Rep. 2103 (1982).

Interval Between Removal and Final Order: Although the interval of 20 months between the time of removal from the home until the final order was long and District Courts are exhorted to give preference to custody cases, reversal here would be an ill-advised and improper sanction because of the best interests of the child. In re A.J.S., 193 M 79, 630 P2d 217, 38 St. Rep. 947 (1981). See also In re B.W.S., 2014 MT 198, 376 Mont. 43, 330 P.3d 467, in which the Supreme Court concluded that missed procedural deadlines did not extinguish the District Court's jurisdiction over a parental termination proceeding. (Annotator's note: Chapter 659, sec. 5, L. 1985, amended 41-3-401 (renumbered 41-3-422) and 41-3-404 (renumbered 41-3-437) to require that the 41-3-404 (renumbered 41-3-437) adjudicatory hearing must be held within 20 days of the filing of the petition and the 41-3-406 (renumbered 41-3-438) dispositional hearing must be held within 30 days of the adjudicatory hearing. Chapter 388, sec. 2, L. 1985, amended 41-3-607 to require that a dispositional hearing on a petition to terminate parental rights must be held within 180 days of the filing of the petition.)

Names of Parties: The Supreme Court directed that in this and in future cases under 41-3-101, et seq., in both the District and Supreme Courts, all names of parties involved be removed to avoid publicity of the minor parties involved. In re G., Youth in Need of Care, 174 M 321, 570 P2d 1110 (1977).

Failure to Make Required Findings: The District Court abused its discretion in awarding permanent custody to the Department of Social and Rehabilitation Services (now Department of Family Services) because it patently failed to make the required findings that the child was "abused, dependent, or neglected" and therefore was without power to effect a permanent transfer of custody to a nonparent. In re Fish, 174 M 201, 569 P2d 924 (1977).

Hearsay in Child Custody Procedure: The Montana Rules of Civil Procedure, including the hearsay rule, must be strictly followed in a child custody procedure to avoid abuse. Therefore, Department of Social and Rehabilitation Services (now Department of Family Services) reports containing hearsay that are not excepted from the rule as either business records or written reports by state officers are inadmissible. In re Swan, 173 M 311, 567 P2d 898 (1977).

Prehearing Report — Petition for Permanent Custody: The Supreme Court avoided deciding whether or not it is proper for a County Attorney to file a prehearing report in support of a petition under 41-3-401 (renumbered 41-3-422) for permanent custody since the only report in the record was filed in support of a temporary investigative authority and protective services (see 2001 amendment to 41-3-427) petition under 41-3-402(3) (renumbered 41-3-427(3)). In re Moyer, 173 M 208, 567 P2d 47 (1977).

Temporary Custody: When petitioners had requested temporary custody of neglected children and no petition had been filed by the welfare department for permanent custody, the District Court was without authority to enter an order of permanent custody. Flathead County Welfare Dept. v. Endres, 166 M 379, 533 P2d 959 (1975).

JURISDICTION

Termination of Parental Rights to Indian Children — Tribal Court to Affirmatively Decline Case Prior to State Court Proceedings — Jurisdiction Transfer Hearing Required Prior to Ruling on Jurisdictional Transfer of Children: The District Court erred in terminating the parental rights of a mother of four Indian children without first holding a jurisdiction transfer hearing under the Indian Child Welfare Act (ICWA) after the mother requested the matter be transferred to tribal court at the outset of the proceedings. The Supreme Court ruled that a tribal court, and not the tribe, must affirmatively decline to accept a case before a state court can proceed with termination of parental rights to Indian children. A District Court must hold a jurisdiction transfer hearing before it grants or denies a request for a jurisdictional transfer of Indian children to tribal custody. In re J.W.C., L.W.C., K.W.C., and C.W.C., 2011 MT 312, 363 Mont. 85, 265 P.3d 1265.

Termination of Parental Rights — Requirements of Indian Child Welfare Act: Under the Indian Child Welfare Act of 1978, 25 U.S.C. 1901, et seq., the party seeking termination of an individual's parental rights to an Indian child under state law must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the efforts have proved unsuccessful. The party seeking termination has the burden of proving beyond a reasonable doubt that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. In re Custody of A.L.R., A.A.R., & T.C.R., 2002 MT 183, 311 M 76, 54 P3d 17 (2002). See also In re A.L.D., 2018 MT 112, 391 Mont. 273, 417 P.3d 342.

Failure to Personally Serve Notice of Child Custody Proceedings to Parent Incarcerated Out-of-State Not Reversible Error: The father was incarcerated in Washington state and was notified by mail of proceedings prior to the filing of a petition for permanent legal custody and termination of parental rights regarding his children, rather than by personal service. He contended that failure to serve notice personally was reversible error. The Supreme Court disagreed. Although the preferred practice is to personally serve parents and legal guardians whose whereabouts are known with copies of all petitions in accordance with this section, the issue of personal service was not dispositive in this case. Because the father was incarcerated at all times during the proceedings, it would have been impossible for him to exercise his legal rights to parent the children during that time. He was unable to show how personal service would have significantly impacted the proceedings or how invalidation of the proceedings would have a significant impact on his parental rights. Therefore, failure to personally serve the father with notice of the proceedings prior to filing the petition for permanent legal custody was not reversible error. In re L.M.A.T. & B.L.F.T., 2002 MT 163, 310 M 422, 51 P3d 504 (2002).

2001 Notice Provisions Not Applicable to Proceedings Begun in 2000: The 2001 Legislature amended this section to require that parents or legal guardians be advised of their right to counsel and the right to contest the proceedings. The amendments also require that when a District Court issues an order in an abuse and neglect proceeding, it must include notice concerning statutory requirements for timeliness of hearings and presumptions of the best interests of the child and that completion of a treatment plan does not guarantee return of a child. The order issued in this case in 2002 did not contain the mandated notices, so a parent contended that the order was invalid and unenforceable. However, the proceedings in this case were begun before the 2001 amendments were adopted, so pursuant to the saving clause in the 2001 act, the notice requirements did not apply. In re L.M.A.T. & B.L.F.T., 2002 MT 163, 310 M 422, 51 P3d 504 (2002).

Expiration of Temporary Custody Order — No Effect on Jurisdiction: At the time that the Department of Family Services filed a petition for temporary investigative authority (see 2001 amendment to 41-3-427), the mother and her children were not living on the reservation. Subsequently, the mother moved back to the reservation and sought to have the action transferred to the tribal court. The mother argued that the District Court had lost jurisdiction over the matter when its order of temporary custody expired. The Supreme Court ruled that the child abuse and neglect statutes do not make provisions for the expiration of custody in the state or for the loss of jurisdiction by the court, other than by a finding by the court that the children are not in danger of being abused or neglected and by vacating any order made pursuant to 41-3-403 (renumbered 41-3-423). In re W.L., C.L., & B.L., 260 M 325, 859 P2d 1019, 50 St. Rep. 1081 (1993).

Jurisdiction Respecting Indian Children — Domicile at Time Action Commenced: At the time that the Department of Family Services filed a petition for temporary investigative authority (see 2001 amendment to 41-3-427), the mother and her children were not living on the reservation. Subsequently, the mother moved back to the reservation and sought to have the action transferred to the tribal court. The Supreme Court held that domicile is determined at the commencement of an action and that the lower court had jurisdiction based on the fact that the mother and her children were not living on the reservation when the petition was filed. In re W.L., C.L., & B.L., 260 M 325, 859 P2d 1019, 50 St. Rep. 1081 (1993).

Lack of Personal Notice — Due Process Not Violated: Mother abandoned her children after two failed treatment plans and neglected to apprise the Department of Family Services (now Department of Public Health and Human Services) of her whereabouts for over 90 days prior to initiation of termination proceedings, during which time Department efforts to contact her were unsuccessful. Relying on 41-3-401 (renumbered 41-3-422), she later argued that because she was not personally served with notice of the termination proceedings, her due process rights were violated. However, 41-3-608 outlines the notice requirements applicable to parent-child relationship termination proceedings. The District Court, after noting the Department's efforts to locate mother and the fact that she was under actual notice from the onset of Department involvement that her parental rights could be terminated if she failed to follow court-ordered treatment plans, properly held that the notice requirements of 41-3-608 were satisfied. In re A.E., C.E., S.R., & J.R., 255 M 56, 840 P2d 572, 49 St. Rep. 877 (1992).

Failure to Transfer Jurisdiction of Eskimo Child to Alaska Tribe Proper — Application of Indian Child Welfare Act: The District Court denied an Eskimo tribe's motion to transfer jurisdiction of child custody proceedings of an Eskimo child under the Indian Child Welfare Act of 1978. The Supreme Court found that denial of the motion was proper under the rationale of 25 U.S.C. 1911(a) and (b) and the previous ruling in In re M.E.M., 195 M 329, 635 P2d 1313 (1981). The child was not residing or domiciled within the tribal reservation. Further, good cause existed for retaining jurisdiction in Montana rather than transferring jurisdiction to Alaska, including evidence of potentially devastating damage to the child's best interests and stability, as well as undue hardship on parties and witnesses. In re T.S., 245 M 242, 801 P2d 77, 47 St. Rep. 2149 (1990), replacing previous opinion, subsequently withdrawn, at 47 St. Rep. 1888.

Refusal to Relinquish Custody of Indian Children to Tribe — No Abuse of Discretion: Although a tribe participated in the dispositional hearing and presented a formal resolution asking for custody of the children, who were tribal members, the District Court did not abuse its discretion in refusing to relinquish custody to the tribe when it was determined that the children's best interests would be better served by leaving them in their foster home placement, with the ultimate goal of placing them in a Native American home. In re M.J.D., C.K.D., & A.R.D., 225 M 200, 731 P2d 937, 44 St. Rep. 167 (1987).

Transfer of Child Proceeding From Montana Court to Tribal Court — Due Process Requirements: One of the purposes of the Indian Child Welfare Act, 25 U.S.C. § 1901, et seq., is to ensure due process for all those involved, which requires a Montana court, when entertaining a tribal court motion for transfer to the tribal court of jurisdiction of children who are the subject of a Montana court proceeding, to hold a hearing on the transfer request and give a parent who claims indigency an appointed counsel if the court finds indigency. In re G.L.O.C., Youth in Need of Care, 205 M 352, 668 P2d 235, 40 St. Rep. 1354 (1983). See also In re J.W.C., L.W.C., K.W.C., and C.W.C., 2011 MT 312, 363 Mont. 85, 265 P.3d 1265.

Parental Consent Not Required: Parental consent is not a jurisdictional necessity under this chapter to declare a child abused, dependent, or neglected or to grant permanent custody of the child to persons other than the natural parents. In re C.M.S., A Dependent and Neglected Child, 187 M 115, 609 P2d 240 (1979).

Jurisdiction Dependent on Statutory Compliance: In a consolidated proceeding based on a petition for a Writ of Habeas Corpus by a natural parent and a petition by a nonparent for guardianship, the District Court was without jurisdiction to find the children involved dependent and neglected and to enter an order granting custody to the nonparent petitioners. Unless 41-3-401 (renumbered 41-3-422) is followed, the court is without jurisdiction to deprive the parent of custody. In re the Marriage of Schultz v. Schultz, 184 M 245, 602 P2d 595 (1979), following Guardianship of Aschenbrenner, 182 M 540, 597 P2d 1156 (1979), and Guardianship of Evans, 179 M 438, 587 P2d 372 (1978).

Jurisdiction Based on Service: Under section 10-504, R.C.M. 1947 (now repealed), District Court had jurisdiction over petition by state seeking permanent custody and right to consent to adoption of three children despite the facts that proper citation was not issued or served on the parents, when father of one of the children had consented to the proceeding, father of other two children was deceased, mother who was represented by counsel appeared at the hearing voluntarily, and the hearing on the petition in question was preceded by a series of hearings and postponements regarding temporary custody of the children. Bonser v. Cascade County, 162 M 1, 507 P2d 1064 (1973).

Jurisdiction Over Indians: Under section 10-503, R.C.M. 1947 (now repealed), when child was taken from Indian reservation and abandoned outside the reservation, court for the county where the child was found could take jurisdiction and provide for the child despite the fact that the mother remained on the reservation and committed no acts of neglect outside the reservation. In re Cantrell, 159 M 66, 495 P2d 179 (1972).

FACTORS TO BE CONSIDERED

Sufficient Evidence to Adjudicate Children as Youths in Need of Care: The District Court properly adjudicated children as youths in need of care based on evidence that: (1) there was a significant prior history of domestic violence and domestic abuse between the parents in the presence of the children; (2) one of the children exhibited various behavior and developmental problems, including running away, violent behavior, anger control problems, and poor language skills; (3) the father could not care for the children because of his long-term federal incarceration; (4) the mother, who was living at a shelter for domestic abuse victims and dealing with mental health issues, had voluntarily surrendered the children to state care because of her inability to adequately parent them; and (5) the state had made reasonable efforts to avoid placement of the children or to make it possible to safely return the children to the home, but protective placement was required. In re B.S. & G.S., 2009 MT 98, 350 M 86, 206 P3d 565 (2009). See also In re K.H. and K.M., 2012 MT 175, 366 Mont. 18, 285 P.3d 474, in which the Supreme Court concluded that there was insufficient evidence to adjudicate children as youths in need of care and that the District Court properly considered the mother's past conduct, including her choice of intimate partners, in the context of how that conduct affected the children.

Misdiagnosis — Evidence at Time of TIA Hearing Sufficient for Issuance of TIA: After the parents' 4-year-old daughter was diagnosed as a probable victim of parental sexual misconduct, the court ordered a TIA and protective services for all five children, who were all under 5 years of age. The parents' rights were eventually terminated. Two years after the initial diagnosis, it was determined that the daughter's physical symptoms were the result of a rare skin disease called lichens sclerosis et atrophicus (LSA) rather than sexual abuse. Subsequent discovery that the initial probable cause determination was based on faulty information does not change the fact that the District Court initially had probable cause based upon information available at the time of the determination. Substantial, credible evidence supported the District Court's finding of probable cause for issuing the TIA. In re D.B., 2004 MT 371, 325 M 13, 103 P3d 1026 (2004).

Termination of Parental Rights: When the following things were considered, the record supported the conclusion that the father's rights were adequately considered prior to termination of parental rights and that the decision to terminate them was supported by credible evidence: (1) the father was notified of the hearing, was present, and was represented by counsel; (2) professional testimony indicated the father would not be able to provide enough influence to offset the marked deprivation anticipated to continue for the child; (3) the father was found to have made no effort to assist the mother in learning to become a good parent; (4) the father had visited the child only once in 6 months when the child was in a foster home and had been reported to have abused the child. In re L.F.G., 183 M 239, 598 P2d 1125 (1979).

Youth in Need — Best Interest of Child — Mental Condition of Parent as Sole Factor: When the District Court considered the best interests of a child only after first determining that the child was in fact abused or neglected, it met the required standard. Considering the mental condition of the mother as the primary if not the sole factor, but having evidence that the child would not receive even minimally satisfactory maternal care and would be exposed to extremely high chances of developing a mental condition similar to that of the mother, sufficient credible evidence was before the District Court to support the District Court's decision that the child was a youth in need of care. The Supreme Court rejected the view that mental condition of a parent could not be the sole factor supporting a severance of parental rights. In re L.F.G., 183 M 239, 598 P2d 1125 (1979).

APPOINTMENT OF GUARDIAN OR COUNSEL

Termination of Parental Rights — Indigent Father — Waiver of Right to Counsel: The District Court terminated the father's parental rights during an adoption hearing. The indigent father was not represented by counsel at the hearing, and the District Court did not advise the father of his right to counsel during the proceeding. On appeal, the father argued that he was entitled to have an attorney appointed to represent him at the District Court. The Supreme Court reversed the District Court, holding that a parent in a termination proceeding, having received no notice of the right to counsel, does not waive the right through mere silence. The court concluded that the father had not knowingly and voluntarily waived his right to counsel. In re Adoption of L.F.R., 2019 MT 2, 394 Mont. 61, 432 P.3d 1030.

Appointed Counsel — Termination of Parental Rights — Factors Considered: The Department of Social and Rehabilitation Services (SRS) (now Department of Family Services) first had contact with the mother of three minor children in 1967. During the period from 1976 through 1981, SRS received numerous complaints alleging abuse and neglect of the children. In 1980, SRS filed a petition for temporary investigative authority (see 2001 amendment to 41-3-427) regarding the children. In 1981, judgment was entered terminating the mother's parental rights. On appeal, the mother contended that the District Court erred in failing to appoint counsel for her at the time the application for temporary investigative authority (see 2001 amendment to 41-3-427) was filed. The Supreme Court, relying on Lassiter v. Dept. of Social Services, 452 US 18 (1981), held that appointed counsel is required if the factors enumerated in Mathews v. Eldridge, 424 US 319, 47 L Ed 2d 18, 96 S Ct 893 (1976), outweigh the presumption against appointment of counsel. The factors to be considered are the private interests, the government's interest, and the risk of erroneous decision. The court found that the mother's due process rights were adequately protected by having counsel appointed prior to the hearings for termination of her parental rights and resting permanent custody in the Department (now Department of Family Services). (See 2005 amendment.) In re M.F., J.F., & R.W., 201 M 277, 653 P2d 1205, 39 St. Rep. 2103 (1982), followed in In re A.B., 239 M 344, 780 P2d 622, 46 St. Rep. 1734 (1989), and in In re T.C. & R.C., 240 M 308, 784 P2d 392, 46 St. Rep. 2148 (1989).

Appointment of Counsel — Indian Child Welfare Act: In a proceeding for termination of parental rights in a dependency and neglect action involving a Sioux Indian child, the District Court was required to apply the Indian Child Welfare Act (25 U.S.C.A. §§ 1901-1963). The mother of the child was indigent and had an IQ of 53. Counsel should have been appointed under the Indian Child Welfare Act and 41-3-401 (renumbered 41-3-422), even though not requested. The Supreme Court held that it was reversible error not to appoint counsel for the mother, particularly in light of her indigency and IQ level. In re M.E.M., 195 M 329, 635 P2d 1313, 38 St. Rep. 1895 (1981).

Child and Indigent Parents' Right to Appointed Counsel: When indigent parents are involved in dependency proceedings, the District Court must make a judicial decision in each case as to whether such parents are entitled to counsel appointed by the court whenever the indigent parent, unable to present his or her case properly, faces a substantial possibility of the loss of custody or prolonged separation from the child. The factors which the District Court may consider in determining whether to appoint such counsel will vary from case to case, but should the District Court refuse a request for counsel, the grounds for refusal must be stated in the record so that meaningful judicial review of the refusal can be had. The same is true for children involved in the proceedings. (See 2005 amendment.) In re M.D.Y.R., Youth in Need of Care, 177 M 521, 582 P2d 758 (1978), following Cleaver v. Wilcox, 499 F2d 940 (9th Cir. 1974).

Appointment of Counsel: Only in cases heard and decided after Gullette, 173 M 132, 566 P2d 396 (1977) (overruled in McDowell v. McDowell, 263 M 252, 868 P2d 1250, 51 St. Rep. 42 (1994)), is a finding on the appointment of counsel for a minor child required. Further, appointment of counsel is only necessary when the child needs an advocate to represent his position as to the issues in dispute or to ensure the development of an adequately complete record concerning his best interests. (See 2005 amendment.) In re Inquiry Into J.J.S., Youth in Need of Care, 176 M 202, 577 P2d 378 (1978).

Adequate Representation in Neglect Case: County Department of Welfare adequately and properly represented children in neglect proceeding. Judge exercised discretion and did not err in failing to appoint counsel. (See 2005 amendment.) Stubben v. Dept. of Public Welfare, 171 M 111, 556 P2d 904 (1976).

Attorney General's Opinions

Child Abuse, Neglect, and Dependency Proceedings — Duty of County Attorney: It is the duty of the County Attorney to represent the Department of Family Services (now Department of Public Health and Human Services) in child abuse, neglect, and dependency proceedings brought under Title 41, ch. 3. 42 A.G. Op. 45 (1987).

Authority to Prevent Withholding of Treatment: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) has authority to initiate legal proceedings to prevent the withholding of medically indicated treatment for disabled infants with life-threatening conditions under the 1985 amendments to the child abuse, neglect, and dependency statutes. 41 A.G. Op. 85 (1986).

Disclosure of Case Records and Reports of Child Abuse and Neglect: Absent a court order, 41-3-205 prohibits the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) from disclosing case records and reports of child abuse and neglect to: (1) the natural parents or parent or other person having legal custody of a child who is the subject of a dependency and neglect action filed under 41-3-401 (renumbered 41-3-422); (2) health care professionals who are treating a child suspected of being abused or neglected; (3) the noncustodial parent of a child who has been removed from the custodial parent following an incident of abuse or neglect; and (4) the natural parents or parent or other person having legal custody of a child who has been abused or neglected while in the care of foster parents. 41 A.G. Op. 49 (1986).

County Power — "4-C's": Counties, jointly with the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services), may contract with local "4-C's" projects to provide coordination and support of child abuse prevention and treatment services. 37 A.G. Op. 105 (1978).

41-3-423. Reasonable efforts required to prevent removal of child or to return — exemption — findings — permanency plan.

Compiler's Comments

2023 Amendments — Composite Section: Section 4, Ch. 674, L. 2023, in (1)(b) substituted current definition of reasonable efforts for former definition (see sec. 4, Ch. 674, L. 2023, for former text); and made minor changes in style. Amendment effective October 1, 2023.

Section 34, Ch. 716, L. 2023, in (2) in first sentence inserted reference to Montana ICWA; and made minor changes in style. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 674, L. 2023, provided: "WHEREAS, the federal Indian Child Welfare Act requires active efforts that are affirmative, active, and thorough and timely efforts that are tailored, in a manner consistent with prevailing social and cultural conditions, to each case to maintain or reunite an Indian child with the child's family; and

WHEREAS, the federal Indian Child Welfare Act outlines placement preferences for foster care, preadoptive, or adoptive placements of Indian children, prioritizing placement with members of a child's extended family; and

WHEREAS, the Legislature desires to incorporate the federal Indian Child Welfare Act's requirements regarding active efforts and placement preferences into Montana's existing child abuse and neglect laws."

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

2021 Amendments — Composite Section: Chapter 19 in (1)(b)(ii)(A) substituted "written prevention plans" for "voluntary protective services agreements". Amendment effective July 1, 2021.

Chapter 222 substituted (1)(b) for former second sentence that read: "Reasonable efforts include but are not limited to voluntary protective services agreements, development of individual written case plans specifying state efforts to reunify families, placement in the least disruptive setting possible, provision of services pursuant to a case plan, and periodic review of each case to ensure timely progress toward reunification or permanent placement"; and made minor changes in style. Amendment effective October 1, 2021.

2007 Amendment: Chapter 166 in (5) near middle after "efforts" inserted "including consideration of both in-state and out-of-state permanent placement options for the child"; in (6) near end of first sentence after "plan" inserted "including, if appropriate, placement in another state" and near middle of third sentence after "planning" inserted "including identifying in-state and out-of-state placements"; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendment: Chapter 449 in (2) in second sentence after first "counsel" inserted requirement for court to immediately provide for appointment or assignment of counsel, after second "counsel" deleted "must be appointed by the court at the time that a request is made for a determination under this subsection", and inserted reference to representation of indigent parent in accordance with 41-3-425. Amendment effective April 28, 2005.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

2003 Amendment: Chapter 555 in (1) near middle of second sentence inserted reference to voluntary protective services agreements and at end deleted "The court shall review the services provided by the agency"; and inserted (7) relating to court review of the department's reasonable efforts to prevent removal of a child. Amendment effective October 1, 2003.

2001 Amendments — Composite Section — Coordination: Chapter 83 in (1)(b) in first sentence after "served" deleted "pursuant to the Montana Rules of Civil Procedure" and after "order" inserted "as provided in 41-3-428 and 41-3-429"; and in (6)(e) inserted "including the name and address of a putative father, as defined in 42-2-201, for the purpose of obtaining service of process in the proceeding". Amendment effective March 20, 2001. The amendment by Ch. 281 rendered the amendment by Ch. 83 void.

Chapter 281 deleted former (1) and (2) that read: "(1) (a) Upon the filing of a petition for temporary investigative authority and protective services, the court, after consideration of the parents' statements, if any, included with the petition and any accompanying affidavit or report to the court, may issue an order granting relief that may be required for the immediate protection of the youth.

(b) The order, along with the petition and supporting documents, must be served pursuant to the Montana Rules of Civil Procedure on the person or persons named in the order. When the youth is placed in a medical facility or protective facility, the department shall notify the parents or parent, guardian, or other person having legal custody of the youth, at the time the placement is made or as soon after placement as possible.

(c) The order must require the person served to comply immediately with the terms of the order and to appear before the court issuing the order on the date specified for a show cause hearing. The show cause hearing must be conducted within 20 days of the issuance of the order by the judge or a master appointed by the judge. The person filing the petition has the burden of presenting evidence establishing probable cause for the issuance of the order. At the show cause hearing, the court shall provide an opportunity for a parent or guardian, if present, and any other person having relevant knowledge to provide relevant testimony. The court may consider all relevant evidence in accordance with the rules of civil procedure as modified by this part, but may in its discretion limit testimony and evidence to only that which is relevant to the issues of removal from the home and the child's need for continued protection. The court may amend the order. Except as otherwise provided in this part, the rules of civil procedure apply. Hearsay evidence of statements made by the affected youth is admissible at the hearing or at a contested case proceeding held pursuant to Title 2, chapter 4, part 6, that results from adverse licensing action taken by the department.

(d) If the child is not returned home after the show cause hearing, the person served may request that a local citizen review board, if available pursuant to part 10, review the case within 30 days of the show cause hearing and make a recommendation to the district court, as provided in 41-3-1010.

(e) Upon a failure to comply or show cause, the court may hold the person in contempt or place temporary physical custody of the youth with the department until further order.

(2) At the conclusion of a show cause hearing, in an order granting or denying relief, the court shall make a finding regarding the reasonableness of agency efforts to prevent the child's removal from the home or to make it possible to safely return the child to the child's home. In determining preservation or reunification services to be provided and in making reasonable efforts at providing preservation or reunification services, the child's health and safety are of paramount concern"; inserted (1) requiring reasonable efforts to prevent the necessity of removal of a child from the child's home and to reunify families that have been separated by the state; in (2) inserted first two sentences allowing the department to request a determination that preservation or

reunification services need not be provided and providing for appointment of counsel for indigent parents; inserted (4) requiring that a finding that preservation or reunification services are not necessary be supported by clear and convincing evidence; in (5) near beginning inserted reference to subsection (3); deleted former (6) through (9) that read: "(6) The court may grant the following kinds of relief:

(a) right of entry by a peace officer or department worker;

(b) medical and psychological evaluation of the youth or parents, guardians, or person having physical or legal custody;

(c) requirement that the youth, parents, guardians, or person having physical or legal custody receive counseling services;

(d) placement of the youth in a temporary medical facility or a facility for protection of the youth;

(e) requirement that the parents, guardian, or other person having physical or legal custody furnish information that the court may designate;

(f) inquiry into the financial ability of the parents, guardian, or other person having custody of the youth to contribute to the costs for the care, custody, and treatment of the youth and requirement of a contribution for those costs pursuant to the requirements of 41-3-411; or

(g) other temporary disposition that may be required in the best interests of the youth that does not require an expenditure of money by the department unless the department is notified and a court hearing is set in a timely manner on the proposed expenditure. The department is the payor of last resort after all family, insurance, and other resources have been examined.

(7) An order for temporary investigative authority and protective services may not be issued for a period longer than 90 days following the show cause hearing and must be limited to one extension of 90 days. Before the expiration of the time provided for in an order for temporary investigative authority and protective services, the county attorney, the attorney general, or an attorney hired by the county shall file a petition for one of the following:

(a) limited emancipation;

(b) temporary legal custody;

(c) termination of the parent-child legal relationship and permanent legal custody with the right to consent to adoption; or

(d) dismissal.

(8) Notwithstanding the above time limits, the court may continue an order for temporary investigative authority pending a hearing on a petition provided for in subsection (7).

(9) If the time limitations of this section are not met, the court shall review the reasons for the failure and order an appropriate remedy that considers the best interests of the child"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 311 throughout (1) substituted references to a child for references to a youth; in (1)(c) near middle substituted reference to Montana Rules of Evidence for reference to rules of civil procedure and deleted former next-to-last sentence that read: "Except as otherwise provided in this part, the rules of civil procedure apply"; in (6) at end inserted last sentence referring to concurrent planning; in (7) at end of first sentence deleted "and must be limited to one extension of 90 days"; and made minor changes in style. Amendment effective October 1, 2001. The amendment by Ch. 281 rendered the amendment by Ch. 311, other than the insertion of the sentence in (6) referring to concurrent planning, void.

The amendment to subsection (6) of this section made by sec. 9, Ch. 311, L. 2001, was rendered void by sec. 18(3), Ch. 281, L. 2001, a coordination section.

Saving Clause: Section 8, Ch. 83, L. 2001, was a saving clause.

Section 19, Ch. 281, L. 2001, was a saving clause.

1999 Amendment: Chapter 566 near beginning of (1)(b) substituted "served pursuant to the Montana Rules of Civil Procedure" for "served by a peace officer or a representative of the department"; in (2) at beginning of first sentence inserted "At the conclusion of a show cause hearing", after "agency efforts to" deleted "rehabilitate the family to", and end inserted "or to make it possible to safely return the child to the child's home" and inserted last two sentences and (2)(a) through (2)(e) providing that child's health and safety are paramount concern in determining preservation and reunification services to be provided and establishing criteria for when reasonable efforts to provide preservation or reunification services are not required; inserted (3) establishing criteria for when preservation or reunification services are not required for putative father; inserted (4) requiring permanency hearing within 30 days of finding that preservation or reunification services are not necessary; inserted (5) requiring department to make reasonable efforts to permanently place child if court determines efforts to return child to home are inconsistent with permanency plan and allowing permanent placement efforts to be conducted concurrently with efforts to return child to home; in (6)(e) substituted "furnish information" for "furnish services"; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendments: Chapter 501 in (1)(a), near middle, inserted "after consideration of the parents' statements, if any, included with the petition and any accompanying affidavit or report to the court". Amendment effective May 2, 1997.

Chapter 516 in (1)(c), in first sentence after "terms of the order", substituted "and" for "or" and at end substituted "for a show cause hearing" for "and show cause why the person has not complied with the order" and inserted fourth through sixth sentences regarding evidence at the show cause hearing and the court's ability to amend an order; inserted (1)(d) regarding case review by a local citizen review board; in (1)(e), near middle after "temporary", substituted "physical" for "legal"; inserted (2) requiring a finding regarding the reasonableness of agency efforts; in (3)(b) and (3)(c), after "having", inserted "physical or"; in (3)(e), after "having", inserted "physical or legal"; in (3)(f), at end, substituted "41-3-411" for "41-3-406(3) through (6)"; in (3)(g), near beginning of first sentence after "best", substituted "interests" for "interest"; inserted (4) limiting an order for temporary investigative authority; inserted (5) regarding continuance of an order for temporary investigative authority; and inserted (6) requiring the court to review reasons why time limits have not been met and order an appropriate remedy.

Applicability: Section 20, Ch. 516, L. 1997, provided that this section applies to proceedings commenced on or after October 1, 1997.

1995 Amendment: Chapter 458 in (1)(c), in last sentence, inserted final clause regarding contested case hearing resulting from adverse licensing action. Amendment effective April 14, 1995.

1993 Amendments — Composite Section: Chapter 112 at end of (1)(c) inserted "Hearsay evidence of statements made by the affected youth is admissible at the hearing"; and made minor changes in style.

Chapter 362 throughout section, after "department", deleted "of family services"; in (2)(g), at end after "youth", inserted "that does not require an expenditure of money by the department unless the department is notified and a court hearing is set in a timely manner on the proposed expenditure. The department is the payor of last resort after all family, insurance, and other resources have been examined"; and made minor changes in style. Amendment effective April 16, 1993.

In the phrase "Except as otherwise provided herein", Ch. 112, near end of (1)(c) changed "herein" to "in this part" and Ch. 362 changed "herein" to "in this section". The codifier used "in this part" because it is the broader reference.

1991 Amendment: Inserted (2)(f) allowing a court to inquire into the financial ability of parent, guardian, or custodian to contribute to costs for care, custody, and treatment of a youth and to order contribution for those costs. Amendment effective July 1, 1991.

1987 Amendment: Substituted "department of family services" for "department of social and rehabilitation services".

1985 Amendment: In (1)(b), near beginning after "order", inserted "along with the petition and supporting documents", and inserted second sentence requiring the Department to notify parents or guardians when youth is placed in medical facility or protective facility; and in (1)(c), in first sentence, near middle after "terms thereof or", deleted "upon failure to so comply", and inserted second and third sentences requiring a show cause hearing within 20 days of protection order and requiring the petitioner to present evidence establishing probable cause for the protective order.

Case Notes

District Court's Termination of Parental Rights Not Abuse of Discretion — Mother's Failure to Make Progress in Treatment Plan and Unwillingness to Engage Department's Efforts to Assist — Conduct or Condition Unlikely to Change Within Reasonable Time. In re A.M.G., 2022 MT 175, 410 Mont. 25, 517 P.3d 149.

Stipulation to Not Provide Reunification Services — No Error in Termination of Parental Rights — No Ineffective Assistance of Counsel When Mother Incarcerated and Children Out of Her Care For More Than 2 Years in 3-Year Period: After her parental rights were terminated, the mother claimed she had received ineffective assistance of counsel. She argued that by stipulating to the request of the Department of Public Health and Human Services that it not provide reunification services, her attorney had acknowledged she had subjected the children to chronic, severe neglect, which led to the termination of her rights. Prior to the hearing on termination, however, the mother had been sentenced to 48 months in federal prison. In its termination order, the District Court emphasized that the children had been out of the mother's care for 31 of the past 34 months and that they would be out of her care for another 23 months. The District Court also based the termination on the testimony of a court-appointed special advocate and the guardian ad litem that it would be in the children's best interests. Based on the evidence, the Supreme Court affirmed, concluding that the mother had not been prejudiced by her attorney's stipulation. In re D.A.D., 2021 MT 2, 402 Mont. 399, 478 P.3d 809.

Relapse and Domestic Violence at Level of Chronic, Severe Neglect — Termination Proper: In a case involving years of drug abuse relapses and domestic violence, the District Court terminated parental rights without requiring the Department of Public Health and Human Services to make reasonable efforts to reunify the family, finding the aggravated circumstance of chronic, severe neglect. On appeal, the Supreme Court affirmed, finding substantial support for the determination in the repeated history of drug abuse and domestic violence in the child's home. In re C.S., 2020 MT 127, 400 Mont. 115, 464 P.3d 66.

No Reliance on Previous Adjudication of Youth in Need of Care — Termination Improper: The District Court terminated a mother's parental rights, and the mother appealed. The issue concerned whether the District Court properly determined the child to be abused or neglected while providing the mother fundamentally fair procedures. In a previous case, the child had been placed with the child's father, resolving issues of neglect. The Supreme Court ruled that the state cannot rely on an adjudication as a youth in need of care or a determination of abuse and neglect from a prior case and reversed the termination of parental rights. In re D.D., 2020 MT 126, 400 Mont. 105, 464 P.3d 60.

Reasonable Efforts When Noncommunicative Parent Moves Out of State: A mother with substance abuse problems failed in many ways to act on the treatment plan created by the Department of Public Health and Human Services and then moved to Idaho, from where she failed to maintain communication with the Department. Subsequently, the District Court terminated the mother's parental rights. Relying on In re R.J.F., 2019 MT 113, 395 Mont. 454, 443 P.3d 387, the mother appealed on the basis that the Department had not made reasonable efforts. Reviewing for abuse of discretion, the Supreme Court affirmed, explaining that the facts showed reasonable efforts by the Department and that the mother had unilaterally moved out of state and failed to maintain contact with the Department. In re R.L., 2019 MT 267, 397 Mont. 507, 452 P.3d 890.

Obligation to Provide Affirmative, Active, Thorough, and Timely Efforts to Reunite Indian Child With Family: Child Protective Services (CPS) became involved with a child when the child's mother tested positive for methamphetamine. The mother is a member of the Little Shell Tribe of Chippewa Indians and the child is eligible for membership, so the Indian Child Welfare Act (ICWA) applied to subsequent efforts regarding the child's father. CPS sought termination of the father's parental rights, which the District Court granted. The Supreme Court reversed and remanded, finding that the requirements of law were not satisfied by CPS's efforts and evidence, noting that the ICWA requires proof beyond a reasonable doubt that a state seeking termination of parental rights to an Indian child has made active efforts to provide remedial and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts were unsuccessful. In re K.L., 2019 MT 256, 397 Mont. 446, 451 P.3d 518.

Reasonable Efforts: The District Court terminated a mother's parental rights. The mother appealed, arguing that the Department of Public Health and Human Services had not made reasonable efforts to help her. The Supreme Court reviewed the facts of the case and affirmed the District Court's decision to terminate, having concluded that the mother had not complied with her treatment plan and was unlikely to change within a reasonable time. In re C.M., 2019 MT 227, 397 Mont. 275, 449 P.3d 806.

Termination of Parental Rights Proper — Parent's Failure to Engage With Counsel and Department Not Basis for Due Process Claim: A father failed to sign and return his treatment plan and did not provide current contact information to his attorney or the Department of Public Health and Human Services. After his parental rights were terminated, he asserted that he was denied due process of law on the basis that (1) he was not served with the petition for temporary legal custody before his child was adjudicated a youth in need of care, (2) he received ineffective assistance of counsel, and (3) the Department failed to make reasonable efforts to prevent the removal of his child. The Supreme Court found the due process claim to be unfounded because the father was served with the petition prior to termination and was aware of the proceedings throughout, a parent cannot establish ineffective assistance of counsel through his own failure to contact and engage with counsel, and the father did not fulfill his obligation to engage with and maintain sufficient contact with the Department for the Department to be able to assist the father. In re B.J.J., 2019 MT 129, 396 Mont. 108, 443 P.3d 488.

Termination of Parental Rights — Removal of Infant — Mother Located in Another State — Department Policies Not Followed — Evidentiary Admissions Clarified: The Montana Department of Public Health and Human Services, Child and Family Services Division, became involved with a mother and child when the mother tested positive for methamphetamine and marijuana at the child's birth. During portions of the proceeding, the mother lived in different states, did not own a vehicle, did not have a driver's license, and could not make it to Montana due to weather. The District Court ultimately terminated the mother's parental rights, finding that the mother did not successfully complete her treatment plan and the condition rendering her unfit, unable, or unwilling to parent was unlikely to change. On appeal, the Supreme Court reversed, holding that the Department failed to provide reasonable efforts to place the child as close as possible to the mother's home in violation of the Department's policies, that it did not implement a service provision plan that could successfully address the mother's substance abuse problem, that the removal of an infant implicates different services than the removal of an older child, that it failed to take efforts to identify or locate a potential kinship placement, that it failed to provide reasonable efforts designed to reunify the mother and her child, and that the presumption in favor of termination in 41-3-604 was misplaced. The court then clarified In re M.C., 2017 MT 252, 389 Mont. 78, 403 P.3d 1266, to hold that it did not intend that case to be interpreted to permit courts to admit any and all written reports or evaluations or service-related documents over otherwise valid hearsay or foundation objections. In re R.J.F., 2019 MT 113, 395 Mont 454, 443 P.3d 387.

Termination of Parental Rights Proper When Record Clearly Shows Reasonable Efforts Made to Reunite Family — Failure of Mother to Cooperate With Getting New Attorney Appointed — Counsel Retained at All Critical Stages of Proceeding — No Due Process Violation: The District Court did not abuse its discretion when it terminated the mother's parental rights when the record clearly shows reasonable efforts were made to reunite the family pursuant to 41-3-423(1) (see 2023 amendment to 41-3-423) and because 41-3-609(1)(f) does not require a specific finding by the District Court that reasonable efforts were made before terminating the mother's parental rights. Because she had counsel at all critical states of the proceedings, the mother's due process right was not infringed when she was without counsel due to her own failure to cooperate. In re M.V.R., 2016 MT 309, 385 Mont. 448, 384 P.3d 1058.

Three Voluntary Services Agreements Prior to First Removal — Child Safety at Issue — Reasonable Efforts Adequate: A father contested the termination of his parental rights and argued that the Department of Public Health and Human Services had not made reasonable efforts to prevent the necessity of removing his children. After his rights were terminated by the District Court, the father appealed. The Supreme Court affirmed, concluding that the Department had made reasonable efforts under this section, given that the Department had entered into three voluntary services agreements before removing the firstborn child and that the father had purchased wine for his wife when she was pregnant with their second child. In re A.G., 2016 MT 203, 384 Mont. 361, 378 P.3d 1177.

Treatment Plan Executed in Good Faith Despite Case Worker Turnover — Due Process Not Violated in Termination Proceedings: The mother appealed the termination of her parental rights, arguing that she was denied due process of law when the Department of Public Health and Human Services did not execute her treatment plan in good faith because it did not adequately account for her history as a victim of domestic violence and because she was assigned six different child protection specialists during the course of her case. The Supreme Court affirmed, concluding that the Department took notice of the mother's history as a victim of domestic violence and, given the Department's provision of numerous services and its efforts to reunite the family, the fact that the mother was assigned numerous case workers did not in itself establish a due process violation. In re T.D.H., 2015 MT 244, 380 Mont. 401, 356 P.3d 457.

Reasonable Efforts to Provide Reunification — Child's Health and Safety Paramount Concern: After the termination of a mother's parental rights, the mother appealed, claiming that the Department of Public Health and Human Services failed to provide reasonable reunification services by preventing phone contact between the mother and her child and by preventing the mother's placement at a residential home for substance-abusing women and their children. However, the Department's opposition to the mother's placement at the home was reasonable because the mother had not made progress on her drug treatment plan or demonstrated that the child could be safely returned to her care. In addition, because of the child's discomfort with his parental interactions, the child chose not to speak with his mother on the telephone, and the

Department's paramount concern was the child's health and safety. Although the Department was required to make reasonable reunification service efforts, it was not required to provide every conceivable reunification service. In re J.O., 2015 MT 229, 380 Mont. 263, 354 P.3d 1242.

Father's Partial Compliance With Treatment Plan Insufficient — Sufficient Evidence to Support Termination: The Department of Public Health and Human Services initiated a parental rights termination proceeding, alleging the father presented a risk to his children. The District Court ultimately terminated the father's rights. On appeal, the father argued that the Department failed to act in good faith and failed to provide reunification services, that he had partially completed his treatment plan, and that it was reasonable for him to improve. The Supreme Court affirmed, holding that the Department was not biased and did not act in bad faith, that a parent does not complete a treatment plan by partial or even substantial compliance with a treatment plan, and that the evidence supported the determination that the father was unlikely to improve. In re A.K., 2015 MT 116, 379 Mont. 41, 347 P.3d 711.

Termination of Parental Rights Proper — Prior Termination of Rights Relevant Where Parent Is Unlikely to Change Behavior: A couple of months before the birth of I.T., the mother's rights to her three children were terminated due to her drug use. Shortly after I.T.'s birth, I.T. was placed in a neonatal intensive care unit for drug withdrawal treatment. At that time, the state petitioned for emergency protective services and later requested and received approval that it need not provide preservation or reunification services to the mother given the prior termination for parental rights and the mother's unlikeliness to change her behavior that led to termination. Subsequently, the mother's parental rights to I.T. were terminated. On appeal, the Supreme Court affirmed the District Court's ruling based on substantial evidence in the record that the mother's chemical dependency was not likely to change. In re I.T., 2015 MT 43, 378 Mont. 239, 343 P.3d 1192. See also In re C.B., 2019 MT 294, 398 Mont. 176, 454 P.3d 1195.

Reasonable Efforts Adequate — Termination Proper: A mother appealed the termination of her parental rights, arguing that the Department of Public Health and Human Services was precluded from seeking termination of her parental rights when it failed to make reasonable efforts to reunite her with her child by not providing recommended mental health treatment. The Supreme Court affirmed, concluding that because the mother was on a waiting list with multiple mental health providers as a result of the Department's efforts and because the mother's ability to parent most likely would not have improved within the period of time between removal of the child and termination of parental rights had the recommended counseling taken place, additional reasonable efforts were not required. In re K.L., 2014 MT 28, 373 Mont. 421, 318 P.3d 691.

Continued Neglect of Children Sufficient Basis for Termination of Mother's Parental Rights Without Reunification Efforts: A mother appealed the District Court's termination of her parental rights to her two children under 41-3-423 on the basis of neglect. The Supreme Court held that the District Court did not abuse its discretion in terminating the mother's parental rights without requiring reunification efforts because the record established that the mother's history of continued and worsening drug use and neglect of her children amounted to "chronic, severe neglect" under 41-3-423(2)(a) and that reunification efforts and treatment plans were not in the best interests of the children. In re E.Z.C., 2013 MT 123, 370 Mont. 116, 300 P.3d 1174. See also In re J.A.B. and L.M.F., 2015 MT 28, 378 Mont. 119, 342 P.3d 35.

No Error in Not Holding Separate Reunification Hearing or Permanency Hearing: A court terminated the parental rights of a mother to her two children in Colorado in 2009. In 2012, the Department of Public Health and Human Services petitioned to forgo reasonable efforts to reunify the mother with her child and to terminate her parental rights because her parenting behavior had not changed since her parental rights to her other two children had been terminated. The Supreme Court found that although the lower court did not hold a separate "pre-hearing" to determine if reunification with the child was possible, the mother was on notice from the petition that the Department was requesting that reasonable efforts be abandoned and she had the opportunity to be heard at the termination hearing. In addition, the Supreme Court found that although the District Court did not conduct a permanency hearing, the Department's actions, including working with the father on a treatment plan in hopes of reunifying him with the child, were consistent with the purposes of such a hearing, and the failure to hold a permanency hearing was not a per se violation of parental rights. In re J.W., 2013 MT 201, 371 Mont. 98, 307 P.3d 274.

Chronic, Severe Neglect — Termination of Parental Rights Affirmed — Consideration of Prior Petition Proper: The parents appealed the District Court's finding that they had subjected their children to chronic, severe neglect and its order terminating their parental rights. The parents argued that the Department of Public Health and Human Services was collaterally estopped from introducing evidence contained in a prior petition for temporary legal custody of the children to establish chronic, severe neglect in the present petition. The parents also argued that their conduct did not rise to the level of chronic, severe neglect. The Supreme Court affirmed, concluding the elements of collateral estoppel were not met because the issues in the current and prior petitions were not identical and the prior petition was not dismissed as a final judgment on the merits. The Supreme Court upheld the District Court's finding of chronic, severe neglect, noting that discrete instances of neglect, when viewed within a consistent pattern of similar behavior, provide a clear basis for a finding of chronic, severe neglect. In re M.N., J.N., Jr., & R.N., 2011 MT 245, 362 Mont. 186, 261 P.3d 1047. See also In re E.Z.C., 2013 MT 123, 370 Mont. 116, 300 P.3d 1174, and In re L.N., 2014 MT 187, 375 Mont. 480, 329 P.3d 598, in which the Supreme Court affirmed the termination of parental rights to L.N., the fourth child of the parents of J.N., M.N., and R.N. (see above), on the basis that the parents had previously subjected their older children to chronic and severe neglect.

Department's Reunification Efforts Held Reasonable — Termination of Parental Rights Over Siblings Held Sufficient Justification — No Abuse of Discretion: After the District Court terminated a mother's parental rights over her child C.J., the mother appealed, claiming as unreasonable the 4½ months that passed between the petition by the Department of Public Health and Human Services (Department) to be exempted from the "reasonable efforts" for reunification requirement under 41-3-423(2)(e), because the mother's rights over C.J.'s two siblings had also been terminated, and the date of the hearing. The Supreme Court held that the Department's efforts were reasonable notwithstanding the Department's petition, that there was no timeline provided in the statutes for the hearing, that the delay in holding the hearing did not subject the mother to a fundamentally unfair proceeding, and that the mother was correctly not given a treatment plan because her circumstances met the requirements of 41-3-609(1)(d) and 41-3-423(2)(e) regarding termination of a mother's rights over one child because her rights over other siblings were previously terminated. Therefore, the Supreme Court held that there was no abuse of discretion by the District Court in terminating the mother's parental rights over C.J. In re C.J., 2010 MT 179, 357 Mont. 219, 237 P.3d 1282.

Proper Consideration of Circumstances of Prior Involuntary Termination of Parental Rights — Clear and Convincing Evidence to Support Termination of Rights to Subsequent Child: The parents contended that there was no clear and convincing evidence to support termination of their parental rights to A.H.D. based on the prior involuntary termination of their rights to two other children. The Supreme Court disagreed. The District Court did not err in relying on relevant testimony presented at earlier hearings and incorporating earlier findings based on evidence presented at those hearings. The court correctly considered that the circumstances related to the prior termination were ongoing and relevant to the parents' ability to adequately care for A.H.D. Thus, the District Court did not abuse its discretion in terminating the parents' rights to A.H.D. In re A.H.D., 2008 MT 57, 341 M 494, 178 P3d 131 (2008). See also In re C.B., 2019 MT 294, 398 Mont. 176, 454 P.3d 1195.

Sufficient Evidence to Terminate Rights of Incarcerated Parent: The District Court did not abuse its discretion in terminating the parental rights of an incarcerated parent after citing: (1) the fact that the child would have been in foster placement for more than 15 of the most recent months before the parent was eligible for parole, thus satisfying the presumption in 41-3-604(1); (2) the parent's criminal history, including seven prior felonies and four sentence revocations; (3) the parent's history of voluntary underemployment, despite the parent's asserted wish to support the child; (4) the parent's failure to establish a substantial relationship with the child through visits or regular contact; (5) the failure of the parent to manifest an ability to assume legal and physical custody because of incarceration; (6) the child's need for immediate permanent placement in order to meet the child's developmental, cognitive, and psychological stability needs; and (7) the inability of the parent to provide for immediate placement because of incarceration. The parent appealed on grounds that the District Court improperly relied on the presumption in 41-3-604(1). The Supreme Court agreed that the presumption was not satisfied because the child had not been in foster care for the requisite amount of time. However, the court noted that parental rights may properly be terminated if the District Court correctly relies on any one basis set out in 41-3-609. In this case, the District Court correctly relied on several bases other than the statutory presumption and thus did not abuse its discretion in terminating the parent's rights. In re M.P., 2008 MT 39, 341 M 333, 177 P3d 495 (2008).

Evidence of Parent's Conviction for Sexual Abuse of Child Sufficient Basis for Termination of Parental Rights: The state petitioned to terminate C.T.'s parental rights on grounds that his child S.T. and the child's mother had lived with C.T. for 2 years, that C.T. was a convicted sex offender, and that both mother and child had been exposed to domestic violence. Without objection, the

District Court took judicial notice of C.T.'s conviction for sexual intercourse with a minor and granted the state's petition. C.T. appealed on grounds that the court abused its discretion by terminating his parental rights on the basis of facts not alleged in the petition or supported by the evidence, asserting that even though the court took judicial notice of the conviction, that court never received the documents into evidence and therefore erred by relying on that evidence in entering its findings of fact. The Supreme Court declined to recognize a distinction between taking judicial notice and entering the noticed facts into evidence. In a civil proceeding, judicially noticed facts are accepted as conclusive, and once a fact is judicially noticed, the party offering the evidence is relieved of the duty to also move for its admission. Thus, C.T.'s conviction was not subject to reasonable dispute, and the District Court was entitled to rely on the conviction as clear and convincing evidence that C.T. had sexually abused a child and to rely on 41-3-423(2)(a) as a statutory basis for terminating C.T.'s parental rights. The District Court was affirmed. In re S.T., 2008 MT 19, 341 M 176, 176 P3d 1054 (2008).

Constitutionality of Procedures Allowing Consideration of Prior Termination of Parental Rights to Sibling: A mother asserted that procedures for terminating her parental rights violated due process, particularly when the District Court considered the prior involuntary termination of the mother's rights to A.P.'s sibling when it terminated her rights to A.P. The Supreme Court noted that because it is a fundamental liberty interest, a parent's right to the care and custody of a child must be protected by fundamentally fair procedures that ensure that the parent is not placed at an unfair disadvantage during termination proceedings. In this case, consideration of the prior termination of the mother's rights to a sibling did not violate due process. The District Court is not required to terminate, but rather the court has discretion to grant or deny the state's termination petition if the state proves the statutory elements, nor is the decision limited to the facts of the prior termination because the court also considers any available evidence relating to present family circumstances and the specific child at issue. The parent is also provided an opportunity to challenge the termination petition, and the burden of proof is on the state without placing the parent at an unfair disadvantage. The Supreme Court determined that the procedure allowing consideration of a prior termination does not violate a parent's due process rights. In re Custody & Parental Rights of A.P., 2007 MT 297, 340 M 39, 172 P3d 105 (2007).

Prior Involuntary Termination of Parental Rights to Sibling as Circumstance for Termination of Parental Rights: The involuntary termination of parental rights to a child's sibling constitutes one circumstance that a District Court may consider in terminating parental rights, as long as the circumstances related to the termination are relevant to the parent's ability to adequately care for the child at issue. The circumstances of a prior termination continue to be relevant in a later termination of a sibling unless the circumstances have changed. In this case, the District Court afforded a mother an opportunity to demonstrate that her circumstances had changed since her rights to her child's sibling were previously terminated, but the mother offered no evidence of changed circumstances, so the District Court did not err in terminating the mother's parental rights to the second child. In re Custody & Parental Rights of A.P., 2007 MT 297, 340 M 39, 172 P3d 105 (2007).

Failure to Develop Parenting Skills for Four Earlier Children — Termination of Parental Rights to Fifth Child Warranted Absent Improvement in Parenting Abilities: A mother suffered from a chromosomal abnormality known as velocardiofacial syndrome (VCFS) that caused numerous physical and cognitive difficulties and developmental delays, resulting in mental impairment and limited intellectual capacity. The father suffered severe intellectual and personality handicaps that were diagnosed as developmental and irreversible. All of the couple's children were afflicted with VCFS. Despite the efforts of the state to assist the parents in developing parenting skills over a period of several years, the parents proved unable to care for their special needs children, resulting in the termination of parental rights to the couple's first four children. The state attempted to help the parents with their fifth child, who was the subject of this case, but again the parents were unable to properly care for the child, and the state ultimately sought to terminate parental rights in order to place the child with a family that was able to provide the specialized intensive care necessary for the child's development and well-being. The District Court held that the child was a youth in need of care, and based in part on unchanged circumstances from the four previous adjudications regarding the child's siblings, the court terminated the parents' rights. The parents appealed, but the Supreme Court affirmed. The District Court heard extensive testimony from numerous professionals who worked with the family and opined that because the parents' conditions were permanent, chronic, and irreversible, their inability to care for the child had not changed and would not change in the future. Thus, the court properly concluded that the child was at substantial risk of ongoing or continuing physical or psychological harm by acts or omissions of the parents that were unchanged from their previous parental terminations and that termination in this case was also warranted. In re K.J.B., 2007 MT 216, 339 M 28, 168 P3d 629 (2007), followed in In re T.S.B., 2008 MT 23, 341 M 204, 177 P3d 429 (2008). See also In re J.W., 2013 MT 201, 371 Mont. 98, 307 P.3d 274.

Admissibility of Evidence of Prior Conviction Based on Certified Copy of Judgment: When determining whether an aggravating circumstance existed in deciding whether to terminate a father's parental rights, the District Court admitted a certified copy of a judgment from a Texas court showing that the father pleaded guilty to and was convicted of a sexual offense. The father asserted that the evidence should not have been admitted because it could not be determined from the document whether a nolo contendere plea was accepted, which would have disallowed the evidence under Rule 803(22), M.R.Ev. (Title 26, ch. 10), and because the judgment or other evidence did not show the essential facts necessary to sustain the judgment. The state argued that the hearsay exception did apply because the father clearly entered a guilty plea and because no proof of the underlying facts was required. The Supreme Court agreed with the state. There was no evidence that the father entered a nolo contendere plea, and the Texas conviction was presumed valid absent direct evidence presented by the father that the conviction was invalid. Additionally, In re L.M.A.T. & B.L.F.T., 2002 MT 163, 310 M 422, 51 P3d 504 (2002), provided that when the state relies on a prior conviction to establish an aggravating circumstance, the state is not required to present evidence of the circumstances of the conviction. Thus, the certified copy of the judgment adjudicating guilt was adequate evidence of the conviction and was properly admitted. The state met its burden of proving that an aggravating circumstance existed, and the District Court's findings of fact were supported by substantial credible evidence supporting the conclusion that the father's prior conviction constituted an aggravating circumstance. In re. M.A.L., D.L., & T.L., 2006 MT 299, 334 M 436, 148 P3d 606 (2006).

Findings Based on More Than Prior Conviction for Crime Against Child — Sufficient Findings to Substantiate Termination of Parental Rights: A father asserted that the District Court lacked sufficient evidence to terminate his parental rights because the court relied on a prior crime committed in Texas that, if committed in Montana, would have been only a misdemeanor. The Supreme Court found that substantial evidence existed to support termination. In addition to the prior sexual crime against a child that was an aggravating circumstance under Montana law, the District Court also found that the father had no significant contact with his children for more than 3 years and failed to complete a treatment plan, that the children had been in foster care for 28 months prior to the termination hearing, and that there was evidence that one of the children claimed that the father sexually abused her. Termination of parental rights was affirmed. In re. M.A.L., D.L., & T.L., 2006 MT 299, 334 M 436, 148 P3d 606 (2006).

Out-of-State Conviction of Indecency With Child Considered Aggravating Circumstance for Purposes of Terminating Parental Rights: A father was convicted in Texas of indecency with a child. A Montana District Court considered the Texas conviction as an aggravating circumstance in terminating the father's parental rights. On appeal, the father contended that in Texas, the crime of indecency with a child was analogous to indecent exposure and asserted that the state did not introduce clear and convincing evidence that the Texas crime would constitute sexual abuse under Montana law to qualify as an aggravating circumstance. The Supreme Court disagreed. In Montana, the definition of child abuse includes indecent exposure, and the District Court properly concluded that the Texas conviction constituted an aggravating circumstance under Montana law. In re. M.A.L., D.L., & T.L., 2006 MT 299, 334 M 436, 148 P3d 606 (2006). See also In re L.M.A.T. & B.L.F.T., 2002 MT 163, 310 M 422, 51 P3d 504 (2002).

Parent's Prior Conviction of Sexual Offense Properly Applied in Parental Rights Termination Proceeding — No Retroactive Statutory Application: During proceedings to terminate a father's parental rights, the state became aware of the father's prior 1985 conviction in Texas of a sexual offense involving a minor. The District Court held that the prior conviction was an aggravating circumstance under this section for purposes of terminating the father's parental rights pursuant to 41-3-609. On appeal, the father argued that the court improperly applied the 1999 amendments to 41-3-609 and this section retroactively to a criminal act that occurred at least 13 years prior to enactment of the amendments, in violation of the father's vested constitutional parental rights. Setting out the conditions of retroactivity, the Supreme Court noted that a statute does not operate retroactively merely because it is applied to conduct that occurs prior to the statute's enactment and that an amended statute that is applied to a factual situation that occurred prior to amendment is not viewed as retroactive in application. In this case, no additional sanction was imposed on the prior conviction by enactment of the new statutory provisions, but the prior conviction was made a condition for the termination of parental rights in the event that the children were subsequently neglected or abused. Moreover, the prior conviction did not require or inevitably lead to the children being abused or neglected, necessitating the filing of an abuse and neglect petition. Rather, the prior conviction became relevant as an independent ground for the state to petition for termination of parental rights only after the children were abused and neglected. Additionally, the statutes went into effect in 1999, and the termination proceeding was initiated in 2003, so the father was on notice that the prior conviction could be used as an aggravating circumstance to justify termination if the father allowed the children to be abused and neglected. Therefore, applying the 1999 versions of 41-3-609 and this section to a conviction that occurred prior to 1999 did not constitute an unlawful retroactive application of the statutes. In re. M.A.L., D.L., & T.L., 2006 MT 299, 334 M 436, 148 P3d 606 (2006).

Preservation or Reunification Services Not Required When Child Subjected to Aggravating Circumstances: The state does not need to make reasonable efforts to provide family preservation or reunification services if a court finds that a parent has subjected a child to any of the aggravating circumstances listed in subsection (2)(a) of this section. In re M.A.L., D.L., & T.L., 2006 MT 299, 334 M 436, 148 P3d 606 (2006).

No Due Process Violations in Parental Rights Termination Proceeding — Statutory Mandates Addressed: A mother asserted that her due process rights were violated in a parental rights termination proceeding because: (1) the state failed to make reasonable efforts to reunify mother and child as required in this section; (2) the District Court, in effect, terminated her right while purporting only to grant a planned permanent living arrangement and permanent care and control of the child to the state in violation of 41-3-609; (3) the state failed to petition the District Court for termination in a timely fashion in violation of 41-3-604; and (4) the District Court failed to hold a permanency plan hearing in a timely manner in violation of 41-3-445. The Supreme Court considered each claim and affirmed. Although reunification efforts failed, the state's efforts were reasonable and in compliance with the governing statutes. The mother's parental rights were severely limited, but not actually terminated, so her argument regarding improper termination procedures failed. The state does not have to petition to terminate parental rights if a compelling reason has been documented for determining that filing a petition would not be in the child's best interests. In this case, there was such a compelling reason—namely, that the state had tried to reunify mother and child for years and did not seek termination casually. The tardy permanency hearing argument also failed in light of the state's diligent, although unsuccessful, efforts to create a permanent and stable environment for the child in an effort to ensure that the child did not languish in foster care. In re B.N.Y., 2006 MT 34, 331 M 145, 130 P3d 594 (2006). See also In re R.T.L.P., 238 M 384, 777 P2d 892 (1989), and In re A.R., 2004 MT 22, 319 M 340, 83 P3d 1287 (2004).

Preservation and Reunification Efforts Not Required in Involuntary Termination of Parental Rights: If a court involuntarily terminates a parent's rights under 41-3-609, the state may forego reasonable efforts to provide preservation or reunification services to that parent with regard to any future children placed with the state, pursuant to this section. Voluntary relinquishment is only one of several criteria that a court may consider when ordering termination of parental rights. In this case, the District Court properly terminated a mother's parental rights based in part on adjudication of the child as a youth in need of care. With the exception of minor immaterial misstatements, the court's decision was based on facts supported by substantial testimonial evidence from professionals, so termination of parental rights was not an abuse of discretion, and the decision was affirmed. In re P.S., 2006 MT 4, 330 M 239, 127 P3d 451 (2006). See also In re C.B., 2019 MT 294, 398 Mont. 176, 454 P.3d 1195.

Chronic and Severe Neglect Inclusive of Emotional Neglect: In terminating parental rights without reunification services, the state relied on 41-3-609 and this section in a case of chronic, severe neglect of a child. A parent asserted that parental rights may not be terminated based on a finding of severe emotional neglect, but the Supreme Court held that by definition, neglect includes psychological harm to a child. (See 2023 amendment to 41-3-102.) Here, the parent's ongoing drug use and repeated incarceration resulted in the parent's unavailability to the child and inconsistent caregiving, and this neglect in turn produced high anxiety and emotional disturbance in the child. Parental rights were thus properly terminated based on chronic, severe emotional neglect. In re Custody & Parental Rights of D.S., 2005 MT 275, 329 M 180, 122 P3d 1239 (2005). See also In re M.N., J.N., Jr., & R.N., 2011 MT 245, 362 Mont. 186, 261 P.3d 1047, which held that discrete instances of neglect, when viewed within a consistent pattern of similar behavior, provide a clear basis by which a District Court can find chronic, severe neglect, and In re E.Z.C., 2013 MT 123, 370 Mont. 116, 300 P.3d 1174.

Statute Not Unconstitutionally Vague for Failure to Give Notice of Conduct Considered Aggravated Circumstance: A mother's parental rights were terminated without reunification services being offered pursuant to this section after the state contended that the mother subjected her child to an aggravated circumstance, namely abuse and neglect. On appeal, the mother contended that subsection (2)(a) of this section was vague and void on its face because the term "including but not limited to" failed to clearly define the standard that would warrant either termination of parental rights or withholding of reunification services, in violation of due process. The mother also asserted that by failing to provide direction to courts in determining what an aggravated circumstance is, basic policy matters were impermissibly delegated to judges for resolution on an ad hoc basis. The Supreme Court noted that a statute is vague on its face when it fails to give a person of ordinary intelligence fair notice that contemplated conduct is forbidden and that an appellant faces a high burden of proof of showing that no standard of conduct is specified at all. The court cited Ward v. Rock Against Racism, 491 US 781 (1989), for the holding that even when statutory standards are flexible and officials implementing them will exercise considerable discretion, perfect clarity and precise guidance are not required. Here, the statute listed several examples of conduct that constituted an aggravated circumstance, including conduct that the mother exposed her child to. Because the mother failed to prove that subsection (2)(a) of this section did not give fair notice of any standard of conduct at all, the statute was not void for vagueness. In re Custody & Parental Rights of D.S., 2005 MT 275, 329 M 180, 122 P3d 1239 (2005).

Attempted Rape of Child Considered Aggravated Circumstance — Determination That Preservation or Reunification Services for Incarcerated Parent Unnecessary Not Erroneous: Generally, the state must make reasonable efforts to reunite a family after children have been removed from the home. However, a District Court may determine that preservation or reunification services are not necessary if a parent has subjected a child to aggravated circumstances. Here, the District Court determined that the services were not necessary for a parent who was incarcerated for attempted rape of a child, and the Supreme Court affirmed. The parent's sexual abuse conviction met the definition of aggravated circumstances, and the determination that preservation or reunification services were unnecessary was not erroneous. In re L.M.A.T. & B.L.F.T., 2002 MT 163, 310 M 422, 51 P3d 504 (2002).

Circumstances Related to Termination of Parental Rights to First Child Relevant to Ability to Care for Second Child: The District Court noted that a mother's parental rights to her first child, S.P., had been terminated and concluded that, because the circumstances related to the termination in S.P.'s case were still present and relevant to the mother's ability to care for her second child, C.P., the mother's parental rights to C.P. should be terminated as well. The mother appealed, but the Supreme Court affirmed. Pursuant to 41-3-609(1)(d), the parent-child relationship may be terminated if the parent has subjected the child to any of the circumstances listed in subsection (2) of this section, including when a parent has had parental rights to the child's sibling or other child of the parent involuntarily terminated and the circumstances related to the termination of parental rights are relevant to the parent's ability to adequately care for the child at issue. The District Court did not abuse its discretion in holding that the circumstances related to the termination in S.P.'s case were still present and relevant to the mother's ability to care for C.P., that continuation of the parent-child relationship would likely result in substantial risk of harm to C.P., and that it was in C.P.'s best interests that parental rights be terminated. In re C.P., 2001 MT 187, 306 M 238, 32 P3d 754 (2001).

Parent Not Represented by Counsel During Show Cause Hearing Regarding Whether Child a Youth in Need of Care — Due Process Rights Not Violated: At the time of a show cause hearing on whether her child was a youth in need of care, the mother was an indigent mental patient civilly committed to the state hospital. She appeared at the hearing without representation of counsel. The mother contended that the District Court violated her due process rights by making that critical determination regarding the child when she was unrepresented. Although in In re A.S.A., J.L.A., G.A., & A.J.A., 258 M 194, 852 P2d 127 (1993), the Supreme Court held that the constitutional right to due process guarantees an indigent parent the right to court-appointed counsel in parental rights termination proceedings, the court has not extended the right to counsel to a pretermination proceeding in which the focal issue is whether a child is a youth in need of care. Rather, appointment of counsel at any time prior to the initiation of termination proceedings is within the discretion of the District Court. In this case, the initial determination that the child was a youth in need of care was made by order pursuant to a finding of probable cause even before the mother's first appearance in any proceedings when the District Court relied on a report submitted by a social worker showing that the child was abused or neglected or in danger of abuse or neglect and that removal from the home was necessary to protect the child's welfare. Subsequent to the initial determination, the District Court reached the same conclusion on at least three separate occasions when the mother was represented by counsel, including one hearing when the social worker was subjected to cross-examination by the mother's counsel. The Supreme Court applied In re M.F., 201 M 277, 653 P2d 1205 (1982), and in re D.S., H.S., R.S., R.S., J.S., R.S., & K.S., 253 M 484, 833 P2d 1090 (1992), and in holding that the state is not required to provide counsel at proceedings concerning temporary investigative authority (see 2001 amendment to 41-3-427) or temporary custody. Thus, the mother's due process rights were not violated when the District Court made the determination that the child was a youth in need of care at a time when the mother was not represented by counsel. (See 2005 amendment.) In re A.M., 2001 MT 60, 304 M 379, 22 P3d 185 (2001).

Source of Children's PTSD Not Traceable to Father — No Abuse of Discretion by Court That Held Children Not Suffering From Abuse and Neglect Caused by Father — Temporary Investigative Authority (See 2001 Amendment to 41-3-427) and Temporary Legal Custody Properly Terminated: John, who pleaded guilty to negligent homicide in the death of his psychotic wife, Nancy, petitioned the District Court for the termination of temporary investigative authority (see 2001 amendment to 41-3-427) and temporary legal custody of the Department of Public Health and Human Services, and the petition was granted. The Supreme Court held that the Department's authority was properly terminated because the District Court could not and did not find that the posttraumatic stress disorder (PTSD) suffered by John's children was caused by their father's behavior. The expert testimony given at trial showed that the children's PTSD could have been caused by living with their psychotic mother and not by their father's killing of their mother and his subsequent attempt to cover up the murder. The Supreme Court held that the District Court properly found that the children were not abused or neglected by their father and that the District Court therefore did not abuse its discretion when it granted John's petition and terminated the Department's authority. In re Inquiry Into J.L. & D.L., 2000 MT 289, 302 M 254, 14 P3d 473, 57 St. Rep. 1219 (2000).

Limited Emancipation Decisions Not Subject to Appellate Mediation Requirements: Former Rule 54, M.R.App.P. (now superseded), provided that certain domestic relations cases are subject to appellate mediation, but those cases do not include limited emancipation decisions, which are more akin to severing parental rights than to delineating how, when, and under what circumstances parental rights may be exercised. Thus, limited emancipation actions are not subject to appellate mediation requirements. In re Emancipation of Dammarell, 2000 MT 46, 298 M 391, 3 P3d 597, 57 St. Rep. 230 (2000).

Denial of Request to Remove Guardian Ad Litem Not Error: At the hearing on the petition for TIA and protective services (see 2001 amendment to 41-3-427), the mother requested removal of the guardian ad litem who had worked with the family for 2 years. The District Court declined, which was not error in light of the lack of evidence that the guardian had not performed the required statutory duties. In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982, 57 St. Rep. 179 (2000), affirmed in In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

Interlocutory Order Granting Temporary Investigative Authority and Protective Services Not Appealable: An order for temporary investigative authority and protective services (see 2001 amendment to 41-3-427) issued under 41-3-403 (renumbered 41-3-423) is not a "final judgement", a specified interlocutory order, or "an allowance for a widow or a child" and is not appealable under former Rule 1, M.R.App.P. (now superseded). In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982, 57 St. Rep. 179 (2000).

Order for Psychiatric Evaluation in Child Abuse Case Not Violative of Privilege Against Self-Incrimination: The District Court hearing a child abuse and neglect case ordered the mother to submit to a psychiatric evaluation, participate in counseling, and follow through with the therapist's recommendations. The mother claimed that the order violated her privilege against self-incrimination under the fifth amendment to the U.S. Constitution. The Supreme Court found no suggestion of criminal liability attending the mother's participation in counseling and noted that a child abuse and neglect proceeding is not a criminal case. Further, 41-3-403 (renumbered 41-3-423) specifically authorizes medical and psychological evaluations of and counseling services for the parents in such cases. Thus, a constitutional violation was not established. In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982, 57 St. Rep. 179 (2000).

Petition Need Not Allege Abuse or Neglect — Facts Establishing Probable Cause Sufficient to Issue Order for Protective Services: A petition for temporary investigative authority (TIA) and protective services (see 2001 amendment to 41-3-427) must state the authority requested and facts establishing probable cause that the youth is abused or neglected or in danger of being so and must be accompanied by an affidavit or Department report stating in detail the facts on which the request is based. There is no statutory requirement that the petition contain an allegation of abuse or neglect or the evidence that the Department would present in support of its petition. The fact that the mother stipulated to a 90-day TIA, but not to protective services or the removal of the children from the home, believing that she would retain custody of the children during the 90-day period, did not preclude the District Court from ordering removal of the children from the home. The best interests of the child is paramount and takes precedence over parental rights in abuse and neglect proceedings. In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982, 57 St. Rep. 179 (2000).

Protective Removal of Children From Home Not Violative of Parent's Right of Religious Freedom — Best Interests of Children Prevail: The District Court hearing a child abuse and neglect case ordered the children removed from the home in their best interests. The mother contended that the order violated her constitutional right to religious freedom by removing her ability to participate in and control the children's religious upbringing because she couldn't see them pending her psychiatric evaluation. The Supreme Court found nothing in the record suggesting that the District Court was hostile to the mother's religious views or had based its order on those views. Rather, the order was based on evidence that the children were emotionally disturbed and threatened with harm, and the temporary restriction on the mother's access to the children was warranted. The mother remained free to pursue her religious beliefs, and the order did not infringe on that freedom. In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982, 57 St. Rep. 179 (2000), affirmed in In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

Dismissal of Petition for Temporary Investigative Authority (See 2001 Amendment to 41-3-427) Without Review of Guardianship Action — Harmless Error in Light of Requirements of Indian Child Welfare Act: In compliance with 41-3-403 (renumbered 41-3-423), the District Court ordered a show cause hearing at which to consider a petition for temporary investigative authority (TIA) (see 2001 amendment to 41-3-427) regarding two Indian children. At the hearing, the Deputy County Attorney offered an order and memorandum from a previously dismissed guardianship proceeding as evidence. The court did not admit the documentation as evidence, but took judicial notice of it. However, at the end of the hearing, the court dismissed the petition for TIA (see 2001 amendment to 41-3-427) without reviewing any records from the guardianship proceeding and ordered the Department of Public Health and Human Services to immediately place the children with their father. The mother contended that it was error to dismiss the petition without reviewing the guardianship file. In order for courts to grant TIA (see 2001 amendment to 41-3-427) petitions when Indian children are involved, the requirements of the Indian Child Welfare Act must be met. Under 25 U.S.C. 1912, active efforts must be made to provide remedial services and rehabilitation programs to prevent the breakup of the Indian family. In addition, any finding that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child must be based on the testimony of qualified expert witnesses. Because these requirements were not met, the court could not have granted TIA (see 2001 amendment to 41-3-427) even if it had reviewed the guardianship file, so its failure to do so, if erroneous, was harmless. In re M.P.M. & A.R.M., 1999 MT 78, 294 M 87, 976 P2d 988, 56 St. Rep. 327 (1999).

Error in Placing Custody With One Parent Following Dismissal of Petition for Temporary Investigative Authority (See 2001 Amendment to 41-3-427): In compliance with 41-3-403 (renumbered 41-3-423), the District Court ordered a show cause hearing at which to consider a petition for temporary investigative authority (TIA) (see 2001 amendment to 41-3-427) regarding two Indian children. At the end of the hearing, the court dismissed the petition for TIA (see 2001 amendment to 41-3-427) and ordered the Department of Public Health and Human Services to immediately place the children with their father. The Department argued on appeal that the court exceeded its authority in ordering transfer of custody to the father after the petition for TIA (see 2001 amendment to 41-3-427) was dismissed. The Supreme Court held that when the District Court vacated the orders issued following filing of the petition for TIA (see 2001 amendment to 41-3-427), it did not have authority to place custody with the father because nothing in the statutory framework or legislative intent authorizes the placement of a child with one parent, as opposed to the other, following dismissal of a petition for TIA (see 2001 amendment to 41-3-427). The order transferring custody to the father was reversed. In re M.P.M. & A.R.M., 1999 MT 78, 294 M 87, 976 P2d 988, 56 St. Rep. 327 (1999).

Expiration of Temporary Custody Order — No Effect on Jurisdiction: At the time that the Department of Family Services (now Department of Public Health and Human Services) filed a petition for temporary investigative authority (see 2001 amendment to 41-3-427), the mother and her children were not living on the reservation. Subsequently, the mother moved back to the reservation and sought to have the action transferred to the tribal court. The mother argued that the District Court had lost jurisdiction over the matter when its order of temporary custody expired. The Supreme Court ruled that the child abuse and neglect statutes do not make provisions for the expiration of custody in the state or for the loss of jurisdiction by the court, other than by a finding by the court that the children are not in danger of being abused or neglected and by vacating any order made pursuant to 41-3-403 (renumbered 41-3-423). In re W.L., C.L., & B.L., 260 M 325, 859 P2d 1019, 50 St. Rep. 1081 (1993).

Continuing Court Jurisdiction Throughout Custody Hearings Proper: Father contended that, once granted, investigative authority and protective services granted to the Department of Family Services (now Department of Public Health and Human Services) cannot be continued by further order of the District Court. However, 41-3-403 (renumbered 41-3-423) permits the court to grant relief as may be required in the best interest of the youth, including the power to make continuing arrangements for the youth's protection. In re H.D., 256 M 70, 844 P2d 114, 49 St. Rep. 1141 (1992).

Mother's Complicity in Murder of Father as Emotional Deprivation of Children: The mother argued that the lower court had improperly granted the state temporary investigative authority (see 2001 amendment to 41-3-427). The Supreme Court ruled that the lower court had not abused its authority because the mother's role in the murder of the children's father could prompt a condition of emotional deprivation in the children. In re B.H.M., C.M.M., & J.T.H., 245 M 179, 799 P2d 1090, 47 St. Rep. 1967 (1990).

Show Cause Hearing Not Required: There is no requirement that a show cause hearing be held prior to removal of youths pursuant to 41-3-403 (renumbered 41-3-423). In re J.W. & J.C., 226 M 491, 736 P2d 960, 44 St. Rep. 843 (1987).

Mere Presence of Hearsay Evidence in Court File Not Reversible Error: The presence in the court file of statements not supported by testimony is not a violation of due process or error when: (1) the authors of the reports did testify and were subject to cross-examination; (2) no evidence was presented to rebut the presumption that any hearsay within the reports themselves was disregarded by the District Court; and (3) the court explicitly based its findings upon the testimony of the witnesses and upon the reports of only those who testified. (See 1993 amendment.) In re M.L.H., H.M.H., & R.H., 220 M 288, 715 P2d 32, 43 St. Rep. 375 (1986).

Order for Protection of Youth — Rules Suspended — Procedure on Appeal: A petition for temporary investigative authority and protective services (see 2001 amendment to 41-3-427) was filed by the prosecutor under 41-3-402 (renumbered 41-3-427). Temporary custody of K.H. was later awarded to county welfare department under 41-3-403 (renumbered 41-3-423). The District Court found probable cause for state intervention and ordered temporary investigative authority (see 2001 amendment to 41-3-427), custody in the mother, and restrictions on the father's visitation. The parents appealed the order, an appealable order within former Rule 1, M.R.App.Civ.P. (now M.R.App.P., now superseded), but not an adequate remedy because of the time involved. Relief should properly be pursued through a Writ of Certiorari, Habeas Corpus, or Supervisory Control. The Supreme Court treated the matter as a Writ of Certiorari and denied it on the grounds that the District Court proceedings were in substantial compliance with law and that the petitioners were not prejudiced thereby. In re K.H., 216 M 267, 701 P2d 720, 42 St. Rep. 796 (1985). However, see In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982, 57 St. Rep. 179 (2000), in which it was held that because an interlocutory order granting temporary investigative authority and protective services is not appealable under former Rule 1, M.R.App.P. (now superseded).

Evidence of Sexual Abuse — Treatment Plan Ordered: Acting on evidence of sexual abuse and other problems within the family, the trial court properly found S.L.T. to be an abused and neglected child. The court granted temporary custody to the county welfare department and required that the child and her parents follow a treatment plan submitted by the welfare department. Section 41-3-404 (renumbered 41-3-437) gives the trial court authority to order any of the forms of relief listed in 41-3-403 (renumbered 41-3-423) once the court determines a child is abused or neglected. This includes the relief ordered in this case. In re S.L.T., 215 M 289, 697 P2d 472, 42 St. Rep. 366 (1985).

41-3-424. Dismissal.

Compiler's Comments

Effective Date: This section is effective October 1, 2003.

Case Notes

Father's Partial Compliance With Treatment Plan Insufficient — Sufficient Evidence to Support Termination: The Department of Public Health and Human Services initiated a parental rights termination proceeding, alleging the father presented a risk to his children. The District Court ultimately terminated the father's rights. On appeal, the father argued that the Department failed to act in good faith and failed to provide reunification services, that he had partially completed his treatment plan, and that it was reasonable for him to improve. The Supreme Court affirmed, holding that the Department was not biased and did not act in bad faith, that a parent does not complete a treatment plan by partial or even substantial compliance with a treatment plan, and that the evidence supported the determination that the father was unlikely to improve. In re A.K., 2015 MT 116, 379 Mont. 41, 347 P.3d 711.

Child Removed From Mother's Care — Child Subsequently Placed With Father — Motion to Dismiss Mother's Termination Proceedings Correctly Denied: The state removed the petitioner's child from her home based on allegations of abuse and neglect. After the District Court adjudicated the child a youth in need of care, the child's paternity was established. The mother did not comply with the terms of her treatment plan and the state filed a petition to terminate her parental rights. Days prior to the termination hearing, the child was placed with the father after he successfully completed his treatment plan. The mother filed a motion to dismiss the petition because the child had been placed with the father and therefore had been reunited with the child's parent. The District Court denied the motion to dismiss the petition, noting that the child had not been reunited with the mother. Moreover, the District Court concluded, and on appeal the Supreme Court agreed, that 41-3-424 was not intended to benefit a noncompliant, offending parent based on the compliance of a nonoffending parent. In re L.V-B., 2014 MT 13, 373 Mont. 344, 317 P.3d 191.

Dismissal Motion Properly Denied When Statutory Criteria Not Met: Based on the Supreme Court's prior holding in In re D.B. & D.B., 2007 MT 246, 339 M 240, 168 P3d 691 (2007) (In re D.B. I), the mother moved to dismiss a parental rights termination case on grounds that the District Court proceedings did not contain sufficient evidence to apply the proper statutory criteria required by In re D.B. I. The court denied the dismissal motion and the mother appealed. The Supreme Court affirmed. Only when the criteria of 41-3-424 are met may a petition be properly dismissed, and the mother failed to satisfy those criteria. The children remained youths in need of care and the District Court was required to provide some form of relief as established in 41-3-422, so dismissal was inappropriate and unavailable to the mother. In re D.B. & D.B., 2008 MT 272, 345 M 225, 190 P3d 1072 (2008). See also In re K.A., 2016 MT 27, 382 Mont. 165, 365 P.3d 478.

Dismissal of Parenting Action Following Placement of Children Under Permanency Plan — Appeal Moot: While a parenting action was pending in Flathead County, a District Court in Missoula County approved a permanency plan that placed the children in California with the mother. The father did not appeal the placement order. The Flathead County action was subsequently dismissed, and the father appealed. The Supreme Court held that the Flathead County order was moot because the state no longer possessed authority over the custody and placement of the children, and in the absence of an ongoing, concrete controversy, effective relief could not be granted. The appeal was dismissed. In re J.A.S. & E.R.S., 2008 MT 269, 345 M 189, 190 P3d 299 (2008).

41-3-425. Right to counsel.

Compiler's Comments

2023 Amendment: Section 2, Ch. 295, L. 2023, inserted (2)(d) regarding petitioning for reinstatement of parental rights; and made minor changes in style. Amendment effective April 26, 2023.

Section 1, Ch. 655, L. 2023, in (2)(b) after "41-3-422" deleted "when a guardian ad litem is not appointed for the child or youth"; deleted former (3) that read: "(3) When appropriate, the court may appoint the office of state public defender to assign counsel for any child or youth involved in a proceeding under a petition filed pursuant to 41-3-422 when a guardian ad litem is appointed for the child or youth"; and made minor changes in style. Amendment effective October 1, 2023.

Section 35, Ch. 716, L. 2023, in (2)(c) and (4) inserted reference to Montana ICWA; and made minor changes in style. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

2017 Amendment: Chapter 52 inserted (5) requiring certain requirements to be met before court may appoint public defender to a putative father; and made minor changes in style. Amendment effective March 1, 2017.

2013 Amendment: Chapter 29 in (2) substituted "subsections (3) and (4)" for "subsection (3)" and after "appoint" substituted "the office of state public defender to assign counsel" for "or have counsel assigned"; in (2)(a) at end after "41-3-422" inserted language on determination of eligibility; in (3) after "appoint" substituted "the office of state public defender to assign counsel" for "or have counsel assigned"; deleted former (3)(a) that read: "(a) a guardian ad litem or a court-appointed special advocate involved in a proceeding under a petition filed pursuant to 41-3-422"; substituted (4) pertaining to court assigning counsel for former language that read: "The court's action pursuant to subsection (2) or (3) must be to order the office of state public defender, provided for in 47-1-201, to immediately assign counsel pursuant to the Montana Public Defender Act, Title 47, chapter 1, pending a determination of eligibility pursuant to 47-1-111"; and made minor changes in style. Amendment effective July 1, 2013.

2011 Amendment: Chapter 343 in (2)(b) at end inserted "when a guardian ad litem is not appointed for the child or youth"; inserted (3)(b) relating to appointment of counsel for a child or youth; and made minor changes in style. Amendment effective October 1, 2011.

2007 Amendment: Chapter 511 in (2)(b) after "youth" deleted "or guardian ad litem"; inserted (3) allowing appointment of counsel for guardian ad litem in a proceeding under 41-3-422; in (4) at beginning deleted "Beginning July 1, 2006" and inserted reference to subsection (3); and made minor changes in style. Amendment effective May 16, 2007.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

Effective Date: Section 80(1), Ch. 449, L. 2005, provided that this section is effective on passage and approval. Approved April 28, 2005.

Case Notes

Termination of Parental Rights Proper When Record Clearly Shows Reasonable Efforts Made to Reunite Family — Failure of Mother to Cooperate With Getting New Attorney Appointed — Counsel Retained at All Critical Stages of Proceeding — No Due Process Violation: The District Court did not abuse its discretion when it terminated the mother's parental rights when the record clearly shows reasonable efforts were made to reunite the family pursuant to 41-3-423(1) (see 2023 amendment to 41-3-423) and because 41-3-609(1)(f) does not require a specific finding by the District Court that reasonable efforts were made before terminating the mother's parental rights. Because she had counsel at all critical states of the proceedings, the mother's due process right was not infringed when she was without counsel due to her own failure to cooperate. In re M.V.R., 2016 MT 309, 385 Mont. 448, 384 P.3d 1058.

Qualifications to Be Considered Party or Interested Person in Child Abuse and Neglect Proceedings: In a child abuse and neglect proceeding, the mother's longtime boyfriend, who was not biologically related to the child but was identified by the child as his "dad", appealed the District Court's determination that the boyfriend was neither a party nor an interested person to the child's case and, therefore, was not entitled to continued notice or the right to appear in any subsequent proceedings related to the child. On appeal, the Supreme Court determined that the Department of Public Health and Human Services, the child, and a parent, guardian, or individual with legal custody of the child are all parties to child abuse and neglect proceedings. In addition, a foster parent, a preadoptive parent, a relative caring for the child, or a relative who has cared for the child is allowed to file a motion to intervene and may also be a party to the proceedings. Therefore, because the boyfriend did not meet the above criteria, the District Court did not err in dismissing him as a party to the proceedings. However, the Supreme Court determined that under 41-3-422(9)(a), the boyfriend is a person interested in the child's case and has a right to appear at hearings pertaining to the child but does not have the right to notice or the right to be heard. The District Court erred when it denied the boyfriend's request to appear at the child's proceedings. In re J.B., 2015 MT 342, 381 Mont. 525, 362 P.3d 859.

Law Review Articles

The Analysis is Simple: A Child's Right to Counsel in Dependency and Neglect Proceedings Under the Montana Constitution, Shannon, 79 Mont. L. Rev. 231 (2018).

Symposium: Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws, Abel, 42 Loy. L.A.L. Rev. 1087 (2009).

41-3-427. Petition for immediate protection and emergency protective services — evidence and consideration of harm of removal — order — service.

Compiler's Comments

2023 Amendment: Section 2, Ch. 384, L. 2023, inserted (1)(c)(ii) concerning written documentation of consideration of harm of removal; inserted (3) concerning provision of information to the court; inserted (4) concerning removal determination; inserted (5)(a)(iii) requiring a finding considering the harm of removal; inserted (5)(b) requiring written findings considering the harm of removal; and made minor changes in style. Amendment effective July 1, 2023.

Section 4, Ch. 711, L. 2023, in (1)(f) near end of first sentence before "meeting" deleted "in-person". Amendment effective May 22, 2023.

Section 36, Ch. 716, L. 2023, throughout section in five places inserted references to Montana ICWA; in (7) after "41-3-422" inserted "or, if the case involves an Indian child, as provided in 41-3-1311"; and made minor changes in style. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

2021 Amendment: Chapter 520 in (1)(e) in two places substituted "child protection specialist" for "social worker". Amendment effective October 1, 2021.

2011 Amendments — Composite Section: Chapter 11 inserted (2)(c) regarding right of department to contact extended family members; and made minor changes in style. Amendment effective March 16, 2011.

Chapter 223 in (1)(b) inserted "must be supported by an affidavit signed by a representative of the department stating in detail the alleged facts upon which the request is based and", inserted "or, if the case is subject to the federal Indian Child Welfare Act, clear and convincing evidence", and inserted last sentence requiring that an affidavit must contain information related to statements by the parents; in (1)(c) substituted current text regarding emergency protective services for "The petition for immediate protection and emergency protective services must be supported by an affidavit signed by a representative of the department stating in detail the facts upon which the request is based. The petition or affidavit of the department must contain information regarding statements, if any, made by the parents detailing the parents' statement of the facts of the case. The parents, if available in person or by electronic means, must be given an opportunity to present evidence to the court before the court rules on the petition"; inserted (1)(d) relating to a request for a contested show cause hearing; in (1)(e) after "physical" inserted "or legal", substituted "child" for "youth", and in middle after "person" inserted "having physical or legal custody of the child"; in (2) substituted first sentence allowing the court to order immediate protection for the child if the court finds probable cause for "The person filing the petition for immediate protection and emergency protective services has the burden of presenting evidence establishing probable cause for the issuance of an order for immediate protection of the child, except as provided by the federal Indian Child Welfare Act, if applicable" and in third sentence after "probable cause" inserted "or, if the case is subject to the federal Indian Child Welfare Act, clear and convincing evidence"; and made minor changes in style. Amendment effective October 1, 2011.

2005 Amendment: Chapter 422 inserted (1)(d) requiring notice of right to have support person present during in-person meeting with social worker. Amendment effective October 1, 2005.

2003 Amendment: Chapter 504 in (2)(g) at end of first sentence substituted "the court finds after notice and a hearing that the expenditure is reasonable and that resources are available for payment" for "the department is notified and a court hearing is set in a timely manner on the proposed expenditure". Amendment effective October 1, 2003.

2001 Amendments — Composite Section: Chapter 281 throughout section after "petition for" substituted "immediate protection and emergency protective services" for "temporary investigative authority and protective services"; in (1)(a) inserted second sentence requiring that the child's health and safety be of paramount concern; in (1)(c) at beginning of third sentence substituted "The parents, if available in person or by electronic means" for "Except as provided in 41-3-403, the parents" and after "opportunity to" substituted "present evidence to the court" for "address the court"; inserted (2) regarding burden of establishing probable cause and forms of relief to be stated in the order; inserted (3) requiring a finding that continued residence of the child with the parent is contrary to the welfare of the child or that an out-of-home placement is in the best interests of the child; inserted (4) providing that the order for immediate protection of the child must require the person served to comply immediately with the terms of the order and to appear before the court for a show cause hearing and allowing the court to hold the person in contempt or place temporary physical custody of the child with the department upon failure to comply or show cause; inserted (5) regarding service of the petition; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 311 in (1)(c) in first sentence substituted "signed by a representative of the department stating in detail" for "signed by the county attorney, the attorney general, or an attorney hired by the county or must be supported by a department report stating in detail" and near beginning of second sentence after "affidavit" deleted reference to a report; and made minor changes in style. Amendment effective October 1, 2001.

Saving Clause: Section 19, Ch. 281, L. 2001, was a saving clause.

1997 Amendment: Chapter 501 in (3) inserted second and third sentences concerning content of petition, affidavit, or report and opportunity for parents to address court; and made minor changes in style. Amendment effective May 2, 1997.

1995 Amendments: Chapter 458 in (1) and (3), after "by the county", deleted "welfare department or office of human services"; in (3) inserted "must be supported by" and after "department" deleted "of family services"; and made minor changes in style. Amendment effective April 14, 1995.

Chapter 546 in (3) substituted "department of public health and human services" for "department of family services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1987 Amendment: In middle of (3) changed provision that affidavit be signed by a county welfare department attorney or office of human services attorney to allow signing by an attorney hired by the county welfare department or office of human services and near end substituted "department of family services" for "department of social and rehabilitation services".

1985 Amendment: In (1) near middle after "county attorney" inserted "or an attorney hired by the county welfare department or office of human services"; and in (3) near middle after "county attorney", inserted "attorney general, county welfare department attorney, or office of human services attorney".

Case Notes

Improper Reliance on Parenting Plan Statutes in Granting Temporary Guardianship — Reversal Required: Pursuant to a stipulated parenting plan, the father was designated primary custodian of the couple's son and the mother was awarded visitation every other weekend. When the father received orders to report for active military duty, he moved to have the couple that he and the son lived with and the mother's sister appointed as temporary guardians. The mother moved to dismiss, but the District Court granted the father's motion, and the mother appealed. Reviewing the appealable order granting temporary guardianship, the Supreme Court reversed. The District Court's reliance on 40-4-219 for granting the guardianship was misplaced because that section applies only to modification of a parenting plan with respect to the parents and does not provide authority to decide custody matters between a parent and a third party, including appointment of a third party as a guardian. The District Court's reliance on 40-4-228 for granting the guardianship was also misplaced because that section provides standards by which a court may award a parental interest to a nonparent who has brought a parenting plan proceeding pursuant to 40-4-211, but no such proceeding was brought in this case. The District Court also mistakenly relied on this section in granting the guardianship because this section deals with child abuse and neglect, but does not provide independent authority for appointment of a guardian in disregard of the guardianship statutes. Rather, the father's request was governed by the guardianship statutes in Title 72, ch. 5, which the District Court did not address. The Supreme Court noted that the guardianship provisions in 72-5-222 apply only when a court order has addressed a party's right to parent, as opposed to arrangements defining a parent's custody and visitation under a parenting plan. The mother's right to parent was never previously limited by court order, so the District Court lacked jurisdiction to appoint a guardian for the child pursuant to 72-5-222, and granting the father's petition for temporary guardianship was reversible error. The Supreme Court remanded for the entry of an order vacating the guardianship. Fischer v. Fischer, 2007 MT 101, 337 M 122, 157 P3d 682 (2007).

Action of Recused Judge in Temporary Child Custody Proceedings Affirmed: A District Court Judge signed an order recusing himself from parental rights termination proceedings, but subsequently presided over an emergency temporary custody and protective services proceeding before the recusal order was filed. The parties questioned when the recusal was effective and whether it affected the validity of the emergency proceeding. The Supreme Court concluded that the recusal question did not affect the disposition of the case because, regardless of when the order became effective, the emergency hearing did not affect the child's permanent legal custody or the parent's rights. Thus, the judge's action in conducting the hearing after recusing himself did not warrant reversal in light of the fundamentally fair procedures afforded in the subsequent youth adjudication and parental rights termination proceedings. In re A.N.W., 2006 MT 42, 331 M 208, 130 P3d 619 (2006).

Parent Not Allowed to Examine or Present Witnesses During Child Adjudication Hearing — No Due Process Violation: A father claimed a due process violation when the District Court discontinued a hearing to determine whether his child was a youth in need of care before the father was allowed to examine a witness or to present two of his own witnesses. Fundamental fairness and due process require that a parent not be placed at an unfair disadvantage during parental rights termination proceedings; however, pretermination proceedings entitle a parent to less process than the actual termination proceedings. In this case, the father did not allege that allowing him to examine a witness or to present his own witnesses would have provided any relevant information or that failing to do so prejudiced him. The proceeding was fundamentally fair, and the District Court's decision to terminate the hearing was not reversible error. In re A.N.W., 2006 MT 42, 331 M 208, 130 P3d 619 (2006). See also In Re Custody & Parental Rights of M.W. & C.S., 2001 MT 78, 305 M 80, 23 P3d 206 (2001).

Failure to Adjudicate Child as Youth in Need of Care — Termination of Parental Rights Improper: A mother was arrested for a parole violation, and the state filed a petition to investigate whether her children were abused or neglected. The District Court granted the petition on a preliminary basis, and the children were placed in a foster home. The mother was released on bond but failed to appear for a show cause hearing. The state's petition was then granted, and the court found that it was in the children's best interests to be removed from the home. The mother was later arrested again, released the following day, and left for Florida, leaving the children behind. She was arrested in Florida about 3 months later, and while incarcerated there, Montana filed for approval of a treatment plan. The treatment plan was faxed to the mother, but she refused to sign it. The plan was approved without her signature. A district citizen review board then recommended that the mother's parental rights be terminated based on the mother's criminal history, the social history of the case, and the children's need for permanence. The District Court terminated the mother's parental rights for failing to comply with the treatment plan, and the mother appealed. The Supreme Court held that termination of parental rights was in error because the children had never been adjudicated as youths in need of care through an adjudicatory hearing, as required by this section. A stipulation by the mother to let the court give temporary custody of the children to the state did not constitute a stipulation or an adjudication that the children were youths in need of care. In re T.C. & W.C., 2001 MT 264, 307 M 244, 37 P3d 70 (2001).

Substantial Risk of Harm to Child — Parental Rights Terminated Despite Lack of Evidence of Abuse or Neglect: A girl was born to a mother who was later divorced and remarried. When the girl was 15, she had sexual intercourse with her stepfather and conceived a baby. The state petitioned for temporary investigative authority (TIA) and emergency protective services (see 2001 amendment—now "immediate protection and emergency protective services") over both the girl and her baby, pursuant to 41-3-402 (renumbered 41-3-427). The mother then agreed to divorce the stepfather so that he could marry the girl. The petition regarding the girl was dismissed because she was married and was no longer subject to the mother's parental control. At the show cause hearing on the petition regarding protection of the baby, a state social worker testified that, although there was no indication of actual abuse or neglect of the baby, there was concern for the baby's safety should the baby be placed in the home with the girl and stepfather. The state ultimately petitioned to terminate the girl's parental rights to the baby. The District Court determined that the baby was a youth in need of care and terminated the girl's parental rights. The girl appealed on grounds that the court's determination that the baby was a youth in need of care was erroneous, absent any evidence of abuse, neglect, or abandonment, and that the petition for TIA was insufficient on its face because it contained no allegations that the baby was abused or neglected. However, the definition of abuse or neglect in 41-3-102 includes either actual harm or the substantial risk of harm. Thus, the report required by this section need set forth in detail only facts supporting the petition's request for TIA based on the assertion that a child is abused or neglected or is in danger of being abused or neglected. The social worker's testimony was considered sufficient to support a finding that there was substantial risk of harm to the baby if returned to the girl's custody; therefore, the District Court's determination that the baby was a youth in need of care was correct. The court's finding that under the circumstances, the baby had little hope of a normal emotional, moral, and psychological development with his parents was also supported by substantial evidence and was not clearly erroneous, based on the social worker's testimony that the girl's relationship with the stepfather was unhealthy, that the family unit exhibited extremely poor boundaries, and that the girl had obvious psychological damage from being sexually abused by her father and would, without successful treatment, be unable to set appropriate boundaries for the baby or be able to understand the risk of harm that her relationship with the stepfather posed to the baby. The Supreme Court affirmed. In re D.T.H., 2001 MT 138, 305 M 502, 29 P3d 1003 (2001).

Stipulation Not Considered Sufficient Adjudication of Youth in Need of Care — Lack of Jurisdictional Prerequisite to Terminate Parental Rights: The mother entered into a stipulation with the state that her children were youths in need of care only upon several conditions: (1) her parental rights would remain intact; (2) the children would reside with their grandmother; (3) the Casey Family Program would manage the children's cases; (4) the mother would always have contact with the children even if the program was required to intervene between the mother and grandmother; and (5) at an appropriate time when the mother was ready, the program, the Department, and the mother would devise a treatment plan that would be completed by the mother in order to regain custody of the children. At a subsequent hearing, the Department proposed a permanency plan that involved removing the children from their grandmother. The mother contended that the proposal amounted to a failure to abide by the conditions of the stipulation, thereby voiding the conditional stipulation that the children were youths in need of care and precluding the District Court's authority to terminate her parental rights. The Supreme Court agreed. Although a stipulation may be an acceptable alternative to an adjudicatory hearing in many circumstances, the fundamental nature of the rights of a parent requires that the process by which a stipulation is drafted and signed needs to be closely scrutinized. In this case, the stipulation was drafted by the County Attorney and signed by the mother without the benefit of legal counsel and essentially allowed the court to determine that the youths were in need of care without a finding that they were abused or neglected and without a hearing as required by 41-3-402 (renumbered 41-3-427). The mother had conflicting feelings about the removal of the children from their grandmother's care and relied on her understanding from the stipulation that the Department would not remove the children or terminate her parental rights, so she did not complete her treatment plan. Only a few days after the initial hearing, she promptly began work toward completion of the treatment plan and had made significant progress, particularly considering the unexpected death of her mother, by the time of the next hearing. Despite the change in circumstances resulting from the death, the Department did not grant the mother any additional time to complete the treatment plan, nor did the Department offer any evidence that the mother had abused or neglected the children. Under the unique facts of this case, the Supreme Court held that the District Court incorrectly found that the stipulation sufficed as an adjudication that the children were youths in need of care. Without that adjudication, the District Court lacked the jurisdictional prerequisite to terminate the mother's parental rights, so the Supreme Court reversed. In Re Custody and Parental Rights of M.W. & C.S., 2001 MT 78, 305 M 80, 23 P3d 206 (2001).

Source of Children's PTSD Not Traceable to Father — No Abuse of Discretion by Court That Held Children Not Suffering From Abuse and Neglect Caused by Father — Temporary Investigative Authority (Now "Immediate Protection and Emergency Protective Services") and Temporary Legal Custody Properly Terminated: John, who pleaded guilty to negligent homicide in the death of his psychotic wife, Nancy, petitioned the District Court for the termination of temporary investigative authority (see 2001 amendment—now "immediate protection and emergency protective services") and temporary legal custody of the Department of Public Health and Human Services, and the petition was granted. The Supreme Court held that the Department's authority was properly terminated because the District Court could not and did not find that the posttraumatic stress disorder (PTSD) suffered by John's children was caused by their father's behavior. The expert testimony given at trial showed that the children's PTSD could have been caused by living with their psychotic mother and not by their father's killing of their mother and his subsequent attempt to cover up the murder. The Supreme Court held that the District Court properly found that the children were not abused or neglected by their father and that the District Court therefore did not abuse its discretion when it granted John's petition and terminated the Department's authority. In re Inquiry Into J.L. & D.L., 2000 MT 289, 302 M 254, 14 P3d 473, 57 St. Rep. 1219 (2000).

Petition Need Not Allege Abuse or Neglect — Facts Establishing Probable Cause Sufficient to Issue Order for Protective Services: A petition for temporary investigative authority (TIA) and protective services (see 2001 amendment—now "immediate protection and emergency protective services") must state the authority requested and facts establishing probable cause that the youth is abused or neglected or in danger of being so and must be accompanied by an affidavit or Department report stating in detail the facts on which the request is based. There is no statutory requirement that the petition contain an allegation of abuse or neglect or the evidence that the Department would present in support of its petition. The fact that the mother stipulated to a 90-day TIA, but not to protective services or the removal of the children from the home, believing that she would retain custody of the children during the 90-day period, did not preclude the District Court from ordering removal of the children from the home. The best interests of the child is paramount and takes precedence over parental rights in abuse and neglect proceedings. In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982, 57 St. Rep. 179 (2000).

Appeal From Extension of Temporary Investigative Authority (Now "Immediate Protection and Emergency Protective Services") Held Moot — Permanent Custody Transferred to Father: When A.E.'s mother, Teresa, filed a pro se appeal from the District Court's extension of temporary custody and temporary investigative authority (see 2001 amendment—now "immediate protection and emergency protective services") of the Department of Public Health and Human Services (Department), Teresa's ex-husband, who was the natural father of A.E., sought and received an amendment to the previous dissolution decree by which his marriage to Teresa was dissolved. The amendment transferred permanent custody of A.E. from Teresa to A.E.'s father. Upon the transfer of custody, the Department sought and received dismissal of its petition for extension of temporary custody and to vacate the District Court's order awarding it temporary legal custody for the purposes of the investigation. On appeal of the award of the extension of temporary investigative authority (see 2001 amendment—"now immediate protection and emergency protective services"), the Supreme Court held that the appeal had been rendered moot because the Department no longer had temporary custody of A.E. and because the Department no longer possessed the authority to investigate. For this reason, the Supreme Court dismissed the appeal. In re A.E., 1998 MT 159, 289 M 340, 961 P2d 1265, 55 St. Rep. 638 (1998).

Evidence Sufficient to Warrant Grant of Temporary Investigative Authority (Now "Immediate Protection and Emergency Protective Services"): Evidence of the mother's previous history of psychiatric problems, fires in the family home, one child's extensive absences from school, and the inability of social workers to investigate these problems due to mother's noncooperation constituted sufficient facts to warrant granting of temporary investigative authority (see 2001 amendment—now "immediate protection and emergency protective services"). In re J.W. & J.C., 226 M 491, 736 P2d 960, 44 St. Rep. 843 (1987).

Only Show Cause Hearing Required Upon Filing Petition for Temporary Investigative Authority (Now "Immediate Protection and Emergency Protective Services"): A mother contended that an order granting temporary custody to the state and allowing temporary investigative authority (see 2001 amendment—now "immediate protection and emergency protective services") under 41-3-402 (renumbered 41-3-427) should be vacated for lack of an adjudicatory hearing pursuant to 41-3-404 (renumbered 41-3-437) and a dispositional hearing pursuant to 41-3-406 (renumbered 41-3-438). In denying the motion to vacate, the District Court properly held that a show cause hearing is the only hearing required when a petition for temporary investigative authority (see 2001 amendment—now "immediate protection and emergency protective services") is filed. In re J.W. & J.C., 226 M 491, 736 P2d 960, 44 St. Rep. 843 (1987).

In-Chambers Interview — Record Required: A District Court may conduct an in-chambers interview of children in an abuse, neglect, and dependency proceeding. A record must be made of any interview conducted. In re M.L.H., H.M.H., & R.H., 220 M 288, 715 P2d 32, 43 St. Rep. 375 (1986), followed in In re T.N.-S., 2015 MT 117, 379 Mont. 60, 347 P.3d 1263.

Exclusion of Evidence on Child Abuse Proceeding Concerning Father — Harmless Error: It was harmless error, in a child custody modification proceeding, for a District Court judge to exclude evidence that a petition for temporary investigative authority (see 2001 amendment—now "immediate protection and emergency protective services"), alleging sexual abuse by the father, had been filed under Title 41, ch. 3, and dismissed for lack of evidence after being heard by the same judge who made the custody modification determination. In re Marriage of Stout, 216 M 342, 701 P2d 729, 42 St. Rep. 856 (1985).

Order for Protection of Youth — Rules Suspended — Procedure on Appeal: A petition for temporary investigative authority and protective services (see 2001 amendment—now "immediate protection and emergency protective services") was filed by the prosecutor under 41-3-402 (renumbered 41-3-427). Temporary custody of K.H. was later awarded to county welfare department under 41-3-403 (renumbered 41-3-423). The District Court found probable cause for state intervention and ordered temporary investigative authority (see 2001 amendment—now "immediate protection and emergency protective services"), custody in the mother, and restrictions on the father's visitation. The parents appealed the order, an appealable order within former Rule 1, M.R.App.Civ.P. (now M.R.App.P., now superseded), but not an adequate remedy because of the time involved. Relief should properly be pursued through a Writ of Certiorari, Habeas Corpus, or Supervisory Control. The Supreme Court treated the matter as a Writ of Certiorari and denied it on the grounds that the District Court proceedings were in substantial compliance with law and that the petitioners were not prejudiced thereby. In re K.H., 216 M 267, 701 P2d 720, 42 St. Rep. 796 (1985). However, see In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982, 57 St. Rep. 179 (2000), in which it was held that because an interlocutory order granting temporary investigative authority and protective services (see 2001 amendment—now "immediate protection and emergency protective services") is not appealable under former Rule 1, M.R.App.P. (now superseded).

Prehearing Report — Petition for Permanent Custody: The Supreme Court avoided deciding whether or not it is proper for a County Attorney to file a prehearing report in support of a petition under 41-3-401 (renumbered 41-3-422) for permanent custody since the only report in the record was filed in support of a temporary investigative authority and protective services (see 2001 amendment—now "immediate protection and emergency protective services") petition under 41-3-402(3) (renumbered 41-3-427(3)). In re Moyer, 173 M 208, 567 P2d 47 (1977).

Attorney General's Opinions

Authority to Prevent Withholding of Treatment: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) has authority to initiate legal proceedings to prevent the withholding of medically indicated treatment for disabled infants with life-threatening conditions under the 1985 amendments to the child abuse, neglect, and dependency statutes. 41 A.G. Op. 85 (1986).

41-3-428. Service of process — service by publication — effect.

Compiler's Comments

2005 Amendment: Chapter 118 in (1) near beginning after "Except as" substituted "otherwise provided in this chapter" for "provided in subsection (2)" and near middle after "process" deleted "under this chapter"; and in (2) in first sentence inserted "or by certified mail". Amendment effective October 1, 2005.

Saving Clause: Section 8, Ch. 83, L. 2001, was a saving clause.

Effective Date: Section 9, Ch. 83, L. 2001, provided that this section is effective on passage and approval. Approved March 20, 2001.

41-3-429. Service by publication — summons — form.

Compiler's Comments

2005 Amendment: Chapter 118 in (2)(a) at end after "person" substituted "if in the state of Montana" for "whether inside or outside this state"; in (2)(b) at beginning inserted "if no last-known address exists, if the last-known address is outside Montana, or" and near beginning after "identity" deleted "or location"; and made minor changes in style. Amendment effective October 1, 2005.

Saving Clause: Section 8, Ch. 83, L. 2001, was a saving clause.

Effective Date: Section 9, Ch. 83, L. 2001, provided that this section is effective on passage and approval. Approved March 20, 2001.

41-3-430. Putative fathers — service by publication — continuation of proceedings.

Compiler's Comments

Saving Clause: Section 8, Ch. 83, L. 2001, was a saving clause.

Effective Date: Section 9, Ch. 83, L. 2001, provided that this section is effective on passage and approval. Approved March 20, 2001.

41-3-431. Discovery procedure.

Compiler's Comments

Effective Date: Section 3, Ch. 615, L. 2023, provided: "[This act] is effective on passage and approval." Approved May 18, 2023.

Applicability: Section 4, Ch. 615, L. 2023, provided: "[This act] applies to proceedings pending on [the effective date of this act] and proceedings filed on or after [the effective date of this act]." Effective May 18, 2023.

41-3-432. Show cause hearing — order.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 37, Ch. 716, L. 2023. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

2011 Amendment: Chapter 223 at beginning of (3) substituted "If a contested show cause hearing is requested pursuant to 41-3-427 based upon a disputed issue of material fact or a dispute regarding the veracity of the affidavit of the department" for "At the show cause hearing" and after "testimony" inserted "regarding the disputed issues"; in (5) inserted exception clause; and made minor changes in style. Amendment effective October 1, 2011.

2007 Amendment: Chapter 166 in (3) deleted former fourth sentence that read: "The court may permit testimony by telephone, audiovisual means, or other electronic means." Amendment effective July 1, 2007.

2005 Amendments — Composite Section: Chapter 349 inserted (1)(b) concerning proceedings under the Indian Child Welfare Act; and made minor changes in style. Amendment effective October 1, 2005.

Chapter 449 in (3) in third sentence at end after "legal counsel" inserted reference to appointment or assignment as provided in 41-3-425; and in (4) in first sentence in two places after "appointment" inserted "or assignment". Amendment effective April 28, 2005.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

2003 Amendments — Composite Section: Chapter 189 in (1)(a) inserted second sentence requiring that a separate notice stating any statutory time deadline for a hearing accompany any petition to which the time deadline applies. Amendment effective October 1, 2003.

Chapter 504 in (1)(a) at beginning inserted exception clause and near middle substituted "20 days" for "10 days, excluding weekends and holidays". Amendment effective October 1, 2003.

Saving Clause: Section 19, Ch. 281, L. 2001, was a saving clause.

Effective Date: This section is effective October 1, 2001.

Case Notes

Consolidation of Show Cause and Termination Hearing Not Violative of Due Process: On appeal from an order terminating the mother's parental rights, the Supreme Court held that, although the District Court consolidated the show cause hearing and termination hearing, and the initial show cause notice failed to inform the mother that her parental rights could be terminated at the show cause hearing, the mother's due process rights were not violated. The mother received additional notice that her parental rights were at stake in communications that included the original petition to terminate her parental rights and grant permanent legal custody of the child to the Department of Public Health and Human Services, the order setting the hearing on the Department's petition, and the original hearing scheduled on the Department's petition, for which the mother attended the hearing and was granted a two-week continuance. Because the mother had notice and an opportunity to be heard, neither the consolidation of the show cause and termination hearings nor the lack of notice of the risk of terminated parental rights in the initial show cause order violated the mother's due process rights. In re C.B., 2019 MT 294, 398 Mont. 176, 454 P.3d 1195.

Termination of Parental Rights — Removal of Infant — Mother Located in Another State — Department Policies Not Followed — Evidentiary Admissions Clarified: The Montana Department of Public Health and Human Services, Child and Family Services Division, became involved with a mother and child when the mother tested positive for methamphetamine and marijuana at the child's birth. During portions of the proceeding, the mother lived in different states, did not own a vehicle, did not have a driver's license, and could not make it to Montana due to weather. The District Court ultimately terminated the mother's parental rights, finding that the mother did not successfully complete her treatment plan and the condition rendering her unfit, unable, or unwilling to parent was unlikely to change. On appeal, the Supreme Court reversed, holding that the Department failed to provide reasonable efforts to place the child as close as possible to the mother's home in violation of the Department's policies, that it did not implement a service provision plan that could successfully address the mother's substance abuse problem, that the removal of an infant implicates different services than the removal of an older child, that it failed to take efforts to identify or locate a potential kinship placement, that it failed to provide reasonable efforts designed to reunify the mother and her child, and that the presumption in favor of termination in 41-3-604 was misplaced. The court then clarified In re M.C., 2017 MT 252, 389 Mont. 78, 403 P.3d 1266, to hold that it did not intend that case to be interpreted to permit courts to admit any and all written reports or evaluations or service-related documents over otherwise valid hearsay or foundation objections. In re R.J.F., 2019 MT 113, 395 Mont 454, 443 P.3d 387.

Procedural Deadlines Missed — Best Interests of Child: The mother's parenting rights were terminated. The initial hearing was scheduled 18 days after the 20-day statutory deadline, which the mother did not object to. Then the Department of Public Health and Human Services requested a continuance, which the mother objected to. Following her objection to the first continuance, the mother failed to object to subsequent motions. On appeal, the mother argued that the District Court committed reversible error when it failed to hold a show cause hearing within 20 days of the filing of the abuse and neglect petition and when it failed to hold a dispositional hearing 20 days after the show cause hearing. The Supreme Court held that pursuant to legislative intent, in cases involving abused and neglected children, a District Court may act to protect a child's best interests despite procedural interests. In re A.H., 2015 MT 75, 378 Mont. 351, 344 P.3d 403.

Guardian Not Entitled to Same Due Process as Parent — Exclusion From First Show Cause Hearing — Termination of Guardianship Based on Best Interests of Child: The state filed for protective custody of a boy whose grandmother and stepgrandfather had been his legal guardians since he was 5 weeks old. The District Court did not allow the stepgrandfather to participate in the first show cause hearing or a permanency plan hearing. Later, however, the stepgrandfather participated in the remainder of the proceedings. Ultimately, the District Court concluded the child's best interests warranted termination of the guardianship. On appeal, the stepgrandfather argued that he had not received adequate due process because of his exclusion from the first show cause hearing. The Supreme Court affirmed, ruling that a guardian is not afforded the same level of due process as a parent in a termination case. Moreover, the District Court had afforded the stepgrandfather adequate due process by allowing him to meaningfully participate in the remainder of the proceedings. In re D.B.J., 2012 MT 220, 366 Mont. 320, 286 P.3d 1201.

Show Cause Hearing to Be Commenced, Not Completed, Within 20 Days: In a termination proceeding, the District Court held a show cause hearing within 20 days of the filing of the petition. The first hearing, however, was limited to the rights of the mother and did not consider the rights of the legal guardians of the child. Ultimately, the District Court terminated the guardianship. On appeal, the guardian argued that the District Court lost jurisdiction by not completing the show cause hearing within 20 days. The Supreme Court affirmed, ruling that a District Court must commence, not complete, a show cause hearing within 20 days. In re D.B.J., 2012 MT 220, 366 Mont. 320, 286 P.3d 1201. See also In re C.B., 2019 MT 294, 398 Mont. 176, 454 P.3d 1195.

Abuse and Neglect Cases — "Initial Appearance" for Purposes of Filing Motion to Substitute — Show Cause Hearing — Dismissal of Motion to Substitute as Untimely Reversed: A parent was served with a show cause order and notice of show cause hearing regarding abuse and neglect of her child. Two days later, a public defender filed a notice of appearance on her behalf. The parent filed a motion to substitute the District Court judge 1 day before the show cause hearing, but more than 10 days after the notice of appearance of counsel had been filed. The District Court denied her motion as untimely, reasoning that the parent had 10 days from counsel's appearance to file her motion. Citing D.H. v. Fourth Judicial District Court, 2012 MT 106, 365 Mont. 82, 278 P.3d 1010, as controlling, the Supreme Court reversed the District Court's denial of the motion. For purposes of filing a motion to substitute the judge in an abuse and neglect case, a parent's "initial appearance" is the show cause hearing. A.C. v. 10th Judicial District Court, 2012 MT 110, 365 Mont. 87, 278 P.3d 1013.

Adjudication of Youth in Need of Care Without Specific Request Affirmed: A parent asserted that the District Court lacked authority to adjudicate a child as a youth in need of care because there was no request for such adjudication contained in the initial petitions for emergency protective services and temporary investigative authority. The Supreme Court disagreed. The relief sought in a petition filed under 41-3-422 may include any relief required for the best interests of the child, and 41-3-432 allows a court to adjudicate a child as a youth in need of care at the show cause hearing for immediate protection and emergency protective services. Thus, the District Court was not foreclosed from adjudicating the child as a youth in need of care following filing of the initial petitions for emergency protective services and temporary investigative authority. In re B.S. & G.S., 2009 MT 98, 350 M 86, 206 P3d 565 (2009).

Hearsay Evidence and Parental Rights Termination — Admission of Hearsay Evidence at Show Cause, Adjudicatory, and Termination Hearings Held Proper Because Children "Unavailable" — J.C.E. Case Distinguished — No Offer of Proof Made: Hearsay evidence in the form of videotaped interviews of young children talking with investigators about sexual abuse by their parents was admitted after the District Court found that the children were "unavailable" to testify because they would be traumatized by testifying against their parents in a courtroom setting. The Supreme Court held that the videotaped testimony was properly admitted by the District Court, based upon the thorough findings by the District Court, at the show cause hearing, the adjudicatory hearing, and the parental rights termination hearing. The Supreme Court distinguished St. v. J.C.E., 235 M 264, 767 P2d 309 (1988), because that case was a criminal case in which the right of confrontation under Art. II, sec. 24, Mont. Const., applied, whereas the case now before the Supreme Court was a civil case. The Supreme Court also held that the District Court properly analyzed the mother's attempt to call the children as witnesses as one of relevance, and because no offer of proof was made under Rule 103, M.R.Ev. (Title 26, ch. 10), by the mother, the Supreme Court could not conclude that the District Court acted arbitrarily. In re O.A.W., 2007 MT 13, 335 M 304, 153 P3d 6 (2007).

Erroneous Award of Custody at Adjudicatory Hearing Cured by Immediate Scheduling of Dispositional Hearing to Address Dispositional Issue Separately: The District Court failed to structure dispositional issues apart from adjudicatory issues when it granted temporary legal custody of two children to the state during an adjudicatory hearing. However, upon discovering the error, the court immediately scheduled a dispositional hearing to address the dispositional issue separately. Although not excusing the error, the Supreme Court held that holding a second dispositional hearing made the initial order placing the children with the state during the adjudicatory hearing the functional equivalent to an order of placement pending the dispositional hearing because temporary placement outside the home is allowed at every stage of the proceeding pursuant to 41-3-301, 41-3-437, and this section. The error was harmless and nonprejudicial and did not warrant reversal. In re S.C. & L.Z., 2005 MT 241, 328 M 476, 121 P3d 552 (2005).

Petition for Permanent Custody and Termination of Parental Rights Not Considered Initial Filing — Show Cause Hearing Timely: Under the 2001 amendments to this section, a District Court is generally required to conduct a show cause hearing within 10 days of the filing of an initial child abuse and neglect petition. A petition for permanent legal custody in this case was filed on September 18, 2001, and was the first document personally served on a father incarcerated in Washington state. The father contended that the petition therefore qualified as the initial pleading, so the hearing held November 5, 2001, was well past the 10-day requirement (see 2003 amendment). The Supreme Court disagreed. The petition for permanent legal custody did not constitute an initial filing; rather, the initial filing was the state's petition for temporary investigative authority and protective services filed on November 17, 2000. The statute in effect at that time required a show cause hearing within 20 days of issuance of an order granting relief as required for the immediate protection of a child, and a show cause hearing was held December 4, 2000, well within the 20-day timeframe. The court noted that even if the father's argument that the petition that he was personally served was considered the initial filing, this section would still not apply because it was not in effect on September 18, 2001. In re L.M.A.T. & B.L.F.T., 2002 MT 163, 310 M 422, 51 P3d 504 (2002).

41-3-433. Temporary investigative authority.

Compiler's Comments

Saving Clause: Section 19, Ch. 281, L. 2001, was a saving clause.

Effective Date: This section is effective October 1, 2001.

41-3-434. Stipulations — prohibition on continuances of hearings.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 779, L. 2023. Amendment effective October 1, 2023.

2003 Amendment: Chapter 504 in introductory clause substituted "the parties" for "a parent"; inserted (4) concerning extension of timeframes; and made minor changes in style. Amendment effective October 1, 2003.

Saving Clause: Section 19, Ch. 281, L. 2001, was a saving clause.

Effective Date: This section is effective October 1, 2001.

Case Notes

Procedural Deadlines Missed — Best Interests of Child: The mother's parenting rights were terminated. The initial hearing was scheduled 18 days after the 20-day statutory deadline, which the mother did not object to. Then the Department of Public Health and Human Services requested a continuance, which the mother objected to. Following her objection to the first continuance, the mother failed to object to subsequent motions. On appeal, the mother argued that the District Court committed reversible error when it failed to hold a show cause hearing within 20 days of the filing of the abuse and neglect petition and when it failed to hold a dispositional hearing 20 days after the show cause hearing. The Supreme Court held that pursuant to legislative intent, in cases involving abused and neglected children, a District Court may act to protect a child's best interests despite procedural interests. In re A.H., 2015 MT 75, 378 Mont. 351, 344 P.3d 403.

Stipulation to Treatment Plan Not Stipulation That Child Is Youth in Need of Care: The mother stipulated to a treatment plan. Later, when seeking to terminate her parental rights, the state argued that by stipulating to the plan the mother had implicitly stipulated to the adjudication of her Indian child as a youth in need of care. The District Court agreed and terminated the mother's parental rights. On appeal, the Supreme Court held that a parent's stipulation to a treatment plan does not equate to a stipulation that a child of the parent is a youth in need of care but concluded that the error did not undermine the fundamental fairness of the current proceedings so as to warrant reversal of the termination. Nevertheless, the Supreme Court vacated the termination, because the District Court applied the incorrect evidentiary standard in its ruling, and remanded the case for application of the correct standard. In re H.T., 2015 MT 41, 378 Mont. 206, 343 P.3d 159.

Voluntary Consent Requirements in ICWA — No Applicability to Nonvoluntary Termination Proceedings: The Supreme Court held that 25 U.S.C. 1913(a) of the Indian Child Welfare Act, requiring a parent's voluntary written consent to terminate parental rights, has no applicability to nonvoluntary termination proceedings. In re D.A. and M.A., 2013 MT 191, 371 Mont. 46, 305 P.3d 824, following In re J.M., 2009 MT 332, 353 Mont. 64, 218 P.3d 1213.

Mother's Stipulation That Child Be Adjudicated Youth in Need of Care Prior to Determination of Child's Status as Indian — Parental Termination Proceedings Not Invalidated: The state petitioned for termination of a mother's parental rights based on her lack of progress with the court-ordered treatment plan. The state recognized the child's Indian status and notified the Blackfeet Tribe. The tribe's motion to intervene in order to monitor the proceedings was granted, and the mother's parental rights were terminated the following day after the mother stipulated to adjudication of the child as a youth in need of care. The mother subsequently appealed on grounds that it was error to terminate her parental rights prior to a determination that the child was subject to the Indian Child Welfare Act (ICWA). The Supreme Court disagreed and affirmed. The District Court complied with ICWA in finding by clear and convincing evidence that the child was a youth in need of care and that the child's best interests would be served by termination of the parent-child relationship. The fact that the court accepted the mother's stipulation before definitively establishing the child's Indian status did not invalidate the proceedings. The District Court was affirmed. In re J.M., 2009 MT 332, 353 M 64, 218 P3d 1213 (2009).

Parent's Acquiescence in Adjudicatory Proceedings — Finding That Child Is Youth in Need of Care Based on Parent's Admissions — Stipulation Not Required: A mother contested termination of her parental rights on grounds that her child was not properly adjudicated as a youth in need of care. The mother was incarcerated at the time of the hearing and contended that although she agreed to a treatment plan, she never admitted that the child met the definition of a youth in need of care or stipulated that the child was in need of care. The Supreme Court noted that the trial court should have specifically inquired of the mother or her counsel whether the mother stipulated that the child was a youth in need of care, but it was not error for the District Court to make that finding based on the mother's own admissions that she was addicted to methamphetamine and needed treatment and that her addiction impacted the child unfairly. The mother was not placed at an unfair disadvantage during the termination proceedings and was represented by counsel at all stages. She never questioned the regularity of the proceedings until appeal. The court held that because 35 months had passed between the adjudicatory hearing and the notice of appeal, it would not be in the child's best interests to prolong the matter, particularly when much of the delay was caused by the mother's repeated relapses and her failure to put the child's interests above her desire to indulge her addiction. The adjudication was proper and did not prejudice the mother, and the District Court was affirmed. In re A.S., 2006 MT 281, 334 M 280, 146 P3d 778 (2006).

Separate Dispositional Hearing Not Required When Parental Stipulations Made Regarding Adjudication and Placement of Children and Treatment Plans: Under 41-3-438, a separate dispositional hearing is not required if parental stipulations are entered pursuant to this section. In this case, the parents stipulated to their children being youths in need of care, to the children being placed in temporary state custody, and to signing treatment plans. Given the parents' stipulations to the pertinent dispositional issues, a separate dispositional hearing was not required. In re B.B. & J.B., 2006 MT 66, 331 M 407, 133 P3d 215 (2006).

Adjudication Properly Based on Parents' Stipulation That Children Considered Youths in Need of Care: Following termination of their parental rights, the parents contended that termination was not proper because the children were never adjudicated as youths in need of care, which is the threshold for termination proceedings. Although there was no hearing at which that determination was made based on a preponderance of the evidence, under this section, a parent may stipulate that a child is a youth in need of care, and the parents in this case twice stipulated that their children were in need of care—once when they signed a stipulation to temporary legal custody and again when they signed a stipulation to the extension of temporary legal custody. Based on these stipulations and the holding in In Re Custody & Parental Rights of M.W. & C.S., 2001 MT 78, 305 M 80 (2001), the children were properly adjudicated as youths in need of care. In re M.B., J.B., & W.B., 2004 MT 304, 323 M 468, 100 P3d 1006 (2004).

41-3-437. Adjudication — temporary disposition — findings — order.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 38, Ch. 716, L. 2023. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

2009 Amendment: Chapter 210 inserted (4)(b)(ii) concerning continuity of care; and made minor changes in style. Amendment effective October 1, 2009.

2005 Amendments — Composite Section: Chapter 130 in (6)(b) in first sentence substituted "41-3-438(1)" for "41-3-438(2)". Amendment effective October 1, 2005.

Chapter 349 inserted (8) concerning proceedings under the Indian Child Welfare Act. Amendment effective October 1, 2005.

2003 Amendment: Chapter 504 in (1) near end of third sentence substituted "stipulation by the parties pursuant to 41-3-434" for "in the notification of parties"; in (2) at end of first sentence deleted "and ascertains, as far as possible, the cause"; in (3) near end before "youth" inserted "affected"; in (7)(a) near middle after "court" substituted "may make oral findings, and following the adjudicatory hearing, the court shall make written findings" for "shall make written findings"; and in (7)(b)(ii) at end of first sentence after "hearing" inserted remainder of sentence concerning not requiring expenditure of money or finding that expenditure is reasonable and inserted second sentence designating department as payor of last resort. Amendment effective October 1, 2003.

2001 Amendments — Composite Section: Chapter 194 inserted (4) requiring court to hear certain evidence in case in which abandonment is alleged; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 281 inserted (1) requiring an adjudicatory hearing when an appropriate petition is filed; in (2) in first sentence after "evidence" inserted "except as provided in the federal Indian Child Welfare Act, if applicable" and inserted second and third sentences regarding applicability of rules of civil procedure and evidence to the adjudicatory hearing and clarifying scope of the hearing; in (3) near middle after "residence of the child" inserted "paternity, if in question"; in (6)(a) after "pursuant to" substituted "41-3-427 or 41-3-432" for "41-3-403"; in (6)(b) near middle of first sentence after "conducted within" substituted "20 days, as provided in 41-3-438(2)" for "30 days" and at end of third sentence substituted "41-3-427(2)" for "41-3-403(6)"; inserted (7) requiring the court to make written findings regarding certain issues prior to adjudication; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 311 in (3) inserted last sentence relating to hearsay statements made by the youth. Amendment effective October 1, 2001.

Applicability: Section 8, Ch. 194, L. 2001, provided: "[This act] applies to proceedings on petitions filed pursuant to 41-3-401 [now 41-3-422] after October 1, 2001."

Saving Clause: Section 19, Ch. 281, L. 2001, was a saving clause.

1999 Amendments — Composite Section: Chapter 481 in (3) near middle after "child" deleted "and granted in Title 26, chapter 1, part 8", after "26-1-803 and the" substituted "mediation" for "mediator", and at end substituted "26-1-813" for "26-1-811, apply"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 566 at end of (4)(b) substituted "41-3-403(6)" for "41-3-403(3)". Amendment effective October 1, 1999.

1997 Amendment: Chapter 516 in (1), near middle after "determine", inserted "by a preponderance of the evidence"; in (3), at end after "26-1-803", inserted "and the mediator privilege granted by 26-1-811"; and in (4)(b), at beginning of first sentence after "If", substituted "the youth is adjudicated a youth in need of care" for "the court determines that the youth is an abused or neglected child" and at end substituted "41-3-403(3)" for "41-3-403(2)".

Applicability: Section 20, Ch. 516, L. 1997, provided that this section applies to proceedings commenced on or after October 1, 1997.

1995 Amendment: Chapter 458 in (3), after "neglect", deleted "or dependency"; in (4)(a) and (4)(b), after "neglected", deleted "or dependent"; and made minor changes in style. Amendment effective April 14, 1995.

1985 Amendment: In (1) near beginning, after "41-3-401", deleted "or 41-3-402"; and in (4)(b), in first sentence, after "hearing", inserted "to be conducted within 30 days", and deleted former second sentence that read: "The dispositional hearing shall be scheduled as soon as practicable."

Case Notes

Foster Parents Precluded From Intervening — No Allegation of Abandonment — Rule 24, M.R.Civ.P., Displaced by Title 41 in Abuse and Neglect Case. In re U.A.C., 2022 MT 230, 410 Mont. 493, 520 P.3d 295.

Admission of Psychological Evaluation — Hearsay Exception Not Required — Unique Statutory Scheme of Youth in Need of Care Proceedings: The District Court ordered a mother's treatment plan, which required her to undergo a psychological evaluation, and she signed the treatment plan, agreeing to follow the evaluation's recommendations. The psychological evaluation became part of the court proceedings, allowing the court to consider any part of the evaluation through the abuse and neglect proceeding. After the District Court terminated the mother's parental rights, she appealed. The Supreme Court affirmed, finding that the District Court properly admitted the mother's psychological evaluation at the hearing to determine whether to terminate the mother's parental rights and that it did not need to be admitted as a hearsay exception. In re M.C., 2017 MT 252, 389 Mont. 78, 403 P.3d 1266, distinguished in In re R.J.F., 2019 MT 113, 395 Mont. 454, 443 P.3d 387, relating to valid hearsay or foundational objections.

Procedural Deadlines Missed — Best Interests of Child: The mother's parenting rights were terminated. The initial hearing was scheduled 18 days after the 20-day statutory deadline, which the mother did not object to. Then the Department of Public Health and Human Services requested a continuance, which the mother objected to. Following her objection to the first continuance, the mother failed to object to subsequent motions. On appeal, the mother argued that the District Court committed reversible error when it failed to hold a show cause hearing within 20 days of the filing of the abuse and neglect petition and when it failed to hold a dispositional hearing 20 days after the show cause hearing. The Supreme Court held that pursuant to legislative intent, in cases involving abused and neglected children, a District Court may act to protect a child's best interests despite procedural interests. In re A.H., 2015 MT 75, 378 Mont. 351, 344 P.3d 403.

Failure to Hold Adjudicatory Hearing — Reversal of Termination Not Warranted: The state filed to terminate the parental rights of the mother to her Indian child. The District Court did not hold an adjudicatory hearing prior to termination. On appeal, the mother argued that the District Court's failure to hold the adjudicatory hearing required reversal of the termination. The Supreme Court held that although the District Court had not complied with this section, the error did not undermine the fundamental fairness of the proceedings. However, the Supreme Court vacated the termination and remanded the matter based on the District Court's application of the incorrect evidentiary standard. In re H.T., 2015 MT 41, 378 Mont. 206, 343 P.3d 159.

Allegations of Abuse and Neglect Directed Only at Mother — Court-Ordered Placement With Father — No Dispositional Hearing Required: The mother and father shared legal custody of their two children. The state filed a petition for emergency protective services and for temporary investigative authority based on allegations that the mother had endangered the children through her alcohol abuse. The state placed the children with the father. The parents stipulated to the children being designated youths in need of care, and the District Court ordered that the children continue to reside with their father, with the mother having only supervised contact with them due to her continued abuse of alcohol. The father then filed a motion to dismiss the state's case and grant him full legal custody. Neither the state nor the children's attorney objected. The District Court granted the motion and the mother appealed, claiming that the District Court had to hold an evidentiary hearing before dismissing the state's case. The Supreme Court affirmed the dismissal because there were no questions of fact regarding the best interests of the children, as the allegations of abuse involved only the mother. The Supreme Court further concluded that the mother could now initiate a parenting plan since the state's case had been dismissed. In re S.S., 2012 MT 78, 364 Mont. 437, 276 P.3d 883.

Sufficient Evidence That Children in Need of Care — Parental Rights Properly Terminated: In 2004, a mother left her two children with a 16-year-old babysitter and did not return for over 24 hours. The children were placed in temporary legal custody with the state, where they remained thereafter. The state attempted to work on reunifying the family, but the mother repeatedly failed to comply with treatment plans, continued her heavy drinking, was arrested several times, and spent periods incarcerated. The children were tribal members, and the state gave proper tribal notification and had an Indian Child Welfare Act expert testify on several occasions that continued parental custody was likely to result in serious emotional or physical harm to the children and that there were no family members available to take the children. The children were adjudicated youth in need of care, and the state eventually sought to terminate the mother's parental rights in 2008. The mother appealed, but the Supreme Court affirmed. The children had been in foster care for over 4 years, exceeding the threshold for triggering the presumption that termination was in the children's best interests. A reasonable person could conclude, as did the District Court, that the children were in need of care and that the mother's parental rights should be terminated. Substantial evidence showed that the mother: (1) had been charged with four separate criminal offenses and was the subject of a bench warrant; (2) entered an intensive outpatient drug treatment program but stopped after five sessions, indicating a high potential for substance abuse that could only be controlled by incarceration or inpatient treatment; (3) did not complete any parts of the court-approved treatment plan; (4) missed a number of scheduled visits with the children; (5) failed to address her mental health issues; (6) failed to obtain adequate housing; (7) failed to make reunification with the children a priority; and (8) was unlikely to change her pattern of substance abuse and her unstable lifestyle. In re T.W.F & A.R.M., 2009 MT 207, 351 M 233, 210 P3d 174 (2009).

No Error in Denial of Continuance of Parental Rights Termination Proceeding to Determine Placement of Children: During his testimony at a hearing on termination of a father's parental rights, the father requested a continuance in order for a hearing to be held regarding whether placement of the children with their grandparents was in the children's best interests. The District Court denied the request, and on appeal the Supreme Court affirmed. The question of possible placement of the children had no bearing on whether the statutory criteria for terminating the father's parental rights had been established, and the District Court did not abuse its discretion in declining to delay final determination of the father's parental rights. In re B.S. & G.S., 2009 MT 98, 350 M 86, 206 P3d 565 (2009). See also In re O.A.W., 2007 MT 13, 335 M 304, 153 P3d 6 (2007).

Sufficient Evidence to Adjudicate Children as Youths in Need of Care: The District Court properly adjudicated children as youths in need of care based on evidence that: (1) there was a significant prior history of domestic violence and domestic abuse between the parents in the presence of the children; (2) one of the children exhibited various behavior and developmental problems, including running away, violent behavior, anger control problems, and poor language skills; (3) the father could not care for the children because of his long-term federal incarceration; (4) the mother, who was living at a shelter for domestic abuse victims and dealing with mental health issues, had voluntarily surrendered the children to state care because of her inability to adequately parent them; and (5) the state had made reasonable efforts to avoid placement of the children or to make it possible to safely return the children to the home, but protective placement was required. In re B.S. & G.S., 2009 MT 98, 350 M 86, 206 P3d 565 (2009). See also In re K.H. and K.M., 2012 MT 175, 366 Mont. 18, 285 P.3d 474, in which the Supreme Court concluded that there was insufficient evidence to adjudicate children as youths in need of care and that the District Court properly considered the mother's past conduct, including her choice of intimate partners, in the context of how that conduct affected the children.

Hearsay Evidence and Parental Rights Termination — Admission of Hearsay Evidence at Show Cause, Adjudicatory, and Termination Hearings Held Proper Because Children "Unavailable" — J.C.E. Case Distinguished — No Offer of Proof Made: Hearsay evidence in the form of videotaped interviews of young children talking with investigators about sexual abuse by their parents was admitted after the District Court found that the children were "unavailable" to testify because they would be traumatized by testifying against their parents in a courtroom setting. The Supreme Court held that the videotaped testimony was properly admitted by the District Court, based upon the thorough findings by the District Court, at the show cause hearing, the adjudicatory hearing, and the parental rights termination hearing. The Supreme Court distinguished St. v. J.C.E., 235 M 264, 767 P2d 309 (1988), because that case was a criminal case in which the right of confrontation under Art. II, sec. 24, Mont. Const., applied, whereas the case now before the Supreme Court was a civil case. The Supreme Court also held that the District Court properly analyzed the mother's attempt to call the children as witnesses as one of relevance, and because no offer of proof was made under Rule 103, M.R.Ev. (Title 26, ch. 10), by the mother, the Supreme Court could not conclude that the District Court acted arbitrarily. In re O.A.W., 2007 MT 13, 335 M 304, 153 P3d 6 (2007).

Parent's Excited Utterance Following Domestic Disturbance Not Considered Hearsay in Proceeding Adjudicating Child as Youth in Need of Care: In adjudicating a child as a youth in need of care, the District Court relied on statements made by the mother to an officer who was investigating a domestic disturbance at the family residence. Following adjudication, the court implemented a treatment plan, which the father refused to sign. The court subsequently terminated the father's parental rights for failing to comply with the treatment plan. The father contended that the District Court improperly admitted hearsay evidence from the officer that provided the evidentiary support for designating the child as a youth in need of care. The Supreme Court disagreed. The excited utterance exception to the hearsay rule under Rule 803, M.R.Ev. (Title 26, ch. 10), applied to the officer's testimony regarding the mother's statements because the statements were made immediately after the mother had been fighting with the father and while she was still visibly upset. Thus, the District Court did not abuse its discretion in allowing the officer's testimony. In re T.W. & J.M., 2006 MT 153, 332 M 454, 139 P3d 810 (2006), distinguishing In re Marriage of Bonamarte, 263 M 170, 866 P2d 1132 (1994).

Erroneous Award of Custody at Adjudicatory Hearing Cured by Immediate Scheduling of Dispositional Hearing to Address Dispositional Issue Separately: The District Court failed to structure dispositional issues apart from adjudicatory issues when it granted temporary legal custody of two children to the state during an adjudicatory hearing. However, upon discovering the error, the court immediately scheduled a dispositional hearing to address the dispositional issue separately. Although not excusing the error, the Supreme Court held that holding a second dispositional hearing made the initial order placing the children with the state during the adjudicatory hearing the functional equivalent to an order of placement pending the dispositional hearing because temporary placement outside the home is allowed at every stage of the proceeding pursuant to 41-3-301, 41-3-432, and this section. The error was harmless and nonprejudicial and did not warrant reversal. In re S.C. & L.Z., 2005 MT 241, 328 M 476, 121 P3d 552 (2005).

Proper Finding That Youths in Need of Care — Expert Testimony Based in Part on Hearsay — Adequate Exercise of Independent Factfinding Judgment: The District Court found that two youths were in need of care. The mother appealed on grounds of insufficient evidence and contended that the District Court erroneously adopted the state's findings of fact and conclusions of law without substantial change, but the Supreme Court affirmed. The record contained sufficient credible evidence to support the findings that the children were abused and neglected by the mother's actions that injured the children's capacity to function emotionally or psychologically and thus were youths in need of care. Additionally, it was not error for the District Court to rely on the testimony of a psychology expert, even though the testimony was based in part on hearsay, because the facts and data relied on by the expert were of the type typically relied on by experts in the field of psychology. Moreover, although the verbatim adoption of findings and conclusions of the prevailing party is not favored, the District Court in this case did not in fact adopt the state's findings and conclusions verbatim, but rather exercised independent factfinding judgment. In re A.R. & I.R., 2005 MT 23, 326 M 7, 107 P3d 457 (2005), distinguishing In re Inquiry Into J.L. & D.L., 2000 MT 289, 302 M 254, 14 P3d 473 (2000).

Adjudication Properly Based on Parents' Stipulation That Children Considered Youths in Need of Care: Following termination of their parental rights, the parents contended that termination was not proper because the children were never adjudicated as youths in need of care, which is the threshold for termination proceedings. Although there was no hearing at which that determination was made based on a preponderance of the evidence, under 41-3-434, a parent may stipulate that a child is a youth in need of care, and the parents in this case twice stipulated that their children were in need of care—once when they signed a stipulation to temporary legal custody and again when they signed a stipulation to the extension of temporary legal custody. Based on these stipulations and the holding in In Re Custody & Parental Rights of M.W. & C.S., 2001 MT 78, 305 M 80 (2001), the children were properly adjudicated as youths in need of care. In re M.B., J.B., & W.B., 2004 MT 304, 323 M 468, 100 P3d 1006 (2004).

Failure to Adjudicate Youth in Need of Care Precluding Termination of Parental Rights: A parent contended that parental rights were improperly terminated because the child was not properly adjudicated as a youth in need of care. The Supreme Court noted that such adjudication is a threshold requirement before a court may grant temporary legal custody, order a parental treatment plan, or terminate parental rights. The state argued that the child was found to be a youth in need of care during earlier guardianship proceedings in a different District Court. The Supreme Court cited In re F.M., 2002 MT 180, 311 M 35, 53 P3d 368 (2002), for the holding that evidence received at a hearing on a collateral matter, such as a guardianship proceeding, did not satisfy the adjudicatory requirements of this section (formerly numbered 41-3-404). Further, it was improper for the District Court to approve a treatment plan 10 months prior to proper adjudication of the child as a youth in need of care, in violation of 41-3-406 (renumbered 41-3-438) and 41-3-420 (renumbered 41-3-443), which also rendered the requirements of 41-3-609 unsatisfied. Because the child was not properly adjudicated a youth in need of care, court approval of a treatment plan was improper and termination of parental rights was reversed. In re B.N.Y., 2003 MT 241, 317 M 291, 77 P3d 189 (2003).

Sufficient Findings to Warrant Grant of Temporary Legal Custody: A mother appealed an order granting temporary legal custody of her child to the state. The Supreme Court held that an order of temporary legal custody is normally an interlocutory order subject to review pursuant to a writ of supervisory control, rather than by direct appeal. Nevertheless, in this case, the court decided to address the appeal as if it were a direct appeal because the state's motion to dismiss had been denied earlier. The court found sufficient evidence to support the order of temporary custody. Even though the mother did nothing wrong personally, she made mistakes concerning other people in her life that endangered her child's welfare. A finding that a parent personally caused a child's injuries is not necessary for a grant of temporary legal custody. A District Court may consider a child to be a youth in need of care regardless of the parent's care for the child or even whether actual abuse or neglect occurred. The temporary custody order was affirmed. In re D.A., 2003 MT 109, 315 M 340, 68 P3d 735 (2003).

Failure to Hold Adjudicatory Hearing to Determine Whether Children in Need of Care — Termination of Parental Rights Improper Absent Adjudication of Status of Children: The District Court held several hearings concerning temporary investigative authority, granting several extensions, and also held several hearings concerning granting temporary legal custody, which was extended twice. The state then filed a petition to terminate the mother's parental rights. Temporary legal custody was extended a third time pending a hearing on the termination hearing. At the hearing, the mother's parental rights were terminated, and she appealed. The Supreme Court found that there had never been an adjudicatory hearing at which the District Court heard testimony or received evidence concerning whether the children were abused or neglected. The hearing for temporary legal custody did not equate to an adjudication by the court that the children were youths in need of care, even in light of an alleged stipulation by the mother to that effect. Absent an adjudicatory hearing and an adjudication that the children were youths in need of care, termination of parental rights was improper, and the order was reversed. In re M.O., M.O., & M.O., 2003 MT 4, 314 M 13, 62 P3d 265 (2003).

Retention of Jurisdiction to Terminate Parental Rights — Findings of Abuse or Neglect in Temporary Legal Custody Stage Required: To retain jurisdiction to terminate parental rights under 41-3-609, a District Court must find by a preponderance of the evidence in the temporary legal custody stage under this section that the child is abused or neglected. The adjudication of a child as a youth in need of care cannot be established based on evidence received at the hearing on permanent legal custody. In its termination order, the court must conclude that it did not exceed its jurisdiction at any time during the course of the proceedings. If the court does not make a proper finding of abuse and neglect under this section, it will have exceeded its jurisdiction in waiting to make that determination until terminating parental rights under 41-3-609. In the present case, the District Court did not specifically state, pursuant to this section, that the children were youths in need of care, but the evidence upon which the court based its order granting temporary legal custody clearly demonstrated that the children had suffered actual harm and that they were in danger of substantial risk of harm to their health and welfare. The Supreme Court declined to disturb the findings of abuse and neglect, based on the District Court's language in its order extending the state's investigative authority. In re F.M. & D.M., 2002 MT 180, 311 M 35, 53 P3d 368 (2002).

Failure to Adjudicate Child as Youth in Need of Care — Termination of Parental Rights Improper: A mother was arrested for a parole violation, and the state filed a petition to investigate whether her children were abused or neglected. The District Court granted the petition on a preliminary basis, and the children were placed in a foster home. The mother was released on bond but failed to appear for a show cause hearing. The state's petition was then granted, and the court found that it was in the children's best interests to be removed from the home. The mother was later arrested again, released the following day, and left for Florida, leaving the children behind. She was arrested in Florida about 3 months later, and while incarcerated there, Montana filed for approval of a treatment plan. The treatment plan was faxed to the mother, but she refused to sign it. The plan was approved without her signature. A district citizen review board then recommended that the mother's parental rights be terminated based on the mother's criminal history, the social history of the case, and the children's need for permanence. The District Court terminated the mother's parental rights for failing to comply with the treatment plan, and the mother appealed. The Supreme Court held that termination of parental rights was in error because the children had never been adjudicated as youths in need of care through an adjudicatory hearing, as required by this section. A stipulation by the mother to let the court give temporary custody of the children to the state did not constitute a stipulation or an adjudication that the children were youths in need of care. In re T.C. & W.C., 2001 MT 264, 307 M 244, 37 P3d 70 (2001).

Stipulation Not Considered Sufficient Adjudication of Youth in Need of Care — Lack of Jurisdictional Prerequisite to Terminate Parental Rights: The mother entered into a stipulation with the state that her children were youths in need of care only upon several conditions: (1) her parental rights would remain intact; (2) the children would reside with their grandmother; (3) the Casey Family Program would manage the children's cases; (4) the mother would always have contact with the children even if the program was required to intervene between the mother and grandmother; and (5) at an appropriate time when the mother was ready, the program, the Department, and the mother would devise a treatment plan that would be completed by the mother in order to regain custody of the children. At a subsequent hearing, the Department proposed a permanency plan that involved removing the children from their grandmother. The mother contended that the proposal amounted to a failure to abide by the conditions of the stipulation, thereby voiding the conditional stipulation that the children were youths in need of care and precluding the District Court's authority to terminate her parental rights. The Supreme Court agreed. Although a stipulation may be an acceptable alternative to an adjudicatory hearing in many circumstances, the fundamental nature of the rights of a parent requires that the process by which a stipulation is drafted and signed needs to be closely scrutinized. In this case, the stipulation was drafted by the County Attorney and signed by the mother without the benefit of legal counsel and essentially allowed the court to determine that the youths were in need of care without a finding that they were abused or neglected and without a hearing as required by 41-3-402 (renumbered 41-3-427). The mother had conflicting feelings about the removal of the children from their grandmother's care and relied on her understanding from the stipulation that the Department would not remove the children or terminate her parental rights, so she did not complete her treatment plan. Only a few days after the initial hearing, she promptly began work toward completion of the treatment plan and had made significant progress, particularly considering the unexpected death of her mother, by the time of the next hearing. Despite the change in circumstances resulting from the death, the Department did not grant the mother any additional time to complete the treatment plan, nor did the Department offer any evidence that the mother had abused or neglected the children. Under the unique facts of this case, the Supreme Court held that the District Court incorrectly found that the stipulation sufficed as an adjudication that the children were youths in need of care. Without that adjudication, the District Court lacked the jurisdictional prerequisite to terminate the mother's parental rights, so the Supreme Court reversed. In Re Custody and Parental Rights of M.W. & C.S., 2001 MT 78, 305 M 80, 23 P3d 206 (2001).

Finding That Child Is Youth in Need of Care Prerequisite to Transfer of Custody: The exigent protection of the health and welfare of a child is paramount when the state's initial intervention into otherwise private family matters reveals an actual or potentially dangerous or unhealthy environment requiring the removal of the child from a custodial caregiver. The legal determination that a child is a youth in need of care is a jurisdictional prerequisite for a court-ordered transfer of custody. The first question in a termination proceeding is whether the District Court correctly adjudicated the child as a youth in need of care, and the state need only offer clear and convincing evidence that the court properly adjudicated the child as a youth in need of care in order for the court to inquire into the actual fitness of the parent. In re A.M., 2001 MT 60, 304 M 379, 22 P3d 185 (2001).

Lack of District Court Jurisdiction to Place Children Found Not to Be Abused or Neglected Remedied by Stipulation for Placement of Children: After the temporary investigative authority (see 2001 amendment to 41-3-427) and temporary legal custody of the Department of Public Health and Human Services were terminated by the District Court, the District Court retained jurisdiction over the placement of the children in question pursuant to a stipulation placing those children with the parents of a father who pleaded guilty to negligent homicide. The Department argued, citing In re M.P.M. & A.R.M., 1999 MT 78, 294 M 87, 976 P2d 988 (1999), that once the District Court found that the children were not abused or neglected, it lost jurisdiction over the case and therefore could not retain jurisdiction. The Supreme Court held that the District Court properly retained jurisdiction because retention of jurisdiction was based upon a stipulation granting custody of the children to the father's parents and the stipulation provided for the retention of jurisdiction by the District Court. In re Inquiry Into J.L. & D.L., 2000 MT 289, 302 M 254, 14 P3d 473, 57 St. Rep. 1219 (2000).

Dismissal of Petition for Temporary Investigative Authority (See 2001 Amendment to 41-3-427) Without Review of Guardianship Action — Harmless Error in Light of Requirements of Indian Child Welfare Act: In compliance with 41-3-403 (renumbered 41-3-423), the District Court ordered a show cause hearing at which to consider a petition for temporary investigative authority (TIA) (see 2001 amendment to 41-3-427—now "immediate protection and emergency protective services") regarding two Indian children. At the hearing, the Deputy County Attorney offered an order and memorandum from a previously dismissed guardianship proceeding as evidence. The court did not admit the documentation as evidence, but took judicial notice of it. However, at the end of the hearing, the court dismissed the petition for TIA (see 2001 amendment to 41-3-427—now "immediate protection and emergency protective services") without reviewing any records from the guardianship proceeding and ordered the Department of Public Health and Human Services to immediately place the children with their father. The mother contended that it was error to dismiss the petition without reviewing the guardianship file. In order for courts to grant TIA (see 2001 amendment to 41-3-427—now "immediate protection and emergency protective services") petitions when Indian children are involved, the requirements of the Indian Child Welfare Act must be met. Under 25 U.S.C. 1912, active efforts must be made to provide remedial services and rehabilitation programs to prevent the breakup of the Indian family. In addition, any finding that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child must be based on the testimony of qualified expert witnesses. Because these requirements were not met, the court could not have granted TIA (see 2001 amendment to 41-3-427—now "immediate protection and emergency protective services") even if it had reviewed the guardianship file, so its failure to do so, if erroneous, was harmless. In re M.P.M. & A.R.M., 1999 MT 78, 294 M 87, 976 P2d 988, 56 St. Rep. 327 (1999).

Error in Placing Custody With One Parent Following Dismissal of Petition for Temporary Investigative Authority (See 2001 Amendment to 41-3-427): In compliance with 41-3-403 (renumbered 41-3-423), the District Court ordered a show cause hearing at which to consider a petition for temporary investigative authority (TIA) (see 2001 amendment to 41-3-427—now "immediate protection and emergency protective services") regarding two Indian children. At the end of the hearing, the court dismissed the petition for TIA (see 2001 amendment to 41-3-427—

now "immediate protection and emergency protective services") and ordered the Department of Public Health and Human Services to immediately place the children with their father. The Department argued on appeal that the court exceeded its authority in ordering transfer of custody to the father after the petition for TIA (see 2001 amendment to 41-3-427—now "immediate protection and emergency protective services") was dismissed. The Supreme Court held that when the District Court vacated the orders issued following filing of the petition for TIA (see 2001 amendment to 41-3-427—now "immediate protection and emergency protective services"), it did not have authority to place custody with the father because nothing in the statutory framework or legislative intent authorizes the placement of a child with one parent, as opposed to the other, following dismissal of a petition for TIA (see 2001 amendment to 41-3-427—now "immediate protection and emergency protective services"). The order transferring custody to the father was reversed. In re M.P.M. & A.R.M., 1999 MT 78, 294 M 87, 976 P2d 988, 56 St. Rep. 327 (1999), distinguished in In re Inquiry Into J.L. & D.L., 2000 MT 289, 302 M 254, 14 P3d 473, 57 St. Rep. 1219 (2000).

Stipulation That Child Is Youth in Need of Care — Court Discretion to Determine Custody: Under 41-3-404 (renumbered 41-3-437) and 41-3-406 (renumbered 41-3-438), a parent's stipulation that a child is a youth in need of care empowers a District Court, in its discretion, to transfer legal custody of the child from the parent to the Department of Public Health and Human Services pursuant to In re C.M., 281 M 183, 932 P2d 1063 (1997). In re J.H., R.H., D.H., & R.H., 1998 MT 128, 289 M 111, 958 P2d 1191, 55 St. Rep. 504 (1998).

Court Not to Take Judicial Notice of Hearing at Which Parties Not Represented by Counsel: The Streckerts were not present or represented at a hearing by the lower court determining temporary custody of their children. Subsequently, during a hearing terminating parental rights, the District Court took judicial notice of the testimony presented during the temporary custody hearing. The Supreme Court held that the lower court should not have taken judicial notice of evidence presented in the first hearing but refused to reverse the decision on the basis that there was substantial other evidence to support the lower court's ruling. In re D.S., H.S., R.S., R.S., J.S., R.S., & K.S., 253 M 484, 833 P2d 1090, 49 St. Rep. 552 (1992).

Hearsay Testimony as Only Evidence of Abuse or Neglect — Dismissal Proper: When the bulk of testimony elicited from a social worker and guardian ad litem at a show cause hearing on abuse and neglect was hearsay and when even the state conceded that no evidence was offered to establish probable cause that the children were abused or neglected, consideration of the testimony by the District Court constituted reversible error. The petition was dismissed without prejudice, and the children were returned to their parents pending further proceedings. In re B.S. & J.S., 252 M 435, 829 P2d 939, 49 St. Rep. 338 (1992).

Adjudicatory and Dispositional Hearing Combined — Notice Not Required: Parental rights may be terminated at a dispositional hearing under 41-3-406 (renumbered 41-3-438) and 41-3-607. The dispositional hearing was combined with an adjudicatory hearing under 41-3-404 (renumbered 41-3-437), and no specific notice of the combination was required. Custody of R.A.D., 44 St. Rep. 2018 (1987). Opinion withdrawn but issue affirmed in Custody of R.A.D. & J.D., 231 M 143, 753 P2d 862, 45 St. Rep. 496 (1988).

Only Show Cause Hearing Required Upon Filing Petition for Temporary Investigative Authority (See 2001 Amendment to 41-3-427): A mother contended that an order granting temporary custody to the state and allowing temporary investigative authority (see 2001 amendment to 41-3-427—now "immediate protection and emergency protective services") under 41-3-404 (renumbered 41-3-437) should be vacated for lack of an adjudicatory hearing pursuant to 41-3-404 (renumbered 41-3-437) and a dispositional hearing pursuant to 41-3-406 (renumbered 41-3-438). In denying the motion to vacate, the District Court properly held that a show cause hearing is the only hearing required when a petition for temporary investigative authority (see 2001 amendment to 41-3-427—now "immediate protection and emergency protective services") is filed. In re J.W. & J.C., 226 M 491, 736 P2d 960, 44 St. Rep. 843 (1987).

In-Chambers Interview — Record Required: A District Court may conduct an in-chambers interview of children in an abuse, neglect, and dependency (see 1995 amendment) proceeding. A record must be made of any interview conducted. In re M.L.H., H.M.H., & R.H., 220 M 288, 715 P2d 32, 43 St. Rep. 375 (1986), followed in In re T.N.-S., 2015 MT 117, 379 Mont. 60, 347 P.3d 1263.

Mere Presence of Hearsay Evidence in Court File Not Reversible Error: The presence in the court file of statements not supported by testimony is not a violation of due process or error when: (1) the authors of the reports did testify and were subject to cross-examination; (2) no evidence was presented to rebut the presumption that any hearsay within the reports themselves was disregarded by the District Court; and (3) the court explicitly based its findings upon the testimony of the witnesses and upon the reports of only those who testified. In re M.L.H., H.M.H., & R.H., 220 M 288, 715 P2d 32, 43 St. Rep. 375 (1986).

Evidence of Sexual Abuse — Treatment Plan Ordered: Acting on evidence of sexual abuse and other problems within the family, the trial court properly found S.L.T. to be an abused and neglected child. The court granted temporary custody to the county welfare department and required that the child and her parents follow a treatment plan submitted by the welfare department. Section 41-3-404 (renumbered 41-3-437) gives the trial court authority to order any of the forms of relief listed in 41-3-403 (renumbered 41-3-423) once the court determines a child is abused or neglected. This includes the relief ordered in this case. In re S.L.T., 215 M 289, 697 P2d 472, 42 St. Rep. 366 (1985).

Family Unity Not to Be Preserved at Expense of Children's Best Interests: After an adjudicatory hearing, the District Court terminated the parental rights of the parents of five children and granted custody with authority to consent to adoption to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services). Under Department placement, the children would be separated from each other. The paternal grandmother appealed to the Supreme Court, claiming that the state policy of preserving the unity and welfare of the family as set forth in 41-3-101 was violated by the separation of the children and by the District Court's refusal to award the children to her. The Supreme Court affirmed because the District Court's findings indicated that it had considered the grandmother's request but that the overriding concern was and ought to have been the best interests of the children. In re M.N., 199 M 407, 649 P2d 749, 39 St. Rep. 1487 (1982).

Competency in Criminal Matter Not Determinative in Civil Matter: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) filed a petition in District Court alleging that J. H. was a youth in need of care. The boy, his mother, and a social worker all testified that the father sexually abused the boy. The youth was found to be an abused and neglected child. The father claimed that since he was declared unfit to proceed in a collateral criminal action he was also unfit to proceed in the civil action. The Supreme Court found nothing in the record to indicate the father was declared unfit to proceed in anything except the criminal action. He had the burden of proving his incompetence. With no affirmative showing of incompetence to proceed in the civil action, the court presumed the father competent. In re J.H., 196 M 482, 640 P2d 445, 39 St. Rep. 267 (1982).

Dispositional Hearing Required: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) filed a petition in District Court alleging that J. H. was a youth in need of care. The boy, his mother, and a social worker all testified that the father sexually abused the boy. The court found the boy abused and neglected but failed to hold a dispositional hearing. The Supreme Court found that dispositional hearings are required but that because a separate dispositional hearing had been held in a juvenile matter and the boy was placed at the Yellowstone Boys Ranch, the failure was harmless error in this case. In re J.H., 196 M 482, 640 P2d 445, 39 St. Rep. 267 (1982).

Youth in Need of Care Proceeding — Spouse May Testify — Section Constitutional: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) filed a petition in District Court alleging that J. H. was a youth in need of care. The boy, his mother, and a social worker all testified that the father sexually abused the boy. The father contended that the wife's testimony was a violation of the spousal privilege. The Supreme Court held the wife could testify. The purpose of the spousal privilege is to protect the sanctity of the marriage and home. However, once a family member has been sexually abused, the sanctity of the home and the reason for the rule have been destroyed. Sexual abuse of the son by the father is also a special wrong to the wife and has particularly and directly affected her in a manner other than that suffered by the public in general. Thus, the wrong against the child is nothing more or less than a wrong against the other spouse. As such it falls into one of the exceptions to the spousal privilege. The father claimed that it was unclear whether 41-3-404 (renumbered 41-3-437) allows parents to testify in youth in need of care proceedings and therefore 41-3-404 (renumbered 41-3-437) was unconstitutionally vague. The court, having found that the wife could testify against the husband, determined that the statute was not void due to vagueness. In re J.H., 196 M 482, 640 P2d 445, 39 St. Rep. 267 (1982).

Indian Child Welfare Act — Effective Date: A proceeding for termination of parental rights initiated in state court prior to May 7, 1979, the effective date of the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901, et seq.) continues as a state proceeding, not subject to the transfer provisions to tribal court under the Act, even though, due to a bifurcation of hearings involving several fathers, one of these hearings was held after the effective date of the Act. In re T.J.D., J.L.D. & R.J.W., 189 M 147, 615 P2d 212 (1980).

One Proceeding With Two Hearings — Failure to Object Again — Waiver of Error: In a child abuse and neglect proceeding to terminate parental rights when the father of the youngest child was to have his rights determined a month after a hearing involving the termination of both parents' rights to the two elder children, the father of the youngest child waived his right to complain of error on appeal because he failed to object to questions by the judge at the second hearing involving a prior felony conviction, even though objection was made and overruled in the first hearing. In re T.J.D., J.L.D. & R.J.W., 189 M 147, 615 P2d 212 (1980).

Abuse or Neglect — Sufficiency of Evidence: The District Court did not abuse its discretion in declaring a child abused or neglected where the child's only known parent had been confined to a state hospital for 6 years, had suffered from organic brain dysfunction since birth, experienced delusions, and her condition had been diagnosed as paranoid schizophrenia with no hope of significant improvement in the foreseeable future. In re C.M.S., A Dependent and Neglected Child, 187 M 115, 609 P2d 240 (1979). See also In re C.L.A. & J.A., 211 M 393, 685 P2d 931, 41 St. Rep. 1444 (1984).

Dependency — Sufficiency of Evidence: The District Court did not abuse its discretion in finding a child dependent (see 1995 amendment) where the child's only known natural parent, possessed with a $40,000 estate, had not contributed to the child's support in any substantial way, and because of her mental condition could not provide the proper guidance for the child's necessary physical, moral, and emotional well-being. In re C.M.S., A Dependent and Neglected Child, 187 M 115, 609 P2d 240 (1979).

Protection of Family Unit: Although it is the function of the District Court to protect the unity of the family, family unity was not a factor when the child's only known natural parent had been confined to a state hospital and the child had been placed in a foster home since birth. The child had never had a viable parent-child relationship with her mother and had never seen or been associated with her natural mother. In re C.M.S., A Dependent and Neglected Child, 187 M 115, 609 P2d 240 (1979).

Scope of Review: The findings of the District Court in an abuse or neglect action enjoy a presumption of correctness and will not be overturned unless unsupported by credible evidence that would amount to a clear abuse of discretion. In re C.M.S., A Dependent and Neglected Child, 187 M 115, 609 P2d 240 (1979), following In re G., Youth in Need of Care, 174 M 321, 570 P2d 1110 (1977).

Termination of Parental Rights: When the following things were considered, the record supported the conclusions that the father's rights were adequately considered prior to termination of parental rights and that the decision to terminate them was supported by credible evidence: (1) the father was notified of the hearing, was present, and was represented by counsel; (2) professional testimony indicated the father would not be able to provide enough influence to offset the marked deprivation anticipated to continue for the child; (3) the father was found to have made no effort to assist the mother in learning to become a good parent; (4) the father had visited the child only once in 6 months when the child was in a foster home and had been reported to have abused the child. In re L.F.G., 183 M 239, 598 P2d 1125 (1979).

Youth in Need — Best Interests of Child — Mental Condition of Parent as Sole Factor: When the District Court considered the best interests of a child after first determining that the child was in fact abused or neglected, it met the required standard. Considering the mental condition of the mother as the primary if not the sole factor, but having evidence that the child would not receive even minimally satisfactory maternal care and would be exposed to extremely high chances of developing a mental condition similar to that of the mother, sufficient credible evidence was before the District Court to support the District Court's decision that the child was a youth in need of care. The Supreme Court rejected the view that mental condition of a parent could not be the sole factor supporting a severance of parental rights. In re L.F.G., 183 M 239, 598 P2d 1125 (1979).

Individual Parental Rights: In addition to their rights as a couple, parents have individual rights with respect to their children, which rights must be given adequate consideration in abuse, neglect, or dependency proceedings. In re Declaring T.E.R. Youth in Need of Care, 180 M 340, 590 P2d 1117 (1979), followed in In re J.B., 278 M 160, 923 P2d 1096, 53 St. Rep. 901 (1996).

Law Review Articles

Expert Testimony in Child Sexual Abuse Cases in Montana: A Proposal for Change, Harrison, 54 Mont. L. Rev. 297 (1993).

The Child Victim as a Witness in Sexual Abuse Cases, McGrath & Clemens, 46 Mont. L. Rev. 229 (1985).

41-3-438. Disposition — hearing — order.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 5, Ch. 674, L. 2023. Amendment effective October 1, 2023.

Preamble: The preamble attached to Ch. 674, L. 2023, provided: "WHEREAS, the federal Indian Child Welfare Act requires active efforts that are affirmative, active, and thorough and timely efforts that are tailored, in a manner consistent with prevailing social and cultural conditions, to each case to maintain or reunite an Indian child with the child's family; and

WHEREAS, the federal Indian Child Welfare Act outlines placement preferences for foster care, preadoptive, or adoptive placements of Indian children, prioritizing placement with members of a child's extended family; and

WHEREAS, the Legislature desires to incorporate the federal Indian Child Welfare Act's requirements regarding active efforts and placement preferences into Montana's existing child abuse and neglect laws."

2009 Amendments — Composite Section: Chapter 179 in (3)(e) at end substituted "41-1-503" for "41-1-501". Amendment effective October 1, 2009.

Chapter 210 inserted (4)(a)(iii) concerning continuity of care as a factor in awarding temporary legal custody; and made minor changes in style. Amendment effective October 1, 2009.

2007 Amendment: Chapter 73 inserted (3)(b) regarding evaluation of the noncustodial parent as a possible caretaker; inserted (3)(c) regarding temporary placement of the child with the noncustodial parent and keeping the proceeding open pending completion of any court-ordered treatment plan; in (3)(f)(iii) at beginning after "a" inserted "nonparent" and after "individual who" inserted "has been evaluated"; and made minor changes in style. Amendment effective October 1, 2007.

2005 Amendments — Composite Section: Chapter 178 inserted (4)(c) requiring department to investigate and determine if awarding custody to family member is in child's best interest, requiring court to inform family member denied custody of reasons for denial, and requiring court to provide reasons for denial in the court order upon request. Amendment effective October 1, 2005.

Chapter 382 in (6) near middle after "permanency" deleted "plan". Amendment effective April 25, 2005.

2003 Amendment: Chapter 504 in (1) near end of second sentence substituted "stipulation by the parties pursuant to 41-3-434" for "in the notification of parties"; inserted (2)(c) concerning timing of dispositional hearing; in (3)(a) near middle before "parent" inserted "custodial"; inserted (3)(b) concerning placement with noncustodial parent; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendments — Composite Section — Coordination: Chapter 194 inserted (4) regarding award of temporary legal custody of abandoned child; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 281 inserted (1) requiring a dispositional hearing on every petition within 20 days after entry of an adjudicatory order; inserted (2) requiring a dispositional order, setting out the procedure at a dispositional hearing, and allowing a bifurcated hearing; deleted former (2) that read: "(2) To grant temporary legal custody, the court shall make a finding that:

(a) dismissing the petition would create a substantial risk of harm to the child or detriment to the child's physical or psychological well-being; and

(b) unless there is a finding that reasonable efforts are not required pursuant to 41-3-403, reasonable services have been provided to the parent or guardian to prevent the removal of the child from the home or to make it possible for the child to safely return home"; in (6) near beginning after "pursuant to" substituted "41-3-442(1) or subsection (5) of this section" for "subsection (2) or (3)"; deleted former (5) through (7) that read: "(5) An order for temporary legal custody may be in effect for no longer than 6 months. Before the expiration of the order for temporary legal custody, the county attorney, the attorney general, or an attorney hired by the county shall petition for one of the following:

(a) an extension of temporary legal custody, not to exceed a total of 6 months, upon a showing that additional time is necessary for the parent or guardian to successfully complete a treatment plan;

(b) termination of the parent-child legal relationship and either:

(i) permanent legal custody with the right of adoption; or

(ii) appointment of a guardian pursuant to 41-3-607;

(c) long-term custody pursuant to 41-3-412;

(d) appointment of a guardian pursuant to 41-3-421; or

(e) dismissal.

(6) The court may continue an order for temporary legal custody pending a hearing on a petition provided for in subsection (5).

(7) If an extension of temporary legal custody is granted to the department, the court shall state the reasons why the child was not returned home and the conditions upon which the child may be returned home"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 311 in (3), (3)(a), (3)(b), and (3)(c) substituted references to child for references to youth; in (3)(d) at end of first sentence substituted "consents and informs the court that resources are available for payment" for "is notified and a court hearing is set in a timely manner on the proposed expenditure"; in (3)(e) substituted "consents and informs the court that resources are available for the proposed care and treatment" for "is notified and a court hearing is set in a timely manner on the proposed expenditure"; and in (6) near beginning substituted "permanency plan hearing" for "permanency hearing". Amendment effective October 1, 2001.

The amendment to former subsection (7) of this section made by sec. 9, Ch. 311, L. 2001, was rendered void by sec. 18(3), Ch. 281, L. 2001, a coordination section.

Applicability: Section 8, Ch. 194, L. 2001, provided: "[This act] applies to proceedings on petitions filed pursuant to 41-3-401 [now 41-3-422] after October 1, 2001."

Saving Clause: Section 19, Ch. 281, L. 2001, was a saving clause.

1999 Amendments — Composite Section: Chapter 428 in (5)(b)(ii) at beginning inserted "appointment of a guardian"; inserted (5)(d) relating to appointment of a guardian pursuant to 41-3-421; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 566 in (2)(a) at beginning substituted "dismissing the petition" for "returning the child to the child's parent or guardian" and substituted "psychological well-being" for "emotional well-being"; in (2)(b) at beginning inserted "unless there is a finding that reasonable efforts are not required pursuant to 41-3-403" and at end inserted "or to make it possible for the child to safely return home"; deleted former (3) that read: "(3) In making a finding regarding the risk of harm to the child or regarding detriment to the child, failure of the child's parent or guardian to participate in, to comply with, in whole or in part, or to meet the goals of a court-ordered treatment plan constitutes prima facie evidence that return of the child to the parent or guardian would be detrimental to the child's physical or emotional well-being"; inserted (3) requiring department to make reasonable efforts to permanently place child if court determines efforts to return child to home are inconsistent with permanency plan; inserted (4) requiring permanency hearing to be conducted within 30 days after determination that reasonable efforts to return child to home are not necessary and requiring finalization of placement; in (5)(a) after "custody" inserted "not to exceed a total of 6 months"; inserted (5)(c) authorizing petition for long-term custody; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendment: Chapter 516 in (1)(a), after "youth's", substituted "parent" for "parents"; in (1)(c), after "transfer", inserted "temporary"; in (1)(c)(ii), at beginning after "a", inserted "licensed"; in (1)(c)(iii), near beginning after "who", substituted "is recommended" for "after study"; in (1)(e), near middle of first sentence after "best", substituted "interests of the child" for "interest of the youth" and at end of second sentence inserted "pursuant to 41-3-411"; inserted (2) regarding required court findings; inserted (3) establishing that failure by a parent or guardian to comply with a treatment plan constitutes prima facie evidence that return of the child to the parent or guardian would be detrimental; inserted (4) limiting the time of a temporary legal custody extension; inserted (5) allowing continuance of an order for temporary legal custody; inserted (6) concerning reasons for extending temporary legal custody; inserted (7) requiring the court to review reasons why time limits have not been met and to order an appropriate remedy; deleted former (2) through (6) that read: "(2) If the youth is transferred to the custody of the department, the court shall examine the financial ability of the youth's parents or guardians to pay a contribution covering all or part of the costs for the care, custody, and treatment of the youth, including the costs of necessary medical, dental, and other health care.

(3) If the court determines that the youth's parents or guardians are financially able to pay a contribution as provided in subsection (2), the court shall order the youth's parents or guardians to pay an amount based on the uniform child support guidelines adopted by the department of public health and human services pursuant to 40-5-209.

(4) (a) Except as provided in subsection (4)(b), contributions ordered under this section and each modification of an existing order are enforceable by immediate or delinquency income withholding, or both, under Title 40, chapter 5, part 4. An order for a contribution that is inconsistent with this section is nevertheless subject to withholding for the payment of the

contribution without need for an amendment of the support order or for any further action by the court.

(b) A court-ordered exception from contributions under this section must be in writing and be included in the order. An exception from the immediate income withholding requirement may be granted if the court finds that there is:

(i) good cause not to require immediate income withholding; or

(ii) an alternative arrangement between the department and the person who is ordered to pay contributions.

(c) A finding of good cause not to require immediate income withholding must, at a minimum, be based upon:

(i) a written determination and explanation by the court of the reasons why the implementation of immediate income withholding is not in the best interests of the child; and

(ii) proof of timely payment of previously ordered support in cases involving modification of contributions ordered under this section.

(d) An alternative arrangement must:

(i) provide sufficient security to ensure compliance with the arrangement;

(ii) be in writing and be signed by a representative of the department and the person required to make contributions; and

(iii) if approved by the court, be entered into the record of the proceeding.

(5) Upon a showing of a change in the financial ability of the youth's parents or guardians to pay, the court may modify its order for the payment of contributions required under subsection (3).

(6) (a) If the court orders the payment of contributions under this section, the department shall apply to the department of public health and human services for support enforcement services pursuant to Title IV-D of the Social Security Act.

(b) The department of public health and human services may collect and enforce a contribution order under this section by any means available under law, including the remedies provided for in Title 40, chapter 5, parts 2 and 4."

Applicability: Section 20, Ch. 516, L. 1997, provided that this section applies to proceedings commenced on or after October 1, 1997.

1995 Amendments: Chapter 458 in (1)(c)(iii) substituted "the department or a licensed child-placing" for "a social service". Amendment effective April 14, 1995.

Chapter 546 in (3), (6)(a), and (6)(b) substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 362 in (1)(c)(i), after "department", deleted "of family services"; in (1)(d), at end after "counseling", and in (1)(e), at end after "youth", inserted "that does not require an expenditure of money by the department unless the department is notified and a court hearing is set in a timely manner on the proposed expenditure. The department is the payor of last resort after all family, insurance, and other resources have been examined"; and made minor changes in style. Amendment effective April 16, 1993.

1991 Amendment: In (1), near beginning, substituted "a youth in need of care" for "abused, neglected, or dependent" and after "court" deleted "after the dispositional hearing"; inserted (2) through (6) regarding determination of the financial ability of parents or guardians to contribute to costs for care, custody, and treatment of a youth and regarding methods of contribution for those costs; and made minor changes in style. Amendment effective July 1, 1991.

1987 Amendment: Substituted "department of family services" for "department of social and rehabilitation services".

1985 Amendment: In (2) at end substituted "41-3-408" for "[section 5]"; deleted former (2) that read: "(2) Whenever the court vests legal custody in any agency, institution, or department, it shall transmit with the dispositional judgment copies of any medical report and such other clinical, predisposition, or other reports and information as may be pertinent to the care and treatment of the youth"; deleted former (3) concerning commitment and form of commitment (see Ch. 564, L. 1985, for text); and deleted former (4) and (5) that read: "(4) Transfer of legal custody of a child shall include guardianship of any assets or estate of the child, unless otherwise specified by the court.

(5) Except in cases in which the court permanently terminates all parental rights or rights of the guardian of the youth, the court shall retain jurisdiction over the case and may subsequently modify any disposition ordered pursuant to this section."

1983 Amendment: Inserted (1)(b) allowing court to grant limited emancipation to abused youth 16 years of age or older.

1981 Amendment: In former (3) (now deleted), deleted reference to the Montana children's center.

Case Notes

Placement With Noncustodial Parent Proper Despite Prior Questions of Parental Fitness: A mother and father entered a parenting plan after dissolving their marriage, with the mother granted primary custody of the two children. The father subsequently moved to Colorado and remained out of state for the following years during which Child Protective Services became involved several times due to the mother's substance use and domestic violence allegations in the household. After the children were removed from the mother's home, the father requested that the children be placed with him. The District Court ordered the children to be placed with the father and dismissed the action without prejudice. The mother appealed, arguing that the father was not a "nonoffending" parent and had been previously found to be an imminent safety risk. The Supreme Court affirmed, finding that the father's previous criminal conduct had happened prior to and was not related to the incidents that led to the children's removal from the mother's custody, so he was not deemed an "offending parent" with respect to the removal. There was no error in the District Court's placement with the father because (1) the children were never removed from the father's custody, (2) the District Court had no evidence that the father was currently unfit to parent, and (3) the District Court dismissed the case upon placement with the father. In re J.S.L., 2021 MT 47, 403 Mont. 326, 481 P.3d 833.

Ineffective Assistance of Counsel — Termination of Parental Rights Improper — Remand for Consideration of Placement with Father: Although the out-of-state father had been the primary parent of the children, they were removed from the mother's care after she refused to return them to the father. The father's court-appointed attorney advised him to stipulate to the state's petitions, failed to object to the children being placed with their maternal grandparents, and never requested a placement hearing. Ultimately, the father's parental rights were terminated and the father appealed. The Supreme Court reversed, holding that the father's attorney had provided ineffective counsel, and remanded the matter to the District Court to consider the father as the first placement option for the children. In re B.H., 2020 MT 4, 398 Mont. 275, 456 P.3d 233.

Termination of Parental Rights of "Non-Offending" Parent: A child was designated a youth in need of care after being removed from her mother's care. The father did not object to the designation and, although the father was deemed the "non-offending parent", the child was not placed with him because he testified that he could not financially support her or provide her a place to live. The District Court approved a document that had been prepared by the Department of Public Health and Human Services as a treatment plan for the father. However, while the child was in foster placement, the father stopped visiting the child, was placed in jail for partner-family member assault, and was alleged to be using meth. The District Court terminated the father's rights. On appeal, the father argued that he had never received a treatment plan. However, the Supreme Court disagreed and affirmed, noting that even if the term "treatment plan" had been crossed out and the word "checklist" had been written next to it, the content of the document constituted a treatment plan. In re K.B., 2016 MT 73, 383 Mont. 85, 368 P.3d 722.

Procedural Deadlines Missed — Best Interests of Child: The mother's parenting rights were terminated. The initial hearing was scheduled 18 days after the 20-day statutory deadline, which the mother did not object to. Then the Department of Public Health and Human Services requested a continuance, which the mother objected to. Following her objection to the first continuance, the mother failed to object to subsequent motions. On appeal, the mother argued that the District Court committed reversible error when it failed to hold a show cause hearing within 20 days of the filing of the abuse and neglect petition and when it failed to hold a dispositional hearing 20 days after the show cause hearing. The Supreme Court held that pursuant to legislative intent, in cases involving abused and neglected children, a District Court may act to protect a child's best interests despite procedural interests. In re A.H., 2015 MT 75, 378 Mont. 351, 344 P.3d 403.

Allegations of Abuse and Neglect Directed Only at Mother — Court-Ordered Placement With Father — No Dispositional Hearing Required: The mother and father shared legal custody of their two children. The state filed a petition for emergency protective services and for temporary investigative authority based on allegations that the mother had endangered the children through her alcohol abuse. The state placed the children with the father. The parents stipulated to the children being designated youths in need of care, and the District Court ordered that the children continue to reside with their father, with the mother having only supervised contact with them due to her continued abuse of alcohol. The father then filed a motion to dismiss the state's case and grant him full legal custody. Neither the state nor the children's attorney objected. The District Court granted the motion and the mother appealed, claiming that the District Court had to hold an evidentiary hearing before dismissing the state's case. The Supreme Court affirmed the dismissal because there were no questions of fact regarding the best interests of the children, as the allegations of abuse involved only the mother. The Supreme Court further concluded that the mother could now initiate a parenting plan since the state's case had been dismissed. In re S.S., 2012 MT 78, 364 Mont. 437, 276 P.3d 883.

Dismissal of Parenting Action Following Placement of Children Under Permanency Plan — Appeal Moot: While a parenting action was pending in Flathead County, a District Court in Missoula County approved a permanency plan that placed the children in California with the mother. The father did not appeal the placement order. The Flathead County action was subsequently dismissed, and the father appealed. The Supreme Court held that the Flathead County order was moot because the state no longer possessed authority over the custody and placement of the children, and in the absence of an ongoing, concrete controversy, effective relief could not be granted. The appeal was dismissed. In re J.A.S. & E.R.S., 2008 MT 269, 345 M 189, 190 P3d 299 (2008).

Separate Dispositional Hearing Not Required When Parental Stipulations Made Regarding Adjudication and Placement of Children and Treatment Plans: Under this section, a separate dispositional hearing is not required if parental stipulations are entered pursuant to 41-3-434. In this case, the parents stipulated to their children being youths in need of care, to the children being placed in temporary state custody, and to signing treatment plans. Given the parents' stipulations to the pertinent dispositional issues, a separate dispositional hearing was not required. In re B.B. & J.B., 2006 MT 66, 331 M 407, 133 P3d 215 (2006).

Erroneous Award of Custody at Adjudicatory Hearing Cured by Immediate Scheduling of Dispositional Hearing to Address Dispositional Issue Separately: The District Court failed to structure dispositional issues apart from adjudicatory issues when it granted temporary legal custody of two children to the state during an adjudicatory hearing. However, upon discovering the error, the court immediately scheduled a dispositional hearing to address the dispositional issue separately. Although not excusing the error, the Supreme Court held that holding a second dispositional hearing made the initial order placing the children with the state during the adjudicatory hearing the functional equivalent to an order of placement pending the dispositional hearing because temporary placement outside the home is allowed at every stage of the proceeding pursuant to 41-3-301, 41-3-432, and 41-3-437. The error was harmless and nonprejudicial and did not warrant reversal. In re S.C. & L.Z., 2005 MT 241, 328 M 476, 121 P3d 552 (2005).

No Improper Bifurcation of Adjudicatory and Dispositional Hearings Based on Noticed Testimony From Earlier Show Cause Hearing: A parent argued that adjudicatory and dispositional hearings were improperly bifurcated because the District Court took notice of and improperly relied upon expert testimony offered at an earlier show cause hearing. The state argued that a court may take notice of the records of any court in the state. The Supreme Court noted that the District Court allowed the parent to move for reconsideration at the hearing of its judicial notice of testimony from the previous hearing, but the parent did not move for reconsideration. Because the District Court also determined that there was sufficient evidence at the later hearing, without reliance on the noticed testimony, to sustain a finding of abuse and neglect and because the parent did not establish that use of the noticed testimony was a disadvantage, no error was demonstrated. In re S.C. & L.Z., 2005 MT 241, 328 M 476, 121 P3d 552 (2005).

Placement of Children With Noncustodial Parent Proper — Parental Rights Not Terminated: A mother contended that her due process rights were violated when the children were adjudicated as youths in need of care and the state placed the children with their father. The Supreme Court declined to address the due process claims because they were raised for the first time on appeal, and the court affirmed the placement. The mother's parental rights were not terminated; rather, the District Court followed the statutory procedure in this section after finding that placement with the father was in the children's best interests. The state took the necessary steps to ensure safe placement as required in the Interstate Placement of Children Compact, and the state was properly relieved of any further obligation once the concern for the children being youths in need of care was eliminated by the placement. In re A.C., T.C., & C.W., 2004 MT 320, 324 M 58, 101 P3d 761 (2004). See also In re M.J., 2013 MT 60, 369 Mont. 247, 296 P.3d 1197.

Failure to Adjudicate Youth in Need of Care Precluding Termination of Parental Rights: A parent contended that parental rights were improperly terminated because the child was not properly adjudicated as a youth in need of care. The Supreme Court noted that such adjudication is a threshold requirement before a court may grant temporary legal custody, order a parental treatment plan, or terminate parental rights. The state argued that the child was found to be a youth in need of care during earlier guardianship proceedings in a different District Court. The Supreme Court cited In re F.M., 2002 MT 180, 311 M 35, 53 P3d 368 (2002), for the holding that evidence received at a hearing on a collateral matter, such as a guardianship proceeding, did not satisfy the adjudicatory requirements of 41-3-404 (renumbered 41-3-437). Further, it was improper for the District Court to approve a treatment plan 10 months prior to proper adjudication of the child as a youth in need of care, in violation of 41-3-420 (renumbered 41-3-443) and this section (formerly numbered 41-3-406), which also rendered the requirements of 41-3-609 unsatisfied. Because the child was not properly adjudicated a youth in need of care, court approval of a treatment plan was improper and termination of parental rights was reversed. In re B.N.Y., 2003 MT 241, 317 M 291, 77 P3d 189 (2003).

No Standing by Former Parent to Object to Child's Placement or Assert Child's Rights: Once the parent-child relationship is terminated by the District Court, a former parent has no standing to object to the court's subsequent placement of the child with the Department or by adoption. Similarly, a former parent has no standing to assert a violation of the child's rights as guardian ad litem because the former parent no longer represents the child. In re E.A.T. & T.A.T., 1999 MT 281, 296 M 535, 989 P2d 860, 56 St. Rep. 1133 (1999).

Stipulation That Child Is Youth in Need of Care — Court Discretion to Determine Custody: Under 41-3-404 (renumbered 41-3-437) and 41-3-406 (renumbered 41-3-438), a parent's stipulation that a child is a youth in need of care empowers a District Court, in its discretion, to transfer legal custody of the child from the parent to the Department of Public Health and Human Services pursuant to In re C.M., 281 M 183, 932 P2d 1063 (1997). In re J.H., R.H., D.H., & R.H., 1998 MT 128, 289 M 111, 958 P2d 1191, 55 St. Rep. 504 (1998).

No Indication of Foreseeable Change in Parenting Skill Despite State-Provided Services — Permanent Department Custody of Children Affirmed: Once a youth is determined to be in need of care, the District Court can take appropriate measures to safeguard the welfare of the youth, including transfer of legal custody of the youth to the state. The youth's best interests are paramount and take precedence over parental rights. In the present case, the mother was shown to be unable and unwilling to remedy the circumstances that placed her children at risk and was not motivated to become an adequate parent despite the best efforts of the state to provide her with services and assistance in parenting, which brought no appreciable improvement. The District Court did not err in transferring permanent custody of the children to the Department of Public Health and Human Services. In re C.M., F.M., & S.M., 281 M 183, 932 P2d 1063, 54 St. Rep. 126 (1997), followed in In re J.H., R.H., D.H., & R.H., 1998 MT 128, 289 M 111, 958 P2d 1191, 55 St. Rep. 504 (1998), and In re R.T., 2005 MT 173, 327 M 498, 116 P3d 783 (2005). See also In re Custody & Parental Rights of F.M. & S.M., 2001 MT 93, 305 M 189, 24 P3d 208 (2001), in which the termination of parental rights to two of the children was affirmed absent evidence that the mother had made any significant progress in her ability to parent.

Award of Permanent Legal Custody — Authority of Court to Award Custody — Best Interests of Child Standard: The Department of Family Services (now Department of Public Health and Human Services) filed a petition requesting the court to terminate parental rights of Mary Ann G. and to grant the Department permanent legal custody of J.J.G., with the right to consent to adoption. Former foster parents of J.J.G. filed a petition seeking permanent custody of the child. The court dismissed the foster parents' petition on grounds that the court could only review the placement actions of the Department but could not make the permanent placement itself. On appeal, the Supreme Court held that the lower court erred when it concluded that the foster parents were without legal authority to seek custody of the child and that the lower court had no option other than to grant custody to the Department. The District Court has discretionary authority to transfer legal custody to any qualified individual, including nonrelatives, in order to protect the welfare of the child. In re J.J.G., 266 M 274, 880 P2d 808, 51 St. Rep. 793 (1994), followed in In re E.A.T. & T.A.T., 1999 MT 281, 296 M 535, 989 P2d 860, 56 St. Rep. 1133 (1999).

Dispositional Hearing — Procedures to Be Rigorously Followed — Error for Court to State Its Intentions Before Evidence Presented: In a dispositional hearing on petitions by the Department of Family Services (now Department of Public Health and Human Services) and former foster parents for permanent custody of a child, the District Court stated its intention to transfer custody to DFS several times prior to the time that evidence was considered at the dispositional hearing. On appeal, the Supreme Court held that the evidence received at the hearing was essentially disregarded by the District Court and that the hearing itself was a mere formality. This was error, and the lower court was reversed. In re J.J.G., 266 M 274, 880 P2d 808, 51 St. Rep. 793 (1994).

Proof of Sexual Abuse Not Necessary to Conclusion That Child Is Youth in Need of Care: A finding that a child was sexually abused was not a prerequisite to a conclusion that the child was a youth in need of care warranting placement of the child with the Department of Family Services. The conclusion was proper in light of the combination of the testimony of four expert witnesses, a video deposition of the child, a series of nude photos of the child taken by the parents, evidence of spousal physical abuse in the presence of the child, and the fact that the father did not provide as evidence the results of his court-ordered psychological evaluation. In re H.D., 256 M 70, 844 P2d 114, 49 St. Rep. 1141 (1992).

Marriage and Divorce Law Inapplicable to Nonparent Seeking Child Custody: As part of a change in custody proceeding conducted under the marriage and divorce statutes, the District Court erred in granting to a nonparent the custody of a child who was neither a natural child nor adopted. The proper procedure to be followed is contained in the child abuse, neglect, and dependency statutes. Although the nonparent apparently fit the requirements for custodian under either scenario, the case was remanded for correct procedural consideration under this chapter. In re Marriage of Miller, 251 M 300, 825 P2d 189, 49 St. Rep. 36 (1992), following In re Doney, 174 M 282, 570 P2d 575 (1977), and overruling a contrary prior holding in In re Custody of C.C., K.C., & B.C., 215 M 72, 695 P2d 816 (1985).

Grant of Long-Term Custody Proper — Finding of Abuse and Neglect: Upon motion by the state to terminate parental rights, the District Court ordered that the "parental custodial rights of [mother, father, and stepfather] in and to the youths [B.N. and T.N.], and to their property, are hereby terminated". Under the authority of 41-3-406 (renumbered 41-3-438), the court then awarded permanent legal custody to the Department of Family Services (now Department of Public Health and Human Services) and gave the Department the right to place the children in foster care. The court also awarded supervised visitation rights to the parents and grandparents—an award inconsistent with termination of parental rights. The record clearly showed that neither the state nor the court intended to fully sever parental rights, even though the order used the words "terminated" and "permanent custody". On appeal, the Supreme Court found that the District Court intended to grant the state long-term custody, substantiated by a 10-year history of family turmoil resulting in abuse and neglect of the children, and that placement of the children in foster care was appropriate. In re B.N. & T.N., 245 M 511, 802 P2d 1244, 47 St. Rep. 2225 (1990).

Standard of Review — Custody Determinations and Termination of Parental Rights: The same standard of review applies to both termination of parental rights and custody determinations. As set out in In re R.A.D., 231 M 143, 753 P2d 862, 45 St. Rep. 496 (1988), in both instances the District Court's decision is afforded all reasonable presumptions as to the correctness of the determination, and therefore the decision will not be disturbed on appeal unless there is a mistake of law or a finding of fact not supported by substantial evidence that would amount to a clear abuse of discretion. In re S.P., 241 M 190, 786 P2d 642, 47 St. Rep. 190 (1990). See also In re K.H. and K.M., 2012 MT 175, 366 Mont. 18, 285 P.3d 474.

Award of Long-Term Custody Not Considered Termination of Parental Rights: An award of long-term custody under 41-3-406 (renumbered 41-3-438) is not equivalent to a termination of parental rights requiring that the statutory factors of 41-3-609 be met. In re R.T.L.P., 238 M 384, 777 P2d 892, 46 St. Rep. 1354 (1989), followed in In re T.A., 249 M 186, 814 P2d 994, 48 St. Rep. 634 (1991).

Insufficient Evidence to Award Child Support: In a dispositional hearing held by the Youth Court under 41-3-406 (renumbered 41-3-438) in which the court removed the child from her abusive mother's care and placed her in the care of her natural father, the court erroneously ordered the mother to pay child support to the father because there was insufficient evidence to support a finding of child support. The court failed to consider the factors in 40-4-204 and the Carlson formula, except to note that the father had just started a new business and the mother was employed as a receptionist. In re C.C., 237 M 246, 772 P2d 857, 46 St. Rep. 773 (1989).

Youth Court Jurisdiction Concurrent With District Court: The Youth Court has concurrent jurisdiction with the District Court over all youths who are within the state for any purpose. Upon the petition for temporary custody filed by the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services), the Youth Court had the authority to determine that the child in question was a youth in need of care, to remove her from her mother's abusive home, and, following a dispositional hearing, to place her in the custody of her natural father. In re C.C., 237 M 246, 772 P2d 857, 46 St. Rep. 773 (1989).

Grant of Long-Term Departmental Custody: Under 41-3-406 (renumbered 41-3-438), once a youth is found to be abused, neglected, or dependent, custody of the youth can be transferred to the state. Upon such finding, the District Court properly granted custody to the state until the children reach 18 years of age or until further notice of the court. In re A.H., T.H., & J.A.H., 236 M 323, 769 P2d 1245, 46 St. Rep. 395 (1989), followed in In re F.H., J.K., & B.K., 266 M 36, 878 P2d 890, 51 St. Rep. 649 (1994).

Adjudicatory and Dispositional Hearing Combined — Notice Not Required: Parental rights may be terminated at a dispositional hearing under 41-3-406 (renumbered 41-3-438) and 41-3-607. The dispositional hearing was combined with an adjudicatory hearing under 41-3-404 (renumbered 41-3-437), and no specific notice of the combination was required. Custody of R.A.D., 44 St. Rep. 2018 (1987). Opinion withdrawn but issue affirmed in Custody of R.A.D. & J.D., 231 M 143, 753 P2d 862, 45 St. Rep. 496 (1988).

Only Show Cause Hearing Required Upon Filing Petition for Temporary Investigative Authority (See 2001 Amendment to 41-3-427): A mother contended that an order granting temporary custody to the state and allowing temporary investigative authority (see 2001 amendment to 41-3-427) under 41-3-406 (renumbered 41-3-438) should be vacated for lack of an adjudicatory hearing pursuant to 41-3-404 (renumbered 41-3-437) and a dispositional hearing pursuant to 41-3-406 (renumbered 41-3-438). In denying the motion to vacate, the District Court properly held that a show cause hearing is the only hearing required when a petition for temporary investigative authority (see 2001 amendment to 41-3-427) is filed. In re J.W. & J.C., 226 M 491, 736 P2d 960, 44 St. Rep. 843 (1987).

Refusal to Relinquish Custody of Indian Children to Tribe — No Abuse of Discretion: Although a tribe participated in the dispositional hearing and presented a formal resolution asking for custody of the children, who were tribal members, the District Court did not abuse its discretion in refusing to relinquish custody to the tribe when it was determined that the children's best interests would be better served by leaving them in their foster home placement, with the ultimate goal of placing them in a Native American home. In re M.J.D., C.K.D., & A.R.D., 225 M 200, 731 P2d 937, 44 St. Rep. 167 (1987).

Parent Not to Unilaterally Declare Emancipation of Child — Terminate Support: Husband petitioned District Court to excuse support arrearages on grounds minor child was emancipated. The Supreme Court reversed the lower court's finding that petitioner's child support obligation was terminated. The court noted that the obligated parent may not unilaterally declare the child emancipated and terminate support. The question of whether a child is emancipated is a question of fact to be determined by the court. If emancipation can be established, a parent generally has no further duty to support the child. Prior to the age of 18, however, there is a presumption against the emancipation of a child, and the burden of establishing emancipation is on the party asserting it. The child in this case was adjudicated a youth in need of care. Parents have a continuing duty of support for a youth in need of care which runs contrary to the concept of emancipation. A decree may be modified to terminate support because of the emancipation of a child only as to installments accruing after the motion. In re Marriage of Bordner, 220 M 339, 715 P2d 436, 43 St. Rep. 417 (1986).

Dispositional Order to Follow Hearing: It was reversible error for the District Court to indicate its intention to transfer custody from the parents to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) before the dispositional hearing was completed. In re M.L.H., H.M.H., & R.H., 220 M 288, 715 P2d 32, 43 St. Rep. 375 (1986).

"Ability to Work" — Support Order for Foster Care Reversed: In determining the parents' obligation for support, District Court erred by including, as income, the wife's "ability to work" as this is a speculative condition. The amount of support should not be based on speculative conditions. When the only relevant evidence was a statement on the parents' financial statement that "[A.R.'s] income is our only income since [W.R.] is not working", the record did not contain sufficient evidence to support the District Court's conclusion. In re L.R., 218 M 266, 707 P2d 24, 42 St. Rep. 1570 (1985).

Findings Required to Terminate Parental Rights: A court must make findings in accordance with 41-3-406 (renumbered 41-3-438), 41-3-607, and 41-3-609 before it can terminate parental rights and award permanent custody of any child to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services). In re C.A.R. & P.J.R., 214 M 174, 693 P2d 1214, 41 St. Rep. 2395 (1984).

Failure to Object to Lack of Report at Trial Court — Effect of Report: Because, at the trial court level, the mother failed to object to the failure to prepare and submit a financial report, she was precluded from raising the issue on appeal. Even if an objection had been made in a timely fashion, failure to make the report does not affect the underlying proceeding; its only purpose is to determine the parent's financial ability to contribute to costs. In this instance, because the parent has not been asked to so contribute, the failure to prepare a report would have no effect. In re B.L.O., 213 M 164, 689 P2d 1246, 41 St. Rep. 2024 (1984).

Cross-Examination on "Best Interests" Proper: The state began termination of parental rights proceedings in the District Court. The court consolidated the adjudicatory and dispositional hearings, found the youths to be "in need of care", found that the parents had not complied with the approved treatment plan, found them to be beyond rehabilitation, and terminated their parental rights. On appeal, the parents contended the trial court committed reversible error by not allowing the parents to cross-examine the testifying physician regarding the "best interests" of the children. The Supreme Court held that a trial court must hear evidence regarding the "best interest" of the children during the dispositional hearing. Because the trial court consolidated that hearing with the adjudicatory hearing, there was only one hearing, and it was error to exclude the evidence. The court held that it was not prejudicial error, however, in light of the substantial evidence presented that the youths were in need of care and the parents were beyond rehabilitation. In re C.L.A. & J.A., 211 M 393, 685 P2d 931, 41 St. Rep. 1444 (1984).

Voluntary Relinquishment of Custody — Intervening Divorce — Custody to Father: The District Court did not abuse its discretion in awarding custody of a child to his father after the parents, while still married, surrendered temporary custody to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) because of the actions of the mother. Subsequent to the surrender of the child but prior to the award of custody, the couple were divorced. The District Court was correct in continuing with the abuse and neglect custody proceeding rather than dismissing it and allowing custody to be determined in the couple's divorce action. Once a determination of abuse and neglect has been made, the court proceeds to a dispositional hearing to determine the custody of the child. There was substantial evidence that the father was stable and nonabusive and the mother had potential for further abuse. In re M.M., 200 M 244, 650 P2d 784, 39 St. Rep. 1716 (1982).

Family Unity Not to Be Preserved at Expense of Children's Best Interests: After an adjudicatory hearing, the District Court terminated the parental rights of the parents of five children and granted custody with authority to consent to adoption to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services). Under Department placement, the children would be separated from each other. The paternal grandmother appealed to the Supreme Court, claiming that the state policy of preserving the unity and welfare of the family as set forth in 41-3-101 was violated by the separation of the children and by the District Court's refusal to award the children to her. The Supreme Court affirmed because the District Court's findings indicated that it had considered the grandmother's request but that the overriding concern was and ought to have been the best interests of the children. In re M.N., 199 M 407, 649 P2d 749, 39 St. Rep. 1487 (1982), followed in In re S.P., 241 M 190, 786 P2d 642, 47 St. Rep. 190 (1990). See also In re E.A.T. & T.A.T., 1999 MT 281, 296 M 535, 989 P2d 860, 56 St. Rep. 1133 (1999).

Severance of Parental Rights — Counsel Not Absolutely Required at In-Chambers Interview of Children: In the trial court, a mother's parental rights to her two children were terminated and custody granted to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services). On appeal, the issue was whether the court had erred by interviewing the children in chambers without the presence of the mother and counsel. When the trial court announced to counsel and the mother that it wished to interview both children in chambers, neither counsel nor the mother objected. The mother claimed that the interview of the children without the presence of her counsel violated her rights to due process. She relied on a case in which it was stated that a child may testify out of the parents' presence in abuse and neglect cases subject to the cross-examination by the parents' attorney. The reviewing court noted that nothing in that opinion suggested that it was the duty of the trial judge to assert a parent's right to cross-examination if counsel for the parent does not. Here, in any event, there was no testimony in chambers, just an inquiry into the children's desires regarding custody. A record of the interviews was made and any claimed right of cross-examination was waived by failing to assert that right at the trial level. In re A.C.S. & E.S.S., 190 M 180, 619 P2d 1199, 37 St. Rep. 1868 (1980).

Home Study of Father's Parents — Discretion of Court: In a proceeding involving the termination of a father's parental rights, in which it was conceded that he could not parent the infant, the trial court did not abuse its discretion in refusing to order a home study of the father's parents when the facts indicated that the best interests of the child would not be served by granting custody to the grandparents. In re T.J.D., J.L.D. & R.J.W., 189 M 147, 615 P2d 212 (1980).

Declaration of Child as Youth in Need of Care — Custody Awarded to Agency — Evidence of Abuse or Neglect: A child diagnosed as failing to thrive was given to foster parents. Professional personnel all agreed that the child in question was failing to thrive and that the child's condition deteriorated while in the care of the natural mother. The child's condition improved dramatically while in foster care. The District Court's finding and conclusion that the child was a neglected child was supported by "clear and convincing" evidence, and the court was justified in permanently depriving the natural mother of the child and transferring legal custody to SRS (now Department of Public Health and Human Services). In re M.R.L., 186 M 468, 608 P2d 134 (1980).

Order Based on Potential of Future Abuse: Because there was evidence showing a high potential for future physical abuse by appellant of her own child, the court did not abuse its discretion in ordering that the child be taken from its mother and the mother's parental rights terminated. In re M.A.M., 183 M 434, 600 P2d 203 (1979).

Evidence Supporting Finding of Neglect: In a child custody case, two circumstances were found by the Supreme Court to be particularly supportive of the District Court finding that the father had neglected his minor child: (1) the father failed to notify the juvenile authorities, despite information about abuse of the child while in her mother's custody and despite the urging by an attorney he had consulted; and (2) the maternal grandmother, not the father, had taken care of the child when the mother forced the child out of the apartment. Additionally, no "viable parent-child relationship" was found to have existed between father and child. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Failure to Make Required Findings: The District Court abused its discretion in awarding permanent custody to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) because it patently failed to make the required findings that the child was "abused, dependent, or neglected" and therefore was without power to effect a permanent transfer of custody to a nonparent. In re Fish, 174 M 201, 569 P2d 924 (1977).

Youth in Need of Care — Transfer of Custody: It was clear from the record that appellant was unwilling or unable to provide care necessary for the physical and emotional well-being of her children, and testimony supported the court's finding that the children were abused and neglected youths in need of care within the meaning of 41-3-102 and its judgment transferring permanent legal custody of the children to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) pursuant to 41-3-406 (renumbered 41-3-438). In re Moyer, 173 M 208, 567 P2d 47 (1977).

Abandonment: Mother leaving infant with babysitter for 1 night and not returning for approximately 1 month supports a finding of abandonment and a dependency upon the public for support where 2 days after mother's departure welfare department was awarded temporary custody. In re Henderson, 168 M 329, 542 P2d 1204 (1975).

Child's Best Interest: Substantial credible evidence that father maltreated children and was incompetent coupled with evidence mother did not provide proper or sufficient food, clothing, or sanitary or medical care was sufficient to support finding and judgment that children were dependent and neglected, awarding permanent care, custody, and control to proper state agency, with right to consent to children's adoption. In re Jones & Peterson Children, 168 M 1, 539 P2d 1193 (1975).

Child's Interests Outweigh Parent's: Once a child has been found dependent and neglected, the primary concern is for the child's best interests and welfare, not that of the mother, and the fact that the mother's consent may have been obtained by undue influence does not necessarily invalidate a judgment awarding permanent custody to the welfare department with the power to consent to adoption. In re Bad Yellow Hair, 162 M 107, 509 P2d 9 (1973).

Custody to State Not Abuse of Discretion: Four children, the two oldest of which were of early school age, were insecure, troubled, frightened, and suffered from lack of medical care. Their mother had been abandoned by her husband, had an alcoholic problem, misused welfare funds, and failed to properly provide within the funds allocated. The decision of the District Court to declare the children dependent and neglected within section 10-501, R.C.M. 1947 (now repealed), and to award custody to the State Welfare Department (now Department of Public Health and Human Services) with right of adoption was not an abuse of discretion. In re Corneliusen, 159 M 6, 494 P2d 908 (1972).

Impoverishment Not a Shield for Neglect: The fact that a family is impoverished does not mean that the mother can use such impoverishment as a shield to hide behind in the neglect of her children when her very acts deprived the children of attention and care. Misuse of welfare funds, lack of medical care, and failure to properly provide within the funds allocated clearly reveal neglect of her children. In re Corneliusen, 159 M 6, 494 P2d 908 (1972).

Sufficiency of Evidence: Evidence in an action by the Director of the Division of Child Welfare (now Department of Public Health and Human Services) to obtain permanent custody of four minor children as dependent and neglected under section 10-501, R.C.M. 1947 (now repealed), was sufficient to support the trial court's finding that two minor daughters were dependent and neglected. The evidence showed that the multitude of the father's problems was such as to make his temper erratic and to cause profanity not conducive to correctly guiding young, impressionable girls toward an adult life. The trial court properly awarded custody of the two minor daughters to the Division of Child Welfare (now Department of Public Health and Human Services). In re Sheriff, 147 M 259, 410 P2d 940 (1966).

Ability to Support Child: Since ability of parents to support children was not determined in compliance with sections 10-506 and 10-507, R.C.M. 1947 (since repealed), but was left to testimony to be elicited at a later hearing, order compelling parents to pay support costs in action depriving them of the children was set aside. In re Phelps, 145 M 557, 402 P2d 593 (1965).

Effect of Awarding Custody to State: Where a child is found by a court decree to be dependent and neglected and its care and custody are awarded to a state agency, the child is as free from parental supervision as when placed in the custody of adoptive parents. State ex rel. Frederick v. District Court, 119 M 143, 173 P2d 626 (1946).

41-3-440. Limitation on placement.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 6, Ch. 674, L. 2023. Amendment effective October 1, 2023.

Preamble: The preamble attached to Ch. 674, L. 2023, provided: "WHEREAS, the federal Indian Child Welfare Act requires active efforts that are affirmative, active, and thorough and timely efforts that are tailored, in a manner consistent with prevailing social and cultural conditions, to each case to maintain or reunite an Indian child with the child's family; and

WHEREAS, the federal Indian Child Welfare Act outlines placement preferences for foster care, preadoptive, or adoptive placements of Indian children, prioritizing placement with members of a child's extended family; and

WHEREAS, the Legislature desires to incorporate the federal Indian Child Welfare Act's requirements regarding active efforts and placement preferences into Montana's existing child abuse and neglect laws."

Effective Date: This section is effective October 1, 2001.

Case Notes

Ineffective Assistance of Counsel — Termination of Parental Rights Improper — Remand for Consideration of Placement with Father: Although the out-of-state father had been the primary parent of the children, they were removed from the mother's care after she refused to return them to the father. The father's court-appointed attorney advised him to stipulate to the state's petitions, failed to object to the children being placed with their maternal grandparents, and never requested a placement hearing. Ultimately, the father's parental rights were terminated and the father appealed. The Supreme Court reversed, holding that the father's attorney had provided ineffective counsel, and remanded the matter to the District Court to consider the father as the first placement option for the children. In re B.H., 2020 MT 4, 398 Mont. 275, 456 P.3d 233.

Placement With Current Foster Family Affirmed Over Placement With Parents of Biological Half-Siblings: The District Court did not err in determining that it was in a minor child's best interest to remain in her placement with her current foster family. The appellants argued that because they had custody of the minor child's biological half-siblings, placement of the child with them was appropriate. In addition, they challenged the propriety of the placement with a foster family. When delivering its decision at the placement hearing, the District Court engaged in a detailed review of the evidence presented, continually noting that the primary consideration was the best interests of the minor child at the present time. As such, the District Court did not act arbitrarily or exceed the bounds of reason in reaching its final determination that placement with the current foster family was in the present best interests of the minor child. In re B.W.S., 2016 MT 340, 386 Mont. 33, 386 P.3d 595.

Mother's Objection to Termination of Parental Rights Not "Dispute Among the Parties" if Not Timely: At the start of the permanent custody hearing, the mother moved to continue the hearing so that a home study could be conducted on the woman whom the mother was recommending take care of her child until she was released from prison. The District Court proceeded with the hearing and ultimately terminated the parental rights of both parents. The mother argued that the District Court should have continued the hearing because the statute authorized the

Department of Public Health and Human Services to place the child only "in the absence of a dispute between the parties". The Supreme Court held that at the time that the hearing for temporary custody was held, the mother had not come forward and that therefore the District Court at the permanent custody and termination hearing could proceed to make a determination regarding permanent custody of the child as though there was no dispute between the parties. In re H.E., 2002 MT 257, 312 M 182, 59 P3d 29 (2002).

41-3-441. Review of necessity of nonyouth foster home placement.

Compiler's Comments

Effective Date: Section 4, Ch. 202, L. 2021, provided: "[This act] is effective July 1, 2021."

41-3-442. Temporary legal custody.

Compiler's Comments

2007 Amendment: Chapter 73 inserted (4)(b) regarding a petition for continued temporary placement with the noncustodial parent; inserted (4)(c)(ii) regarding a petition for termination of the parent-child relationship and permanent placement of the child with the noncustodial parent; and made minor changes in style. Amendment effective October 1, 2007.

2003 Amendment: Chapter 504 inserted (3) concerning temporary legal custody to department; inserted (4)(a)(ii) concerning continuation of temporary legal custody; substituted (4)(c) concerning long-term custody for "planned alternative permanent placement pursuant to 41-3-445"; and made minor changes in style. Amendment effective October 1, 2003.

Saving Clause: Section 19, Ch. 281, L. 2001, was a saving clause.

Effective Date: This section is effective October 1, 2001.

Case Notes

Questioning by Guardian Ad Litem at Hearing Allowed — Partial Compliance — Extension of Temporary Legal Custody Proper: The Department of Public Health and Human Services petitioned for emergency protective services following reports of inappropriate behavior by the minors' parents. Eventually, at a hearing to terminate the father's parental rights, the District Court allowed the minors' guardian ad litem to question a child protection specialist and therapist over the objections of the father. The District Court subsequently terminated the father's parental rights. On appeal, the Supreme Court found that the District Court did not err in allowing the children's guardian ad litem to cross-examine witnesses, although some lines of questioning lacked foundation and should have not been permitted. The Supreme Court also found that the Department provided reasonable efforts to reunify the father with the children, that the father's partial compliance with the treatment plan was not sufficient for compliance, that while the Department did not file for a formal motion to extend an order for temporary legal custody the Department nevertheless requested it, and that the father failed to identify which of his three attorneys he believed were ineffective over the course of his 4-year case. In re B.F., 2020 MT 223, 401 Mont. 185, 472 P.3d 142.

Agreement to Extension of Temporary Legal Custody — No Violation of Due Process: Although temporary legal custody of a youth in need of care expired 4 months before the Department of Health and Human Services filed a request to extend it, the mother's due process rights were not violated because she agreed to the Department's extension request and represented to the court that it was not necessary for the Department to file a new petition to adjudicate her child a youth in need of care. In re M.C., 2017 MT 252, 389 Mont. 78, 403 P.3d 1266.

Placement with Family Considered Foster Care — Statutory Presumption Applicable: The Department of Public Health and Human Services removed the mother's two children from her care. The mother stipulated to a treatment plan and to having the District Court adjudicate her children as youths in need of care. The children were placed with family members. The District Court eventually terminated the mother's parental rights by applying the statutory presumption in 41-3-604. On appeal, the mother argued that the District Court erred in considering time the children spent with family as foster care. The Supreme Court affirmed, holding that the statutory presumption applied to care provided by family members. In re C.W.E., 2016 MT 2, 382 Mont. 65, 364 P.3d 1238.

Extension of Temporary Legal Custody Proper: Although the father claimed to have done "an outstanding job" on some aspects of his treatment plan, the District Court properly granted an extension of temporary legal custody because the father needed to continue working on the remaining conditions and goals of his treatment plan. In re K.L., 2014 MT 28, 373 Mont. 421, 318 P.3d 691.

Sufficient Findings to Warrant Grant of Temporary Legal Custody: A mother appealed an order granting temporary legal custody of her child to the state. The Supreme Court held that an order of temporary legal custody is normally an interlocutory order subject to review pursuant to a writ of supervisory control, rather than by direct appeal. Nevertheless, in this case, the court decided to address the appeal as if it were a direct appeal because the state's motion to dismiss had been denied earlier. The court found sufficient evidence to support the order of temporary custody. Even though the mother did nothing wrong personally, she made mistakes concerning other people in her life that endangered her child's welfare. A finding that a parent personally caused a child's injuries is not necessary for a grant of temporary legal custody. A District Court may consider a child to be a youth in need of care regardless of the parent's care for the child or even whether actual abuse or neglect occurred. The temporary custody order was affirmed. In re D.A., 2003 MT 109, 315 M 340, 68 P3d 735 (2003).

Temporary Custody Order Not Considered Final for Purposes of Appeal — Writ of Supervisory Control Appropriate Mechanism to Challenge Temporary Custody: The District Court ordered temporary legal custody for a child, and the child's mother appealed. The Supreme Court held that orders of temporary legal custody do not embrace a final determination of the rights of the parties contemplated in former Rule 1, M.R.App.P. (now superseded), that would subject the temporary order to direct appeal. Rather, temporary custody orders are considered interlocutory orders from which the Supreme Court will grant relief in extraordinary circumstances. This ensures the expeditious review of legal errors while still protecting children from the instability of protracted, piecemeal litigation. However, qualifying temporary custody orders as interlocutory does not leave a parent who is aggrieved by an erroneous order without a remedy. The parent may invoke the extraordinary remedy of a writ of supervisory control, which is the appropriate mechanism to challenge an order of temporary custody. In re D.A., 2003 MT 109, 315 M 340, 68 P3d 735 (2003). See also G.B. v. M.M.B., 670 A2d 714 (Pa. Sup. Ct. 1996).

41-3-443. Treatment plan — contents — changes.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 429, L. 2023. Amendment effective October 1, 2023.

2017 Amendment: Chapter 131 inserted (6) providing a 30-day timeline for ordering a treatment plan. Amendment effective October 1, 2017.

2005 Amendment: Chapter 382 in (5)(b) near beginning after "permanency" deleted "plan". Amendment effective April 25, 2005.

2001 Amendments — Composite Section: Chapter 281 in (1) at beginning deleted "Upon the stipulation of the parties or upon a judicial finding that a child is a youth in need of care"; inserted (1)(a) through (1)(c) allowing the court to order a treatment plan under certain conditions; in (3)(f) at end substituted "or out-of-home care" for "facility or a facility for protection of the youth"; inserted (5) setting out required notice provisions in the treatment plan; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 311 in (1) substituted "The court may order a treatment plan if:

(a) the parents admit the allegations of an abuse and neglect petition or make stipulations pursuant to 41-3-434; or

(b) the court has made an adjudication under 41-3-437 that the child is a youth in need of care" for "Upon the stipulation of the parties or upon a judicial finding that a child is a youth in need of care, the court may order a treatment plan." Amendment effective October 1, 2001.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

Effective Date: This section is effective October 1, 1999.

Case Notes

Termination of Parental Rights Affirmed — Mother Unlikely to Change in Reasonable Time. In re C.K., 2022 MT 27, 407 Mont. 329, 503 P.3d 1104.

Admission of Psychological Evaluation — Hearsay Exception Not Required — Unique Statutory Scheme of Youth in Need of Care Proceedings: The District Court ordered a mother's treatment plan, which required her to undergo a psychological evaluation, and she signed the treatment plan, agreeing to follow the evaluation's recommendations. The psychological evaluation became part of the court proceedings, allowing the court to consider any part of the evaluation through the abuse and neglect proceeding. After the District Court terminated the mother's parental rights, she appealed. The Supreme Court affirmed, finding that the District Court properly admitted the mother's psychological evaluation at the hearing to determine whether to terminate the mother's parental rights and that it did not need to be admitted as a hearsay exception. In re M.C., 2017 MT 252, 389 Mont. 78, 403 P.3d 1266, distinguished in In re R.J.F., 2019 MT 113, 395 Mont. 454, 443 P.3d 387, relating to valid hearsay or foundational objections.

Termination of Mother's Rights Appropriate Despite Treatment Plan's Failure to Include Chemical Dependency Evaluation — Ineffective Counsel: In a termination of parental rights proceeding, the District Court found that the mother did not complete the approved treatment plan and that she was unlikely to change within a reasonable time because of her drug problem. On appeal, the mother argued that while she and her attorney agreed to the treatment plan, it was deficient because it failed to include a chemical dependency evaluation. The mother also argued that her counsel was ineffective for failing to advocate for the inclusion of an evaluation in the plan. The Supreme Court affirmed the District Court, holding that while the failure of the treatment plan to include substance abuse evaluation and treatment was notable, the best interests of the children supported termination of her rights, the difference was being offered help with the drug problem and being required to get help, and the failure to advocate for a treatment plan did not prejudice the mother. In re T.N.-S., 2015 MT 117, 379 Mont. 60, 347 P.3d 1263, followed in In re J.E.L., III, 2018 MT 50, 390 Mont. 379, 414 P.3d 279.

Determination That Amending Treatment Plan Not In Children's Best Interest — No Error: When the District Court considered the best interests of the children and concluded that the chances of reunification were unknown and that there was a "quantum of proof' that reunification would harm the children, not amending the treatment plan and proceeding with termination proceedings was appropriate. In re B.J.T.H., 2013 MT 366, 373 Mont. 85, 314 P.3d 911.

Failure to Comply With Treatment Plan Sufficient to Justify Termination of Parental Rights: The birth mother alleged on appeal that the state failed to prove at the termination hearing that her treatment plan was appropriate or, in the alternative, that the state failed to prove that she did not comply with her treatment plan. The Supreme Court held that a parent who does not object to a treatment plan waives the right to argue on appeal that the plan was not appropriate and that complete compliance with a treatment plan is required. In re H.R. and D.R., 2012 MT 290, 367 Mont. 338, 291 P.3d 583, following In re L.H., 2007 MT 70, 336 Mont. 405, 154 P.3d 622, and followed in In re D.S.B., 2013 MT 112, 370 Mont. 37, 300 P.3d 702.

District Court Not Limited to Consideration of Only Physical Neglect in Termination of Parental Rights: The final petition for termination of a mother's parental rights specifically cited physical neglect as its basis, and the mother contended that the District Court was thus barred from considering any evidence beyond physical neglect, such as psychological abuse, as demonstrated by the living conditions in her home. The District Court did not rule on the issue, but simply made the underlying findings necessary to terminate the mother's parental rights. On appeal, the Supreme Court affirmed. Although it may have been better if the final petition had listed other grounds, it is proper for the state to consider other causes of abuse and neglect during proceedings because the purpose of the proceedings is to protect the child. The final petition also cited failure to comply with the treatment plan as another basis for termination. The treatment plan addressed the mother's psychological issues related to her parenting skills, so the mother was clearly on notice that psychological issues could be considered. Based on the record, parental rights were properly terminated because the mother failed to comply with the treatment plan, she was unable to properly and consistently parent her children by understanding and meeting each of their needs, her conduct was unlikely to change within a reasonable time relevant to the developmental needs of the children, and termination was in the best interests of the children. In re J.G., C.G., & M.G.-E., 2004 MT 104, 321 M 54, 89 P3d 11 (2004). See also In re T.D.H., 2015 MT 244, 380 Mont. 401, 356 P.3d 457.

Failure to Adjudicate Youth in Need of Care Precluding Termination of Parental Rights: A parent contended that parental rights were improperly terminated because the child was not properly adjudicated as a youth in need of care. The Supreme Court noted that such adjudication is a threshold requirement before a court may grant temporary legal custody, order a parental treatment plan, or terminate parental rights. The state argued that the child was found to be a youth in need of care during earlier guardianship proceedings in a different District Court. The Supreme Court cited In re F.M., 2002 MT 180, 311 M 35, 53 P3d 368 (2002), for the holding that evidence received at a hearing on a collateral matter, such as a guardianship proceeding, did not satisfy the adjudicatory requirements of 41-3-404 (renumbered 41-3-437). Further, it was improper for the District Court to approve a treatment plan 10 months prior to proper adjudication of the child as a youth in need of care, in violation of 41-3-406 (renumbered 41-3-438) and this section (formerly numbered 41-3-420), which also rendered the requirements of 41-3-609 unsatisfied. Because the child was not properly adjudicated a youth in need of care, court approval of a treatment plan was improper and termination of parental rights was reversed. In re B.N.Y., 2003 MT 241, 317 M 291, 77 P3d 189 (2003).

Failure to Comply With Treatment Plan Requirement for Provision of Stable Home With Adequate Housing and Income — Parental Rights Properly Terminated: A mother relinquished custody of her three children after the District Court determined that the children were in need of care. When she became pregnant again, the state moved for emergency protective services for the fourth child upon the child's birth. When the state moved to terminate the father's parental rights based on failure to comply with two treatment plans, the father contended that because the child was removed from the parents at birth, the child was never abused or neglected and thus could not properly have been adjudicated as a youth in need of care. Because this section requires that an adequate treatment plan must identify the problems or conditions that resulted in abuse or neglect, the father asserted that the treatment plans were not adequate because the child was not abused or neglected. The Supreme Court disagreed. Because the mother as primary caregiver could not provide for the children, the onus was on the father to provide a safe environment for the new child. Both treatment plans required that the father provide a stable home for the child with adequate housing and income, but the father could provide no evidence of substantial compliance with either plan, being unable to secure either a residence or a job. Thus, the District Court did not err in determining that both elements of 41-3-609 were present and in terminating the father's parental rights. In re K.C.H., 2003 MT 125, 316 M 13, 68 P3d 788 (2003).

No Requirement That Parent's Counsel Receive and Approve Treatment Plan Prior to Submission to Court: Under 41-3-609, a District Court may approve a treatment plan without a parent's signature, and under former 41-3-420 (now 41-3-443), a treatment plan must include the parent's signature, unless the plan is ordered by the District Court. Thus, there is no requirement for parental approval prior to submitting a treatment plan to the District Court, and by implication, there is no requirement that a parent's counsel receive and approve a proposed treatment plan prior to submission to the court. In re R.F., 2001 MT 199, 306 M 270, 32 P3d 1257 (2001). See also In re D.A. and M.A., 2013 MT 191, 371 Mont. 46, 305 P.3d 824.

41-3-444. Abuse and neglect proceedings — appointment of guardian — financial subsidies.

Compiler's Comments

2023 Amendments — Composite Section: Section 7, Ch. 674, L. 2023, deleted former (3) that read: "(3) In the case of an abandoned child, the court may give priority to a member of the abandoned child's extended family, including adult siblings, grandparents, great-grandparents, aunts, and uncles, if placement with the extended family member is in the best interests of the child. If more than one extended family member has requested to be appointed as guardian, the court may determine which extended family member to appoint in the same manner provided for in 41-3-438(4)"; and made minor changes in style. Amendment effective October 1, 2023.

Section 39, Ch. 716, L. 2023, in (2)(h) inserted reference to 41-3-1303; and made minor changes in style. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 674, L. 2023, provided: "WHEREAS, the federal Indian Child Welfare Act requires active efforts that are affirmative, active, and thorough and timely efforts that are tailored, in a manner consistent with prevailing social and cultural conditions, to each case to maintain or reunite an Indian child with the child's family; and

WHEREAS, the federal Indian Child Welfare Act outlines placement preferences for foster care, preadoptive, or adoptive placements of Indian children, prioritizing placement with members of a child's extended family; and

WHEREAS, the Legislature desires to incorporate the federal Indian Child Welfare Act's requirements regarding active efforts and placement preferences into Montana's existing child abuse and neglect laws."

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

2001 Amendment — Composite Section: Chapter 194 inserted (3) authorizing court to give priority in appointment of guardian to certain individuals in abandonment cases; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 281 deleted former (2)(e) that read: "(e) the child is at least 12 years old or the child is in a group of siblings, at least one of whom is at least 12 years old, and the guardianship is in the best interests of the siblings"; and made minor changes in style. Amendment effective October 1, 2001.

Applicability: Section 8, Ch. 194, L. 2001, provided: "[This act] applies to proceedings on petitions filed pursuant to 41-3-401 [now 41-3-422] after October 1, 2001."

Saving Clause: Section 19, Ch. 281, L. 2001, was a saving clause.

Effective Date: This section is effective October 1, 1999.

Administrative Rules

Title 37, chapter 50, subchapter 11, ARM Guardianship services.

Case Notes

Statutory Criteria for Guardianship Met — Further Efforts to Reunify Mother and Child Likely Unproductive. In re S.S., 2022 MT 75, 408 Mont. 238, 507 P.3d 1161.

Guardianship of Indian Child With Foster Family Appropriate: The state's failure to provide notice at the outset did not provide a basis to overturn the guardianship order when initial shortcomings were subsequently cured. When the father did not have a relationship with or custody of the son, section 1912 of the Indian Child Welfare Act (25 U.S.C. 1912) does not provide a basis for overturning the District Court's award of guardianship to the foster family. In Re J.S., 2014 MT 79, 374 Mont. 329, 321 P.3d 103.

Law Review Articles

Money, Caregiving, and Kinship: Should Paid Caregivers Be Allowed to Obtain De Facto Parental Status?, Laufer-Ukeles, 74 Mo. L. Rev. 25 (2009).

41-3-445. Permanency hearing.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 8, Ch. 674, L. 2023. Amendment effective October 1, 2023.

Preamble: The preamble attached to Ch. 674, L. 2023, provided: "WHEREAS, the federal Indian Child Welfare Act requires active efforts that are affirmative, active, and thorough and timely efforts that are tailored, in a manner consistent with prevailing social and cultural conditions, to each case to maintain or reunite an Indian child with the child's family; and

WHEREAS, the federal Indian Child Welfare Act outlines placement preferences for foster care, preadoptive, or adoptive placements of Indian children, prioritizing placement with members of a child's extended family; and

WHEREAS, the Legislature desires to incorporate the federal Indian Child Welfare Act's requirements regarding active efforts and placement preferences into Montana's existing child abuse and neglect laws."

2021 Amendment: Chapter 520 in (9)(a) near end substituted "child protection specialist" for "social worker". Amendment effective October 1, 2021.

2017 Amendment: Chapter 182 inserted (6)(a) regarding child's opinion on permanency outcome; inserted (6)(c) regarding reasonable efforts to effectuate permanency plan; inserted (6)(e) regarding compelling reasons why it is not in the best interest of child to return to child's home or be placed for adoption; inserted (9) and (10) regarding permanency plan development, case management team selection, and transition services for child age 14 or older and documentation of permanency hearing; and made minor changes in style. Amendment effective October 1, 2017.

2007 Amendments — Composite Section: Chapter 73 inserted (8)(b) regarding permanent placement of the child with the noncustodial parent as a permanency option; and made minor changes in style. Amendment effective October 1, 2007.

Chapter 166 inserted (4) regarding child consultation in a permanency hearing; and made minor changes in style. Amendment effective July 1, 2007.

2005 Amendments — Composite Section: Chapter 130 in (7)(d) after "arrangement" inserted "and if it is"; and made minor changes in style. Amendment effective October 1, 2005.

Chapter 178 in (4)(a) inserted second, third, fourth, and fifth sentences requiring department in permanency hearing to investigate whether grant of temporary or permanent custody is in best interest of child, requiring department to provide reasons for denial of custody to court, requiring court, to the extent allowed under confidentiality laws, to inform family member of reasons for denial, and requiring court to provide reasons for denial in the court order upon request. Amendment effective October 1, 2005.

Chapter 382 in (1)(a)(i) near beginning after "permanency" deleted "plan" and near middle after "court" inserted "or, subject to the approval of the court and absent an objection by a party to the proceeding, by the foster care review committee, as provided in 41-3-115, or the citizen review board, as provided in 41-3-1010"; in (1)(a)(ii) near middle after the first "court" inserted "or the court-approved entity holding the permanency hearing"; in (1)(b) near beginning after "permanency" deleted "plan" and at end after "guardian" inserted "or the child has been legally adopted or appointed a legal guardian"; in (1)(c) in first sentence near beginning after "permanency" deleted "plan", near middle after "part" inserted "or with a review held pursuant to 41-3-115 or 41-3-1010", before "time" inserted "applicable", and after "limits" deleted "of that section" and in second sentence near beginning after "permanency" deleted "plan" and in two places after "hearing" inserted reference to a review; inserted (1)(d) providing for joint or separate reviews for groups of siblings; in (2) near beginning after "permanency" deleted "plan", after "department" deleted "and the guardian ad litem or", after "shall" deleted "each", and near end before "for review" substituted "entity that will be conducting the hearing" for "court"; in (3) near beginning after "permanency" deleted "plan", and after "hearing" inserted "the guardian ad litem or", and near end before "for review" substituted "entity that will be conducting the hearing" for "court"; in (4)(a) after "within" substituted "20 days" for "a reasonable time", after "permanency" deleted "plan", and after "hearing" inserted "if the hearing was conducted by the court" and deleted former second and third sentences that read: "The court shall make findings on whether the permanency plan is in the best interests of the child and whether the department has made reasonable efforts to finalize the plan. The court shall order the department to take whatever additional steps are necessary to effectuate the terms of the plan"; inserted (4)(b) and (4)(c) establishing guidelines for court review of a hearing held by an entity other than the court; inserted (5) providing guidelines for a court's findings with respect to a permanency plan; and made minor changes in style. Amendment effective April 25, 2005.

2003 Amendment: Chapter 504 in (1)(a)(ii) after "placed" inserted "in either an adoptive or a guardianship placement" and after "shall" inserted "conduct a hearing and"; in (5) at end of first sentence substituted "the court finds after notice and a hearing that the expenditures are reasonable and that resources are available for payment" for "the department is notified and a court hearing is set in a timely manner on the proposed expenditure"; and in (6)(d) at beginning inserted "long-term custody if the child is in" and after "arrangement" substituted "established" for "for a child if the evidence demonstrates". Amendment effective October 1, 2003.

2001 Amendments — Composite Section: Chapter 281 in (1)(a)(i) at beginning inserted "Subject to subsection (1)(b)"; inserted (1)(a)(i)(A) requiring a permanency plan hearing within 30 days of a determination that reasonable efforts to provide preservation or reunification services are not necessary; in (1)(a)(i)(B) at end deleted "unless the proceeding has been dismissed, the child was not removed from the home, or the child has been returned to the child's parent or guardian"; inserted (1)(a)(ii) requiring a finding whether the department has made reasonable efforts to finalize the permanency plan; inserted (1)(b) providing that a permanency plan hearing is not required if the proceeding has been dismissed, the child was not removed from the home, or the child was returned to the parent or guardian; in (2) at beginning of first sentence substituted "3 working days" for "3 days" and in second sentence substituted "The report must address the department's efforts to effectuate the permanency plan for the child, address the options for the child's permanent placement, examine the reasons for excluding higher priority options, and set forth the proposed plan to carry out the placement decision, including specific times for achieving the plan" for "The report must contain the:

(a) efforts and progress demonstrated by the child's parent or guardian to complete a treatment plan;

(b) extent to which the parent or guardian cooperated and used the services provided;

(c) status of the child, including the child's mental, physical, and psychological health; and

(d) plan for permanency for the child, including specific times for achieving the plan"; at beginning of (3) substituted "3 working days" for "3 days"; in (4) inserted first sentence requiring issuance of the order within a reasonable time after the permanency plan hearing, at end of second sentence inserted "and whether the department has made reasonable efforts to finalize the plan", and in third sentence after "whatever" inserted "additional" and at end deleted "including returning the child safely to the child's home, and shall order the county attorney, the attorney general, or an attorney hired by the county to file any necessary petition to implement the plan with the court within 30 days after the present hearing unless a petition has already been filed"; in (6) at beginning substituted "Permanency options include:

(a) reunification of the child with the child's parent or guardian;

(b) adoption" for "If the permanency plan hearing results in a finding that reunification of the child with the child's parent or guardian is not in the best interests of the child, a subsequent petition filed must be one of the following:

(a) termination of parental rights if the applicable requirements to terminate parental rights have been met"; in (6)(d) at beginning substituted "a planned permanent living arrangement for a child" for "long-term custody of a child"; inserted (6)(d)(i) allowing a planned permanent living arrangement if the child is being cared for by a relative; deleted former (6)(c)(iv) that read: "(iv) the child is in a group of siblings, at least one of whom meets the requirements of subsections (6)(c)(v)(A) through (6)(c)(v)(D), and the best interests of the child will be met by continued placement in the sibling group in long-term foster care"; in (6)(d)(v) after "child" deleted "is at least 12 years of age and"; in (6)(d)(v)(C) substituted "there is a judicial finding that other permanent placement options for the child have been considered and found not to be in the child's best interests" for "termination of parental rights to the child is not in the child's best interests"; in (6)(d)(v)(D) after "parent" inserted "or relative"; in (7) near beginning after "terminate" substituted "the planned permanent living arrangement" for "long-term custody"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 311 in (2)(c) after "physical" deleted "and psychological" (amendment rendered void by Ch. 281); in (6)(d) at beginning substituted "a planned permanent living arrangement for a child" for "long-term custody of a child"; inserted (6)(d)(i) relating to a fit and willing relative; in (6)(c)(v) at end substituted "in a planned permanent living arrangement" for "in long-term foster care" (amendment rendered void by Ch. 281); in (6)(d)(v) after "child" deleted "is at least 12 years of age and"; inserted (6)(d)(v)(C) relating to a judicial finding on more permanent options; in (7) substituted "a planned permanent living arrangement" for "long-term custody"; and made minor changes in style. Amendment effective October 1, 2001.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

Saving Clause: Section 19, Ch. 281, L. 2001, was a saving clause.

1999 Amendments — Composite Section: Chapter 428 in (4) substituted "to file any necessary petition with the court" for "to petition the court" and after "present hearing" deleted former language that read: "for one of the following:

(i) termination of parental rights;

(ii) temporary legal custody, not to exceed 6 months; or

(iii) dismissal"; in (6) near beginning substituted "results in a finding" for "results in an order for a 6-month extension of temporary legal custody, upon the expiration of the temporary legal custody order and the filing of a petition by the department and if the court finds" and substituted "a subsequent petition may only be for" for "the court shall order"; inserted (6)(b) relating to appointment of a guardian pursuant to 41-3-421; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 566 near beginning of (1) substituted "initial court finding that the child has been subjected to abuse or neglect or 12 months after the child's first 60 days of removal from the home, whichever comes first" for "initial order is issued"; in (2)(c) substituted "psychological health" for "emotional health"; at end of (2)(d) inserted "including specific times for achieving the plan"; in (4) after "terms of the plan" inserted "including returning the child safely to the child's home", after "county" substituted "to file a petition to implement the plan with the court" for "to petition the court", and at end after "hearing" substituted "unless a petition has already been filed" for "for one of the following:

(i) termination of parental rights;

(ii) temporary legal custody, not to exceed 6 months; or

(iii) dismissal"; in (5) after "discretion" inserted "the court may" and after "child" inserted "that does not conflict with the provisions in subsection (6) and"; in (6) substituted "results in a finding" for "results in an order for a 6-month extension of temporary legal custody, upon the expiration of the temporary legal custody order and the filing of a petition by the department and if the court finds" and at end after "child" substituted "any subsequent petition filed must be one of the following" for "the court shall order"; at end of (6)(c) inserted "which is reflected in specific findings by the court"; inserted (6)(c)(i) through (6)(c)(iv) allowing long-term custody of child if child has emotional or mental handicap or is at least 16, child's parent is incarcerated, or child is in group of siblings; in (6)(c)(v) inserted "the child is at least 12 years of age and meets the following criteria"; deleted former (5)(b)(iii) that read: "(iii) the child has reached 12 years of age"; in (7) after "parents" deleted "those to whom legal custody has been transferred"; and made minor changes in style. Amendment effective October 1, 1999.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

Case Notes

Grant of Long-Term Custody Proper: A father appealed the District Court's order granting the Department of Public Health and Human Services long-term custody of his son, arguing that the Department failed to make reasonable efforts to reunify the father with his son and that the District Court erred by not specifically finding that the father was unfit before determining that the son's best interests were served by living with his great-aunt. The Supreme Court affirmed, noting that the requirements of 41-3-445(8)(e)(v) were met and that the Department's efforts to determine whether placing the son with the father was viable, including requesting that Texas officials conduct a home study and considering the results of a private home study commissioned by the father, constituted reasonable efforts. The court also held that the District Court was not required to explicitly find that the father was unfit before it could determine that reunification of the son with the father would be contrary to the son's best interests. In re J.H., 2016 MT 35, 382 Mont. 214, 367 P.3d 339.

Dismissal of Parenting Action Following Placement of Children Under Permanency Plan — Appeal Moot: While a parenting action was pending in Flathead County, a District Court in Missoula County approved a permanency plan that placed the children in California with the mother. The father did not appeal the placement order. The Flathead County action was subsequently dismissed, and the father appealed. The Supreme Court held that the Flathead County order was moot because the state no longer possessed authority over the custody and placement of the children, and in the absence of an ongoing, concrete controversy, effective relief could not be granted. The appeal was dismissed. In re J.A.S. & E.R.S., 2008 MT 269, 345 M 189, 190 P3d 299 (2008).

Failure to Complete Treatment Plan and Lack of Evidence That Conduct Likely to Change in Reasonable Time — Children in Foster Care for 17 of 22 Months — Parental Rights Properly Terminated: When D.A. was born in 2003, he and both parents tested positive for methamphetamine, and the state immediately obtained temporary custody of D.A. The case was dismissed 10 months later. When M.A. was born in 2005, the mother again tested positive for methamphetamine, and the state removed both children and placed them in foster care. The parents completed treatment plans and the children were returned to their care. About 2 months later, the parents were arrested on drug-related charges and the children were again removed, placed in foster care, and adjudicated youths in need of care. The parents agreed to another treatment plan, which included addressing and conquering their drug addictions and maintaining visitation with their children, increasing visitation when appropriate, and increasing parenting responsibilities until they were reunited with their children. However, the parents never completed the treatment plan, and their visitation actually decreased because of the children's negative reactions to the visits. Rather than adopt the state's proposed permanency plan calling for reunification, the District Court ordered the state to take steps to permanently place the children. Subsequently, after the children had been in foster care for 17 of the previous 22 months, the state moved to terminate the parents' rights. At the hearing, witnesses testified that it would take another year to know if reunification would be possible. In the interests of the children, the District Court terminated the parents' rights. On appeal, the Supreme Court affirmed. The District Court correctly held that the parents had not completed their treatment plan and that as a matter of fact the conditions rendering the parents unfit were unlikely to change in a reasonable time, based on their past drug use and the effect their use had on their ability to care for their children. Nor was it error for the court to consider the presumption that, because the children had been in foster care for 17 months, termination of parental rights was in the children's best interests. Additionally, there was sufficient evidence for the court to conclude that the state's permanency plan was not in the children's best interests, and having rejected the plan, the court had the authority to order the state to take specific steps to effectuate an alternate plan, which could include adoption of the children. Entering the order following the permanency hearing to advance the children's best interests did not constitute plain error or violate the parents' due process rights, and termination of parental rights was not plain error or an abuse of discretion. In re Custody & Parental Rights of D.A. & M.A., 2008 MT 247, 344 M 513, 189 P3d 631 (2008), followed in In re T.N.-S., 2015 MT 117, 379 Mont. 60, 347 P.3d 1263.

Parents' Due Process Rights Not Violated by Failure to Hold Permanency Plan Hearing When Objective of Plan Achieved: Three times the state attempted to preserve and reunite the parents with their children through the establishment of treatment plans and by emphasizing to the parents the importance of permanent placement of the children in a safe and secure home, but each time the parents failed to comply with the treatment plans and the children were returned to state custody. The District Court, without holding a permanency plan hearing, eventually terminated the parents' rights. On appeal, the parents claimed that their due process rights were violated by the failure of the court to hold a permanency plan hearing. The Supreme Court disagreed. Although a permanency plan hearing per se was never held, the purposes served by a hearing were nevertheless met. The District Court had repeatedly referenced permanency for the children and sought to ensure that the parents understood that the children could not be allowed to languish in the system. This is typical of the discussion that would normally occur at a permanency plan hearing, and had a hearing been held, it would undoubtedly have formalized the state's goal of reunifying the parents and children, which had been attempted repeatedly. Thus, failure to hold a permanency plan hearing was not fundamentally unfair and did not violate the parents' due process rights. In re B.B. & J.B., 2006 MT 66, 331 M 407, 133 P3d 215 (2006), following In re A.R., 2004 MT 22, 319 M 340, 83 P3d 1287 (2004).

Res Judicata and Collateral Estoppel — Inapplicable Absent Final Judgment: In In re B.N.Y., 2003 MT 241, 317 M 291, 77 P3d 189 (2003), the Supreme Court held that a mother's due process rights were violated in parental rights termination proceedings. Almost immediately after the 2003 decision, the state began new proceedings. The mother asserted that res judicata and collateral estoppel barred the new action. The District Court disagreed, and the mother appealed, but the Supreme Court affirmed. Both res judicata and collateral estoppel require a final judgment in an initial action before they preclude a similar future action. The initial order terminating the mother's parental rights did not constitute a final judgment as a result of In re B.N.Y. The 2003 decision had no preclusive effect in the current action, and the mother's res judicata and collateral estoppel arguments failed. In re B.N.Y., 2006 MT 34, 331 M 145, 130 P3d 594 (2006). See also Baltrusch v. Baltrusch, 2006 MT 51, 331 M 281, 130 P3d 1267 (2006), and In re M.N., J.N., Jr., & R.N., 2011 MT 245, 362 Mont. 186, 261 P.3d 1047.

No Due Process Violations in Parental Rights Termination Proceeding — Statutory Mandates Addressed: A mother asserted that her due process rights were violated in a parental rights termination proceeding because: (1) the state failed to make reasonable efforts to reunify mother and child as required in 41-3-423; (2) the District Court, in effect, terminated her right while purporting only to grant a planned permanent living arrangement and permanent care and control of the child to the state in violation of 41-3-609; (3) the state failed to petition the District Court for termination in a timely fashion in violation of 41-3-604; and (4) the District Court failed to hold a permanency plan hearing in a timely manner in violation of this section. The Supreme Court considered each claim and affirmed. Although reunification efforts failed, the state's efforts were reasonable and in compliance with the governing statutes. The mother's parental rights were severely limited, but not actually terminated, so her argument regarding improper termination procedures failed. The state does not have to petition to terminate parental rights if a compelling reason has been documented for determining that filing a petition would not be in the child's best interests. In this case, there was such a compelling reason—namely, that the state had tried to reunify mother and child for years and did not seek termination casually. The tardy permanency hearing argument also failed in light of the state's diligent, although unsuccessful, efforts to create a permanent and stable environment for the child in an effort to ensure that the child did not languish in foster care. In re B.N.Y., 2006 MT 34, 331 M 145, 130 P3d 594 (2006). See also In re R.T.L.P., 238 M 384, 777 P2d 892 (1989), and In re A.R., 2004 MT 22, 319 M 340, 83 P3d 1287 (2004).

Failure to Hold Parental Permanency Plan Hearing Within Statutory Time Not Violative of Due Process: A mother whose parental rights were terminated contended that the failure to hold a permanency hearing within the time enumerated in this section, the length of the proceeding, and the denial of her request to allow her counselor to videotape her visits with her children violated her due process rights. The Supreme Court examined the case for fundamental fairness and affirmed. Under this section, a permanency hearing is not required if a child has been returned to a biological parent, and in this case, the children were returned to the custody of their biological father. The court did not condone the failure to hold a timely hearing as required, but noted that in this case, there was an ongoing attempt to reunify the children with one of the parents, which was the goal of the permanency plan, so the goal was accomplished without a hearing. As to the issue of length of proceedings, the court noted that despite the failure of the mother to show progress toward reunification goals, after 15 months, the Department was still actively working with her to accomplish the goal and did not seek termination until more than 20 months after the children were removed from the home, so the length of time did not prejudice the mother's rights. Moreover, the request for presence of the mother's counselor during visits was never actually denied by the District Court because the mother had no visitation rights at the time of the request that could have been denied. In re A.R. & S.A.R., 2004 MT 22, 319 M 340, 83 P3d 1287 (2004).

No Denial of Fair Procedures in Grant of Long-Term Custody of Child to State — Failure of Parent to Properly Object to Procedures at Hearing: Long-term custody of a child was granted to the state. The father appealed on grounds that he was denied fundamentally fair procedures in the custody proceedings, contending that: (1) the District Court failed to hold a permanency hearing within the statutory deadline; (2) the state failed to submit the statutorily required prehearing report to the District Court; (3) the state failed to develop a plan with any elements of permanency; (4) the state tried to terminate his visitation rights without satisfying the requisite statutory criteria and burden of proof; and (5) the District Court erroneously granted the state a second chance to prove its case. The Supreme Court considered each claim in turn, and affirmed. Although the permanency hearing occurred after the statutory deadline in this section (formerly numbered 41-3-412), the father did not raise the issue in District Court or advise the District Court of the appropriate remedy as required, and raising the issue in a proposed conclusion of law did not constitute a proper objection. The father also neglected to object to the absence of a prehearing report either at the hearing or by pretrial motion, so those issues were not properly preserved for appeal. The contention that the state failed to develop a plan with any elements of permanency was belied by evidence showing that the child had made reasonable progress toward a settled placement. The question of whether there was any merit to the state's attempt to terminate visitation was moot because the District Court reinstated visitation at the permanency hearing. Moreover, disallowing the state a second opportunity to present its case would have required that the District Court overlook the best interests of the child by ignoring substantial evidence that the child continued to suffer both emotionally and mentally. It was the father who objected to the form of the evidence as first offered, and because the evidence was originally offered in a form authorized by statute, the child's best interests were paramount, and the father could not demonstrate prejudice in the District Court's granting of another hearing to hear the evidence. In re M.W. & L.W., 2002 MT 126, 310 M 103, 49 P3d 31 (2002). See also In re M.C., 2017 MT 252, 389 Mont. 78, 403 P.3d 1266, holding that a mother's failure to raise the failure of the Department of Health and Human Services to accommodate her reading disability first in District Court barred her claim on appeal.

Findings Sufficient to Warrant Assignment to Long-Term Custody: The state petitioned to terminate the mother's parental rights or, alternatively, to grant long-term custody to the state with the right to assign guardianship to the children's grandmother. The District Court granted the latter. The mother did not contend that the court's findings were erroneous, but did argue that the court erred because its findings were not sufficiently specific to justify long-term custody to the state. The Supreme Court disagreed, noting that if the state follows fundamentally fair procedures, a parent may be divested of custody. Here, the District Court found that: (1) the children were youths in need of care; (2) the state had developed treatment plans for the mother, but the plans had not been followed; (3) the mother was warned that the last treatment plan was her final chance; (4) the mother had been given many opportunities to straighten out and retain custody of her children, but did not do so; (5) continuation of the parent-child legal relationship would likely result in continued abuse or neglect if the children were returned to the mother; (6) the mother's conduct and condition rendered her unfit, unable, and unwilling to give her children adequate parental care; (7) it would be in the children's best interest if they were allowed to visit with their mother as directed by the state, even if she was not their custodian; (8) since the children had been living with their grandmother, they had improved in school and become more socially involved; and (9) the grandmother was willing to act as the children's guardian. These findings were sufficiently specific to support the District Court's award of long-term custody to the children's grandmother, and that award was affirmed. In re Custody & Parental Rights of T.Z. & J.Z., 2000 MT 205, 300 M 522, 6 P3d 960, 57 St. Rep. 806 (2000).

Petition for Long-Term Custody Included With Petition for Termination of Parental Rights — No Requirement for Filing Subsequent to Hearing: The state petitioned to terminate the mother's parental rights or, alternatively, to grant long-term custody to the state with the right to assign guardianship to the children's grandmother. Because the District Court combined the permanency hearing with the termination hearing, the petition for long-term legal custody was not filed subsequent to the hearing, which the mother contended violated 41-3-412 (renumbered 41-3-445) and erroneously denied her sufficient notice. However, 41-3-412 (renumbered 41-3-445) does not require that a petition for long-term custody be filed subsequent to a hearing. That petition may be filed at the same time as a petition to terminate parental rights, and this alternative petition provides a parent with adequate notice of issues to be raised at the hearing.

Thus, the court did not err in awarding long-term custody without requiring a separate petition limited to that issue. In re Custody & Parental Rights of T.Z. & J.Z., 2000 MT 205, 300 M 522, 6 P3d 960, 57 St. Rep. 806 (2000).

41-3-446. Contributions by parents or guardians for youth's care.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 174, L. 2023. Amendment effective October 1, 2023.

Preamble: The preamble attached to Ch. 174, L. 2023, provided: "WHEREAS, it is the policy of the State of Montana to support and preserve the family as the single most powerful influence for ensuring the healthy social development and mental and physical well-being of Montana's children pursuant to section 41-7-102, MCA; and

WHEREAS, it is the policy of the State of Montana to preserve the unity and welfare of the family whenever possible pursuant to section 41-3-101, MCA; and

WHEREAS, the federal Children's Bureau released new guidance to states on June 8, 2022, that under 42 U.S.C. 671(a)(17), an assignment of rights to child support for children in foster care receiving maintenance payments under Title IV-E of the Social Security Act "is not required except in very rare instances where there will be positive or no adverse effects on the child, or the assignment will not impede successful achievement of the child's permanency plan.""

2001 Amendment: Chapter 311 in (1) at beginning inserted "physical or legal". Amendment effective October 1, 2001.

Applicability: Section 20, Ch. 516, L. 1997, provided that this section applies to proceedings commenced on or after October 1, 1997.

41-3-450. Placement preferences.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

2023 Enactment — Coordination: The enactment of this section was amended by sec. 11, Ch. 674, L. 2023, a coordination section. Section 11, Ch. 674, in (1) at end inserted the reference to the Montana Indian Child Welfare Act.

Preamble: The preamble attached to Ch. 674, L. 2023, provided: "WHEREAS, the federal Indian Child Welfare Act requires active efforts that are affirmative, active, and thorough and timely efforts that are tailored, in a manner consistent with prevailing social and cultural conditions, to each case to maintain or reunite an Indian child with the child's family; and

WHEREAS, the federal Indian Child Welfare Act outlines placement preferences for foster care, preadoptive, or adoptive placements of Indian children, prioritizing placement with members of a child's extended family; and

WHEREAS, the Legislature desires to incorporate the federal Indian Child Welfare Act's requirements regarding active efforts and placement preferences into Montana's existing child abuse and neglect laws."

41-3-451. Exemption from placement preferences.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

Preamble: The preamble attached to Ch. 674, L. 2023, provided: "WHEREAS, the federal Indian Child Welfare Act requires active efforts that are affirmative, active, and thorough and timely efforts that are tailored, in a manner consistent with prevailing social and cultural conditions, to each case to maintain or reunite an Indian child with the child's family; and

WHEREAS, the federal Indian Child Welfare Act outlines placement preferences for foster care, preadoptive, or adoptive placements of Indian children, prioritizing placement with members of a child's extended family; and

WHEREAS, the Legislature desires to incorporate the federal Indian Child Welfare Act's requirements regarding active efforts and placement preferences into Montana's existing child abuse and neglect laws."

Part 6
Parent-Child Legal Relationship Termination — Reinstatement

Part Compiler's Comments

Source: Chapter 420, L. 1981, was derived in large part from sections 19-4-101, et seq., Colorado Statutes, 1973.

Part Case Notes

Parental Rights Terminated — Objection to Sufficiency of Reasonable Efforts Prior to Termination Not Necessary for Preservation of Issue: A father whose parental rights were terminated argued on appeal that the Department of Health and Human Services did not make reasonable efforts to reunite him with his children. The Department argued that the father waived his right to appeal the Department's efforts because he did not challenge the Department's efforts prior to the termination hearing. The Supreme Court affirmed the termination, noting that the father made almost no progress on his treatment plan, consistently refused to work with the Department, did not attend anger management, and failed to appear for 77 requested drug tests. But regarding the Department's waiver argument, the court stated that it knew of nothing in statute or common law that would require a parent to object to the sufficiency of the Department's reasonable efforts for purposes of termination prior to the termination hearing in order to preserve the issue for appeal. In re C.M.G., 2020 MT 15, 398 Mont. 369, 456 P.3d 1017.

Children With Same Parents — Evidence on One Child's Status as Non-ICWA Presumptive for Other Child: A mother's two children were removed, and later the Department of Public Health and Human Services filed a petition to terminate her parental rights. At the initial removal hearing, the mother informed the District Court that the children may be Indian children as defined by the federal Indian Child Welfare Act (ICWA). Later, at the termination hearing, the Department provided a letter from the Crow Tribe stating that one of the children was not enrolled or enrollable into the tribe. After the District Court terminated the mother's rights based on non-ICWA standards of proof, she appealed, arguing that the District Court had not made a finding about her other child's status as an Indian child. The District Court had reasoned that both children had the same mother and same father and therefore if one child was not an Indian child, neither was the other. The Supreme Court affirmed the termination, ruling that the District Court's lack of a finding was harmless error. In re S.R., 2019 MT 47, 394 Mont. 362, 436 P.3d 696.

Termination of Parental Rights Without Conclusive Tribal Determination of Tribal Membership Status and Enrollment Eligibility — Abuse of Discretion: In a termination proceeding, there was reason to believe that the deceased father may have been a member of the Blackfeet Tribe. A Children and Family Services employee testified that a representative of the Blackfeet Tribe had orally expressed to him that the two children were not enrolled or eligible for enrollment. Subsequently, the case proceeded as though the Indian Child Welfare Act (ICWA) did not apply, and the mother's parental rights were terminated. On appeal, the Supreme Court reversed, finding that the District Court had erred by treating the matter as a non-ICWA case despite the lack of documentation or testimony of an authorized tribal representative. The court remanded for an appropriate determination of tribal membership status and eligibility and, if necessary, further proceedings to meet the evidentiary burdens of ICWA. In re D.E., 2018 MT 196, 392 Mont. 297, 423 P.3d 586.

Compliance With Statutory Procedures — Fundamental Fairness Satisfied: A mother appealed a District Court order terminating her parental rights. She argued that the adjudication proceedings had not been long enough to protect her right to fundamentally fair procedures. The Supreme Court upheld the District Court, finding that a court can terminate a person's parental rights as long as the child is an adjudicated youth in need of care, an appropriate and approved treatment plan was unsuccessful or not complied with by the parent, and the court makes a finding that the parent is unlikely to become fit to parent within a reasonable time. In re G.W., 2018 MT 192, 392 Mont. 269, 423 P.3d 575.

Termination of Parental Rights to Indian Children — Tribal Court to Affirmatively Decline Case Prior to State Court Proceedings — Jurisdiction Transfer Hearing Required Prior to Ruling on Jurisdictional Transfer of Children: The District Court erred in terminating the parental rights of a mother of four Indian children without first holding a jurisdiction transfer hearing under the Indian Child Welfare Act (ICWA) after the mother requested the matter be transferred to tribal court at the outset of the proceedings. The Supreme Court ruled that a tribal court, and not the tribe, must affirmatively decline to accept a case before a state court can proceed with termination of parental rights to Indian children. A District Court must hold a jurisdiction transfer hearing before it grants or denies a request for a jurisdictional transfer of Indian children to tribal custody. In re J.W.C., L.W.C., K.W.C., and C.W.C., 2011 MT 312, 363 Mont. 85, 265 P.3d 1265.

Sufficient Evidence That ICWA Standards Met in Terminating Parental Rights — Termination Affirmed Absent Abuse of Discretion: An Indian father contended that the state did not present sufficient evidence under the federal Indian Child Welfare Act of 1978 (ICWA) to warrant termination of his parental rights. The Supreme Court determined that: (1) there was sufficient evidence that continued custody of the children was likely to result in serious emotional or physical damage to the children; (2) the evidence was supported by testimony from qualified experts; (3) active but unsuccessful efforts had been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family; and (4) the children had lived in foster care a sufficient time to create the presumption under 41-3-604 that the children's best interests would be served by terminating parental rights. The ICWA requirements having been followed, parental rights were properly terminated. In re S.R., R.R., & G.R. Jr., 2004 MT 227, 322 M 424, 97 P3d 559 (2004). See also In re S.B., 2019 MT 279, 398 Mont. 27, 459 P.3d 214.

Federal Indian Child Welfare Act — Temporary Custody Not in Compliance With Act — Otherwise Valid Parental Termination Not Invalidated: Child of Indian parents was placed in the temporary custody of the state in proceedings that may not have complied with the federal Indian Child Welfare Act (25 U.S.C. § 1901, et seq.). Later, in proceedings that complied with the Act and before a different judge with different witnesses, the parents' rights were terminated and permanent custody was granted the state. The Supreme Court held that any failure to comply with the Act in the temporary proceedings would not invalidate the later termination because the proceedings are separate actions involving separate petitions and statutory guidelines. In re M.E.M., 209 M 192, 679 P2d 1241, 41 St. Rep. 636 (1984). See also In re S.P., 241 M 190, 786 P2d 642, 47 St. Rep. 190 (1990).

Determination of Neglect at Custody Hearing Not Sufficient: After the death of the custodial mother, the maternal grandmother took the children into her home. The natural father petitioned to have the children restored to his custody. The grandmother requested custody and filed a petition for adoption. In a proceeding pursuant to 40-4-221, the grandmother was granted custody because the father had failed to make child support payments for more than a year and had generally neglected the children. The trial court properly dismissed the grandmother's petition for adoption for lack of jurisdiction. The determination of neglect needed to excuse the need for the father's consent to adoption under 40-8-111 (now repealed) must be made in a separate proceeding pursuant to Title 41, ch. 3, part 6. Brost v. Glasgow, 200 M 194, 651 P2d 32, 39 St. Rep. 1679 (1982).

Part Law Review Articles

Recognizing Parental Consortium: Montana Follows a National Trend in Pence v. Fox, Vannatta, 54 Mont. L. Rev. 149 (1993).

Loss of Consortium and Loss of Services Actions: A Legacy of Separate Spheres, Ridgeway, 50 Mont. L. Rev. 349 (1989).

41-3-602. Purpose.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 295, L. 2023. Amendment effective April 26, 2023.

1995 Amendment: Chapter 458 near end, after "neglected", deleted "or dependent"; and made minor changes in style. Amendment effective April 14, 1995.

Case Notes

Abandonment Held to Constitute Abuse or Neglect: The father appealed the termination of his parental rights, arguing that the trial court's finding of abandonment did not constitute a finding of abuse or neglect required by statute to terminate parental rights. The Supreme Court ruled that in the past, it had implicitly upheld terminations on the basis of abandonment and that it was clarifying its earlier rulings by holding that abandonment is "harm to a child's welfare" and that "harm to a child's welfare" is a statutory ground for a finding of "child abuse or neglect" upon which a termination of parental rights may be founded. In re M.J.W., 1998 MT 142, 289 M 232, 961 P2d 105, 55 St. Rep. 563 (1998), followed in In re T.H. & C.D.F., 2005 MT 237, 328 M 428, 121 P3d 541 (2005).

Finding of Abuse, Neglect, or Dependency Necessary Before Consideration of Best Interests of the Child: M.G.M. was born out of wedlock and had little contact with her natural father until the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) placed M.G.M. in a foster home and terminated her mother's parental rights. The Department then sought to terminate the father's parental rights. To terminate his parental rights, the court must first find that the child is abused, neglected, or dependent (see 1995 amendment). Only when such a finding has been made can the court apply the best interests of the child test. In re M.G.M., 201 M 400, 654 P2d 994, 39 St. Rep. 2191 (1982).

41-3-604. When petition to terminate parental rights required.

Compiler's Comments

2017 Amendment: Chapter 131 inserted (6) providing a 45-day timeline for a hearing on a petition for termination of parental rights. Amendment effective October 1, 2017.

2003 Amendment: Chapter 504 in (5) after "petition for" substituted "long-term custody" for "a planned permanent living arrangement". Amendment effective October 1, 2003.

2001 Amendment: Chapter 311 in (1) in first sentence before "custody" inserted "physical"; and inserted (5) relating to types of petitions to be filed under exceptions to subsection (1). Amendment effective October 1, 2001.

Effective Date: This section is effective October 1, 1999.

Case Notes

District Court's Termination of Parental Rights Not Abuse of Discretion — Mother's Failure to Make Progress in Treatment Plan and Unwillingness to Engage Department's Efforts to Assist — Conduct or Condition Unlikely to Change Within Reasonable Time. In re A.M.G., 2022 MT 175, 410 Mont. 25, 517 P.3d 149.

Termination of Parental Rights in Child's Best Interests Rather Than Guardianship: The District Court terminated the parental rights of a mother who persisted in methamphetamine use while her child was placed with the child's grandmother. The parties did not dispute the presumption that termination is in the child's best interests if the child has been in an out-of-home placement for 15 out of the most recent 22 months. The District Court found that the mother did not overcome the presumption. Some parties argued for guardianship rather than termination, but the District Court guardianship was sought for the mother's needs, not for the child's. On appeal, the Supreme Court reviewed for abuse of discretion and affirmed, finding that the District Court had substantial credible evidence that it did not misapprehend to support its determination that it was in the child's best interests to terminate the mother's parental rights. In re A.B., 2020 MT 64, 399 Mont. 219, 460 P.3d 405.

Termination of Parental Rights After Thirty Months — Parent's Relapse, Improvement, and Subsequent Relapse — Reasonableness of Treatment Plan Challenged: The father had his children removed after the Department of Public Health and Human Services found that he used drugs, failed to adequately supervise his children, kept an unsanitary home, and did not ensure that his children received medical care. The District Court granted a petition for emergency protective services and the father stipulated to a treatment plan. Over the course of the proceeding, the father relapsed, improved for a time, relapsed again, and finally showed signs of improvement. Ultimately, the District Court terminated the father's parental rights, finding that the children could not wait any longer for the father to complete his treatment plan. On appeal, the father argued that the treatment plan was not appropriate because it did not provide him with a reasonable amount of time to complete certain tasks and that it erred in determining that he was unfit and not likely to change within a reasonable amount of time. The Supreme Court affirmed, holding that the father failed to completely comply with his treatment plan, despite coming close, and that the children spending 30 consecutive months in kinship foster care required termination of the father's rights. In re X.B., 2018 MT 153, 392 Mont. 15, 420 P.3d 538.

Placement with Family Considered Foster Care — Statutory Presumption Applicable: The Department of Public Health and Human Services removed the mother's two children from her care. The mother stipulated to a treatment plan and to having the District Court adjudicate her children as youths in need of care. The children were placed with family members. The District Court eventually terminated the mother's parental rights by applying the statutory presumption in 41-3-604. On appeal, the mother argued that the District Court erred in considering time the children spent with family as foster care. The Supreme Court affirmed, holding that the statutory presumption applied to care provided by family members. In re C.W.E., 2016 MT 2, 382 Mont. 65, 364 P.3d 1238.

No Abuse of Discretion in Terminating Parental Rights When Conditions Rendering Mother Unfit to Parent Unlikely to Change Within Reasonable Time: A mother's failure to object to a treatment plan prevented her from challenging it on appeal. In this case, because the children were adjudicated youths in need of care, the mother's treatment plan was unsuccessful, and clear and convincing evidence was present that the condition rendering the mother unfit to parent was unlikely to change, the court was within its discretion to terminate parental rights. In re C.M., 2015 MT 292, 381 Mont. 230, 359 P.3d 1081.

Termination of Mother's Rights Appropriate Despite Treatment Plan's Failure to Include Chemical Dependency Evaluation — Ineffective Counsel: In a termination of parental rights proceeding, the District Court found that the mother did not complete the approved treatment plan and that she was unlikely to change within a reasonable time because of her drug problem. On appeal, the mother argued that while she and her attorney agreed to the treatment plan, it was deficient because it failed to include a chemical dependency evaluation. The mother also argued that her counsel was ineffective for failing to advocate for the inclusion of an evaluation in the plan. The Supreme Court affirmed the District Court, holding that while the failure of the treatment plan to include substance abuse evaluation and treatment was notable, the best interests of the children supported termination of her rights, the difference was being offered help with the drug problem and being required to get help, and the failure to advocate for a treatment plan did not prejudice the mother. In re T.N.-S., 2015 MT 117, 379 Mont. 60, 347 P.3d 1263, followed in In re J.E.L., III, 2018 MT 50, 390 Mont. 379, 414 P.3d 279.

Termination of Parental Rights — Transfer to Tribal Court Denied: The birth mother of a minor considered an Indian child under the Indian Child Welfare Act (ICWA) forfeited parental care, was arrested for DUI, failed in attempts to reunite with the child, and subsequently failed to follow the District Court's treatment plan. Similarly, the father denied paternity, refused to voluntarily undergo paternity tests, and exhibited no interest in caring for the child. The state placed the child in an ICWA-qualified foster home. Eighteen months after the foster care placement, the tribe moved to transfer to tribal court, which was denied by the District Court. On appeal, the Supreme Court held that the District Court did not abuse its discretion because ICWA did not require transfer to tribal court and that 41-3-604 and 41-3-609 were satisfied because the mother failed to comply with her parenting plan. In re S.B.C., 2014 MT 345, 377 Mont. 400, 340 P.3d 534.

Father's Conduct Unlikely to Change Within a Reasonable Time — Reliance on Statutory Presumption Affirmed: In terminating a father's parental rights, the District Court correctly relied on the statutory presumption that the best interests of the children were unlikely to change since both children had been under the care of their grandmother pursuant to a foster care agreement with the Department of Public Health and Human Services for 15 months of the most recent 22 months. The District Court's termination of parental rights was affirmed. In re B.M. and P.M., 2010 MT 114, 356 Mont. 327, 233 P.3d 338.

Sufficient Evidence That Children in Need of Care — Parental Rights Properly Terminated: In 2004, a mother left her two children with a 16-year-old babysitter and did not return for over 24 hours. The children were placed in temporary legal custody with the state, where they remained thereafter. The state attempted to work on reunifying the family, but the mother repeatedly failed to comply with treatment plans, continued her heavy drinking, was arrested several times, and spent periods incarcerated. The children were tribal members, and the state gave proper tribal notification and had an Indian Child Welfare Act expert testify on several occasions that continued parental custody was likely to result in serious emotional or physical harm to the children and that there were no family members available to take the children. The children were adjudicated youth in need of care, and the state eventually sought to terminate the mother's parental rights in 2008. The mother appealed, but the Supreme Court affirmed. The children had been in foster care for over 4 years, exceeding the threshold for triggering the presumption that termination was in the children's best interests. A reasonable person could conclude, as did the District Court, that the children were in need of care and that the mother's parental rights should be terminated. Substantial evidence showed that the mother: (1) had been charged with four separate criminal offenses and was the subject of a bench warrant; (2) entered an intensive outpatient drug treatment program but stopped after five sessions, indicating a high potential for substance abuse that could only be controlled by incarceration or inpatient treatment; (3) did not complete any parts of the court-approved treatment plan; (4) missed a number of scheduled visits with the children; (5) failed to address her mental health issues; (6) failed to obtain adequate housing; (7) failed to make reunification with the children a priority; and (8) was unlikely to change her pattern of substance abuse and her unstable lifestyle. In re T.W.F & A.R.M., 2009 MT 207, 351 M 233, 210 P3d 174 (2009).

Sufficient Evidence to Terminate Rights of Incarcerated Parent: The District Court did not abuse its discretion in terminating the parental rights of an incarcerated parent after citing: (1) the fact that the child would have been in foster placement for more than 15 of the most recent months before the parent was eligible for parole, thus satisfying the presumption in 41-3-604(1); (2) the parent's criminal history, including seven prior felonies and four sentence revocations; (3) the parent's history of voluntary underemployment, despite the parent's asserted wish to support the child; (4) the parent's failure to establish a substantial relationship with the child through visits or regular contact; (5) the failure of the parent to manifest an ability to assume legal and physical custody because of incarceration; (6) the child's need for immediate permanent placement in order to meet the child's developmental, cognitive, and psychological stability needs; and (7) the inability of the parent to provide for immediate placement because of incarceration. The parent appealed on grounds that the District Court improperly relied on the presumption in 41-3-604(1). The Supreme Court agreed that the presumption was not satisfied because the child had not been in foster care for the requisite amount of time. However, the court noted that parental rights may properly be terminated if the District Court correctly relies on any one basis set out in 41-3-609. In this case, the District Court correctly relied on several bases other than the statutory presumption and thus did not abuse its discretion in terminating the parent's rights. In re M.P., 2008 MT 39, 341 M 333, 177 P3d 495 (2008).

Failure to Apply Proper Statutory Criteria in Termination Proceedings — Reversible Error: Instead of applying the statutory criteria in 41-3-609 when considering whether to terminate a mother's parental rights, the District Court relied on the legal presumption in this section that because the children had been in foster care for 15 of the prior 22 months, termination was appropriate. The Supreme Court reversed. A parent's right to the care and custody of a child is a fundamental liberty interest that must be protected by fundamentally fair procedures. The legal presumption in this section alone is not a sufficient basis to terminate parental rights and neither eliminates the substantive requirements in 41-3-609 nor diminishes the clear and convincing burden of proof on the party seeking to terminate parental rights. By relying on the presumption in this section, the District Court impermissibly shifted the burden of proof to the mother by concluding that there was insufficient evidence to rebut the presumption. It was not the mother's duty to rebut the presumption, but rather the state's burden to show that the mother failed to complete a treatment plan and that the mother's conduct or condition was unlikely to change within a reasonable time. Because the District Court applied the wrong statutory standards, the order terminating parental rights was reversed and the case was remanded for application of the proper statutory criteria. In re D.B. & D.B., 2007 MT 246, 339 M 240, 168 P3d 691 (2007), distinguished on other grounds by In re C.B., 2014 MT 4, 373 Mont. 204, 316 P.3d 177.

Findings Based on More Than Prior Conviction for Crime Against Child — Sufficient Findings to Substantiate Termination of Parental Rights: A father asserted that the District Court lacked sufficient evidence to terminate his parental rights because the court relied on a prior crime committed in Texas that, if committed in Montana, would have been only a misdemeanor. The Supreme Court found that substantial evidence existed to support termination. In addition to the prior sexual crime against a child that was an aggravating circumstance under Montana law, the District Court also found that the father had no significant contact with his children for more than 3 years and failed to complete a treatment plan, that the children had been in foster care for 28 months prior to the termination hearing, and that there was evidence that one of the children claimed that the father sexually abused her. Termination of parental rights was affirmed. In re. M.A.L., D.L., & T.L., 2006 MT 299, 334 M 436, 148 P3d 606 (2006).

Parent's Acquiescence in Adjudicatory Proceedings — Finding That Child Is Youth in Need of Care Based on Parent's Admissions — Stipulation Not Required: A mother contested termination of her parental rights on grounds that her child was not properly adjudicated as a youth in need of care. The mother was incarcerated at the time of the hearing and contended that although she agreed to a treatment plan, she never admitted that the child met the definition of a youth in need of care or stipulated that the child was in need of care. The Supreme Court noted that the trial court should have specifically inquired of the mother or her counsel whether the mother stipulated that the child was a youth in need of care, but it was not error for the District Court to make that finding based on the mother's own admissions that she was addicted to methamphetamine and needed treatment and that her addiction impacted the child unfairly. The mother was not placed at an unfair disadvantage during the termination proceedings and was represented by counsel at all stages. She never questioned the regularity of the proceedings until appeal. The court held that because 35 months had passed between the adjudicatory hearing and the notice of appeal, it would not be in the child's best interests to prolong the matter, particularly when much of the delay was caused by the mother's repeated relapses and her failure to put the child's interests above her desire to indulge her addiction. The adjudication was proper and did not prejudice the mother, and the District Court was affirmed. In re A.S., 2006 MT 281, 334 M 280, 146 P3d 778 (2006).

Parent's Continued Drug Use Unlikely to Change — Parental Rights Properly Terminated: Facts presented at the termination hearing showed that although the mother successfully completed inpatient drug treatment, maintained sobriety for a time, and was moving toward successful completion of her treatment plan, she relapsed and began using methamphetamine again, and the use continued until the termination hearing. Additionally, she had numerous probation violations, the violations were increasing, she failed to maintain employment, and she had no plan for supporting herself or her child. The child had also been in foster care for more than 17 months, but rather than make every effort to maintain her sobriety so that she could parent her child, the mother's relapses continued. The District Court concluded that despite all the available resources, the mother's addiction was stronger than her desire to remain sober and parent her child and that the condition or conduct rendering the mother unfit to parent was unlikely to change within a reasonable time. The mother's parental rights were properly terminated. In re A.S., 2006 MT 281, 334 M 280, 146 P3d 778 (2006).

Termination of Parental Rights of Father Incarcerated for Failure to Pay Child Support Affirmed: A father was incarcerated for failure to pay child support for more than 10 years, resulting in his inability to be available for his child, who had been in foster care for more than 56 consecutive months at the time of hearing. The father's sentence was to run for about 3 additional years. The District Court properly concluded that the child's paramount best interests and needs were best served by continued stable foster care placement and that there was clear and convincing evidence to support termination of the father's parental rights. In re A.N.W., 2006 MT 42, 331 M 208, 130 P3d 619 (2006).

No Due Process Violations in Parental Rights Termination Proceeding — Statutory Mandates Addressed: A mother asserted that her due process rights were violated in a parental rights termination proceeding because: (1) the state failed to make reasonable efforts to reunify mother and child as required in 41-3-423; (2) the District Court, in effect, terminated her right while purporting only to grant a planned permanent living arrangement and permanent care and control of the child to the state in violation of 41-3-609; (3) the state failed to petition the District Court for termination in a timely fashion in violation of this section; and (4) the District Court failed to hold a permanency plan hearing in a timely manner in violation of 41-3-445. The Supreme Court considered each claim and affirmed. Although reunification efforts failed, the state's efforts were reasonable and in compliance with the governing statutes. The mother's parental rights were severely limited, but not actually terminated, so her argument regarding improper termination procedures failed. The state does not have to petition to terminate parental rights if a compelling reason has been documented for determining that filing a petition would not be in the child's best interests. In this case, there was such a compelling reason—namely, that the state had tried to reunify mother and child for years and did not seek termination casually. The tardy permanency hearing argument also failed in light of the state's diligent, although unsuccessful, efforts to create a permanent and stable environment for the child in an effort to ensure that the child did not languish in foster care. In re B.N.Y., 2006 MT 34, 331 M 145, 130 P3d 594 (2006). See also In re R.T.L.P., 238 M 384, 777 P2d 892 (1989), and In re A.R., 2004 MT 22, 319 M 340, 83 P3d 1287 (2004).

Sufficient Evidence That ICWA Standards Met in Terminating Parental Rights — Termination Affirmed Absent Abuse of Discretion: An Indian father contended that the state did not present sufficient evidence under the federal Indian Child Welfare Act of 1978 (ICWA) to warrant termination of his parental rights. The Supreme Court determined that: (1) there was sufficient evidence that continued custody of the children was likely to result in serious emotional or physical damage to the children; (2) the evidence was supported by testimony from qualified experts; (3) active but unsuccessful efforts had been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family; and (4) the children had lived in foster care a sufficient time to create the presumption under this section that the children's best interests would be served by terminating parental rights. The ICWA requirements having been followed, parental rights were properly terminated. In re S.R., R.R., & G.R. Jr., 2004 MT 227, 322 M 424, 97 P3d 559 (2004). See also In re S.B., 2019 MT 279, 398 Mont. 27, 459 P.3d 214.

Children in Foster Care for Years Coupled With Failure to Comply With Treatment Plan — Parental Rights Properly Terminated: At least three experts testified that the mother failed to comply with a treatment plan. This fact, coupled with the fact that the children were adjudicated youths in need of care and had been in foster care for more than 15 of the most recent 22 months, was sufficient to terminate the mother's parental rights. In re K.S., D.S., & C.S., 2003 MT 212, 317 M 88, 75 P3d 325 (2003).

Recognition of Statutory Presumption Coupled With Parental Rights Termination Criteria — Parental Rights Properly Terminated: A mother contended that the District Court erred in terminating her parental rights by inappropriately relying on the statutory presumption in this section, contrary to the termination criteria in 41-3-609. The children had been in foster care for more than 15 of the most recent 22 months, so the presumption in this section applied, but the presumption neither eliminates the substantive requirements of 41-3-609 nor diminishes the clear and convincing burden of proof on the party seeking to terminate parental rights. However, in this case, the District Court both acknowledged the statutory presumption and considered the termination criteria, which included evidence that the mother had not successfully completed her treatment program and had two significantly handicapping conditions (marginal general aptitude and a personality disorder) that rendered her unfit to parent and that would not change within the foreseeable future. Thus, the mother's parental rights were properly terminated. In re B.H. & D.H., 2001 MT 288, 307 M 412, 37 P3d 736 (2001).

Child in Foster Care for Nineteen Continuous Months — Termination of Parental Rights Presumed to Be in Child's Best Interests: If a child has been in foster care for 15 of the most recent 22 months, the best interests of the child are presumed to be served by the termination of parental rights, pursuant to this section. Here, after the children were placed with their foster parents, they lived in the foster home for 19 continuous months as of the hearing to terminate parental rights. The District Court did not err in applying the presumption in this section in terminating parental rights. In re E.K., C.K., & J.E., 2001 MT 279, 307 M 328, 37 P3d 690 (2001).

41-3-607. Petition for termination — separate hearing — no jury trial.

Compiler's Comments

2017 Amendment: Chapter 388 in (1) at beginning inserted exception clause; and made minor changes in style. Amendment effective October 1, 2017.

2005 Amendment: Chapter 449 deleted former (4) that read: "(4) At the time that a petition for termination of a parent-child relationship is filed, parents must be advised of the right to counsel, and counsel must be appointed for an indigent party"; in (4) in third sentence before "counsel" inserted "appointed or assigned" and before "parent" inserted "minor"; and made minor changes in style. Amendment effective April 28, 2005.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

2003 Amendment: Chapter 504 inserted (3) concerning child's legal status when parent-child relationship is not terminated; and made minor changes in style. Amendment effective October 1, 2003.

1999 Amendments — Composite Section: Chapter 428 inserted (1)(b) relating to custody to the department and guardian under 41-3-421; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 566 in (2) at beginning substituted "At the time that" for "After" and at end substituted "appointed for an indigent party" for "appointed in accordance with 41-3-401". Amendment effective October 1, 1999.

1997 Amendment: Chapter 516 in (2), at end after "41-3-401", deleted "(12)".

1995 Amendment: Chapter 458 in (1), at end of first sentence, inserted "pursuant to 41-3-609", at beginning of second sentence inserted "If", and substituted last clause in second sentence and (1)(a) through (1)(c) regarding transfer of permanent legal custody to certain entities for "shall be considered at a dispositional hearing held pursuant to 41-3-406, following or together with an adjudicatory hearing held pursuant to 41-3-404, within 180 days after the filing of the petition"; in (2), after "After", deleted "the county attorney, attorney general, or an attorney hired by the county welfare department or office of human services"; and made minor changes in style. Amendment effective April 14, 1995.

1987 Purported Amendment: Although sec. 45, Ch. 609, L. 1987, purported to amend this section, in the final version the text remained unamended.

1985 Amendment: In (1) near end, after "41-3-404", inserted "within 180 days after filing of the petition"; in (2) after "county attorney", inserted "attorney general, or an attorney hired by the county welfare department or office of human services"; and in (3) at beginning of first sentence, deleted "An attorney, who whenever possible shall be the child's previously appointed" and inserted "A", and near beginning of second sentence changed "attorney" to "guardian ad litem".

Case Notes

Improper Termination of Parental Rights by Default Judgment — Abuse of Discretion — Action to Terminate Other Parent's Rights Inappropriate: A mother filed a petition to terminate the parental rights of her infant daughter's father, who was incarcerated at the time. Despite the father's efforts to respond timely, the District Court, without a hearing, evidence, or findings, entered default judgment. The father appealed the termination to the Supreme Court, which reversed, concluding that parental rights cannot be terminated pursuant to a default judgment. The Supreme Court also emphasized that a natural parent cannot petition to terminate the parental rights of the other natural parent except in the case of a stepparent adoption. In re K.J.B., 2014 MT 327, 377 Mont. 270, 339 P.3d 824, distinguished in In re A.M.S., 2016 MT 22, 382 Mont. 145, 364 P.3d 1261.

Statute Providing No Right to Jury Trial in Parental Rights Termination Cases Not Unconstitutional: The father argued that the language in this section providing that there is no right to a jury trial in a proceeding to terminate parental rights violates the guarantee of a jury trial contained in Montana's Constitution. The Supreme Court, citing previous cases and decisions of other jurisdictions, held that the right to a jury trial exists only if that right existed at the time that the 1889 Montana Constitution was adopted and noted that parental termination proceedings did not exist at that time. The Supreme Court also noted that in 1972, the delegates to the constitutional convention considered whether the right to jury trials should be extended to all cases but did not expand the right to a jury trial. In re M.H. & G.H., 2006 MT 208, 333 M 286, 143 P3d 103 (2006).

Probate Code Permanent Guardianship Proceeding — Dependency or Neglect Not Grounds for Terminating Mother's Custody of Child: A mother's parental rights were not terminated by circumstance when a court order granted, with her consent, temporary guardianship in the paternal grandparents. A later court, on the grandparents' petition for permanent guardianship under the Uniform Probate Code, found that the child was neglected or dependent and that the child's best interests would be served by granting the petition. The mother appeared in and contested the later action, withdrew her consent, and filed a petition to terminate the temporary guardianship. The guardianship provisions of the Uniform Probate Code were never intended as a substitute for the child custody provisions of Title 40 governing dissolution of marriage or for the procedures of this title governing termination of the parent-child relationship. The court relied on cases stating that a dependent neglected best interests of the child determination could not be made in a Uniform Probate Code permanent guardianship proceeding and had to be made under a child custody or parental termination proceeding. In re Guardianship of D.T.N., 275 M 480, 914 P2d 579, 53 St. Rep. 253 (1996).

Failure to Notify Guardian Ad Litem of Adoption Proceedings — Reversible Error: A guardian ad litem is required to represent a child in every case in which child abuse or neglect is alleged, and that representation continues until the child is permanently placed. Therefore, failure by the court to notify an unplaced child's guardian ad litem of a hearing on a petition for permanent adoption constituted reversible error. In re F.H., 272 M 342, 901 P2d 96, 52 St. Rep. 791 (1995).

Award of Permanent Legal Custody — Authority of Court to Award Custody — Best Interests of Child Standard: The Department of Family Services (now Department of Public Health and Human Services) filed a petition requesting the court to terminate parental rights of Mary Ann G. and to grant the Department permanent legal custody of J.J.G., with the right to consent to adoption. Former foster parents of J.J.G. filed a petition seeking permanent custody of the child. The court dismissed the foster parents' petition on grounds that the court could only review the placement actions of the Department but could not make the permanent placement itself. On appeal, the Supreme Court held that the lower court erred when it concluded that the foster parents were without legal authority to seek custody of the child and that the lower court had no option other than to grant custody to the Department. The District Court has discretionary authority to transfer legal custody to any qualified individual, including nonrelatives, in order to protect the welfare of the child. In re J.J.G., 266 M 274, 880 P2d 808, 51 St. Rep. 793 (1994), followed in In re E.A.T. & T.A.T., 1999 MT 281, 296 M 535, 989 P2d 860, 56 St. Rep. 1133 (1999).

Error by Court in Failure to Appoint Counsel for Parental Rights Termination Proceedings: To avoid a parent being placed at an unfair disadvantage during parental rights termination proceedings, due process and fairness require that the parent be represented by counsel. An indigent parent is constitutionally guaranteed the right to court-appointed counsel during the proceedings, and denial of such a request constitutes reversible error. (See 2005 amendment.) In re A.S.A., J.L.A., G.A., & A.J.A., 258 M 194, 852 P2d 127, 50 St. Rep. 494 (1993).

Holding of Adjudicatory Hearing as Directory Rather Than Mandatory or Jurisdictional: Because the presiding judge was changed, the dispositional hearing on termination of parental rights was not held within the 180-day period provided in this section. The parent contended that the delay necessitated dismissal of the petition because the timeframe was not met. However, use of the word "shall" with regard to holding the hearing is directory rather than mandatory, and failure to hold the hearing within 180 days does not divest the court of jurisdiction. Absent prejudice to the parent from the hearing delay, termination of parental rights was proper in light of clear and convincing evidence supporting the court's findings and conclusions. In re A.N.S. & L.M.R., 252 M 279, 828 P2d 1357, 49 St. Rep. 250 (1992).

Adjudicatory and Dispositional Hearing Combined — Notice Not Required: Parental rights may be terminated at a dispositional hearing under 41-3-406 (renumbered 41-3-438) and this section. The dispositional hearing was combined with an adjudicatory hearing under 41-3-404 (renumbered 41-3-437), and no specific notice of the combination was required. Custody of R.A.D., 44 St. Rep. 2018 (1987). Opinion withdrawn but issue affirmed in Custody of R.A.D. & J.D., 231 M 143, 753 P2d 862, 45 St. Rep. 496 (1988).

Findings Required to Terminate Parental Rights: A court must make findings in accordance with 41-3-406 (renumbered 41-3-438), 41-3-607, and 41-3-609 before it can terminate parental rights and award permanent custody of any child to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services). In re C.A.R. & P.J.R., 214 M 174, 693 P2d 1214, 41 St. Rep. 2395 (1984).

Termination of Parental Rights — No Right to Jury Trial: The State began termination of parental rights proceedings in the District Court. The parents filed a jury demand. The court denied the motion, citing 41-3-607. The court consolidated the adjudicatory and dispositional hearings, found the youths to be "in need of care", found that the parents had not complied with the approved treatment plan, found them to be beyond rehabilitation, and terminated their parental rights. The parents appealed the denial of the jury trial, alleging that 41-3-607(4) was unconstitutional pursuant to Art. II, sec. 24, of the 1972 Montana Constitution. The Supreme Court held that in Montana the state constitution guarantees the right to a jury trial only in the class of cases in which the right was enjoyed when the constitution was adopted. When the constitution was first adopted in 1889, there was no right to a jury trial in parental rights termination proceedings because such proceedings did not exist. Because there was no right to a jury trial for civil proceedings to terminate parental rights when the Montana Constitution was adopted in 1889 and recodified in 1972, such right could not be brought within the protection of Art. II, sec. 26, of the 1972 Montana Constitution. Because the adjudicatory and dispositional hearings may be consolidated, as was the case here, the court held it was unlikely the Legislature intended to provide for a jury trial at the adjudicatory hearing but not at the dispositional hearing. In re C.L.A. & J.A., 211 M 393, 685 P2d 931, 41 St. Rep. 1444 (1984), followed in In re M.H. & G.H., 2006 MT 208, 333 M 286, 143 P3d 103 (2006).

41-3-608. Notice.

Compiler's Comments

2001 Amendment: Chapter 83 near beginning after "relationship" deleted "based on abandonment", after "whether the" substituted "provisions of 41-3-428 and 41-3-429" for "rules of civil procedure", after "process" deleted "on the parents", and deleted former second and third sentences that read: "If the parents were not served personally, the petitioner must file an affidavit stating what efforts have been made to locate the parent or parents of the child. The affidavit must be filed at least 10 days prior to the hearing." Amendment effective March 20, 2001.

Saving Clause: Section 8, Ch. 83, L. 2001, was a saving clause.

Case Notes

Petition for Long-Term Custody Included With Petition for Termination of Parental Rights — No Requirement for Filing Subsequent to Hearing: The state petitioned to terminate the mother's parental rights or, alternatively, to grant long-term custody to the state with the right to assign guardianship to the children's grandmother. Because the District Court combined the permanency hearing with the termination hearing, the petition for long-term legal custody was not filed subsequent to the hearing, which the mother contended violated 41-3-412 (renumbered 41-3-445) and erroneously denied her sufficient notice. However, 41-3-412 (renumbered 41-3-445) does not require that a petition for long-term custody be filed subsequent to a hearing. That petition may be filed at the same time as a petition to terminate parental rights, and this alternative petition provides a parent with adequate notice of issues to be raised at the hearing. Thus, the court did not err in awarding long-term custody without requiring a separate petition limited to that issue. In re Custody & Parental Rights of T.Z. & J.Z., 2000 MT 205, 300 M 522, 6 P3d 960, 57 St. Rep. 806 (2000).

Lack of Personal Notice — Due Process Not Violated: Mother abandoned her children after two failed treatment plans and neglected to apprise the Department of Family Services (now Department of Public Health and Human Services) of her whereabouts for over 90 days prior to initiation of termination proceedings, during which time Department efforts to contact her were unsuccessful. Relying on 41-3-401 (renumbered 41-3-422), she later argued that because she was not personally served with notice of the termination proceedings, her due process rights were violated. However, this section outlines the notice requirements applicable to parent-child relationship termination proceedings. The District Court, after noting the Department's efforts to locate mother and the fact that she was under actual notice from the onset of Department involvement that her parental rights could be terminated if she failed to follow court-ordered treatment plans, properly held that the notice requirements of this section were satisfied. In re A.E., C.E., S.R., & J.R., 255 M 56, 840 P2d 572, 49 St. Rep. 877 (1992).

41-3-609. Criteria for termination.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 40, Ch. 716, L. 2023. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

2005 Amendment: Chapter 349 inserted (5) concerning proceedings under the Indian Child Welfare Act. Amendment effective October 1, 2005.

2003 Amendments — Composite Section: Chapter 44 in (4)(b) at end inserted "within a reasonable time". Amendment effective February 26, 2003.

Chapter 504 in (1) after "finding" inserted "established by clear and convincing evidence, except as provided in the federal Indian Child Welfare Act and if applicable"; and made minor changes in style. Amendment effective October 1, 2003.

Preamble: The preamble attached to Ch. 44, L. 2003, provided: "WHEREAS, in In re C.R.O., 2002 MT 50, 309 Mont. 48, 43 P.3d 913 (2002), the concurring opinions urged the Legislature to revisit section 41-3-609(4)(b), MCA, concerning termination of parental rights without requiring a treatment plan."

1999 Amendments — Composite Section: Chapter 395 in (4)(d) substituted "45-2-101" for "45-2-101(64)". Amendment effective October 1, 1999.

Chapter 566 at end of (1)(b) after "parents" deleted "as set forth in 41-3-102"; deleted former (1)(c) that read: "(c) the identity of the parent is unknown and has been unknown for a period of 90 days and reasonable efforts to identify and locate the parent have failed"; inserted (1)(d) relating to circumstances listed in 41-3-403(2)(a) through (2)(e); inserted (1)(e) relating to putative father meeting criteria listed in 41-3-403(3)(a) through (3)(c); deleted former (1)(f) that read: "(f) the parent has substantially failed to successfully complete or meet the goals of a treatment plan approved by the court and the child has been in an out-of-home placement for a cumulative total period of 1 year or longer"; deleted former (2)(c) that read: "(c) a single incident of life-threatening or gravely disabling injury to or disfigurement of a child caused by the parent"; deleted former (2)(f) and (2)(g) that read: "(f) the injury or death of a child because of proven abuse or neglect; and

(g) any reasonable efforts by protective service agencies that have been unable to rehabilitate the parent"; in (3) deleted former second sentence that read: "The court shall review and, if necessary, order an evaluation of the child's or the parent's physical, mental, and emotional conditions"; inserted (4)(a) relating to parents who meet criteria of subsections (1)(a) through (1)(e); in (4)(c) after "is" inserted "or will be" and at end substituted "and reunification of the child with the parent is not in the best interests of the child because of the child's circumstances, including placement options, age, and developmental, cognitive, and psychological needs" for "and a treatment plan is not practical considering the incarceration"; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendments: Chapter 480 at end of (1)(a) substituted "42-2-402 and 42-2-412" for "40-6-135"; and made minor changes in style.

Chapter 514 in (1)(b) substituted "41-3-102" for "41-3-102(7)(e)"; in (2)(f) and (4)(c) substituted "child" for "sibling"; in (4)(a) inserted "or clinical psychologists" and after "the parent" deleted "is so severely mentally ill that the parent"; and made minor changes in style. Amendment effective May 2, 1997.

Chapter 516 in (1)(b), at end, substituted "41-3-102(8)(e)" for "41-3-102(7)(e)" (voided by Ch. 514); inserted (1)(c) regarding a parent whose identity is unknown; inserted (1)(d) regarding a parent convicted of certain felonies; deleted former (1)(d) that read: "(d) the parent has failed to successfully complete a treatment plan approved by the court within the time periods allowed for the child to be in foster care under 41-3-410 unless it orders other permanent legal custody under 41-3-410"; inserted (1)(f) regarding a parent who fails to complete a treatment plan; in (2)(f), after "death of a", substituted "child" for "sibling" and after "proven" deleted "parental"; in (4)(c), after "death", substituted "or serious bodily injury, as defined in 45-2-101(64), of a child" for "of a sibling"; deleted (5) that read: "(5) If a person is convicted of a felony in which sexual intercourse occurred or if a minor is adjudicated a delinquent youth because of an act that, if committed by an adult, would be a felony in which sexual intercourse occurred and, as a result of the sexual intercourse, a child is born, the court may terminate the offender's parental rights to the child at any time after the conviction or adjudication"; and made minor changes in style.

Severability: Section 172, Ch. 480, L. 1997, was a severability clause.

Applicability: Section 173, Ch. 480, L. 1997 provided: "(1) [Sections 1 through 156] [Title 42, chapters 1 through 7, and Title 52, chapter 8] apply to proceedings commenced on or after October 1, 1997.

(2) A petition for adoption filed prior to October 1, 1997, is governed by the law in effect at the time the petition was filed.

(3) The putative father registry requirements apply to children born on or after October 1, 1997."

1995 Amendment: Chapter 458 in (1)(b) substituted "41-3-102(7)(e)" for "41-3-102(8)(d)"; and made minor changes in style. Amendment effective April 14, 1995.

Code Commissioner Correction: In (1)(b), pursuant to the authority contained in sec. 73, Ch. 18, L. 1995, the Code Commissioner substituted reference to 41-3-102(7)(e) for reference to 41-3-102(8)(d).

Severability: Section 4, Ch. 369, L. 1995, was a severability clause.

Effective Date: Section 5, Ch. 369, L. 1995, provided that subsection (5) is effective April 12, 1995.

1993 Amendment: Chapter 439 at end of (1)(b) substituted reference to 41-3-102(8)(d) for reference to 41-3-102(7)(d).

1991 Amendment: Inserted (1)(d) regarding parental completion of a court-ordered treatment plan; and made minor changes in style. Amendment effective July 1, 1991.

1985 Amendments: Chapters 15 and 388 in (1)(a) substituted "40-6-135" for "40-6-132 through 40-6-134".

Chapter 388 inserted (4) establishing when a treatment plan is not required.

Case Notes

General 1470
Procedure 1480
Best Interests of Child 1497
Abandonment 1501
Abuse and Neglect 1504
Treatment Plan and Compliance 1508
Standard of Review 1532

GENERAL

Termination of Parental Rights Affirmed — Mother Unlikely to Change in Reasonable Time. In re C.K., 2022 MT 27, 407 Mont. 329, 503 P.3d 1104.

District Court Terminated Father's Parental Rights After Child Reunified With Mother — No Abuse of Discretion: Shortly after a child's birth, the District Court adjudicated the baby as a youth in need of care and granted temporary legal custody to the Department of Public Health and Human Services (DPHHS) for 6 months. Over the next 2 years, the father failed to engage with his treatment plan, failed to make progress on his behavioral health and substance use issues, was intermittently incarcerated, and negatively impacted the mother's ability to provide a stable environment for the child. The District Court ultimately terminated his parental rights. On appeal, the father argued that the child no longer met the requirement of being a youth in need of care when the termination occurred, because by that time the child had been reunified with the mother. The Supreme Court found that although the District Court need not have proceeded with the termination action after the child had achieved permanency with the mother, it was not abuse of discretion to terminate. In re D.D., 2021 MT 66, 403 Mont. 376, 482 P.3d 1176.

Stipulation to Not Provide Reunification Services — No Error in Termination of Parental Rights — No Ineffective Assistance of Counsel When Mother Incarcerated and Children Out of Her Care For More Than 2 Years in 3-Year Period: After her parental rights were terminated, the mother claimed she had received ineffective assistance of counsel. She argued that by stipulating to the request of the Department of Public Health and Human Services that it not provide reunification services, her attorney had acknowledged she had subjected the children to chronic, severe neglect, which led to the termination of her rights. Prior to the hearing on termination, however, the mother had been sentenced to 48 months in federal prison. In its termination order, the District Court emphasized that the children had been out of the mother's care for 31 of the past 34 months and that they would be out of her care for another 23 months. The District Court also based the termination on the testimony of a court-appointed special advocate and the guardian ad litem that it would be in the children's best interests. Based on the evidence, the Supreme Court affirmed, concluding that the mother had not been prejudiced by her attorney's stipulation. In re D.A.D., 2021 MT 2, 402 Mont. 399, 478 P.3d 809.

Filing Certificate of Service of Notice to Tribe — Notice Sufficient Under ICWA: After a father's parental rights were terminated by the District Court, he appealed to the Supreme Court, arguing that the Department of Public Health and Human Services failed to provide proper notice of the proceedings to the tribal entity as required under the Indian Child Welfare Act of 1978 (ICWA). The Supreme Court affirmed, finding that the Department had filed a certificate of service attesting it had provided the petition for termination to the tribe through registered mail, which was sufficient notice under the ICWA. In re S.B., 2019 MT 279, 398 Mont. 27, 459 P.3d 214.

Ineffective Assistance of Counsel: In protracted litigation, the Department of Public Health and Human Services would not give an out-of-state father, who was not unfit, custody of his child and the father's appointed counsel failed in many ways to advocate effectively for him. The District Court ultimately terminated the father's parental rights. Reviewing the case on the father's appeal, the Supreme Court laid out the course of actions the Department should have taken and found that the father's counsel had been ineffective, which prejudiced his case and violated the father's due process rights. The Supreme Court reversed and remanded. In re E.Y.R., 2019 MT 189, 396 Mont. 515, 446 P.3d 1117.

Termination of Parental Rights Proper — Parent's Failure to Engage With Counsel and Department Not Basis for Due Process Claim: A father failed to sign and return his treatment plan and did not provide current contact information to his attorney or the Department of Public Health and Human Services. After his parental rights were terminated, he asserted that he was denied due process of law on the basis that (1) he was not served with the petition for temporary legal custody before his child was adjudicated a youth in need of care, (2) he received ineffective assistance of counsel, and (3) the Department failed to make reasonable efforts to prevent the removal of his child. The Supreme Court found the due process claim to be unfounded because the father was served with the petition prior to termination and was aware of the proceedings throughout, a parent cannot establish ineffective assistance of counsel through his own failure to contact and engage with counsel, and the father did not fulfill his obligation to engage with and maintain sufficient contact with the Department for the Department to be able to assist the father. In re B.J.J., 2019 MT 129, 396 Mont. 108, 443 P.3d 488.

Termination of Parental Rights — Removal of Infant — Mother Located in Another State — Department Policies Not Followed — Evidentiary Admissions Clarified: The Montana Department of Public Health and Human Services, Child and Family Services Division, became involved with a mother and child when the mother tested positive for methamphetamine and marijuana at the child's birth. During portions of the proceeding, the mother lived in different states, did not own a vehicle, did not have a driver's license, and could not make it to Montana due to weather. The District Court ultimately terminated the mother's parental rights, finding that the mother did not successfully complete her treatment plan and the condition rendering her unfit, unable, or unwilling to parent was unlikely to change. On appeal, the Supreme Court reversed, holding that the Department failed to provide reasonable efforts to place the child as close as possible to the mother's home in violation of the Department's policies, that it did not implement a service provision plan that could successfully address the mother's substance abuse problem, that the removal of an infant implicates different services than the removal of an older child, that it failed to take efforts to identify or locate a potential kinship placement, that it failed to provide reasonable efforts designed to reunify the mother and her child, and that the presumption in favor of termination in 41-3-604 was misplaced. The court then clarified In re M.C., 2017 MT 252, 389 Mont. 78, 403 P.3d 1266, to hold that it did not intend that case to be interpreted to permit courts to admit any and all written reports or evaluations or service-related documents over otherwise valid hearsay or foundation objections. In re R.J.F., 2019 MT 113, 395 Mont 454, 443 P.3d 387.

Conditional Relinquishment in Previously Dismissed Case — No Application in Subsequent Termination Case: The mother signed a conditional relinquishment of parental rights in an earlier abuse and neglect case that was later dismissed. Three years later, when the mother was involved in another abuse and neglect case, the Department of Public Health and Human Services asked the District Court to terminate her rights based on the earlier relinquishment, which it did. The mother appealed and argued to the Supreme Court that the relinquishment from a dismissed case could not be used against her in a subsequent case. The Supreme Court agreed, holding that the application of the relinquishment violated the mother's due process rights. Accordingly, it reversed and remanded the matter to the District Court to proceed without applying her relinquishment. In re K.B., 2019 MT 73, 395 Mont. 213, 437 P.3d 1042.

Abuse of Discretion to Allow CASA to Subpoena Father's Therapy Notes and to Cross-Examine Him — Harmless Error: In a parental termination proceeding, the District Court allowed the child's court-appointed special advocate (CASA) to subpoena the father's therapy notes and allowed her to cross-examine him. After his parental rights were terminated, the father appealed. The Supreme Court agreed that the District Court had abused its discretion and that the CASA had exceeded the scope of her authority; however, based on other evidence in the record, it concluded the error to be harmless. In re J.D., 2019 MT 63, 395 Mont. 141, 437 P.3d 131.

Determination of Indian Status — No "Reason to Know" Under ICWA — No Facts, Affidavits, or Allegations That Children Were Indian: A termination proceeding under 41-3-609 was appealed on the basis that an affidavit by a child protective specialist gave the District Court reason to know that the children were Indian and may be subject to the Indian Child Welfare Act (ICWA). The Supreme Court found no ICWA violation given that there was no indication in over 2 years of pretermination proceedings that the children were enrolled members of a tribe or were eligible for enrollment, or that the mother or the children's fathers were enrolled members. In re J.J.C., 2018 MT 317, 394 Mont. 35, 432 P.3d 149.

Indian Child Welfare Act Not Triggered Unless Parental Relationship Exists: The District Court's decision to terminate a putative father's parental rights without complying with the requirements of the Indian Child Welfare Act under 25 U.S.C. 1912 was not clearly erroneous because the putative father never had custody or a meaningful family relationship with the child. In re P.T.D., 2018 MT 206, 392 Mont. 376, 424 P.3d 619.

Admission of Psychological Evaluation — Hearsay Exception Not Required — Unique Statutory Scheme of Youth in Need of Care Proceedings: The District Court ordered a mother's treatment plan, which required her to undergo a psychological evaluation, and she signed the treatment plan, agreeing to follow the evaluation's recommendations. The psychological evaluation became part of the court proceedings, allowing the court to consider any part of the evaluation through the abuse and neglect proceeding. After the District Court terminated the mother's parental rights, she appealed. The Supreme Court affirmed, finding that the District Court properly admitted the mother's psychological evaluation at the hearing to determine whether to terminate the mother's parental rights and that it did not need to be admitted as a hearsay exception. In re M.C., 2017 MT 252, 389 Mont. 78, 403 P.3d 1266, distinguished in In re R.J.F., 2019 MT 113, 395 Mont. 454, 443 P.3d 387, relating to valid hearsay or foundational objections.

Termination of Parental Rights Proper When Record Clearly Shows Reasonable Efforts Made to Reunite Family — Failure of Mother to Cooperate With Getting New Attorney Appointed — Counsel Retained at All Critical Stages of Proceeding — No Due Process Violation: The District Court did not abuse its discretion when it terminated the mother's parental rights when the record clearly shows reasonable efforts were made to reunite the family pursuant to 41-3-423(1) (see 2023 amendment to 41-3-423) and because 41-3-609(1)(f) does not require a specific finding by the District Court that reasonable efforts were made before terminating the mother's parental rights. Because she had counsel at all critical states of the proceedings, the mother's due process right was not infringed when she was without counsel due to her own failure to cooperate. In re M.V.R., 2016 MT 309, 385 Mont. 448, 384 P.3d 1058.

Claim of Ineffective Assistance of Counsel in Termination Proceedings — Attorney Within Range of Competence Despite Offer of Proof: At the end of a hearing to determine whether a mother's parental rights should be terminated, the mother's court-appointed counsel from the Office of State Public Defender submitted an offer of proof of his own incompetency and lack of preparation. The mother's counsel had earlier sought to vacate his appointment as her attorney based on his lack of knowledge in representing a client in a termination proceeding. On appeal, the mother argued that she had received ineffective assistance of counsel. Applying Strickland, the court affirmed, concluding that the mother's attorney was within the range of competence required of attorneys in similar cases and that the mother could not establish that she had suffered any prejudice. In re Adoption of A.W.S., 2016 MT 194, 384 Mont. 278, 377 P.3d 1201.

Mother Unlikely to Change Within Reasonable Time: The Department of Public Health and Human Services removed the mother's two children from her care after 17 referrals over a period of 3 years. The mother stipulated to a treatment plan and to having the District Court adjudicate her children as youths in need of care. However, the mother subsequently failed to abide by the stipulated treatment plan. The District Court eventually terminated the mother's parental rights. On appeal, the Supreme Court affirmed, holding that the District Court properly found that the conduct or condition that made the mother unfit to parent was unlikely to change within a reasonable time. In re C.W.E., 2016 MT 2, 382 Mont. 65, 364 P.3d 1238. See also In re X.M., 2018 MT 264, 393 Mont. 210, 429 P.3d 920.

No Abuse of Discretion in Terminating Parental Rights When Conditions Rendering Mother Unfit to Parent Unlikely to Change Within Reasonable Time: A mother's failure to object to a treatment plan prevented her from challenging it on appeal. In this case, because the children were adjudicated youths in need of care, the mother's treatment plan was unsuccessful, and clear and convincing evidence was present that the condition rendering the mother unfit to parent was unlikely to change, the court was within its discretion to terminate parental rights. In re C.M., 2015 MT 292, 381 Mont. 230, 359 P.3d 1081.

Termination of Parental Rights Proper — Prior Termination of Rights Relevant Where Parent Is Unlikely to Change Behavior: A couple of months before the birth of I.T., the mother's rights to her three children were terminated due to her drug use. Shortly after I.T.'s birth, I.T. was placed in a neonatal intensive care unit for drug withdrawal treatment. At that time, the state petitioned for emergency protective services and later requested and received approval that it need not provide preservation or reunification services to the mother given the prior termination for parental rights and the mother's unlikeliness to change her behavior that led to termination. Subsequently, the mother's parental rights to I.T. were terminated. On appeal, the Supreme Court affirmed the District Court's ruling based on substantial evidence in the record that the mother's chemical dependency was not likely to change. In re I.T., 2015 MT 43, 378 Mont. 239, 343 P.3d 1192. See also In re C.B., 2019 MT 294, 398 Mont. 176, 454 P.3d 1195.

Improper Termination of Parental Rights by Default Judgment — Abuse of Discretion — Action to Terminate Other Parent's Rights Inappropriate: A mother filed a petition to terminate the parental rights of her infant daughter's father, who was incarcerated at the time. Despite the father's efforts to respond timely, the District Court, without a hearing, evidence, or findings, entered default judgment. The father appealed the termination to the Supreme Court, which reversed, concluding that parental rights cannot be terminated pursuant to a default judgment. The Supreme Court also emphasized that a natural parent cannot petition to terminate the parental rights of the other natural parent except in the case of a stepparent adoption. In re K.J.B., 2014 MT 327, 377 Mont. 270, 339 P.3d 824, distinguished in In re A.M.S., 2016 MT 22, 382 Mont. 145, 364 P.3d 1261.

Reasonable Efforts Adequate — Termination Proper: A mother appealed the termination of her parental rights, arguing that the Department of Public Health and Human Services was precluded from seeking termination of her parental rights when it failed to make reasonable efforts to reunite her with her child by not providing recommended mental health treatment. The Supreme Court affirmed, concluding that because the mother was on a waiting list with multiple mental health providers as a result of the Department's efforts and because the mother's ability to parent most likely would not have improved within the period of time between removal of the child and termination of parental rights had the recommended counseling taken place, additional reasonable efforts were not required. In re K.L., 2014 MT 28, 373 Mont. 421, 318 P.3d 691.

Termination of Parental Rights Not in Compliance with Requirements of ICWA and Parallel State Law: The District Court terminated the appellant Indian mother's parental rights to her two children. In reversing for a new termination hearing, the Supreme Court found that the termination proceedings did not comply with the mandates of the Indian Child Welfare Act (ICWA) because the mother and the tribe should have received notice of the petition for termination at least 10 days in advance of the termination hearing. At the termination hearing the ICWA expert, pursuant to the ICWA and 41-3-609, was required to testify as to whether the mother's continued custody was likely to result in serious emotional or physical damage to the children, but the ICWA expert failed to provide the required testimony. The termination proceeding record did not establish that the state satisfied ICWA requirements that active efforts be made to provide remedial services and rehabilitation programs that were designed to prevent the breakup of the Indian family. In Re K.B. and T.B., 2013 MT 133, 370 Mont. 254, 301 P.3d 836.

However, see In re M.S., 2014 MT 265, 376 Mont. 394, 336 P.3d 930, in which the Supreme Court held that even though the Department of Public Health and Human Services did not provide appropriate proof that the father's tribe had received proper notice of the termination hearing, the Department made "active efforts" as required under the ICWA, and that the error in this case was harmless.

Father's Behavior Unlikely to Change in Reasonable Amount of Time — Parental Rights Properly Terminated: The District Court did not abuse its discretion in terminating a father's parental rights by concluding that the father's behavior would not change within a reasonable amount of time because the father had continually demonstrated over an extended period of time that he would not take the necessary steps to establish a relationship with his child. In re D.B., 2012 MT 231, 366 Mont. 392, 288 P.3d 160.

No Showing of Ineffective Assistance of Counsel for Counsel's Failure to Argue Alternatives — Termination of Parental Rights Affirmed: In a hearing in which the District Court terminated a father's parental rights, the father's counsel did not provide ineffective assistance by failing to advocate for appropriate alternatives to termination of parental rights. Counsel argued against granting the petition for termination, and the question of alternatives had not yet arisen. In re B.M. and P.M., 2010 MT 114, 356 Mont. 327, 233 P.3d 338.

Long-Term Incarceration Rendering Parent's Unfitness Unlikely to Change — Termination of Parental Rights Affirmed: The District Court did not clearly err in terminating a mother's parental rights after finding that the mother's long-term incarceration in federal prison rendered her unfit and was unlikely to change within a reasonable time. Termination of parental rights was affirmed. In re B.S. & G.S., 2009 MT 113, 350 M 132, 206 P3d 74 (2009).

Sufficient Evidence to Terminate Rights of Incarcerated Parent: The District Court did not abuse its discretion in terminating the parental rights of an incarcerated parent after citing: (1) the fact that the child would have been in foster placement for more than 15 of the most recent months before the parent was eligible for parole, thus satisfying the presumption in 41-3-604(1); (2) the parent's criminal history, including seven prior felonies and four sentence revocations; (3) the parent's history of voluntary underemployment, despite the parent's asserted wish to support the child; (4) the parent's failure to establish a substantial relationship with the child through visits or regular contact; (5) the failure of the parent to manifest an ability to assume legal and physical custody because of incarceration; (6) the child's need for immediate permanent placement in order to meet the child's developmental, cognitive, and psychological stability needs; and (7) the inability of the parent to provide for immediate placement because of incarceration. The parent appealed on grounds that the District Court improperly relied on the presumption in 41-3-604(1). The Supreme Court agreed that the presumption was not satisfied because the child had not been in foster care for the requisite amount of time. However, the court noted that parental rights may properly be terminated if the District Court correctly relies on any one basis set out in 41-3-609. In this case, the District Court correctly relied on several bases other than the statutory presumption and thus did not abuse its discretion in terminating the parent's rights. In re M.P., 2008 MT 39, 341 M 333, 177 P3d 495 (2008).

Mother Allowed to Challenge Trial Court's Findings Respecting Her Treatment Plan Resulting in Termination of Her Parental Rights: The appellant did not object to any of the procedures followed in the lower court proceedings concerning the termination of her parental rights but did argue that the trial court erred in rendering its factual findings. The Supreme Court stated that parental rights are a fundamental liberty interest that must be protected by fundamentally fair procedures and that the lower court's finding of fact were subject to review as to whether the findings were clearly erroneous. The trial court found that the appellant had performed some of the requirements of the treatment plan but had failed to meet other parts, including urinalysis testing. The lower court ruled that in failing to perform all required tasks, the appellant had failed to achieve the overall changes contemplated by the treatment plan. The Supreme Court rejected the appellant's argument that the Supreme Court could excuse noncompliance with any particular aspect of the treatment plan and held that the lower court was correct in finding that the treatment plan had not been fully complied with and that therefore the mother's parental rights should be terminated. In re D. F., 2007 MT 147, 337 M 461, 161 P3d 825 (2007).

Findings Based on More Than Prior Conviction for Crime Against Child — Sufficient Findings to Substantiate Termination of Parental Rights: A father asserted that the District Court lacked sufficient evidence to terminate his parental rights because the court relied on a prior crime committed in Texas that, if committed in Montana, would have been only a misdemeanor. The Supreme Court found that substantial evidence existed to support termination. In addition to the prior sexual crime against a child that was an aggravating circumstance under Montana law, the District Court also found that the father had no significant contact with his children for more than 3 years and failed to complete a treatment plan, that the children had been in foster care for 28 months prior to the termination hearing, and that there was evidence that one of the children claimed that the father sexually abused her. Termination of parental rights was affirmed. In re. M.A.L., D.L., & T.L., 2006 MT 299, 334 M 436, 148 P3d 606 (2006).

Preservation or Reunification Services Not Required When Child Subjected to Aggravating Circumstances: The state does not need to make reasonable efforts to provide family preservation or reunification services if a court finds that a parent has subjected a child to any of the aggravating circumstances listed in 41-3-423(2)(a). In re M.A.L., D.L., & T.L., 2006 MT 299, 334 M 436, 148 P3d 606 (2006).

Inability of Father to Assume Role of Parent Within Reasonable Time — Parental Rights Properly Terminated: The District Court terminated a father's parental rights based on the testimony of two clinical psychologists that it was unlikely that the father would be able to parent within a reasonable time. The father appealed on grounds that the District Court relied on testimony that was based on an evaluation made before the father engaged in various treatments through the prison system. Although the father took steps to rehabilitate himself, his extensive criminal history and lack of responsibility for behavior that made him unavailable to parent his child contradicted his claims of rehabilitation. Given the father's extensive history with mental instability, aggression, and crime, the District Court did not abuse its discretion in concluding that the father could not assume the role of parent within a reasonable time and in terminating parental rights in the best interests of the child. In re A.J.E., 2006 MT 41, 331 M 198, 130 P3d 612 (2006).

Res Judicata and Collateral Estoppel — Inapplicable Absent Final Judgment: In In re B.N.Y., 2003 MT 241, 317 M 291, 77 P3d 189 (2003), the Supreme Court held that a mother's due process rights were violated in parental rights termination proceedings. Almost immediately after the 2003 decision, the state began new proceedings. The mother asserted that res judicata and collateral estoppel barred the new action. The District Court disagreed, and the mother appealed, but the Supreme Court affirmed. Both res judicata and collateral estoppel require a final judgment in an initial action before they preclude a similar future action. The initial order terminating the mother's parental rights did not constitute a final judgment as a result of In re B.N.Y. The 2003 decision had no preclusive effect in the current action, and the mother's res judicata and collateral estoppel arguments failed. In re B.N.Y., 2006 MT 34, 331 M 145, 130 P3d 594 (2006). See also Baltrusch v. Baltrusch, 2006 MT 51, 331 M 281, 130 P3d 1267 (2006), and In re M.N., J.N., Jr., & R.N., 2011 MT 245, 362 Mont. 186, 261 P.3d 1047.

Evidence of History of Violence — Consideration Not Limited to Parent or to Violence of Another Committed During Course of Relationship With Parent — Converse Fallacy of Accident or Hasty Generalization: In a child abuse and neglect proceeding, the physician doing psychological evaluations of the parents was given documents that referred to the father's alleged history of violence in another state. On appeal of the termination of parental rights, the mother argued that because she was neither dating nor married to the father at the time of the alleged violence, the doctor should not have considered the father's violent history in evaluating her. The mother relied on three cases in which evidence of violence by a spouse or intimate partner that was committed during the course of the relationship with the parent, who is the subject of the inquiry, was held admissible. The Supreme Court held that the cases cited by the mother do not require a court to exclude any evidence if that evidence is relevant. If the evidence is admissible in court, a fortiori, it is admissible in the psychologist's evaluation. By relying on the cited cases, the mother committed the converse fallacy of accident or hasty generalization. In re D.B., 2004 MT 371, 325 M 13, 103 P3d 1026 (2004).

Lack of Fitness Unlikely to Change Within Reasonable Time — Consideration of Past Conduct Permissible: The mother was diagnosed with mental illnesses in sufficient number, degree of severity, and effect on the children's welfare to support the District Court's conclusion that the mother was unlikely to change within a reasonable amount of time. The father's mental illnesses and violent tendencies posed a danger to the children's future welfare. The District Court did not commit clear error in determining that the father was unlikely to change within a reasonable amount of time. In re D.B., 2004 MT 371, 325 M 13, 103 P3d 1026 (2004). See also In re C.B., 2014 MT 4, 373 Mont. 204, 316 P.3d 177, In re J.O., 2015 MT 229, 380 Mont. 263, 354 P.3d 1242, and In re S.C.L., 2019 MT 61, 395 Mont. 127, 437 P.3d 122, in which the history of the mother's inability to care for her older children was permitted.

Misdiagnosis of Rare Skin Disease as Evidence of Parental Sexual Misconduct — Newly Acquired Evidence Did Not Undermine Validity of Adjudication of Children as Youths in Need *of Care — Termination of Parental Rights Upheld:* After the parents' 4-year-old daughter was diagnosed as a probable victim of parental sexual misconduct, the court ordered a TIA and protective services for all five children, who were all under 5 years of age. Both parents were criminally charged with abuse and neglect of their children. The father remained in jail for 1 year. The children were tested and found to be developmentally delayed in their speech, and both parents were diagnosed with psychological disorders. Both parents were ordered to complete treatment plans, which they failed to complete. Eventually, their parental rights were terminated. Two years after the initial diagnosis, it was determined that the daughter's physical symptoms were the result of a rare skin disease called lichens sclerosis et atrophicus (LSA) rather than sexual abuse. The parents appealed the termination of their parental rights and argued that the District Court had erred in adjudicating the children as youths in need of care based on the misdiagnosis. The parents further argued that the allegations of sexual molestation because of the misdiagnosis tainted the entire proceedings to such a degree that they were deprived of their rights to due process and fundamental fairness, thereby invalidating the subsequent termination ruling. The Supreme Court upheld the District Court and held that, based on the developmental delays and psychological disorders, the District Court had adequate grounds independent of the LSA misdiagnosis for adjudicating the children as youths in need of care under 41-3-422 and that the subsequent termination under this section was valid. In re D.B., 2004 MT 371, 325 M 13, 103 P3d 1026 (2004).

De Minimis Amount of Inadmissible Evidence in Findings — Adoption of State's Findings Not Reversible Error: The District Court issued findings and conclusions substantially similar to those proposed by the state, including a de minimis amount of inadmissible evidence. Nevertheless, on appeal, the Supreme Court concluded that, although discouraged, verbatim adoption of a prevailing party's proposed findings did not constitute error per se and that in this case, the careless but harmless inclusion of such a small amount of inadmissible evidence did not warrant reversing the ultimate decision terminating parental rights. In re M.W., K.W., & A.L., 2004 MT 301, 323 M 433, 102 P3d 6 (2004). See also In re Marriage of Allison, 269 M 250, 887 P2d 1217 (1994), and In re I.T., 2015 MT 43, 378 Mont. 239, 343 P.3d 1192.

Rights Terminated for Failure to Complete Treatment Plan, Criminal Activity, Inability to Parent, Likely Harm to Child if Returned to Parent, and Child's Best Interests: In a proceeding subject to the Indian Child Welfare Act of 1978, the father's parental rights with respect to a 4-year-old girl were properly terminated based on findings of fact and conclusions of law that he failed to complete several treatment plans, that he was involved in criminal activity before and after the proceeding was begun, that he had not made substantial changes that would allow for safe parenting, that serious emotional or physical harm would likely occur if the child were returned to him, and that the child's best interests would be served by the termination. In re M.D.M., 2002 MT 305, 313 M 51, 59 P3d 1142 (2002).

Termination for Serious Injuries to Baby, Incarceration and Parole Violations, Chemical Dependency, and Failure to Comply With Treatment Plan or Improve Parenting Skills: Parental rights of a father in his late teens were properly terminated. He inflicted numerous serious injuries on his 2-week-old son. He did nothing to improve his parenting skills, was chemically dependent, and did not comply or attempt to comply with the treatment plan. During his incarceration for injuring his son, he was cited for numerous major rule violations, including assault; made graphically violent drawings that expressed hatred, satanic overtones, death, and mutilation; and recited Marilyn Manson lyrics. He did not comply with the conditions of his parole. In re A.S., 2002 MT 265, 312 M 277, 59 P3d 382 (2002).

Termination of Parental Rights — Requirements of Indian Child Welfare Act: Under the Indian Child Welfare Act of 1978, 25 U.S.C. 1901, et seq., the party seeking termination of an individual's parental rights to an Indian child under state law must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the efforts have proved unsuccessful. The party seeking termination has the burden of proving beyond a reasonable doubt that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. In re Custody of A.L.R., A.A.R., & T.C.R., 2002 MT 183, 311 M 76, 54 P3d 17 (2002). See also In re I.B., 2011 MT 82, 360 Mont. 132, 255 P.3d 56, In re D.A. and M.A., 2013 MT 191, 371 Mont. 46, 305 P.3d 824, In Re K.B. and T.B., 2013 MT 133, 370 Mont. 254, 301 P.3d 836, and In re A.L.D., 2018 MT 112, 391 Mont. 273, 417 P.3d 342.

Recognition of Statutory Presumption Coupled With Parental Rights Termination Criteria — Parental Rights Properly Terminated: A mother contended that the District Court erred in terminating her parental rights by inappropriately relying on the statutory presumption in

41-3-604, contrary to the termination criteria in this section. The children had been in foster care for more than 15 of the most recent 22 months, so the presumption in 41-3-604 applied, but the presumption neither eliminates the substantive requirements of this section nor diminishes the clear and convincing burden of proof on the party seeking to terminate parental rights. However, in this case, the District Court both acknowledged the statutory presumption and considered the termination criteria, which included evidence that the mother had not successfully completed her treatment program and had two significantly handicapping conditions (marginal general aptitude and a personality disorder) that rendered her unfit to parent and that would not change within the foreseeable future. Thus, the mother's parental rights were properly terminated. In re B.H. & D.H., 2001 MT 288, 307 M 412, 37 P3d 736 (2001).

Circumstances Related to Termination of Parental Rights to First Child Relevant to Ability to Care for Second Child: The District Court noted that a mother's parental rights to her first child, S.P., had been terminated and concluded that, because the circumstances related to the termination in S.P.'s case were still present and relevant to the mother's ability to care for her second child, C.P., the mother's parental rights to C.P. should be terminated as well. The mother appealed, but the Supreme Court affirmed. Pursuant to subsection (1)(d) of this section, the parent-child relationship may be terminated if the parent has subjected the child to any of the circumstances listed in 41-3-423(2), including when a parent has had parental rights to the child's sibling or other child of the parent involuntarily terminated and the circumstances related to the termination of parental rights are relevant to the parent's ability to adequately care for the child at issue. The District Court did not abuse its discretion in holding that the circumstances related to the termination in S.P.'s case were still present and relevant to the mother's ability to care for C.P., that continuation of the parent-child relationship would likely result in substantial risk of harm to C.P., and that it was in C.P.'s best interests that parental rights be terminated. In re C.P., 2001 MT 187, 306 M 238, 32 P3d 754 (2001).

No Authority to Grant Third-Party Petition for Parenting Plan Absent Termination of Parental Rights: A young, single mother left her child in the temporary care of the Knopps, her aunt and uncle, while she sought employment and a place to live. About 2 months after the child was left with them, the Knopps petitioned for a parenting plan and support for the child. Although the document was referred to as a petition for a parenting plan, child support, and medical support, it was the functional equivalent of a petition for permanent custody. The Knopps applied for temporary custody and received it, ex parte, so that when the mother returned and tried to remove the child to their new home, she was not allowed to do so. The mother then sought termination of the guardianship and the return of her child. The mother's parental rights were never terminated or suspended by the state or county, nor were any proceedings ever commenced to demonstrate that the child was abused, dependent, or neglected. The District Court dismissed the petition, relying on In re Guardianship of D.T.N., 275 M 480, 914 P2d 579 (1996), in holding that the mother had a constitutional right to custody of her child and that permanent guardianship could not be granted because the mother's parental rights had not been terminated or suspended. The Knopps appealed, but the Supreme Court affirmed. The rule of law does not permit destruction of a natural parent's fundamental right to the custody of a child based simply on the subjective determination of the child's best interests. Rather, a natural parent cannot be denied custody of a child absent termination of parental rights for abuse or neglect pursuant to Title 41, ch. 3. In re Parenting of J.N.P., 2001 MT 120, 305 M 351, 27 P3d 953 (2001). See also In re A.R.A., 276 M 66, 919 P2d 388 (1996), and Girard v. Williams, 1998 MT 231, 291 M 49, 966 P2d 1155 (1998). However, see In re Parenting of M.M.G., 2012 MT 228, 366 Mont. 386, 287 P.3d 952, in which the Supreme Court held that the petitioners could seek a parenting plan if the petitioners could establish a child-parent relationship, even though the mother's parental rights had not been terminated, distinguishing this case from In re Parenting of J.N.P.

Statutory Termination Criteria Met:

A family preservation treatment plan listed four goals: (1) a plan for reunification; (2) a safety plan for the children; (3) timelines; and (4) a backup plan, including concurrent placement. The parents acknowledged that they did not comply with the goal of completing tasks within the established timelines, and the Department had been working with the parents for more than a year to get them to complete the treatment plans in order to reunify the family. Safety and cleanliness goals were not met, and psychological profiles of the parents indicated a lack of ability to provide a safe and appropriate home environment for their young children. There was little evidence that the condition rendering the parents unfit was likely to change within a reasonable time. The parents' compliance with the various treatment plans was characterized by a pattern of increasing their efforts as hearings approached and then slipping back into their previous behavior patterns. The statutory criteria for terminating parental rights was met, and the District Court did not err in doing so. The parents' contention of District Court error in finding that the mother had lost custody of another child because of her inability to parent, which was unsupported in the record, did not constitute grounds for dismissal because the error would have had no significant impact on the result and was therefore harmless. In re C.B. & J.B., 2001 MT 42, 304 M 252, 20 P3d 117 (2001).

Termination of parental rights was proper where evidence showed that: (1) parents did not challenge adjudication that children were youths in need of care; (2) court-approved treatment plans were unsuccessful; (3) the father's sexual conduct toward his daughter and his failure to obtain counseling rendered him unfit to provide adequate parental care; and (4) the conduct or condition that rendered the father unfit was unlikely to change within a reasonable time. In re T.M.M., 234 M 283, 762 P2d 866, 45 St. Rep. 1909 (1988).

Termination of Parental Rights Not Precluded by Conflicting or Ambiguous Expert Testimony: The father of three children appealed from a District Court ruling terminating his parental rights based on evidence that neither parent had complied with six treatment plans and that the parents remained unfit, unwilling, or unable to given their children adequate parental care. In affirming the District Court's termination of parental rights, the Supreme Court ruled that the existence of conflicting or ambiguous evidence presented by therapists regarding the father's progress in demonstrating any improvement in parenting skills does not preclude a termination of parental rights when the parent's conduct rendering him unfit to provide adequate care is unlikely to change within a reasonable time. In re C.D.S., S.E.S., & T.M.S., 2000 MT 313, 302 M 466, 14 P3d 1248, 57 St. Rep. 1327 (2000).

Finding That Jail Not Child-Friendly Place for Parental Visitation — Parental Incarceration Not Controlling Factor in Termination of Parental Rights: As part of its findings in terminating the rights of a parent who was incarcerated, the District Court held that a jail is not a child-friendly environment or an appropriate place for a parent-child visit. The parent appealed on grounds that the court erroneously made the implication from that finding that the parent's requests for visits were inappropriate and that the implication inappropriately colored the court's determination that the parent could not become an adequate parent within a reasonable time, amounting to an almost de facto determination that parents who are incarcerated cannot satisfactorily rehabilitate themselves to resume the parenting role. The Supreme Court disagreed and affirmed, finding that the parent's incarceration was not a controlling consideration. Substantial credible evidence supported the conclusion that jail is not a child-friendly place, and undisputed evidence that the parent neglected the child, made no progress on court-approved treatment plans, tested positive for drugs, was repeatedly incarcerated for crimes committed in the child's presence, and allowed unknown persons to care for the child was sufficient to support the conclusion that parental rights should be terminated. In re C.A., 2000 MT 227, 301 M 233, 8 P3d 116, 57 St. Rep. 931 (2000).

Findings Sufficient to Warrant Assignment to Long-Term Custody: The state petitioned to terminate the mother's parental rights or, alternatively, to grant long-term custody to the state with the right to assign guardianship to the children's grandmother. The District Court granted the latter. The mother did not contend that the court's findings were erroneous, but did argue that the court erred because its findings were not sufficiently specific to justify long-term custody to the state. The Supreme Court disagreed, noting that if the state follows fundamentally fair procedures, a parent may be divested of custody. Here, the District Court found that: (1) the children were youths in need of care; (2) the state had developed treatment plans for the mother, but the plans had not been followed; (3) the mother was warned that the last treatment plan was her final chance; (4) the mother had been given many opportunities to straighten out and retain custody of her children, but did not do so; (5) continuation of the parent-child legal relationship would likely result in continued abuse or neglect if the children were returned to the mother; (6) the mother's conduct and condition rendered her unfit, unable, and unwilling to give her children adequate parental care; (7) it would be in the children's best interest if they were allowed to visit with their mother as directed by the state, even if she was not their custodian; (8) since the children had been living with their grandmother, they had improved in school and become more socially involved; and (9) the grandmother was willing to act as the children's guardian. These findings were sufficiently specific to support the District Court's award of long-term custody to the children's grandmother, and that award was affirmed. In re Custody & Parental Rights of T.Z. & J.Z., 2000 MT 205, 300 M 522, 6 P3d 960, 57 St. Rep. 806 (2000).

Proper Termination of Parental Rights Based on Conviction for Sexual Assault of Child and Sexual Intercourse Without Consent With Child: Snyder pleaded guilty to sexual assault on a child and sexual intercourse without consent with a child based on his involvement with three young girls. His marriage was dissolved 6 months later and custody was awarded to his former wife, who remarried and then petitioned for termination of Snyder's parental rights so that their son could be adopted by her new husband. The petition was granted, and Snyder appealed. The plain language of 42-2-608 provides that the court may terminate a parent's rights and make the child available for adoption if a parent is convicted of sexual assault on a child or sexual intercourse without consent with a child. There is no statutory requirement that the sexual assault on a child or sexual intercourse without consent with a child has been committed on the adoptee. The trial court did not err when it held that clear and convincing evidence supported the termination of the father's parental rights based on his prior convictions. In re Adoption of Snyder, 2000 MT 61, 299 M 40, 996 P2d 875, 57 St. Rep. 288 (2000), following In re J.N. & A.N., 1999 MT 64, 293 M 524, 977 P2d 317, 56 St. Rep. 269 (1999).

Court Refusing to Terminate Parental Rights for One Child and Not for Second Child: Stephanie argued that the District Court's decision to terminate her parental rights with respect to one child and not with respect to her second child was reversible as being logically inconsistent. The Supreme Court held that the record contained evidence showing that she could handle the parenting of one child but was not up to the task of raising two children and therefore the lower court's decision was valid. In re J.L., D.L., & A.G., 277 M 284, 922 P2d 459, 53 St. Rep. 649 (1996), followed in In re B.C., 283 M 423, 941 P2d 106, 54 St. Rep. 690 (1997).

Probate Code Permanent Guardianship Proceeding — Dependency or Neglect Not Grounds for Terminating Mother's Custody of Child: A mother's parental rights were not terminated by circumstance when a court order granted, with her consent, temporary guardianship in the paternal grandparents. A later court, on the grandparents' petition for permanent guardianship under the Uniform Probate Code, found that the child was neglected or dependent and that the child's best interests would be served by granting the petition. The mother appeared in and contested the later action, withdrew her consent, and filed a petition to terminate the temporary guardianship. The guardianship provisions of the Uniform Probate Code were never intended as a substitute for the child custody provisions of Title 40 governing dissolution of marriage or for the procedures of this title governing termination of the parent-child relationship. The court relied on cases stating that a dependent neglected best interests of the child determination could not be made in a Uniform Probate Code permanent guardianship proceeding and had to be made under a child custody or parental termination proceeding. In re Guardianship of D.T.N., 275 M 480, 914 P2d 579, 53 St. Rep. 253 (1996).

Medical and Psychological Evaluations of Youth: In a proceeding to terminate parental rights, the rights of the child must be given paramount consideration, and when the evidence supports the court's expressed finding that an immediate evaluation of the youth was in the child's best interest, the court erred in denying a motion for medical and psychological evaluations of the child. In re J.J.G., 266 M 274, 880 P2d 808, 51 St. Rep. 793 (1994).

Mental Disease and Inability to Provide Care or Meet Treatment Plan — Parental Rights Terminated: The following facts and conclusions warranted termination of parental rights: (1) mother suffered from chronic schizophrenia, a borderline personality disorder, paranoia, and active hallucinations; (2) the children were found to be youths in need of care; (3) mother was incapable of adhering to any proposed treatment plan; and (4) mother was unfit and unable to provide adequate parental care, and her conduct and condition were unlikely to change within a reasonable amount of time. In re A.N.S. & L.M.R., 252 M 279, 828 P2d 1357, 49 St. Rep. 250 (1992).

Termination of Parental Rights Proper After Death of One Child and Consideration of Statutory Factors: After properly considering the statutory criteria of this section, especially the efforts exerted by the Department of Family Services (now Department of Public Health and Human Services) in trying to rehabilitate the mother as well as the circumstances surrounding the death of one child and the abuse and neglect of three others, the District Court did not err in finding that the treatment plan was unsuccessful, that the mother's conduct or condition was unlikely to improve within a reasonable time, and that it was in the children's best interests to terminate parental rights. In re J.H., S.H., & N.H., 252 M 31, 825 P2d 1222, 49 St. Rep. 112 (1992).

Parental Rights Terminated — Alcohol, Drug, Emotional, and Stability Problems — Failure to Complete Treatment: The District Court did not abuse its discretion or err in finding that the conduct of mother whose parental rights were terminated rendered her unfit as a parent and was unlikely to change within a reasonable time. Among other things, mother: (1) left the children with their grandmother because she "decided to screw off my life" as children's father had; (2) had a history of chronic drug and alcohol abuse and of emotional problems stemming from childhood;

(3) was recently hospitalized, once for depression and twice for pill overdoses; (4) had recently abandoned the children for a 9-day period at the end of which the Department placed them with their grandmother; and (5) failed to complete a three-part court-ordered program aimed at evaluating and treating her problems and helping her provide a stable home and environment for the children. In re Custody & Parental Rights of N.J. & A.J., 250 M 198, 819 P2d 166, 48 St. Rep. 752 (1991).

Award of Long-Term Custody Not Considered Termination of Parental Rights: An award of long-term custody under 41-3-406 (renumbered 41-3-438) is not equivalent to a termination of parental rights requiring that the statutory factors of this section be met. In re R.T.L.P., 238 M 384, 777 P2d 892, 46 St. Rep. 1354 (1989).

Three Prerequisites for Termination of Parental Rights: The Supreme Court found substantial credible evidence that the three prerequisites for termination of parental rights were met: (1) that S.B. was a youth in need of care under the statutory definitions of 41-3-102 since the child failed to thrive due to carelessness of the parent (citing In re C.A.R. & P.J.R., 214 M 174, 693 P2d 1214, 41 St. Rep. 2395 (1984)); (2) that a court-approved treatment plan was unsuccessful (citing In re R.J.W., 197 M 286, 642 P2d 1072, 39 St. Rep. 568 (1982)); and (3) that the conduct or condition rendering the parent unfit to provide adequate care was unlikely to change within a reasonable time (citing In re R.J.W., supra). In re S.B., 223 M 36, 724 P2d 168, 43 St. Rep. 1512 (1986).

PROCEDURE

No Reason to Know Child Possibly Eligible for Enrollment Based on Vague Assertion of Descendance From Unrecognized Tribe: In a case for a youth in need of care that ended in parental termination, one parent asserted possible eligibility for membership in the Lakota Sioux Tribe. Despite the Lakota Sioux not being a federally recognized tribe, the Department of Public Health and Human Services gave notice to the Bureau of Indian Affairs and received correspondence from one tribe stating that the child was not eligible for enrollment with that tribe. An appeal followed termination, asserting that termination was improper without a determination of the child's eligibility for enrollment in the Lakota Sioux Tribe. The Supreme Court affirmed, explaining that the record is void of any nonspeculative basis indicating reason to know the child is eligible for membership in a federally recognized tribe. In re L.H., 2021 MT 199, 405 Mont. 173, 492 P.3d 1218.

Termination of Parental Rights Reversed and Remanded for Final Determination of Children's Tribal Membership: The District Court terminated the mother's parental rights without a final determination of whether the children were subject to the federal Indian Child Welfare Act of 1978 (ICWA). On appeal, the Supreme Court found that the District Court abused its discretion by terminating her rights without a determination of the children's tribal membership status. Accordingly, the Supreme Court reversed and remanded the case to allow the tribe to make a determination and, if applicable, to conduct anew the termination proceedings subject to ICWA. In re M.T., 2020 MT 262, 401 Mont. 518, 474 P.3d 820.

Failure to Apply ICWA Standards at Outset of Proceedings — Cured by Subsequent ICWA-Compliant Adjudication — Termination Proper: After a father's parental rights were terminated by the District Court, he appealed to the Supreme Court, arguing that the District Court's failure to apply the Indian Child Welfare Act of 1978 (ICWA) for the first year of proceedings created a ripple effect that led to the improper termination of his rights. While the Supreme Court agreed that the District Court had erred in not applying the ICWA from the beginning of the proceedings, it found that the subsequent ICWA-compliant adjudication hearing cured the prior violations and affirmed the termination of rights. In re S.B., 2019 MT 279, 398 Mont. 27, 459 P.3d 214.

Children With Same Parents — Evidence on One Child's Status as Non-ICWA Presumptive for Other Child: A mother's two children were removed, and later the Department of Public Health and Human Services filed a petition to terminate her parental rights. At the initial removal hearing, the mother informed the District Court that the children may be Indian children as defined by the federal Indian Child Welfare Act (ICWA). Later, at the termination hearing, the Department provided a letter from the Crow Tribe stating that one of the children was not enrolled or enrollable into the tribe. After the District Court terminated the mother's rights based on non-ICWA standards of proof, she appealed, arguing that the District Court had not made a finding about her other child's status as an Indian child. The District Court had reasoned that both children had the same mother and same father and therefore if one child was not an Indian child, neither was the other. The Supreme Court affirmed the termination, ruling that the District Court's lack of a finding was harmless error. In re S.R., 2019 MT 47, 394 Mont. 362, 436 P.3d 696.

Detailed Findings of Active Efforts Required Prior to Termination Under ICWA: During termination proceedings, there were indications that two children might be Indian children. The District Court issued an order terminating the father's parental rights to the children. On appeal, the Supreme Court reversed, ruling that the District Court had failed to comply with the Indian Child Welfare Act (ICWA) due to the absence of detailed findings of what active efforts had been made to prevent the breakup of the Indian family and a finding that those efforts had been unsuccessful. The court remanded for further action. In re B.Y., 2018 MT 309, 393 Mont. 530, 432 P.3d 129.

Active Efforts to Prevent Breakup of Indian Family in Indian Child Welfare Proceeding — Specific Findings Required: The District Court terminated the parental rights of a mother of two children. On appeal, the Supreme Court reversed, finding that a complete lack of findings or a conclusion that active efforts had been made to prevent the breakup of the Indian family failed to meet the standard set forth in 25 U.S.C. 1912(d), part of the federal Indian Child Welfare Act (ICWA). The termination order was remanded with further instructions for complying with the ICWA. In re L.A.G. & N.L., 2018 MT 255, 393 Mont. 146, 429 P.3d 629.

Admission of Drug Results at Termination Hearing Improper — Sufficient Evidence in Support of Termination of Parental Rights: During a parental rights termination hearing, the District Court, citing 41-3-112(4), admitted the parents' drug test results through a court-appointed special advocate (CASA) and subsequently terminated the parents' rights. On appeal, the Supreme Court concluded that admitting the drug test results through the CASA was erroneous. The Supreme Court stated that 41-3-112(4) was enacted to allow a guardian ad litem to gather information from collateral sources to form and make recommendations as to the best interest of the child and that the subsection was not enacted as a bypass for the Department of Public Health and Human Services to admit evidence that would otherwise be inadmissible or to cure a party's failure to call a witness to testify. However, the Supreme Court affirmed, finding that admitting the drug test results was harmless and reversal was not warranted because substantial evidence supported the District Court's determination that the parents had failed to complete their treatment plans and that their conduct or the conditions rendering them unfit were unlikely to change within a reasonable time. In re I.M., 2018 MT 61, 391 Mont. 42, 414 P.3d 797.

Untimely Objection to Treatment Plan: A mother appealed the termination of her parental rights, arguing that her court-ordered treatment plan was inadequate because it did not take into account the pain that was the root cause of her addiction. The Supreme Court disagreed, holding that raising the objection for the first time at the termination hearing was not timely. Her failure to timely object resulted in the waiver of any argument about the plan's appropriateness on appeal. Furthermore, the mother had stipulated to the plan, and it had taken into account the mother's particular problems. In re C.B., 2014 MT 4, 373 Mont. 204, 316 P.3d 177. See also In re M.B., 2018 MT 205, 392 Mont. 368, 424 P.3d 606.

No Error in Not Holding Separate Reunification Hearing or Permanency Hearing: A court terminated the parental rights of a mother to her two children in Colorado in 2009. In 2012, the Department of Public Health and Human Services petitioned to forgo reasonable efforts to reunify the mother with her child and to terminate her parental rights because her parenting behavior had not changed since her parental rights to her other two children had been terminated. The Supreme Court found that although the lower court did not hold a separate "pre-hearing" to determine if reunification with the child was possible, the mother was on notice from the petition that the Department was requesting that reasonable efforts be abandoned and she had the opportunity to be heard at the termination hearing. In addition, the Supreme Court found that although the District Court did not conduct a permanency hearing, the Department's actions, including working with the father on a treatment plan in hopes of reunifying him with the child, were consistent with the purposes of such a hearing, and the failure to hold a permanency hearing was not a per se violation of parental rights. In re J.W., 2013 MT 201, 371 Mont. 98, 307 P.3d 274.

Termination of Parental Rights Under ICWA: A mother argued that the failure to hold an expert hearing under the Indian Child Welfare Act before the children were removed from her home did not satisfy the requirements of 25 U.S.C. 1912(e). The Supreme Court held that the District Court did not abuse its discretion by terminating the mother's parental rights because the termination was conducted according to the requirements of state and federal statutes and that the record clearly supported the District Court's findings of facts and conclusions of law. In re A.S. and T.S., 2011 MT 69, 360 Mont. 55, 253 P.3d 799.

Department's Reunification Efforts Held Reasonable — Termination of Parental Rights Over Siblings Held Sufficient Justification — No Abuse of Discretion: After the District Court terminated a mother's parental rights over her child C.J., the mother appealed, claiming as unreasonable the 4½ months that passed between the petition by the Department of Public Health and Human Services (Department) to be exempted from the "reasonable efforts" for reunification requirement under 41-3-423(2)(e), because the mother's rights over C.J.'s two siblings had also been terminated, and the date of the hearing. The Supreme Court held that the Department's efforts were reasonable notwithstanding the Department's petition, that there was no timeline provided in the statutes for the hearing, that the delay in holding the hearing did not subject the mother to a fundamentally unfair proceeding, and that the mother was correctly not given a treatment plan because her circumstances met the requirements of 41-3-609(1)(d) and 41-3-423(2)(e) regarding termination of a mother's rights over one child because her rights over other siblings were previously terminated. Therefore, the Supreme Court held that there was no abuse of discretion by the District Court in terminating the mother's parental rights over C.J. In re C.J., 2010 MT 179, 357 Mont. 219, 237 P.3d 1282.

Lack of Effective Counsel During Parental Rights Termination Hearing — Remand: Appellant father asserted that he received ineffective assistance of counsel during parental rights termination proceedings. The Supreme Court examined the quality of advocacy demonstrated at the adjudication hearing and agreed. The father's counsel failed to object to hearsay evidence presented during the hearing and did not file a response to the state's brief in support of admission of the evidence, which resulted in the automatic admission of the evidence. In addition counsel made no objections at the hearing, asked no questions on cross-examination, and failed to meet with the father prior to the hearing or request an extension to do so. Thus, the father received ineffective assistance of counsel, warranting remand. In re J.J.L., D.J.L., and R.D.L.L., 2010 MT 4, 355 Mont. 23, 223 P.3d 921, following In re A.S., 2004 MT 62, 320 Mont. 268, 87 P.3d 408, which was followed in In re T.N.-S., 2015 MT 117, 379 Mont. 60, 347 P.3d 1263. See also In re J.E.L., III, 2018 MT 50, 390 Mont. 379, 414 P.3d 279.

No Error in Finding Inapplicability of Indian Child Welfare Act to Parental Rights Termination Proceeding: At a hearing to terminate a father's parental rights, the father listed three Indian tribes that he thought either he or the children's mother was affiliated with. The District Court found that although the father was an enrolled member of one of the tribes, the children were not eligible or enrolled with that tribe. The father also asserted that he might have connections to a second tribe because of the mother's alleged membership, but in order for the Indian Child Welfare Act (ICWA) to apply, the child must be either a tribal member or eligible for tribal membership and be the biological child of a tribal member. Because the father could not assert that he was a member of the second tribe, the children could not qualify as members of the second tribe. The father also contended that there was possible heritage with a third tribe through the mother's father, but neither he nor the mother was a tribal member, so the children could not be biological children of a member of the third tribe. Additionally, any connection the children had with the third tribe through their maternal grandfather was preserved by their mother's continued custody and care. Therefore, the District Court did not err in finding that ICWA did not apply. In re J.J.L., D.J.L., and R.D.L.L., 2010 MT 4, 355 Mont. 23, 223 P.3d 921.

Facial Showing of Competence in Counsel's Representation of Mother in Parental Rights Termination Proceedings — Ineffective Counsel Claims Dismissed: A mother raised several claims concerning the effectiveness of counsel she received during proceedings to terminate her parental rights. The Supreme Court examined the record and found that the mother's trial attorney provided her with vigorous and competent representation. There was no showing or argument concerning trial counsel's training and experience, and there was facially competent representation in the trial record. The mother failed to establish a threshold showing of ineffective assistance of counsel, and her claims were therefore without merit. In re C.M.C., 2009 MT 153, 350 M 391, 208 P3d 809 (2009).

No Error in Denial of Continuance of Parental Rights Termination Proceeding to Determine Placement of Children: During his testimony at a hearing on termination of a father's parental rights, the father requested a continuance in order for a hearing to be held regarding whether placement of the children with their grandparents was in the children's best interests. The District Court denied the request, and on appeal the Supreme Court affirmed. The question of possible placement of the children had no bearing on whether the statutory criteria for terminating the father's parental rights had been established, and the District Court did not abuse its discretion in declining to delay final determination of the father's parental rights. In re B.S. & G.S., 2009

MT 98, 350 M 86, 206 P3d 565 (2009). See also In re O.A.W., 2007 MT 13, 335 M 304, 153 P3d 6 (2007).

Proper Consideration of Circumstances of Prior Involuntary Termination of Parental Rights — Clear and Convincing Evidence to Support Termination of Rights to Subsequent Child: The parents contended that there was no clear and convincing evidence to support termination of their parental rights to A.H.D. based on the prior involuntary termination of their rights to two other children. The Supreme Court disagreed. The District Court did not err in relying on relevant testimony presented at earlier hearings and incorporating earlier findings based on evidence presented at those hearings. The court correctly considered that the circumstances related to the prior termination were ongoing and relevant to the parents' ability to adequately care for A.H.D. Thus, the District Court did not abuse its discretion in terminating the parents' rights to A.H.D. In re A.H.D., 2008 MT 57, 341 M 494, 178 P3d 131 (2008). See also In re C.B., 2019 MT 294, 398 Mont. 176, 454 P.3d 1195.

Constitutionality of Procedures Allowing Consideration of Prior Termination of Parental Rights to Sibling: A mother asserted that procedures for terminating her parental rights violated due process, particularly when the District Court considered the prior involuntary termination of the mother's rights to A.P.'s sibling when it terminated her rights to A.P. The Supreme Court noted that because it is a fundamental liberty interest, a parent's right to the care and custody of a child must be protected by fundamentally fair procedures that ensure that the parent is not placed at an unfair disadvantage during termination proceedings. In this case, consideration of the prior termination of the mother's rights to a sibling did not violate due process. The District Court is not required to terminate, but rather the court has discretion to grant or deny the state's termination petition if the state proves the statutory elements, nor is the decision limited to the facts of the prior termination because the court also considers any available evidence relating to present family circumstances and the specific child at issue. The parent is also provided an opportunity to challenge the termination petition, and the burden of proof is on the state without placing the parent at an unfair disadvantage. The Supreme Court determined that the procedure allowing consideration of a prior termination does not violate a parent's due process rights. In re Custody & Parental Rights of A.P., 2007 MT 297, 340 M 39, 172 P3d 105 (2007).

Prior Involuntary Termination of Parental Rights to Sibling as Circumstance for Termination of Parental Rights: The involuntary termination of parental rights to a child's sibling constitutes one circumstance that a District Court may consider in terminating parental rights, as long as the circumstances related to the termination are relevant to the parent's ability to adequately care for the child at issue. The circumstances of a prior termination continue to be relevant in a later termination of a sibling unless the circumstances have changed. In this case, the District Court afforded a mother an opportunity to demonstrate that her circumstances had changed since her rights to her child's sibling were previously terminated, but the mother offered no evidence of changed circumstances, so the District Court did not err in terminating the mother's parental rights to the second child. In re Custody & Parental Rights of A.P., 2007 MT 297, 340 M 39, 172 P3d 105 (2007).

Failure to Apply Proper Statutory Criteria in Termination Proceedings — Reversible Error: Instead of applying the statutory criteria in this section when considering whether to terminate a mother's parental rights, the District Court relied on the legal presumption in 41-3-604 that because the children had been in foster care for 15 of the prior 22 months, termination was appropriate. The Supreme Court reversed. A parent's right to the care and custody of a child is a fundamental liberty interest that must be protected by fundamentally fair procedures. The legal presumption in 41-3-604 alone is not a sufficient basis to terminate parental rights and neither eliminates the substantive requirements in this section nor diminishes the clear and convincing burden of proof on the party seeking to terminate parental rights. By relying on the presumption in 41-3-604, the District Court impermissibly shifted the burden of proof to the mother by concluding that there was insufficient evidence to rebut the presumption. It was not the mother's duty to rebut the presumption, but rather the state's burden to show that the mother failed to complete a treatment plan and that the mother's conduct or condition was unlikely to change within a reasonable time. Because the District Court applied the wrong statutory standards, the order terminating parental rights was reversed and the case was remanded for application of the proper statutory criteria. In re D.B. & D.B., 2007 MT 246, 339 M 240, 168 P3d 691 (2007), distinguished on other grounds by In re C.B., 2014 MT 4, 373 Mont. 204, 316 P.3d 177.

Parent's Prior Conviction of Sexual Offense Properly Applied in Parental Rights Termination Proceeding — No Retroactive Statutory Application: During proceedings to terminate a father's parental rights, the state became aware of the father's prior 1985 conviction in Texas of a sexual offense involving a minor. The District Court held that the prior conviction was an aggravating circumstance under 41-3-423 for purposes of terminating the father's parental rights pursuant to this section. On appeal, the father argued that the court improperly applied the 1999 amendments to 41-3-423 and this section retroactively to a criminal act that occurred at least 13 years prior to enactment of the amendments, in violation of the father's vested constitutional parental rights. Setting out the conditions of retroactivity, the Supreme Court noted that a statute does not operate retroactively merely because it is applied to conduct that occurs prior to the statute's enactment and that an amended statute that is applied to a factual situation that occurred prior to amendment is not viewed as retroactive in application. In this case, no additional sanction was imposed on the prior conviction by enactment of the new statutory provisions, but the prior conviction was made a condition for the termination of parental rights in the event that the children were subsequently neglected or abused. Moreover, the prior conviction did not require or inevitably lead to the children being abused or neglected, necessitating the filing of an abuse and neglect petition. Rather, the prior conviction became relevant as an independent ground for the state to petition for termination of parental rights only after the children were abused and neglected. Additionally, the statutes went into effect in 1999, and the termination proceeding was initiated in 2003, so the father was on notice that the prior conviction could be used as an aggravating circumstance to justify termination if the father allowed the children to be abused and neglected. Therefore, applying the 1999 versions of 41-3-423 and this section to a conviction that occurred prior to 1999 did not constitute an unlawful retroactive application of the statutes. In re. M.A.L., D.L., & T.L., 2006 MT 299, 334 M 436, 148 P3d 606 (2006).

Parent's Excited Utterance Following Domestic Disturbance Not Considered Hearsay in Proceeding Adjudicating Child as Youth in Need of Care: In adjudicating a child as a youth in need of care, the District Court relied on statements made by the mother to an officer who was investigating a domestic disturbance at the family residence. Following adjudication, the court implemented a treatment plan, which the father refused to sign. The court subsequently terminated the father's parental rights for failing to comply with the treatment plan. The father contended that the District Court improperly admitted hearsay evidence from the officer that provided the evidentiary support for designating the child as a youth in need of care. The Supreme Court disagreed. The excited utterance exception to the hearsay rule under Rule 803, M.R.Ev. (Title 26, ch. 10), applied to the officer's testimony regarding the mother's statements because the statements were made immediately after the mother had been fighting with the father and while she was still visibly upset. Thus, the District Court did not abuse its discretion in allowing the officer's testimony. In re T.W. & J.M., 2006 MT 153, 332 M 454, 139 P3d 810 (2006), distinguishing In re Marriage of Bonamarte, 263 M 170, 866 P2d 1132 (1994).

Action of Recused Judge in Temporary Child Custody Proceedings Affirmed: A District Court Judge signed an order recusing himself from parental rights termination proceedings, but subsequently presided over an emergency temporary custody and protective services proceeding before the recusal order was filed. The parties questioned when the recusal was effective and whether it affected the validity of the emergency proceeding. The Supreme Court concluded that the recusal question did not affect the disposition of the case because, regardless of when the order became effective, the emergency hearing did not affect the child's permanent legal custody or the parent's rights. Thus, the judge's action in conducting the hearing after recusing himself did not warrant reversal in light of the fundamentally fair procedures afforded in the subsequent youth adjudication and parental rights termination proceedings. In re A.N.W., 2006 MT 42, 331 M 208, 130 P3d 619 (2006).

No Error in Consideration of Evidence of Parole Status Following Termination Hearing: A father contended that it was error for the District Court to consider evidence of his parole status in Wisconsin after the father's parental rights termination hearing had concluded in Montana. The Supreme Court found no prejudicial error because the written report simply verified the same information that the father's parole officer presented in person at the termination hearing. In re A.N.W., 2006 MT 42, 331 M 208, 130 P3d 619 (2006).

Failure to Appear at Parental Rights Termination Hearing and to Object to Termination — Waiver of Right to Appeal: A father appealed the termination of his parental rights on grounds that the District Court relied on evidence in the extensive record rather than live testimony at the termination hearing. However, to properly preserve an issue for appeal, a party must notify the trial court at the time that the objectionable conduct is at issue, and untimely objections may not be heard on appeal. The father failed to appear at the termination hearing and thus waived the right to testify, nor did the father's attorney object to termination, having had no contact with the father prior to the hearing. By failing to appear or to object in person or by counsel, the father waived the right to appeal the manner in which the hearing was conducted, including the District Court's decision to rely on the record rather than take live testimony. Termination was affirmed. In re A.T., 2006 MT 35, 331 M 155, 130 P3d 1249 (2006), following In re Parenting of K.P., 2005 MT 297, 329 M 337, 124 P3d 1091 (2005), and distinguishing In re M.O., 2003 MT 4, 314 M 13, 62 P3d 265 (2003).

No Due Process Violations in Parental Rights Termination Proceeding — Statutory Mandates Addressed: A mother asserted that her due process rights were violated in a parental rights termination proceeding because: (1) the state failed to make reasonable efforts to reunify mother and child as required in 41-3-423; (2) the District Court, in effect, terminated her right while purporting only to grant a planned permanent living arrangement and permanent care and control of the child to the state in violation of this section; (3) the state failed to petition the District Court for termination in a timely fashion in violation of 41-3-604; and (4) the District Court failed to hold a permanency plan hearing in a timely manner in violation of 41-3-445. The Supreme Court considered each claim and affirmed. Although reunification efforts failed, the state's efforts were reasonable and in compliance with the governing statutes. The mother's parental rights were severely limited, but not actually terminated, so her argument regarding improper termination procedures failed. The state does not have to petition to terminate parental rights if a compelling reason has been documented for determining that filing a petition would not be in the child's best interests. In this case, there was such a compelling reason—namely, that the state had tried to reunify mother and child for years and did not seek termination casually. The tardy permanency hearing argument also failed in light of the state's diligent, although unsuccessful, efforts to create a permanent and stable environment for the child in an effort to ensure that the child did not languish in foster care. In re B.N.Y., 2006 MT 34, 331 M 145, 130 P3d 594 (2006). See also In re R.T.L.P., 238 M 384, 777 P2d 892 (1989), and In re A.R., 2004 MT 22, 319 M 340, 83 P3d 1287 (2004).

Preservation and Reunification Efforts Not Required in Involuntary Termination of Parental Rights: If a court involuntarily terminates a parent's rights under this section, the state may forego reasonable efforts to provide preservation or reunification services to that parent with regard to any future children placed with the state, pursuant to 41-3-423. Voluntary relinquishment is only one of several criteria that a court may consider when ordering termination of parental rights. In this case, the District Court properly terminated a mother's parental rights based in part on adjudication of the child as a youth in need of care. With the exception of minor immaterial misstatements, the court's decision was based on facts supported by substantial testimonial evidence from professionals, so termination of parental rights was not an abuse of discretion, and the decision was affirmed. In re P.S., 2006 MT 4, 330 M 239, 127 P3d 451 (2006). See also In re C.B., 2019 MT 294, 398 Mont. 176, 454 P.3d 1195.

No Improper Bifurcation of Adjudicatory and Dispositional Hearings Based on Noticed Testimony From Earlier Show Cause Hearing: A parent argued that adjudicatory and dispositional hearings were improperly bifurcated because the District Court took notice of and improperly relied upon expert testimony offered at an earlier show cause hearing. The state argued that a court may take notice of the records of any court in the state. The Supreme Court noted that the District Court allowed the parent to move for reconsideration at the hearing of its judicial notice of testimony from the previous hearing, but the parent did not move for reconsideration. Because the District Court also determined that there was sufficient evidence at the later hearing, without reliance on the noticed testimony, to sustain a finding of abuse and neglect and because the parent did not establish that use of the noticed testimony was a disadvantage, no error was demonstrated. In re S.C. & L.Z., 2005 MT 241, 328 M 476, 121 P3d 552 (2005).

Protective Order Against Parent's Discovery Requests Not Abuse of Discretion Given Department's Open File Policy: In a termination of parental rights case, the District Court granted the state's motion for a protective order against a parent's discovery requests for admission, interrogatories, and requests for production, and the parent appealed. The Supreme Court cautioned that parties to termination proceedings have the full right to discover the case against them. However, in this case, the District Court did not abuse its discretion in granting the protective order because the state and the county maintained an open file policy that allowed the parent access to the entire file for inspection and copying and because the District Court ruled that any evidence or witness offered at trial that was not disclosed by review of the file might be excluded upon objection. Because the parent could not demonstrate prejudice, granting of the protective order was affirmed. In re S.C. & L.Z., 2005 MT 241, 328 M 476, 121 P3d 552 (2005).

Lack of Counsel — No Due Process Violation Following Termination of Parental Rights: A mother's parental rights were terminated in 2001, after which her counsel withdrew and the

District Court appointed a public defender without notifying the defender. The mother contended that her due process rights were violated because she did not have adequate representation once her counsel withdrew. The Supreme Court recognized that due process and fundamental fairness require that a parent be represented by counsel at proceedings to terminate parental rights and that the mother had counsel during the termination proceedings and on direct appeal. The mother failed to establish that the proceedings did not comport with relevant statutory and constitutional due process requirements, and her argument was without merit. Termination of her parental rights was affirmed. In re T.H. & C.D.F., 2005 MT 237, 328 M 428, 121 P3d 541 (2005), following In re A.S., 2004 MT 62, 320 M 268, 87 P3d 408 (2004).

Time Limit for Appeal of Termination of Parental Rights Running From Service of Notice of Entry of Judgment — Laches Inapplicable: The District Court determined that a mother abandoned her children and terminated the mother's parental rights; however, the mother was never served with notice of entry of judgment regarding the termination. The mother moved to vacate or void the order and requested a hearing on the termination, but the motion was denied. The state contended that further consideration of the issue was barred by 42-2-620 or by laches. The Supreme Court disagreed that the mother's appeal was barred by 42-2-620 because the statute does not alter the filing period for timely appeals but merely sets a 6-month time limit on all other challenges to orders terminating parental rights. Rather, former Rule 77(d), M.R.Civ.P. (now superseded), applied. The rule requires service of notice of entry of judgment, and former Rule 5, M.R.App.P. (now superseded), provided that the 60-day time limit for appeals does not apply until service of notice of entry of judgment, but the mother was never served. The equitable doctrine of laches also did not apply because the state failed to discharge its simple affirmative duty to notify the mother of entry of judgment. Thus, the mother's appeal was timely. In re T.H. & C.D.F., 2005 MT 237, 328 M 428, 121 P3d 541 (2005), clarifying In re P.D.L., 2004 MT 346, 324 M 327, 102 P3d 1225 (2004).

No Requirement to Reopen Testimony or Continue Hearing Upon Parent's Failure to Appear: A mother failed to appear for the final day of a hearing on termination of her parental rights. On appeal, the mother contended that it was fundamentally unfair for the trial court to refuse to reopen the case to allow her testimony or to continue the trial. The Supreme Court disagreed. The mother was represented by counsel and was properly notified of the petition to terminate and the hearing. Any prejudice to the mother arose from her failure to appear. There is no requirement that a termination hearing be continued indefinitely until a parent decides to show up. The District Court's refusal to reopen or continue the hearing was therefore not fundamentally unfair. In re A.A. & D.A., 2005 MT 119, 327 M 127, 112 P3d 993 (2005).

Failure of District Court to Determine Indian Status of Children Prior to Termination of Parental Rights Warranting Reversal: Absent a conclusive determination from the affected tribes, it was reversible error for the District Court to terminate a mother's parental rights without definitely resolving the threshold question of whether the children were Indian children within the meaning of the Indian Child Welfare Act. In this case, the District Court was presented with insufficient evidence regarding the children's status because of the mother's failure to present crucial evidence regarding the children's possible tribal affiliation and the tribe's delay in intervening. However, the tribe's right to intervene was not impaired by the delay, and the court should not have proceeded absent a conclusive determination that the children were not tribal members. In re A.G., W.G., T.A., & J.A., 2005 MT 81, 326 M 403, 109 P3d 756 (2005). See also In re L.D., 2018 MT 60, 391 Mont. 33, 414 P.3d 768, holding that a parent cannot waive application of the Indian Child Welfare Act by stipulation or acquiescence.

Finding That Child Adjudicated Youth in Need of Care Required for Termination: A mother contended that the District Court erred in a termination proceeding by not making a finding that her child was a youth in need of care. However, this section does not require a District Court in a termination proceeding to find by clear and convincing evidence that the child is a youth in need of care, but rather to find that the child has been adjudicated as a youth in need of care. In this case, that finding was made at a prior temporary custody hearing, and the District Court did not err by failing to revisit the question at the termination hearing. In re V.F.A., 2005 MT 76, 326 M 383, 109 P3d 749 (2005).

Standards Applicable to Termination of Indian Parental Rights — Active Department Efforts to Provide Services Required: The District Court terminated the parental rights of an Indian father after the children were removed from the father's custody a fourth time because of the father's abuse and neglect. The father appealed on grounds that: (1) the state did not make active efforts to provide remedial services; (2) the District Court relied on expert testimony based on the Department file rather than personal interviews; and (3) it was error not to grant the father's request for an extension of temporary legal custody. The Supreme Court affirmed on all issues. The father left no phone number or address with the social worker and moved multiple times. Without any involvement, the father prevented the Department from making active efforts at providing more intensive services. Second, the federal Indian Child Welfare Act requires testimony from a qualified expert witness, but does not require a specific form of that testimonial evidence or personal interviews, and a District Court need not conform its decision to a particular piece of evidence or a particular expert's report or testimony as long as a reasonable person could have found beyond a reasonable doubt that continued custody by an Indian parent or custodian is likely to result in serious emotional or physical damage to the child. Last, the District Court did not abuse its discretion in refusing to extend temporary custody because the Department had already provided active efforts and did not need more time to assist the father in attaining his goals. The District Court had an accurate perspective on the father's parenting abilities, and refusal to extend the temporary placement did not make the court's decision any less reasonable. In re A.N. & M.N., 2005 MT 19, 325 M 379, 106 P3d 556 (2005). See also In re Marriage of McKenna, 2000 MT 58, 299 M 13, 996 P2d 386 (2000), In re D.S.B., 2013 MT 112, 370 Mont. 37, 300 P.3d 702, and In re S.B., 2019 MT 279, 398 Mont. 27, 459 P.3d 214, holding that the Department made active efforts beyond a reasonable doubt.

Misdiagnosis of Rare Skin Disease as Evidence of Parental Sexual Misconduct — Newly Acquired Evidence Did Not Undermine Validity of Adjudication of Children as Youths in Need of Care — Termination of Parental Rights Upheld: After the parents' 4-year-old daughter was diagnosed as a probable victim of parental sexual misconduct, the court ordered a TIA and protective services for all five children, who were all under 5 years of age. Both parents were criminally charged with abuse and neglect of their children. The father remained in jail for 1 year. The children were tested and found to be developmentally delayed in their speech, and both parents were diagnosed with psychological disorders. Both parents were ordered to complete treatment plans, which they failed to complete. Eventually, their parental rights were terminated. Two years after the initial diagnosis, it was determined that the daughter's physical symptoms were the result of a rare skin disease called lichens sclerosis et atrophicus (LSA) rather than sexual abuse. The parents appealed the termination of their parental rights and argued that the District Court had erred in adjudicating the children as youths in need of care based on the misdiagnosis. The parents further argued that the allegations of sexual molestation because of the misdiagnosis tainted the entire proceedings to such a degree that they were deprived of their rights to due process and fundamental fairness, thereby invalidating the subsequent termination ruling. The Supreme Court upheld the District Court and held that, based on the developmental delays and psychological disorders, the District Court had adequate grounds independent of the LSA misdiagnosis for adjudicating the children as youths in need of care under 41-3-422 and that the subsequent termination under this section was valid. In re D.B., 2004 MT 371, 325 M 13, 103 P3d 1026 (2004).

Adjudication Properly Based on Parents' Stipulation That Children Considered Youths in Need of Care: Following termination of their parental rights, the parents contended that termination was not proper because the children were never adjudicated as youths in need of care, which is the threshold for termination proceedings. Although there was no hearing at which that determination was made based on a preponderance of the evidence, under 41-3-434, a parent may stipulate that a child is a youth in need of care, and the parents in this case twice stipulated that their children were in need of care—once when they signed a stipulation to temporary legal custody and again when they signed a stipulation to the extension of temporary legal custody. Based on these stipulations and the holding in In Re Custody & Parental Rights of M.W. & C.S., 2001 MT 78, 305 M 80 (2001), the children were properly adjudicated as youths in need of care. In re M.B., J.B., & W.B., 2004 MT 304, 323 M 468, 100 P3d 1006 (2004).

Extension of Temporary Legal Custody — Failure to Extend Original Treatment Plan Deadlines Not Error: Following termination of their parental rights, the parents argued that because several deadlines in the original treatment plan had already passed when the District Court extended the Department's temporary legal custody of the children, the court erred when it did not also extend the deadlines in the original treatment plan. The Supreme Court disagreed. Consistent with the statutory preference for resolution of parenting problems and reunification of the family over termination of parental rights, the Department sought to extend temporary custody in order to allow the parents more time to complete their respective treatment plans. Further, the parents requested no extension of the deadlines when the extension was granted, the District Court considered all of the parents' efforts to complete their plans, not just those preceding the deadlines, and the parents failed to cite any authority that would oblige a District

Court to modify a treatment plan when a parent has failed to meet its deadlines. In re M.B., J.B., & W.B., 2004 MT 304, 323 M 468, 100 P3d 1006 (2004).

Sufficient Evidence That ICWA Standards Met in Terminating Parental Rights — Termination Affirmed Absent Abuse of Discretion: An Indian father contended that the state did not present sufficient evidence under the federal Indian Child Welfare Act of 1978 (ICWA) to warrant termination of his parental rights. The Supreme Court determined that: (1) there was sufficient evidence that continued custody of the children was likely to result in serious emotional or physical damage to the children; (2) the evidence was supported by testimony from qualified experts; (3) active but unsuccessful efforts had been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family; and (4) the children had lived in foster care a sufficient time to create the presumption under 41-3-604 that the children's best interests would be served by terminating parental rights. The ICWA requirements having been followed, parental rights were properly terminated. In re S.R., R.R., & G.R. Jr., 2004 MT 227, 322 M 424, 97 P3d 559 (2004). See also In re S.B., 2019 MT 279, 398 Mont. 27, 459 P.3d 214.

Parent's Due Process Right to Effective Assistance of Counsel During Parental Rights Termination Proceedings: Because a parent's right to the custody and care of the parent's child is a fundamental liberty interest that must be protected by fundamentally fair procedures, a parent is entitled not only to assistance of counsel during parental rights termination proceedings, but also to effective assistance of counsel during those proceedings. The Supreme Court will evaluate effectiveness of counsel in parental rights termination cases by following the nonexclusive factors of training and experience and of advocacy. In the present case, a mother's counsel was not prepared to perform the duty to zealously advocate for the mother at a termination hearing, nor was advocacy beyond counsel's means, as demonstrated by the fact that counsel was prepared at a later hearing. However, because the mother did not suffer prejudice because of counsel's failure to provide effective assistance, termination of the mother's parental rights was affirmed. In re A.S., 2004 MT 62, 320 M 268, 87 P3d 408 (2004), followed in In re J.J.L., D.J.L., and R.D.L.L., 2010 MT 4, 355 Mont. 23, 223 P.3d 921, In re A.J.W., 2010 MT 42, 355 Mont. 264, 227 P.3d 1012, and In re T.N.-S., 2015 MT 117, 379 Mont. 60, 347 P.3d 1263, which was followed in In re J.E.L., III, 2018 MT 50, 390 Mont. 379, 414 P.3d 279.

Failure to Hold Parental Permanency Plan Hearing Within Statutory Time Not Violative of Due Process: A mother whose parental rights were terminated contended that the failure to hold a permanency hearing within the time enumerated in 41-3-445, the length of the proceeding, and the denial of her request to allow her counselor to videotape her visits with her children violated her due process rights. The Supreme Court examined the case for fundamental fairness and affirmed. Under 41-3-445, a permanency hearing is not required if a child has been returned to a biological parent, and in this case, the children were returned to the custody of their biological father. The court did not condone the failure to hold a timely hearing as required, but noted that in this case, there was an ongoing attempt to reunify the children with one of the parents, which was the goal of the permanency plan, so the goal was accomplished without a hearing. As to the issue of length of proceedings, the court noted that despite the failure of the mother to show progress toward reunification goals, after 15 months, the Department was still actively working with her to accomplish the goal and did not seek termination until more than 20 months after the children were removed from the home, so the length of time did not prejudice the mother's rights. Moreover, the request for presence of the mother's counselor during visits was never actually denied by the District Court because the mother had no visitation rights at the time of the request that could have been denied. In re A.R. & S.A.R., 2004 MT 22, 319 M 340, 83 P3d 1287 (2004).

Letter From Tribe Conclusive as to Tribal Membership of Children in Parental Termination Proceeding: During parental termination proceedings, a question arose as to whether two of the children involved might be Indian children by virtue of their father's tribal membership. In order to comply with the Indian Child Welfare Act of 1978 (ICWA), the state contacted the tribe to determine if the children were tribal members. The tribe responded by letter and stated that the children were not tribal members and were not eligible for membership based on blood quantum. Under In re Adoption of Riffle, 277 M 388, 922 P2d 510 (1996), the tribe's determination was conclusive, but even aside from the letter, testimony from the children's father and several social workers affirmed that the children were not eligible for tribal membership. Because the children could not be considered Indian children by definition, the ICWA did not apply to the termination proceedings. In re T.J.H., J.H., J.L., & A.L., 2003 MT 352, 318 M 528, 81 P3d 504 (2003). See also In re C.H., S.H., & D.H., 2003 MT 308, 318 M 208, 79 P3d 822 (2003).

Belated Notice of Possible Indian Heritage of Child Subject to State Parental Termination Proceedings — Notice to Tribe Required to Allow Future Tribal Involvement if Appropriate: Only after parental termination proceedings were completed did the mother raise the issue of the possible Indian heritage of one of her children and the possible applicability of the Indian Child Welfare Act of 1978 (ICWA). One purpose of ICWA is to afford tribes the opportunity to intervene by providing a tribe with notice before proceedings begin; but in this case, that purpose could not be honored because the District Court did not know or have reason to know of the child's possible heritage until after the termination hearing had concluded. Faced with a silent record and because the issue was not raised in the trial court, the Supreme Court declined to undermine the entire termination proceeding, but the court did order that notice be given to the tribe of which the child might be a member so that the tribe could intervene in any future proceedings if it was determined that the child was indeed an Indian child. In re C.H., S.H., & D.H., 2003 MT 308, 318 M 208, 79 P3d 822 (2003).

Indian Child Welfare Act Inapplicable to Child Ineligible for Membership in Federally Unrecognized Tribe: The state sought to terminate a mother's parental rights, but the mother contended that the Indian Child Welfare Act of 1978 (ICWA) should apply because the father of the child was an enrolled member of the Little Shell Band of Chippewa. The Supreme Court held that ICWA did not apply for two reasons: (1) the father qualified for membership in the Little Shell Band based on the minimum one-quarter blood quantum, but the child, having only one-eighth blood quantum, did not qualify for enrollment, and tribal membership of an Indian child is required for ICWA to apply; and (2) ICWA applies only to federally recognized tribes, and as of the date of the proceeding, the Little Shell Band of Chippewa was not recognized by the U.S. Secretary of the Interior as eligible to receive services. In re C.H., S.H., & D.H., 2003 MT 308, 318 M 208, 79 P3d 822 (2003).

Failure to Adjudicate Youth in Need of Care Precluding Termination of Parental Rights: A parent contended that parental rights were improperly terminated because the child was not properly adjudicated as a youth in need of care. The Supreme Court noted that such adjudication is a threshold requirement before a court may grant temporary legal custody, order a parental treatment plan, or terminate parental rights. The state argued that the child was found to be a youth in need of care during earlier guardianship proceedings in a different District Court. The Supreme Court cited In re F.M., 2002 MT 180, 311 M 35, 53 P3d 368 (2002), for the holding that evidence received at a hearing on a collateral matter, such as a guardianship proceeding, did not satisfy the adjudicatory requirements of 41-3-404 (renumbered 41-3-437). Further, it was improper for the District Court to approve a treatment plan 10 months prior to proper adjudication of the child as a youth in need of care, in violation of 41-3-406 (renumbered 41-3-438) and 41-3-420 (renumbered 41-3-443), which also rendered the requirements of this section unsatisfied. Because the child was not properly adjudicated a youth in need of care, court approval of a treatment plan was improper and termination of parental rights was reversed. In re B.N.Y., 2003 MT 241, 317 M 291, 77 P3d 189 (2003).

State's Reliance on Parent's Failure to Provide Treatment Plan Verification Not Considered Impermissible Shift of Burden of Proof to Parent: A mother's treatment plan required compliance with various goals and tasks. The state social worker who testified regarding the mother's compliance with the treatment plan stated that no verification was received regarding the mother's compliance with the various goals and tasks, and on that basis, the mother's parental rights were terminated. On appeal, the mother contended that the sole reliance on her failure to provide verification of compliance resulted in an impermissible shifting of the state's burden to her to prove compliance. The Supreme Court disagreed. The evidence at trial established that the mother failed to satisfy her affirmative obligations under the treatment plan, so the trial court did not erroneously impute the state's burden of proof to the mother or abuse its discretion in terminating her parental rights. In re A.T. & J.T., 2003 MT 154, 316 M 255, 70 P3d 1247 (2003).

Judicial Notice of Mother's Prior Termination Proceeding in Action to Terminate Father's Parental Rights — No Error: The District Court terminated a father's parental rights after taking judicial notice of the sealed record of the mother's prior termination proceeding. The father asserted error because the court took notice of facts that were not known and could not be discovered by the father. The Supreme Court disagreed. Rules 201 and 202, M.R.Ev. (Title 26, ch. 10), allow the District Court to take judicial notice of certain facts of record. Although sealed, the record was not entirely inaccessible because the father could have petitioned for disclosure of the records under 41-3-205, but he did not, even though he was aware of the prior proceeding. In re K.C.H., 2003 MT 125, 316 M 13, 68 P3d 788 (2003).

Expert Witness in Indian Child Welfare Proceeding — Cultural Knowledge of Particular Tribe Not Required: Federal law does not define "qualified expert witness" or provide criteria for determining whether a person is qualified to testify as an expert under the Indian Child Welfare Act of 1978 (ICWA), although federal guidelines do allow expert testimony of a professional person having substantial education and experience in the area of the professional's specialty. In the present case, the state called an expert who: (1) was a Blackfeet tribal member with knowledge of Blackfeet culture; (2) worked closely with Indian families while conducting home studies and writing reports relating to adoption and foster care placement of Indian children in Montana; (3) was a teacher in Minnesota and was exposed to the culture of other tribes; (4) worked for the state as a family resource specialist; and (5) was trained and certified by the state as a qualified ICWA expert witness. The father of the Indian youth in need of care objected that the state's witness was not qualified because the witness had no knowledge of the Confederated Tribes of Siletz Indians of Oregon. The objection was overruled, and the father appealed. The Supreme Court affirmed. It is not necessary that an expert witness in an ICWA case have knowledge of the cultural standards of a particular tribe. The determination of whether the witness is sufficiently qualified remains within the discretion of the trial court, and it was not an abuse of that discretion for the District Court to accept the state's witness in this case. In re M.R.G., 2003 MT 60, 314 M 396, 66 P3d 312 (2003), followed in In re K.S., D.S., & C.S., 2003 MT 212, 317 M 88, 75 P3d 325 (2003).

Failure to Hold Adjudicatory Hearing to Determine Whether Children in Need of Care — Termination of Parental Rights Improper Absent Adjudication of Status of Children: The District Court held several hearings concerning temporary investigative authority, granting several extensions, and also held several hearings concerning granting temporary legal custody, which was extended twice. The state then filed a petition to terminate the mother's parental rights. Temporary legal custody was extended a third time pending a hearing on the termination hearing. At the hearing, the mother's parental rights were terminated, and she appealed. The Supreme Court found that there had never been an adjudicatory hearing at which the District Court heard testimony or received evidence concerning whether the children were abused or neglected. The hearing for temporary legal custody did not equate to an adjudication by the court that the children were youths in need of care, even in light of an alleged stipulation by the mother to that effect. Absent an adjudicatory hearing and an adjudication that the children were youths in need of care, termination of parental rights was improper, and the order was reversed. In re M.O., M.O., & M.O., 2003 MT 4, 314 M 13, 62 P3d 265 (2003).

Termination of Parental Rights — Fundamental Fairness Issues Not Considered When Raised for First Time on Appeal: On appeal, the father raised numerous issues to support his claim that he was denied fundamental fairness in procedures resulting in the termination of his parental rights. However, by failing to raise the objections in District Court, the father failed to properly preserve the issues for appeal and waived the right to have the issues considered by the Supreme Court. A District Court cannot correct statutory deficiencies if those concerns are not brought to its attention during the course of the proceedings, and the court will not be faulted for failing to address issues not raised before it. The District Court properly considered the best interests of the children in this case, and termination of the father's parental rights was affirmed. In re T.E., M.E., & M.E., 2002 MT 195, 311 M 148, 54 P3d 38 (2002), following In re D.H., 2001 MT 200, 306 M 278, 33 P3d 616 (2001), and In re M.W., 2002 MT 126, 310 M 103, 49 P3d 31 (2002). See also In re M.H. & G.H., 2006 MT 208, 333 M 286, 143 P3d 103 (2006). See also In re M.C., 2017 MT 252, 389 Mont. 78, 403 P.3d 1266, holding that a mother's failure to raise the failure of the Department of Health and Human Services to accommodate her reading disability first in District Court barred her claim on appeal.

Retention of Jurisdiction to Terminate Parental Rights — Findings of Abuse or Neglect in Temporary Legal Custody Stage Required: To retain jurisdiction to terminate parental rights under this section, a District Court must find by a preponderance of the evidence in the temporary legal custody stage under 41-3-437 that the child is abused or neglected. The adjudication of a child as a youth in need of care cannot be established based on evidence received at the hearing on permanent legal custody. In its termination order, the court must conclude that it did not exceed its jurisdiction at any time during the course of the proceedings. If the court does not make a proper finding of abuse and neglect under 41-3-437, it will have exceeded its jurisdiction in waiting to make that determination until terminating parental rights under this section. In the present case, the District Court did not specifically state, pursuant to 41-3-437, that the children were youths in need of care, but the evidence upon which the court based its order granting temporary legal custody clearly demonstrated that the children had suffered actual harm and that they were in danger of substantial risk of harm to their health and welfare. The Supreme Court declined to disturb the findings of abuse and neglect, based on the District Court's language in its order extending the state's investigative authority. In re F.M. & D.M., 2002 MT 180, 311 M 35, 53 P3d 368 (2002).

Alleged Newly Discovered Evidence That Could Have Been Produced at Trial — Motion for New Parental Rights Termination Trial Properly Denied: The District Court denied a petition to terminate a mother's parental rights and ordered her child returned to her within 30 days. The guardian ad litem appealed, contending that the judgment should be set aside based on newly discovered evidence. The guardian ad litem presented the alleged newly discovered evidence through affidavits, contending that the mother left her apartment in poor condition with empty beer cans, was evicted, was fired twice from her employment, was seen driving a stolen vehicle, and had continued ongoing communication with the child's father. The District Court noted that this was one of the hardest fought and most lengthy parental rights termination trials in the court's experience and found it extremely unlikely that the alleged newly discovered evidence could not with reasonable diligence have been discovered and produced at trial. The District Court weighed the affidavit information and did not act arbitrarily or abuse its discretion in denying the motion to set aside the judgment based on newly discovered evidence. The District Court was affirmed. In re B.B., 2001 MT 285, 307 M 379, 37 P3d 715 (2001).

Objection to Medical Testimony Regarding Effects of Personality Disorder on Parenting Sustained — Cross-Examination Properly Limited: A medical expert who evaluated a mother regarding her parenting ability was asked about opinions that could be made based on the evaluation. The expert responded that it would require an explanation of personality and cognitive features and limitations. The guardian ad litem contended that inquiry should be allowed on cross-examination into the effects of a personality disorder on parenting. The mother objected, and the District Court sustained as beyond the scope of direct examination. The Supreme Court affirmed. The District Court did not abuse its discretion in limiting the latitude of cross-examination because the expert testimony in this case centered on the expert's observations and because the expert had not diagnosed the mother with a personality disorder. In re B.B., 2001 MT 285, 307 M 379, 37 P3d 715 (2001).

Failure to Appoint Counsel for Minor Parent During Formulation of and Prior to Court Approval of Treatment Plan Violative of Due Process Rights: H.C. was adjudicated a youth in need of care, and was simultaneously a minor parent in an abuse and neglect proceeding whose own child was adjudicated a youth in need of care. Although a guardian ad litem was appointed to represent H.C.'s child, counsel was never appointed for H.C. herself during the formulation of her treatment plan or prior to the District Court's approval of the plan. A natural parent's right to the care and custody of a child is a fundamental liberty interest that requires that the state provide a fundamentally fair procedure at all stages in proceedings for the termination of parental rights. Due process requires fundamental fairness, and fundamental fairness requires fair procedures. Further, under Art. II, sec. 15, Mont. Const., a minor parent is entitled to the same due process protections and procedures as adult counterparts. In this case, in order to preserve the fundamental fairness of the proceedings and for the treatment plan to be considered appropriate, due process required that counsel be appointed for the minor mother during the formulation of her treatment plan and prior to the District Court's approval of the plan, and the failure of the District Court to do so was reversible error. In re A.F.-C., 2001 MT 283, 307 M 358, 37 P3d 724 (2001), distinguishing In re T.C. & R.C., 240 M 308, 784 P2d 392 (1989), inasmuch as appointment of counsel is not always inappropriate or otherwise precluded during the earlier stages of child protective proceedings that precede termination proceedings, if due process requires.

Error in Allowing Amendment of Pleadings in Parental Rights Termination Case to Include New Theory — Lack of Notice Violative of Due Process Rights: During a parental rights termination hearing, the District Court allowed the state to amend the pleadings to include a new theory that the mother had abandoned her children. The mother's counsel objected for lack of notice. The state asserted that although abandonment may not have been included in the original pleadings as a separate ground for termination, there were facts in the original petition that supported a claim for abandonment and that the mother was thus on notice that the state intended to present evidence that would support a theory of abandonment. The Supreme Court disagreed. The fundamental liberty interest associated with parental rights must be protected with fundamentally fair procedures, including the due process requirement that a parent receive notice and be allowed the opportunity to be heard. Generally, a District Court cannot grant leave to amend the pleadings arbitrarily or perfunctorily, and although there are cases when the

Supreme Court will allow a party to amend pleadings in order for a case to proceed efficiently on the merits, this was not one of those cases. The termination petition as a whole did not provide the mother with sufficient notice on the charge of abandonment. Although some of the facts may have been applicable to abandonment, the mother should not have been required to glean from those facts which claims the state could bring. Rather, the state was required to articulate the claims that it expected to raise, and allowing amendment of the pleadings during the hearing to include a theory of abandonment was reversible error. In re T.C. & W.C., 2001 MT 264, 307 M 244, 37 P3d 70 (2001), followed in In re C.J., 2010 MT 179, 357 Mont. 219, 237 P.3d 1282, and distinguished in In re E.M.S. and C.A.S., 2011 MT 307, 363 Mont. 68, 265 P.3d 1258.

Failure to Adjudicate Child as Youth in Need of Care — Termination of Parental Rights Improper: A mother was arrested for a parole violation, and the state filed a petition to investigate whether her children were abused or neglected. The District Court granted the petition on a preliminary basis, and the children were placed in a foster home. The mother was released on bond but failed to appear for a show cause hearing. The state's petition was then granted, and the court found that it was in the children's best interests to be removed from the home. The mother was later arrested again, released the following day, and left for Florida, leaving the children behind. She was arrested in Florida about 3 months later, and while incarcerated there, Montana filed for approval of a treatment plan. The treatment plan was faxed to the mother, but she refused to sign it. The plan was approved without her signature. A district citizen review board then recommended that the mother's parental rights be terminated based on the mother's criminal history, the social history of the case, and the children's need for permanence. The District Court terminated the mother's parental rights for failing to comply with the treatment plan, and the mother appealed. The Supreme Court held that termination of parental rights was in error because the children had never been adjudicated as youths in need of care through an adjudicatory hearing, as required by 41-3-437. A stipulation by the mother to let the court give temporary custody of the children to the state did not constitute a stipulation or an adjudication that the children were youths in need of care. In re T.C. & W.C., 2001 MT 264, 307 M 244, 37 P3d 70 (2001).

No Error in Failure to Grant Continuance of Parental Rights Trial Absent Affidavits or Showing of Good Cause: The father contended that the District Court erred in failing to grant his motion for a continuance of the trial to terminate his parental rights because he had only 20 days to prepare for trial. Although true that only 20 days elapsed after the father received actual notice of the hearing, he was aware for more than 4 months of the state's intention to terminate his parental rights. Further, he offered no affidavits in support of his motion to continue, offered no evidence of what he would have presented had more time been available, and failed to show any good cause beyond the argument of fundamental unfairness. The District Court noted that this was not a new case and that the father had plenty of time to get witnesses to the hearing. The hearing did not spring upon the father unexpectedly, and denial of his motion to continue was not erroneous. In re R.F., 2001 MT 199, 306 M 270, 32 P3d 1257 (2001).

No Requirement That Parent's Counsel Receive and Approve Treatment Plan Prior to Submission to Court: Under this section, a District Court may approve a treatment plan without a parent's signature, and under former 41-3-420 (now 41-3-443), a treatment plan must include the parent's signature, unless the plan is ordered by the District Court. Thus, there is no requirement for parental approval prior to submitting a treatment plan to the District Court, and by implication, there is no requirement that a parent's counsel receive and approve a proposed treatment plan prior to submission to the court. In re R.F., 2001 MT 199, 306 M 270, 32 P3d 1257 (2001).

Trial Court Not Precluded From Finding of Fact Even Though Evidence Conflicts: A mother contended that the trial court erred in finding that she had not completed her treatment plan because the testimony presented by counselors and the case worker conflicted in regard to her therapeutic progress in the ability to parent. The Supreme Court noted that the differences in opinion and conflicting evidence among the counselors on whether the requisite progress had been made in therapy did not preclude the trial court's determination that clear and convincing evidence existed to support the finding of fact. The trial court was in the best position to judge the credibility of all the witnesses, and the court's finding was affirmed. In re M.F.B., D.A.B., M.S.B., & S.L.B., 2001 MT 136, 305 M 481, 29 P3d 480 (2001).

No Rule That One Parent Be Allowed to Participate in Hearing to Terminate Other Parent's Rights: The father claimed that he should have been present with counsel at two hearings that were held to terminate the parental rights of his child and that he should have been allowed to challenge the state's evidence regarding the child's permanency plan. Although the fundamental liberty interest in a parent's right to the care and custody of a child requires the state to provide a fundamentally fair procedure for the termination of a parent's rights, in this case, both hearings were held to consider termination of the mother's parental rights, not the father's. The Supreme Court declined to adopt a rule that one parent must be allowed to take part in a hearing to terminate the other parent's rights. Further, testimony at the hearings involved recommendations for the child's future custody, not the father's parenting capabilities, so the court was not required to allow the father to scrutinize and challenge the evidence and witnesses at the permanency hearings. In Re Custody & Parental Rights of M.W. & C.S., 2001 MT 78, 305 M 80, 23 P3d 206 (2001).

Rejection of Court-Appointed Counsel During Criminal Trial — No Requirement for Different Court-Appointed Counsel at Subsequent Hearing to Terminate Parental Rights: On the first day of his criminal trial, Jeremy rejected court-appointed counsel from the public defender's office and represented himself instead. He was convicted of deliberate homicide. Later, during hearings to terminate his parental rights, the court appointed the same public defenders to represent him. His parental rights were terminated, and he appealed on grounds that his right to counsel was violated. However, he provided no authority for the argument that his rejection of the attorneys during the criminal trial somehow required that the court find alternative counsel for later proceedings. Jeremy was entitled to counsel, but not to counsel of his choice, nor did the appointment of the same counsel for both parents in the parental rights proceedings create a conflict of interest in violation of the Rules of Professional Conduct, absent a showing that it resulted in prejudice or adverse impact to the rights of the parties. Jeremy presented no evidence or authority that the right to counsel was denied, and the termination of his parental rights was affirmed. In Re Custody & Parental Rights of M.W. & C.S., 2001 MT 78, 305 M 80, 23 P3d 206 (2001).

Stipulation Not Considered Sufficient Adjudication of Youth in Need of Care — Lack of Jurisdictional Prerequisite to Terminate Parental Rights: The mother entered into a stipulation with the state that her children were youths in need of care only upon several conditions: (1) her parental rights would remain intact; (2) the children would reside with their grandmother; (3) the Casey Family Program would manage the children's cases; (4) the mother would always have contact with the children even if the program was required to intervene between the mother and grandmother; and (5) at an appropriate time when the mother was ready, the program, the Department, and the mother would devise a treatment plan that would be completed by the mother in order to regain custody of the children. At a subsequent hearing, the Department proposed a permanency plan that involved removing the children from their grandmother. The mother contended that the proposal amounted to a failure to abide by the conditions of the stipulation, thereby voiding the conditional stipulation that the children were youths in need of care and precluding the District Court's authority to terminate her parental rights. The Supreme Court agreed. Although a stipulation may be an acceptable alternative to an adjudicatory hearing in many circumstances, the fundamental nature of the rights of a parent requires that the process by which a stipulation is drafted and signed needs to be closely scrutinized. In this case, the stipulation was drafted by the County Attorney and signed by the mother without the benefit of legal counsel and essentially allowed the court to determine that the youths were in need of care without a finding that they were abused or neglected and without a hearing as required by 41-3-402 (renumbered 41-3-427). The mother had conflicting feelings about the removal of the children from their grandmother's care and relied on her understanding from the stipulation that the Department would not remove the children or terminate her parental rights, so she did not complete her treatment plan. Only a few days after the initial hearing, she promptly began work toward completion of the treatment plan and had made significant progress, particularly considering the unexpected death of her mother, by the time of the next hearing. Despite the change in circumstances resulting from the death, the Department did not grant the mother any additional time to complete the treatment plan, nor did the Department offer any evidence that the mother had abused or neglected the children. Under the unique facts of this case, the Supreme Court held that the District Court incorrectly found that the stipulation sufficed as an adjudication that the children were youths in need of care. Without that adjudication, the District Court lacked the jurisdictional prerequisite to terminate the mother's parental rights, so the Supreme Court reversed. In Re Custody and Parental Rights of M.W. & C.S., 2001 MT 78, 305 M 80, 23 P3d 206 (2001).

Failure of Parent With Mental Disability to Raise Issue of Violation of Americans With Disabilities Act — Consideration of Issue Precluded on Appeal: Following termination of her parental rights, the mother appealed on grounds that the termination violated the federal Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. 12101, et seq., because different standards were imposed upon her as a parent with a mental illness than standards imposed on other parents. Although a majority of appellate courts have ruled that the ADA does not provide a defense to a parental rights termination proceeding, the Montana Supreme Court has not addressed the issue and declined to do so in this case because the mother did not offer any testimony, evidence, or argument at any of the various proceedings prior to appeal that would support the legal conclusion regarding her ADA defense. The mother's belated allusion to a possible ADA defense in her posthearing proposed conclusions of law was untimely and did not preserve the issue for appeal. In re A.M., 2001 MT 60, 304 M 379, 22 P3d 185 (2001). See also Nason v. Leistiko, 1998 MT 217, 290 M 460, 963 P2d 1279 (1998).

Finding That Child Is Youth in Need of Care Prerequisite to Transfer of Custody: The exigent protection of the health and welfare of a child is paramount when the state's initial intervention into otherwise private family matters reveals an actual or potentially dangerous or unhealthy environment requiring the removal of the child from a custodial caregiver. The legal determination that a child is a youth in need of care is a jurisdictional prerequisite for a court-ordered transfer of custody. The first question in a termination proceeding is whether the District Court correctly adjudicated the child as a youth in need of care, and the state need only offer clear and convincing evidence that the court properly adjudicated the child as a youth in need of care in order for the court to inquire into the actual fitness of the parent. In re A.M., 2001 MT 60, 304 M 379, 22 P3d 185 (2001).

Parent Not Represented by Counsel During Show Cause Hearing Regarding Whether Child a Youth in Need of Care — Due Process Rights Not Violated: At the time of a show cause hearing on whether her child was a youth in need of care, the mother was an indigent mental patient civilly committed to the state hospital. She appeared at the hearing without representation of counsel. The mother contended that the District Court violated her due process rights by making that critical determination regarding the child when she was unrepresented. Although in In re A.S.A., J.L.A., G.A., & A.J.A., 258 M 194, 852 P2d 127 (1993), the Supreme Court held that the constitutional right to due process guarantees an indigent parent the right to court-appointed counsel in parental rights termination proceedings, the court has not extended the right to counsel to a pretermination proceeding in which the focal issue is whether a child is a youth in need of care. Rather, appointment of counsel at any time prior to the initiation of termination proceedings is within the discretion of the District Court. In this case, the initial determination that the child was a youth in need of care was made by order pursuant to a finding of probable cause even before the mother's first appearance in any proceedings when the District Court relied on a report submitted by a social worker showing that the child was abused or neglected or in danger of abuse or neglect and that removal from the home was necessary to protect the child's welfare. Subsequent to the initial determination, the District Court reached the same conclusion on at least three separate occasions when the mother was represented by counsel, including one hearing when the social worker was subjected to cross-examination by the mother's counsel. The Supreme Court applied In re M.F., 201 M 277, 653 P2d 1205 (1982), and in re D.S., H.S., R.S., R.S., J.S., R.S., & K.S., 253 M 484, 833 P2d 1090 (1992), and in holding that the state is not required to provide counsel at proceedings concerning temporary investigative authority or temporary custody. Thus, the mother's due process rights were not violated when the District Court made the determination that the child was a youth in need of care at a time when the mother was not represented by counsel. In re A.M., 2001 MT 60, 304 M 379, 22 P3d 185 (2001).

Petition for Long-Term Custody Included With Petition for Termination of Parental Rights — No Requirement for Filing Subsequent to Hearing: The state petitioned to terminate the mother's parental rights or, alternatively, to grant long-term custody to the state with the right to assign guardianship to the children's grandmother. Because the District Court combined the permanency hearing with the termination hearing, the petition for long-term legal custody was not filed subsequent to the hearing, which the mother contended violated 41-3-412 (renumbered 41-3-445) and erroneously denied her sufficient notice. However, 41-3-412 (renumbered 41-3-445) does not require that a petition for long-term custody be filed subsequent to a hearing. That petition may be filed at the same time as a petition to terminate parental rights, and this alternative petition provides a parent with adequate notice of issues to be raised at the hearing. Thus, the court did not err in awarding long-term custody without requiring a separate petition limited to that issue. In re Custody & Parental Rights of T.Z. & J.Z., 2000 MT 205, 300 M 522, 6 P3d 960, 57 St. Rep. 806 (2000).

Hearsay Statements of Child Improperly Admitted in Parental Rights Termination Case — Harmless Error: The District Court improperly admitted hearsay evidence related by the child of parents who were subject to a parental rights termination case. However, the improper hearsay was not necessary to the court's determination of proved abuse or neglect of the fitness of the parents and thus did not affect the parents' substantial rights or the result that the court reached. Although the court abused its discretion in admitting the testimony, the error was harmless, and termination of parental rights was affirmed on appeal. In re A.N. & C.N., 2000 MT 35, 298 M 237, 995 P2d 427, 57 St. Rep. 155 (2000).

Consideration of Nonstatutory Options Not Required Prior to Termination of Parental Rights: Specific criteria for which a court may order termination of the parent-child legal relationship are enumerated in this section. There is no limitation placed upon a court that requires consideration of other options, such as a guardianship, prior to the termination of parental rights. In re E.A.T. & T.A.T., 1999 MT 281, 296 M 535, 989 P2d 860, 56 St. Rep. 1133 (1999).

Probable Cause That Child Abused or Neglected Not Adjudication of Youth in Need of Care: The father appealed the termination of his parental rights, arguing that the lower court erred in holding that it could terminate his rights based on an earlier adjudication that the child was a youth in need of care. The Supreme Court agreed, ruling that in the earlier hearing, the District Court's finding that there was probable cause to believe that the child was abused or neglected did not constitute an adjudication that the child was a youth in need of care. The Supreme Court upheld the termination on other grounds. In re M.J.W., 1998 MT 142, 289 M 232, 961 P2d 105, 55 St. Rep. 563 (1998).

Argument of Denial of Due Process to Be Raised at Trial: On appeal, Ison argued that her due process rights had been violated in that she was not able to cross-examine a psychologist ordered by the court to complete a posthearing evaluation. The Supreme Court ruled that Ison had not raised her due process argument at the trial court level and in fact only objected to the individual picked to perform the evaluation. In re R.B.O., 277 M 272, 921 P2d 268, 53 St. Rep. 640 (1996).

Reliance on Nonexistent Testimony — Findings of Fact Not Reversed: The Department of Family Services (now Department of Public Health and Human Services) moved to terminate the parental rights of M.C. after a long history of both M.C.'s mental illness and her daughter being placed in foster care. The District Court terminated M.C.'s parental rights, basing one of its findings upon the answer to a question concerning M.C.'s mental health that was never given by a social worker before the District Court. The Supreme Court found that there was other evidence before the District Court that M.C.'s mental health was not going to change within a reasonable time, and because the result of a reversal of the District Court's ruling would not ultimately change that ruling, the Supreme Court held that the reliance upon nonexistent testimony was harmless error. In re S.C., 264 M 24, 869 P2d 266, 51 St. Rep. 129 (1994).

No Reliance on Alford Plea in Terminating Parental Rights: Cameron pleaded guilty under an Alford plea to two counts of felony sexual assault, then later claimed that the District Court improperly relied on the plea to terminate his parental rights. The Supreme Court found that the nature of Cameron's plea was irrelevant to the termination of his parental rights because even though he pleaded guilty, the District Court had considered only Cameron's incarceration, the length of his prison sentence, and his refusal to complete sex offender treatment. In re Custody & Parental Rights of M.D., 262 M 183, 864 P2d 783, 50 St. Rep. 1505 (1993).

Child as Witness — Testimony Properly Excluded: In proceedings to terminate a father's parental rights, the District Court did not abuse its discretion in refusing to have a child testify as to custody when the threatened harm to the child outweighed any possible relevance the testimony would have. In re M.A.W. & K.M.W., 256 M 296, 846 P2d 985, 50 St. Rep. 64 (1993).

Motion to Rescind Untimely: A motion to rescind the order terminating parental rights, made nearly 6 months after appellant learned the termination order was entered, was untimely. In re A.E., C.E., S.R., & J.R., 255 M 56, 840 P2d 572, 49 St. Rep. 877 (1992).

Court Not to Take Judicial Notice of Hearing at Which Parties Not Present or Represented by Counsel: The Streckerts were not present or represented at a hearing by the lower court determining temporary custody of their children. Subsequently, during a hearing terminating parental rights, the District Court took judicial notice of the testimony presented during the temporary custody hearing. The Supreme Court held that the lower court should not have taken judicial notice of evidence presented in the first hearing but refused to reverse the decision on the basis that there was substantial other evidence to support the lower court's ruling. In re D.S., H.S., R.S., R.S., J.S., R.S., & K.S., 253 M 484, 833 P2d 1090, 49 St. Rep. 552 (1992).

Grant of Long-Term Custody Proper — Finding of Abuse and Neglect: Upon motion by the state to terminate parental rights, the District Court ordered that the "parental custodial rights of [mother, father, and stepfather] in and to the youths [B.N. and T.N.], and to their property, are hereby terminated". Under the authority of 41-3-406 (renumbered 41-3-438), the court then awarded permanent legal custody to the Department of Family Services (now Department of

Public Health and Human Services) and gave the Department the right to place the children in foster care. The court also awarded supervised visitation rights to the parents and grandparents—an award inconsistent with termination of parental rights. The record clearly showed that neither the state nor the court intended to fully sever parental rights, even though the order used the words "terminated" and "permanent custody". On appeal, the Supreme Court found that the District Court intended to grant the state long-term custody, substantiated by a 10-year history of family turmoil resulting in abuse and neglect of the children, and that placement of the children in foster care was appropriate. In re B.N. & T.N., 245 M 511, 802 P2d 1244, 47 St. Rep. 2225 (1990).

Unclear Findings Not Grounds for Reversal: The mother appealed the termination of her parental rights on the basis that the lower court had never ordered a complete treatment plan for her prior to the termination. The Supreme Court stated that although it was unclear from the findings whether the lower court had found that there had been a treatment plan that was unsuccessful or whether the court had terminated the mother's rights on the basis that she was incarcerated, no grounds for reversal existed. The Supreme Court found that there was sufficient evidence to terminate the mother's parental rights under this section. In re B.H.M., C.M.M., & J.T.H., 245 M 179, 799 P2d 1090, 47 St. Rep. 1967 (1990).

Long-Term Incarceration Unconfirmed by Appellate Review — No Abuse of Discretion: A father whose parental rights were terminated while he was serving a lengthy prison term for aggravated assault of the child argued that the trial court, in the termination proceeding, could not rely upon a criminal conviction and sentence of imprisonment unconfirmed by appellate review. There is no authority for this proposition, and therefore the trial court did not abuse its discretion in severing his parental rights. In re A.B., 239 M 344, 780 P2d 622, 46 St. Rep. 1734 (1989).

No Right to Effective Assistance of Counsel at Termination Hearing — "Fundamental Fairness" Standard: There is no authority for the contention that a parent is entitled to effective assistance of counsel in a termination hearing so long as the procedure followed by the court is fundamentally fair. In re R.T.L.P., 238 M 384, 777 P2d 892, 46 St. Rep. 1354 (1989).

Due Process Properly Afforded Noncustodial Parent: Noncustodial father argued he was not afforded adequate due process in the termination of his parental rights. Although he was not properly notified of the first proceeding in which mother's and "unknown father's" rights were terminated, the District Court rectified the situation by reinstating father's rights, giving him proper notice of a second proceeding, and appointing counsel. Father personally appeared at all subsequent hearings with counsel. This notice and opportunity to appear constituted adequate procedural due process, and termination was proper. In re M.W., 234 M 530, 764 P2d 1279, 45 St. Rep. 2107 (1988).

Termination of Parental Rights Without Treatment Plan — Impossibility Required: After a hearing on the state's petition for temporary custody of C.L.R., the District Court amended the petition pursuant to 41-3-401 (renumbered 41-3-422) and terminated the father's parental rights. At the time of C.L.R.'s birth, both natural parents were incarcerated on convictions resulting from the death of C.L.R.'s half-brother. The father contended that the court erred in terminating his parental rights without following this section properly. He argued that the statute specifically requires establishment of a treatment plan prior to termination. The District Court set forth extensive findings and conclusions prior to determining that C.L.R. would not receive even minimally satisfactory care and would be exposed to extremely high chances of neglect, abuse, and even death if the father were ever allowed to care for the child. The Supreme Court held that the District Court had acted properly in terminating the father's parental rights, but it further stated that a termination of parental rights without first establishing a treatment plan would be allowed only when the facts clearly proved the impossibility of any workable plan. In re C.L.R., 211 M 381, 685 P2d 926, 41 St. Rep. 1436 (1984), followed in In re Custody & Parental Rights of M.D., 262 M 183, 864 P2d 783, 50 St. Rep. 1505 (1993). See also In re A.B., 239 M 344, 780 P2d 622, 46 St. Rep. 1734 (1989). (Annotator's note: Chapter 388, sec. 3, L. 1985, amended 41-3-609(3) to provide that a treatment plan is not required if "the parent is incarcerated for more than 1 year and such treatment plan is not practical" or if "the death of a sibling caused by abuse or neglect by the parent has occurred".)

Federal Indian Child Welfare Act — Violation of Treatment Plan: A year or more after temporary custody of Indian child was granted the state in proceedings that may not have complied with the federal Indian Child Welfare Act (25 U.S.C. §§ 1901, et seq.), a treatment plan was prepared and approved by the court. The treatment plan was neither suggested nor required by the temporary custody order. In a termination proceeding complying with the Act, it was not error for the District Court to rely on the failure of the parents to comply with the treatment plan. In re M.E.M., 209 M 192, 679 P2d 1241, 41 St. Rep. 636 (1984).

Conditions Existing Prior to Neglect Adjudication — Unnecessary to Prove Continued Existence: District Court could properly base its decision to terminate parental rights on events occurring before the adjudication that child was neglected and was not required to base its decision on a showing by the State that the circumstances and conditions predating the adjudication continued to exist at the time of the decision, where the State had for years been working with and monitoring the family. In re Declaring K.V. and K.A. Youth in Need of Care, 199 M 516, 649 P2d 1308, 39 St. Rep. 1582 (1982). See also In re C.A.R. & P.J.R., 214 M 174, 693 P2d 1214, 41 St. Rep. 2395 (1984).

BEST INTERESTS OF CHILD

Father Incarcerated Majority of Child's Life — Termination of Parental Rights In Best Interests: While the father was incarcerated, he stipulated to his daughter being designated a youth in need of care and entered into a treatment plan. The Department of Public Health and Human Services later filed a petition to terminate his parental rights while he was incarcerated. Following a hearing on the petition that was held shortly after his release, the District Court terminated his rights. On appeal, the father argued that the District Court had abused its discretion because the Department had not demonstrated that reunification with him was not in his daughter's best interests. Although the Supreme Court noted that the father had made efforts and showed a willingness to parent, it agreed that these did not outweigh the daughter's best interests, which included her stated desire not to live with her father, and affirmed the termination. In re I.K., 2018 MT 270, 393 Mont. 264, 430 P.3d 86.

Termination of Parental Rights After Thirty Months — Parent's Relapse, Improvement, and Subsequent Relapse — Reasonableness of Treatment Plan Challenged: The father had his children removed after the Department of Public Health and Human Services found that he used drugs, failed to adequately supervise his children, kept an unsanitary home, and did not ensure that his children received medical care. The District Court granted a petition for emergency protective services and the father stipulated to a treatment plan. Over the course of the proceeding, the father relapsed, improved for a time, relapsed again, and finally showed signs of improvement. Ultimately, the District Court terminated the father's parental rights, finding that the children could not wait any longer for the father to complete his treatment plan. On appeal, the father argued that the treatment plan was not appropriate because it did not provide him with a reasonable amount of time to complete certain tasks and that it erred in determining that he was unfit and not likely to change within a reasonable amount of time. The Supreme Court affirmed, holding that the father failed to completely comply with his treatment plan, despite coming close, and that the children spending 30 consecutive months in kinship foster care required termination of the father's rights. In re X.B., 2018 MT 153, 392 Mont. 15, 420 P.3d 538.

Termination of Mother's Rights Appropriate Despite Treatment Plan's Failure to Include Chemical Dependency Evaluation — Ineffective Counsel: In a termination of parental rights proceeding, the District Court found that the mother did not complete the approved treatment plan and that she was unlikely to change within a reasonable time because of her drug problem. On appeal, the mother argued that while she and her attorney agreed to the treatment plan, it was deficient because it failed to include a chemical dependency evaluation. The mother also argued that her counsel was ineffective for failing to advocate for the inclusion of an evaluation in the plan. The Supreme Court affirmed the District Court, holding that while the failure of the treatment plan to include substance abuse evaluation and treatment was notable, the best interests of the children supported termination of her rights, the difference was being offered help with the drug problem and being required to get help, and the failure to advocate for a treatment plan did not prejudice the mother. In re T.N.-S., 2015 MT 117, 379 Mont. 60, 347 P.3d 1263, followed in In re J.E.L., III, 2018 MT 50, 390 Mont. 379, 414 P.3d 279.

Father's Partial Compliance With Treatment Plan Insufficient — Sufficient Evidence to Support Termination: The Department of Public Health and Human Services initiated a parental rights termination proceeding, alleging the father presented a risk to his children. The District Court ultimately terminated the father's rights. On appeal, the father argued that the Department failed to act in good faith and failed to provide reunification services, that he had partially completed his treatment plan, and that it was reasonable for him to improve. The Supreme Court affirmed, holding that the Department was not biased and did not act in bad faith, that a parent does not complete a treatment plan by partial or even substantial compliance with a treatment plan, and that the evidence supported the determination that the father was unlikely to improve. In re A.K., 2015 MT 116, 379 Mont. 41, 347 P.3d 711.

Termination of Parental Rights of Both Parents in Best Interest of Child: Both parents appealed the termination of their parental rights. The Supreme Court upheld the termination, holding that the state made reasonable efforts to reunite the mother and her daughter, that the mother's drug addiction rendered her an unfit parent, and that it was not error to terminate the father's rights based on his incarceration for mitigated deliberate homicide. In re A.D.B., 2013 MT 167, 370 Mont. 422, 305 P.3d 739.

Father's Conduct Unlikely to Change Within a Reasonable Time — Reliance on Statutory Presumption Affirmed: In terminating a father's parental rights, the District Court correctly relied on the statutory presumption that the best interests of the children were unlikely to change since both children had been under the care of their grandmother pursuant to a foster care agreement with the Department of Public Health and Human Services for 15 months of the most recent 22 months. The District Court's termination of parental rights was affirmed. In re B.M. and P.M., 2010 MT 114, 356 Mont. 327, 233 P.3d 338.

Sufficient Evidence That Children in Need of Care — Parental Rights Properly Terminated: In 2004, a mother left her two children with a 16-year-old babysitter and did not return for over 24 hours. The children were placed in temporary legal custody with the state, where they remained thereafter. The state attempted to work on reunifying the family, but the mother repeatedly failed to comply with treatment plans, continued her heavy drinking, was arrested several times, and spent periods incarcerated. The children were tribal members, and the state gave proper tribal notification and had an Indian Child Welfare Act expert testify on several occasions that continued parental custody was likely to result in serious emotional or physical harm to the children and that there were no family members available to take the children. The children were adjudicated youth in need of care, and the state eventually sought to terminate the mother's parental rights in 2008. The mother appealed, but the Supreme Court affirmed. The children had been in foster care for over 4 years, exceeding the threshold for triggering the presumption that termination was in the children's best interests. A reasonable person could conclude, as did the District Court, that the children were in need of care and that the mother's parental rights should be terminated. Substantial evidence showed that the mother: (1) had been charged with four separate criminal offenses and was the subject of a bench warrant; (2) entered an intensive outpatient drug treatment program but stopped after five sessions, indicating a high potential for substance abuse that could only be controlled by incarceration or inpatient treatment; (3) did not complete any parts of the court-approved treatment plan; (4) missed a number of scheduled visits with the children; (5) failed to address her mental health issues; (6) failed to obtain adequate housing; (7) failed to make reunification with the children a priority; and (8) was unlikely to change her pattern of substance abuse and her unstable lifestyle. In re T.W.F & A.R.M., 2009 MT 207, 351 M 233, 210 P3d 174 (2009).

Failure to Develop Parenting Skills for Four Earlier Children — Termination of Parental Rights to Fifth Child Warranted Absent Improvement in Parenting Abilities: A mother suffered from a chromosomal abnormality known as velocardiofacial syndrome (VCFS) that caused numerous physical and cognitive difficulties and developmental delays, resulting in mental impairment and limited intellectual capacity. The father suffered severe intellectual and personality handicaps that were diagnosed as developmental and irreversible. All of the couple's children were afflicted with VCFS. Despite the efforts of the state to assist the parents in developing parenting skills over a period of several years, the parents proved unable to care for their special needs children, resulting in the termination of parental rights to the couple's first four children. The state attempted to help the parents with their fifth child, who was the subject of this case, but again the parents were unable to properly care for the child, and the state ultimately sought to terminate parental rights in order to place the child with a family that was able to provide the specialized intensive care necessary for the child's development and well-being. The District Court held that the child was a youth in need of care, and based in part on unchanged circumstances from the four previous adjudications regarding the child's siblings, the court terminated the parents' rights. The parents appealed, but the Supreme Court affirmed. The District Court heard extensive testimony from numerous professionals who worked with the family and opined that because the parents' conditions were permanent, chronic, and irreversible, their inability to care for the child had not changed and would not change in the future. Thus, the court properly concluded that the child was at substantial risk of ongoing or continuing physical or psychological harm by acts or omissions of the parents that were unchanged from their previous parental terminations and that termination in this case was also warranted. In re K.J.B., 2007 MT 216, 339 M 28, 168 P3d

629 (2007), followed in In re T.S.B., 2008 MT 23, 341 M 204, 177 P3d 429 (2008). See also In re J.W., 2013 MT 201, 371 Mont. 98, 307 P.3d 274.

Parent's Acquiescence in Adjudicatory Proceedings — Finding That Child Is Youth in Need of Care Based on Parent's Admissions — Stipulation Not Required: A mother contested termination of her parental rights on grounds that her child was not properly adjudicated as a youth in need of care. The mother was incarcerated at the time of the hearing and contended that although she agreed to a treatment plan, she never admitted that the child met the definition of a youth in need of care or stipulated that the child was in need of care. The Supreme Court noted that the trial court should have specifically inquired of the mother or her counsel whether the mother stipulated that the child was a youth in need of care, but it was not error for the District Court to make that finding based on the mother's own admissions that she was addicted to methamphetamine and needed treatment and that her addiction impacted the child unfairly. The mother was not placed at an unfair disadvantage during the termination proceedings and was represented by counsel at all stages. She never questioned the regularity of the proceedings until appeal. The court held that because 35 months had passed between the adjudicatory hearing and the notice of appeal, it would not be in the child's best interests to prolong the matter, particularly when much of the delay was caused by the mother's repeated relapses and her failure to put the child's interests above her desire to indulge her addiction. The adjudication was proper and did not prejudice the mother, and the District Court was affirmed. In re A.S., 2006 MT 281, 334 M 280, 146 P3d 778 (2006).

Termination of Parental Rights of Father Incarcerated for Failure to Pay Child Support Affirmed: A father was incarcerated for failure to pay child support for more than 10 years, resulting in his inability to be available for his child, who had been in foster care for more than 56 consecutive months at the time of hearing. The father's sentence was to run for about 3 additional years. The District Court properly concluded that the child's paramount best interests and needs were best served by continued stable foster care placement and that there was clear and convincing evidence to support termination of the father's parental rights. In re A.N.W., 2006 MT 42, 331 M 208, 130 P3d 619 (2006).

Termination of Parental Rights in Best Interests of Children Despite Parent's Health Improvements: A mother asserted that her psychologist's testimony demonstrated sufficient improvement in her physical and mental health as to warrant reunification with her children or forestalling termination of her parental rights. The District Court concluded that the mother's condition and conduct were not likely to change in a reasonable time and that it was in the children's best interests to terminate the mother's parental rights. On appeal, the Supreme Court noted that the trial court listened to hours of testimony, questioned witnesses personally, was very engaged in the hearing, took judicial notice of other proceedings involving the mother, including criminal proceedings, and reviewed her cases carefully, and concluded that her conduct was not likely to change in a reasonable period of time. The Supreme Court also noted that the psychologist's testimony indicated that the mother's improvement was possibly the result of not having to care for the children and noted the psychologist's continuing concern for the mother's ability to protect the children from abuse or potentially harmful relationships and her unstable moods resulting from deeply rooted personality disorders that were resistant to change. The children's best interests were paramount and took precedence over the mother's parental rights, and the termination order was affirmed. In re M.W., K.W., & A.L., 2004 MT 301, 323 M 433, 102 P3d 6 (2004).

Child in Foster Care for Nineteen Continuous Months — Termination of Parental Rights Presumed to Be in Child's Best Interests: If a child has been in foster care for 15 of the most recent 22 months, the best interests of the child are presumed to be served by the termination of parental rights, pursuant to 41-3-604. Here, after the children were placed with their foster parents, they lived in the foster home for 19 continuous months as of the hearing to terminate parental rights. The District Court did not err in applying the presumption in 41-3-604 in terminating parental rights. In re E.K., C.K., & J.E., 2001 MT 279, 307 M 328, 37 P3d 690 (2001).

Failure of Parents to Comply With Any of Five Different Treatment Plans — Child's Best Interests Paramount: To ensure the proper care of their sexually abused children, the state devised five different treatment plans for the parents over a 2-year period, but none of the plans were successful, so the state sought to terminate parental rights. The parents did not challenge the finding that their children were youths in need of care, but did challenge the appropriateness of the treatment plans, the finding that the plans were unsuccessful, and the finding that their conduct was unlikely to change within a reasonable time. The Supreme Court affirmed the termination. Primary consideration must be given to the best interests of the child as demonstrated by the child's physical, mental, and emotional conditions and needs, and the child's interests take precedence over parental rights. Here, the treatment plans were directed at protecting the children from further sexual abuse within the home and were thus appropriate. Although the parents complied with some obligations of the treatment plans, partial compliance is an insufficient basis upon which to premise error in a finding that a plan was not complied with. Further, a District Court should assess a parent's past and present conduct in determining whether that parent's conduct is unlikely to change within a reasonable time. In this case, ongoing incest between the siblings characterized the parents' inability to provide a safe environment to protect the younger children in the foreseeable future. The children had been in periodic foster care for several years, and numerous treatment plans were provided to the parents, who had considerable time to comply. The District Court did not abuse its discretion in terminating parental rights based on these findings of fact. In re D.H., S.H., K.H., N.S., & J.B., 2001 MT 200, 306 M 278, 33 P3d 616 (2001). See also In re C.J.M., 2012 MT 137, 365 Mont. 298, 280 P.3d 899.

No Evidence of Significant Change in Parenting Ability — Termination of Parental Rights in Children's Best Interests to Establish Permanency and Stability: The District Court granted permanent custody of three children with the Department of Public Health and Human Services (DPHHS) in 1996 after finding that the mother failed to complete her treatment plan and that existing conditions that rendered the mother unfit were unlikely to change within a reasonable time. The Supreme Court affirmed in In re C.M., 281 M 183, 932 P2d 1063 (1997). The DPHHS subsequently petitioned to terminate the mother's parental rights to two of the children. Reiterating its findings from the 1996 order, the District Court determined that no evidence had been presented that the mother had made any significant progress in her ability to parent, concluding that it was in the children's best interests to terminate the mother's parental rights because the children needed permanent placement to successfully progress in their therapy. The court did grant the mother the right to visit the children when the DPHHS determined that the children were psychologically ready for visitation to occur. The mother appealed. The Supreme Court examined the evidence and affirmed. The children's continued fantasy of being returned to their mother's care someday was detrimental to the therapeutic process, and termination of parental rights was supported by substantial evidence and not otherwise clearly erroneous. In re Custody & Parental Rights of F.M. & S.M., 2001 MT 93, 305 M 189, 24 P3d 208 (2001).

Children's Best Interests Met by Termination of Parental Rights:

The District Court's finding, that it was in the child's best interests to terminate the mother's parental rights, was amply supported in the record. The mother proved unable to follow her doctor's recommendations in regard to exposing her children to her adult male companions, demonstrated a repeated inability to put her children's needs before her own (including her historical inability to select appropriate male companions and accept responsibility for placing the children in dangerous circumstances), had an inconsistent history of visitation, and was unable to meet the youngest child's need for a family environment characterized by very high levels of nurturance, stability, and predictability and by freedom from further risk of sexual abuse or violence. In re B.F., R.F., & M.S., 2000 MT 231, 301 M 281, 8 P3d 790, 57 St. Rep. 954 (2000).

Father argued that the best interests of his children did not require termination of his parental rights, pointing to instances in the transcript where the foster mother testified she had no objection to supervised contact and where a psychologist testified that some contact would pose little risk to the children. However, termination was proper in light of substantial credible evidence by the child psychologist who counseled the children and recommended no visitation and by the father's evaluating psychologist who testified that termination might be beneficial to father in the long run. In re S.P., 241 M 190, 786 P2d 642, 47 St. Rep. 190 (1990).

Termination of Parental Rights Rather Than Award of Temporary State Custody Pending Parent's Release From Prison — Child's Best Interests: Rather than award temporary custody to the state pending release of the mother from incarceration, the District Court terminated the mother's parental rights instead, which she asserted was error. Adjudication of the child as a youth in need of care was not disputed, and two treatment plans were not successful. In reaching its decision that the mother's fitness to parent was unlikely to change, the court considered the mother's possible long-term confinement as well as all reasonable efforts by state protective services to rehabilitate her, relying on evidence regarding her parenting skills, the length of her incarceration, and the child's bonding with a foster family after placement with the family 3 weeks after birth. The court properly gave primary consideration to the physical, mental, and emotional needs of the child and correctly determined that, in the child's best interests, termination of the mother's parental rights was proper rather than awarding temporary custody to the state pending the mother's release from prison. In re J.H., 2000 MT 11, 298 M 41, 994 P2d 37, 57 St. Rep. 60 (2000).

Child's Best Interest of Primary Consideration for Termination of Parental Rights: When considering the criteria for termination of parental rights, courts must give primary consideration to the best interests of the child, as demonstrated by the child's mental, physical, and emotional conditions and needs. In re J.N. & A.N., 1999 MT 64, 293 M 524, 977 P2d 317, 56 St. Rep. 269 (1999), followed in In re Adoption of Snyder, 2000 MT 61, 299 M 40, 996 P2d 875, 57 St. Rep. 288 (2000). See also In re B.C., 283 M 423, 941 P2d 106, 54 St. Rep. 690 (1997), In re K.A.B., 1999 MT 71, 294 M 29, 977 P2d 997, 56 St. Rep. 297 (1999), In re S.M. & P.L.M., 2001 MT 11, 304 M 102, 19 P3d 213 (2001), and In re E.K., C.K., & J.E., 2001 MT 279, 307 M 328, 37 P3d 690 (2001).

Absence of Court-Approved Treatment Plan Not Bar to Termination of Parental Rights — Warning to Follow Law in Future Cases: In proceedings to terminate a mother's parental rights, the Department prepared and executed a treatment plan, but the mother refused to sign it. The plan was filed with the court, but the judge failed to officially sign it. The court found that the mother had allowed her children to be sexually abused or exploited and terminated her parental rights. The mother appealed on the grounds that this section requires a court-approved treatment plan before parental rights may be terminated. On appeal, the Supreme Court affirmed the termination despite the requirements of this section and warned the Department to follow the law in future cases or risk reversal of terminations. This section does not require that the parent sign the treatment plan in order for the court to approve it. In re Inquiry Into M.M., 274 M 166, 906 P2d 675, 52 St. Rep. 1170 (1995).

Failure to Complete Alcohol Treatment Programs Grounds for Termination of Parental Rights: T.M., whose mother died when he was 14 months old, was diagnosed as having fetal alcohol syndrome and required constant parental supervision. His father was repeatedly incarcerated for alcohol-related offenses and unable to take care of T.M. during those times. T.M.'s father also repeatedly failed to complete treatment programs for alcohol abuse, domestic violence, and anger management. The Supreme Court held that in applying its standard of review, the lower court's decision to terminate T.M.'s father's parental rights was not clearly erroneous given the fact that the record showed that the father had failed to complete required treatment and that it was in the best interests of the child that the father's parental rights be terminated. In re Custody of T.M., 267 M 75, 881 P2d 1333, 51 St. Rep. 952 (1994).

Status as Youth in Need of Care as Satisfaction of Prerequisites for Best Interests Test: The mother argued that the lower court erroneously applied the "best interests of the children" standard in terminating her parental rights. The Supreme Court ruled that the lower court was correct in applying the standard because its finding that the children were youth in need of care met the threshold requirement of finding dependency, abuse, or neglect. In re B.H.M., C.M.M., & J.T.H., 245 M 179, 799 P2d 1090, 47 St. Rep. 1967 (1990), followed in In re Custody & Parental Rights of M.D., 262 M 183, 864 P2d 783, 50 St. Rep. 1505 (1993).

Mother's Conduct Unlikely to Change Significantly Despite Evidence of Recent Rehabilitation: The trial court properly terminated a mother's parental rights and awarded custody of her two children to the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) with the authority to consent to adoption when it was shown to be in the best interests of the children. Substantial evidence established that the children were abused and neglected; the mother had agreed to an approved treatment plan but failed to meet its conditions; and the conduct or condition that rendered the mother an unfit parent was not likely to change within a reasonable time. The court properly considered evidence of the mother's alleged rehabilitation but its determination, based on 6 years of neglect and abuse, that her conduct was unlikely to change significantly in the future was based on substantial evidence and was not an abuse of its discretion. In re C.A.R. & P.J.R., 214 M 174, 693 P2d 1214, 41 St. Rep. 2395 (1984).

ABANDONMENT

Sufficient Evidence of Abandonment — Termination of Father's Parental Rights Proper: The District Court did not err in terminating a father's parental rights when the father lived out of state for the child's entire life, made no attempt or plan to establish a relationship with the child, failed to provide any care or financial support for the child, and failed to comply with his treatment plan. The District Court properly gave primary consideration to the emotional needs of the child and determined that the father's conduct was unlikely to change. In re M.J.C., 2014 MT 122, 375 Mont. 106, 324 P.3d 1198.

Termination of Parental Rights — Willful Surrender of Children to Other Parent Without Maintaining Contact for 3 Years — Abandonment of Children: In 2001, the parties divorced and the mother received custody of their two children. In 2006, to avoid termination proceedings against her, the mother stipulated with the Department of Health and Human Services (the Department) to transfer custody of the children to the father. Three years later, the Department removed the children from the father and petitioned to terminate the parental rights of both parents. The District Court ultimately terminated the mother's parental rights, finding that the mother had willfully abandoned the children. The mother appealed, alleging that she could not have abandoned the children when she did not have custody of them. The Supreme Court affirmed the District Court's ruling that the mother had abandoned her children because she had surrendered custody and had not maintained any contact with the children since 2008. In re E.M.S. and C.A.S., 2011 MT 307, 363 Mont. 68, 265 P.3d 1258.

Stepparent's Petition to Terminate Biological Parent's Parental Rights Granted Given Evidence of Abandonment: A custodial stepparent has standing to petition for termination of a noncustodial parent's parental rights. In this case, the custodial stepmother petitioned for and was granted termination of the noncustodial mother's rights in order to allow for adoption of the child by the stepmother. The mother appealed, but the Supreme Court affirmed. The District Court concluded that the mother abandoned the child and thus was an unfit parent. As evidence of abandonment, the court did not err in considering: (1) the mother's time in prison and residential drug treatment, during which she had no contact with the child; (2) during the mother's periods of absence, the mother's struggle with an abusive relationship, use of illegal drugs, and associations with known criminals; (3) the mother's failure to follow through on commitments to care for and visit the child; and (4) a lack of intent on the mother's part to resume care of the child in the future, regardless of any understanding that an initial parenting plan was temporary. Evidence of abandonment was substantial, and the District Court did not err in granting the petition to terminate the mother's parental rights. In re Adoption of K.P.M., 2009 MT 31, 349 M 170, 201 P3d 833 (2009).

Two-Year Wait to Assert Parental Rights — Failure to Advise Parent of Right to Counsel Harmless Error: A father who was incarcerated waited more than 2 years to file for relief following termination of his parental rights, asserting that he was denied due process by not being provided notice of the right to counsel. The Supreme Court agreed that fairness requires that a parent be represented by counsel at parental termination proceedings, but in this case, the error was harmless because the lack of notice was not prejudicial to the father. There was adequate evidence to terminate the father's parental rights, and even if he had been notified and represented by counsel, there was no way that an attorney would have made a difference under the circumstances and the result would have been the same. Denial of the motion for relief was affirmed. In re P.D.L., 2004 MT 346, 324 M 327, 102 P3d 1225 (2004).

Improper Termination of Rights of Noncustodial Parent on Grounds of Abandonment Absent Showing of Willful Surrender of Custody: The District Court terminated a father's parental rights after finding that he abandoned his children by willfully surrendering physical custody for a period of 6 months without manifesting a firm intention to resume physical custody or making permanent physical arrangements for care of the children. The father appealed on grounds that he could not have willfully surrendered custody because he did not have physical custody of the children, who were initially with the mother and then in state foster care. The Supreme Court agreed. Acknowledging that pursuant to In re M.W., 234 M 530, 764 P2d 1279 (1988), it is possible for a court to find that a noncustodial parent has abandoned children, that finding must be based on evidence that the parent did not intend to resume the children's care, which was not the case here. Rather, the District Court in this case found that the father willfully surrendered physical custody, which was directly controverted by the fact that the father could not surrender custody that he did not have. Termination of the father's parental rights under that theory of abandonment was reversible error. In re T.C. & W.C., 2001 MT 264, 307 M 244, 37 P3d 70 (2001).

No Treatment Plan Required to Terminate Parental Rights When Child Abandoned: A mother's parental rights were terminated based on the determination that she had abandoned her children, and the mother appealed. The children had been in out-of-home placement for longer than 1 year, and the mother had no contact with the children for almost 6 years, so no court-approved treatment plan was ever devised for the mother. The Supreme Court found that the mother's minimal efforts to contact the Department of Public Health and Human Services after termination proceedings were initiated were not sufficient to show the mother's intent to resume the care of her children, so the District Court did not err when it terminated the mother's parental rights on grounds of abandonment. A treatment plan is not required when the District

Court finds that a parent has abandoned a child. In re J.J. & C.J., 2001 MT 131, 305 M 431, 28 P3d 1076 (2001).

Evidence of Intent to Remedy Child's Situation During Time of Alleged Abandonment — Finding of Abandonment Reversed: The state alleged abandonment by father from September 1994 to January 1995. Evidence showed that father had an unimpressive history as a parent, offering little or no financial or emotional support during the first 5 years of his son's life. Nevertheless, father's actions during the time in question, including a petition to modify the dissolution decree to allow him visitation, contact with the mother to arrange visitation, and a trip from Wisconsin to visit his son, precluded a finding of abandonment during that finite period. In re W.Z., 285 M 16, 946 P2d 125, 54 St. Rep. 1019 (1997).

Termination of Parental Rights Based on Abandonment — Sporadic Attempts to Maintain Custody of Child Held Insufficient: Linda, the natural mother of P.E., left P.E. at a camping site with persons barely known to Linda. For the next 14 months, Linda traveled with persons with known criminal records, failed to give social workers her address and phone number on several occasions, failed to accept or maintain gainful employment, and failed to keep appointments with social workers or to appear at hearings to determine the status of P.E. Despite her expressed intent to resume physical custody, the District Court terminated her parental rights. Citing In re Adoption of C.R.D., 240 M 106, 782 P2d 1280 (1989), the Supreme Court affirmed, holding that Linda's sporadic attempts to maintain physical custody of P.E. did not constitute "a firm intention to resume physical custody" pursuant to 41-3-102. In re P.E., 282 M 52, 934 P2d 206, 54 St. Rep. 237 (1997).

Presence of at Least One Threshold Requirement Necessary — Abandonment: Mother willfully surrendered physical custody of her 6-month-old twins to a neighbor, with the representation that it would be for the day. About 3½ years later, the twins continued to reside with the neighbor, with no evidence that mother ever indicated that she intended to resume custody or attempted to make permanent legal arrangements for the children's care. It was not an abuse of discretion for the District Court to conclude that the children were abandoned pursuant to subsection (1)(b) of this section and that parental rights should be terminated. A court must determine the presence of at least one of the threshold requirements set forth in subsection (1) of this section to terminate a parent-child relationship. Because abandonment was a sufficient basis for termination of parental rights, it was not necessary to determine whether there was a sufficient basis for termination under other provisions of subsection (1) of this section. In re D.H. & F.H., 264 M 521, 872 P2d 803, 51 St. Rep. 386 (1994).

Six-Month Abandonment Requirement Applicable Only to Willful Surrender of Physical Custody: The requirement in 41-3-102(3)(d) that applies a 6-month period to the definition of abandonment that is part of the definition of harm to a child's health or welfare is applicable only to the willful surrender of physical custody of the child. It was therefore proper to terminate the parental rights of a parent who left children for a 5-month period under circumstances that made reasonable the belief that the parent did not intend to resume care of them. In re A.E., C.E., S.R., & J.R., 255 M 56, 840 P2d 572, 49 St. Rep. 877 (1992), followed in In re W.Z., 285 M 16, 946 P2d 125, 54 St. Rep. 1019 (1997).

Lack of Contact for Three Years Constituting Abandonment: The District Court did not abuse its discretion in terminating the parental rights of a father who abandoned his child by having no contact for 3 years and by indicating at no time his intention to resume custody until he learned his parental rights had been terminated. In re M.W., 234 M 530, 764 P2d 1279, 45 St. Rep. 2107 (1988).

Statute Constitutional — Abandonment by Noncustodial Parent: Father whose parental rights were terminated questioned the constitutionality of this section with regard to noncustodial parents. The Supreme Court found that the legal relationship between father and child did not change despite the facts that the mother was awarded custody and that the father failed to continue in his obligations to the child. In determining what constitutes abandonment, 41-3-102 considers the action of the parent responsible for the child's welfare, not the action of the custodial or noncustodial parent. In re M.W., 234 M 530, 764 P2d 1279, 45 St. Rep. 2107 (1988).

Evidence of Abandonment — Termination Proper: Evidence of abandonment warranting termination of parental rights was sufficient when the father had no contact and did not state any intention of resuming care of his children for a period of 2 years and did not make known his intention to acquire custody until 3 months after he was informed of the custody proceedings filed by the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services). In re M.J.D., C.K.D., & A.R.D., 225 M 200, 731 P2d 937, 44 St. Rep. 167 (1987).

Abandonment — Termination Proceedings to Be Fundamentally Fair: Termination of a natural parent's right to care and custody of a child is a fundamental liberty interest in Montana, which must be protected by fundamentally fair procedures. In a proceeding to terminate parental rights, the mother testified that on the advice of a social worker she refused to disclose to the father, who was in prison, the name of the child's foster parents; the father testified that while in prison he had tried to contact his son and see how he was doing. The Supreme Court held that this testimony contradicted the District Court's finding that father had abandoned child, and the Supreme Court remanded the case to the District Court for additional findings of fact and conclusions in light of specific requirements of 41-3-102. The Supreme Court also found the District Court record insufficient to conclude whether or not implementation of a treatment plan was attempted or feasible. The rights of parents cannot be terminated unless the parents have failed to comply with a court-approved treatment plan. In re R.B., 217 M 99, 703 P2d 846, 42 St. Rep. 1055 (1985), followed in In re W.Z., 285 M 16, 946 P2d 125, 54 St. Rep. 1019 (1997), In re E.W., C.W., & A.W., 1998 MT 135, 289 M 190, 959 P2d 951, 55 St. Rep. 536 (1998), and In re A.W-M., 1998 MT 157, 289 M 333, 960 P2d 779, 55 St. Rep. 628 (1998). See also In re E.A.T. & T.A.T., 1999 MT 281, 296 M 535, 989 P2d 860, 56 St. Rep. 1133 (1999).

ABUSE AND NEGLECT

Misapprehension of Stipulations — Termination Proper: The District Court determined a child to be abused or neglected and terminated the parental rights of the child's mother. She appealed, arguing the court had not held fundamentally fair procedures and had found her child to be a youth in need of care based on a stipulation she did not make. The Supreme Court affirmed, noting that the mother was afforded fundamentally fair procedures and had equal opportunity to present evidence and test evidence entered by the Department of Public Health and Human Services. The Supreme Court also noted that a determination of abuse or neglect was sufficient in the case and noted the mother's statements that supported the finding. In re C.S., 2020 MT 127, 400 Mont. 115, 464 P.3d 66.

No Reliance on Previous Adjudication of Youth in Need of Care — Termination Improper: The District Court terminated a mother's parental rights, and the mother appealed. The issue concerned whether the District Court properly determined the child to be abused or neglected while providing the mother fundamentally fair procedures. In a previous case, the child had been placed with the child's father, resolving issues of neglect. The Supreme Court ruled that the state cannot rely on an adjudication as a youth in need of care or a determination of abuse and neglect from a prior case and reversed the termination of parental rights. In re D.D., 2020 MT 126, 400 Mont. 105, 464 P.3d 60.

Continued Neglect of Children Sufficient Basis for Termination of Mother's Parental Rights Without Reunification Efforts: A mother appealed the District Court's termination of her parental rights to her two children under 41-3-423 on the basis of neglect. The Supreme Court held that the District Court did not abuse its discretion in terminating the mother's parental rights without requiring reunification efforts because the record established that the mother's history of continued and worsening drug use and neglect of her children amounted to "chronic, severe neglect" under 41-3-423(2)(a) and that reunification efforts and treatment plans were not in the best interests of the children. In re E.Z.C., 2013 MT 123, 370 Mont. 116, 300 P.3d 1174. See also In re J.A.B. and L.M.F., 2015 MT 28, 378 Mont. 119, 342 P.3d 35.

Chronic, Severe Neglect — Termination of Parental Rights Affirmed — Consideration of Prior Petition Proper: The parents appealed the District Court's finding that they had subjected their children to chronic, severe neglect and its order terminating their parental rights. The parents argued that the Department of Public Health and Human Services was collaterally estopped from introducing evidence contained in a prior petition for temporary legal custody of the children to establish chronic, severe neglect in the present petition. The parents also argued that their conduct did not rise to the level of chronic, severe neglect. The Supreme Court affirmed, concluding the elements of collateral estoppel were not met because the issues in the current and prior petitions were not identical and the prior petition was not dismissed as a final judgment on the merits. The Supreme Court upheld the District Court's finding of chronic, severe neglect, noting that discrete instances of neglect, when viewed within a consistent pattern of similar behavior, provide a clear basis for a finding of chronic, severe neglect. In re M.N., J.N., Jr., & R.N., 2011 MT 245, 362 Mont. 186, 261 P.3d 1047. See also In re E.Z.C., 2013 MT 123, 370 Mont. 116, 300 P.3d 1174, and In re L.N., 2014 MT 187, 375 Mont. 480, 329 P.3d 598, in which the Supreme Court affirmed the termination of parental rights to L.N., the fourth child of the parents of J.N., M.N., and R.N. (see above), on the basis that the parents had previously subjected their older children to chronic and severe neglect.

Requirement That Child Be Adjudicated Youth in Need of Care Met by Parents' Stipulation in Adoption of Treatment Plans — Harmless Error: A father contended that all proceedings related to a parental rights termination were invalid because the children had never been formally adjudicated as youths in need of care. The Supreme Court found that in this case, the absence of a formal adjudication was harmless error because the parents previously agreed that their children were abused or neglected when the parents stipulated to that fact during the adoption of four separate treatment plans. The evidence of abuse and neglect was overwhelming, and if the parents had objected to temporary legal custody or to subsequent District Court findings or if they had disputed the status of the children as youths in need of care, the District Court could have easily made a ruling on the children's status at that time. The parents were afforded full due process at every stage and had ample opportunity to object to the proceedings and findings, yet they stipulated and agreed to the District Court findings through counsel at every turn. Although failure to adhere to statutory requirements governing termination proceedings will generally constitute grounds for reversal, this case was one of the rare occasions that application of the harmless error doctrine was warranted. The procedural error did not affect the outcome of the termination proceedings or substantively prejudice the parents, and termination was affirmed. In re J.C. & A.D., 2008 MT 127, 343 M 30, 183 P3d 22 (2008), distinguishing In re M.O., M.O., & M.O., 2003 MT 4, 314 M 13, 62 P3d 265 (2003), and In re B.N.Y., 2003 MT 241, 317 M 291, 77 P3d 189 (2003).

Evidence of Parent's Conviction for Sexual Abuse of Child Sufficient Basis for Termination of Parental Rights: The state petitioned to terminate C.T.'s parental rights on grounds that his child S.T. and the child's mother had lived with C.T. for 2 years, that C.T. was a convicted sex offender, and that both mother and child had been exposed to domestic violence. Without objection, the District Court took judicial notice of C.T.'s conviction for sexual intercourse with a minor and granted the state's petition. C.T. appealed on grounds that the court abused its discretion by terminating his parental rights on the basis of facts not alleged in the petition or supported by the evidence, asserting that even though the court took judicial notice of the conviction, that court never received the documents into evidence and therefore erred by relying on that evidence in entering its findings of fact. The Supreme Court declined to recognize a distinction between taking judicial notice and entering the noticed facts into evidence. In a civil proceeding, judicially noticed facts are accepted as conclusive, and once a fact is judicially noticed, the party offering the evidence is relieved of the duty to also move for its admission. Thus, C.T.'s conviction was not subject to reasonable dispute, and the District Court was entitled to rely on the conviction as clear and convincing evidence that C.T. had sexually abused a child and to rely on 41-3-423(2)(a) as a statutory basis for terminating C.T.'s parental rights. The District Court was affirmed. In re S.T., 2008 MT 19, 341 M 176, 176 P3d 1054 (2008).

Chronic and Severe Neglect Inclusive of Emotional Neglect: In terminating parental rights without reunification services, the state relied on 41-3-423 and this section in a case of chronic, severe neglect of a child. A parent asserted that parental rights may not be terminated based on a finding of severe emotional neglect, but the Supreme Court held that by definition, neglect includes psychological harm to a child. (See 2023 amendment to 41-3-102.) Here, the parent's ongoing drug use and repeated incarceration resulted in the parent's unavailability to the child and inconsistent caregiving, and this neglect in turn produced high anxiety and emotional disturbance in the child. Parental rights were thus properly terminated based on chronic, severe emotional neglect. In re Custody & Parental Rights of D.S., 2005 MT 275, 329 M 180, 122 P3d 1239 (2005). See also In re M.N., J.N., Jr., & R.N., 2011 MT 245, 362 Mont. 186, 261 P.3d 1047, which held that discrete instances of neglect, when viewed within a consistent pattern of similar behavior, provide a clear basis by which a District Court can find chronic, severe neglect, and In re E.Z.C., 2013 MT 123, 370 Mont. 116, 300 P.3d 1174.

Failure to Protect Child From Physical Abuse and to Feed Child — Sufficient Evidence of Abuse: Following termination of her parental rights, a mother contended that there was insufficient evidence to find that she had abused her child. The Supreme Court disagreed. There was convincing testimony that the mother failed to protect the child from physical abuse by her boyfriend and that on at least one occasion, she neglected to feed the child until 4:30 p.m. This evidence met the statutory definition of child abuse or neglect, and the characterization of her treatment of the child as abuse was not clearly erroneous. In re Custody & Parental Rights of C.J.K., 2005 MT 67, 326 M 289, 109 P3d 232 (2005).

Adjudication of Child as Youth in Need of Care Based on Prospective Abuse Proper: A mother relinquished custody of her three children after the District Court determined that the children were in need of care. When she became pregnant again, the state moved for emergency protective services for the fourth child upon the child's birth. The father contended that because the child was removed from the parents at birth, the child was never abused or neglected and thus could not properly have been adjudicated as a youth in need of care. Citing In re C.P., 2001 MT 187, 306 M 238, 32 P3d 754 (2001), the Supreme Court disagreed. The circumstances related to the prior termination of the mother's parental rights to her three children had not changed, and because she would also be the primary caregiver for the fourth child, there was substantial risk to the health and welfare of the newborn child as well, so the District Court did not err in adjudicating the fourth child as a youth in need of care based on prospective abuse. In re K.C.H., 2003 MT 125, 316 M 13, 68 P3d 788 (2003).

Substantial Risk of Harm to Child — Parental Rights Terminated Despite Lack of Evidence of Abuse or Neglect: A girl was born to a mother who was later divorced and remarried. When the girl was 15, she had sexual intercourse with her stepfather and conceived a baby. The state petitioned for temporary investigative authority (TIA) and emergency protective services (see 2001 amendment to 41-3-427) over both the girl and her baby, pursuant to 41-3-402 (renumbered 41-3-427). The mother then agreed to divorce the stepfather so that he could marry the girl. The petition regarding the girl was dismissed because she was married and was no longer subject to the mother's parental control. At the show cause hearing on the petition regarding protection of the baby, a state social worker testified that, although there was no indication of actual abuse or neglect of the baby, there was concern for the baby's safety should the baby be placed in the home with the girl and stepfather. The state ultimately petitioned to terminate the girl's parental rights to the baby. The District Court determined that the baby was a youth in need of care and terminated the girl's parental rights. The girl appealed on grounds that the court's determination that the baby was a youth in need of care was erroneous, absent any evidence of abuse, neglect, or abandonment, and that the petition for TIA was insufficient on its face because it contained no allegations that the baby was abused or neglected. However, the definition of abuse or neglect in 41-3-102 includes either actual harm or the substantial risk of harm. Thus, the report required by 41-3-427 need set forth in detail only facts supporting the petition's request for TIA based on the assertion that a child is abused or neglected or is in danger of being abused or neglected. The social worker's testimony was considered sufficient to support a finding that there was substantial risk of harm to the baby if returned to the girl's custody; therefore, the District Court's determination that the baby was a youth in need of care was correct. The court's finding that under the circumstances, the baby had little hope of a normal emotional, moral, and psychological development with his parents was also supported by substantial evidence and was not clearly erroneous, based on the social worker's testimony that the girl's relationship with the stepfather was unhealthy, that the family unit exhibited extremely poor boundaries, and that the girl had obvious psychological damage from being sexually abused by her father and would, without successful treatment, be unable to set appropriate boundaries for the baby or be able to understand the risk of harm that her relationship with the stepfather posed to the baby. The Supreme Court affirmed. In re D.T.H., 2001 MT 138, 305 M 502, 29 P3d 1003 (2001).

Child in Danger of Abuse and Neglect Subject to Adjudication Regardless of Whether Actual Abuse or Neglect Occurred: A child who is in danger of being abused or neglected may be considered a youth in need of care regardless of whether actual abuse or neglect occurred, irrespective of a parent's care for the child prior to the parent's incarceration or commitment to a mental hospital. In re A.M., 2001 MT 60, 304 M 379, 22 P3d 185 (2001).

Record Showing Child to Be Youth in Need of Care and Failure of Mother to Complete Treatment Plan Held Sufficient for Termination of Parental Rights: The parental rights of M.M., the natural mother of A.W-M., were terminated by the District Court based on its finding that A.W-M. was a youth in need of care and that M.M. failed to complete her treatment plan. The Supreme Court reviewed the District Court record and found that the record contained substantial credible evidence that A.W-M. was a youth in need of care, including evidence that A.W-M. was left with a babysitter when she was 7 months old and sick with bronchitis, that after treatment, doctors would not release A.W-M. to her mother's care because her mother "appeared to be high", that M.M. made little effort to comply with her treatment plan, and that A.W-M. had been left with other caregivers for indefinite periods of time. The Supreme Court also found substantial evidence that M.M. could not be expected to complete her treatment plan in the foreseeable future, including evidence that she tested positive for use of a controlled substance, was unable to obtain stable employment or housing, failed to attend court-ordered counseling, visited only sporadically with A.W-M., and agreed in her testimony that she should not be given further time to comply with her treatment plan. In re A.W-M., 1998 MT 157, 289 M 333, 960 P2d 779, 55 St. Rep. 628 (1998).

Absence of Court-Approved Treatment Plan Not Bar to Termination of Parental Rights — Warning to Follow Law in Future Cases: In proceedings to terminate a mother's parental rights, the Department prepared and executed a treatment plan, but the mother refused to sign it. The plan was filed with the court, but the judge failed to officially sign it. The court found that the mother had allowed her children to be sexually abused or exploited and terminated her parental rights. The mother appealed on the grounds that this section requires a court-approved treatment plan before parental rights may be terminated. On appeal, the Supreme Court affirmed the termination despite the requirements of this section and warned the Department to follow the law in future cases or risk reversal of terminations. This section does not require that the parent sign the treatment plan in order for the court to approve it. In re Inquiry Into M.M., 274 M 166, 906 P2d 675, 52 St. Rep. 1170 (1995).

Lack of Care, Supervision, and Guidance — Threats of Sexual and Physical Abuse — Termination Proper: After finding that the children were youths in need of care because they were not under the care and supervision of a suitable adult, had no proper guidance, and were threatened with sexual and physical abuse, the District Court properly terminated mother's parental rights, noting her failure to comply with a treatment plan or to change her conduct that continually endangered her children. In re A.W. & A.V., 247 M 268, 806 P2d 520, 48 St. Rep. 192 (1991).

Continuation of Unfitness of Parents: Evidence in an action to terminate parental rights showing that father had a history of violent behavior, had been arrested for physically abusing his wife, and was known to have abused his children; that both parents routinely drank alcoholic beverages to excess, that they became aggressive and violent under the influence of alcohol, and that they were generally unable to properly care for their children at such times; and that counseling had been unsuccessful because of the parents' hostile and uncooperative attitude and failure to participate clearly supported the finding under subsection (2) of this section that the conduct or condition of the parents rendering them unfit was unlikely to change within a reasonable time. In re J.L.S. & A.D.S., 234 M 201, 761 P2d 838, 45 St. Rep. 1842 (1988). See also In re R.B., 242 M 141, 788 P2d 1361, 47 St. Rep. 642 (1990).

Inability to Follow Through on Treatment for Chronic Mental Condition Sufficient to Warrant Termination of Rights: A mother's undifferentiated schizophrenia was a chronic condition, and because of her inability to follow through on her prescribed psychiatric treatment plan, the conduct that rendered her unfit as a mother was not likely to change within a reasonable time. Termination of her parental rights was proper. In re J.W. & J.C., 232 M 46, 757 P2d 769, 45 St. Rep. 855 (1988).

Sexual Abuse and Failure to Seek Treatment — Parental Rights Terminated: The District Court was presented with clear and convincing evidence that children were sexually abused, but the abusive parent did not enter into treatment or have the court approve an appropriate treatment program and was evaluated at court order only. The court properly terminated the parent's rights on the merits. Custody of R.A.D. & J.D., 231 M 143, 753 P2d 862, 45 St. Rep. 496 (1988).

Reasonable Time for Change — Construction With Age of Child: The trial court properly terminated a father's parental rights when there was substantial credible evidence to the effect that despite his good intentions to do so, the father was unable to provide for his child's mental and emotional needs. The child's age (9 years) made it imperative that she be provided with a loving, stable home as soon as possible. Expert testimony indicated that her well-being could not stand further delay. In re D.S.N., 222 M 312, 722 P2d 614, 43 St. Rep. 1291 (1986).

Termination of Mother's Rights — Test: The State met its burden of proof and District Court acted within the proper scope of discretion in terminating mother's parental rights where, among other things, testimony showed that the father lived apart from the mother, the residence was in a consistently filthy and deplorable condition, the child had inadequate sleeping facilities, meals, and clothing, the mother had been evicted three times because of the condition of the home, the child was beginning to manifest autistic behavior, and the mother had been diagnosed as a paranoid schizophrenic with serious ambivalence in regard to her roles as a mother and a person and a lack of ongoing capacity to provide long-term care for the child. Clear and convincing evidence in the record that a child is neglected and that it is in the best interests of the child that parental rights be severed sustains judgment declaring the child to be in the need of care and granting state agency permanent custody with the right to consent to adoption. In re Declaring

K.V. and K.A. Youth in Need of Care, 199 M 516, 649 P2d 1308, 39 St. Rep. 1582 (1982). See also In re C.A.R. & P.J.R., 214 M 174, 693 P2d 1214, 41 St. Rep. 2395 (1984).

Evidence Supporting Termination of Parent-Child Legal Relationship: Where the child had been determined to be a youth in need of care, the father was serving a 10-year prison sentence, and a clinical psychologist testified that the mother was not interested in learning how to parent and probably could not do so unless she received 2 to 3 years of counseling, the evidence supported the termination of parent-child legal relationship. In re R.J.W., 197 M 286, 642 P2d 1072, 39 St. Rep. 568 (1982).

TREATMENT PLAN AND COMPLIANCE

Complete Compliance With Treatment Plan Required — No Abuse of Discretion to Terminate Mother's Parental Rights to Child When Mother Consistently Failed to Attend Visitation With Child. In re R.K., 2023 MT 161, 413 Mont. 184, 534 P.3d 659.

District Court's Termination of Parental Rights Not Abuse of Discretion — Mother's Failure to Make Progress in Treatment Plan and Unwillingness to Engage Department's Efforts to Assist — Conduct or Condition Unlikely to Change Within Reasonable Time. In re A.M.G., 2022 MT 175, 410 Mont. 25, 517 P.3d 149.

Mother Alleged Insufficient Visitation and Insufficient Access to Services Prior to Termination — No Failure of Active Efforts When Mother Did Not Request Additional Services: During a District Court hearing on termination of parental rights, a mother with a disability elicited testimony that she may have benefited from more frequent therapeutic sessions and visitation sessions with her children. The District Court terminated her parental rights. The mother appealed, arguing that the insufficient services and visitation demonstrate that the District Court erred in finding that she was unlikely to become fit to parent within a reasonable time. The Supreme Court affirmed, finding that there was no error and that the District Court appropriately weighed the evidence, particularly in light of the fact that the mother never requested additional services or visitation and that evidence supported the conclusion that the child would suffer serious emotional or physical harm if placed in the mother's care. In re K.L.N., 2021 MT 56, 403 Mont. 342, 482 P.3d 650.

Questioning by Guardian Ad Litem at Hearing Allowed — Partial Compliance — Extension of Temporary Legal Custody Proper: The Department of Public Health and Human Services petitioned for emergency protective services following reports of inappropriate behavior by the minors' parents. Eventually, at a hearing to terminate the father's parental rights, the District Court allowed the minors' guardian ad litem to question a child protection specialist and therapist over the objections of the father. The District Court subsequently terminated the father's parental rights. On appeal, the Supreme Court found that the District Court did not err in allowing the children's guardian ad litem to cross-examine witnesses, although some lines of questioning lacked foundation and should have not been permitted. The Supreme Court also found that the Department provided reasonable efforts to reunify the father with the children, that the father's partial compliance with the treatment plan was not sufficient for compliance, that while the Department did not file for a formal motion to extend an order for temporary legal custody the Department nevertheless requested it, and that the father failed to identify which of his three attorneys he believed were ineffective over the course of his 4-year case. In re B.F., 2020 MT 223, 401 Mont. 185, 472 P.3d 142.

Relapse and Domestic Violence at Level of Chronic, Severe Neglect — Termination Proper: In a case involving years of drug abuse relapses and domestic violence, the District Court terminated parental rights without requiring the Department of Public Health and Human Services to make reasonable efforts to reunify the family, finding the aggravated circumstance of chronic, severe neglect. On appeal, the Supreme Court affirmed, finding substantial support for the determination in the repeated history of drug abuse and domestic violence in the child's home. In re C.S., 2020 MT 127, 400 Mont. 115, 464 P.3d 66.

Two Years of Continued Methamphetamine Use — Proper Finding That Condition Unlikely to Change: The District Court terminated the parental rights of a mother who continued to use methamphetamine, did not successfully attend inpatient treatment as recommended by her counselors, and had only one clean urinalysis in 2 years. The District Court found that the conduct or condition rendering the mother unfit to parent was unlikely to change in a reasonable time. On appeal, the Supreme Court reviewed for abuse of discretion and affirmed, finding that the District Court did not clearly err by its finding. In re A.B., 2020 MT 64, 399 Mont. 219, 460 P.3d 405.

Reasonable Efforts When Noncommunicative Parent Moves Out of State: A mother with substance abuse problems failed in many ways to act on the treatment plan created by the Department of Public Health and Human Services and then moved to Idaho, from where she failed to maintain communication with the Department. Subsequently, the District Court terminated the mother's parental rights. Relying on In re R.J.F., 2019 MT 113, 395 Mont. 454, 443 P.3d 387, the mother appealed on the basis that the Department had not made reasonable efforts. Reviewing for abuse of discretion, the Supreme Court affirmed, explaining that the facts showed reasonable efforts by the Department and that the mother had unilaterally moved out of state and failed to maintain contact with the Department. In re R.L., 2019 MT 267, 397 Mont. 507, 452 P.3d 890.

Admission of Drug Results at Termination Hearing Improper — Sufficient Evidence in Support of Termination of Parental Rights: During a parental rights termination hearing, the District Court, citing 41-3-112(4), admitted the parents' drug test results through a court-appointed special advocate (CASA) and subsequently terminated the parents' rights. On appeal, the Supreme Court concluded that admitting the drug test results through the CASA was erroneous. The Supreme Court stated that 41-3-112(4) was enacted to allow a guardian ad litem to gather information from collateral sources to form and make recommendations as to the best interest of the child and that the subsection was not enacted as a bypass for the Department of Public Health and Human Services to admit evidence that would otherwise be inadmissible or to cure a party's failure to call a witness to testify. However, the Supreme Court affirmed, finding that admitting the drug test results was harmless and reversal was not warranted because substantial evidence supported the District Court's determination that the parents had failed to complete their treatment plans and that their conduct or the conditions rendering them unfit were unlikely to change within a reasonable time. In re I.M., 2018 MT 61, 391 Mont. 42, 414 P.3d 797.

Failure to Comply with Treatment Plan — Excuse of Misunderstanding Plan Discounted — Termination Proper: Although the mother conceded that she failed to complete most of her treatment plan, she claimed that she mistakenly believed that an alternative plan was being created and that she therefore did not have to comply with the plan. The District Court, however, terminated her parental rights. On appeal, the Supreme Court affirmed, noting that the fact she had somewhat complied with portions of the treatment plan belied her claim that she did not think she had to complete it. In re A.S., 2016 MT 156, 384 Mont. 41, 373 P.3d 848.

Parent's Perpetual Absence — Implied Finding That Parent Conduct Unlikely to Change Proper — Termination Proper: After the District Court terminated his parental rights, the father appealed to the Supreme Court, arguing that the court had not made the statutory finding that he was unfit and unlikely to change his behavior. Noting the father's perpetual absence from the child and from the court proceedings involving the child, the Supreme Court ruled that the District Court had cited to clear and convincing evidence that the condition rendering the father unfit to parent was unlikely to change and applied the doctrine of implied findings in affirming the termination of his rights. In re A.S., 2016 MT 156, 384 Mont. 41, 373 P.3d 848.

Termination of Parental Rights of "Non-Offending" Parent: A child was designated a youth in need of care after being removed from her mother's care. The father did not object to the designation and, although the father was deemed the "non-offending parent", the child was not placed with him because he testified that he could not financially support her or provide her a place to live. The District Court approved a document that had been prepared by the Department of Public Health and Human Services as a treatment plan for the father. However, while the child was in foster placement, the father stopped visiting the child, was placed in jail for partner-family member assault, and was alleged to be using meth. The District Court terminated the father's rights. On appeal, the father argued that he had never received a treatment plan. However, the Supreme Court disagreed and affirmed, noting that even if the term "treatment plan" had been crossed out and the word "checklist" had been written next to it, the content of the document constituted a treatment plan. In re K.B., 2016 MT 73, 383 Mont. 85, 368 P.3d 722.

Unsuccessful Treatment Plan — Incarceration Not Sole Basis of Conclusion — Termination Proper: A father appealed the termination of his parental rights, arguing that the District Court had abused its discretion by concluding that the treatment plan was not successful. Although a District Court may not conclude that a treatment plan has been unsuccessful solely because the parent is incarcerated, the Supreme Court noted that, in this case, the District Court had cited instances of bad behavior by the father while imprisoned that served as the basis for the District Court's termination of rights. Given the District Court's supported findings that the father had "an inability to conform his conduct to law" based on his behavior while incarcerated, the Supreme Court affirmed, holding that the District Court's conclusion was supported. In re

J.B., 2016 MT 68, 383 Mont. 48, 368 P.3d 715. See also In re A.S., 2016 MT 156, 384 Mont. 41, 373 P.3d 848, and In re A.L.P., 2020 MT 87, 399 Mont. 504, 461 P.3d 136.

Mother Unlikely to Change Within Reasonable Time: The Department of Public Health and Human Services removed the mother's two children from her care after 17 referrals over a period of 3 years. The mother stipulated to a treatment plan and to having the District Court adjudicate her children as youths in need of care. However, the mother subsequently failed to abide by the stipulated treatment plan. The District Court eventually terminated the mother's parental rights. On appeal, the Supreme Court affirmed, holding that the District Court properly found that the conduct or condition that made the mother unfit to parent was unlikely to change within a reasonable time. In re C.W.E., 2016 MT 2, 382 Mont. 65, 364 P.3d 1238. See also In re X.M., 2018 MT 264, 393 Mont. 210, 429 P.3d 920.

Treatment Plan Executed in Good Faith Despite Case Worker Turnover — Due Process Not Violated in Termination Proceedings: The mother appealed the termination of her parental rights, arguing that she was denied due process of law when the Department of Public Health and Human Services did not execute her treatment plan in good faith because it did not adequately account for her history as a victim of domestic violence and because she was assigned six different child protection specialists during the course of her case. The Supreme Court affirmed, concluding that the Department took notice of the mother's history as a victim of domestic violence and, given the Department's provision of numerous services and its efforts to reunite the family, the fact that the mother was assigned numerous case workers did not in itself establish a due process violation. In re T.D.H., 2015 MT 244, 380 Mont. 401, 356 P.3d 457.

Termination of Mother's Rights Appropriate Despite Treatment Plan's Failure to Include Chemical Dependency Evaluation — Ineffective Counsel: In a termination of parental rights proceeding, the District Court found that the mother did not complete the approved treatment plan and that she was unlikely to change within a reasonable time because of her drug problem. On appeal, the mother argued that while she and her attorney agreed to the treatment plan, it was deficient because it failed to include a chemical dependency evaluation. The mother also argued that her counsel was ineffective for failing to advocate for the inclusion of an evaluation in the plan. The Supreme Court affirmed the District Court, holding that while the failure of the treatment plan to include substance abuse evaluation and treatment was notable, the best interests of the children supported termination of her rights, the difference was being offered help with the drug problem and being required to get help, and the failure to advocate for a treatment plan did not prejudice the mother. In re T.N.-S., 2015 MT 117, 379 Mont. 60, 347 P.3d 1263, followed in In re J.E.L., III, 2018 MT 50, 390 Mont. 379, 414 P.3d 279.

Father's Partial Compliance With Treatment Plan Insufficient — Sufficient Evidence to Support Termination: The Department of Public Health and Human Services initiated a parental rights termination proceeding, alleging the father presented a risk to his children. The District Court ultimately terminated the father's rights. On appeal, the father argued that the Department failed to act in good faith and failed to provide reunification services, that he had partially completed his treatment plan, and that it was reasonable for him to improve. The Supreme Court affirmed, holding that the Department was not biased and did not act in bad faith, that a parent does not complete a treatment plan by partial or even substantial compliance with a treatment plan, and that the evidence supported the determination that the father was unlikely to improve. In re A.K., 2015 MT 116, 379 Mont. 41, 347 P.3d 711.

Mother's Failure to Follow Treatment Plan With Ample Opportunity — Fitness of Parent Unlikely to Change: The mother's parenting rights were terminated and she was given approximately 2 years to follow a treatment plan. Ultimately, the District Court found that the mother would not be able to achieve long-term change necessary to provide for her children. On appeal, the Supreme Court found that the mother was given sufficient time and that sufficient evidence showed she was unlikely to change within a reasonable time. In re A.H., 2015 MT 75, 378 Mont. 351, 344 P.3d 403, followed in In re J.E.L., III, 2018 MT 50, 390 Mont. 379, 414 P.3d 279.

Termination of Parental Rights — Transfer to Tribal Court Denied: The birth mother of a minor considered an Indian child under the Indian Child Welfare Act (ICWA) forfeited parental care, was arrested for DUI, failed in attempts to reunite with the child, and subsequently failed to follow the District Court's treatment plan. Similarly, the father denied paternity, refused to voluntarily undergo paternity tests, and exhibited no interest in caring for the child. The state placed the child in an ICWA-qualified foster home. Eighteen months after the foster care placement, the tribe moved to transfer to tribal court, which was denied by the District Court. On appeal, the Supreme Court held that the District Court did not abuse its discretion because

ICWA did not require transfer to tribal court and that 41-3-604 and 41-3-609 were satisfied because the mother failed to comply with her parenting plan. In re S.B.C., 2014 MT 345, 377 Mont. 400, 340 P.3d 534.

Child Removed From Mother's Care — Child Subsequently Placed With Father — Motion to Dismiss Mother's Termination Proceedings Correctly Denied: The state removed the petitioner's child from her home based on allegations of abuse and neglect. After the District Court adjudicated the child a youth in need of care, the child's paternity was established. The mother did not comply with the terms of her treatment plan and the state filed a petition to terminate her parental rights. Days prior to the termination hearing, the child was placed with the father after he successfully completed his treatment plan. The mother filed a motion to dismiss the petition because the child had been placed with the father and therefore had been reunited with the child's parent. The District Court denied the motion to dismiss the petition, noting that the child had not been reunited with the mother. Moreover, the District Court concluded, and on appeal the Supreme Court agreed, that 41-3-424 was not intended to benefit a noncompliant, offending parent based on the compliance of a nonoffending parent. In re L.V-B., 2014 MT 13, 373 Mont. 344, 317 P.3d 191.

Untimely Objection to Treatment Plan: A mother appealed the termination of her parental rights, arguing that her court-ordered treatment plan was inadequate because it did not take into account the pain that was the root cause of her addiction. The Supreme Court disagreed, holding that raising the objection for the first time at the termination hearing was not timely. Her failure to timely object resulted in the waiver of any argument about the plan's appropriateness on appeal. Furthermore, the mother had stipulated to the plan, and it had taken into account the mother's particular problems. In re C.B., 2014 MT 4, 373 Mont. 204, 316 P.3d 177. See also In re M.B., 2018 MT 205, 392 Mont. 368, 424 P.3d 606.

Failure to Object to Treatment Plan in Timely Manner Precludes Court Consideration of Issue: After a father's parental rights to his children were terminated, the father and his attorney stipulated to the treatment plan and did not object to the fact that it did not address the father's hearing impairment. By failing to object, the father waived any right to argue on appeal about the propriety of the treatment plan. In re T.S., 2013 MT 274, 372 Mont. 79, 310 P.3d 538. See also In re M.B., 2018 MT 205, 392 Mont. 368, 424 P.3d 606.

Court Determination Regarding Danger of Physical or Emotional Damage to Child — Testimony by ICWA Expert Required — Supplementary Evidence Permitted: Sufficient evidence that reunification would cause serious physical or emotional damage to the children requires testimony by an Indian Child Welfare Act expert; however, such evidence may be supplemented by other evidence in the record, such as a parent's drug use and inability to overcome drug addictions despite treatment programs. In re D.A. and M.A., 2013 MT 191, 371 Mont. 46, 305 P.3d 824, following In re K.B. and T.B., 2013 MT 133, 370 Mont. 254, 301 P.3d 836.

Factors Court May Consider When Evaluating Active Efforts of Department Under ICWA — Incarceration, Supervised Status, and Other Absences: When evaluating whether the Department of Public Health and Human Services made sufficient active efforts to unify a parent with her children under the Indian Child Welfare Act, a court may consider the parent's incarceration, supervised status, and absences while on the lam. Here, the record established beyond a reasonable doubt that the Department undertook active efforts to reunite the parent and her children while trying to work around the parent's incarceration, supervision, and chemical dependency problems. In re D.A. and M.A., 2013 MT 191, 371 Mont. 46, 305 P.3d 824, following A.A. v. Dept. of Family and Youth Services, 982 P.2d 256 (Alaska 1999).

Failure to Comply With Treatment Plan Sufficient to Justify Termination of Parental Rights: The birth mother alleged on appeal that the state failed to prove at the termination hearing that her treatment plan was appropriate or, in the alternative, that the state failed to prove that she did not comply with her treatment plan. The Supreme Court held that a parent who does not object to a treatment plan waives the right to argue on appeal that the plan was not appropriate and that complete compliance with a treatment plan is required. In re H.R. and D.R., 2012 MT 290, 367 Mont. 338, 291 P.3d 583, following In re L.H., 2007 MT 70, 336 Mont. 405, 154 P.3d 622, and followed in In re D.S.B., 2013 MT 112, 370 Mont. 37, 300 P.3d 702. See also In re M.B., 2018 MT 205, 392 Mont. 368, 424 P.3d 606.

Compliance With Treatment Plan — Actual Effectuation of Purposes Required: Based on the facts of the case, the District Court did not abuse its discretion when it terminated parental rights based on whether the parents complied with the appropriate treatment plan. District Courts must do more than mechanistically check items off a task list. A court must determine whether parents have actually effectuated the purposes of a treatment plan — a parent does not successfully complete a treatment plan by partial or even substantial compliance. In re I.B., 2011 MT 82, 360 Mont. 132, 255 P.3d 56.

Department's Reunification Efforts Held Reasonable — Termination of Parental Rights Over Siblings Held Sufficient Justification — No Abuse of Discretion: After the District Court terminated a mother's parental rights over her child C.J., the mother appealed, claiming as unreasonable the 4½ months that passed between the petition by the Department of Public Health and Human Services (Department) to be exempted from the "reasonable efforts" for reunification requirement under 41-3-423(2)(e), because the mother's rights over C.J.'s two siblings had also been terminated, and the date of the hearing. The Supreme Court held that the Department's efforts were reasonable notwithstanding the Department's petition, that there was no timeline provided in the statutes for the hearing, that the delay in holding the hearing did not subject the mother to a fundamentally unfair proceeding, and that the mother was correctly not given a treatment plan because her circumstances met the requirements of 41-3-609(1)(d) and 41-3-423(2)(e) regarding termination of a mother's rights over one child because her rights over other siblings were previously terminated. Therefore, the Supreme Court held that there was no abuse of discretion by the District Court in terminating the mother's parental rights over C.J. In re C.J., 2010 MT 179, 357 Mont. 219, 237 P.3d 1282.

Incarceration of Parent for More Than One Year — No Requirement for Treatment Plan Prior to Termination of Parental Rights: When her child was only 1 month old, a mother was extradited to Texas and subsequently was sentenced to 2 years in prison. The state sought to terminate parental rights based on the mother's long-term incarceration and the needs of the baby. The District Court found that the baby deserved permanency and that the mother had not shown any likelihood that she could provide needed care considering her history of substance abuse, failure to participate in ordered treatment, continued criminal conduct, and long-term incarceration. The court therefore terminated the mother's parental rights and awarded permanent legal custody of the child to the state, with the right to consent to adoption. The mother appealed on grounds that it was improper to terminate parental rights without first providing an opportunity to complete a treatment plan. The Supreme Court concluded that because the mother was incarcerated for more than 1 year, there was no requirement that a treatment plan be implemented prior to termination of parental rights. Reunification with the mother was not in the best interests of the child, considering placement options and the child's developmental, cognitive, and psychological needs and age. Termination of parental rights was affirmed. In re J.A.S., 2010 MT 47, 355 Mont. 302, 228 P.3d 1119.

Failure of Treatment Plan and Parent's Behavior Unlikely to Change: A mother stipulated that her child was a youth in need of care and subsequently failed to comply with her treatment plan, having been arrested and incarcerated for several felony offenses before completing the plan. There was also substantial evidence that the mother was unlikely to change her behavior in a reasonable time, being deeply involved in alcohol abuse and domestic violence, unable to control her anger and aggression, and a high risk to violate conditions of her parole and to return to prison. Termination of the mother's parental rights was affirmed. In re A.J.W., 2010 MT 42, 355 Mont. 264, 227 P.3d 1012.

Mother's Stipulation That Child Be Adjudicated Youth in Need of Care Prior to Determination of Child's Status as Indian — Parental Termination Proceedings Not Invalidated: The state petitioned for termination of a mother's parental rights based on her lack of progress with the court-ordered treatment plan. The state recognized the child's Indian status and notified the Blackfeet Tribe. The tribe's motion to intervene in order to monitor the proceedings was granted, and the mother's parental rights were terminated the following day after the mother stipulated to adjudication of the child as a youth in need of care. The mother subsequently appealed on grounds that it was error to terminate her parental rights prior to a determination that the child was subject to the Indian Child Welfare Act (ICWA). The Supreme Court disagreed and affirmed. The District Court complied with ICWA in finding by clear and convincing evidence that the child was a youth in need of care and that the child's best interests would be served by termination of the parent-child relationship. The fact that the court accepted the mother's stipulation before definitively establishing the child's Indian status did not invalidate the proceedings. The District Court was affirmed. In re J.M., 2009 MT 332, 353 M 64, 218 P3d 1213 (2009).

Minimal Progress on Treatment Plan With No Hope of Improvement — Termination of Parental Rights Affirmed: Despite repeated warnings in open court and repeated attempts by her social worker and other professionals who tried to work with her, a mother still had not completed treatment plan requirements after 1 year or changed her destructive habits of living with violent substance-abusing men, failing to maintain employment, and failing to take personal responsibility for the serious situation she was in regarding her children. Absent a demonstration that she was committed to making reunion with her children her most important goal or that her situation was not going to change within a reasonable time, the District Court did not misapprehend the court's role or requirements of law in terminating the mother's parental rights. In re C.M.C., 2009 MT 153, 350 M 391, 208 P3d 809 (2009).

Parent in Long-Term Federal Incarceration Unable to Comply With Treatment Plan — Termination of Parental Rights Affirmed: The District Court terminated the parental rights of a father who was incarcerated in federal prison for a long-term sentence. The father asserted that the District Court erred in terminating his parental rights because it was not in the children's best interests and that the court should have allowed the children to continue their relationship with their loving, but temporarily absent, father. The Supreme Court disagreed. The best interests of the child are of paramount importance and take precedence over parental rights, and the need for permanent placement of children in a loving and stable home supersedes the parents' interests. The District Court kept informed about the children's placements and placement failures and made arrangements for their placement in a stable home. Given the fact that the father's long-term incarceration would not provide the opportunity for adequate parenting, and the father's failure to comply with a court-ordered parenting plan, the District Court did not abuse its discretion by terminating the father's parental rights and placing the children in permanent foster care. In re B.S. & G.S., 2009 MT 98, 350 M 86, 206 P3d 565 (2009).

Petition as Adequate Notice: The Supreme Court held that the Department of Public Health and Human Services' affidavit and petition for emergency protective services, adjudication as youth in need of care, and temporary legal custody unquestionably gave the mother notice that the allegations were more than actual physical abuse. In re T.C., 2008 MT 335, 346 M 200, 194 P3d 653, (2008).

Failure to Modify Written Treatment Plan Following Neuropsychological Evaluation Not Error: Following remand pursuant to In re D.B. & D.B., 2007 MT 246, 339 M 240, 168 P3d 691 (2007), the District Court applied the original treatment plan, setting out 21 specific tasks the mother was to accomplish. The mother subsequently underwent a neuropsychological evaluation that identified cognitive and emotional disabilities, but the written treatment plan was not revised to specifically address the results of the evaluation, which the mother asserted rendered the treatment plan inappropriate. The Supreme Court disagreed. There was sufficient evidence to support the appropriateness of the plan, including: (1) testimony from counselors that they were aware of the diagnoses and modified their assistance methods accordingly; (2) evidence that the treatment plan was customized in numerous ways to meet the mother's particular needs; and (3) tasks established in the treatment plan could have been undertaken immediately and pursued on an ongoing and simultaneous basis. In re D.B. & D.B., 2008 MT 272, 345 M 225, 190 P3d 1072 (2008). See also In re K.L., 2014 MT 28, 373 Mont. 421, 318 P.3d 691.

Individual Explanations for Findings That Conduct and Conditions Unlikely to Change — Termination Affirmed: Following remand pursuant to In re D.B. & D.B., 2007 MT 246, 339 M 240, 168 P3d 691 (2007), the District Court applied the original treatment plan, setting out 21 specific tasks the mother was to accomplish. The court subsequently examined each of the conditions for compliance and terminated the mother's parental rights. Although the court determined that eight of the tasks had been accomplished and found that the mother's conduct related to five tasks was unlikely to change, the court was not able to definitively conclude whether the mother's conduct regarding the eight remaining tasks was unlikely to change. Nevertheless, the court provided individual explanations for its findings related to all the tasks and thus met the statutory requirement to consider whether the mother would continue to be unfit, unable, or unwilling to provide her children with adequate parental care. The District Court was affirmed. In re D.B. & D.B., 2008 MT 272, 345 M 225, 190 P3d 1072 (2008).

Failure to Complete Treatment Plan and Lack of Evidence That Conduct Likely to Change in Reasonable Time — Children in Foster Care for 17 of 22 Months — Parental Rights Properly Terminated: When D.A. was born in 2003, he and both parents tested positive for methamphetamine, and the state immediately obtained temporary custody of D.A. The case was dismissed 10 months later. When M.A. was born in 2005, the mother again tested positive for methamphetamine, and the state removed both children and placed them in foster care. The parents completed treatment plans and the children were returned to their care. About 2 months later, the parents were arrested on drug-related charges and the children were again removed, placed in foster care, and adjudicated youths in need of care. The parents agreed to another treatment plan, which included addressing and conquering their drug addictions and maintaining visitation with their children, increasing visitation when appropriate, and increasing parenting responsibilities until they were reunited with their children. However, the parents never completed the treatment plan, and their visitation actually decreased because of the children's negative reactions to the visits. Rather than adopt the state's proposed permanency plan calling for reunification, the District Court ordered the state to take steps to permanently place the children. Subsequently, after the children had been in foster care for 17 of the previous 22 months, the state moved to terminate the parents' rights. At the hearing, witnesses testified that it would take another year to know if reunification would be possible. In the interests of the children, the District Court terminated the parents' rights. On appeal, the Supreme Court affirmed. The District Court correctly held that the parents had not completed their treatment plan and that as a matter of fact the conditions rendering the parents unfit were unlikely to change in a reasonable time, based on their past drug use and the effect their use had on their ability to care for their children. Nor was it error for the court to consider the presumption that, because the children had been in foster care for 17 months, termination of parental rights was in the children's best interests. Additionally, there was sufficient evidence for the court to conclude that the state's permanency plan was not in the children's best interests, and having rejected the plan, the court had the authority to order the state to take specific steps to effectuate an alternate plan, which could include adoption of the children. Entering the order following the permanency hearing to advance the children's best interests did not constitute plain error or violate the parents' due process rights, and termination of parental rights was not plain error or an abuse of discretion. In re Custody & Parental Rights of D.A. & M.A., 2008 MT 247, 344 M 513, 189 P3d 631 (2008), followed in In re T.N.-S., 2015 MT 117, 379 Mont. 60, 347 P.3d 1263.

Failure to Abide by Drug Use Restrictions and Housing Requirements in Treatment Plan — Termination of Parental Rights Warranted: A mother's treatment plan required her to remain drug and alcohol free and to maintain appropriate housing for her children. The state asserted that the mother had failed both conditions and sought to terminate her parental rights. The District Court agreed and terminated her parental rights. The mother appealed, but the Supreme Court affirmed. Evidence showed that the mother continued to use drugs, even in the presence of her children, was arrested for drug possession, failed numerous urinalysis tests, and failed to show up for drug testing on several occasions. The mother also failed to maintain appropriate housing for her children for 12 of the first 14 months from the beginning of the treatment plan, having lost her housing because of nonpayment of rent. The children were removed from their mother's custody on three separate occasions during periods of sobriety and relapse, yet the children's removal did not prompt the mother to refrain from drug use or from continued abusive relationships that threatened both her and her children. The District Court did not err in concluding that the mother's conduct rendering her unfit to parent was unlikely to change. Failure to abide by the terms of the treatment plan and continuing inappropriate conduct were sufficient to warrant termination of parental rights. In re E.D., N.T., & M.S., 2008 MT 216, 344 M 228, 186 P3d 1283 (2008).

Failure to Apply Proper Statutory Criteria in Termination Proceedings — Reversible Error: Instead of applying the statutory criteria in this section when considering whether to terminate a mother's parental rights, the District Court relied on the legal presumption in 41-3-604 that because the children had been in foster care for 15 of the prior 22 months, termination was appropriate. The Supreme Court reversed. A parent's right to the care and custody of a child is a fundamental liberty interest that must be protected by fundamentally fair procedures. The legal presumption in 41-3-604 alone is not a sufficient basis to terminate parental rights and neither eliminates the substantive requirements in this section nor diminishes the clear and convincing burden of proof on the party seeking to terminate parental rights. By relying on the presumption in 41-3-604, the District Court impermissibly shifted the burden of proof to the mother by concluding that there was insufficient evidence to rebut the presumption. It was not the mother's duty to rebut the presumption, but rather the state's burden to show that the mother failed to complete a treatment plan and that the mother's conduct or condition was unlikely to change within a reasonable time. Because the District Court applied the wrong statutory standards, the order terminating parental rights was reversed and the case was remanded for application of the proper statutory criteria. In re D.B. & D.B., 2007 MT 246, 339 M 240, 168 P3d 691 (2007), distinguished on other grounds by In re C.B., 2014 MT 4, 373 Mont. 204, 316 P.3d 177.

Lower Court Finding That Mother's Inability to Parent Unlikely to Change Within Reasonable Period of Time Upheld: The appellant argued that the lower court erred in terminating her parental rights because the facts demonstrated that she was making progress toward making the changes required by her treatment plan. The Supreme Court held that the appellant's argument that she was making progress failed to address the relevant issue of whether she would make the necessary changes within a reasonable time and therefore the appellant had failed to meet her burden of showing that the lower court's findings were clearly erroneous. In re D. F., 2007 MT 147, 337 M 461, 161 P3d 825 (2007).

Mother Allowed to Challenge Trial Court's Findings Respecting Her Treatment Plan Resulting in Termination of Her Parental Rights: The appellant did not object to any of the procedures followed in the lower court proceedings concerning the termination of her parental rights but did argue that the trial court erred in rendering its factual findings. The Supreme Court stated that parental rights are a fundamental liberty interest that must be protected by fundamentally fair procedures and that the lower court's finding of fact were subject to review as to whether the findings were clearly erroneous. The trial court found that the appellant had performed some of the requirements of the treatment plan but had failed to meet other parts, including urinalysis testing. The lower court ruled that in failing to perform all required tasks, the appellant had failed to achieve the overall changes contemplated by the treatment plan. The Supreme Court rejected the appellant's argument that the Supreme Court could excuse noncompliance with any particular aspect of the treatment plan and held that the lower court was correct in finding that the treatment plan had not been fully complied with and that therefore the mother's parental rights should be terminated. In re D. F., 2007 MT 147, 337 M 461, 161 P3d 825 (2007).

Parent's Continued Drug Use Unlikely to Change — Parental Rights Properly Terminated: Facts presented at the termination hearing showed that although the mother successfully completed inpatient drug treatment, maintained sobriety for a time, and was moving toward successful completion of her treatment plan, she relapsed and began using methamphetamine again, and the use continued until the termination hearing. Additionally, she had numerous probation violations, the violations were increasing, she failed to maintain employment, and she had no plan for supporting herself or her child. The child had also been in foster care for more than 17 months, but rather than make every effort to maintain her sobriety so that she could parent her child, the mother's relapses continued. The District Court concluded that despite all the available resources, the mother's addiction was stronger than her desire to remain sober and parent her child and that the condition or conduct rendering the mother unfit to parent was unlikely to change within a reasonable time. The mother's parental rights were properly terminated. In re A.S., 2006 MT 281, 334 M 280, 146 P3d 778 (2006).

Supreme Court Avoids Ruling on Whether Parental Rights Termination Proceedings Subject to Americans With Disabilities Act: The father in a parental rights termination proceeding argued that because it was found that he was mentally ill, the Department of Public Health and Human Services violated the Americans With Disabilities Act of 1990 by having his parental rights terminated rather than accommodating his mental illness. The Supreme Court avoided ruling on whether parental termination proceedings are subject to the Act, ruling instead that clinical psychologists had testified that the father would not be able to parent within a reasonable time or for the foreseeable future, indicating that there was no way to accommodate the father's mental illness. In re M.H. & G.H., 2006 MT 208, 333 M 286, 143 P3d 103 (2006).

Conclusion That Parent's Conduct Unlikely to Change Based on Three Failed Treatment Plans — Parental Rights Properly Terminated: Following termination of a mother's parental rights, she appealed on grounds that the District Court's finding that her conduct was unlikely to change within a reasonable time was clearly erroneous based on her recent sobriety and the opinions of counselors that she could overcome her drug addiction. The Supreme Court held that the finding was not clearly erroneous because it was founded on the mother's well-documented drug history and the fact that the District Court had witnessed her fail three different court-approved treatment plans because of continuing drug use. The evidence that finding that her conduct was unlikely to change within a reasonable time was substantial and not misapprehended, and the District Court properly acted in the best interests of the children. Termination of the mother's parental rights was affirmed. In re B.B. & J.B., 2006 MT 66, 331 M 407, 133 P3d 215 (2006).

History of Treatment Plan Noncompliance — Termination Despite Recent Efforts to Comply: A mother's parental rights were terminated after the District Court found that her unfitness was unlikely to change within a reasonable time. The mother appealed, asserting that the court had erred by relying on past conduct when she had made recent progress in her rehabilitation efforts. The Supreme Court noted that a District Court must assess both past and present conduct and that the decision to terminate parental rights must to some extent be based on a parent's past conduct. In this case, experts testified that the mother had chronic disabilities that precluded her from parenting adequately and that despite efforts to help her learn necessary skills through parenting and anger management classes, she exhibited an inability to implement the lessons. Although the mother had made some progress, the District Court did not err in finding that her conduct was unlikely to change within a reasonable time and in subsequently terminating her parental rights. In re A.J.E., 2006 MT 41, 331 M 198, 130 P3d 612 (2006).

Total Treatment Plan Compliance Required — Termination Based on Parent's Lack of Responsibility for Conduct Affirmed: A parent contested termination of parental rights, but the Supreme Court affirmed. Uncontested findings showed that the parent did not satisfy the requirement for complete compliance with a treatment plan. Testimony regarding failure of the parent to take responsibility for continued consumption of alcohol and other behaviors and actions constituted substantial evidence that the parent's conduct or condition was unlikely to change within a reasonable time. The District Court did not abuse its discretion in terminating parental rights. In re T.L. & K.L., 2005 MT 256, 329 M 58, 122 P3d 453 (2005).

Inability of Parent to Relieve Child of Problems Associated With Pathological Parenting Within Reasonable Time — Parental Rights Properly Terminated: A mother admittedly failed to comply with two treatment plans established to deal with her child's serious attachment and behavioral disorder caused by long-term pathological parenting, but she took issue with the District Court's finding that the condition rendering her unfit was unlikely to change within a reasonable time. Upon review, the Supreme Court affirmed termination of the mother's parental rights. The state made reasonable efforts to assist the mother in completing the treatment plans, including referrals and payment for a variety of services, and gave the mother an adequate opportunity to address the problems that prevented her from adequately parenting her child. However, the mother failed to provide sufficient evidence showing what had changed that would now cause her to complete her treatment in a reasonable time. Thus, the District Court properly concluded that the conduct or conditions rendering the mother unfit to parent were unlikely to change within a reasonable time and did not abuse its discretion in terminating her parental rights. In re R.T., 2005 MT 173, 327 M 498, 116 P3d 783 (2005).

Appropriateness of Treatment Plans Recommending Parent Seek Treatment for Diagnosed and Undiagnosed Mental Disorders: The Supreme Court has not established a precise test by which to determine whether a particular treatment plan is appropriate, but one factor to be considered is whether a treatment plan addresses the particular circumstances facing both the parent and child. Here, the mother contended that her second and third treatment plans were inappropriate because they required that she obtain treatment for bipolar disorder, for which she had not been formally diagnosed, and because the plans failed to address her posttraumatic stress disorder, for which she had been diagnosed, and to recommend treatment for that condition. The Supreme Court noted that the mother herself testified that she had bipolar disorder and that the treatment plan required that she seek treatment for bipolar disorder and any other condition for which she had been diagnosed. Thus, the treatment plans appropriately covered both disorders, and because the mother failed to successfully comply with the treatment requirements or challenge the other relevant findings, her parental rights were properly terminated. In re D.G. & R.G., 2005 MT 139, 327 M 266, 114 P3d 201 (2005).

Failure of Parent to Meet With Professionals, Conduct Visits With Children, Live Independently, and Address Codependency Issues — Parental Rights Properly Terminated: A mother failed to comply with treatment plan requirements that she attend AlAnon meetings, meet with her social worker, attend visits with her children, detail how she would deal with a seizure by one of her children, live independently and not fall back into abusive relationships that put her children at risk, not allow anyone to reside in her home without approval, and address codependency issues and recognize the risks to her children and herself from associating with people under the influence of alcohol or drugs. This evidence was sufficient to show that the mother failed to comply with the treatment plans and, coupled with evidence that her conduct was unlikely to change within a reasonable time, was sufficient to warrant termination of the mother's parental rights. In re A.A. & D.A., 2005 MT 119, 327 M 127, 112 P3d 993 (2005), followed in In re L.H., 2007 MT 70, 336 M 405, 154 P3d 622 (2007).

Failure to Timely Object to Appropriateness of Parental Treatment Plan — Waiver of Right to Object: A mother contended that certain requirements of her treatment plans were inappropriate and should not have been considered in terminating her parental rights. However, the mother was represented by counsel at all stages of the matter, including negotiation of the treatment plans, and with advice of counsel agreed to three of the four plans. By failing to object to the treatment plan requirements in a timely manner, the mother waived the argument that portions of the plans were inappropriate. The Supreme Court declined to hold the District Court in error for an action to which the mother acquiesced. In re A.A. & D.A., 2005 MT 119, 327 M 127, 112 P3d 993 (2005). See also In re C.J.M., 2012 MT 137, 365 Mont. 298, 280 P.3d 899.

Complete Treatment Plan Compliance Required — Sufficient Evidence to Support Termination of Parental Rights: Following termination of her parental rights, the mother argued that her minor noncompliance with her treatment plans did not render her an unfit parent. The Supreme Court noted that complete compliance with a treatment plan is required and that substantial or partial compliance is insufficient to prove a parent's fitness or responsibility. Here, the evidence showed that the mother had a long history of choosing drugs over her children and that she either suffered from serious medical problems or was exaggerating the problems in order to claim that she was not capable of securing gainful employment. The District Court refused to accept the mother's claim that she was too disabled to work but was still capable of parenting a young child on a full-time basis, and the Supreme Court affirmed. In re V.F.A., 2005 MT 76, 326 M 383, 109 P3d 749 (2005), followed in In re O.A.W., 2007 MT 13, 335 M 304, 153 P3d 6 (2007). See also In re D.V., 2003 MT 160, 316 M 282, 70 P3d 1253 (2003).

Parent's Inability to Comply With Treatment Plan or Remain Drug-Free — Parental Rights Properly Terminated: Although it was a condition of a mother's treatment plan that she attend parenting classes and remain drug-free, she failed to participate in classes for 7 months and during a 6-month period, she had five positive tests and failed to show up for 16 drug tests, which were also considered failed tests. The District Court concluded that the mother's conduct was unlikely to change within a reasonable time. On appeal, the Supreme Court agreed. Because a court cannot see into the future to determine whether a parent's conduct is likely to change, that determination must to some extent be based on the parent's past conduct. The mother admitted that she was addicted to methamphetamine, and given her consistent inability to remain drug-free, the District Court did not err in finding that the condition rendering the mother unfit to parent was unlikely to change within a reasonable time. Termination of parental rights was affirmed. In re Custody & Parental Rights of C.J.K., 2005 MT 67, 326 M 289, 109 P3d 232 (2005). See also In re K.A., 2016 MT 27, 382 Mont. 165, 365 P.3d 478.

Treatment Plan Not Inappropriate — Completion Required: The mother was required to complete a treatment plan. Merely going through the motions but refusing to internalize the lessons and apply them to her own situation was not sufficient compliance. The inclusion in the mother's treatment plan of factors appropriate to a sexual offender based on the misdiagnosis of sexual assault was harmless error, and the mother was not required to complete that portion of the treatment plan. The mother's failure to complete other factors was sufficient to support the District Court's finding that the mother failed to complete the treatment plan. The father's incarceration was not an excuse for failure to complete the required evaluations. Requiring the evaluations as part of the father's treatment plans while he was incarcerated was not inappropriate. In re D.B., 2004 MT 371, 325 M 13, 103 P3d 1026 (2004).

Failure of Mother to Understand Children's Needs in Wake of Father's Incest — Termination Proper: A critical objective of the mother's treatment plan was to achieve an empathetic understanding of her children's needs in the wake of their sexual abuse by their father, yet witness testimony, documentary evidence, and information in the court file showed that the mother often appeared skeptical regarding the children's truthfulness concerning the abuse and was disruptive and antagonistic in Department-sponsored meetings with the children. The mother clearly failed to achieve this critical goal, and subsequent termination of her parental rights was proper based on her failure to comply with the treatment plan. Further, given the mother's long history of disregarding the children's needs, her ongoing exposure of the children to unreasonable risk, and her continued failure to protect them, there was sufficient evidence that her ability to parent was unlikely to change within a reasonable time. The statutory criteria for termination of the mother's parental rights was adequately considered, and termination was affirmed. In re M.B., J.B., & W.B., 2004 MT 304, 323 M 468, 100 P3d 1006 (2004).

Failure to Complete Court-Approved Treatment Plan Grounds for Termination of Parental Rights: The District Court terminated a father's parental rights for failing to comply with a treatment plan. The father contended that the court failed to approve the plan offered by the Department. However, the record showed that the court indeed approved the plan and ordered the father to complete it and that the father stipulated to the fact that the Department had offered a treatment plan, confirmed the stipulation at the termination hearing, and testified to the fact that he had been ordered to complete the plan. Termination of the father's parental rights based on failure to complete the treatment plan was affirmed. In re M.B., J.B., & W.B., 2004 MT 304, 323 M 468, 100 P3d 1006 (2004).

Consideration of Parent's Mental Disability in Determining Whether Conduct Likely to Change — No Violation of Americans With Disabilities Act: A mother contended that she should have been granted additional time to comply with her treatment plan because of her mental disability and that failure to grant more time violated the federal Americans With Disabilities Act of 1990 (ADA). The Supreme Court declined to address the applicability of the ADA to parental termination proceedings because the District Court did in fact consider the mother's disability in determining that her inability to parent was unlikely to change within a reasonable time. Thus, the criteria for termination of parental rights were properly considered, and because the mother failed to establish that the statutory criteria were not met, termination was affirmed. In re J.B.K. & J.T.K., 2004 MT 202, 322 M 286, 95 P3d 699 (2004), followed in In re M.H. & G.H., 2006 MT 208, 333 M 286, 143 P3d 103 (2006).

Unsuccessful Treatment Plan, Remedial Services, and Rehabilitative Program — Indian Parental Rights Properly Terminated: The District Court terminated the parental rights of an Indian mother. On appeal, the mother contended that the court's determination that the child would suffer serious emotional or physical damage if the child was returned to her was not proved beyond a reasonable doubt. The Supreme Court noted that state law requires successful completion of a parenting plan and that the federal Indian Child Welfare Act requires that active efforts be made to provide remedial services and rehabilitative programs to prevent the breakup of an Indian family, but that in this case, both the state and federal measures proved unsuccessful. The District Court received substantial testimony from qualified cultural and other experts upon which it could conclude beyond a reasonable doubt that the prospect of the mother providing primary care was likely to subject the child to serious harm, so the mother's parental rights were properly terminated. In re M.R.G., 2004 MT 172, 322 M 60, 97 P3d 1085 (2004).

Fundamental Liberty Interest Recognized in Fundamentally Fair Procedures for Termination of Parental Rights — Credibility of Witnesses Within Discretion of Trial Court: The District Court terminated a father's parental rights for failure to comply with or complete a treatment plan, including successful completion of an anger management program. On appeal, the father contended that the District Court: (1) failed to acknowledge a parent's fundamental right to the care and custody of a child: (2) gave greater credence to the testimony of the child than that of the father; (3) incorrectly found that the father had not successfully completed the anger management program; and (4) failed to consider the testimony of the father's therapist. The Supreme Court considered the arguments and affirmed. Although the District Court did not specifically address the fundamental liberty interest, the court did protect the liberty interest by following fundamentally fair statutory procedures. Further, although the father did complete all the anger management classes, he was unable to admit that he had an anger problem or demonstrate changes in his behavior after taking the program. Last, it was within the discretion of the District Court to weigh the credibility of the witnesses, and the Supreme Court declined to reweigh the evidence absent an abuse of that discretion. In re J.C.B. & L.E.C., 2004 MT 111, 321 M 110, 88 P3d 1280 (2004).

District Court Not Limited to Consideration of Only Physical Neglect in Termination of Parental Rights: The final petition for termination of a mother's parental rights specifically cited physical neglect as its basis, and the mother contended that the District Court was thus barred from considering any evidence beyond physical neglect, such as psychological abuse, as demonstrated by the living conditions in her home. The District Court did not rule on the issue, but simply made the underlying findings necessary to terminate the mother's parental rights. On appeal, the Supreme Court affirmed. Although it may have been better if the final petition had listed other grounds, it is proper for the state to consider other causes of abuse and neglect during proceedings because the purpose of the proceedings is to protect the child. The final petition also cited failure to comply with the treatment plan as another basis for termination. The treatment plan addressed the mother's psychological issues related to her parenting skills, so the mother was clearly on notice that psychological issues could be considered. Based on the record, parental rights were properly terminated because the mother failed to comply with the treatment plan, she was unable to properly and consistently parent her children by understanding and meeting each of their needs, her conduct was unlikely to change within a reasonable time relevant to the developmental needs of the children, and termination was in the best interests of the children. In re J.G., C.G., & M.G.-E., 2004 MT 104, 321 M 54, 89 P3d 11 (2004). See also In re T.D.H., 2015 MT 244, 380 Mont. 401, 356 P.3d 457.

Partial Attempts to Rehabilitate and Comply With Treatment Plan Compared to History of Noncompliance — Finding of Unlikelihood of Fitness Within Reasonable Time Affirmed: A mother did not contest that her children had been adjudicated in need of care or that she had failed to comply with her treatment plan, but did assert an insufficiency of evidence that she was unlikely to become a fit parent within a reasonable time. The District Court compared the mother's partial attempts to comply with her treatment plan in the 3 months preceding the hearing to her history of noncompliance over the course of 17 months and concluded that, taken as a whole, it was unlikely that the mother would become a fit parent within a reasonable time. Noting that evidence of rehabilitation on the part of a parent is germane to the issue of that parent's ability to care for a child in the future but does not render a District Court powerless to find future danger to the child, the Supreme Court found no error in the determination that despite some evidence of rehabilitation, the conduct rendering the mother unfit was unlikely to change within a reasonable time. Termination of parental rights was affirmed. In re J.C. & R.B., 2003 MT 369, 319 M 112, 82 P3d 900 (2003).

Complete Compliance With Treatment Plan Required: Substantial or partial compliance with a treatment plan is insufficient to prove that a person is prepared to be a fit or responsible parent. The District Court did not err when it found that, despite the fact that a mother completed a chemical dependency evaluation, the condition rendering her unfit was unlikely to change in a reasonable time because she made minimal efforts to comply with a treatment plan by failing to consistently submit to random drug testing, failed to submit verification of attendance at required meetings, did not attend individual counseling and psychiatric appointments, neglected to take prescribed medications, and failed to maintain a healthy relationship with her children by maintaining frequent and consistent contact. In re S.H. & B.H., 2003 MT 366, 319 M 90, 86 P3d 1027 (2003).

No Abuse of Discretion in Giving More Weight to Testimony of Guardian Ad Litem Than Parent: In determining the best interests of the children, the District Court relied more on the testimony of a guardian ad litem than on that of the mother. The mother contended that the guardian's testimony was highly prejudicial and based on hearsay, violated her due process rights, and lowered the state's burden of proof. She also contended that the statute that allowed the guardian's testimony was unconstitutional. Without reaching the issue of constitutionality, the Supreme Court affirmed. The District Court did not rely on the guardian's testimony in determining whether the mother complied with her treatment plan or whether her unfitness was likely to change within a reasonable time. Those criteria were established by other testimony, so the District Court did not abuse its discretion in terminating the mother's parental rights. In re S.H. & B.H., 2003 MT 366, 319 M 90, 86 P3d 1027 (2003).

Sufficient Evidence of Failure to Comply With or Complete Six Treatment Plans — Parental Rights Properly Terminated: A mother of four children had six court-approved treatment plans over several years. The most recent plan included a provision that the mother not see the father of two of the children. Nevertheless, the two continued their relationship, which culminated in removal of the children following a violent domestic disturbance. The state sought to terminate the mother's parental rights, and despite the mother's contention that she had made some progress on the treatment plans, the District Court terminated her parental rights. The Supreme Court affirmed. There was sufficient evidence that the mother continued her drug use, did not submit timely drug tests, missed meetings and counseling sessions, was belligerent, failed to maintain a job or provide stable income, missed the children's medical, dental, counseling, and day-care appointments, and failed to maintain a home apart from the children's father or deal effectively with that relationship. Absent evidence that conditions were likely to change within a reasonable time, parental rights were properly terminated. In re T.J.H., J.H., J.L., & A.L., 2003 MT 352, 318 M 528, 81 P3d 504 (2003).

No Demonstration of Mental Stability Necessary to Parent High-Needs Children — Parental Rights Properly Terminated: The last two court-approved treatment plans established four goals for the mother: (1) address her mental health issues; (2) establish a stable, consistent, and safe environment for the children; (3) address the children's mental health needs; and (4) establish a healthy relationship with the children and effectively parent. The District Court found that the mother failed to comply with the treatment plan and terminated her parental rights. The mother appealed on grounds that she was complying with the terms of the treatment plan, but the Supreme Court affirmed. To successfully complete the plan, the mother needed to demonstrate that she would no longer become overwhelmed with the stresses of her life, which she failed to do. After receiving services under various social programs, she would show improvement for a time but invariably relapsed into her previous way of doing things as she became overwhelmed. She missed meetings and was likely to return to the lifestyle that gave rise to the proceedings. She failed to comply with the plan because she denied the state access to her mental health care providers. Most importantly, she did not demonstrate sufficient mental ability to be able to parent her high-needs children. Parental rights were properly terminated. In re C.H., S.H., & D.H., 2003 MT 308, 318 M 208, 79 P3d 822 (2003).

Failure to Meet Department Treatment Plan — Rights Terminated:

Substantial evidence supported the District Court's conclusion that the mother did not comply with all of the tasks and goals of her treatment plan and that the conduct or condition rendering her unable to adequately parent her children was not likely to change in a reasonable time. The District Court properly resolved any conflicting evidence and terminated the mother's parental rights. In re A.F. & A.C., 2003 MT 254, 317 M 367, 77 P3d 266 (2003).

A family preservation treatment plan listed four goals: (1) a plan for reunification; (2) a safety plan for the children; (3) timelines; and (4) a backup plan, including concurrent placement. The parents acknowledged that they did not comply with the goal of completing tasks within the established timelines, and the Department had been working with the parents for more than a year to get them to complete the treatment plans in order to reunify the family. Safety and cleanliness goals were not met, and psychological profiles of the parents indicated a lack of ability to provide a safe and appropriate home environment for their young children. There was little evidence that the condition rendering the parents unfit was likely to change within a reasonable time. The parents' compliance with the various treatment plans was characterized by a pattern of increasing their efforts as hearings approached and then slipping back into their previous behavior patterns. The statutory criteria for terminating parental rights was met, and the District Court did not err in doing so. The parents' contention of District Court error in finding that the mother had lost custody of another child because of her inability to parent, which was unsupported in the record, did not constitute grounds for dismissal because the error would have had no significant impact on the result and was therefore harmless. In re C.B. & J.B., 2001 MT 42, 304 M 252, 20 P3d 117 (2001), and In re J.O., 2015 MT 229, 380 Mont. 263, 354 P.3d 1242.

Findings of fact that were applied in terminating mother's parental rights were not clearly erroneous. She had failed to comply with and successfully complete two treatment plans, and conditions making her unfit as a parent, including chronic alcoholism, were unlikely to change within a reasonable time. In re W.Z., 285 M 16, 946 P2d 125, 54 St. Rep. 1019 (1997).

The children of Kevin and Toni were adjudicated "youths in need of care", and a court-approved treatment plan was established. More than a year after the plan was established, the District Court found that neither Kevin nor Toni had successfully completed the plan and that neither was likely to complete the plan within a reasonable time. The District Court found that neither parent had maintained weekly contact with a social worker, neither obtained a parenting assessment and evaluation, and for some time, neither complied with the requirement that each submit to random drug and alcohol urinalysis. When Toni did comply, she tested positive for cocaine use three times. Both Kevin and Toni failed to comply with the treatment plan when they failed to report their incarceration to a social worker. Additionally, Kevin and Toni together and Toni individually at times lived in one bedroom apartments that were not suitable for their children, even though the treatment plan required them to maintain a home suitable for the children. The record also showed that the children had not been attending school, the parents had taught the children how to shoplift, and neither parent had returned to Montana to work on regaining custody or to visit the children. For these reasons, the Supreme Court held that the District Court did not err in finding that Kevin and Toni failed to complete their treatment plan and did not err in terminating Kevin and Toni's parental rights. In re B.C., 283 M 423, 941 P2d 106, 54 St. Rep. 690 (1997).

The state showed by clear and convincing evidence that the statutory criteria for termination of parental rights had been met when proof was offered in evidence of mother's failure to: (1) obtain a valid driver's license; (2) successfully complete parenting classes; and (3) make weekly contacts with her social worker. When combined with maternal grandmother's testimony as to abuse, neglect, and exposure to alcohol and drugs, mother's parental rights were properly terminated. In re N.R.M., 261 M 502, 862 P2d 1171, 50 St. Rep. 1428 (1993).

The county Department of Family Services (now Department of Public Health and Human Services) developed a three-phase plan designed to reunite a mother with her children. The goal of phase one was to restore the mother's mental and emotional health and capability to a level sufficient to enable her to conduct herself in a manner that would make it reasonable for mental health professionals to believe her likely to function responsibly as an adult, parent, and homemaker. Phase two called for the mother to maintain the stability established in the first phase. Phase three was to attempt to restore full custody of the children to the mother through reintegration into the mother's home. Although progress was apparent under the first two phases, failure to achieve the third phase was sufficient to warrant relinquishment of parental rights. In re A.H., T.H., & J.A.H., 236 M 323, 769 P2d 1245, 46 St. Rep. 395 (1989).

Failure to Adjudicate Youth in Need of Care Precluding Termination of Parental Rights: A parent contended that parental rights were improperly terminated because the child was not properly adjudicated as a youth in need of care. The Supreme Court noted that such adjudication is a threshold requirement before a court may grant temporary legal custody, order a parental treatment plan, or terminate parental rights. The state argued that the child was found to be a youth in need of care during earlier guardianship proceedings in a different District Court. The Supreme Court cited In re F.M., 2002 MT 180, 311 M 35, 53 P3d 368 (2002), for the holding that evidence received at a hearing on a collateral matter, such as a guardianship proceeding, did not satisfy the adjudicatory requirements of 41-3-404 (renumbered 41-3-437). Further, it was improper for the District Court to approve a treatment plan 10 months prior to proper adjudication of the child as a youth in need of care, in violation of 41-3-420 (renumbered 41-3-443) and this section (formerly numbered 41-3-406), which also rendered the requirements of 41-3-609 unsatisfied. Because the child was not properly adjudicated a youth in need of care, court approval of a treatment plan was improper and termination of parental rights was reversed. In re B.N.Y., 2003 MT 241, 317 M 291, 77 P3d 189 (2003).

Children in Foster Care for Years Coupled With Failure to Comply With Treatment Plan — Parental Rights Properly Terminated: At least three experts testified that the mother failed to comply with a treatment plan. This fact, coupled with the fact that the children were adjudicated youths in need of care and had been in foster care for more than 15 of the most recent 22 months, was sufficient to terminate the mother's parental rights. In re K.S., D.S., & C.S., 2003 MT 212, 317 M 88, 75 P3d 325 (2003).

Finding That Continuing Parental Relationship Would Cause Child Serious Emotional and Physical Damage — Rights Properly Terminated: Termination of parental rights based on a District Court finding that a child's continued relationship with the father would likely cause the child serious emotional and physical damage, applying the best interests of the child standard, was supported by substantial credible evidence, was not an abuse of discretion, and was affirmed. In re D.V., 2003 MT 160, 316 M 282, 70 P3d 1253 (2003). See also In re D.A. and M.A., 2013 MT 191, 371 Mont. 46, 305 P.3d 824.

Completion of Five of Six Treatment Plan Elements — Improper Termination of Parental Rights of Incarcerated Parent: Although the state was aware that the father was incarcerated and would remain so during the schedule incorporated in a treatment plan, the state did not invoke subsection (4)(c) of this section, which provides that a treatment plan is not required for an incarcerated parent, but relied instead on subsection (1)(f) of this section, which allows termination of parental rights upon failure of the parent to comply with a treatment plan. The treatment plan here required the incarcerated parent to maintain a chemically free lifestyle, establish a consistent and stable lifestyle, and establish a safe environment and a healthy relationship with the children. The residential and employment requirements proved inapplicable because the parent was incarcerated, but the parent completed five of the six remaining applicable tasks related to maintenance of a chemically free lifestyle. However, development of a treatment plan with the knowledge that the parent would be incarcerated during the plan's applicable period, requiring compliance with the plan, and then terminating parental rights because incarceration rendered the plan unsuccessful did not constitute a good faith effort by the state to preserve the parent-child relationship and the family unit. Thus, it was erroneous to terminate the parental rights in this case, and the Supreme Court ordered vacation of the portion of the District Court's order that terminated the incarcerated parent's rights. In re A.T. & J.T., 2003 MT 154, 316 M 255, 70 P3d 1247 (2003). However, see In re J.B., 2016 MT 68, 383 Mont. 48, 368 P.3d 715, in which a parent's bad behavior while incarcerated served as a proper basis for determination that the parent's treatment plan was not successful.

Failure to Comply With Treatment Plan Requirement for Provision of Stable Home With Adequate Housing and Income — Parental Rights Properly Terminated: A mother relinquished custody of her three children after the District Court determined that the children were in need of care. When she became pregnant again, the state moved for emergency protective services for the fourth child upon the child's birth. When the state moved to terminate the father's parental rights based on failure to comply with two treatment plans, the father contended that because the child was removed from the parents at birth, the child was never abused or neglected and thus could not properly have been adjudicated as a youth in need of care. Because 41-3-443 requires that an adequate treatment plan must identify the problems or conditions that resulted in abuse or neglect, the father asserted that the treatment plans were not adequate because the child was not abused or neglected. The Supreme Court disagreed. Because the mother as primary caregiver could not provide for the children, the onus was on the father to provide a safe environment for the new child. Both treatment plans required that the father provide a stable home for the child with adequate housing and income, but the father could provide no evidence of substantial compliance with either plan, being unable to secure either a residence or a job. Thus, the District Court did not err in determining that both elements of this section were present and in terminating the father's parental rights. In re K.C.H., 2003 MT 125, 316 M 13, 68 P3d 788 (2003).

Parent's Mental Illness, Emotional Problems, and Limited Intellectual Functioning Unlikely to Change Within Reasonable Time — Parental Rights Properly Terminated: Because of a mother's serious mental problems, emotional problems, and limited intellectual functioning, she was unable to make sufficient improvement to allow her to safely parent her children, so the District Court terminated her parental rights. The mother appealed. The Supreme Court noted the fundamental liberty interest of a parent's right to the care and custody of a child, but affirmed the termination based on substantial credible evidence that there was little chance that, despite the mother's love for her children, the mother's condition was likely to change within a reasonable time or that parenting would become easier as the children grew older, given the mother's intellectual deficits that would not improve with age. In re S.C., M.J., C.C., & K.C., 2003 MT 93, 315 M 188, 68 P3d 685 (2003).

Failure to Stop Drinking and Complete Chemical Dependency Counseling During Treatment Plan Period — Chemical Dependency and Antisocial Personality Disorder Unlikely to Change — Parental Rights Terminated: A father entered into successive treatment plans wherein he agreed to complete chemical dependency testing and counseling, attend parenting classes, contact a social worker on a weekly basis, and maintain visitation with his child in accordance with the recommendations of the child's counselor. However, the father did not stop drinking or follow through with chemical dependency counseling during the treatment plan period. The father pointed out that he and a woman with whom he was living successfully parented his biological child and two other children for 2 years prior to the termination hearing, demonstrating that his antisocial disorder and alcoholism did not preclude him from parenting. The Supreme Court was not impressed, noting that the woman's parenting ability did not compensate for the father's unwillingness to address his chemical dependency and the fact that he never established a meaningful relationship with his child. Although counselors testified that the father could address his problems through intensive therapy, the father's conduct was unlikely to change within a reasonable time, and his parental rights were properly terminated. In re J.V., S.V., T.V., & M.V., 2003 MT 68, 314 M 487, 67 P3d 242 (2003).

Pressure of Full-Time Employment Combined With Fragile Mental Health Making Demands of Parenting Insurmountable — Parental Rights Properly Terminated: After the mother failed to comply with a second parenting plan, the District Court terminated her parental rights. The mother appealed on grounds that she had made significant strides during the treatment plan period, addressing her chronic depression with medication and psychological counseling, securing gainful employment, and locating affordable housing. Nevertheless, the court's findings that financial and psychological problems continued to adversely impact her ability to care for her children and the likelihood that the conditions were unlikely to change within a reasonable time were not clearly erroneous. Testimony from community social workers confirmed that the pressures of full-time employment, combined with the mother's fragile mental health, made insurmountable the demands of parenting children with special needs. Parental rights were properly terminated. In re J.V., S.V., T.V., & M.V., 2003 MT 68, 314 M 487, 67 P3d 242 (2003).

Unlikely Change in Conduct and Failure to Complete Treatment Plan Within Two Years Warranting Termination of Parental Rights: Considering the District Court's unchallenged and sufficiently supported findings regarding the father's failure to complete any portion of a treatment plan within 2 years, the Supreme Court held that the District Court's finding that the father's ability to parent was not likely to change within a reasonable time was not in error. Termination of the father's parental rights was affirmed. In re L.S., 2003 MT 12, 314 M 42, 63 P3d 497 (2003).

Failure to Complete Treatment Plan Within Eighteen Months — Unfit Conduct Unlikely to Change — Termination of Parental Rights Proper: The District Court terminated the mother's parental rights. The mother argued on appeal that the court's finding that she was unlikely to complete a treatment plan and that the condition rendering her unfit was unlikely to change was erroneous because she was leading a stable, child-centered life in Wyoming. However, that argument ignored contrary testimony from a clinical psychologist, a therapist, and a social worker that she had not completed any of her treatment plans and had essentially refused to obtain mental health and alcohol counseling. The Supreme Court held that the fact that the mother had not completed a treatment plan within 18 months indicated that she was unlikely to complete one within a reasonable time and that the conduct rendering her unfit was also unlikely to change within a reasonable time; therefore, termination of her parental rights was affirmed. In re Custody & Parental Rights of M.A.D. & C.D., 2003 MT 10, 314 M 38, 62 P3d 717 (2003).

Admitted Failure to Complete Treatment Plan by Father With Serious Mental Illness — Termination of Parental Rights Without Visitation Upheld: The lower court's determination that the father did not complete his treatment plan was supported by the father's admission that he did not complete it, and his partial compliance with the plan was not sufficient. The testimony of the father and his psychologist and the father's conduct supported the lower court's determination that he had bipolar disorder and severe mental illness, making him unfit to parent, and that his parental rights should be terminated and he should be denied visitation with the children. In re N.A., B.A., & A.A., 2002 MT 303, 313 M 27, 59 P3d 1135 (2002).

Adequate Showing of Failure to Complete Treatment Plans — Termination of Parental Rights Not Improper: Despite testimony that the mother was a loving parent struggling against incredible odds to parent her children, it was not error for the District Court to terminate her parental rights after the children had been in state custody for 22 of the preceding 26 months and after the court found that she did not complete court-approved treatment plans, failed to remain drug-free and alcohol-free and to complete chemical dependency treatment, failed to participate regularly in her own individual therapy, did not consistently attend family therapy with her children, was unwilling to work consistently on parenting skills, did not terminate her relationship with a partner who abused one of the children, and failed to work consistently with a psychiatric nurse practitioner to monitor her medication needs. In re Custody of D.T., T.D., & B.D., 2002 MT 232, 311 M 463, 56 P3d 859 (2002).

Parental Rights Terminated Despite Parent's Contention That No Treatment Plan in Effect: A mother successfully completed two treatment plans, and her three children were returned to her care. A few months later, officials at the children's Jefferson County school notified the Department of Public Health and Human Services that the children had hitchhiked 12 miles into town to get to school on at least four occasions and had already missed 8 days of school. The children were placed in foster care, and the Department filed for temporary legal custody. A treatment plan was developed in Jefferson County in December 2000, but in January 2001, the mother informed the Department that she was moving to Lewis and Clark County. She was instructed to establish a suitable home in Lewis and Clark County and to continue working on the treatment objectives while awaiting transfer of the case between counties. About 2 months later, the mother was arrested for operating a methamphetamine lab in her apartment. The children were adjudicated youths in need of care, and the mother's parental rights were terminated about 8 months later. She appealed on grounds that she never actually had a treatment plan during the 6 months preceding the termination and that the Department should have designed a treatment plan that she could have completed during her incarceration. The Supreme Court disagreed. The December 2000 treatment plan was to be in effect for 180 days, but it was the mother who determined the shortness of the plan by participating in dangerous criminal activity. Although a new treatment plan was not yet developed in Lewis and Clark County, the Jefferson County plan was still in effect. The District Court correctly concluded that the mother did not comply with or successfully complete the court-approved treatment plan and was unlikely to make significant progress within a reasonable time to meet the children's needs. Parental rights were properly terminated. In re Custody of A.L.R., A.A.R., & T.C.R., 2002 MT 183, 311 M 76, 54 P3d 17 (2002).

Violation of Treatment Plan Requiring No Contact Between Parents — Parental Rights Terminated: One condition of a treatment plan required the mother to refrain from contact with the father because the relationship was destructive and abusive and posed a danger to the mother and the children. Nevertheless, the mother continued to maintain contact with the father throughout the case, going so far as to hide the contact and engage in a pattern of dishonesty with professionals involved in the case, who were unwilling to work with her because of her dishonesty. Although the mother was partly successful with some goals of the treatment plan, her dishonesty required appointment of an entirely new treatment team, making completion of the treatment plan within a reasonable time unworkable. Findings that the mother was unable to put her children's needs before her own, to meet the emotional needs of the children, to understand relationships that put the children at risk, and to refrain from contact with the father were sufficient to warrant termination of parental rights. In re F.M. & D.M., 2002 MT 180, 311 M 35, 53 P3d 368 (2002).

Past and Present Behavior Considered as Indication of Parental Fitness and Potential to Change — Failure to Provide Nurturing Environment: Over a 2-year period, a mother entered into four different treatment plans aimed at reunification with her children. A primary element of each plan was that she provide a safe and nurturing environment for the children, yet several planned reunifications were delayed, usually as a result of volatile altercations between the mother and her husband. The altercations traumatized the children, and the postponed reunifications disillusioned them. Because of the mother's propensity to enter abusive relationships, none of the treatment plans were successfully completed. Based on the mother's history, it was highly likely that she would continue with abusive relationships and remain unable to remove herself from violent relationships or establish a safe and nurturing environment for the children. Further, she exhausted all the services that were available to facilitate reunification, including individual counseling for the children and herself, chemical dependency counseling, parenting classes, couple's counseling, family intervention, and referral to emergency housing and counseling for women in domestic violence cycles, and even given additional time, no new services would become available. The state went well beyond the requirements of making reasonable efforts to provide reunification services available for the mother and family, but the efforts proved unsuccessful. Given the mother's history and unlikely ability to change, it was in the children's best interests to protect them from exposure to the chronic family violence and to terminate the mother's parental rights and grant permanent placement of the children with the state. In re M.T., T.T., D.T., & B.W., 2002 MT 174, 310 M 506, 51 P3d 1141 (2002).

Parent Facing Several Years of Incarceration Unlikely to Change Within Reasonable Time — Parental Rights Terminated: The father attempted to comply with a treatment plan for less than 2 months before being arrested and jailed on drug-related charges. By continuing his drug use, the father ruined his chances for a favorable plea agreement, and faced several years of incarceration. The District Court correctly concluded that the father's substance abuse problems were unlikely to change within a reasonable time and that he failed to successfully complete the court-ordered treatment plan, so his parental rights were properly terminated. In re A.L., A.L., & C.L., 2002 MT 169, 310 M 480, 51 P3d 1131 (2002).

Termination of Parental Rights Without Treatment Plan — Reversal Warranted When Two Doctors Not in Agreement That Inability to Parent Cannot Be Remedied Within Reasonable Time: This section allows the termination of parental rights without a treatment plan if two medical doctors or clinical psychologists agree that a person cannot assume the role of parent. In In re Baby Boy Scott, 235 M 253, 767 P2d 298 (1988), the Supreme Court added an additional requirement that the doctors must also testify that the condition of the parent is unlikely to change within a reasonable time. In the present case, the District Court terminated a father's parental rights without a treatment plan after one doctor testified that it would probably be decades before the father could assume the role of parent, while a second doctor testified that it would be difficult to determine a time because it depended on so many variables but that the father could theoretically assume the role of parent if given the opportunity to participate in an ongoing treatment plan with strict supervision and continuous monitoring by trained professionals. The Supreme Court held that it is insufficient for both doctors to agree merely that a person is currently unable to parent. Both must also agree that the condition making a parent unable to assume that role is unlikely to change within a reasonable time (see 2003 amendment). Here, the doctors were not in agreement regarding the likelihood of the father's condition to change, so the basic statutory requirements were not met, and the District Court improperly terminated the father's parental rights. In re C.R.O., 2002 MT 50, 309 M 48, 43 P3d 913 (2002).

No Error in Finding That Conduct Rendering Father Unfit Unlikely to Change — Parental Rights Properly Terminated: The father attempted to work through seven consecutive treatment plans over a 3-year period, all designed to address his admitted problems with drugs and alcohol, anger management and associated abuse and neglect issues, and to reunite him with his children. Nevertheless, the father continued to drink and use drugs despite the plans' prohibition on their use, refused urinalysis tests on eight different occasions, did not attend Alcoholics Anonymous as required, made death threats to social workers, and refused to allow social workers into his home, which ultimately resulted in termination of his parental rights. On appeal, it was not contested that the children had been adjudicated youths in need of care or that the father had not successfully completed the treatment plans, but the father did contest the District Court's finding that the conduct or condition rendering him unfit was unlikely to change within a reasonable time. The Supreme Court agreed with the father's assertions that he had made progress with positive life changes, but there was also evidence that the father would not be able to elevate his parenting abilities to a minimal standard in time to be developmentally beneficial to the children. There was no clear error in the District Court's finding that the conduct or condition rendering the father unfit was unlikely to change within a reasonable time, so the termination of parental rights was affirmed. In re T.A.G. & K.L.G., 2002 MT 4, 308 M 89, 39 P3d 686 (2002).

Petition to Terminate Parental Rights Properly Dismissed — Sufficient Evidence of Compliance With Treatment Plan: The District Court denied a petition to terminate a mother's parental rights and ordered her child returned to her within 30 days. The guardian ad litem appealed, contending that several of the court's findings were clearly erroneous and that the court had made findings without sufficient evidence and misapprehended the effect of the evidence. The Supreme Court affirmed. Although it stated that all of the treatment plan tasks had not been accomplished, the District Court was satisfied that the mother had substantially complied with her treatment plan as a whole, that the plan was successful, and that she could provide adequate care for her child. The District Court was thorough in its analysis, made findings pertaining to each goal in the plan, and summarized the completion of the treatment plan based on those findings. Although bonding issues remained, the District Court attributed the lack of bonding to the fact that the mother was living and working in Iowa while the child was in foster care in Montana, rather than to an inability to bond. The finding that the mother had substantially complied with the treatment plan was not clearly erroneous. In re B.B., 2001 MT 285, 307 M 379, 37 P3d 715 (2001).

No Bright Line Definition of Appropriate Treatment Plan: Because of the unique circumstances of each case, no bright line definition of what constitutes an appropriate treatment plan is possible. Factors routinely considered are: (1) whether the parent was represented by counsel; (2) whether the parent stipulated to the treatment plan; and (3) whether or not the treatment plan takes into consideration the particular problems facing both the parent and the child. It is, however, imperative that the process by which a treatment plan is implemented be fair. In re A.F.-C., 2001 MT 283, 307 M 358, 37 P3d 724 (2001). See also In re Custody & Parental Rights of M.M., 271 M 52, 894 P2d 298 (1995), and In re A.N. & C.N., 2000 MT 35, 298 M 237, 995 P2d 427 (2000).

Failure of Parents to Comply With Any of Five Different Treatment Plans — Child's Best Interests Paramount: To ensure the proper care of their sexually abused children, the state devised five different treatment plans for the parents over a 2-year period, but none of the plans were successful, so the state sought to terminate parental rights. The parents did not challenge the finding that their children were youths in need of care, but did challenge the appropriateness of the treatment plans, the finding that the plans were unsuccessful, and the finding that their conduct was unlikely to change within a reasonable time. The Supreme Court affirmed the termination. Primary consideration must be given to the best interests of the child as demonstrated by the child's physical, mental, and emotional conditions and needs, and the child's interests take precedence over parental rights. Here, the treatment plans were directed at protecting the children from further sexual abuse within the home and were thus appropriate. Although the parents complied with some obligations of the treatment plans, partial compliance is an insufficient basis upon which to premise error in a finding that a plan was not complied with. Further, a District Court should assess a parent's past and present conduct in determining whether that parent's conduct is unlikely to change within a reasonable time. In this case, ongoing incest between the siblings characterized the parents' inability to provide a safe environment to protect the younger children in the foreseeable future. The children had been in periodic foster care for several years, and numerous treatment plans were provided to the parents, who had considerable time to comply. The District Court did not abuse its discretion in terminating parental rights based on these findings of fact. In re D.H., S.H., K.H., N.S., & J.B., 2001 MT 200, 306 M 278, 33 P3d 616 (2001).

Admission of Letter Referencing Treatment Plan Not Arbitrary or Beyond Bounds of Reason — Parent's Claim of Illiteracy Questionable: In addition to presenting a revised treatment plan to the father when he was incarcerated, a state social worker sent the father's counsel a letter advising that unless the state heard otherwise, it would be assumed that counsel had no objections to the treatment plan. The letter also advised counsel of the father's claim of illiteracy. The state was not notified of any objections, and the District Court admitted the letter as evidence of a treatment plan. The father's subsequent motion to strike the treatment plan on grounds that the plan was not submitted to counsel prior to submission to the District Court and that the father could not read or write was denied. The Supreme Court affirmed. Based on the District Court's observations, the father's claim of illiteracy was questionable at best, and if there were objections to the treatment plan, presumably they would have been raised. The District Court did not err in relying on the treatment plan and in terminating the father's parental rights for completely failing to comply with the plan. In re R.F., 2001 MT 199, 306 M 270, 32 P3d 1257 (2001).

Mental or Emotional Illness Rendering Mother Unable to Parent Children Within Reasonable Time — Parental Rights Properly Terminated: A mother contended that her parental rights were improperly terminated based on evidence that she did not complete her parenting plan, including the therapy and visitation provisions of the plan. The family had two vehicles, but the mother did not attempt to take one when she left the father, failed to meet the requirement for weekly supervised visits, and maintained only sporadic contact with her children for almost a year. The therapy provisions of the treatment plan required the mother to obtain individual therapy and continue in therapy until she could demonstrate a clear understanding of how to protect her children from further emotional, physical, and sexual abuse and neglect, put that understanding into practice for at least 6 months, and address her own parenting issues, self-esteem, prior family history, signs of sexual abuse, and dependency on the children's father at the cost of her children's safety. The trial court noted that the mother could not have applied her therapy for 6 months as required because she had not had custody of the children since the plan was put into place. The court also found that the mother was not willing or able to carry out the tasks associated with parenting because of her mental or emotional illness and that her conduct was unlikely to change, as evidenced by her failure to comply with the treatment plan within 15 months. Absent clear error, the termination of the mother's parental rights was affirmed. In re M.F.B., D.A.B., M.S.B., & S.L.B., 2001 MT 136, 305 M 481, 29 P3d 480 (2001).

Appropriateness of Treatment Plan Requirement That Parents Provide Explanation of Child's Injuries: Four treatment plans were developed with the parents, the purpose of all of which was to: (1) return the child to parental custody; (2) enable the parents to provide a safe and nurturing environment for the child; (3) enable the parents to develop an awareness of the child's needs and an ability to meet those needs; (4) help the parents develop minimal parenting skills; and (5) resolve the issues that led to the child's abuse, which included a requirement that the parents provide a reasonable and consistent explanation for the child's injuries. The parents were subsequently convicted of endangering the welfare of the child, and the state petitioned for custody. Prior to the permanent custody hearing, the mother moved to strike the task that required an explanation of the child's injuries, but the state never filed a brief in response to the motion. Nevertheless, the motion was denied. Following the termination of the mother's parental rights, she challenged the appropriateness of that task on grounds that the task placed her in the untenable position of having to choose between incriminating herself and failing to complete the treatment plan, in violation of her right against self-incrimination, relying on In re A.N., 2000 MT 35, 298 M 237, 995 P2d 427 (2000). The Supreme Court found her reliance on In re A.N. misplaced. The mother waived her self-incrimination privileges by voluntarily testifying regarding her knowledge of the child's injuries at both the permanent custody hearing and during the criminal proceeding and could not argue later that the disputed task impinged on her constitutional privilege against self-incrimination. Further, the state's duty to protect children, as set out in 41-3-101, necessitated that the parents come to terms with the reasons why the child was abused, and without demonstrable willingness from the parents to resolve the abuse issues, the District Court had no assurance that the child would not be abused again. Thus, the task was a fair requirement in the treatment plan, and the District Court did not err in concluding that the plan was appropriate or in denying the motion to strike the task from the plan. Denying the motion was within the court's discretion regardless of whether the state filed a brief in response to the motion. In re A.C., 2001 MT 126, 305 M 404, 27 P3d 960 (2001).

Parents' Failure to Provide Explanation of Child's Injuries or Change Conduct — Termination of Parental Rights Proper: As a condition of a treatment plan, the District Court required the parents to provide a reasonable and consistent explanation for their child's life-threatening injuries, which was a reasonable and appropriate task. After 2 years of trying unsuccessfully to resolve the abuse issues, the District Court concluded that the treatment plan was unsuccessful because both parents had steadfastly maintained ignorance as to how the child was injured. The court also concluded that the parents' conduct was unlikely to change and terminated parental rights. The mother appealed on grounds that the court's determinations were not supported by clear and convincing evidence. The Supreme Court affirmed. The standard of review is whether the District Court's findings are clearly erroneous. Here, substantial evidence supported the conclusion that the treatment plan was not complied with and that the condition rendering the mother unfit was unlikely to change within a reasonable time, and that finding was not clearly erroneous. In re A.C., 2001 MT 126, 305 M 404, 27 P3d 960 (2001), overruling In re B.F., 2000 MT 231, 301 M 281, 8 P3d 790 (2000), and subsequent decisions to the extent that In re B.F. suggested that the Supreme Court should review a District Court's findings in a parental termination case to determine whether the findings are supported by clear and convincing evidence.

Long-Term Incarceration as Impediment to Parenting Ability — Treatment Plan Impractical: The father was sentenced to two life terms in prison with no eligibility for parole for 60 years for killing his girlfriend and her daughter. The District Court held a hearing on the termination of the father's parental rights but allowed no evidence or testimony other than the fact of his incarceration and length of sentence. The court determined that a treatment plan was impractical in light of the father's long-term incarceration and terminated his parental rights. The father appealed on grounds that a treatment plan must be established before parental rights can be terminated unless a showing of facts clearly proves the impossibility of any workable plan. Treatment plans are intended to improve a parent's ability to meet a child's needs in order to help the parent regain custody and preserve the parent-child relationship. However, in this case, no treatment plan could be devised that would remedy the fact of the father's long-term incarceration. His imprisonment presented an insurmountable impediment to his ability to provide for his child's physical, mental, and emotional needs, so the District Court did not err in finding that a treatment plan was impractical. Because a plan was not required, the court needed only to consider whether the father's conduct or condition rendering him unfit as a parent was unlikely to change within a reasonable time. Two life terms in prison so severely limited the father's parenting abilities that continuation of the parent-child relationship was not in the child's best interests, so termination of his parental rights was proper. In Re Custody & Parental Rights of M.W. & C.S., 2001 MT 78, 305 M 80, 23 P3d 206 (2001).

Sufficient Evidence to Terminate Parental Rights Without Prior Treatment Plan: The requirement of a treatment plan may be waived under this section upon a finding that "two medical doctors or clinical psychologists submit testimony that the parent cannot assume the role of parent". Two doctors did submit evaluations to that effect in this case, and the District Court waived the treatment plan requirement. On appeal, the mother contended that the doctors' testimony was canceled by the testimony of two other doctors, called by her, who testified positively regarding the mother's ability to parent. However, the evaluation of one of the mother's doctors was conducted for the limited purpose of determining whether the mother was qualified for Social Security income, and the other doctor's testimony exclusively addressed the issue of whether the mother should be permitted to continue weekly visits with the child and did not deal with the issue of her potential to assume the role of parent. Thus, the District Court did not err when it terminated the mother's parental rights based on the testimony by two medical doctors or clinical psychologists that the mother could not assume the role of parent without the court first requiring implementation of an appropriate parenting plan. In re A.M., 2001 MT 60, 304 M 379, 22 P3d 185 (2001).

Evidence Improperly Admitted Regarding Incident With "Baby Think It Over" Doll — Parental Rights Terminated Based on Statutory Criteria: The Department received a referral regarding J.M.'s birth, indicating that the parents had intellectual disabilities. The parents were provided with a "Baby Think It Over" doll, which is an infant simulator used in parenting classes that records incidents of neglect and significant abuse if not tended to. The simulator also measures a parent's ability or willingness to respond to an infant's time demands. The simulator recorded an incident of abuse for which the parents had no explanation. As part of a subsequent proceeding to terminate parental rights, the District Court allowed the introduction of evidence regarding the incident. Parental rights were terminated based on the parents' noncompliance with their treatment plan. On appeal, the mother contended that the court erred in allowing evidence regarding the doll because a sufficient foundation was not provided for admission of the evidence. The Supreme Court agreed that the state failed to provide a sufficient foundation for admission of the evidence, such as whether the doll was functioning properly at the time that it was used and whether the results of its use were reliable. The doll's recordation of an incident of abuse did not establish a consequential fact relevant to the state's contention that the parents had not complied with their treatment plan and that the parents' condition was unlikely to change, so the evidence was inadmissible. However, the state did provide sufficient other evidence to support its contention. Thus, although evidence regarding the doll was erroneously allowed, the evidence would not have affected the outcome of the case, so the error was harmless. In re J.M., 2001 MT 51, 304 M 303, 21 P3d 618 (2001).

Finding That Father Unlikely to Change Because of Incarceration Upheld: Michael argued that his parental rights should not have been terminated because he had substantially complied with his court-ordered treatment plan by completing anger management and parenting classes, attending substance abuse treatment, and staying sober. The lower court found that because of his incarceration, Michael was unlikely to be able to change within a reasonable time the condition of being unable to provide a stable home for his son. The Supreme Court held that reasonable evidence supported the lower court's findings and therefore it had properly terminated Michael's parental rights. In re Custody & Parental Rights of C.F., H.F., & J.F., 2001 MT 19, 304 M 134, 18 P3d 1014 (2001).

Substantial Compliance Does Not Constitute Successful Completion: Michael argued that his parental rights should not have been terminated because he had substantially complied with his court-ordered treatment plan by completing anger management and parenting classes, attending substance abuse treatment, and staying sober. The Supreme Court held that substantial compliance was not enough because Michael, by returning to incarceration, was unable to provide a stable home, food, and clothing for his son and therefore the lower court had not erred in terminating his parental rights. In re Custody & Parental Rights of C.F., H.F., & J.F., 2001 MT 19, 304 M 134, 18 P3d 1014 (2001), following In re J.H., 2000 MT 11, 298 M 41, 994 P2d 37 (2000).

Inclusion of Self-Incriminating Requirement as One Element of Parenting Plan — Harmless Error: As part of his third parenting treatment plan, the father was required to affirmatively explain the cause of his child's injuries, assume responsibility for any injuries inflicted on the child, and cooperate with law enforcement to resolve the related criminal charges against him. In essence, the state used the treatment plan to make an official inquiry into the child's injuries, leaving the father with the Hobson's choice of either disclosing his involvement in the child's injuries and incriminating himself in the criminal proceeding or facing certain termination of his parental rights. The Supreme Court found the requirement to be inappropriate. However, the requirement impacted only one goal of five that the District Court found were not successfully met and only one task of four that were not completed. Thus, inclusion of the inappropriate requirement did not significantly impact the District Court's decision to terminate the father's parental rights or result in substantial injustice. The error was harmless, and the Supreme Court affirmed. In re A.N. & C.N., 2000 MT 35, 298 M 237, 995 P2d 427, 57 St. Rep. 155 (2000).

Unsuccessful Short-Term Treatment Plans — Parental Rights of Incarcerated Parent Terminated: The mother was offered two short-term treatment plans while she was incarcerated and was led to believe that if she completed these plans, she would be allowed to parent her child upon release from prison. The short timeframe for the treatment plans was due to representations made by the mother regarding when she expected to be released, but the state conducted no followup investigation to determine when she would actually be eligible for release and what the conditions of her release would be. Her incarceration was subsequently extended, and after determining that the treatment plans were not successful, the District Court terminated her parental rights. The Supreme Court affirmed, finding no error in the District Court's conclusion. In re J.H., 2000 MT 11, 298 M 41, 994 P2d 37, 57 St. Rep. 60 (2000).

Error in Finding That Parent Not in Compliance With Either Preincarceration or Incarceration Treatment Plan — Termination of Rights Affirmed Absent Evidence of Likely Change in Parental Conduct: A parenting plan was drawn for a mother, but she did not comply with it because of her subsequent incarceration. A second plan was then drawn that took into account the mother's incarceration. The District Court later concluded, incorrectly, that the mother had not complied with either plan. However, whether the parent's contrary conduct occurred before the treatment plan or after the termination of the plan, the results were essentially the same because the plan could not be considered successful under its terms. Further, the court relied on clear and convincing evidence in determining that the mother's conduct or condition that rendered her unfit was unlikely to change within a reasonable time. Having addressed each applicable statutory requirement, the court's termination of the mother's parental rights was affirmed. In re M.A.E., 1999 MT 341, 297 M 434, 991 P2d 972, 56 St. Rep. 1349 (1999), following In re R.B.O., 277 M 272, 921 P2d 268, 53 St. Rep. 640 (1996), and In re J.N., 1999 MT 64, 293 M 524, 977 P2d 317 (1999), and followed in In re E.K., C.K., & J.E., 2001 MT 279, 307 M 328, 37 P3d 690 (2001), and In re O.A.W., 2007 MT 13, 335 M 304, 153 P3d 6 (2007). In re E.K., C.K., & J.E. was followed in In re O.A.W., 2007 MT 13, 335 M 304, 153 P3d 6 (2007).

Failure to Complete Treatment Goals — Child in State Custody for Over Twenty Months — Substantial Evidence Supporting Termination of Parental Rights: Applying the standard of whether substantial evidence supported the District Court's findings of fact, the Supreme Court affirmed the termination of the mother's parental rights. Although the mother made positive changes in her life in the months preceding the hearing, she did not successfully complete or meet the goals of any of four court-approved treatment plans during the more than 20 months that her child was in Department custody. On this record, the District Court's finding that the conduct or condition that rendered her unfit to parent her child was unlikely to change within a reasonable time was supported by substantial evidence and was not otherwise erroneous. In re J.M.J., 1999 MT 277, 296 M 510, 989 P2d 840, 56 St. Rep. 1119 (1999).

Termination of Incarcerated Father's Parental Rights Proper — Treatment Plan Impractical: The District Court did not err when it concluded that a treatment plan was not practical for an incarcerated father who, even with parole, would be limited to only supervised visits with his children. No treatment plan would obviate the difficulty that the children would have in knowing him as their father after his extended incarceration. The incarceration and sentencing conditions presented a substantial long-term impediment to his ability to provide for the children's physical, mental, and emotional needs, limiting his parenting abilities to the extent that continuation of the parent-child relationship was not in the children's best interests. Therefore, it was not error for the District Court to terminate the father's parental rights. In re T.B., 1999 MT 174, 295 M 234, 983 P2d 929, 56 St. Rep. 679 (1999), distinguishing In re W.Z., 285 M 16, 946 P2d 125, 54 St. Rep. 1019 (1997).

No Treatment Plan in Effect at Time of Mother's Unauthorized Contact With Father — Termination of Parental Rights Reversed: When the mother surreptitiously contacted the father, who had had his parental rights terminated after being convicted of murdering the couple's other child, the state petitioned to terminate the mother's parental rights as well. Parental rights may be terminated when each of the following statutory requirements has been established: (1) the child must have been adjudicated a youth in need of care; (2) an appropriate treatment plan must have been approved by the court but not been complied with by the parent or not been successful; and (3) the conduct or condition of the unfit parent is unlikely to change within a reasonable time. In this case, the Supreme Court reversed the termination order in the absence of clear and convincing evidence that the mother failed to comply with a court-approved treatment plan because there was no treatment plan in effect at the time of her unauthorized contact with the father. In re J.A.B., 1999 MT 173, 295 M 227, 983 P2d 387, 56 St. Rep. 675 (1999).

Conditions Constituting Impractical Treatment Plan — Parent's Lack of Cooperation in Providing Information Insufficient to Render Plan Impractical: The District Court found that a treatment plan for an incarcerated father was impractical considering the length of incarceration, the father's lack of cooperation with the Department in refusing to release his medical records, and the distance between Montana and Minnesota where he was incarcerated. The court terminated his parental rights. A Department social worker told the incarcerated father that there could be no evaluation or treatment plan unless he released his medical records, which he did not do. Thus, implementation of a treatment plan was not discussed. At a minimum, the impracticality provision requires that the Department discuss the possibility of implementing a treatment plan with a parent, but not only was no plan discussed, the Department did not advise the father that his cooperation was necessary for him to participate in a plan. A parent's lack of cooperation in disclosing information is an insufficient ground by itself to conclude that a treatment plan is impractical unless the parent has been clearly informed that cooperation is necessary. In re J.F. & C.F., 1999 MT 131, 294 M 494, 982 P2d 1011, 56 St. Rep. 528 (1999), following In re W.Z., 285 M 16, 946 P2d 125, 54 St. Rep. 1019 (1997).

Appropriateness of Treatment Plan for Incarcerated Person: At the hearing on the petition for temporary legal custody, the mother testified by telephone because she was in prison in Idaho at the time for battery of a minor. She stated that she had 88 days left until she was eligible for release and that she was willing to work on a treatment plan while incarcerated. The social worker who prepared the plan recognized that the mother was limited in what she could accomplish while in prison and would be unable to complete the plan until she was released but pointed out that the prison programs would fulfill some of the treatment plan requirements. Because of disciplinary problems, she was not paroled. The mother later asserted, and the Supreme Court agreed, that most of the treatment plan was designed for a person who was not incarcerated. However, the plan was drafted when the mother had a chance of being released and was directed at the problems facing her and the children. She was adequately represented by counsel and did not object to the plan as presented. The District Court did not err in finding that the treatment plan was appropriate and that termination of parental rights was proper given the mother's neglect in even attempting to comply with the plan and given the denial of her parole because of her bad behavior. In re J.N. & A.N., 1999 MT 64, 293 M 524, 977 P2d 317, 56 St. Rep. 269 (1999), distinguishing In re W.Z., 285 M 16, 946 P2d 125, 54 St. Rep. 1019 (1997), and followed in In re M.A.E., 1999 MT 341, 297 M 434, 991 P2d 972, 56 St. Rep. 1349 (1999).

Well-Intentioned Efforts Toward Success of Treatment Plan — Insufficient Minimum Compliance Justifying Termination of Parental Rights: A mother's attempts to comply with the terms of four approved treatment plans, though well-intentioned, were insufficient to meet minimum compliance with the plan and did not constitute successful treatment. A treatment plan can be unsuccessful even when the tasks dictated by the plan are completed. The District

Court held correctly that continuing the parent-child relationship would likely result in continued abuse or neglect of the children because of the mother's repeated inability to protect the children from abuse by others and that her conduct, having failed to change significantly in the past, was unlikely to change within a reasonable time in the future. In re S.M., R.D., Jr., D.D., S.D., C.D., & J.D., 1999 MT 36, 293 M 294, 975 P2d 339, 56 St. Rep. 152 (1999), followed in In re Declaring J.W. & K.D. Youths in Need of Care, 2001 MT 86, 305 M 149, 23 P3d 916 (2001). See also In re E.K., C.K., & J.E., 2001 MT 279, 307 M 328, 37 P3d 690 (2001).

Record Showing Child to Be Youth in Need of Care and Failure of Mother to Complete Treatment Plan Held Sufficient for Termination of Parental Rights: The parental rights of M.M., the natural mother of A.W-M., were terminated by the District Court based on its finding that A.W-M. was a youth in need of care and that M.M. failed to complete her treatment plan. The Supreme Court reviewed the District Court record and found that the record contained substantial credible evidence that A.W-M. was a youth in need of care, including evidence that A.W-M. was left with a babysitter when she was 7 months old and sick with bronchitis, that after treatment, doctors would not release A.W-M. to her mother's care because her mother "appeared to be high", that M.M. made little effort to comply with her treatment plan, and that A.W-M. had been left with other caregivers for indefinite periods of time. The Supreme Court also found substantial evidence that M.M. could not be expected to complete her treatment plan in the foreseeable future, including evidence that she tested positive for use of a controlled substance, was unable to obtain stable employment or housing, failed to attend court-ordered counseling, visited only sporadically with A.W-M., and agreed in her testimony that she should not be given further time to comply with her treatment plan. In re A.W-M., 1998 MT 157, 289 M 333, 960 P2d 779, 55 St. Rep. 628 (1998).

Treatment Plan Never Offered to Incarcerated Parent — Termination of Parental Rights Improper Absent Plan: Father had been incarcerated for more than 1 year, so pursuant to subsection (4)(b) of this section, the District Court terminated the father's parental rights on the grounds that: (1) a treatment plan was impractical in light of his incarceration; (2) the date of his release from prison was unknown; and (3) he had shown minimal interest in his child. The Supreme Court disagreed, noting that neither the Department nor the social worker involved in the case ever presented or examined the possibility of a treatment plan with the father; therefore, the practicality of a treatment plan could not be determined when a treatment plan had never been offered or discussed. Failure to demonstrate the impracticality of an unoffered treatment plan constituted reversible error. In re W.Z., 285 M 16, 946 P2d 125, 54 St. Rep. 1019 (1997), distinguished in In re J.N. & A.N., 1999 MT 64, 293 M 524, 977 P2d 317, 56 St. Rep. 269 (1999), and followed in In re J.F. & C.F., 1999 MT 131, 294 M 494, 982 P2d 1011, 56 St. Rep. 528 (1999).

Complete History Relevant to Termination of Incarcerated Parent's Parental Rights: This section recognizes that a child may need help while a parent is incarcerated and that such help cannot be delayed pending the parent's release. Thus, a treatment plan is not required if the parent's incarceration for more than 1 year makes a treatment plan impractical. Further, a complete history of a parent's neglect and abuse of the children and of all attempts to comply with prior treatment plans is relevant to whether parental rights should be terminated, rather than a parent's performance only under the latest treatment plan. The primary consideration is the physical, mental, and emotional conditions and needs of the children. In re K.F.L. & N.L., 275 M 102, 910 P2d 241, 53 St. Rep. 57 (1996).

Absence of Court-Approved Treatment Plan Not Bar to Termination of Parental Rights — Warning to Follow Law in Future Cases: In proceedings to terminate a mother's parental rights, the Department prepared and executed a treatment plan, but the mother refused to sign it. The plan was filed with the court, but the judge failed to officially sign it. The court found that the mother had allowed her children to be sexually abused or exploited and terminated her parental rights. The mother appealed on the grounds that this section requires a court-approved treatment plan before parental rights may be terminated. On appeal, the Supreme Court affirmed the termination despite the requirements of this section and warned the Department to follow the law in future cases or risk reversal of terminations. This section does not require that the parent sign the treatment plan in order for the court to approve it. In re Inquiry Into M.M., 274 M 166, 906 P2d 675, 52 St. Rep. 1170 (1995).

Failure to Complete Alcohol Treatment Programs Grounds for Termination of Parental Rights: T.M., whose mother died when he was 14 months old, was diagnosed as having fetal alcohol syndrome and required constant parental supervision. His father was repeatedly incarcerated for alcohol-related offenses and unable to take care of T.M. during those times. T.M.'s father also repeatedly failed to complete treatment programs for alcohol abuse, domestic violence, and anger management. The Supreme Court held that in applying its standard of review, the lower court's decision to terminate T.M.'s father's parental rights was not clearly erroneous given the fact that the record showed that the father had failed to complete required treatment and that it was in the best interests of the child that the father's parental rights be terminated. In re Custody of T.M., 267 M 75, 881 P2d 1333, 51 St. Rep. 952 (1994).

Failure to Complete Treatment Plan — Out-of-Home Placement for Over Two Years — Termination of Parental Rights Upheld: The District Court did not err in terminating a father's parental rights when the father failed to complete treatment recommended by psychological evaluations, failed to enter into counseling to develop effective methods of discipline and to understand the children's needs as victims of sexual abuse, and continued to deny various aspects of the mother's sexual abuse of the children. Overwhelming evidence that the father failed to comply with critical parts of the treatment plan met the statutory requirements for termination of parental rights. In re M.A.W. & K.M.W., 256 M 296, 846 P2d 985, 50 St. Rep. 64 (1993).

Appropriateness of Treatment Plan Requiring Psychological Therapy for Indigent Mother: Mother contended that the court-ordered treatment plan implemented in her case was inappropriate because the court failed to consider her financial situation when it ordered her to undergo treatment that included continuing psychotherapy, for which she was required to pay, and that her indigency thus doomed the plan to failure. Noting that the treatment plan was agreed to by the mother on advice of counsel, the Supreme Court found substantial testimony regarding failure of the treatment plan, beyond her indigency, that indicated circumstances that rendered the plan unsuccessful but not necessarily inappropriate. In re J.R. & S.D., 253 M 434, 833 P2d 1063, 49 St. Rep. 513 (1992), followed in In re Custody & Parental Rights of M.M., 271 M 52, 894 P2d 298, 52 St. Rep. 325 (1995).

Successful Treatment Plan, Not Just Compliance With Plan, Required: Parents contended their parental rights were wrongfully terminated because there was no evidence that the treatment plan failed or that their lack of fitness was unlikely to change. However, the treatment plan required not only compliance with but a successful completion of the plan, which was not accomplished. Coupled with the fact of ongoing and continuous unfitness unlikely to change within a reasonable time, termination of parental rights was proper. In re F.M., 248 M 358, 811 P2d 1263, 48 St. Rep. 407 (1991), followed in In re J.H., 2000 MT 11, 298 M 41, 994 P2d 37, 57 St. Rep. 60 (2000). See also In re S.C., 264 M 24, 869 P2d 266, 51 St. Rep. 129 (1994), In re R.B.O., 277 M 272, 921 P2d 268 (1996), In re E.W., C.W., & A.W., 1998 MT 135, 289 M 190, 959 P2d 951, 55 St. Rep. 536 (1998), In re S.M., R.D., Jr., D.D., S.D., C.D., & J.D., 1999 MT 36, 293 M 294, 975 P2d 334, 56 St. Rep. 152 (1999), In re M.A.E., 1999 MT 341, 297 M 434, 991 P2d 972, 56 St. Rep. 1349 (1999), In re S.M. & P.L.M., 2001 MT 11, 304 M 102, 19 P3d 213 (2001), In re Declaring J.W. & K.D. Youths in Need of Care, 2001 MT 86, 305 M 149, 23 P3d 916 (2001), In re E.K., C.K., & J.E., 2001 MT 279, 307 M 328, 37 P3d 690 (2001), and In re K.L., 2014 MT 28, 373 Mont. 421, 318 P.3d 691.

Operation of Treatment Plan Interrupted by Parent's Incarceration — Termination of Parental Rights Affirmed: The District Court did not err in terminating a mother's parental rights rather than awarding long-term custody to the Department of Family Services (now Department of Public Health and Human Services) when: (1) a 6-month treatment plan had not even begun when the mother was incarcerated 4 months after approval of the plan; (2) although her incarceration may have interfered with her ability to complete the plan, her failure to timely begin the plan, coupled with her failure to complete previously assigned parenting tasks, foretold the potential failure of the plan; and (3) the mother's conduct was unlikely to change within a reasonable time. In re D.G., 244 M 17, 795 P2d 489, 47 St. Rep. 1408 (1990). See also In re R.B.O., 277 M 272, 921 P2d 268, 53 St. Rep. 640 (1996). In re R.B.O. was followed in In re M.A.E., 1999 MT 341, 297 M 434, 991 P2d 972, 56 St. Rep. 1349 (1999).

Partial Compliance With Treatment Plan — Possibility of Change of Conduct — Parental Rights Terminated: The District Court did not abuse its discretion in terminating parental custody and transferring legal custody to the state when evidence showed that the mother only partially complied with a treatment plan and that the possibility that she might be able to change her conduct in 8 to 12 months was outweighed by the immediacy of the children's needs for stability and predictability. In re H.R.B. & K.R.B., 239 M 387, 780 P2d 1139, 46 St. Rep. 1771 (1989), followed in In re J.J.C.H. & C.M.H., 252 M 158, 827 P2d 812, 49 St. Rep. 193 (1992), and In re B.C., 283 M 423, 941 P2d 106, 54 St. Rep. 690 (1997). See also In re K.A.B., 1999 MT 71, 294 M 29, 977 P2d 997, 56 St. Rep. 297 (1999), and In re E.K., C.K., & J.E., 2001 MT 279, 307 M 328, 37 P3d 690 (2001).

Failure of Parent to Complete Court-Approved Treatment Plan — Burden of Proof Met in Termination of Parental Rights: The state met the burden of proof in terminating parental rights after showing, by clear and convincing evidence, that the father of the youths in need of care did not comply with several tasks required under a court-approved treatment plan, including: (1) meeting with therapists on a scheduled basis; (2) completing a series of parenting classes; (3) establishing contact with and visiting the children; and (4) providing a home large enough to accommodate all the children. Further, the state was responsible to assist the father in establishing treatment but was not required to force him to comply with the treatment plan. In re L.W.K., D.E.K., & A.J.K., 236 M 14, 767 P2d 1339, 46 St. Rep. 145 (1989), followed in In re R.H., 250 M 164, 819 P2d 152, 48 St. Rep. 692 (1991).

Exceptions to Treatment Plan Requirement: A mother's parental rights may be extinguished without a finding that she has not complied with a court-approved treatment plan or that such plan has been unsuccessful. Exceptions in the statute allow for extinguishment of parental rights of a mentally ill person without establishing a court-approved treatment plan as long as two medical doctors testify that the parent is so severely mentally ill that she cannot assume the role of parent. In this case, three psychiatrists testified that the mother suffered from chronic schizophrenia and agreed that her history of mental illness showed little hope that she could assume her parental role. In re Baby Boy Scott, 235 M 253, 767 P2d 298, 45 St. Rep. 2362 (1988).

Failure of Rehabilitative Training as Criteria for Termination: The District Court did not abuse its discretion in terminating parental rights upon finding that despite several years of rehabilitative training to improve the mother's parenting and home management skills, she was unfit, unable, and unwilling to care for her children and failed to provide a stable home environment. In re M.J.D., C.K.D., & A.R.D., 225 M 200, 731 P2d 937, 44 St. Rep. 167 (1987), followed in In re B.T.B. & B.B., 254 M 449, 840 P2d 558, 49 St. Rep. 594 (1992), and In re J.M.W.E.H., 1998 MT 18, 287 M 239, 954 P2d 26, 55 St. Rep. 65 (1998).

Substantial Credible Evidence to Terminate Parental Rights: Evidence was held sufficient to support trial court's findings that appellant failed to comply with court-approved treatment plan and that appellant's condition which rendered her unfit to be a parent is unlikely to change within a reasonable time. Substantial credible evidence supports the findings, and they may not be set aside unless clearly erroneous. In re R.M.B., Youth in Need of Care, 213 M 29, 689 P2d 281, 41 St. Rep. 1925 (1984).

STANDARD OF REVIEW

Standard and Sufficiency of Evidence Challenged: Parents whose parental rights were terminated and who had inadequately asserted their child was an Indian child challenged the standard of review used in District Court. The Supreme Court affirmed, explaining that the federal Indian Child Welfare Act of 1978 did not apply, and that the waiver effect of the parents' unqualified stipulations precluded any subsequent assertion of error and resulting review regarding evidentiary sufficiency. One parent also challenged the sufficiency of the evidence. The Supreme Court found that the District Court's rulings were supported by substantial record evidence that was minimally sufficient to satisfy the applicable clear and convincing evidence standard. In re L.H., 2021 MT 199, 405 Mont. 173, 492 P.3d 1218.

Standard of Review — Custody Determinations and Termination of Parental Rights:

The Supreme Court reviews a District Court decision to terminate parental rights to determine whether there was an abuse of discretion. The District Court's conclusions of law are reviewed to determine whether the law was interpreted correctly. The test for abuse of discretion is whether the trial court acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice. A parent's fundamental liberty interest in the right to the care and custody of a child must be protected by fundamentally fair procedures. To satisfy the statutory requirements for terminating parental rights, a District Court must make specific factual findings, and those finding are reviewed to determine whether they are clearly erroneous. Although a decision to terminate parental rights is not to be taken lightly, the District Court decision is presumed to be correct and will not be disturbed on appeal unless there is a mistake of law or a finding of fact not supported by substantial evidence that would amount to a clear abuse of discretion. In re D.V., 2003 MT 160, 316 M 282, 70 P3d 1253 (2003), following In re J.V., S.V., T.V., & M.V., 2003 MT 68, 314 M 487, 67 P3d 242 (2003), and In re K.C.H., 2003 MT 125, 316 M 13, 68 P3d 788 (2003), and followed in In re V.F.A., 2005 MT 76, 326 M 383, 109 P3d 749 (2005). See also In re S.R., R.R., & G.R. Jr., 2004 MT 227, 322 M 424, 97 P3d 559 (2004), and In re A.A. & D.A., 2005 MT 119, 327 M 127, 112 P3d 993 (2005).

The Supreme Court has adopted a different standard of review for nonjury findings of fact than is applied to jury verdicts. The standard set out in Interstate Prod. Credit Ass'n v. DeSaye, 250 M 320, 820 P2d 1285 (1991), is the appropriate standard to be applied to purely factual findings in a proceeding to terminate parental rights. The rule set out in In re Marriage of Burris, 258 M 265, 852 P2d 616 (1993), that the court generally will review conclusions of law to determine whether they are correct, is the appropriate basis for reviewing most conclusions of law in a termination proceeding. However, the conclusion that a child is abused or neglected involves a decision that is neither purely factual nor purely legal and is thus analogous to a District Court's determination of conscionability when reviewing marital and property settlement agreements. Thus, in challenges to a District Court's determination regarding abuse or neglect, review involves a determination as to whether there was an abuse of discretion. In re D.H. & F.H., 264 M 521, 872 P2d 803, 51 St. Rep. 386 (1994).

The same standard of review applies to both termination of parental rights and custody determinations. As set out in In re R.A.D., 231 M 143, 753 P2d 862, 45 St. Rep. 496 (1988), in both instances the District Court's decision is afforded all reasonable presumptions as to the correctness of the determination, and therefore the decision will not be disturbed on appeal unless there is a mistake of law or a finding of fact not supported by substantial evidence that would amount to a clear abuse of discretion. In re S.P., 241 M 190, 786 P2d 642, 47 St. Rep. 190 (1990), distinguished in In re D.H. & F.H., supra, and followed in In re J.J.C.H. & C.M.H., 252 M 158, 827 P2d 812, 49 St. Rep. 193 (1992), In re J.R. & S.D., 253 M 434, 833 P2d 1063, 49 St. Rep. 513 (1992), and in In re Custody & Parental Rights of M.D. 262 M 183, 864 P2d 783, 50 St. Rep. 1505 (1993).

Review of District Court Findings Regarding Termination of Parental Rights: In reviewing a District Court's findings regarding termination of parental rights, the Supreme Court will not consider whether the evidence will support a different finding or substitute its judgment for that of the factfinder regarding the weight given to the evidence. Further, determining whether conduct or a condition rendering a parent unfit is likely to change within a reasonable time requires an assessment of the parent's past and present conduct. In re L.S., 2003 MT 12, 314 M 42, 63 P3d 497 (2003), followed in In re D.G. & R.G., 2005 MT 139, 327 M 266, 114 P3d 201 (2005). See also In re T.A.G., 2002 MT 4, 308 M 89, 39 P3d 686 (2002), and In re M.T., 2002 MT 174, 310 M 506, 51 P3d 1141 (2002).

Definition of Clear and Convincing Evidence: In the context of parental rights termination cases, clear and convincing evidence is defined as simply a requirement that a preponderance of the evidence be definite, clear, and convincing or that a particular issue be clearly established by a preponderance of the evidence or by a clear preponderance of the proof. The requirement does not call for unanswerable or conclusive evidence. In re E.A.T. & T.A.T., 1999 MT 281, 296 M 535, 989 P2d 860, 56 St. Rep. 1133 (1999). See also In re E.W., C.W., & A.W., 1998 MT 135, 289 M 190, 959 P2d 951 (1998), and In re M.T., T.T., D.T., & B.W., 2002 MT 174, 310 M 506, 51 P3d 1141 (2002).

Test to Determine if Findings Clearly Erroneous: The Supreme Court adopted the following test to determine whether findings used in terminating parental rights are clearly erroneous: (1) the record will be reviewed to see if the findings are supported by substantial evidence; (2) if the findings are supported by substantial evidence, the Supreme Court will determine whether the trial court misapprehended the effect of the evidence; and (3) if substantial evidence exists and the effect of the evidence has not been misapprehended, the Supreme Court may still find clear error when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed. Applying the test in the present case, the finding that a continued relationship between parents and children would result in continued abuse of the children was consistent with the evidence and was not clearly erroneous. In re J.S. & P.S., 269 M 170, 887 P2d 719, 51 St. Rep. 1428 (1994), following In re D.H. & F.H., 264 M 521, 872 P2d 803 (1994). See also In re R.B.O., 277 M 272, 921 P2d 268, 53 St. Rep. 640 (1996), In re J.L., D.L., & A.G., 277 M 284, 922 P2d 459, 53 St. Rep. 649 (1996), In re Custody & Parental Rights of C.F., H.F., & J.F., 2001 MT 19, 304 M 134, 18 P3d 1014 (2001), In re A.C., 2001 MT 126, 305 M 404, 27 P3d 960 (2001), which overruled In re B.F., 2000 MT 231, 301 M 281, 8 P3d 790 (2000), and subsequent decisions to the extent that In re B.F. suggested that the Supreme Court should review a District Court's findings in a parental termination case to determine whether the findings are supported by clear and convincing evidence, In re A.L., A.L., & C.L., 2002 MT 169, 310 M 480, 51 P3d 1131 (2002), In re F.M. & D.M., 2002 MT 180, 311 M 35, 53 P3d 368 (2002), In re Custody of D.T., T.D., & B.D., 2002 MT 232, 311 M 463, 56 P3d

859 (2002), In re A.T. & J.T., 2003 MT 154, 316 M 255, 70 P3d 1247 (2003), and In re S.H. & B.H., 2003 MT 366, 319 M 90, 86 P3d 1027 (2003).

Failure to Complete Alcohol Treatment Programs Grounds for Termination of Parental Rights: T.M., whose mother died when he was 14 months old, was diagnosed as having fetal alcohol syndrome and required constant parental supervision. His father was repeatedly incarcerated for alcohol-related offenses and unable to take care of T.M. during those times. T.M.'s father also repeatedly failed to complete treatment programs for alcohol abuse, domestic violence, and anger management. The Supreme Court held that in applying its standard of review, the lower court's decision to terminate T.M.'s father's parental rights was not clearly erroneous given the fact that the record showed that the father had failed to complete required treatment and that it was in the best interests of the child that the father's parental rights be terminated. In re Custody of T.M., 267 M 75, 881 P2d 1333, 51 St. Rep. 952 (1994).

41-3-611. Effect of decree.

Compiler's Comments

2003 Amendment: Chapter 504 in (3) after "any" substituted "permanent" for "other" and at end substituted "41-3-445" for "41-3-610". Amendment effective October 1, 2003.

1995 Amendment: Chapter 458 in (1) inserted "and Title 41, chapter 3, part 2"; and made minor changes in style. Amendment effective April 14, 1995.

1987 Amendment: At end of (3) changed "41-3-609" to "41-3-610".

Case Notes

Department's Failure to Comply With Discovery Not Due Process Violation — No Alleged Undiscovered Evidence to Defeat Termination Petition: After a motion to compel discovery, the Department of Health and Human Services represented to a father that there was no additional relevant or discoverable information relating to a termination action concerning his parental rights. Based on that representation, the father did not review files made available by the Department or depose the child protection specialist whose files were at issue. At trial, testimony was presented that undisclosed emails existed, and the father argued that because the Department violated its discovery obligations, he was denied due process because he could not properly prepare for the termination hearing. However, the District Court held that the father had received due process and declined to dismiss or continue the case. At trial, the father testified on his own behalf and cross-examined witnesses, including the witnesses whose communications had not been disclosed properly, and the court ultimately terminated the father's parental rights. On appeal, the Supreme Court held that the father did not allege any information in the undiscovered communications that could have led to additional evidence that would defeat the petition for termination. The District Court acted within its discretion when it determined that the father's due process rights were not violated by the failure of the Department to comply with its discovery obligation. In re M.B., 2018 MT 205, 392 Mont. 368, 424 P.3d 606.

Mother Lacked Standing to Challenge Placement of Indian Child After Parental Rights Terminated: The District Court issued an order terminating the parental rights of the appellant mother and ordering the placement of two children, C.B.D. and P.M.P., in separate placements. On appeal, the mother challenged the placement of P.M.P. only and did not challenge the termination itself. The Supreme Court held that the mother lacked standing to appeal P.M.P.'s placement. Because her appeal came after the District Court terminated her parental rights, she no longer had any legal status relative to P.M.P. and therefore she was alleging an injury to a civil right that she no longer had and made no effort to regain. The appeal of P.M.P.'s placement did not stay the termination of her parental rights, and therefore she lacked standing to maintain her appeal. In re C.B.D. & P.M.P., 2017 MT 108, 387 Mont. 347, 394 P.3d 202.

No Standing by Former Parent to Object to Child's Placement or Assert Child's Rights: Once the parent-child relationship is terminated by the District Court, a former parent has no standing to object to the court's subsequent placement of the child with the Department or by adoption. Similarly, a former parent has no standing to assert a violation of the child's rights as guardian ad litem because the former parent no longer represents the child. In re E.A.T. & T.A.T., 1999 MT 281, 296 M 535, 989 P2d 860, 56 St. Rep. 1133 (1999). See also In re C.B.D. & P.M.P., 2017 MT 108, 387 Mont. 347, 394 P.3d 202.

Sua Sponte Modification of Postadoption Visitation Agreement Within Discretion of District Court: The rule that in the context of separation agreements made between spouses, parties cannot make binding agreements concerning the support, custody, or visitation of children applies equally to postadoption agreements made between an adopted child's birth parents and adoptive parents. The best interests of the child are paramount, and sua sponte modification of an original visitation agreement in this case was within the discretion of the District Court after determining the best interests of the adopted child. Groves v. Clark, 1999 MT 117, 294 M 417, 982 P2d 446, 56 St. Rep. 490 (1999). See also In re Marriage of Mager, 241 M 78, 785 P2d 198, 47 St. Rep. 97 (1990), and In re Marriage of Widhalm/Miller, 279 M 97, 926 P2d 748, 53 St. Rep. 1067 (1996).

Postadoption Visitation Agreement Between Natural Mother and Adoptive Parents — Responsibilities of District Court: Groves consented to the adoption of her child by the Clarks on the condition that the Clarks sign a visitation agreement allowing Groves to have specified contact with her daughter. After the document was signed and the adoption completed, the Clarks tried to terminate Groves' contact with her daughter. Groves brought an action for specific performance of the visitation agreement, but the District Court held that the agreement was void from its inception under 40-8-125 (now repealed). The Supreme Court reversed, holding that In re C.P., 221 M 180, 717 P2d 1093 (1986), was distinguishable and that the Legislature would not have enacted 40-8-136 (now repealed) if 40-8-125 (now repealed) terminated the interests of the natural parent altogether. The Supreme Court also noted that 40-8-136 (now repealed) also places a burden upon the adoptive parents and, in this case, upon the adoption agency that acted as Groves' agent, to make sure that the visitation agreement was filed in accordance with that statute. The Supreme Court also concluded that under 40-8-114 (now repealed), the District Court has a responsibility to make sure that the enforcement is in the best interests of the child. Groves v. Clark, 277 M 179, 920 P2d 981, 53 St. Rep. 703 (1996). The District Court did not err when it later modified sua sponte the parties' postadoption visitation agreement to provide weekend visitation and weekly telephone contact with the birth mother because the modification was determined to be in the best interests of the child. The finding was supported by substantial evidence, and the court did not misapprehend the effect of the evidence. Adoptive parents do not have sole discretion in deciding whether a postadoption visitation agreement should be enforced. Rather, the adoptive parents' wishes are but one factor among many to be considered in determining the child's best interests under 40-4-212. Groves v. Clark, 1999 MT 117, 294 M 417, 982 P2d 446, 56 St. Rep. 490 (1999).

Refusal to Grant Contact — Child's Best Interest: A natural mother may be allowed to maintain contact with her child after her parental rights have been extinguished only upon a showing that contact is in the child's best interest. In this case, the mother failed to present any testimony regarding the effect such contact would have upon the child. In addition, the record clearly shows that it would not be in the child's best interest to allow the mother to maintain contact with him. In re Baby Boy Scott, 235 M 253, 767 P2d 298, 45 St. Rep. 2362 (1988).

Termination of Parental Rights While Maintaining Possibility of Parental Contact — Adoption Exception: There is no apparent conflict in terminating parental rights while simultaneously maintaining the possibility of parental contact. It was within the trial judge's discretion to terminate the mother's parental rights, due to her recurring mental problems, while allowing contact with the children if the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) determined it was in the children's best interests, since the children had a psychological attachment to their mother. However, when parental rights are terminated, continuing contact is allowable only in exceptional cases. In the event of adoption, continuing contact cannot be court-ordered even with Department approval. In re Declaring V.B., T.B., D.B., & B.B. Youths in Need of Care, 229 M 133, 744 P2d 1248, 44 St. Rep. 1838 (1987), followed in In re D.G., 244 M 17, 795 P2d 489, 47 St. Rep. 1408 (1990).

Parents to Have No Visitation Rights After Termination of Parental Rights Proceeding: Neither 40-8-125 (now repealed) nor 41-3-611 provides for a retention of visitation rights by the natural parent in the event of termination of parental rights and later adoption. In re C.P., 221 M 180, 717 P2d 1093, 43 St. Rep. 728 (1986).

41-3-613. Relinquishment of parental rights — open adoption.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

41-3-615. Reinstatement of parental rights.

Compiler's Comments

Effective Date: Section 6, Ch. 295, L. 2023, provided: "[This act] is effective on passage and approval." Approved April 26, 2023.

Part 10
Citizen Review Board Program Act

Part Compiler's Comments

Source: Part 10 is modeled after Oregon Revised Statutes (ORS), Chapter 419, sections 770 through 794, which were enacted into law by the Oregon Legislative Assembly but not codified as part of the ORS.

Effective Date: Section 19, Ch. 610, L. 1993, provided: "[This act] [41-3-205, 41-3-1001 through 41-3-1014 (41-3-1002, 41-3-1009, and 41-3-1014 now repealed), 41-3-1115, and 41-3-1122] is effective July 1, 1993."

41-3-1001. Short title.

Compiler's Comments

2001 Amendment: Chapter 570 substituted "Citizen Review Board Program Act" for "Local Citizen Review Board Pilot Program Act". Amendment effective July 1, 2001.

41-3-1003. Establishment of board — definition — membership.

Compiler's Comments

2001 Amendment: Chapter 570 in (1) substituted "As used in this part, "board" means a citizen review board appointed as provided in this section" for "Subject to the availability of funds, the district court judge of a district designated pursuant to 41-3-1002 to operate a pilot program"; in (2) at beginning of first sentence inserted "Subject to the availability of funds, a district court judge who has indicated in writing an interest in having a board", after "establish" substituted "at least one" for "a local citizen review", and after "each child" substituted "in the custody of the department and in foster care" for "assigned to foster care by the district court" and inserted second sentence allowing board review of the case of a child who remains in or returns to the child's home; in (3) at beginning of first sentence after "A" deleted "local citizen review" and at end substituted "judges" for "judge of a judicial district designated pursuant to 41-3-1002"; in (4) at beginning of introductory clause substituted "The board must be appointed" for "The district court judge of a judicial district designated pursuant to 41-3-1002 shall appoint the local citizen review board"; in (4)(a) at beginning after "Members of a" deleted "local citizen review" and at end after "welfare" deleted "which may include but is not limited to adoptive parents and members of the professions of law, medicine, psychology, social work, and education"; in (4)(b) in first sentence after "members of a" deleted "local citizen review" and inserted second sentence encouraging inclusion of tribal representatives; in (4)(c) near beginning after "department" substituted "who has a direct conflict of interest" for "of public health and human services, by a private agency regulated, certified, directed, or licensed by or contracting with the department of public health and human services, or by a district court" and at end before "board" deleted "local citizen review"; in (4)(d) after "member of a" deleted "local citizen review"; in (5) after "members of a" deleted "local citizen review"; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendments: Chapter 386 throughout section substituted "district court" for "youth court"; and at end of (1), after "court", deleted "of the judicial district, as provided in Title 41, chapter 5". Amendment effective July 1, 1995.

Chapter 546 in (3)(c), in two places, substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

41-3-1004. Administration — training — oversight — procedures.

Compiler's Comments

2001 Amendment: Chapter 570 in (1) at beginning deleted "Subject to the availability of funds" and inserted language directing the office of court administrator to oversee the program; in (2)(a) after "court" deleted "pursuant to subsection (3)" and after "operation of" substituted "a board, including procedures for removing members" for "the local citizen review board"; in (2)(b) after "programs for" deleted "local citizen review" and after "members" inserted "consisting of orientation training of at least 16 hours and a minimum of 8 hours of continuing education training annually"; in (2)(c) after "request to" substituted "a board" for "the local citizen review board"; in (2)(d) at end substituted "boards" for "the local citizen review board"; deleted former (2) and (3) that read: "(2) The office of the supreme court administrator shall, in accordance with the direction of the supreme court, oversee the program established in this part and, at the time prescribed by 5-11-210, prepare a report to the governor, the legislature, and the public regarding:

(a) state laws, policies, and practices affecting permanence and appropriate care for children in the custody of the department of public health and human services and other agencies; and

(b) the effectiveness of the local citizen review board in bringing about permanence and appropriate care for children in the custody of the department of public health and human services and other agencies.

(3) The Montana supreme court shall adopt procedures that have the force of law for the administration of the local citizen review board pilot program regarding:

(a) the removal of members of the local citizen review board;

(b) the time, content, and manner in which case plans for and case progress reports on a child assigned to foster care must be provided to the local citizen review board by the department of public health and human services, other agencies, or individuals directly responsible for the care of the child;

(c) the provision of written notice of the review to the department of public health and human services, any other agency directly responsible for the care or placement of a child, the parents or their attorneys, foster parents, surrogate parents, mature children or their attorneys, a court-appointed attorney or special advocate of any child, any county attorney or attorney general actively involved in the case, and other interested persons. The notice must include a statement that persons receiving a notice may participate in the hearing and be accompanied by a representative.

(d) securing or excusing the presence at the review of caseworkers and other employees of the department of public health and human services or other agencies directly responsible for the care of the child; and

(e) the manner in which the local citizen review board may remove cases from review when review is not required under federal law"; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendments: Chapter 386 in (1), near beginning, substituted "the court administrator" for "the youth court of a judicial district designated pursuant to 41-3-1002"; in (1)(a), after "establish", deleted "and approve" and after "procedures" substituted "for adoption by the Montana supreme court pursuant to subsection (3)" for "that have the force of law"; at beginning of (1)(b) deleted "approve and"; and at beginning of (3) substituted "The Montana supreme court" for "The youth court of a judicial district designated pursuant to 41-3-1002". Amendment effective July 1, 1995.

Chapter 546 in (2)(a), (2)(b), (3)(b), (3)(c), and (3)(d) substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Special Session Amendment: Chapter 21 at beginning of (2) substituted "The office of the supreme court administrator shall, in accordance with the direction of the supreme court, oversee the program established in this part and" for "The youth court of a judicial district designated pursuant to 41-3-1002 shall". Amendment effective December 23, 1993.

41-3-1005. Removal of members — grounds.

Compiler's Comments

2001 Amendment: Chapter 570 in introductory clause after "member of a" deleted "local citizen review" and substituted "41-3-1004" for "41-3-1004(3)"; in (1) after "by a" deleted "local citizen review"; and made minor changes in style. Amendment effective July 1, 2001.

41-3-1006. Terms — officers.

Compiler's Comments

2001 Amendment: Chapter 570 throughout section substituted reference to citizen review board for reference to local citizen review board; deleted former (2)(b) that read: "(b) meet at the nearest department of public health and human services office or another place mutually agreed to by a majority of the local citizen review board as often as it considers necessary to carry out the duties of the board"; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendment: Chapter 546 in (2)(b) substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

41-3-1007. Confidentiality of information — penalty.

Compiler's Comments

2001 Amendment: Chapter 570 in two places substituted reference to citizen review board for reference to local citizen review board. Amendment effective July 1, 2001.

41-3-1008. Access to records.

Compiler's Comments

2003 Amendment: Chapter 504 in (1)(b) after "dispositional" deleted "review". Amendment effective October 1, 2003.

2001 Amendment: Chapter 570 throughout section substituted reference to citizen review board for reference to local citizen review board; throughout section after "department" deleted "of public health and human services"; in (1)(b) at beginning substituted "pertinent electronic and paper records" for "any records"; in (2) after "department" substituted "within 10 working days" for "within 5 working days" and deleted former second sentence that read: "A local citizen review board and any staff provided for the board shall return all records and copies received from the department of public health and human services to the department within 7 working days after completion of the review"; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendments: Chapter 386 in (1)(a) substituted "district court" for "youth court". Amendment effective July 1, 1995.

Chapter 546 in (1)(b), in two places, in (2), in two places, and in (3)(b) substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

41-3-1010. Review — scope — procedures — immunity.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 382 in (2) after "must" substituted "be conducted within the time limit established under" for "take place at times set by the board. The time limit must comply with" and after "1997" inserted "42 U.S.C. 675(5)"; in (5)(e) at end after "or" substituted "by which a permanent placement will be finalized" for "placed for adoption"; in (8) after "siblings" inserted "but the court shall issue specific findings for each child"; inserted (11) providing for permanency hearings to be held by the board; and made minor changes in style. Amendment effective April 25, 2005.

(Version effective July 1, 2006) Chapter 449 in (4) in first sentence near middle after "child's attorney" inserted reference to child's assigned attorney and after "court-appointed" deleted "attorney or". Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449 L. 2005, was a saving clause.

2001 Amendment: Chapter 570 throughout section substituted reference to citizen review board for reference to local citizen review board; in (1)(a) at beginning deleted "Except for cases removed from review under procedures established under 41-3-1004" and after "foster care" substituted "focusing on issues that are germane to the goals of permanency and to accessing appropriate services for parents and children. In evaluating the accessibility, availability, and appropriateness of services, the board may consider:

(i) the safety of the child;

(ii) whether an involved agency has selected services specifically relevant to the problems and needs of the child and family;

(iii) whether caseworkers have diligently provided services;

(iv) whether appropriate services have been available to the child and family on a timely basis; and

(v) the results of intervention.

(b) The board may review the case of a child who remains in or returns to the child's home and for whom the department retains legal custody" for "that is assigned by the district court"; in (2) substituted "The time limit must comply with the Adoption and Safe Families Act of 1997" for "The first review may not be more than 6 months after the child is placed in foster care. Subsequent reviews must take place at least once every 6 months until the child is no longer within the jurisdiction of the district court or no longer in foster care"; in (4) substituted language regarding notice of review for "The local citizen review board shall review any case in which a petition to terminate parental rights has been denied as soon as practical but no later than 45 days after the denial"; in (5)(b) after "need for" inserted "the placement" and after "appropriateness" inserted "and safety"; in (7) near middle after "department" deleted "of public health and human services" and at end inserted "unless prohibited by the confidentiality provisions of 41-3-205"; in (9) near middle of first sentence after "foster parents" substituted "children who are 12 years of age or older" for "mature children"; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendments: Chapter 386 throughout section substituted "district court" for "youth court"; and inserted (10) concerning the immunity from suit of a person serving in a voluntary capacity on a local citizen review board. Amendment effective July 1, 1995.

Chapter 546 in (7) substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

41-3-1011. Board recommendations concerning foster care services and policy considerations.

Compiler's Comments

2001 Amendment: Chapter 570 near beginning of first sentence before "board" deleted "local citizen review" and after "department" deleted "of public health and human services" and inserted second sentence requiring that recommendations be in writing and provided to the department. Amendment effective July 1, 2001.

1995 Amendments: Chapter 386 substituted "district court" for "youth court". Amendment effective July 1, 1995.

Chapter 546 substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

41-3-1012. Presence of employees and participants at reviews and deliberations of board.

Compiler's Comments

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in (3) near middle after "child's attorney" inserted reference to child's assigned attorney and after "court-appointed" deleted "attorney or"; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

2001 Amendment: Chapter 570 throughout section substituted reference to citizen review board for reference to local citizen review board; throughout section substituted reference to board reviews for reference to board meetings; in (1) near beginning after "department" deleted "of public health and human services"; in (2) near middle of first sentence after "department" deleted "of public health and human services"; inserted (3) specifying persons who are allowed to be present at a review; inserted (4) generally requiring open deliberations; inserted (5) providing that the board and staff are considered public servants for purposes of bringing criminal charges; in (6)(a) in definition of presence after "except that" substituted "a representative of the department knowledgeable about the case" for "the caseworker on the case"; inserted (6)(b) defining open; inserted (6)(c) defining close; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendment: Chapter 546 in (1) and (2) substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

41-3-1013. Court review of findings and recommendations of board.

Compiler's Comments

2001 Amendment: Chapter 570 throughout section substituted reference to citizen review board for reference to local citizen review board; throughout section after "department" deleted "of public health and human services"; in (1)(a) at end of first sentence substituted "20 days" for "10 days"; in (3)(b) near middle substituted "any reasons why the department objects to or is not able to implement the recommendations" for "the action the department of public health and human services intends to take to implement the recommendations"; inserted (3) allowing the court to schedule a hearing on any recommendations that the department objects to or contends that it is unable to implement; and made minor changes in style. Amendment effective July 1, 2001.

1995 Amendments: Chapter 386 throughout section substituted "district court" for "youth court"; and in (2)(b) substituted "17 days" for "7 days", after "after" substituted "receipt of the findings and recommendations, of the action" for "the review is completed if", and after "services" substituted "intends to take" for "does not intend". Amendment effective July 1, 1995.

Chapter 546 in (2), (2)(a), (2)(b), (2)(c), (3), and (3)(c) substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Part 12
Office of Child and Family Ombudsman

Part Compiler's Comments

Effective Date: Section 12, Ch. 354, L. 2015, provided: "[This act] is effective July 1, 2015."

41-3-1209. Purpose and intent.

Compiler's Comments

2021 Amendment: Chapter 549 in (2) near middle substituted "consultation" for "collaboration". Amendment effective May 14, 2021.

41-3-1211. Powers and duties.

Compiler's Comments

2021 Amendments — Composite Section: Chapter 261 in (11) at end of first sentence inserted "in accordance with 5-11-210". Amendment effective April 20, 2021.

Chapter 411 inserted (6) including oversight of the department's systems as a duty of the ombudsman; and made minor changes in style. Amendment effective October 1, 2021.

Chapter 549 in (7) near middle substituted "in consultation" for "collaboratively"; in (8) near beginning substituted "consult" for "cooperate"; and in (11) near end of last sentence substituted "systemic" for "systematic". Amendment effective May 14, 2021.

41-3-1212. Investigations — discretion — procedure.

Compiler's Comments

2021 Amendments — Composite Section: Chapter 411 inserted current language in (3)(b) and deleted former text (see 2021 Session Law for former text); inserted (3)(c) outlining what information is required in a report under 41-3-1211; and made minor changes in style. Amendment effective October 1, 2021.

Chapters 411 and 549 deleted former (1)(a) that read: "(a) the request for assistance could reasonably be addressed by another remedy or channel"; inserted (2) allowing the ombudsman to investigate a request for assistance in a matter that is being addressed by another remedy or channel; and made minor changes in style. Chapter 411 amendment effective October 1, 2021. Chapter 549 amendment effective May 14, 2021.

41-3-1214. Legislator access to ombudsman records.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 651, L. 2023. Amendment effective May 19, 2023.

Effective Date: Section 3, Ch. 388, L. 2021, provided: "[This act] is effective July 1, 2021."

41-3-1215. Systemic oversight of child protective services activities.

Compiler's Comments

Effective Date: Section 7, Ch. 549, L. 2021, provided that this section is effective on passage and approval. Approved May 14, 2021.

Part 13
Montana Indian Child Welfare Act

Part Compiler's Comments

Effective Date: Section 54, Ch. 716, L. 2023, provided that this part is effective July 1, 2023.

Termination: Section 55, Ch. 716, L. 2023, provided: "[This act] terminates June 30, 2025."

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

CHAPTER 4
INTERSTATE PLACEMENT OF CHILDREN

Part 1
Text of Compact

41-4-101. Enactment — provisions.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Administrative Rules

Title 37, chapter 50, subchapter 9, ARM Interstate Compact on the Placement of Children.

Case Notes

Ineffective Assistance of Counsel — Termination of Parental Rights Improper — Remand for Consideration of Placement with Father: Although the out-of-state father had been the primary parent of the children, they were removed from the mother's care after she refused to return them to the father. The father's court-appointed attorney advised him to stipulate to the state's petitions, failed to object to the children being placed with their maternal grandparents, and never requested a placement hearing. Ultimately, the father's parental rights were terminated and the father appealed. The Supreme Court reversed, holding that the father's attorney had provided ineffective counsel, and remanded the matter to the District Court to consider the father as the first placement option for the children. In re B.H., 2020 MT 4, 398 Mont. 275, 456 P.3d 233.

Jurisdiction Over Termination of Parental Rights Proper: A mother appealed the termination of her parental rights, arguing that the District Court erred in not staying the proceedings because once the mother left Montana for Utah and the child was placed with a Utah foster family, Montana was an inconvenient forum and no longer held exclusive and continuing jurisdiction over the proceedings. The Supreme Court affirmed, concluding that Montana was not an inconvenient forum under 40-7-108 because the evidence required for the proceeding was not located in Utah and did not require any evidence from Utah and that because there was not an ongoing proceeding in Utah, the District Court did not err in refusing to relinquish jurisdiction under the continuing jurisdiction provision of the Uniform Child Custody Jurisdiction and Enforcement Act, 40-7-202, which requires a pending proceeding in another state. In addition, absent any pending Utah proceeding, Article V of the Interstate Compact on the Placement of Children, codified at 41-4-101, dictated that Montana retain jurisdiction after the child was placed in Utah in order to adjudicate the proceeding. In re A.R.B., 2013 MT 310, 372 Mont. 274, 312 P.3d 425.

Youth Committed to Program in Nonadjacent State — School District Not Liable for Related Education Costs: The Youth Court committed a youth to a program for sexual offenders located in Minnesota. Cost was $148 a day, of which $48 were education costs, and the court assigned payment of that portion to the youth's school district. On appeal of the assignment, the Supreme Court found that 20-5-314 authorized reciprocal tuition agreements only with states adjoining Montana but found no statutory method to calculate tuition to be paid to a school in a state not adjacent to Montana. Absent specific statutory authority, the Supreme Court held that the Youth Court erred in finding the school district liable for the youth's education costs. In re W.J.H., 226 M 479, 736 P2d 484, 44 St. Rep. 817 (1987).

Definition of "Sending Agency" — Applicability: Mother argued that she should be considered the "sending agency" under Article II of this section and that she therefore had jurisdiction to effect the return of her child whom she had formally released for adoption. The Supreme Court refused to interpret the definition so broadly, holding that such an interpretation would mean that no state or private licensed adoption agency would ever be able to act with assurance that its conduct was final. In re Male Child Born July 15, 1985, to L.C., 221 M 309, 718 P2d 660, 43 St. Rep. 835 (1986).

Jurisdiction After Child Placed for Adoption Out of State: Once a parent voluntarily signed and executed a form relinquishing parental rights to an adoption agency, the adoption agency became the "sending agency" as defined in 41-4-101, Art. II, with the power to place the child for adoption out of state. The only standing the parent then had in Montana courts was to seek a revocation of the relinquishment with the adoption agency as copetitioner. Under 40-6-135(7) (now repealed), the relinquishment became irrevocable once the child was placed for adoption out of state, and Montana lost jurisdiction. In re Male Child Born July 15, 1985, to L.C., 221 M 309, 718 P2d 660, 43 St. Rep. 835 (1986).

Violation of Interstate Compact on Placement of Children — Illegal Placement as a Result — Revocation of Parents' Consent: Failure of prospective adoptive parents to notify the appropriate public authorities in writing before bringing their prospective adoptive child into Montana violated the Interstate Compact on Placement of Children. The prospective adoptive parents' status as custodians did not prevent the operation of the Compact. By virtue of the failure of the prospective adoptive parents to comply with the Compact, the placement of the child with the prospective adoptive parents in Montana constituted illegal placement under the provision of the Compact, and the failure to comply constitutes full and sufficient grounds for the revocation of the previously executed parents' consent. In re the Adoption of T.M.M., 186 M 460, 608 P2d 130 (1980).

Attorney General's Opinions

Responsibility for Tuition of Child in Legal Custody of Local Welfare Department: If a local welfare department has legal custody by a temporary or permanent order for placement of a minor child and places that child with foster parents outside the school district of residence (residence of the natural parents in most cases), tuition would have to be paid by the district of residence. If the placement of the child is outside the state, financial responsibility for school costs would rest with the sending agency under the Interstate Compact on the Placement of Children. 40 A.G. Op. 69 (1984).

41-4-102. Financial responsibility.

Compiler's Comments

1997 Amendments: Chapter 42 near end of second sentence substituted "Title 40, chapter 5, part 1 (Uniform Interstate Family Support Act)" for "Title 40, chapter 5 (Revised Uniform Reciprocal Enforcement of Support Act)"; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 516 in second sentence, near end after "chapter 5", substituted "part 1 (Uniform Interstate Family Support Act), 41-3-411" for "(Revised Uniform Reciprocal Enforcement of Support Act), 41-3-406"; and made minor changes in style.

1991 Amendment: Near end substituted reference to 41-3-406 for reference to 41-3-404 and 41-3-1123. Amendment effective July 1, 1991.

1983 Amendment: Changed "41-3-104" to "41-3-1122" and "41-3-405" to "41-3-1123".

41-4-103. Appropriate public authorities defined.

Compiler's Comments

1995 Amendment: Chapter 546 substituted "department of public health and human services" for "department of family services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1987 Amendment: Substituted "department of family services" for "department of social and rehabilitation services".

Case Notes

Violation of Interstate Compact on Placement of Children — Illegal Placement as a Result — Revocation of Parents' Consent: Failure of prospective adoptive parents to notify the appropriate public authorities in writing before bringing their prospective adoptive child into Montana violated the Interstate Compact on Placement of Children. The prospective adoptive parents' status as custodians did not prevent the operation of the Compact. By virtue of the failure of the prospective adoptive parents to comply with the Compact, the placement of the child with the prospective adoptive parents in Montana constituted illegal placement under the provision of the Compact, and the failure to comply constitutes full and sufficient grounds for the revocation of the previously executed parents' consent. In re the Adoption of T.M.M., 186 M 460, 608 P2d 130 (1980).

41-4-104. Appropriate authority in the receiving state.

Compiler's Comments

1995 Amendment: Chapter 546 substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1987 Amendment: Substituted "department of family services" for "department of social and rehabilitation services".

Case Notes

Valid Memorandum of Agreement Allowing State to Investigate Child Abuse Allegations on Reservation and Pursue Substantiation Proceedings Against Tribal Member: The Assiniboine and Sioux Tribes of the Fort Peck Reservation entered a memorandum of agreement with the Bureau of Indian Affairs and the Montana Department of Public Health and Human Services (DPHHS), allowing DPHHS to place Indian children with enrolled tribal members living on the reservation. DPHHS subsequently placed a Minnesota Indian child with the child's great-aunt Hanna on the Fort Peck Reservation, but the placement was terminated after DPHHS received reports that the child was being abused or neglected. DPHHS subsequently initiated an investigation into the cause of the abuse and issued a substantiated report that Hanna had abused or neglected the child. Hanna moved for a fair hearing, and because no criminal charges had been filed, DPHHS began the fair hearing process. Hanna then moved to dismiss the substantiation proceeding on jurisdictional grounds. The hearings officer held that the tribe maintained exclusive jurisdiction over Indian youth and that DPHHS's substantiation proceedings interfered with tribal sovereignty. DPHHS appealed the decision in District Court, arguing that pursuant to the memorandum of agreement, DPHHS had jurisdiction to issue the substantiated report under state law and policy because DPHHS had licensed Hanna as a kinship foster care provider in the first place. The District Court agreed and reversed the hearings officer's decision. On appeal, the Supreme Court affirmed. The purpose of the agreement was to allow eligible Indian children on the Fort Peck Reservation to receive services and foster care maintenance payments, and the agreement was a valid, federally authorized agreement. Under the agreement, DPHHS was assigned the responsibility of investigating allegations of abuse and neglect, documenting conclusions of the investigation in a final report, and making the final decision about an individual's licensing status, and the agreement did not contemplate tribal jurisdiction regarding these issues. Therefore, DPHHS had jurisdiction to pursue substantiation proceedings against Hanna. In re Fair Hearing of Hanna, 2010 MT 38, 355 Mont. 236, 227 P.3d 596.

41-4-106. Requirements for visitation, inspection, and supervision.

Compiler's Comments

1983 Amendment: Changed 41-3-502 to 41-3-1141 and 41-3-503 to 41-3-1142.

CHAPTER 5
YOUTH COURT ACT

Chapter Compiler's Comments

Section Not Codified: Section 10-1204, R.C.M. 1947, a severability clause, was not codified in the MCA. This clause has not been repealed and is still valid law. Citation may be made to sec. 4, Ch. 329, L. 1974.

Section 10-1205, R.C.M. 1947, dealing with number and gender, was not codified in the MCA, as it was redundant with 1-2-105. This clause has not been repealed and is still valid law. Citation may be made to sec. 5, Ch. 329, L. 1974.

Chapter Case Notes

Refusal to Issue Jury Instructions Instructing Jury to Consider Youth Characteristics in Determining Youth's Culpability — No Abuse of Discretion: The Youth Court did not abuse its discretion by refusing to instruct the jury to consider youth characteristics in determining the defendant's guilt. The Supreme Court declined to extend jurisprudence regarding consideration of youth characteristics during sentencing to a Youth Court jury's determination of guilt or innocence. In re J.W., 2021 MT 291, 406 Mont. 224, 498 P.3d 211.

Youth Tried, Convicted, and Sentenced Under Transfer Statute Correctly Sentenced as Persistent Felony Offender: In 1999, when Mainwaring was a juvenile, he pleaded guilty to mitigated deliberate homicide and was convicted pursuant to 41-5-206 and sentenced pursuant to 41-5-2503(1)(a). A part of that sentence was later suspended under 41-5-2510. Later, shortly after turning 21, Mainwaring assaulted a child. The state brought assault charges against Mainwaring and then sought to have the court designate Mainwaring as a persistent felony offender (PFO). The District Court approved the designation as a PFO, based on Mainwaring's 1999 felony conviction, and Mainwaring was convicted and sentenced to 20 years in prison. The Supreme

Court held that a conviction under 41-5-206(6) was equivalent to any adult felony conviction and that there is nothing in the Montana Youth Court Act or the Criminally Convicted Youth Act that precludes the application of the PFO statutes and designation to an individual previously convicted of a felony when the individual was a youth. Citing St. v. Damon, 2005 MT 218, 328 M 276, 119 P3d 1194 (2005), the Supreme Court held that the District Court therefore had the authority to apply the PFO statutes and designation to Mainwaring. The Supreme Court also overruled Mainwaring's due process objections and affirmed his conviction. St. v. Mainwaring, 2007 MT 14, 335 M 322, 151 P3d 53 (2007).

Youth Court — Lack of Jurisdiction to Determine Place and Length of Commitment: B.L.T., a 15-year-old youth, was charged with theft, escape, and criminal mischief. The Youth Court ordered that B.L.T. be committed to the custody of the Department of Family Services (now Department of Corrections), with placement at Pine Hills until he reached the age of 18. The Supreme Court noted that 41-5-103 defines "legal custody" as including the right to determine "with whom the youth shall live and for what period". The Supreme Court noted that even though the Youth Court has continuing jurisdiction over a youth under 41-5-205, placement by the Youth Court is not tantamount to a sentence of imprisonment because the purpose of the Montana Youth Court Act is rehabilitation rather than punishment in a penal institution. This purpose is consistent with 41-5-523 (renumbered 41-5-1512), which allows the Department of Family Services (now Department of Corrections) to determine the place and length of placement of the youth. The Youth Court therefore had no authority to commit to Pine Hills for a specific period of time. In re B.L.T., 258 M 468, 853 P2d 1226, 50 St. Rep. 617 (1993).

Youth Not Denied Equal Protection by Sentencing System More Severe Than System Imposed on Adults: A youth has not been denied her right to equal protection of the law by imposition of a term of commitment upon her that is longer than the criminal sentence an adult would receive for the same act. Adults and minors are not similarly situated with respect to state sentencing laws because: (1) the purpose of their detention is not the same, that of the adult offender being both retributional and rehabilitational; and (2) the physical liberty interests of minors and adults are qualitatively different. In re C.S., 210 M 144, 687 P2d 57, 41 St. Rep. 970 (1984), followed in In re T.A.S., 244 M 259, 797 P2d 217, 47 St. Rep. 1590 (1990), and In re S.M.K.-S.H., 2012 MT 281, 367 Mont. 176, 290 P.3d 718.

Juvenile — Traffic Violation — Guilty Plea — Ability to Waive Rights: The provisions of the Youth Court Act do not apply to traffic violations. The youth who was accused of failure to drive in a careful and prudent manner was not subject to a jail sentence if found guilty. He therefore did not have the right to counsel and could knowledgeably waive his rights without the presence of counsel or his parents. State ex rel. Maier v. City Court, 203 M 443, 662 P2d 276, 39 St. Rep. 1560 (1982).

Chapter Law Review Articles

Juveniles' Overdue Rights: Integrating the Rights-of-Minors Provision With the Cruel and Unusual Punishment Analysis in Montana, Towe, 83 Mont. L. Rev. 195 (2022), https://scholarworks.umt.edu/mlr/vol83/iss1/8/.

Still-In-Flux: Reinterpreting Montana's Rights-of-Minors Provision, Stursberg, 79 Mont. L. Rev. 259 (2018).

The Indian Child Welfare Act of 1978: A Montana Analysis, DuMontier-Pierre, 56 Mont. L. Rev. 505 (1995).

In Defense of a Youth, Curtis, 36 Mont. L. Rev. 225 (1975).

Indian Juveniles and Legislative Delinquency in Montana, Mudd, 33 Mont. L. Rev. 233 (1972).

The Constitution and Juvenile Delinquents, Mudd, 32 Mont. L. Rev. 307 (1971).

Montana Legislative Summary, 1959 (Juvenile Offender), 20 Mont. L. Rev. 146 (1959).

Book Review—Youth and the Law by Frederic J. Ludwig, 17 Mont. L. Rev. 227 (1956).

What's Wrong With Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice, Henning, 97 Calif. L. Rev. 1107 (2009).

Youth Court Guide, 2d Ed., Glennie, 156 New L.J. 638 (2006).

A Prospective Longitudinal Study of Teen Court's Impact on Offending Youth's Behavior, Rasmussen & Diener, 56 Juv. & Fam. Ct. J. 17 (2005).

Chapter Collateral References

Federal Juvenile Delinquency Act, 18 U.S.C. § 5031, et seq.

Part 1
General

Part Compiler's Comments

Preamble: The preamble attached to Ch. 436, L. 1995, provided: "WHEREAS, the Montana Youth Court Act is now 20 years old and has been both amended and litigated numerous times; and

WHEREAS, juvenile court and probation philosophy and practice have changed; and

WHEREAS, national attention has been focused on the issue of youth violence; and

WHEREAS, a performance audit report issued by the Legislative Auditor in June 1993 concluded that Montana's juvenile justice system suffers from a lack of coordination and that current reforms are occurring without a formal planning process; and

WHEREAS, the 54th Legislature will be asked to consider amending several major provisions of the Montana Youth Court Act; and

WHEREAS, it is important to strike a balance that protects the community from delinquent youth, imposes accountability for offenses, and equips juvenile offenders with the competencies to live productively in the community; and

WHEREAS, it is important to consider issues such as initiation of proceedings, jurisdiction and transfer, rights of youth, procedure before the youth courts, disposition, confidentiality, and mental health considerations in order to achieve a balance; and

WHEREAS, it is important that all services to youth in the juvenile justice system and mental health services delivery system be coordinated in a single, seamless continuum of care and treatment.

THEREFORE, the Legislature finds it appropriate that an interim commission be established and assigned to complete a comprehensive review and assessment of the Montana juvenile justice system and the mental health services delivery system for youth and develop a plan to ensure the effective and efficient delivery of services to all youth in those systems."

Juvenile Justice Study Commission: Chapter 436, L. 1995, provided: "Section 1. Juvenile justice study commission — composition — vacancies. (1) There is a juvenile justice study commission.

(2) The commission is composed of the following members:

(a) two members of the house of representatives, one from each party, appointed by the speaker of the house;

(b) two members of the senate, one from each party, appointed by the president of the senate;

(c) a citizen representing the public at large, appointed by the governor;

(d) a youth court judge, appointed by the governor;

(e) a justice of the peace, appointed by the governor from three candidates nominated by the Montana magistrates' association;

(f) a member of the youth justice advisory council, appointed by the governor from three candidates nominated by the board of crime control;

(g) a parent or guardian of a youth being treated or supervised, appointed by the governor;

(h) a juvenile probation officer appointed by the governor from three candidates nominated by the Montana juvenile probation officers association;

(i) a county attorney, appointed by the governor from three candidates nominated by the county attorneys association;

(j) a victim of a violent crime committed by a youth, appointed by the governor;

(k) a member of a private agency that provides treatment services to youth, appointed by the governor;

(l) a young adult who was formerly adjudicated to be a juvenile delinquent or youth in need of supervision [now youth in need of intervention], appointed by the governor; and

(m) one employee each of the department of family services [now department of public health and human services], the board of crime control, and the department of corrections and human services [now department of corrections], who shall serve as nonvoting members.

(3) The members of the commission shall elect a presiding officer from among the members.

(4) A vacancy occurring on the commission must be filled in the same manner as the original appointment.

Section 2. Meetings. (1) The presiding officer shall schedule meetings of the commission as considered necessary and shall give notice of the time and place of each meeting to the members of the commission. At least one meeting must be held in each mental health region.

(2) The commission may adopt rules of procedure for the conduct of its meetings.

Section 3. Reimbursement of expenses — compensation. (1) Each member of the commission, except the legislative members appointed under [section 1] [not codified], is entitled to reimbursement for expenses as provided in 2-18-501 through 2-18-503.

(2) A legislative member appointed under [section 1] [not codified] is entitled to compensation and expenses as provided in 5-2-302.

Section 4. Powers and duties — staff support — recommendations — report. (1) The commission shall make a thorough study of the juvenile justice system and youth mental health services delivery system. The study must include:

(a) a comprehensive review of past and present programs used to successfully rehabilitate youth and reduce juvenile crime;

(b) a review of methods and programs in other states and nations that have been documented as a success in treating and rehabilitating youth;

(c) the development of a juvenile justice and mental health treatment continuum that provides for community protection, youth accountability, youth competency, meaningful restitution, and successful reintegration of youth into the community;

(d) a definition and delineation of the roles and responsibilities of the department of family services [now department of public health and human services] and other state and local government agencies working with youth;

(e) a definition and delineation of the roles and responsibilities of the juvenile justice system and the youth mental health services delivery system; and

(f) a review of the effectiveness and efficiency of each state youth correctional facility and of each detention facility operated by the state, including the feasibility of privatizing each facility.

(2) The legislative council shall supply staff support to the commission.

(3) The commission is authorized to secure information of any type from any agency, board, or commission or from any independent organization. Any state agency, board, or commission shall supply information upon the request of the commission.

(4) On or before December 1, 1996, the commission shall submit to the 55th legislature a report of its findings and conclusions. The report must contain recommendations for legislation, including a draft of the proposed legislation. The report must also contain a discussion related to any area of study for which the commission does not recommend legislation and an explanation of why legislation is not recommended.

Section 5. Authority to accept funding — appropriation of federal funds. (1) The legislative council is authorized to accept funds appropriated from the board of crime control for the purpose of conducting the study identified in [section 4] [not codified].

(2) There is allocated to the legislative council from the youth justice advisory council $20,000 in funds granted to the state board of crime control for the youth justice council by the federal office of juvenile justice and delinquency prevention. The funds may be used only for fulfilling the duties of the commission, including:

(a) reimbursing or compensating the members as provided in [section 3] [not codified];

(b) contracting for services to execute the study to be conducted by the commission; and

(c) paying other expenses incurred by the commission or the legislative council in completing the study.

(3) Funds allocated to the legislative council on behalf of the commission but not expended prior to the termination date specified in [section 7] [not codified] must be returned to the youth justice advisory council within 60 days of the termination date.

(4) The funds identified in this section must be deposited in quarterly installments that are sufficient to meet the commission's costs for each quarter in an account in the state special revenue fund to the credit of the legislative council. The first installment must be deposited on or before July 1, 1995. The legislative council staff may not begin work on the study until the first installment has been deposited." The Commission was established July 1, 1995, and terminates June 30, 1997.

Part Administrative Rules

Title 20, chapter 9, subchapter 2, ARM Juvenile Delinquency Intervention Act.

41-5-101. Short title.

Case Notes

Family Travel and Counseling Expenses Properly Denied: A youth sentenced to a youth correctional facility requested funds to enable his family to visit at the facility and to participate in family counseling. The request was denied by the Youth Court, and the Supreme Court affirmed. Although one purpose of the Montana Youth Court Act is to preserve the unity and welfare of the family whenever possible, there is no provision for family travel expenses, and the Youth Court did not abuse its discretion in denying expenses absent a showing that: (1) family visits and counseling would be beneficial; (2) counseling was required; (3) funds were available; or (4) the Department of Corrections would not have made similar arrangements following disposition. In re N.V., 2004 MT 80, 320 M 442, 87 P3d 510 (2004).

41-5-102. Declaration of purpose.

Compiler's Comments

2005 Amendment: Chapter 512 inserted (2)(d) relating to maintaining appropriate heritage upon removal from home; and made minor changes in style. Amendment effective April 28, 2005.

1999 Amendment: Chapter 537 in (2) inserted "a system that does not seek retribution but that provides"; in (2)(b) inserted "for youth before they become adult offenders"; and made minor changes in style. Amendment effective April 30, 1999.

1995 Amendment: Chapter 528 at beginning of (2) substituted "to prevent and reduce youth delinquency through immediate, consistent, enforceable, and avoidable consequences of youths' actions and to establish a program" for "to remove from youth committing violations of the law the element of retribution and to substitute therefor a program" and after "rehabilitation" inserted "detention, competency development, community protection"; in (4) substituted "fair, accurate hearing" for "fair hearing"; and made minor changes in style.

Case Notes

Seventeen-Year-Old Defendant Charged in District Court — Denial of Transfer to Youth Court Proper: A 17-year-old defendant was charged directly in District Court with two consolidated counts of sexual intercourse without consent concerning two separate incidents. The District Court subsequently denied the defendant's motions to have the charges moved to Youth Court, concluding that the defendant's age, home environment, conduct while on release, minimization of his alleged conduct, and need for more structured supervision made the District Court a more appropriate forum. The defendant agreed to a nonbinding plea agreement for one of the charges and was sentenced to 50 years in prison with 10 years suspended. On appeal, the Supreme Court affirmed, holding that the District Court correctly denied the motions for transfer to Youth Court. However, the Supreme Court found that the District Court erred by not including the requirements of 41-5-2503 and remanded to modify the judgment. St. v. Talksabout, 2017 MT 79, 387 Mont. 166, 392 P.3d 574, distinguished in St. v. Johnson, 2023 MT 167, 413 Mont. 202, 534 P.3d 676.

Youth Offender Jointly and Severally Liable for Restitution Award — Failure to Consider Youth's Ability to Pay — Plain Error Warranting New Restitution Hearing: At his plea hearing, the youth defendant admitted to having committed criminal mischief as part of a common scheme, in violation of 45-6-101 and 45-2-101. The youth admitted his participation in 2 nights of vandalism, causing $16,020.63 in damages, out of 11 total nights of vandalism, worth total damages of $78,702.09. At the restitution hearing, the Youth Court held the youth jointly and severally liable for the entire $78,702.09 without inquiring into the extent of the youth's assets or prospects for future earnings. On appeal, the Supreme Court held that it was plain error for the Youth Court to fail to consider the youth's ability to pay the restitution. The Supreme Court took up the issue sua sponte because the error implicated the youth's fundamental constitutional rights under Article II, sec. 15, Mont. Const., as a youth in the Youth Court system faces a different disposition and therefore is not similarly situated to an adult who commits the same offense. Additionally, the criminal mischief statute at 45-6-101(2) expressly requires the court to impose restitution only after fully considering the convicted person's ability to pay. The Supreme Court held that the Youth Court's failure to consider the youth's ability to pay raised questions of the fundamental fairness of the proceedings against him and remanded for a new restitution hearing to consider the youth's ability to pay the full amount of restitution. In re K.E.G., 2013 MT 82, 369 Mont. 375, 298 P.3d 1151.

Jury Instruction on Purpose of Youth Court Act Improper: The Youth Court's act of instructing a deadlocked jury on the legislative purpose of the Youth Court Act was prejudicial because it introduced the positive impact that a guilty verdict would have on the defendant youth and distracted the jurors from weighing only the elements of the criminal charges. St. v. E.M.R., 2013 MT 3, 368 Mont. 179, 292 P.3d 451.

Appropriate Conditions on Probation of Delinquent and Serious Youth Sex Offender: As a youth, D.A.S. was convicted of sexual assault and placed in a youth correctional facility. When D.A.S. turned 18, jurisdiction and supervisory responsibility were transferred from Youth Court to District Court until age 25, and numerous supervisory conditions were attached, including prohibitions on the use of drugs and alcohol, a curfew, and a requirement that D.A.S. obtain a GED 1 year prior to expiration of the sentence. D.A.S. objected to these conditions on grounds that they were unrelated to the crime of sexual assault, but the Supreme Court affirmed, applying St. v. Ashby, 2008 MT 83, 342, M 187, 179 P3d 1164 (2008), which allows imposition of conditions that have a nexus either to the offense or to the offender. In this case, both alcohol and drug prohibitions were reasonably related to D.A.S.'s rehabilitation and placement in a sexual offender program. A curfew was reasonable to ensure development of a consistent and healthy routine and was reasonable given legislative intent to provide youth offenders with additional supervision. Completion of the high school equivalency test was not an abuse of discretion because it was consistent with legislative intent to rehabilitate youth offenders through competency development, especially given D.A.S.'s expressed desire to further his education. In re D.A.S., 2008 MT 168, 343 M 360, 184 P3d 349 (2008).

Similar Purposes of Adult and Youth Sentencing Statutes Regarding Public Safety and Rehabilitation: In its transfer order, the Youth Court concluded that adult sentencing policies are similar to the sentencing purposes of the Montana Youth Court Act in that both are designed to ensure rehabilitation, accountability, and protection of the community. Spina contended that the conclusion was a misstatement of the law because the declaration of purpose in the Montana Youth Court Act does not promote accountability. The Supreme Court held that, although not identical, the statutes have similar purposes, including holding individuals accountable for their actions through the imposition of restitutionary measures. St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421, 56 St. Rep. 467 (1999).

Youth Legally Capable of Committing Crime — Jurisdiction When Crime Disclosed After Majority: The District Court has jurisdiction to try an individual charged at age 22 for felonies allegedly committed at age 15, as provided in the court's constitutional grant of jurisdiction over all felonies. The Youth Court Act does not contain any direct statement or implication that the Legislature intended to set the minimum age of criminal responsibility at 16, making a 15-year-old incapable of committing a crime. The primary purposes of statutes defining a "delinquent youth" and providing for transfer to District Court are to clarify that delinquency proceedings are noncriminal and to prohibit prosecution of youths in District Court while they are youths. State ex rel. Elliot v. District Court, 211 M 1, 684 P2d 481, 41 St. Rep. 1184 (1984).

Predetention Hearing: The facts of this case did not demonstrate a violation of this statute by the youth court's denial of assistance of available counsel in a predetention hearing. In re Marten, 174 M 343, 570 P2d 1122 (1977).

Dispositional Stage — Fitness of Parents: At the dispositional stage the concern for the best interests of the youth and community is paramount. The court need not, therefore, make specific findings as to the fitness of the parents. In re Geary, 172 M 204, 562 P2d 821 (1977).

Repeal of Conflicting Laws: By the enactment of Ch. 227, L. 1943 (now repealed), and its amendments covering juveniles and creating juvenile courts, the Legislature intended to repeal all prior laws in conflict therewith and amended the general criminal code insofar as it conflicts with the statutes relating to juveniles. State ex rel. Dahl v. District Court, 134 M 395, 333 P2d 495 (1958).

Disqualification of Judge: Section 93-901, R.C.M. 1947 (now repealed), which governed the removal of judges in civil actions and matters, applies to juvenile delinquency proceedings as it is the legislative intent that delinquency proceedings are to be treated as civil proceedings. State ex rel. Ostoj v. McClernan, 129 M 160, 284 P2d 252 (1955).

Paternal Nature of Proceedings: Proceedings under the juvenile delinquency law, section 10-601, et seq., R.C.M. 1947 (since repealed), are in no sense criminal, as the law does not contemplate punishment for an offense committed by an erring minor. The law is no more than an administrative police regulation for the saving of the child and the protection of society. In administering it the courts act more in a paternal than in a judicial capacity, and the proceedings to be conducted under the act are exclusive. State ex rel. Palagi v. Freeman, 81 M 132, 262 P 168 (1927).

41-5-103. Definitions.

Compiler's Comments

2023 Amendments — Composite Section: Section 1, Ch. 199, L. 2023, in definition of victim in (a) substituted "natural person" for "person"; and made minor changes in style. Amendment effective October 1, 2023.

Section 6, Ch. 506, L. 2023, in definition of final disposition at end substituted "41-5-1522 through 41-5-1524" for "41-5-1522 through 41-5-1525". Amendment effective October 1, 2023.

Section 20, Ch. 685, L. 2023, in definition of youth after "sex" inserted "as defined in 1-1-201"; and made minor changes in style. Amendment effective October 1, 2023.

Severability: Section 42, Ch. 685, L. 2023, was a severability clause.

2021 Amendment: Chapter 339 in definition of conditional release before "correctional facility" deleted "state youth"; in definition of correctional facility substituted current definition for former definition that read: ""Correctional facility" means a public or private, physically secure residential facility under contract with the department and operated solely for the purpose of housing adjudicated delinquent youth"; deleted definition that read: "State youth correctional facility" means the Pine Hills youth correctional facility in Miles City or the correctional facility under contract with the department for female youth"; and made minor changes in style. Amendment effective October 1, 2021.

2019 Amendment: Chapter 344 inserted definition of conditional release; in definition of delinquent youth inserted (c) regarding violation of conditional release agreements; in definition of department records in (a) at end deleted "or who are under parole supervision"; in definition of detention in (c) substituted "the terms and conditions of the youth's conditional release agreement" for "a youth parole agreement"; in definition of jail in (b) and in definition of youth detention facility in (a)(ii) substituted "collocated" for "colocated"; in definition of secure detention facility in (a) and in definition of youth detention facility in (b) substituted "the terms and conditions of the youth's conditional release agreement" for "a parole agreement"; in definition of state youth correctional facility substituted "correctional facility under contract with the department for female youth" for "Riverside youth correctional facility in Boulder"; in definition of youth court inserted "or a youth alleged to have violated the terms and conditions of the youth's conditional release agreement"; and made minor changes in style. Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2015 Amendment: Chapter 143 in definition of cost containment pool substituted current definition for "means funds allocated by the department under 41-5-132 for distribution by the cost containment review panel". Amendment effective July 1, 2015.

2013 Amendment: Chapter 281 in definition of habitual truancy substituted "unexcused absences of 9 or more days or 54 or more parts of a day, whichever is less, in 1 school year" for "absences of 10 days or more of unexcused absences in a semester or absences without prior written approval of a parent or a guardian". Amendment effective July 1, 2013.

Applicability: Section 6, Ch. 281, L. 2013, provided: "[This act] applies to school years beginning after July 1, 2013."

2009 Amendment: Chapter 2 in definition of youth court near end before "probation officer" inserted "juvenile". Amendment effective October 1, 2009.

2007 Amendment: Chapter 398 substituted cost containment pool for cost containment funds as defined term and substituted "allocated" for "retained"; in definition of department records deleted reference to 41-5-1512(1)(c); and made minor changes in style. Amendment effective June 30, 2007.

2005 Amendment: Chapter 423 in definition of department records in (b) after "system" inserted reference to information maintained through office of court administrator; inserted definition of formal youth court records; inserted definition of informal youth court records; deleted definition of youth court records that read: ""Youth court records" means information or data, either in written or electronic form, maintained by the youth court pertaining to a youth under jurisdiction of the youth court and includes reports of preliminary inquiries, petitions, motions, other filed pleadings, court findings, verdicts, orders and decrees, youth assessment materials, predispositional studies, and supervision records of probationers. Youth court records do not include information provided by the youth court to the department of public health and human services' management information system"; and made minor changes in style. Amendment effective October 1, 2005.

2003 Amendments — Composite Section: Chapter 114 in definition of youth assessment at end substituted "41-5-1203" for "41-5-1201". Amendment effective October 1, 2003.

Chapter 188 in definition of delinquent youth in (b) after "youth" deleted "or a youth in need of intervention"; and made minor changes in style. Amendment effective March 31, 2003.

2001 Amendments — Composite Section: Chapter 7 in definition of department records after "41-5-1513(1)(b)" deleted "or (1)(c)". Amendment effective October 1, 2001.

Chapter 114 in definition of shelter care facility substituted "41-5-347" for "41-5-344"; in definition of youth court after "intervention" deleted "or a youth in need of care"; deleted former definition of youth in need of care that read: ""Youth in need of care" has the meaning provided for in 41-3-102"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 576 in definition of commit near beginning after "means to transfer" substituted "legal custody of a youth to the department or to the youth court" for "to legal custody"; in definition of correctional facility near beginning after "public or private" substituted text regarding secure facility under contract with department to house delinquent youth for "residential facility used for the placement of delinquent youth or individuals convicted of criminal offenses"; in definition of department records in first sentence near middle after "youth who are committed" deleted "to the department"; inserted definition of emergency placement; in definition of shelter care facility at end substituted "41-5-347" for "41-5-344"; in definition of state youth correctional facility near beginning after "means" deleted "a residential facility used for the placement and rehabilitation of delinquent youth, such as" and at end after "Miles City" inserted "or the Riverside youth correctional facility in Boulder"; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 587 inserted definitions of cost containment funds, cost containment review panel, and out-of-home placement; in definition of department records substituted "41-5-1512(1)(c)" for "41-5-1512(3)"; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 5, Ch. 576, L. 2001, was a severability clause.

Section 24, Ch. 587, L. 2001, was a severability clause.

1999 Amendments — Composite Section: Chapter 106 inserted definitions of department records, law enforcement records, and youth court records; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 326 inserted definition of juvenile home arrest officer; and made minor changes in style. Amendment effective July 1, 1999.

Chapter 532 inserted definition of criminally convicted youth; in definition of detention inserted (c) concerning violation of parole agreement; in definition of victim in (a) substituted "criminal offense" for "felony offense"; in definition of youth detention facility inserted (a)(ii) concerning collocated secure detention facility; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendments: Chapter 42 in definition of state youth correctional facility, at end, deleted reference to Mountain View School in Helena; and made minor changes in style. Amendment effective March 12, 1997.

Chapter 189 in definition of state youth correctional facility, after "Pine Hills", substituted "youth correctional facility" for "school" and after "Miles City" deleted "and the Mountain View school in Helena".

Chapter 286 in definition of final disposition, at end, inserted reference to 41-5-1513; in definition of foster home substituted "department of public health and human services" for "department"; deleted definition of guardianship that read: ""Guardianship" means the status created and defined by law between a youth and an adult with the reciprocal rights, duties, and responsibilities"; inserted definition of guardian; in definition of probable cause hearing substituted "41-5-332" for "41-5-303"; in definition of shelter care facility substituted "41-5-347" for "41-5-306(1)"; in definition of short-term detention center after "not to exceed 96 hours" inserted "excluding weekends and legal holidays"; in definition of state youth correctional facility, after "Pine Hills school [see Ch. 189 amendment] in Miles City", deleted "and the Mountain View school in Helena"; and made minor changes in style.

Chapter 550 inserted definition of assessment officer; substituted definition of delinquent youth for former definition that read: ""Delinquent youth" means a youth:

(a) who has committed an offense that, if committed by an adult, would constitute a criminal offense; or

(b) who, having been placed on probation as a delinquent youth or a youth in need of supervision, violates any condition of probation"; in definition of detention inserted (b) including "contempt of court or violation of a valid court order"; inserted definition of family; in definition of final disposition inserted references to 41-5-1422, 41-5-1503, 41-5-1504, 41-5-1513, and 41-5-1522 through 41-5-1525; in definition of foster home, after "department", inserted "of public health and human services"; deleted definition of guardianship that read: ""Guardianship" means the status created and defined by law between a youth and an adult with the reciprocal rights, duties, and responsibilities"; inserted definition of guardian; inserted definition of habitual truancy; at end of definition of jail inserted "but does not include a collocated juvenile detention facility that complies with 28 CFR, part 31"; in definition of restitution substituted "pursuant to a consent adjustment" for "pursuant to an informal adjustment"; inserted definition of running away from home; in definition of secure detention facility, in (a), inserted "or as a sanction for contempt of court, violation of a parole agreement, or violation of a valid court order"; in definition of shelter care facility substituted "41-5-306(1)(a)" (renumbered 41-5-344) for "41-5-306(1)"; in definition of short-term detention center substituted "a period not to exceed 10 days" for "a period not to exceed 96 hours" and inserted "youth assessment center"; in definition of state youth correctional facility, after "Pine Hills school [see Ch. 189 amendment] in Miles City", deleted "and the Mountain View school in Helena"; inserted definition of victim; inserted definition of youth assessment; inserted definition of youth assessment center; inserted definition of youth care facility; in definition of Youth Court substituted "youth in need of intervention" for "youth in need of supervision" and inserted "and assessment officers"; in definition of youth detention facility, at end of (b), inserted "or as a sanction for contempt of court, violation of a parole agreement, or violation of a valid court order"; substituted youth in need of intervention for youth in need of supervision as defined term and after "who" inserted "is adjudicated as a youth and who", in (a) substituted "law regarding alcoholic beverages" for "law regarding use of alcoholic beverages by minors", in (b) inserted reference to running away from home or habitual truancy, and in (c) substituted "youth in need of intervention" for "youth in need of supervision"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

1995 Amendment: Chapter 546 in definition of Department substituted "department of corrections provided for in 2-15-2301" for "department of family services provided for in 2-15-2401"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendments: Chapter 231 in definition of youth in need of supervision, in (b), substituted "continues to exhibit behavior beyond the control" for "habitually disobeys the reasonable and lawful demands" and after "or guardian" substituted language relating to attempt to mediate, resolve, or control youth's behavior for "or is ungovernable and beyond their control" and deleted former (c) that read: "(c) being subject to compulsory school attendance, is habitually truant from school"; and made minor change in style.

Chapter 547 inserted definitions of final disposition, jail, shelter care facility, and youth detention facility; substituted definition of detention for former definition that read: ""Detention" means the temporary substitute care of youth in physically restricting facilities"; in definition of youth in need of supervision, in (b) before "beyond control", deleted "ungovernable and" (language reinserted pursuant to sec. 29, Ch. 799, L. 1991, a coordination instruction and rendered void by Ch. 231); and made minor changes in style. Amendment effective July 1, 1992. Because the amendments made by this chapter were also contained in the other chapters amending this section, only one version was codified.

Chapter 548 inserted definitions of correctional facility, final disposition, jail, secure detention facility, shelter care facility, and youth detention facility; substituted definition of detention for former definition that read: ""Detention" means the temporary substitute care of youth in physically restricting facilities"; in definition of youth in need of supervision, in (b) before "beyond control", deleted "ungovernable and" (language reinserted pursuant to sec. 29, Ch. 799, L. 1991, a coordination instruction and rendered void by Ch. 231); and made minor changes in style. Amendment effective April 23, 1991.

Chapter 799 inserted definitions of final disposition, holdover, jail, probable cause hearing, regional detention facility, shelter care facility, short-term detention center, and youth detention facility; substituted definition of detention for former definition that read: ""Detention" means the temporary substitute care of youth in physically restricting facilities"; in definition of detention facility inserted second sentence enumerating facilities; in definition of state youth correctional facility, before "rehabilitation", inserted "placement and"; and made minor changes in style. Amendment effective July 1, 1991.

1991 Statement of Intent: The statement of intent attached to Ch. 799, L. 1991, provided: "A statement of intent is required for this bill because [section 14] [41-5-1008, renumbered 41-5-1908] grants the board of crime control authority to adopt rules necessary to implement provisions of this bill.

It is the intent of the legislature, in enacting this bill, to provide alternatives to the detention of youth in adult jails in order to meet the requirements of Senate Bill No. 38, which prohibits the detention of youth in adult jails.

In order to ensure that alternatives to jail are established, the legislature intends that each county have the primary responsibility to provide youth detention services, as required by [section 2] [41-5-810, renumbered 41-5-1803]. In addition, in order to stimulate the development of needed services, the legislature intends to provide state grants authorized in [section 8] [41-5-1002, renumbered 41-5-1902], using state and federal funds, to assist counties in providing a spectrum of services for the detention and care of youth. These services are intended to include but are not limited to youth detention facilities, short-term detention centers, holdovers, attendant care, home detention, and programs for the transportation of youth to regional detention facilities.

The legislature intends that counties receiving state grants should share in the costs of services in order to prevent excessive utilization of services and to give counties a financial incentive to hold down program costs. For this reason, [section 10] [41-5-1004, renumbered 41-5-1904] requires that state grants be provided on a matching basis or, if in a block grant, based on a percentage of the approved cost of services.

In order to discourage the use of secure detention and to promote the use of less costly, nonsecure community-based programs, the legislature intends to provide state grants to counties at a higher rate of payment for such services, including holdovers, attendant care, and other alternatives to secure detention.

The legislature further intends that, as a condition of receiving state grants under [section 8] [41-5-1002, renumbered 41-5-1902], each county shall develop a written plan for providing youth detention services, including alternatives to secure detention. The development of county plans is required to ensure that formal planning does, in fact, occur and to make certain that state grants are not provided for services that are not well planned in advance.

As a further condition of receiving state grants under [section 8] [41-5-1002, renumbered 41-5-1902], each county shall, within a reasonable period of time, demonstrate compliance or substantial compliance with state law and policies contained in the Montana Youth Court Act relating to the detention and placement of youth. The legislature intends that the board of crime control review and monitor counties receiving grants under [section 8] [41-5-1002, renumbered 41-5-1902] to assure compliance or substantial compliance with the Montana Youth Court Act.

Finally, the legislature intends that the board of crime control adopt rules as authorized in [section 14] [41-5-1008, renumbered 41-5-1908]. In adopting rules, the board may:

(1) establish requirements for approved holdovers consistent with the definition of holdovers provided in 41-5-103(13);

(2) designate geographical areas of the state that are eligible for creation of a youth detention region under [section 4] [41-5-812, renumbered 41-5-1805]. In designating these areas, the board shall use available state data showing the number of youth held in detention in each county of the state.

(3) adopt procedures governing the distribution and allocation of funds in accordance with [sections 10 and 11] [41-5-1004 and 41-5-1005, renumbered 41-5-1904 and 41-5-1905];

(4) provide a system to review and monitor counties under [section 9] [41-5-1003, renumbered 41-5-1903] to assure that counties receiving grants are in compliance or substantial compliance with the Montana Youth Court Act;

(5) provide standards for determining compliance or substantial compliance with the Montana Youth Court Act pursuant to [section 9] [41-5-1003, renumbered 41-5-1903]. These standards should be based upon comparable standards for compliance with sections 223(a)(12) and 223(a)(14) of the federal Juvenile Justice and Delinquency Prevention Act of 1974.

(6) establish a process for providing notice and fair hearings required under [section 9] [41-5-1003, renumbered 41-5-1903] in order to terminate state grants to counties that fail to attain compliance or substantial compliance with the Montana Youth Court Act."

1987 Amendments: Chapter 475 inserted definition of detention facility.

Chapter 515 in (14)(b), after "parents", inserted "foster parents, physical custodian".

Chapter 609 inserted definition of Department as Department of Family Services; in (6), after "residence", substituted "licensed by the department" for "approved by the court"; at end of (12) deleted reference to Youth Court and inserted reference to Youth Court Judge; at end of (22) substituted "pursuant to an informal adjustment, consent decree, or other youth court order" for "under the jurisdiction of a youth court proceeding"; deleted last sentence of (23) that read: "Nothing in this definition is intended to include juvenile correctional facilities, evaluation facilities, mental health facilities and services, and aftercare programs operated by the department of institutions"; and inserted definition of serious juvenile offender.

1983 Amendments: Chapter 233, at end of (17), deleted "and Swan River youth forest camp".

Chapter 465 made the following changes: in (2), substituted present definition for "the department of institutions, the department of social and rehabilitation services, and any division or department of either"; in (18) and (19) inserted "substitute" after "temporary"; deleted former (20), which read: "District youth guidance home means a family-oriented residence established in a judicial district of the state of Montana as an alternative to existing state youth correctional facilities, the function of which is to provide a home and guidance through adult supervision for delinquent youths and youths in need of supervision."; and inserted definition of substitute care.

Case Notes

Valuation of Damaged Automobile of "At Least $1,000" in Youth Court Held Insufficient to Support Adjudication as Delinquent Youth — Failure to Develop Argument in Brief: J.D.N. was adjudicated in Youth Court of damaging an automobile that the court valued to be of "at least $1,000" for the purposes of 45-6-101. The court concluded that J.D.N. committed felony criminal mischief and was therefore adjudicated to be a delinquent youth under 41-5-1502. J.D.N. argued that the finding by the court that the vehicle was worth "at least $1,000" was insufficient to support an adjudication that he was a delinquent youth as defined in 41-5-103. The Supreme Court agreed, noting that the criminal mischief statute uses the language "in excess of $1,000." The Supreme Court therefore remanded the case to the Youth Court and directed a disposition consistent with the finding that J.D.N. committed an offense that, if committed by an adult, would be a misdemeanor. The court declined to enter an order dismissing the petition charging J.D.N. to be a delinquent youth, saying that J.D.N. had failed to develop an argument for that result in his brief and that the court would not do it for him, citing St. v. Torgerson, 2008 MT 303, 345 M 532, 192 P3d 695 (2008). In re J.D.N., 2008 MT 420, 347 M 368, 199 P3d 189 (2008).

Youth Court — Lack of Jurisdiction to Determine Place and Length of Commitment: B.L.T., a 15-year-old youth, was charged with theft, escape, and criminal mischief. The Youth Court ordered that B.L.T. be committed to the custody of the Department of Family Services (now Department of Corrections), with placement at Pine Hills until he reached the age of 18. The Supreme Court noted that this section defines "legal custody" as including the right to determine "with whom the youth shall live and for what period". The Supreme Court noted that even though the Youth Court has continuing jurisdiction over a youth under 41-5-205, placement by the Youth Court is not tantamount to a sentence of imprisonment because the purpose of the Montana Youth Court Act is rehabilitation rather than punishment in a penal institution. This purpose is consistent with 41-5-523 (renumbered 41-5-1512), which allows the Department of Family Services (now Department of Corrections) to determine the place and length of placement of the youth. The Youth Court therefore had no authority to commit to Pine Hills for a specific period of time. In re B.L.T., 258 M 468, 853 P2d 1226, 50 St. Rep. 617 (1993).

Youth Properly Adjudicated Delinquent Improperly Committed to Correctional Facility: H.F. violated the terms of her probation by violating curfew and using alcohol. She was adjudged a delinquent youth and placed in the custody of the Department of Family Services (now Department of Corrections) until age 19. H.F. was also placed in a youth correctional facility on the basis of being a serious juvenile offender. The Supreme Court held that the youth had properly been designated a delinquent youth and placed in the Department's custody. However, the acts that constituted a violation of her probation were not the serious acts set out in the statutory definition of a serious juvenile offender. Therefore, the Youth Court was without authority to place her in a correctional facility. In re H.F., 242 M 381, 791 P2d 53, 47 St. Rep. 826 (1990).

Youth Violating Probation Conditions: H.F.'s mother filed a complaint charging the youth with ungovernable behavior. H.F. entered into a consent agreement that established 13 rules of probation. The youth subsequently violated several of the rules, was adjudicated a delinquent youth, and was committed to the Department of Family Services (now Department of Corrections) until the age of 19. The Supreme Court held that H.F. had been properly designated a delinquent youth because one of the statutory grounds for such adjudication is violation of parole. In re H.F., 242 M 381, 791 P2d 53, 47 St. Rep. 757 (1990).

"Delinquent Youth" — Felony Basis: The Youth Court's finding that the youth had committed a deliberate homicide, although based entirely on circumstantial evidence, was supported by substantial evidence in the record and therefore was sufficient to support a finding that he was a delinquent youth within the meaning of 41-5-103. St. v. Twoteeth, 219 M 101, 711 P2d 789, 42 St. Rep. 1873 (1985).

Youth Legally Capable of Committing Crime — Jurisdiction When Crime Disclosed After Majority: The District Court has jurisdiction to try an individual charged at age 22 for felonies allegedly committed at age 15, as provided in the court's constitutional grant of jurisdiction over all felonies. The Youth Court Act does not contain any direct statement or implication that the Legislature intended to set the minimum age of criminal responsibility at 16, making a 15-year-old incapable of committing a crime. The primary purposes of statutes defining a "delinquent youth" and providing for transfer to District Court are to clarify that delinquency proceedings are noncriminal and to prohibit prosecution of youths in District Court while they are youths. State ex rel. Elliot v. District Court, 211 M 1, 684 P2d 481, 41 St. Rep. 1184 (1984).

Youth in Need of Supervision (Now Youth in Need of Intervention) Who Violates Probation by Truancy Adjudged Delinquent Youth: The Montana Youth Court Act, which allows a youth in need of supervision (now youth in need of intervention) who has violated probation to be adjudged a delinquent youth, is not unconstitutional as violative of the due process, equal protection, or cruel and unusual punishment provisions of the United States and Montana Constitutions. The Supreme Court rejected appellant's assertion that a juvenile status offender who violated the terms of her probation by truancy should not be considered a delinquent youth and subjected to greater punishment for the same conduct which originally gave the Youth Court authority to designate her a youth in need of supervision (now youth in need of intervention). In re C.H., 210 M 184, 683 P2d 931, 41 St. Rep. 997 (1984).

"Delinquent Youth": The Youth Court's finding that the youth had committed a burglary, a charge which the youth admitted and which was supported by the evidence, was sufficient to support a finding that he was a delinquent youth within the meaning of 41-5-103. In re V.R.B., 201 M 127, 653 P2d 133, 39 St. Rep. 2001 (1982).

Dispositional Stage — Fitness of Parents: At the dispositional stage the concern for the best interests of the youth and community is paramount. The court need not, therefore, make specific findings as to the fitness of the parents. In re Geary, 172 M 204, 562 P2d 821 (1977).

Citation to Parents: Although youths admitted violations contained in the petition while on the stand, court was without jurisdiction to order commitment where second hearing proceeded upon citation to parents that was not in compliance with section 10-606, R.C.M. 1947 (now repealed). St. v. Johnson, 141 M 1, 374 P2d 504 (1962).

Criminal Court Jurisdiction: The words "and carrying a deadly weapon or weapons with intent to assault" do not modify robbery or any of the other specifically listed crimes; therefore, as to the crime of robbery, possession of a weapon need not be charged. State ex rel. Keast v. District Court, 136 M 367, 348 P2d 135 (1959). (Dissenting opinion, 136 M 367, 348 P2d 135 (1959).)

Age Controlling Element: The controlling element in juvenile laws is age, not minority. Section 12276, R.C.M. 1921 (now repealed), relating to juvenile delinquents, reveals the legislative intention to include rather than exclude married minors. Marriage releases a child from parental authority, but it does not change the status of a child from that of a minor to that of an adult. State ex rel. Foot v. District Court, 77 M 290, 250 P 973, 49 ALR 398 (1926).

Attorney General's Opinions

Delinquent Youth Charge for Probation Violation: A youth in need of supervision (now youth in need of intervention) who violates probation could be charged by petition as a delinquent youth under the definition of a delinquent youth in this section and could then be committed for a period of more than 6 months. This is an alternative to a revocation proceeding under 41-5-533 (renumbered 41-5-1431). 40 A.G. Op. 74 (1984).

County Power — "Big Brothers and Big Sisters": Counties may contract with Big Brothers and Big Sisters organizations to furnish adult companionship, guidance, and counseling to needy and troubled children. 37 A.G. Op. 105 (1978).

41-5-105. Youth court committee.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

1991 Amendment: At end of last sentence substituted "facilities" for "homes"; and made minor changes in style. Amendment effective July 1, 1991.

41-5-106. Order of adjudication — noncriminal.

Compiler's Comments

2021 Amendment: Chapter 339 in first sentence before "correctional facility" deleted "state youth"; and made minor changes in style. Amendment effective October 1, 2021.

1987 Amendment: At beginning substituted "No placement of any youth in" for "No commitment of any youth to".

Case Notes

Absence of Youth Court Procedure to Determine Competency of Youths Not Violative of Equal Protection: Attorneys for a 9-year-old youth charged with arson contended that the youth lacked the capacity to form the requisite mental intent to commit the crime and that the youth was too young to understand the process against him and to effectively assist in his defense. A motion was made to dismiss. The Youth Court determined that the youth understood the charges and his rights and sentenced the youth to 2 years' probation. On appeal, the youth asserted that the Youth Court Act violated the constitutional guarantee of equal protection by not providing a procedure to evaluate the competency of youths similar to the procedure for determining the competency of adults to stand trial. The Supreme Court disagreed. A youth alleging incompetency based on immaturity is not similarly situated to an adult criminal defendant alleging mental disease or defect. All youths experience a period of immaturity, which most youths outgrow, but the same cannot be said for a mental disease or defect. The court noted that the logical extension of the youth's argument would require that immature youths be placed in mental health facilities until they are mature enough to stand trial. Because immature youths are not similarly situated to adult criminal defendants alleging mental disease or defect, equal protection was not implicated. In this case, substantial evidence indicated that the youth could consult with his attorneys and understand the proceedings against him and that the youth could form the requisite criminal intent of purposely and knowingly starting a fire. The youth was fit to proceed and did not suffer from a mental disorder, and the youth's due process rights were protected by hearings at which the youth's competency to proceed was determined. The Youth Court was affirmed. In re G.T.M., 2009 MT 443, 354 M 197, 222 P3d 626 (2009). See also State ex rel. Elliot v. District Court, 211 M 1, 684 P2d 481 (1984), and In re S.M.K.-S.H., 2012 MT 281, 367 Mont. 176, 290 P.3d 718, in which the court determined the youth was not similarly situated to an adult because he faced a different disposition for assault with a weapon as a delinquent youth than an adult would face in District Court.

Youth Court Adjudication Not Considered Conviction — No Authority to Require Adjudicated Youth to Register as Sexual or Violent Offender Under Pre-2007 Law: In 1998, 16-year-old Hastings was adjudicated a delinquent youth in Youth Court, admitting one offense of sexual intercourse without consent, and was committed to the Department of Corrections (DOC). When Hastings turned 18 in 2000, his case was transferred to District Court until age 25 based on the parties' stipulation that Hastings had not completed sex offender treatment or paid restitution and was at high risk to reoffend. The District Court then determined that Hastings had violated the conditions of the Youth Court order and committed Hastings to the DOC and also required that Hastings register as a level 2 sex offender. Hastings initially registered as a sex offender, but failed to update registration after moving and was subsequently charged with failure to maintain registration. Hastings moved to dismiss the charge, asserting that he had not been convicted of a sexual offense and that neither the commitment order nor statutes required him to register after discharging his sentence. The motion was denied, and Hastings appealed. The Supreme Court reversed. Although the Youth Court had the authority to require sex offender registration pursuant to 41-5-1513, no requirement was made in this case. Because the Youth Court adjudication did not constitute a conviction, the District Court could not impose registration requirements under 46-18-201. (Note that the 2007 Legislature amended 46-23-502 to include an adjudicated youth in the definition of a sexual or violent offender.) The District Court's opinion that 41-5-1513 suggests a wholesale incorporation of sexual offender registry into the Montana Youth Court Act was erroneous, and absent statutory authority, a court may not impose a registration requirement. Failure to grant Hastings' motion to dismiss was error, and the case was remanded for dismissal. St. v. Hastings, 2007 MT 294, 340 M 1, 171 P3d 726 (2007), distinguishing St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003), and St. v. Villanueva, 2005 MT 192, 328 M 135, 118 P3d 179 (2005).

Washington Youth Sexual Offender Required to Register as Sexual or Violent Offender if Residing in Montana: At age 15, Villanueva was adjudicated guilty of first degree rape in Washington state and was later required to register for life in that state as a sexual offender. Villanueva subsequently moved to Montana where he resided for 6 weeks. After being arrested for a domestic disturbance, it was discovered that Villanueva had not registered as a sexual or violent offender in Montana, and he was charged with failure to register. Villanueva contended that Montana law did not apply to his Washington registration requirement because he did not meet the definition of sexual or violent offender under 46-23-502 and because a 1989 Attorney

General's opinion held that juveniles adjudicated delinquent under the Montana Youth Court Act whose cases have not been transferred to District Court are not required to register. Villanueva moved to dismiss the charge, but the District Court denied the motion. On appeal, the Supreme Court affirmed. Although the Washington definition of sexual offender may not have been identical to the Montana definition, Villanueva was nevertheless a sexual offender under Washington law and was therefore required to register in Montana under 46-23-504. Further, Villanueva could not rely on the Attorney General's opinion because he was not adjudicated under the Montana Youth Court Act. The Supreme Court noted that the Washington sexual offender registration law also required Villanueva to register in another state if he changed state residency, so under both Washington and Montana law, Villanueva was required to register as a sexual offender. Villanueva's motion to dismiss was properly denied. St. v. Villanueva, 2005 MT 192, 328 M 135, 118 P3d 179 (2005).

Youth Legally Capable of Committing Crime — Jurisdiction When Crime Disclosed After Majority: The District Court has jurisdiction to try an individual charged at age 22 for felonies allegedly committed at age 15, as provided in the court's constitutional grant of jurisdiction over all felonies. The Youth Court Act does not contain any direct statement or implication that the Legislature intended to set the minimum age of criminal responsibility at 16, making a 15-year-old incapable of committing a crime. The primary purposes of statutes defining a "delinquent youth" and providing for transfer to District Court are to clarify that delinquency proceedings are noncriminal and to prohibit prosecution of youths in District Court while they are youths. State ex rel. Elliot v. District Court, 211 M 1, 684 P2d 481, 41 St. Rep. 1184 (1984).

Evidence and Disposition — Admission in Criminal Proceeding — Reversible Error: On appeal by defendant following his conviction, the Supreme Court held that evidence given in a Youth Court proceeding against a juvenile and evidence of the disposition of the juvenile in such a proceeding are to be excluded for all purposes. It was reversible error requiring a new trial when, upon cross-examination of defendant's character witness, the prosecutor asked the witness if he knew of a charge of attempted rape when defendant was 15 years old and service of 6 months' probation. The questions of the prosecutor in regard to the juvenile proceedings were evidence and inadmissible. St. v. Holzworth, 201 M 54, 651 P2d 1255, 39 St. Rep. 1949 (1982).

41-5-110. Youth court hearings — priority.

Law Review Articles

Administering Justice in Montana's Rural Courts, McKeon & Rice, 70 Mont. L. Rev. 201 (2009).

41-5-111. Court costs and expenses.

Compiler's Comments

2017 Amendment: Chapter 358 in (1) substituted "2-15-1029" for "47-1-201". Amendment effective July 1, 2017.

Severability: Section 48, Ch. 358, L. 2017, was a severability clause.

2005 Amendment: (Version effective July 1, 2006) Chapter 449 at beginning deleted former introductory clause that read: "The following expenses must be a charge upon the funds of the court or other appropriate agency when applicable, upon their certification by the court"; in (1) before "compensation" deleted "reasonable", after "counsel" deleted "appointed by the court" and inserted "assigned", and after "party" inserted reference to office of state public defender; in (2) after "subpoenas" inserted reference to fees and at end after "provided for" deleted "by law" and inserted reference to 26-2-506; in (3) at end inserted reference to 3-5-901; in (4) after "briefs" deleted "on appeal" and inserted reference to 3-5-604; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

2003 Amendment: Chapter 583 deleted former (1) that read: "(1) the costs of medical and other examinations and treatment of a youth ordered by the court"; and made minor changes in style. Amendment effective July 1, 2003.

1986 Amendments: Chapter 11, Sp. L. June 1986, deleted former (1)(f) in both versions that included as an allowable charge the cost of detention at the Mountain View School.

Section 6, Ch. 14, Sp. L. June 1986, deleted in second version language relating to charging the court or agency with the cost of youth detention.

Effective Dates: Chapter 11, Sp. L. June 1986, was effective July 1, 1986.

Section 6, Ch. 14, Sp. L. June 1986, will be effective on the date the deed of sale of the Montana Youth Treatment Center from the Board of Land Commissioners is delivered to a buyer. (Deed delivered January 1, 1987.)

Repealer: Section 15, Ch. 14, Sp. L. June 1986, also repeals sections 53-21-164, 53-21-501, 53-21-502, and 53-21-505, effective upon the sale.

1985 Amendment: Section 1, Ch. 737, L. 1985, inserted (1)(f) adding the cost of youth detention as a charge upon the funds of the court or agency. Amendment was to terminate July 1, 1987 (sec. 5, Ch. 737, L. 1985). Sections 1 and 5, Ch. 737, were repealed by sec. 2, Ch. 11, Sp. L. June 1986.

1983 Amendment: Inserted (2) (of temporary version) relating to reimbursement of costs for treatment at Montana Youth Treatment Center.

Attorney General's Opinions

County, Not State, Required to Fund Legal Expenses of Indigent Juvenile Under Youth Court Act: Youth Court defense expenses are not included in 3-5-901 as a specific expense that the state is required to fund; thus, the Legislature did not intend the state to be responsible for funding Youth Court expenses. Rather, pursuant to 41-5-104 (now repealed) and this section, the Board of County Commissioners is required to fund the legal defense expenses of an indigent youth against whom a petition has been filed in Youth Court. 48 A.G. Op. 16 (2000).

41-5-113. Restrictions on use of funds.

Compiler's Comments

Effective Date: Section 25, Ch. 398, L. 2007, provided: “[This act] is effective June 30, 2007.”

41-5-114. Certain costs, obligations, and fees prohibited — report.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

41-5-121. Youth placement committees — composition.

Compiler's Comments

2019 Amendment: Chapter 344 in (1) substituted “youth court may” for “youth court and the department shall”; in (1)(b) at end substituted “a youth on conditional release” for “the department under 41-5-1513. However, the committee may not substitute its judgment for that of the superintendent of a state youth correctional facility regarding the discharge of a youth from the facility or the placement of a youth on parole under the department's jurisdiction”; in (2)(b) substituted “may” for “must”; in (2)(b)(i) substituted “representative of’ for “juvenile parole officer employed by”; in (2) deleted “(c) The committee may include”; in (3) substituted “chief juvenile probation officer” for “youth court judge” and at end deleted “except the juvenile parole officer. The director of the department shall appoint the juvenile parole officer and shall, when making the appointment, take into consideration:

(a) the juvenile parole officer's qualifications;

(b) the costs involved in the juvenile parole officer's attendance at youth placement committee meetings; and

(c) the location of the juvenile parole officer's home in relation to the location of the youth placement committee”; in (5) after “convened” deleted “by request of the department to the presiding officer or”; in (6) after substituted “chief juvenile probation officer” for “person who convened the committee”; deleted former (7) that read: “(7) The office of court administrator may not charge expenditures to the judicial district allocations established pursuant to 41-5-130 unless the youth court has established a youth placement committee as provided in this section”; and made minor changes in style. Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: “[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019.”

2015 Amendment: Chapter 143 in (7) substituted “office of court administrator” for “department” and after “youth court” deleted “and the department”; and made minor changes in style. Amendment effective July 1, 2015.

2007 Amendment: Chapter 398 in (1)(a) near middle after “youth” substituted “committed” for “referred”, after “court” inserted “under 41-5-1512 or 41-5-1513”, after “or” inserted “committed to”, and after “under” deleted “41-5-1512 and”; in (1)(b) in first sentence before “custody” inserted “legal”, after “of the” substituted “youth court” for “department”, and at end inserted “or the department under 41-5-1513” and in second sentence at end inserted “or the placement of a youth on parole under the department's jurisdiction”; in (2)(b)(iii) in first sentence in two places before “probation” inserted “juvenile” and at beginning of second sentence inserted “The officer or the officer's designee”; in (2)(c)(iv) before “probation” inserted “juvenile”; in (5) at beginning deleted “Notwithstanding the provisions of 41-5-123”, after “convened by” inserted “request of”, after “department” inserted “to the presiding officer”, before “probation” inserted “chief juvenile”, and at end deleted "of the youth court"; in (7) near middle substituted "charge expenditures to the judicial district allocations" for "disburse funds from the budget allocation accounts"; and made minor changes in style. Amendment effective June 30, 2007.

2003 Amendment: Chapter 266 in (1) in introductory clause after "youth court" inserted "and the department"; inserted (3) concerning the appointment of members of the youth placement committee; in (7) near middle after "youth court" inserted "and the department"; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 587 in (1) substituted "youth court" for "department"; in (1)(a) before "department" inserted "youth court or the"; in (2)(b) substituted "The committee must include" for "Members may include"; in (2)(b)(i) substituted "a juvenile parole officer employed by the department" for "two representatives of the department"; in (2)(b)(iii) after "probation officer" substituted "or the chief probation officer's designee, who is the presiding officer of the committee" for "or the youth's probation officer"; inserted (2)(b)(v) requiring committee to include person who is Indian or knowledgeable about Indian culture and family matters if involved youth is Indian; in (2)(c) inserted "The committee may include"; in (2)(c)(i) substituted "who has knowledge of and experience with youth" for "who must have personal knowledge of and experience with the youth"; deleted former (2)(f) that read: "(f) if an Indian child or children are involved, someone, preferably an Indian person, knowledgeable about Indian culture and family matters"; in (2)(c)(ii) inserted "the youth's"; inserted (2)(c)(iv) authorizing committee to include the youth's probation officer; inserted (6) prohibiting department from disbursing funds from authorized accounts unless youth placement committee is established; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 24, Ch. 587, L. 2001, was a severability clause.

1999 Amendment: Chapter 532 in (1)(a) at end substituted "41-5-1512 and 41-5-1513" for "41-5-1304". Amendment effective October 1, 1999.

1997 Amendments: Chapter 286 in (1)(b), at end of first sentence, inserted reference to 41-5-1513.

Chapter 550 at end of (2)(e) inserted "who must have personal knowledge of and experience with the youth"; and inserted (5) requiring school to be notified of youth's placement if school district representative not on committee. Amendment effective July 1, 1997.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

1995 Amendment: Chapter 403 in (1)(b), at beginning, substituted "recommending available community services or alternative placements whenever a change is required in the placement of a youth who is currently in the custody of" for "committed to" and at end inserted "However, the committee may not substitute its judgment for that of the superintendent of a state youth correctional facility regarding the discharge of a youth from the facility"; in (2) deleted requirement that all members be appointed by the Department and at end inserted "persons who are knowledgeable about the youth, treatment and placement options, and other resources appropriate to address the needs of the youth. Members may include"; in (2)(a) substituted "two representatives" for "a representative"; in (2)(b) substituted "the department of social and rehabilitation services" for "a county department of public welfare"; in (2)(c) substituted "either the chief probation officer or the youth's" for "a youth"; inserted (2)(g) that read: "(g) a parent or guardian"; inserted (2)(h) that read: "(h) a youth services provider"; and inserted (4) allowing the Department or the probation officer to convene the committee. Amendment effective April 13, 1995.

Code Commissioner Change: Pursuant to sec. 1, Ch. 546, L. 1995, the Code Commissioner substituted Department of Public Health and Human Services for Department of Social and Rehabilitation Services.

1989 Amendment: At end of (2) required committee to include member knowledgeable about Indian culture and family matters when Indian child involved; and made minor changes in form.

Case Notes

No Absolute Right to Counsel at Placement Hearing — Due Process: A delinquent youth was not denied due process when, pursuant to 41-5-523 (renumbered 41-5-1512), he was placed in a youth incarceration facility without an adversarial hearing to decide his placement. Beyond commitment of the youth by the Youth Court, the delinquent youth has no absolute right to counsel at the placement hearing. However, the youth is not without due process rights at the hearing stage. A youth placement committee created by this section (formerly 41-5-525) makes a recommendation to the Department of Family Services (now Department of Corrections), which can accept or reject the recommendation under 41-5-527 (renumbered 41-5-123, now repealed). In addition, the Youth Court can modify that decision if placement is not in the best interests of the child. In re Peterson, 235 M 313, 767 P2d 319, 46 St. Rep. 13 (1989).

41-5-122. Duties of youth placement committee.

Compiler's Comments

2021 Amendment: Chapter 339 in (5) near end before "correctional facility" deleted "state youth". Amendment effective October 1, 2021.

2001 Amendment: Chapter 587 in (1) after "youth" deleted "referred or committed to the department"; in (5) before "department" inserted "youth court judge or the"; and in (7) substituted "every 6 months" for "semiannually" and at end substituted "youth court" for "department". Amendment effective July 1, 2001.

Severability: Section 24, Ch. 587, L. 2001, was a severability clause.

1995 Amendment: Chapter 403 inserted (4) that read: "(4) consider options for the financial support of the youth"; in (5), in second sentence, substituted "a state youth correctional facility" for "Mountain View school, at Pine Hills school"; and in (7) inserted language to provide that reviews be conducted at least semiannually. Amendment effective April 13, 1995.

1989 Amendment: Near beginning of (4), after "placement for the youth", deleted "in a licensed facility" and inserted last sentence that read: "A committee shall consider placement in a licensed facility, at Mountain View school, at Pine Hills school, or with a parent, other family member, or guardian"; and made minor change in phraseology. Amendment effective April 1, 1989.

41-5-124. Temporary and emergency placements — limit.

Compiler's Comments

2019 Amendment: Chapter 344 in (1) at end of second sentence inserted "if a committee has been established as provided for in 41-5-121". Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2007 Amendment: Chapter 398 in first sentence near middle after "facility" inserted "for less than 45 days" and at end substituted "review by the appropriate youth placement committee" for "the requirements of 41-5-123", in second sentence near middle after "days, the" substituted "youth court" for "department", and in third sentence at end deleted "in accordance with 41-5-123"; and made minor changes in style. Amendment effective June 30, 2007.

2001 Amendment: Chapter 587 in (2) in second sentence substituted "youth court" for "department". Amendment effective July 1, 2001.

Severability: Section 24, Ch. 587, L. 2001, was a severability clause.

Administrative Rules

Title 20, chapter 9, subchapter 1, ARM Youth placement committees.

41-5-125. Confidentiality of youth placement committee meetings and records.

Compiler's Comments

2019 Amendment: Chapter 344 in (2) substituted "established by the court" for "established by rule by the department". Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

Administrative Rules

Title 20, chapter 9, subchapter 1, ARM Youth placement committees.

41-5-130. Office of court administrator to administer juvenile placement funds — allocations — deposit of unexpended funds.

Compiler's Comments

2019 Amendment: Chapter 344 deleted former (2) that read: "(2) For each fiscal year, the department shall administer appropriated juvenile placement funds for juvenile parole out-of-home placements, programs, and services"; and made minor changes in style. Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2015 Amendment: Chapter 143 in (1), (3), and (6) substituted "office of court administrator" for "department"; in (1) in first sentence inserted "to the judicial branch" and deleted second sentence that read: "The department shall consult with the office of court administrator when developing its budget request for juvenile placement funds for submission to the budget director as provided in 17-7-112"; deleted former (2) that read: "(2) For each fiscal year, the department shall transfer $25,000 from the appropriated juvenile placement funds to the office of court administrator for evaluations of out-of-home placements, programs, and services as provided in 41-5-2003. The office shall deposit the funds in the youth court intervention and prevention account provided for in 41-5-2011"; in (2) after "department shall" substituted "administer" for "after transferring funds under subsection (2) and allocating funds to the cost containment pool under 41-5-132, allocate 11% of the remaining"; in (3) near beginning substituted "shall allocate funds to the cost containment pool under 41-5-132 and allocate" for "shall, after allocating funds under subsection (3), allocate", near middle after "formula" substituted "recommended" for "established", and at end inserted "and adopted by the office of court administrator"; in (5)(a) reduced reserve amount from 80% to 50%; in (5)(b) substituted "may reserve more than 50%" for "may reserve up to 50%"; deleted former (7) that read: "(7) A judicial district that intends to expend funds from its annual allocation on an out-of-home placement, program, or service for a person who is 18 years of age or older shall submit to the cost containment review panel a plan describing how the funds will be used. The cost containment review panel shall approve or disapprove the plan. If the plan is approved, the judicial district may expend funds from its annual allocation to implement the plan"; in (6) near middle after "shall" substituted "deposit" for "transfer" and after "section" deleted "to the office of court administrator for deposit"; and made minor changes in style. Amendment effective July 1, 2015.

2007 Amendment: Chapter 398 substituted (1) concerning department administration of juvenile placement funds for former text that read: "Each judicial district may elect to participate in the juvenile delinquency intervention program"; inserted (2) concerning annual fund transfer; inserted (3) concerning allocation of funds; inserted (4) concerning allocation of remaining funds; in (5) at beginning substituted "judicial district" for "jurisdiction that elects to participate in the program", after "funds from" substituted "its annual allocation" for "a juvenile placement fund", after "other" inserted "programs", and at end substituted "the provisions of subsection (6)" for "restrictions in this chapter and administrative rules adopted by the department"; deleted former (3) through (6) that read: "(3) A jurisdiction that does not elect to participate in the program may commit youth to the department for out-of-home placements pursuant to this chapter.

(4) A jurisdiction that has not previously participated in the program may elect to participate in the program prior to the start of a new biennium. Participation must be for a complete biennium. A jurisdiction may elect to discontinue participation in future bienniums upon 3 months' written notice to the department prior to the beginning of the next biennium.

(5) A youth court that does not participate in the program may not expend any juvenile placement funds for placements or services unless approved by the department pursuant to 41-5-123.

(6) The department shall establish an account for each judicial district in order to administer a juvenile placement fund as appropriated by the legislature. The accounts must be used by the youth courts for funding out-of-home placements and for other services intended to reduce or prevent juvenile delinquency subject to restrictions in this chapter and administrative rules adopted by the department. At the end of a fiscal year, the balance in the accounts established under this subsection must be transferred to the youth intervention and prevention account established in 41-5-2011"; inserted (6) concerning reservation of annual allocation; inserted (7) concerning plan describing use of funds; inserted (8) concerning transfer of unexpended funds; and made minor changes in style. Amendment effective June 30, 2007.

2005 Amendment: Chapter 482 in (6) at end of second sentence inserted language relating to other services and inserted last sentence relating to transfer of balance in the accounts. Amendment effective April 28, 2005.

Retroactive Applicability: Section 6, Ch. 482, L. 2005, provided "[This act] applies retroactively, within the meaning of 1-2-109, to unexpended funds in the accounts established under 41-5-130(6) on June 30, 2004."

Severability: Section 24, Ch. 587, L. 2001, was a severability clause.

Effective Date: Section 25, Ch. 587, L. 2001, provided: "[This act] is effective July 1, 2001."

41-5-131. Cost containment review panel — duties.

Compiler's Comments

2019 Amendment: Chapter 344 deleted former (2)(a)(i) that read: "(i) three members appointed by the director of the department"; in (2)(a)(i) substituted "four members" for "three members"; and made minor changes in style. Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2015 Amendment: Chapter 143 in (1) substituted "supreme court" for "department" and after "panel" inserted language requiring the cost containment review panel to advise the office of court administrator; in (3) at beginning substituted "Recommendations" for "Decisions"; in (4)(a) at beginning substituted "recommend a" for "establish the"; deleted former (4)(b) that read: "(b) approve or disapprove plans for out-of-home placements, programs, or services for persons 18 years of age or older as provided in 41-5-130"; in (4)(c) at beginning substituted "review" for "approve" and inserted "and recommend to the office of court administrator whether each request should be approved"; inserted (4)(e) concerning recommendations to the department regarding youth placement; deleted former (4)(h) that read: "(h) adopt procedures for the operation of the cost containment review panel"; and made minor changes in style. Amendment effective July 1, 2015.

2007 Amendment: Chapter 398 substituted (2)(a) concerning appointment for former text that read: "The cost containment review panel shall consist of the following members appointed by the department"; in (2)(a)(i) at beginning substituted "three" for "two" and substituted "appointed by the director of the department" for "from the department"; inserted (2)(a)(ii) concerning appointment by chief justice; in (2)(a)(iii) after "member" substituted "who is a professional working in the field of children's mental health appointed by the director of the department" for "from the department"; deleted former (2)(c) through (2)(g) that read: "(c) a representative from the field of mental health;

(d) a youth court judge;

(e) two chief juvenile probation officers;

(f) a county commissioner; and

(g) a representative of the youth justice council"; inserted (2)(b) concerning alternate members; in (3) at end inserted "of the members of the cost containment review panel or their alternates"; substituted (4) concerning cost containment review panel functions regarding allocation of funds for former (4) and (5) that read: "(4) The cost containment review panel shall determine the distribution of funds allocated in 41-5-132.

(5) The cost containment review panel may evaluate the effectiveness of new or innovative programs for the treatment of troubled youth and make recommendations to the youth courts and the department"; deleted former (6) that read: "(6) A youth court shall request funds from the cost containment review panel prior to exceeding its account allocation under 41-5-130. If a panel member referred to in subsections (2)(d) through (2)(g) is a resident of or is employed in the judicial district of a youth court requesting cost containment funds, the panel member may not serve as a panel member for purposes of a decision regarding disbursement of cost containment funds to the youth court and an alternate panel member must be appointed by the department for purposes of the decision"; and made minor changes in style. Amendment effective June 30, 2007.

Severability: Section 24, Ch. 587, L. 2001, was a severability clause.

Effective Date: Section 25, Ch. 587, L. 2001, provided: "[This act] is effective July 1, 2001."

41-5-132. Cost containment pool — allocation of appropriated funds — allocation from pool — deposit of unexpended funds.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 7, Ch. 506, L. 2023. Amendment effective October 1, 2023.

2019 Amendment: Chapter 344 in (3)(b) in first sentence after "department may request" deleted "at the end of the fiscal year" and in second sentence substituted "expend any parental contributions made on behalf of the youth, federal funds available for the youth's care" for "expend its budgets for placements and services to youth and any parental contributions or federal funds" and at end substituted "the youth's treatment" for "treatment"; and made minor changes in style. Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2015 Amendment: Chapter 143 in (1)(a) in two places, (1)(b), and (5) substituted "office of court administrator" for "department"; in (2) substituted current language concerning judicial district requests for allocations from the cost containment pool for former language that read: "According to criteria and procedures adopted by the cost containment review panel, the cost containment review panel may authorize an allocation from the cost containment pool to a judicial district that has exceeded its annual allocation under 41-5-130 for juvenile out-of-home placements, programs, and services. The judicial district shall request an allocation from the cost containment review panel before exceeding its annual allocation"; in (3)(b) in second sentence after "expend its" substituted "budgets for placements and services to youth" for "state youth correctional facility budgets for mental health placements"; in (4) substituted "office of court administrator" for "cost containment review panel" and substituted "office" for "department"; inserted (4)(b) concerning evaluations of out-of-home placements, programs, and services; in (5) substituted "deposit" for "transfer" and after "fiscal year" deleted "to the office of court administrator for deposit"; and made minor changes in style. Amendment effective July 1, 2015.

2007 Amendment: Chapter 398 in (1)(a) in first sentence after "department" deleted "of corrections" and at end substituted "pool" for "fund for the purposes of 41-5-131" and at beginning of second sentence inserted language concerning review panel's recommendation, after "allocate to the" substituted "cost containment pool" for "fund", and at end deleted "budget for the fiscal biennium beginning July 1, 2001, to be used for the purposes of 41-5-131"; in (1)(b) deleted former first sentence that read: "The department shall determine the amount of the cost containment fund at the beginning of each fiscal year", in first sentence after "submit" inserted "to the department" and substituted "pool" for "fund", and inserted second sentence concerning establishing methodology for recommended amount; inserted (2) concerning allocation from pool to judicial district; inserted (3) concerning allocation from pool to department; inserted (4) concerning reimbursement of panel members; inserted (5) concerning transfer of remaining funds to youth court intervention and prevention account; and made minor changes in style. Amendment effective June 30, 2007.

Severability: Section 24, Ch. 587, L. 2001, was a severability clause.

Effective Date: Section 25, Ch. 587, L. 2001, provided: "[This act] is effective July 1, 2001."

Part 2
Youth Court — Jurisdiction — Records

Part Case Notes

Youth Court Jurisdiction: The Youth Court Act does not provide for a Youth Court's continuing jurisdiction over a revocation proceeding after a youth has turned 21 years old, even when a petition to transfer has been previously filed. In re J.A., 2011 MT 132, 361 Mont. 16, 255 P.3d 150.

Transfer of Child Proceeding From Montana Court to Tribal Court — Due Process Requirements: One of the purposes of the Indian Child Welfare Act, 25 U.S.C. § 1901, et seq., is to ensure due process for all those involved, which requires a Montana court, when entertaining a tribal court motion for transfer to the tribal court of jurisdiction of children who are the subject of a Montana court proceeding, to hold a hearing on the transfer request and give a parent who claims indigency an appointed counsel if the court finds indigency. In re G.L.O.C., Youth in Need of Care, 205 M 352, 668 P2d 235, 40 St. Rep. 1354 (1983).

Part Law Review Articles

Blended Sentencing in Montana: A New Way to Look at an Old Problem, Henderson, 61 Mont. L. Rev. 337 (2000).

41-5-201. Youth court judge — judges pro tempore — special masters.

Compiler's Comments

1997 Amendment: Chapter 550 inserted (3) allowing Youth Court Judge to appoint judge pro tempore or special master and requiring judge pro tempore or special master to belong to State Bar; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

1985 Amendment: Near beginning of (2) after "designate one", inserted "or more".

Part of Section Not Codified: The last paragraph of section 10-1233, R.C.M. 1947 (partially codified at 41-5-201, MCA), was not codified as it was temporary. This paragraph has not been repealed and is still valid law. Citation may be made to sec. 33, Ch. 329, L. 1974.

41-5-203. Jurisdiction of court.

Compiler's Comments

2001 Amendments — Composite Section: Chapter 114 in middle of (1) after "intervention" deleted "or a youth in need of care"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 576 inserted (3)(c) regarding imposition of criminal sanctions on juvenile; and made minor changes in style. Amendment effective July 1, 2001.

Severability: Section 5, Ch. 576, L. 2001, was a severability clause.

1997 Amendments: Chapter 498 inserted (3) stating court's jurisdiction to transfer cases to District Court and specifying court's jurisdiction with respect to extended jurisdiction juvenile cases. Amendment effective May 2, 1997.

Chapter 550 in (1), in exception clause, inserted reference to cases filed in District Court under 41-5-206 and substituted "youth in need of intervention" for "youth in need of supervision"; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 15, Ch. 498, L. 1997, was a severability clause.

Section 80, Ch. 550, L. 1997, was a severability clause.

Applicability: Section 17, Ch. 498, L. 1997, provided: "[This act] applies to all offenses committed on or after [the effective date of this act]." Effective May 2, 1997.

Code Commissioner Change: Section 76, Ch. 550, L. 1997, instructed the Code Commissioner, in the Montana Code Annotated or in legislation enacted by the 1997 Legislature, to change references to youth in need of supervision to references to youth in need of intervention. The change has been made in this section.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

1995 Amendment: Chapter 376 in (2) inserted "tobacco products".

1993 Amendment: Chapter 626 in (2), after "beverage", inserted "and gambling".

Case Notes

Youth Court Jurisdiction Under 45-5-214 Not Exclusive Jurisdiction — District Court Jurisdiction Over Youth Offender May Be Established in Conjunction With Commission of Enumerated Felony. St. v. Pehringer, 2023 MT 146, 413 Mont. 122, 533 P.3d 657.

District Court's Continued Imposition of House Arrest Upheld After Youth Court Transfer Upheld: The Youth Court and the District Court did not err in imposing house arrest with restrictive conditions on the appellant pending a final disposition of his case. Pursuant to the Youth Court's order, the appellant was no longer under Department of Corrections supervision once he turned 18 years old. However, pursuant to 41-5-203, the Youth Court had jurisdiction over the appellant until he turned 21 or until it transferred jurisdiction to the District Court. Once the appellant's case was transferred to it, the District Court had the authority to impose conditions consistent with the underlying Youth Court disposition, and continuation of the appellant's house arrest in keeping with the Youth Court's order was consistent with the underlying Youth Court disposition order. In re J.W., 2016 MT 330, 386 Mont. 1, 387 P.3d 195.

Failure to Notify Parents of Hearing to Transfer Jurisdiction to District Court — Statutory Notice Requirement Not Jurisdictional — Youth Court Jurisdiction: E.G. was found to be a delinquent youth by the Youth Court. The commitment order stated that the Youth Court would retain jurisdiction until E.G. was 21 and would consider transfer of the case to District Court. Shortly after E.G. turned 18, the state filed a motion to transfer supervisory control to the District Court. E.G. was represented by his attorney and expressly consented to the transfer. The parties discussed the parental notification requirements in 41-5-208, but E.G. consented to continue the hearing, regardless of whether his parents received notice. The Youth Court entered an order granting the motion to transfer supervision of E.G. to District Court until he was age 25, with potential release from supervision for good behavior. However, after E.G. violated conditions of his probation, the District Court sentenced him to the Department of Corrections until age 25, with no time suspended. On appeal, E.G. claimed that the District Court lacked jurisdiction to revoke probation because his parents did not receive notice of the Youth Court transfer hearing under 41-5-208. The Supreme Court affirmed the sentence and held that the parental notice requirement does not withdraw, circumscribe, limit, or affect the Youth Court's jurisdiction over the issue of transferring supervision to District Court. In re E.G., 2014 MT 148, 375 Mont. 252, 326 P.3d 1092.

Minor's Prior DUI in City Court Properly Applied to Felony DUI Charge — No Violation of Constitutional Rights in City Court: Allen was arrested for a felony fourth DUI in 2004. Calculation of the number of DUIs included Allen's first arrest in 1997 as a minor, to which Allen pleaded guilty in City Court. Allen contended that it was improper to include the 1997 conviction in the total because that conviction was constitutionally infirm in that the City Court failed to advise him of his rights, including the right to counsel, and accepted his guilty plea without consent of a parent. Allen further contended that as a minor he was incapable of knowingly, voluntarily, and intelligently waiving the right to counsel. The Supreme Court disagreed. City Court records provided direct evidence that Allen's 1997 conviction was not obtained in violation of Allen's constitutional rights, and Allen failed to rebut the presumption of regularity that attached to the 1997 conviction. With specific regard to the right to counsel argument, the court noted that because the Youth Court does not have concurrent jurisdiction with the City Court over traffic violations, including DUIs, Allen was incorrect in claiming that the right to counsel could only have been waived by Allen and a parent at the 1997 proceedings. Therefore, application of Allen's 1997 conviction in calculating a felony DUI was not error. St. v. Allen, 2009 MT 124, 350 M 204, 206 P3d 951 (2009).

No Youth Court Authority to Expunge DUI Offenses — Elements of Judicial Estoppel Not Met: Following Darrah's completion of a Youth Drug Court program in 2004, the Youth Court ordered that Darrah's prior criminal record be expunged, including a previous minor in possession offense and a 2002 DUI. Darrah was subsequently charged in 2005 with second offense DUI, based on the prior 2002 DUI, and in 2006 Darrah was charged with third offense DUI. Citing the principle of judicial estoppel, Darrah asserted that because the Youth Court record had been expunged, the 2002 DUI should not count against him. The District Court disagreed and Darrah appealed. The Supreme Court applied the elements of judicial estoppel set out in Vogel v. Intercontinental Truck Body, Inc., 2006 MT 131, 332 M 322, 137 P3d 573 (2006), and determined that Darrah had failed to demonstrate that each element was met, so judicial estoppel did not apply. Further, there is no authority under which the Youth Court could order expungement of Darrah's DUI offenses. The District Court was affirmed. St. v. Darrah, 2009 MT 96, 350 M 70, 205 P3d 792 (2009), following St. v. Chesley, 2004 MT 165, 322 M 26, 92 P3d 1212 (2004).

Due Process Satisfied by Requiring Hearing After Information Filed — Butler Overruled: In St. v. Butler, 1999 MT 70, 294 M 17, 977 P2d 1000 (1999), the Supreme Court held that to satisfy due process, a youth must be afforded a hearing prior to the filing of an information in District Court to charge the youth as an adult. Subsequent amendment to 41-5-206 established a transfer hearing requirement within 30 days after leave to file an information is granted. The amendment was held to satisfy due process, so to the extent that Butler required a hearing before filing in District Court, Butler was overruled. St. v. McKee, 2006 MT 5, 330 M 249, 127 P3d 445 (2006).

Direct Filing of Information in District Court Rather Than Filing in Youth Court Violative of Due Process — Probable Cause Hearing Required: Pursuant to 41-5-206, Butler, a youth, was charged in District Court with attempted deliberate homicide and attempted robbery. Butler moved to have the District Court declare 41-5-206 unconstitutional on grounds that it violated his right to due process by allowing the prosecution to file an information directly in District Court rather than Youth Court without first affording him a hearing. The motion was denied, and Butler appealed. Although it is within the province of the prosecution to move the District Court for leave to file an information in that court if the youth has attained a certain age and is alleged to have committed certain unlawful conduct, the prosecution's discretion ends at that point. Absent a pure prosecutorial waiver system, the ultimate decision rests with the District Court, which must make specific findings that there is probable cause to believe the youth committed the offense and that, because of the seriousness of the offense, the case should be filed in District Court. In Butler's case, the District Court based its decision solely on the affidavit of the prosecution and Butler did not have the opportunity, with assistance of counsel, to challenge the specific findings of the court. Although declining to declare the entire statute unconstitutional, the Supreme Court cited Kent v. U.S., 383 US 541, 16 L Ed 2d 84, 86 S Ct 1045 (1966), in holding that because the decision in this regard is potentially critically important to the youth, under the 14th amendment to the United States Constitution, Butler's right to due process requires that the District Court hold a hearing when rendering a decision under 41-5-206(3). St. v. Butler, 1999 MT 70, 294 M 17, 977 P2d 1000, 56 St. Rep. 291 (1999), followed and applied retroactively in St. v. O'Neill, 1999 MT 224, 296 M 71, 985 P2d 154, 56 St. Rep. 886 (1999). Butler was overruled, to the extent that it requires a hearing before filing in District Court, in St. v. McKee, 2006 MT 5, 330 M 249, 127 P3d 445 (2006).

Termination of Youth Court Jurisdiction — No Bar to Jurisdiction of District Court: The defendant was under 18 years of age when the crime of which he was accused was committed. When the defendant was 20 years old he confessed, and the County Attorney filed a petition in the Youth Court, seeking a declaration that the defendant was a delinquent youth and requesting authority to incarcerate him. The defendant turned 21 before the motion was ruled on. He then was charged with deliberate homicide in District Court. The defendant contended that when the Youth Court lost jurisdiction over him under 41-5-205, the District Court did not have jurisdiction because once jurisdiction has attached under 41-5-203, the District Court can never assume jurisdiction over the offense underlying the Youth Court's proceeding absent transfer under 41-5-206, which did not occur here. The Supreme Court held that on termination of Youth Court jurisdiction, there was no bar to the exercise of jurisdiction by the District Court under Art. VII, sec. 4(1), Mont. Const., 3-5-302, and 46-2-201, over felony proceedings against the defendant. Exclusive original jurisdiction of the Youth Court does not divest a District Court of jurisdiction over crimes committed by a juvenile defendant. St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985).

Youth Court — Prosecution of Felonies: In two cases pending in the Youth Court, two youths, ages 14 and 15, were charged with numerous felony counts. The State sought to arrest the proceeding in order to move that the youths be transferred to the jurisdiction of the District Court under 41-5-206. The State contends that the requirement for transfer contained in that statute effectively gives the Youth Court all jurisdiction over all felony criminal cases if the youth charged is less than 16 years old and that this provision conflicts with Art. VII, sec. 4(1), Mont. Const., which provides for District Court jurisdiction. The State also contends that this constitutional provision gives the District Court exclusive jurisdiction in all criminal cases amounting to a felony and that a youth under 16 years is legally capable of committing a felony. In denying the state's application for relief, the Supreme Court held that: (1) the term "original jurisdiction", as used in that section of the constitution, does not mean exclusive jurisdiction; and (2) felonies may be prosecuted in the Youth Court because when it acts in jurisdiction it is acting as a District Court. In re T.L.G. & M.E.H., 214 M 164, 692 P2d 1227, 41 St. Rep. 2388 (1984).

Youth Legally Capable of Committing Crime — Jurisdiction When Crime Disclosed After Majority: The District Court has jurisdiction to try an individual charged at age 22 for felonies allegedly committed at age 15, as provided in the court's constitutional grant of jurisdiction over all felonies. The Youth Court Act does not contain any direct statement or implication that the Legislature intended to set the minimum age of criminal responsibility at 16, making a 15-year-old incapable of committing a crime. The primary purposes of statutes defining a "delinquent youth" and providing for transfer to District Court are to clarify that delinquency proceedings are noncriminal and to prohibit prosecution of youths in District Court while they are youths. State ex rel. Elliot v. District Court, 211 M 1, 684 P2d 481, 41 St. Rep. 1184 (1984).

Traffic Offenses by Youths — Jurisdiction: Section 61-12-601 (now repealed), giving District Courts, Justices' Courts, and Municipal and City Courts concurrent original jurisdiction of all proceedings concerning unlawful operation of motor vehicles by persons under the age of 18, does not give jurisdiction to Youth Courts or grant the named courts jurisdiction concurrent with Youth Courts. Youth Court jurisdiction is fixed by 41-5-203, which specifically excludes traffic violations. State ex rel. Maier v. City Court, 203 M 443, 662 P2d 276, 40 St. Rep. 560 (1983).

Possession of Alcohol by Youth — Prosecutor's Choice of Forum: In light of 45-5-624, the County Attorney has sole discretion over which court (Justice's or Youth Court) hears a case involving illegal possession of alcohol by a minor. Edward v. Collings, 193 M 426, 632 P2d 325, 38 St. Rep. 1240 (1981).

Jurisdiction Over Indian Juveniles: The juvenile court did not have jurisdiction of charges of alleged acts of delinquency by enrolled Indians within the exterior boundaries of the reservation, although the tribal court had "remanded" the proceedings to juvenile court pursuant to a reservation code provision, where the State had not accepted jurisdiction through affirmative legislation and special tribal election. Blackwolf v. District Court, 158 M 523, 493 P2d 1293 (1972).

Involuntary Manslaughter: Conviction of involuntary manslaughter (now negligent homicide, 45-5-104), arising from driving an automobile while intoxicated, was proper notwithstanding defendant's contention that since he was a juvenile and "delinquent child" within the meaning of the juvenile code he could be punished only civilly for his acts and not criminally. St. v. Medicine Bull, 152 M 34, 445 P2d 916 (1968).

Right to Trial by Jury:
A child under the age of 16 years may never be tried for a law violation in the District Court. He is solely under the exclusive jurisdiction of the juvenile court. State ex rel. Dahl v. District Court, 134 M 395, 333 P2d 495 (1958). (Annotator's note: See sec. 3, Ch. 60, L. 1985, for crimes for which a child 12 years of age or more may be tried as an adult.)

Where a minor, charged with being a delinquent, made a demand for a jury trial on the day preceding the trial and at the opening of the trial, the court was without jurisdiction to try him without a jury. Application of Banschbach, 133 M 312, 323 P2d 1112 (1958).

Disqualification of Judge: Section 93-901, R.C.M. 1947 (now repealed), which governs the removal of judges in civil actions and matters, applies to juvenile delinquency proceedings as the legislative intent as found in the juvenile statutes indicates that delinquency proceedings are to be treated as civil proceedings. State ex rel. Ostoj v. McClernan, 129 M 160, 284 P2d 252 (1955).

Criminal Liability: It is the child as defined in section 10-602, R.C.M. 1947 (now repealed), to whom this part is primarily applicable and the one with whom the juvenile courts and authorities are ordinarily concerned. When such person arrives at the age of 18, he is an adult and under the criminal laws of this state is subject to the same rules of society as is any other adult no matter what his age may be. Exceptions found in this part are those regarding the person between 18 and 21 years of age, and such exceptions have to do with detention of such person and trial of such person if the offense for which he is charged occurred prior to the time he reached the age of 18. State ex rel. Bresnahan v. District Court, 127 M 310, 263 P2d 968 (1953). (See dissenting opinion in 127 M 310, 263 P2d 968 (1953).)

District Court Jurisdiction: Section 10-603, R.C.M. 1947 (since repealed), provided that the juvenile court shall have exclusive original jurisdiction in proceedings concerning any person under 21 years of age charged with having violated any law of the state, with specified exceptions. The District Court and not the juvenile court had jurisdiction over a defendant who was charged with attempted rape and who was under 21 but over 18 years of age at the time the alleged act was charged to have been committed. State ex rel. Bresnahan v. District Court, 127 M 310, 263 P2d 968 (1953).

41-5-204. Venue and transfer.

Compiler's Comments

2001 Amendment: Chapter 114 at end of first sentence in (2) and in (3) after "intervention" deleted "or a youth in need of care". Amendment effective October 1, 2001.

1997 Amendment: Chapter 550 in (1), at beginning of second sentence, inserted exception clause; in (2) and (3) substituted "youth in need of intervention" for "youth in need of supervision"; in (4), after "41-5-206", deleted "the court in the county where the offense occurred shall serve as a transfer hearing court"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

1985 Amendment: In first sentence of (1), after "resident", inserted "or is alleged to have violated the law" and after "jurisdiction over", substituted "any youth alleged to be a delinquent youth. The youth court shall assume the initial handling of the case.

(2) The county where a youth is a resident has initial jurisdiction over any youth alleged to be a youth in need of supervision or a youth in need of care." for "any youth alleged to be a delinquent youth, a youth in need of supervision, or a youth in need of care."; and at beginning of (3) inserted "In the case of a youth alleged to be a youth in need of supervision or a youth in need of care".

Case Notes

Transfer Request to Youth Court Properly Denied — Interests of Community Protection Not Served — Nature of Offense Supported Finding: A 17-year-old defendant was charged as an adult with one count of sexual intercourse without consent and one count of sexual assault. Subsequently, the District Court denied a motion to transfer prosecution to Youth Court, and the defendant was sentenced to 6 years and 60 days in a county detention center. On appeal, the Supreme Court considered three factors in 41-5-206 and determined that the District Court did not abuse its discretion in determining that the lengthier term of supervision available in District Court would better serve the interest of community protection. Moreover, the District Court properly considered sufficient credible evidence through testimony concerning the nature of the offense in determining that a transfer to Youth Court was not warranted. St. v. Dietsch, 2013 MT 245, 371 Mont. 460, 308 P.3d 111, distinguished in St. v. Johnson, 2023 MT 167, 413 Mont. 202, 534 P.3d 676.

41-5-205. Retention of jurisdiction — termination.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 2, Ch. 199, L. 2023. Amendment effective October 1, 2023.

2001 Amendment: Chapter 587 inserted (4) providing jurisdiction of court not terminated if department issues release from supervision due to commitment expiration. Amendment effective July 1, 2001.

Severability: Section 24, Ch. 587, L. 2001, was a severability clause.

1997 Amendment: Chapter 498 in (1) inserted first sentence allowing dismissal on court's or party's motion and in second sentence substituted "Unless terminated by the court and except as provided in subsections (2) and (3), the jurisdiction of the court continues until the individual becomes 21 years of age" for "Once a court obtains jurisdiction over a youth, the court retains jurisdiction unless terminated by the court or by mandatory termination in the following cases"; in (2) inserted "Court jurisdiction terminates when"; in (2)(a), at beginning, deleted "at the time", substituted "transferred to district court under 41-5-208" for "transferred to adult criminal court", and inserted reference to filing of information under 41-5-206; at beginning of (2)(b) deleted "at the time" at end substituted "or" for "and"; inserted (2)(c) providing that jurisdiction terminates when execution of sentence is ordered and supervisory responsibilities are transferred under 41-5-1605; deleted former (3) that read: "(3) in any event, at the time the youth reaches the age of 21 years"; and inserted (3) increasing jurisdiction over extended jurisdiction juvenile to 25 years of age. Amendment effective May 2, 1997.

The amendments to this section made by sec. 17, Ch. 550, L. 1997, were rendered void by sec. 78(2), Ch. 550, L. 1997, a coordination section.

Severability: Section 15, Ch. 498, L. 1997, was a severability clause.

Applicability: Section 17, Ch. 498, L. 1997, provided: "[This act] applies to all offenses committed on or after [the effective date of this act]." Effective May 2, 1997.

1987 Amendment: In (2) substituted present language for former text that read: "at the time of commitment of the youth to the custody of the department of institutions".

Case Notes

Youth Court Authority to Extend Probation Period at Probation Revocation Proceeding — No Violation of Equal Protection: At age 14, the appellant admitted to the charge of assault with a weapon and was placed on probation until his 18th birthday by the Youth Court. Two years later, the appellant admitted to possession of a handgun, in violation of his probation agreement. At the disposition hearing, the Youth Court revoked the appellant's probation, committed him to the Pine Hills Youth Correctional Facility until his 18th birthday, and extended his probation term until his 21st birthday to ensure he would be fully rehabilitated. The appellant appealed the Youth Court order on the grounds that the Youth Court had no authority to impose an additional probationary period beyond the period in the initial order. The appellant also asserted that he was denied equal protection of the law because he was similarly situated to an adult who committed assault with a weapon but was treated differently because the adult could not be subject to an additional probation period upon revocation. The Supreme Court upheld the order of the Youth Court because, under 41-5-1431, the court could have issued an order of commitment to the correctional facility and required the appellant to remain on probation until his 21st birthday at the original hearing. In addition, the Supreme Court determined that the appellant was not similarly situated to an adult who committed assault with a weapon because specific statutory provisions within the Youth Court Act ensure minors are treated differently from adults, including emphasizing rehabilitation, which was the Youth Court's justification for extending the appellant's probation. In re S.M.K.-S.H., 2012 MT 281, 367 Mont. 176, 290 P.3d 718.

Retention of Jurisdiction Proper: A youth appealed the Youth Court's denial of his motion to dismiss for lack of jurisdiction, arguing that the Youth Court lost jurisdiction when his probation ended when he turned 18 years old and therefore lacked jurisdiction to transfer the matter to District Court. The Supreme Court, distinguishing In re K.D.K., 2006 MT 187, 333 Mont. 100, 141 P.3d 1212, affirmed, concluding that the Youth Court retained jurisdiction because it had not terminated its jurisdiction pursuant to 41-5-205 and because 41-5-208 allows the Youth Court to transfer a matter to District Court at any time after the youth reaches the age of 18 but before the youth reaches the age of 21. In re T.M.L., 2012 MT 9, 363 Mont. 304, 268 P.3d 1255.

District Court Order Revoking Youth's Probation and Committing Him to Department Judged Reversible Error — No Authority of Department to Impose Standard Probationary Conditions: As a youth of 13, defendant committed sexual assault and was placed on probation with the condition that he complete an outpatient sexual offender treatment program. When the program had not been completed 2 years later, defendant's probation was revoked and he was placed at Pine Hills until age 18 and until completion of the Pine Hills sexual offender program, and if he failed to complete the program, he would be required to register as a sexual offender. When defendant turned 18, he was released from Pine Hills without completing the program. Defendant then stipulated to transfer supervisory control to District Court. The stipulation included a provision that defendant complete sexual offender treatment by age 25 and provided that defendant would have to register as a sexual offender if the treatment was not completed. Although the stipulation contained no other conditions or restrictions, defendant also signed a form that included the standard conditions of probation adopted by the Department of Corrections (DOC). Defendant subsequently violated some of the standard probation conditions, and the state petitioned to revoke probation. Defendant moved to dismiss the petition, but the District Court denied the motion and committed defendant to the DOC until age 25. On appeal, the Supreme Court reversed. The stipulation placed only one condition on defendant, that being the requirement to complete sexual offender treatment by age 25. Defendant was not yet 25 years old, so that condition was not violated. The standard DOC probation conditions were imposed by the DOC, not by the court, and the DOC was not authorized to add conditions to those articulated by the court's judgment, nor did the court have authority to revoke defendant's probation for failure to abide by conditions added by the DOC after the sentence. Therefore, the District Court's judgment revoking defendant's probation and committing him to the DOC was reversible error. St. v. Andersen-Conway, 2007 MT 281, 339 M 439, 171 P3d 678 (2007).

No Authority of Youth Court to Order Youth to Pay Restitution Past Age of Majority: In 2000, a 12-year-old who admitted sexually assaulting an 8-year-old was adjudicated a delinquent youth by the Youth Court and placed on probation until age 18. Probation conditions included payment of restitution and the costs of the victim's therapy. In 2003, the Youth Court was notified by a restitution officer that a therapist had advised that counseling for the victim and the victim's mother was complete and that the restitution amount owed was $4,507.53; however, no restitution hearing was held. Nevertheless, the state and the youth's parents executed a restitution agreement specifying that the youth was liable for payment of restitution and identifying $4,507.53 as the total restitution due. The Youth Court signed the 2003 agreement, and $4,507.53 was subsequently paid in full. In 2005, the state requested a restitution hearing, noting that the victim's mother had submitted additional restitution claims of $4,352.93 for therapeutic sports activity for the victim and $8,309.25 for university schooling costs for the mother. At a hearing held 2 days before the end of the youth's probation, the Youth Court claimed jurisdiction over the youth for financial purposes until the youth turned 21 and ordered the youth to pay $12,662.18 in additional restitution to cover the mother's claims for sports and school-related costs. The youth appealed on grounds that the Youth Court had no authority to order additional restitution, and the Supreme Court reversed. The Youth Court limited its retention of jurisdiction beyond the youth's 18th birthday to enforcement of financial obligations set forth in the original disposition order and in the 2003 agreement establishing the total restitution to be paid by the youth. Therefore, the Youth Court did not have jurisdiction to impose additional restitution in a stand-alone order after the youth's probation, of which payment of restitution was a condition, expired, and the Supreme Court remanded with instructions to vacate the order for additional restitution. (See 2023 amendment to 41-5-205.) In re K.D.K., 2006 MT 187, 333 M 100, 141 P3d 1212 (2006), distinguished in In re T.M.L., 2012 MT 9, 363 Mont. 304, 268 P.3d 1255, and in In re S.M.K.-S.H., 2012 MT 281, 367 Mont. 176, 290 P.3d 718, in which the Supreme Court upheld a Youth Court order extending the youth's probation period at a revocation hearing when the original probation had not terminated.

Youth Court Jurisdiction Improperly Extended for Youth Charged With Crime Punishable by Life in Prison: In the case of a youth charged with felony sexual intercourse without consent, the Youth Court was without legal basis to extend its jurisdiction beyond the youth's 21st birthday because the youth was charged with a crime punishable by life imprisonment. In re N.V., 2004 MT 80, 320 M 442, 87 P3d 510 (2004).

Termination of Youth Court Jurisdiction — No Bar to Jurisdiction of District Court: The defendant was under 18 years of age when the crime of which he was accused was committed. When the defendant was 20 years old he confessed, and the County Attorney filed a petition in the Youth Court, seeking a declaration that the defendant was a delinquent youth and requesting authority to incarcerate him. The defendant turned 21 before the motion was ruled on. He then was charged with deliberate homicide in District Court. The defendant contended that when the Youth Court lost jurisdiction over him under 41-5-205, the District Court did not have jurisdiction because once jurisdiction has attached under 41-5-203, the District Court can never assume jurisdiction over the offense underlying the Youth Court's proceeding absent transfer under 41-5-206, which did not occur here. The Supreme Court held that on termination of Youth Court jurisdiction, there was no bar to the exercise of jurisdiction by the District Court under Art. VII, sec. 4(1), Mont. Const., 3-5-302, and 46-2-201, over felony proceedings against the defendant. Exclusive original jurisdiction of the Youth Court does not divest a District Court of jurisdiction over crimes committed by a juvenile defendant. St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985).

41-5-206. Filing in district court prior to formal proceedings in youth court.

Compiler's Comments

2021 Amendment: Chapter 339 in (6) in third sentence near end after "the department in an appropriate" deleted "juvenile or adult" and in fourth sentence before "correctional facility" deleted "state youth". Amendment effective October 1, 2021.

2020 Amendment by Initiative: Initiative Measure No. 190 in (1)(xi) substituted "45-9-102(2)" for "45-9-102(3)". Amendment effective January 1, 2021.

Severability: Section 55, Initiative Measure No. 190, was a severability clause.

2017 Amendment: Chapter 321 in (1)(b)(xi) substituted "45-9-102(3)" for "45-9-102(4) through (6)". Amendment effective July 1, 2017.

Applicability: Section 44, Ch. 321, L. 2017, provided: "[This act] applies to offenses committed after June 30, 2017."

2011 Amendment: Chapter 87 in (6) in first sentence inserted "and any offense that arose during the commission of a crime enumerated in subsection (1)", and inserted second sentence regarding youth acquitted in district court. Amendment effective October 1, 2011.

Saving Clause: Section 2, Ch. 87, L. 2011, was a saving clause.

2007 Amendment: Chapter 483 inserted (1)(b)(iv) including the crime of sexual assault; and made minor changes in style. Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

2005 Amendment: Chapter 277 in (1)(b)(x) inserted reference to 45-9-102(6); and made minor changes in style. Amendment effective October 1, 2005.

2001 Amendments — Composite Section: Chapter 7 renumbered former (1)(b)(xi) as new (1)(b)(xv); and made minor changes in style. Amendment effective October 1, 2001.

Chapter 243 inserted (1)(b)(x) relating to criminal possession of dangerous drugs; inserted (1)(b)(xi) relating to criminal possession with intent to distribute; in (1)(b)(xv) substituted "subsections (1)(b)(i) through (1)(b)(xii) and (1)(b)(xiv)" for "subsections (1)(b)(i) through (1)(b)(iii) and (1)(b)(v) through (1)(b)(xii)" (amendment modified by Ch. 7); and made minor changes in style. Amendment effective October 1, 2001.

Chapter 576 in (3) in last sentence near middle after "to the youth court" substituted "unless" for "if"; in (3)(a) near middle after "and disposition will" deleted "not"; inserted (3)(b) regarding nature of offense; in (3)(c) substituted "if the matter was prosecuted in youth court" for "and that, considering the seriousness of the offense, the case should remain in the district court"; in (7) substituted text regarding detention of youth in jail or other facility pending final disposition if physical separation is maintained for "(7) A youth whose case is filed in the district court may not be detained or otherwise placed in a jail or other adult detention facility before final disposition of the youth's case unless:

(a) alternative facilities do not provide adequate security; and

(b) the youth is kept in an area that provides physical separation as well as sight and sound separation from adults accused or convicted of criminal offenses"; and made minor changes in style. Amendment effective July 1, 2001.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text. The composite section includes all of the offenses enumerated in subsection (1)(b) to reflect the amendments by the chapters.

Severability: Section 5, Ch. 576, L. 2001, was a severability clause.

1999 Amendments — Composite Section: Chapter 432 in (1)(b)(iii) before "assault" deleted "or felony"; inserted (1)(b)(iv) concerning assault with a weapon; in (1)(b)(ix) substituted "criminal distribution" for "criminal sale"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 523 in (1) in introductory clause near middle after "discretion" inserted "and in accordance with the procedure provided in 46-11-201"; in (3) substituted present language pertaining to hearings on and transfer of cases back to youth court for former language that read: "(3) The district court shall grant leave to file the information if the court finds that there is probable cause to believe that the youth has committed the alleged offense and that, considering the seriousness of the offense and in the interests of community protection, the case should be filed in the district court"; in (5)(b) inserted second sentence requiring a hearing before court decides the motion; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 532 inserted (1)(a)(iv) concerning assault on a peace officer or judicial officer; inserted (1)(b)(xiii) concerning escape; in (6) at end of first sentence substituted "the court shall sentence the youth pursuant to 41-5-2503 and Titles 45 and 46. A youth who is sentenced to the department or a state prison must be evaluated and placed by the department in an appropriate juvenile or adult correctional facility" for "and is sentenced to the state prison, the commitment must be to the department of corrections"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 537 at end of first sentence in (6) inserted "not to exceed the period of time allowed in 46-18-201"; and made minor changes in style. Amendment effective April 30, 1999. The code commissioner has not codified the change made to (6) by Ch. 537 because the change appears to have been rendered void by the changes to (6) made by Ch. 532.

1997 Amendments: Chapter 285 inserted (1)(b)(xi) authorizing the court to transfer to District Court a prosecution involving coercion or use of violence to coerce criminal street gang membership; and made minor changes in style. Amendment effective April 16, 1997.

Chapter 550 in (1) substituted "The county attorney may, in the county attorney's discretion, file with the district court a motion for leave to file an information in the district court if" for "After a petition has been filed alleging delinquency, the court may, upon motion of the county attorney, before hearing the petition on its merits, transfer the matter of prosecution to the district court if"; in (1)(a) inserted "if it had been committed by an adult"; in (1)(a)(iv) inserted reference to accountability and after "mitigated deliberate homicide" deleted "if the act had been committed by an adult"; in (1)(b)(x) inserted reference to accountability and substituted "(1)(b)(i) through (1)(b)(x)" for "(1)(a)(ii)(A) through (1)(a)(ii)(I)"; deleted former (1)(b) through (4) that read: "(b) a hearing on whether the transfer should be made is held in conformity with the rules on a hearing on a petition alleging delinquency, except that the hearing must be conducted by the youth court without a jury;

(c) notice in writing of the time, place, and purpose of the hearing is given to the youth, the youth's counsel, and the youth's parents, guardian, or custodian at least 10 days before the hearing; and

(d) the court finds upon the hearing of all relevant evidence that there is probable cause to believe that:

(i) the youth committed the delinquent act alleged;

(ii) the seriousness of the offense and the protection of the community require treatment of the youth beyond that afforded by juvenile facilities; and

(iii) the alleged offense was committed in an aggressive, violent, or premeditated manner.

(2) In transferring the matter of prosecution to the district court, the court may also consider the following factors:

(a) the sophistication and maturity of the youth, determined by consideration of the youth's home, environmental situation, and emotional attitude and pattern of living;

(b) the record and previous history of the youth, including previous contacts with the youth court, law enforcement agencies, youth courts in other jurisdictions, prior periods of probation, and prior commitments to juvenile institutions. However, lack of a prior juvenile history with youth courts is not of itself grounds for denying the transfer.

(3) The court shall grant the motion to transfer if the youth was 16 years old or older at the time of the conduct alleged to be unlawful and the unlawful act would constitute deliberate homicide as defined in 45-5-102, mitigated deliberate homicide as defined in 45-5-103, or the attempt, as defined in 45-4-103, of either deliberate or mitigated deliberate homicide if the act had been committed by an adult.

(4) Upon transfer to district court, the judge shall make written findings of the reasons why the jurisdiction of the youth court was waived and the case transferred to district court"; inserted (2) requiring filing in District Court if youth 17 years of age at time of offense; inserted (3) requiring court to grant leave to file if probable cause exists and considering seriousness of offense and interests of community protection; in (4), at beginning of first sentence, substituted

"The filing of an information in district court terminates" for "The transfer terminates" and at end substituted "in the information" for "in the petition" and in second sentence substituted "has been filed in the district court" for "has been transferred"; deleted former (6) that read: "(6) Upon order of the youth court transferring the case to the district court under subsection (5), the county attorney shall file the information against the youth without unreasonable delay"; in (5)(b) substituted "order of the district court judge" for "order of the youth court judge"; in (6), in first sentence, substituted "offenses enumerated in subsection (1)" for "offenses transferred by the youth court", at end of third sentence substituted "a state prison facility" for "the state prison", and inserted fourth sentence requiring school-aged youth with disabilities to be provided an education while in confinement; in (7) substituted "whose case is filed in the district court" for "whose case is transferred to district court"; and made minor changes in style. Amendment effective July 1, 1997.

The amendments to this section made by sec. 3, Ch. 498, L. 1997, were rendered void by sec. 78(2), Ch. 550, L. 1997, a coordination section.

Preamble: The preamble attached to Ch. 285, L. 1997, provided: "WHEREAS, the Legislature finds and declares that it is the right of every person to be secure and protected from fear, intimidation, and physical harm caused by the activities of violent groups and individuals; and

WHEREAS, it is not the intent of the Legislature to interfere with the exercise of the constitutionally protected rights of freedom of expression and association; and

WHEREAS, the Legislature hereby recognizes the constitutional right of every citizen to harbor and express beliefs on any lawful subject whatsoever, to lawfully associate with others who share similar beliefs, to petition lawfully constituted authority for a redress of perceived grievances, and to participate in the electoral process; and

WHEREAS, the Legislature further finds that the State of Montana is in a situation of rising crisis caused by the entry into the state of criminal street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods; and

WHEREAS, these activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected; and

WHEREAS, the Legislature finds that several out-of-state criminal street gangs have established a presence in Montana's larger cities, that these criminal street gangs are attracting and recruiting members in Montana, and that identifiable criminal street gang-related crimes are beginning to appear and increase in Montana communities that have recognizable criminal street gang-related presences; and

WHEREAS, the Legislature finds that when these criminal street gangs establish a presence in Montana cities, the quality of Montana citizens' safety, welfare, and enjoyment of life begins to decline; and

WHEREAS, the Legislature wishes to deter the growing influx of violent criminal street gangs and criminal street gang-related activity in its communities and to protect Montana citizens from the terror associated with violent criminal street gangs; and

WHEREAS, it is the intent of the Legislature in enacting [sections 1 through 8] [45-8-401 through 45-8-408] to seek the eradication of activity of criminal street gangs by focusing on the patterns of criminal street gang activity and on the organized nature of criminal street gangs.

THEREFORE, the Legislature finds it appropriate to enact [sections 1 through 8] [45-8-401 through 45-8-408]."

Severability: Section 11, Ch. 285, L. 1997, was a severability clause.

Section 80, Ch. 550, L. 1997, was a severability clause.

Source: Chapter 285, L. 1997, was based on California Penal Code §§ 186.20 through 186.28, the "California Street Terrorism & Prevention Act".

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

1995 Amendments: Chapter 438 inserted third sentence in (5) authorizing transfer of case to District Court after prosecution as provided in 41-5-208 or 41-5-1105 (renumbered 41-5-1605); in (6), after "court", inserted "under subsection (5)"; and made minor changes in style. Amendment effective April 14, 1995.

Chapter 546 in (8) substituted "department of corrections" for "department of corrections and human services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 448 inserted (1)(a)(ii)(I) allowing transfer to District Court of the prosecution of the offense of criminal production or manufacture of dangerous drugs; at end of (1)(a)(ii)(J) substituted "(1)(a)(ii)(I)" for (1)(a)(ii)(H); and made minor changes in style.

1991 Amendments — Instructions to Code Commissioner: The Code Commissioner changed "department of institutions" to "department of corrections and human services", pursuant to sec. 1, Ch. 262, L. 1991, directing the Code Commissioner to make the change wherever necessary in the Montana Code Annotated. Amendment effective July 1, 1991.

Chapter 547 in (9), after "detained", inserted "or otherwise placed in a jail or other" and at end deleted "the youth court judge determines that"; in (9)(a), at beginning, substituted "alternative facilities" for "the youth facilities"; in (9)(b) substituted present text concerning detaining youth in adult facility with physical, sight, and sound separation for "detention in the adult facility is in an area physically, aurally, and visually separate from that of adults"; and made minor changes in style. Amendment effective July 1, 1992.

1989 Amendment: Inserted (9) relating to detention of a youth in an adult detention facility.

1987 Amendments: Chapters 370, 515, and 609 deleted former (1)(a)(ii)(F) that read: "(F) sexual intercourse without consent as defined in 45-5-503"; and in (1)(a)(ii)(I) changed reference to (1)(a)(ii)(I) to reference to (1)(a)(ii)(H).

Chapter 515 in (1)(a)(ii)(C), after "aggravated", inserted "or felony"; in (1)(a)(ii)(H), after "drugs", deleted "for profit"; in (1)(d) substituted "is probable cause" for "are reasonable grounds"; deleted former (2)(c) and (2)(d) that read: "(c) the severity of the offense;

(d) the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the youth by the use of procedures, services, and facilities currently available to the youth court"; inserted (3) describing when court must grant motion to transfer prosecution of youth to District Court; in (4), (5), and (6) changed "court" to "youth court"; in (7)(b) substituted "order of the youth court" for "acceptance by the district court"; and in (8), after "offenses", substituted "transferred by the youth court" for "enumerated in subsection (1) of this section".

Chapter 609 near end of (8), after "proper", inserted "including a state youth correctional facility under the procedures of 53-30-212 [renumbered 52-5-111]".

1985 Amendment: Inserted (1)(a)(i) allowing the transfer to District Court of a prosecution involving a youth 12 years of age or older who is charged with sexual intercourse without consent, deliberate homicide, mitigated deliberate homicide, attempted deliberate homicide, or attempted mitigated deliberate homicide; in (1)(a)(ii)(A) substituted "negligent homicide as defined in 45-5-104" for "criminal homicide as defined in 45-5-101"; and at end of (7) inserted "however, no youth under 16 years of age may be confined in the state prison".

1981 Amendment: Inserted subsections (1)(a)(x), allowing attempt of acts enumerated to be transferred to criminal court, (2)(c), allowing court to consider severity of offense in determining transfer, and (6), referring offenses not enumerated to youth or criminal court for trial; substituted "may" for "shall" after "court" in the introductory clause of (2); added the provision relating to prior juvenile history with youth courts to the end of (2)(b).

Case Notes

Evidence of Youth Offender's Attributes Inform Nature of Offense Inquiry — Denial of Transfer to Youth Court Reversed. St. v. Johnson, 2023 MT 167, 413 Mont. 202, 534 P.3d 676.

District Court Jurisdiction Over Youth — Jurisdiction Proper Over Misdemeanor Count Only When Arising Out of Commission of Felony — Misdemeanor Committed Close in Time But in Different Location Involving Different Parties Insufficient to Establish District Court Jurisdiction. St. v. Pehringer, 2023 MT 146, 413 Mont. 122, 533 P.3d 657.

Youth Court Jurisdiction Under 45-5-214 Not Exclusive Jurisdiction — District Court Jurisdiction Over Youth Offender May Be Established in Conjunction With Commission of Enumerated Felony. St. v. Pehringer, 2023 MT 146, 413 Mont. 122, 533 P.3d 657.

110-Year Sentence Not De Facto Life Sentence — Crime Committed While 17 Years Old: The defendant committed a murder in Montana when he was 17 years old. While subsequently serving a sentence in Washington for another murder, the defendant was convicted in Montana and sentenced to 110 years. The sentence was set to run concurrent with his Washington sentence. On a petition for writ of habeas corpus, the defendant argued that the sentence violated his eighth amendment rights because he committed the offense when he was 17 years old, the sentence amounted to a de facto life sentence, and the sentencing court failed to consider the special circumstances of his youth. The Supreme Court held that Miller v. Alabama, 567 U.S. 460 (2012), and subsequent cases apply to discretionary sentences in Montana. The Supreme Court analyzed the unique circumstances of the sentence, finding that the defendant's eligibility for day-for-day good time credit and concurrent nature with the Washington sentence did not render the District Court's sentence a de facto life sentence. Steilman v. Michael, 2017 MT 310, 389 Mont. 512, 407 P.3d 313. However, see In re J.W., 2021 MT 291, 406 Mont. 224, 498 P.3d 211, declining to extend the holding of Steilman regarding consideration of the unique characteristics of youth to a youth court jury's consideration of culpability.

Seventeen-Year-Old Defendant Charged in District Court — Denial of Transfer to Youth Court Proper: A 17-year-old defendant was charged directly in District Court with two consolidated counts of sexual intercourse without consent concerning two separate incidents. The District Court subsequently denied the defendant's motions to have the charges moved to Youth Court, concluding that the defendant's age, home environment, conduct while on release, minimization of his alleged conduct, and need for more structured supervision made the District Court a more appropriate forum. The defendant agreed to a nonbinding plea agreement for one of the charges and was sentenced to 50 years in prison with 10 years suspended. On appeal, the Supreme Court affirmed, holding that the District Court correctly denied the motions for transfer to Youth Court. However, the Supreme Court found that the District Court erred by not including the requirements of 41-5-2503 and remanded to modify the judgment. St. v. Talksabout, 2017 MT 79, 387 Mont. 166, 392 P.3d 574, distinguished in St. v. Johnson, 2023 MT 167, 413 Mont. 202, 534 P.3d 676.

Transfer Request to Youth Court Properly Denied — Interests of Community Protection Not Served — Nature of Offense Supported Finding: A 17-year-old defendant was charged as an adult with one count of sexual intercourse without consent and one count of sexual assault. Subsequently, the District Court denied a motion to transfer prosecution to Youth Court, and the defendant was sentenced to 6 years and 60 days in a county detention center. On appeal, the Supreme Court considered three factors in 41-5-206 and determined that the District Court did not abuse its discretion in determining that the lengthier term of supervision available in District Court would better serve the interest of community protection. Moreover, the District Court properly considered sufficient credible evidence through testimony concerning the nature of the offense in determining that a transfer to Youth Court was not warranted. St. v. Dietsch, 2013 MT 245, 371 Mont. 460, 308 P.3d 111, distinguished in St. v. Johnson, 2023 MT 167, 413 Mont. 202, 534 P.3d 676.

Untimely Youth Court Transfer Hearing — Failure to Move for Transfer to Youth Court Within Statutory Timeframe Not Ineffective Assistance of Counsel: Lindsey was charged with sexual intercourse without consent and sexual assault from incidents that occurred when he was 16 and 17 years old. A hearing to transfer the case to Youth Court was not held within 30 days, but Lindsey, who was 18 years old at the time he was charged, pleaded guilty to sexual assault in District Court and waived a Youth Court transfer. Prior to sentencing, Lindsey obtained new counsel and moved to withdraw his guilty plea. However, Lindsey waived his claim that he was denied due process by the lack of a timely transfer hearing. In addition, Lindsey did not receive ineffective assistance of counsel when his first counsel failed to move for dismissal of the charges on the ground that a timely transfer hearing was not held. Lindsey had time to prepare for the hearing, the District Court considered the transfer, and there was no evidence Lindsey was substantially prejudiced by the delay. St. v. Lindsey, 2011 MT 46, 359 Mont. 362, 249 P.3d 491.

Authority of District Court to Sentence Youth to Department of Corrections for Fifteen Years With None Suspended: After Quesnel violated five conditions of a suspended sentence for sexual intercourse without consent and sexual assault, Quesnel was sentenced to 15 years with the Department of Corrections with a recommendation for placement at the state prison and that parole eligibility be conditioned on completion of sexual offender treatment. Quesnel was a youth at the time of the offenses but was charged directly in District Court as an adult. Quesnel contended that the District Court lacked authority to impose a 15-year sentence because under the 2001 version of 46-18-201(3)(d)(i), all but the first 5 years of the sentence should be suspended. The state maintained that 46-18-201(3)(d)(ii) should apply because Quesnel was a youth whose case was transferred to District Court, so the District Court was authorized to impose the longer sentence. Quesnel argued that because charges were filed directly in District Court, his case was never technically transferred. The Supreme Court examined the legislative history to reconcile the use of the term "transferred" and concluded that 46-18-201(3)(d)(ii) applied not only to a youth whose case was transferred from Youth Court to District Court, but also to any youth who appears in District Court pursuant to 41-5-206. Quesnel appeared in District Court to answer charges of an offense enumerated in 41-5-206 and was found guilty, therefore the provisions of 46-18-201(3)(d)(ii) applied, and the District Court was not required to suspend all but 5 years of Quesnel's sentence but in fact was authorized to impose the 15-year sentence. The District Court was affirmed. St. v. Quesnel, 2009 MT 388, 353 M 317, 220 P3d 634 (2009).

Lack of Hearing to Determine Whether to Transfer Case to Youth Court — No Error: The state filed an information charging Quesnel with violations of a suspended sentence, but the District

Court did not hold a hearing within 30 days to determine whether the case should be transferred back to Youth Court. Quesnel asserted that the court lacked authority to impose a sentence because Quesnel was improperly before the court absent the required hearing. The Supreme Court found the argument to be without merit. The reason the hearing was not held within 30 days was that both parties moved to continue the hearing multiple times. However, Quesnel at no time objected to the continuances and could not complain that the hearing was not timely. St. v. Quesnel, 2009 MT 388, 353 M 317, 220 P3d 634 (2009).

No Statutory Indication That Youth Received Illegal Sentence Following Transfer of Case to District Court: At the age of 17, Strong was charged with two counts of felony burglary, and the state moved to transfer the charges to District Court. The state also filed theft charges against Strong in Youth Court. Strong entered a guilty plea on the burglary charges in exchange for dismissal of the theft charges. The District Court sentenced Strong to the Department of Corrections for 8 years, with 2 years suspended on each count. While serving the prison term, Strong challenged the sentence as illegal because the District Court failed to suspend all but 5 years. The state countered that the 5-year limitation in 46-18-201(3)(d) did not apply to a youth who was transferred to District Court under 41-5-206. The District Court affirmed the original sentence and Strong appealed. Applying the criteria in St. v. Ellis, 2007 MT 210, 339 M 14, 167 P3d 896 (2007), the Supreme Court addressed the facial challenge to the exemption in 46-18-201(3)(d)(ii) and affirmed. In order for an adult to receive the less onerous commitment to the Department of Corrections, the sentencing court must be willing to suspend all but 5 years of the commitment, but the statute imposes no similar impediment on a court's ability to commit to the Department a youth transferred to District Court under 41-5-206. This enhanced flexibility with regard to the treatment of youth offenders comports with the goals of the Youth Court Act to ensure rehabilitation of youth offenders rather than solely retribution. Therefore, nothing in 46-18-201(3)(d)(ii) established that Strong received an illegal sentence. St. v. Strong, 2009 MT 65, 349 M 417, 203 P3d 848 (2009). See also In re C.H., 210 M 184, 683 P2d 931 (1984).

Revocation of Youth Court Probation and Imposition of Suspended Sentence Proper: When Hinkle was 17 years old, he pleaded true to the charge of negligent homicide. The case was tried in District Court, and Hinkle was committed to the Youth Court for suspended placement in a treatment facility until age 18, placed on formal juvenile probation until age 25, and given a stayed adult sentence of 20 years with the Department of Corrections, pursuant to 22 probation conditions, including requirements that Hinkle not violate the dispositional order, possess or consume alcohol, or commit a new offense. Twelve days after the sentencing hearing, Hinkle was cited for being a minor in possession of alcohol. The Youth Court revoked Hinkle's probation and transferred the case back to District Court for further proceedings. After considering numerous balancing factors, the District Court imposed the 20-year adult sentence that had been stayed, but suspended the sentence subject to 19 conditions, including prohibiting Hinkle from entering casinos and gambling. Hinkle appealed on grounds that his probation was improperly revoked, that the 20-year sentence was improperly imposed, and that the casino and gambling restriction was illegal. The Supreme Court affirmed on all issues. The District Court did not err in concluding that simply continuing Hinkle's youth probation for the probation violations would be no more than a slap on the wrist and would be inappropriate given the seriousness of the underlying homicide offense. Imposing a suspended adult sentence was in fact a further act of grace, in light of the fact that the court could have imposed a 20-year sentence of confinement, but Hinkle ignored the act of grace in asserting that the suspended sentence was unduly harsh. Additionally, Hinkle's personal characteristics made him particularly vulnerable to the pitfalls of irresponsible gambling, so the casino and gambling restriction was appropriate. Thus, the District Court's order was "neither arbitrary nor without conscientious judgment or exceeding the bounds of reason and was an appropriate exercise of discretion". St. v. Hinkle, 2008 MT 217, 344 M 236, 186 P3d 1279 (2008).

Youth Tried, Convicted, and Sentenced Under Transfer Statute Correctly Sentenced as Persistent Felony Offender: In 1999, when Mainwaring was a juvenile, he pleaded guilty to mitigated deliberate homicide and was convicted pursuant to this section and sentenced pursuant to 41-5-2503(1)(a). A part of that sentence was later suspended under 41-5-2510. Later, shortly after turning 21, Mainwaring assaulted a child. The state brought assault charges against Mainwaring and then sought to have the court designate Mainwaring as a persistent felony offender (PFO). The District Court approved the designation as a PFO, based on Mainwaring's 1999 felony conviction, and Mainwaring was convicted and sentenced to 20 years in prison. The Supreme Court held that a conviction under subsection (6) of this section was equivalent to any adult felony conviction and that there is nothing in the Montana Youth Court Act or the Criminally

Convicted Youth Act that precludes the application of the PFO statutes and designation to an individual previously convicted of a felony when the individual was a youth. Citing St. v. Damon, 2005 MT 218, 328 M 276, 119 P3d 1194 (2005), the Supreme Court held that the District Court therefore had the authority to apply the PFO statutes and designation to Mainwaring. The Supreme Court also overruled Mainwaring's due process objections and affirmed his conviction. St. v. Mainwaring, 2007 MT 14, 335 M 322, 151 P3d 53 (2007).

Due Process Satisfied by Requiring Hearing After Information Filed — Butler Overruled: In St. v. Butler, 1999 MT 70, 294 M 17, 977 P2d 1000 (1999), the Supreme Court held that to satisfy due process, a youth must be afforded a hearing prior to the filing of an information in District Court to charge the youth as an adult. Subsequent amendment to this section established a transfer hearing requirement within 30 days after leave to file an information is granted. The amendment was held to satisfy due process, so to the extent that Butler required a hearing before filing in District Court, Butler was overruled. St. v. McKee, 2006 MT 5, 330 M 249, 127 P3d 445 (2006).

Claim of Illegal Sentence Based on Lack of Jurisdiction to Be Raised on Direct Appeal, Not Postconviction Petition — Pena Applied: Camarillo was a minor when he was convicted in 1999 of deliberate homicide, robbery, and aggravated burglary and sentenced as an adult offender to 70 years in the state prison. The case was filed directly in District Court rather than Youth Court, as allowed under this section. Camarillo filed a petition for postconviction relief in 2003, claiming that the District Court lacked subject matter jurisdiction. The state responded that the claims could have been raised on direct appeal, and the District Court agreed and dismissed the petition. On appeal, the Supreme Court noted that the District Court properly exercised jurisdiction under Art. VII, sec. 4, Mont. Const., so Camarillo's jurisdiction argument failed. The court then applied Pena v. St., 2004 MT 293, 323 M 347, 100 P3d 154 (2004), and held that the issues that Camarillo attempted to raise in the petition for postconviction relief could have been but were not raised on direct appeal and, pursuant to 46-21-105, could not be brought in the petition for postconviction relief. In addition, under 46-21-102, petitions for postconviction relief must be filed within 1 year of final judgment. Camarillo's petition was not filed until more than 3 years after judgment and thus was untimely. The District Court was affirmed. Camarillo v. St., 2005 MT 29, 326 M 35, 107 P3d 1265 (2005).

Proper Consideration of Conflicting Evidence in Assigning Youth Deliberate Homicide Case to District Court: The District Court determined that it, rather than Youth Court, was the proper venue for prosecution of a deliberate homicide case against Whiteman, a juvenile. Whiteman appealed on grounds that the District Court contemplated only selective factual allegations proposed by the state and adopted verbatim. The Supreme Court disagreed. The District Court made comprehensive findings of fact that intimately detailed testimony offered at trial and were not subject to being overturned simply because the District Court relied on proposed findings and conclusions submitted by counsel. Whiteman's contention that the District Court erred in determining that the nature of the offense warranted prosecution in District Court also failed. Substantial credible evidence, even though conflicting, supported findings that probable cause existed for a deliberate homicide charge and prosecution in District Court. Despite testimony from three of Whiteman's teachers and a psychologist that Whiteman was intelligent, respectful, and just needed more structure, the District Court did not err in finding that a Youth Court proceeding and disposition would not serve the interests of the community or promote Whiteman's rehabilitation. Prosecution of the deliberate homicide in District Court was affirmed. St. v. Whiteman, 2005 MT 15, 325 M 358, 106 P3d 543 (2005). See also St. v. Smith, 261 M 419, 863 P2d 1000 (1993), and St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421 (1999).

Right to Appeal Error in Length of Sentence Lost by Failing to File Petition Within Statutory Time Limit: Pena, who was 17 years of age at the time, was sentenced as an adult to 45 years in prison for deliberate homicide and aggravated burglary. Pena did not challenge the legality of his sentence on direct appeal, but more than a year after entering a guilty plea and being sentenced, Pena filed a petition alleging that his sentence was illegal because the Montana Youth Court Act provided that a youth could not be sentenced to the custody of the Department of Corrections for more than 5 years and therefore the District Court did not have subject matter jurisdiction to impose a longer sentence. Pena argued that the lack of subject matter jurisdiction was not subject to any statutory postconviction time limits for filing appeals and could be raised at any time. The Supreme Court held that an error in sentencing does not divest a court of subject matter jurisdiction over the case before it. The Supreme Court further held that all postconviction claims, both jurisdictional and nonjurisdictional, must be brought within the 1-year time limit provided by statute and that the time limit was jurisdictional and was not waived by the state's failure to raise the issue in District Court. Pena v. St., 2004 MT 293, 323 M 347, 100 P3d 154 (2004), overruled in Davis v. St., 2008 MT 226, 344 M 300, 187 P3d 654 (2008), to the extent that Pena held that the Legislature limited District Courts' subject matter jurisdiction by codifying a 1-year time bar on postconviction relief pursuant to 46-21-102.

Statute Allowing Transfer of Jurisdiction of Juvenile to District Court Not Violative of Constitutional Separation of Powers Doctrine: Bedwell was 17 when he was charged with burglary, theft, and misdemeanor criminal mischief. The motion to charge him as an adult under this section was granted. Bedwell moved to dismiss on grounds that this section unconstitutionally violated the separation of powers doctrine, impermissibly vesting the court with prosecutorial powers to determine the manner in which to enforce laws with respect to specified juvenile offenders, by allowing the courts discretion to decide whether a juvenile should be treated as an adult. The District Court agreed, finding that courts were allowed to indirectly determine what charges should be filed against a juvenile by determining the legal forum in which a juvenile proceeding should be prosecuted, and remanded for filing in Youth Court. The state appealed. The Supreme Court reversed. In determining whether to accept jurisdiction, a District Court is not making a prosecutorial decision on how the law should be enforced or deciding whether a prosecution should go forward or what charges should be brought. The statute merely allows District Courts a proper judicial function to exercise discretion in determining whether to accept or reject jurisdiction over juvenile offenders under specified circumstances, which does not usurp or intrude into prosecutorial duties and powers of the County Attorney or intrude a court into Executive Branch powers. Thus, this section is not violative of the separation of powers doctrine. St. v. Bedwell, 1999 MT 206, 295 M 476, 985 P2d 150, 56 St. Rep. 805 (1999).

Findings and Conclusions in Transfer Order Not in Error — Transfer Affirmed: Spina was charged with killing her father. She raised numerous arguments that certain issues were not properly considered and that the findings of fact and conclusions of law in a Youth Court transfer order were erroneous and a simple verbatim adoption of the state's proposed findings. The Supreme Court considered each argument in turn and concluded that there was probable cause to believe that Spina committed the delinquent act alleged, that the seriousness of the offense and the protection of the community required treatment of Spina beyond that afforded by juvenile facilities, and that the alleged offense was committed in an aggressive, violent, or premeditated manner. The Youth Court's failure to specifically set forth findings regarding Spina's level of maturity was not reversible error, nor was it in error in finding that Spina was in need of long-term secure care beyond age 19. The Youth Court did not abuse its discretion in transferring Spina's case to District Court. St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421, 56 St. Rep. 467 (1999).

No Error in Youth Court Conclusion That Incarceration Not Mandatory if Youth Convicted in District Court: In its transfer order, the Youth Court concluded that transferring Spina into the adult system neither mandated incarceration nor precluded rehabilitation and that although any commitment of the youth must necessarily be to the Department of Corrections, the Department was not necessarily bound to incarcerate Spina. The Supreme Court agreed. The sentencing guidelines in 46-18-201 provide a District Court with a number of sentencing options, including imposition of a deferred or suspended sentence. The Youth Court was correct in concluding that Spina's conviction would not mandate incarceration. St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421, 56 St. Rep. 467 (1999).

Transfer of Youth Court Case to District Court Not Violative of Equal Protection Rights: Spina argued that the statute allowing transfer of her Youth Court case to the District Court resulted in an equal protection violation because of discriminatory treatment on the basis of her gender, asserting that the transfer was primarily motivated by the lack of affordable placement options for girls in the juvenile system. However, the primary concern in Spina's case was not that placements were not available, but that the duration of placement in the juvenile system would not be long enough to rehabilitate her. Further, the quality of supervision required for a juvenile like Spina, who was charged with killing her father, was not available for male or female offenders, so the concern was not triggered by gender. State placement policy with regard to juvenile offenders convicted and sentenced as adults has no bearing on the constitutionality of the transfer statute. Hence, it is not the transfer statute that generates any alleged disparities in treatment but rather the state placement policies, and the policies were not at issue in this case. Spina's challenge of the transfer statute on equal protection grounds failed. St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421, 56 St. Rep. 467 (1999).

Transfer of Youth Court Case to District Court Not Violative of Minor's Constitutional Rights: Spina argued that the statute allowing transfer of her Youth Court case to the District Court resulted in violation of her rights under Art. II, sec. 15, Mont. Const., which guarantees to minors the same fundamental rights afforded to adults, and under Art. II, sec. 24, Mont. Const., which guarantees the right to a fair trial. The Supreme Court considered alleged violations of the right against self-incrimination, the right to effective assistance of counsel, the right to a fair trial, and the right to a presumption of innocence, finding that Spina's arguments were without merit. The transfer statute did not violate Spina's constitutional rights. St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421, 56 St. Rep. 467 (1999).

Direct Filing of Information in District Court Rather Than Filing in Youth Court Violative of Due Process — Probable Cause Hearing Required: Pursuant to this section, Butler, a youth, was charged in District Court with attempted deliberate homicide and attempted robbery. Butler moved to have the District Court declare this section unconstitutional on grounds that it violated his right to due process by allowing the prosecution to file an information directly in District Court rather than Youth Court without first affording him a hearing. The motion was denied, and Butler appealed. Although it is within the province of the prosecution to move the District Court for leave to file an information in that court if the youth has attained a certain age and is alleged to have committed certain unlawful conduct, the prosecution's discretion ends at that point. Absent a pure prosecutorial waiver system, the ultimate decision rests with the District Court, which must make specific findings that there is probable cause to believe the youth committed the offense and that, because of the seriousness of the offense, the case should be filed in District Court. In Butler's case, the District Court based its decision solely on the affidavit of the prosecution and Butler did not have the opportunity, with assistance of counsel, to challenge the specific findings of the court. Although declining to declare the entire statute unconstitutional, the Supreme Court cited Kent v. U.S., 383 US 541, 16 L Ed 2d 84, 86 S Ct 1045 (1966), in holding that because the decision in this regard is potentially critically important to the youth, under the 14th amendment to the United States Constitution, Butler's right to due process requires that the District Court hold a hearing when rendering a decision under subsection (3) of this section. St. v. Butler, 1999 MT 70, 294 M 17, 977 P2d 1000, 56 St. Rep. 291 (1999), followed and applied retroactively in St. v. O'Neill, 1999 MT 224, 296 M 71, 985 P2d 154, 56 St. Rep. 886 (1999). Butler was overruled, to the extent that it requires a hearing before filing in District Court, in St. v. McKee, 2006 MT 5, 330 M 249, 127 P3d 445 (2006).

Indian Defendant — Failure to Challenge Transfer to District Court and Failure to Reserve Right to Appeal Issues — District Court Jurisdiction Upheld: After the state filed an amended petition in Youth Court to have Spotted Blanket declared a delinquent youth and a serious juvenile offender, the state and Spotted Blanket stipulated to transferring the case to District Court. Later, Spotted Blanket objected to the jurisdiction of the District Court, arguing that the Youth Court abused its discretion in making the transfer because there was insufficient evidence that the juvenile facilities were inadequate, as required by subsection (1)(d)(ii) of this section (see 1997 amendment), and because the District Court failed to make a finding of probable cause concerning some of the counts against him, as required by the same statute. The Supreme Court declined to address those issues, noting that: (1) Spotted Blanket's notice of appeal was limited to the District Court order denying his motion to dismiss and did not include the order transferring the case to District Court; (2) Spotted Blanket never challenged the propriety of the transfer to District Court and, citing the requirements of 46-12-204, St. v. Weeks, 270 M 63, 891 P2d 477 (1995), and St. v. Swoboda, 276 M 479, 918 P2d 296 (1996), holding that claims of error not properly preserved in the trial court are barred from appellate review; (3) Spotted Blanket stipulated to the transfer and that a probable cause hearing would not be necessary; and (4) Spotted Blanket pleaded guilty to the felony counts and noting that the plea acts as a waiver of nonjurisdictional defects under the Supreme Court's prior opinions in St. v. Butler, 272 M 286, 900 P2d 908 (1995), and Stilson v. St., 278 M 20, 924 P2d 238 (1996). St. v. Spotted Blanket, 1998 MT 59, 288 M 126, 955 P2d 1347, 55 St. Rep. 253 (1998).

Lack of Testimony Regarding Inadequacy of Juvenile Facilities — Transfer to District Court Inappropriate: A Youth Court order transferring charges of attempted deliberate homicide, attempted robbery, and felony theft to the District Court was an abuse of discretion absent testimony that juvenile facilities were inadequate to deal with the youth and in light of a lack of substantial credible evidence supporting the findings of the Youth Court. An assumption that juvenile facilities are inadequate based on the mere fact that a youth is charged with a serious offense ignores the rehabilitative purpose of the Montana Youth Court Act. In re J.K.C., 270 M 342, 891 P2d 1169, 52 St. Rep. 221 (1995), distinguishing In re K.M.H., 231 M 180, 752 P2d 162 (1988), In re T.N., 267 M 81, 881 P2d 1329, 51 St. Rep. 955 (1994), and In re J.D.W., 267 M 87, 881 P2d 1324, 51 St. Rep. 958 (1994).

Error to Assume Juvenile Facilities Inadequate Based Upon Seriousness of Youth's Crimes: The Youth Court took judicial notice of the length of time that a Youth Court may commit a juvenile and ordered J.D.W.'s case transferred to District Court. The Supreme Court held that there was no testimony given by Pine Hills staff or anyone else that the average length of stay in a juvenile facility would be inadequate for rehabilitation in J.D.W.'s case and that therefore it was error for the Youth Court to assume that a juvenile facility was inadequate based solely on the seriousness of the juvenile's crimes. In re J.D.W., 267 M 87, 881 P2d 1324, 51 St. Rep. 958 (1994).

Transfer Proper When Youth Poses Threat to Community and Juvenile Facilities Inadequate: T.N. was accused of shooting his father. The District Court decided to transfer the case to adult court on the basis that a Youth Court could not order his commitment to a treatment facility for a period as long as might be needed and on the basis that the juvenile facilities were not equipped to provide the type of treatment that T.N. might need. T.N. argued that the District Court erred in transferring him because he did not pose a threat to the community. The Supreme Court held that there was no error because the record did include medical testimony that although it was unlikely that there would be another violent occurrence, it could not be ruled out and because the record supported the finding that the juvenile facilities were inadequate for the potential needs of T.N.'s rehabilitation. In re T.N., 267 M 81, 881 P2d 1329, 51 St. Rep. 955 (1994).

Decision to Transfer Within Discretion of Youth Court: The decision whether to transfer a case from Youth Court to District Court, after the statutory criteria have been considered, is within the discretion of the Youth Court. In re J.A., 255 M 214, 841 P2d 1130, 49 St. Rep. 972 (1992), followed in In re T.N., 267 M 81, 881 P2d 1329, 51 St. Rep. 955 (1994), and in In re J.D.W., 267 M 87, 881 P2d 1324, 51 St. Rep. 958 (1994). In re T.N. was followed in St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421, 56 St. Rep. 467 (1999).

Finding of Aggressive Behavior Sufficient to Warrant Transfer to District Court: Evidence of aggressive behavior by a youth that led to the shooting of another youth constituted sufficient probable cause under the statutory criteria of this section to warrant transfer of the case to District Court. In re J.A., 255 M 214, 841 P2d 1130, 49 St. Rep. 972 (1992).

Arrest for Felony Assault (now Assault With a Weapon) and Robbery — Transfer to District Court Proper: The jurisdiction over a 17 year old was properly transferred to District Court after the Youth Court considered testimony and evidence relating to the youth's arrest for felony assault (now assault with a weapon) and robbery, prior criminal record, negative psychological evaluation, and sophistication and maturity; the seriousness of the offenses; the protection of society; and the inappropriateness of treatment in the juvenile program. In re B.J., 239 M 371, 780 P2d 1132, 46 St. Rep. 1756 (1989).

Mandatory Transfer of Prosecution of Older Youth to District Court — No Denial of Equal Protection Under U.S. or Montana Constitution: Plaintiff alleged that the automatic transfer provisions of subsection (3) of this section infringed upon a youth's rights to equal protection under the equal protection provisions of the U.S. Constitution and the Montana Constitution. The Supreme Court held that a classification based on age and gravity of the offense for automatic transfer of prosecution to District Court from Youth Court requires only a rational relationship to a legitimate state interest. The court found that interest in curbing homicides committed by teenagers and in protecting society from these violent offenders. Strict scrutiny analysis under federal equal protection is not required because procedural due process is not a fundamental right, nor is age a suspect class. Under Art. II, sec. 4, Mont. Const., the Supreme Court determined that no provision exists in the Montana Constitution that provides a youth with a fundamental right to special treatment, and thus the state's middle tier analysis is inapplicable and only a rational relationship to a legitimate state interest is required. In re Wood, 236 M 118, 768 P2d 1370, 46 St. Rep. 228 (1989).

Mandatory Transfer of Prosecution of Older Youth to District Court — Not Violation of Doctrine of Separation of Powers: The automatic transfer provisions of subsection (3) of this section, providing for the prosecution of older youth for certain offenses in District Court rather than Youth Court, are not a usurpation of the judiciary's power to hear and decide motions and is not in violation of the Montana Constitution's requirement for separation of powers. The transfer provision is within the Legislature's inherent power to create other courts under Art. VII, sec. 1, Mont. Const. The 1987 amendment providing for transfer without hearing on mitigating factors was merely a revision of protection afforded youth under earlier legislative action and not a violation of the separation of powers doctrine. In re Wood, 236 M 118, 768 P2d 1370, 46 St. Rep. 228 (1989).

Transfer of Youth to District Court for Homicide Prosecution — Age of Youth Determines Whether Hearing Necessary: For a youth between 12 years and 16 years of age charged with homicide, a hearing may be held to determine whether prosecution should be transferred to District Court. For youth 16 years old or older, no hearing is authorized, and the youth must be transferred to District Court upon a motion by the County Attorney. In re Wood, 236 M 118, 768 P2d 1370, 46 St. Rep. 228 (1989).

Youth Sixteen Years Old and Older — Mandatory Transfer of Homicide Prosecution to District Court — No Denial of Due Process: A youth does not have a constitutional due process right to a hearing to determine whether a homicide prosecution should be transferred to District Court. However, whatever criteria is set in state law for the transfer must be followed. The Supreme Court held that in a homicide prosecution, the requirement for a transfer hearing for youth between 12 years and 16 years of age and for a mandatory transfer for youth 16 years old or older is permissible. Since no irregularities in the transfer of an older youth for homicide prosecution in District Court were alleged, there was no violation of his federal due process rights. In re Wood, 236 M 118, 768 P2d 1370, 46 St. Rep. 228 (1989).

Transfer of Fifteen Year Old to District Court on Homicide Charge: Substantial credible evidence supported a Youth Court finding that a 15-year-old minor be transferred to District Court in light of the seriousness of the offense and the need to protect the community. In re K.M.H., 231 M 180, 752 P2d 162, 45 St. Rep. 526 (1988).

Termination of Youth Court Jurisdiction — No Bar to Jurisdiction of District Court: The defendant was under 18 years of age when the crime of which he was accused was committed. When the defendant was 20 years old he confessed, and the County Attorney filed a petition in the Youth Court, seeking a declaration that the defendant was a delinquent youth and requesting authority to incarcerate him. The defendant turned 21 before the motion was ruled on. He then was charged with deliberate homicide in District Court. The defendant contended that when the Youth Court lost jurisdiction over him under 41-5-205, the District Court did not have jurisdiction because once jurisdiction has attached under 41-5-203, the District Court can never assume jurisdiction over the offense underlying the Youth Court's proceeding absent transfer under 41-5-206, which did not occur here. The Supreme Court held that on termination of Youth Court jurisdiction, there was no bar to the exercise of jurisdiction by the District Court under Art. VII, sec. 4(1), Mont. Const., 3-5-302, and 46-2-201, over felony proceedings against the defendant. Exclusive original jurisdiction of the Youth Court does not divest a District Court of jurisdiction over crimes committed by a juvenile defendant. St. v. Beach, 217 M 132, 705 P2d 94, 42 St. Rep. 1080 (1985).

Prosecution of Felonies in Youth Court Proper: In cases pending in the Youth Court, two youths, ages 14 and 15, were charged with numerous felony counts. The State sought to arrest the proceeding in the Youth Court to move that the youths be transferred to the jurisdiction of the District Court under this statute. The State contends that the requirement for transfer (that a youth charged with a felony must have been 16 years of age or older at the time of the alleged unlawful conduct before the charges may be transferred to District Court) effectively gives the Youth Court all jurisdiction over all felony criminal cases if the youth charged is less than 16 years old and that this provision conflicts with Art. VII, sec. 4(1), Mont. Const., which provides for District Court jurisdiction. The State further contends that this constitutional provision gives the District Court exclusive jurisdiction in all criminal cases amounting to a felony and that a youth under 16 years is legally capable of committing a felony. In denying the state's application, the Supreme Court held that: (1) the term "original jurisdiction", as used in that section of the constitution, does not mean exclusive jurisdiction; and (2) felonies may be prosecuted in the Youth Court because when it acts in jurisdiction it is acting as a District Court. In re T.L.G. & M.E.H., 214 M 164, 692 P2d 1227, 41 St. Rep. 2388 (1984).

Accountability: The youth was charged with criminal homicide under the accountability statute. The Supreme Court rejected the youth's argument that the Youth Court could not transfer the case to the adult court because he was not charged under the criminal homicide statute, 45-5-101 (now repealed). The Supreme Court stated that there is no separate offense of accountability, only the underlying offense which has been physically committed by another but for which the youth is equally responsible. (The case was reversed on other grounds.) In re B.D.C., 211 M 216, 687 P2d 655, 41 St. Rep. 1318 (1984).

Finding Not Supported by Evidence: A petition was filed alleging a youth to be a delinquent youth, based on an allegation that the youth was guilty of criminal homicide. The Youth Court ordered a 45-day evaluation at Pine Hills, which reported to the Youth Court that Pine Hills School (now Pine Hills Youth Correctional Facility) was an appropriate placement for the youth and that the staff could help him in dealing with the problems he was having. The Youth Court later sought to transfer the case to the District Court and in its findings found that the juvenile facilities were inadequate for the youth in light of the seriousness of the offense and the need to protect the community. On appeal, the Supreme Court held that there was no evidence to support the Youth Court's adequacy of placement finding and therefore the Youth Court had no jurisdiction to transfer the case to District Court. In re B.D.C., 211 M 216, 687 P2d 655, 41 St. Rep. 1318 (1984).

Youth Legally Capable of Committing Crime — Jurisdiction When Crime Disclosed After Majority: The District Court has jurisdiction to try an individual charged at age 22 for felonies allegedly committed at age 15, as provided in the court's constitutional grant of jurisdiction over all felonies. The Youth Court Act does not contain any direct statement or implication that the Legislature intended to set the minimum age of criminal responsibility at 16, making a 15-year-old incapable of committing a crime. The primary purposes of statutes defining a "delinquent youth" and providing for transfer to District Court are to clarify that delinquency proceedings are noncriminal and to prohibit prosecution of youths in District Court while they are youths. State ex rel. Elliot v. District Court, 211 M 1, 684 P2d 481, 41 St. Rep. 1184 (1984).

Illegal Pretrial Process and Procedure — State's Right to Charge and Try Case: Youth Court petition initiating proceedings did not state the facts constituting the offense youth was charged with in ordinary and concise language so as to enable a person of common understanding to know what was intended. The petition did not include a witness list. An arrest warrant was issued out of the Youth Court, although there is no provision in the Youth Court Act for issuance of an arrest warrant. Presumably the warrant was issued under 46-6-201, but there was no showing of probable cause supported by oath or affirmation reduced to writing. The youth had already been arrested in Oklahoma at the time the warrant was issued. By what process and authority he was arrested in Oklahoma was not shown, nor was it shown he was arrested by a law enforcement officer. He was subsequently transferred to the District Court for trial as an adult and convicted of two counts of deliberate homicide. The Youth Court proceedings from issuance of the warrant for arrest onward were patently defective. However, this did not preclude the state from having him transferred to the District Court, proceeding against him, and obtaining a conviction. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Transfer From Youth Court to District Court — Youth Court Hearing — Valid Initiation of District Court Action: At Youth Court hearing at which it was decided to transfer youth to District Court for trial as an adult, testimony established probable cause for filing of an information in the District Court. This procedure satisfied the state constitutional requirement that a criminal action in the District Court be initiated either by an information after examination and commitment by a magistrate or after leave granted by the District Court. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Transfer to District Court — Hearing on Youth Court Petition Against Youth Unnecessary: The provision in 41-5-516 (now repealed) that a petition alleging delinquency or need of supervision (now intervention) shall be dismissed with prejudice if a hearing on the petition is not begun within 15 days after service does not apply when the charges are subject to transfer to the District Court and a timely motion to transfer is made. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Substantial Credible Evidence to Support Youth Court's Determination: N.C.F., a minor, is accused of shooting a 16-year-old girl in the face with a sawed-off shotgun and killing her. The State filed a motion requesting the Youth Court to waive its jurisdiction and to transfer jurisdiction to the District Court. At a hearing on the State's motion, evidence was offered that N.C.F. occasionally dry-fired a gun while it was pointed at an individual. Testimony was also offered that there was no Youth Court facility available for treatment of N.C.F., because of his size, age, independent lifestyle, and level of maturity. Based on the evidence, the Youth Court issued an order granting the State's motion. N.C.F. appealed the order. The Supreme Court found that there was substantial credible evidence to support the Youth Court's determination. In re N.C.F., 197 M 390, 643 P2d 236, 39 St. Rep. 634 (1982).

Youth Court — Holding Youth Without Arraignment Until Transfer to District Court: Defendant, age 17, was arrested and charged with homicide. Defendant refused to be interviewed by a Youth Court probation officer or a psychologist. The State moved to transfer prosecution to the District Court. Because of lack of an interview, the probation officer could not recommend for or against transfer and so advised the court. The motion was granted and defendant was ordered to be tried as an adult. Defendant contends that the cause of the transfer was his refusal to be interviewed and that the court placed on him the burden to justify continuation in Youth

Court. Placing the burden on him, defendant claims, would force him to waive his right against self-incrimination. That is not the case here; the record indicates that the Youth Court considered each factor in 41-5-206. Once the Youth Court was refused the interviews, the only source of information it could rely on was that coming other than from the defendant. In doing so the Youth Court considered each of the factors set out in 41-5-206. St. v. Rodriguez, 192 M 411, 628 P2d 280, 38 St. Rep. 578F (1981).

Insanity Defense — Discretion of Judge — Attempt: A transfer hearing is not an adjudicatory stage of the juvenile process. Appellant's constitutional right to assert the insanity defense was not denied when judge failed to allow entry of the plea at the transfer hearing. The Youth Court did not abuse its discretion in transferring the matter. Lastly, the court erred in transferring charge of attempted homicide because that charge is not specifically enumerated. In re Stapelkempr, 172 M 192, 562 P2d 825 (1977).

Factors Court Must Consider — Evidence to Be Preserved For Appeal: When juvenile was arrested and charged with attempted robbery, robbery, and aggravated assault, and State attempted to waive him to adult criminal court, evidence presented at transfer hearing was insufficient to waive jurisdiction because State failed to present evidence concerning requirements in this section and cause was remanded to Youth Court. The importance of a transfer hearing demands that the Youth Court carefully consider all factors set forth in this section, and evidence relevant to each factor should be preserved in the transcript in order to permit meaningful appellate review. In re Stevenson, 167 M 220, 538 P2d 5 (1975).

Constitutional Requirements: Conventional findings of fact or an express, formal statement of the reasons for ordering the waiver and transfer to the District Court are not required; if the reasons motivating the exercise of the juvenile court's discretion in ordering the waiver and transfer are sufficiently apparent in the record to allow meaningful appellate review, constitutional requirements are satisfied. Transfer of defendant to District Court on charge of second degree assault under former law was not an abuse of discretion when at the time of the commission of the crime the defendant was a juvenile by less than 1 month, the victim was brutally assaulted without provocation, the defendant was far removed from influences of family, home, or normal adult supervision, and trial court found that the probable cause was of such a nature that failure to bring the defendant to trial on the charge of second degree assault would have failed to preserve the best and necessary interest of the people of the State of Montana. Lujan v. District Court, 161 M 287, 505 P2d 896 (1973).

Criminal Information: District Court has no jurisdiction to authorize or order the filing of a criminal information against a juvenile child of less than 16 years of age or to try such child in the District Court. State ex rel. Dahl v. District Court, 134 M 395, 333 P2d 495 (1958). (Annotator's note: Chapter 60, sec. 3, L. 1985, amended 41-5-206 to permit the transfer to District Court of criminal proceedings against youths 12 years of age or older who are charged with one of several serious crimes listed in the statute.)

Attorney General's Opinions

Exemption of Juvenile Delinquents From Sexual Offender Registration: A juvenile who is adjudicated delinquent under the Montana Youth Court Act and whose case has not been transferred to District Court under this section is exempt from the registration requirements of the Sexual Offender Registration Act, 46-18-254 (now repealed); 46-18-255; and Title 46, ch. 23, part 5. 43 A.G. Op. 45 (1989).

41-5-208. Transfer of supervisory responsibility to district court after juvenile disposition — nonextended jurisdiction and nontransferred cases.

Compiler's Comments

2021 Amendment: Chapter 339 in (5) before "correctional facility" deleted "state youth"; and made minor changes in style. Amendment effective October 1, 2021.

2015 Amendment: Chapter 51 in (4) after "46-18-203" inserted restriction from placing youth in state adult correctional facility unless adjudicated for a felony offense; and in (5)(a) after "facility" inserted "if the youth was adjudicated for a felony offense". Amendment effective February 25, 2015.

1999 Amendment: Chapter 537 in middle of first sentence in (1) substituted "part 16" for "part 11". Amendment effective April 30, 1999.

Preamble: The preamble attached to Ch. 537, L. 1999, provided: "WHEREAS, juveniles who are 17 to 18 years of age frequently have difficulty completing their Youth Court sentences, particularly felony offenses, before they reach age 18; and

WHEREAS, extending juvenile jurisdiction with the possibility of an adult sanction for failure to comply with the conditions of a stayed sentence or for additional criminal behavior by the youth has been shown to be an effective incentive in other states to rehabilitate juveniles to keep them out of the adult correctional system and allow them to pay restitution, finish treatment, and complete their education; and

WHEREAS, the maximum extension or period of jurisdiction may not exceed the period of an adult sentence without violating equal protection; and

WHEREAS, limiting section 41-5-208, MCA, supervision transfers after the youth reaches the age of 18 to additional community corrections programs of the Department of Corrections subject to the same adult sentence limit on supervision will also allow juveniles to complete their sentences, to be held accountable, and to avoid an adult conviction, without violating equal protection of the laws."

Severability: Section 7, Ch. 537, L. 1999, was a severability clause.

1997 Amendments: Chapter 286 in (1) and (2) substituted "under 41-5-1513" for "under 41-5-523" ((2) amendment voided by Ch. 498).

Chapter 498 in (1) inserted first sentence allowing transfer of jurisdiction to District Court and transfer of supervisory responsibility for cases that were not originally transferred under 41-5-206 or prosecuted as extended jurisdiction juvenile cases and at beginning of second sentence inserted "A transfer under this section may be made to" and at end, after "21 years of age", deleted "the youth court judge may transfer jurisdiction to district court and order the transfer of supervisory responsibility and the youth's case files to the department"; inserted (2) requiring hearing and establishing procedure for hearing; inserted (3) allowing court to order transfer to District Court after hearing; in (4) substituted "disposition previously imposed" for "disposition imposed" and after "the district court may" inserted "after hearing"; and made minor changes in style. Amendment effective May 2, 1997.

Chapter 550 in (1) inserted reference to 41-5-1513. Amendment effective July 1, 1997.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Section 79, Ch. 550, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

Section 17, Ch. 498, L. 1997, provided: "[This act] applies to all offenses committed on or after [the effective date of this act]." Effective May 2, 1997.

Severability: Section 15, Ch. 498, L. 1997, was a severability clause.

Section 80, Ch. 550, L. 1997, was a severability clause.

Effective Date: Section 10, Ch. 438, L. 1995, provided: "[This act] [41-5-208] is effective on passage and approval." Approved April 14, 1995.

Code Commissioner Change: In (1), the Code Commissioner deleted a reference to the former Department of Family Services transferring records to the Department of Corrections because the juvenile justice functions of both agencies were consolidated by Ch. 546, L. 1995.

Case Notes

Continuation of Unfulfilled Sexual Offender Treatment Program — Youth Court Did Not Err in Transferring Jurisdiction to District Court With Program as Condition — No Double Jeopardy: The Youth Court did not err in granting the state's motion to transfer the appellant's Youth Court proceeding to the District Court pursuant to 41-5-208 after he failed to complete his sexual offender treatment program (SOTP). The appellant contended that the Youth Court improperly considered evidence that should have been suppressed, but irrespective of how or why the appellant was removed from SOTP, he undisputedly did not complete that portion of his disposition while under the Youth Court's jurisdiction. The appellant was given the opportunity to comply with the SOTP under the jurisdiction of the District Court, and the Youth Court did not err in granting the state's motion to transfer to ensure continued compliance with the court's disposition. Additionally, the state's effort to ensure that the appellant completed the unfulfilled portion of the disposition did not constitute additional punishment and thus did not constitute double jeopardy. In re J.W., 2016 MT 330, 386 Mont. 1, 387 P.3d 195.

Additional Adult Conditions Added Without Hearing and Finding of Violation — Underlying Youth Court Disposition Condition Violated: After A.D.T., a youth adjudicated as a juvenile sexual offender, turned 18, he was transferred from the jurisdiction of the Youth Court to the District Court for compliance with outpatient treatment. Because A.D.T. agreed to a request to add 41 conditions of probation related to adult probationers convicted of sexual offenses, the court amended A.D.T.'s probation conditions. Two months later, the probation officer alleged that A.D.T. had violated 4 of the 41 conditions and sought revocation of his probation. Under 41-5-208, the 41 new adult probation conditions could not be imposed absent a hearing and a finding that A.D.T had violated his Youth Court disposition. However, the evidence at the revocation hearing substantiated a finding that A.D.T. had violated the terms of his Youth Court disposition when he was terminated from outpatient sex offender treatment. Although the District Court erred in denying A.D.T.'s motion to dismiss the revocation petition, it reached the correct result in finding that he had violated the terms of his disposition. In re A.D.T., 2015 MT 178, 379 Mont. 452, 351 P.3d 682.

Failure to Notify Parents of Hearing to Transfer Jurisdiction to District Court — Statutory Notice Requirement Not Jurisdictional — Youth Court Jurisdiction: E.G. was found to be a delinquent youth by the Youth Court. The commitment order stated that the Youth Court would retain jurisdiction until E.G. was 21 and would consider transfer of the case to District Court. Shortly after E.G. turned 18, the state filed a motion to transfer supervisory control to the District Court. E.G. was represented by his attorney and expressly consented to the transfer. The parties discussed the parental notification requirements in 41-5-208, but E.G. consented to continue the hearing, regardless of whether his parents received notice. The Youth Court entered an order granting the motion to transfer supervision of E.G. to District Court until he was age 25, with potential release from supervision for good behavior. However, after E.G. violated conditions of his probation, the District Court sentenced him to the Department of Corrections until age 25, with no time suspended. On appeal, E.G. claimed that the District Court lacked jurisdiction to revoke probation because his parents did not receive notice of the Youth Court transfer hearing under 41-5-208. The Supreme Court affirmed the sentence and held that the parental notice requirement does not withdraw, circumscribe, limit, or affect the Youth Court's jurisdiction over the issue of transferring supervision to District Court. In re E.G., 2014 MT 148, 375 Mont. 252, 326 P.3d 1092.

Modification to Transfer Order Regarding Parole Eligibility — District Court Affirmed: As a part of his sentence as a delinquent youth, the defendant was required to complete two phases of sex offender treatment in order to be eligible for parole. At the time of his transfer to the Montana State Prison at age 18, the defendant had not completed treatment. He subsequently filed a motion to modify his transfer order to remove the requirement of sex offender treatment and to terminate Department of Corrections supervision of him to allow him to be placed in an out-of-state treatment facility to address his developmental disabilities and mental illness. The District Court modified the transfer order to remove the treatment requirement but not to terminate the Department's supervision. The defendant appealed to the Supreme Court, which affirmed the District Court's modification of the transfer order, concluding that it was consistent with the Youth Court Act policy of ensuring an offender completes treatment. In re A.S.M., 2014 MT 133, 375 Mont. 147, 325 P.3d 1251.

Retention of Jurisdiction Proper: A youth appealed the Youth Court's denial of his motion to dismiss for lack of jurisdiction, arguing that the Youth Court lost jurisdiction when his probation ended when he turned 18 years old and therefore lacked jurisdiction to transfer the matter to District Court. The Supreme Court, distinguishing In re K.D.K., 2006 MT 187, 333 Mont. 100, 141 P.3d 1212, affirmed, concluding that the Youth Court retained jurisdiction because it had not terminated its jurisdiction pursuant to 41-5-205 and because 41-5-208 allows the Youth Court to transfer a matter to District Court at any time after the youth reaches the age of 18 but before the youth reaches the age of 21. In re T.M.L., 2012 MT 9, 363 Mont. 304, 268 P.3d 1255.

Appropriate Conditions on Probation of Delinquent and Serious Youth Sex Offender: As a youth, D.A.S. was convicted of sexual assault and placed in a youth correctional facility. When D.A.S. turned 18, jurisdiction and supervisory responsibility were transferred from Youth Court to District Court until age 25, and numerous supervisory conditions were attached, including prohibitions on the use of drugs and alcohol, a curfew, and a requirement that D.A.S. obtain a GED 1 year prior to expiration of the sentence. D.A.S. objected to these conditions on grounds that they were unrelated to the crime of sexual assault, but the Supreme Court affirmed, applying St. v. Ashby, 2008 MT 83, 342, M 187, 179 P3d 1164 (2008), which allows imposition of conditions that have a nexus either to the offense or to the offender. In this case, both alcohol and drug prohibitions were reasonably related to D.A.S.'s rehabilitation and placement in a sexual offender program. A curfew was reasonable to ensure development of a consistent and healthy routine and was reasonable given legislative intent to provide youth offenders with additional supervision. Completion of the high school equivalency test was not an abuse of discretion because it was consistent with legislative intent to rehabilitate youth offenders through competency development, especially given D.A.S.'s expressed desire to further his education. In re D.A.S., 2008 MT 168, 343 M 360, 184 P3d 349 (2008).

District Court Order Revoking Youth's Probation and Committing Him to Department Judged Reversible Error — No Authority of Department to Impose Standard Probationary Conditions: As a youth of 13, defendant committed sexual assault and was placed on probation with the condition that he complete an outpatient sexual offender treatment program. When the program had not been completed 2 years later, defendant's probation was revoked and he was placed at Pine Hills until age 18 and until completion of the Pine Hills sexual offender program, and if he failed to complete the program, he would be required to register as a sexual offender. When defendant turned 18, he was released from Pine Hills without completing the program. Defendant then stipulated to transfer supervisory control to District Court. The stipulation included a provision that defendant complete sexual offender treatment by age 25 and provided that defendant would have to register as a sexual offender if the treatment was not completed. Although the stipulation contained no other conditions or restrictions, defendant also signed a form that included the standard conditions of probation adopted by the Department of Corrections (DOC). Defendant subsequently violated some of the standard probation conditions, and the state petitioned to revoke probation. Defendant moved to dismiss the petition, but the District Court denied the motion and committed defendant to the DOC until age 25. On appeal, the Supreme Court reversed. The stipulation placed only one condition on defendant, that being the requirement to complete sexual offender treatment by age 25. Defendant was not yet 25 years old, so that condition was not violated. The standard DOC probation conditions were imposed by the DOC, not by the court, and the DOC was not authorized to add conditions to those articulated by the court's judgment, nor did the court have authority to revoke defendant's probation for failure to abide by conditions added by the DOC after the sentence. Therefore, the District Court's judgment revoking defendant's probation and committing him to the DOC was reversible error. St. v. Andersen-Conway, 2007 MT 281, 339 M 439, 171 P3d 678 (2007).

State Breach of Plea Agreement — Remand for Resentencing in Conformity With Sentencing Stipulation: Pursuant to a plea bargain, a youth was placed on probation until age 18 with a sentencing stipulation that if the youth did not follow treatment plans or meet other requirements, the matter would be transferred to District Court and adult supervision. The youth subsequently violated probation and was sent to the Pine Hills correctional facility. The youth reoffended at Pine Hills, and the state moved to transfer the case to District Youth Court. Despite the sentencing stipulation, the state moved for a custodial sentence, and the Youth Court concurred with the state's recommendation and sentenced the youth to the Department of Corrections until age 25, with the last 3 years suspended. The youth appealed. The Supreme Court reversed. Both parties were bound by the terms of the plea agreement, and although the case was transferred to District Court as per the agreement, the state failed to follow the terms of the agreement when it sought a custodial sentence rather than adult supervision for the youth. Upon resentencing following the subsequent revocation for violation of sentencing conditions, the youth was entitled to receive the sentence that was presented to and approved by the Youth Court, and the Youth Court abused its discretion by failing to hold the state to the terms of the sentencing stipulation and by ordering the custodial sentence. On remand, the Youth Court was ordered to resentence the youth in accordance with the terms of the sentencing stipulation. In re H.C.R., 2007 MT 64, 336 M 369, 155 P3d 1221 (2007), following St. v. Rardon, 1999 MT 220, 296 M 19, 986 P2d 424 (1999), and St. v. Rardon, 2002 MT 345, 313 M 321, 61 P3d 132 (2002).

Revocation of Juvenile Offender's Suspended Sentence and Commitment to Department Authorized: Following a dispositional hearing, the Youth Court entered an order declaring Lesmeister a delinquent youth and serious juvenile offender, transferred the 18 year old's case to District Court, and placed the youth on probation until age 25, with the entire commitment suspended upon certain conditions. One year later, on a petition filed by the Cascade County Attorney alleging numerous probation violations, the District Court revoked Lesmeister's suspended sentence and committed the youth to the Department of Corrections until age 25. On appeal, Lesmeister challenged the legality of the court's commitment to the Department, arguing that because he was not incarcerated in a youth facility when his case was transferred to the District Court, this section allowed the court to impose only the conditions prescribed under 46-18-201 through 46-18-203, which did not include a sentence to the Department of Corrections. In affirming the District Court decision, the Supreme Court ruled that state law authorizes a District Court to impose a sentence to commit an offender to the Department of Corrections when all but the first 5 years are suspended. St. v. Lesmeister, 2000 MT 318, 302 M 500, 15 P3d 392, 57 St. Rep. 1344 (2000).

Youth Court Transfer Provision Illegal Mechanism to Rectify Youth's Failure to Pay Restitution — Ex Post Facto: As a teenager, Young entered a consent decree to dispose of three felony property offenses. He was ordered to pay $3,788 in restitution while on probation, but paid only $125. Later, Young was adjudicated as delinquent and sentenced to the Department of Corrections until age 18, with conditions. Restitution was not required, but the prior restitution was reinstated. Young then committed new offenses and was institutionalized until age 19, but restitution was not made by the time that he was 19. Young's cases were then transferred to District Court pursuant to this section, and he was placed on probation until the restitution was paid. Young appealed the transfer of the case, contending that he had successfully completed a residential treatment program in Utah according to the court's disposition order and that applying this section violated state and federal constitutional ex post facto provisions because the law was not in effect when he committed any of the offenses and because applying the transfer provisions would increase the possible penalty for offenses that he previously admitted. The Supreme Court found that ex post facto application of the transfer provisions did not provide a lawful mechanism to rectify Young's failure to pay restitution. Applying the two-part test in St. v. Leistiko, 256 M 32, 844 P2d 97 (1992), the court held that the transfer provision was retrospective because it was not in effect when Young committed the offenses and that this section is more onerous than the prior law because it changed the legal consequences by allowing the Youth Court to extend probation for an additional 6 years through transfer to the District Court. Since Young had successfully completed the Utah residential treatment program and was age 20 at the time that the appeal was decided, the cases should be closed. In re Young, 1999 MT 195, 295 M 394, 983 P2d 985, 56 St. Rep. 759 (1999).

41-5-215. Youth court and department records — notification of school.

Compiler's Comments

2019 Amendments — Composite Section: Chapter 248 in (2)(g) substituted "county or regional interdisciplinary child information and school safety team" for "county interdisciplinary child information and school safety team"; deleted former (3) (see 2019 Session Law for former text); and made minor changes in style. Amendment effective May 2, 2019.

Chapter 344 inserted (2)(k) regarding attorneys, guardians ad litem, and child advocates; in (3)(a) after "jurisdiction over the matter" deleted "or the department of corrections for youth under the supervision of the department"; in (3)(c) after "youth court's supervision" deleted "or the discharge of the youth by the department of corrections" (superseded by Ch. 248); and made minor changes in style. Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2017 Amendment: Chapter 45 deleted former (2)(i) that read: "(i) persons allowed access to the reports referred to under 45-5-624(7)"; and made minor changes in style. Amendment effective October 1, 2017.

2013 Amendment: Chapter 364 in (2)(g) after "information" inserted "and school safety"; in (3)(a) substituted "and according to the guidelines in subsection (3)(f) of this section, the chief probation officer or other designee from the district that has jurisdiction over the matter or the department of corrections for youth under the supervision of the department" for "the youth court" and near end after "youth's" substituted "past or current" for "suspected"; in (3)(a)(i) at beginning deleted "the youth has admitted the allegation or", after "court" inserted "or charges are filed in district court alleging a violation of any section in Title 45, chapter 5", and at end substituted "or" for "and"; in (3)(a)(ii) substituted current language for "a juvenile probation officer has reason to believe that a youth is currently involved with drug use or other criminal activity that has a bearing on the safety of children"; in (3)(c) substituted current language for "In addition to the notice requirements in subsection (3)(a), the youth court shall provide notice to the superintendent of a school district for a level 3 sexual offender as provided in 41-5-1513(3)"; inserted (3)(f) concerning notification to school district; and made minor changes in style. Amendment effective July 1, 2013.

2009 Amendments — Composite Section: Chapter 54 inserted (2)(k) providing that youth court records are open to persons conducting required evaluations; and made minor changes in style. Amendment effective March 23, 2009.

Chapter 373 inserted (3)(c) requiring the youth court to provide notice of level 3 sexual offenders to school superintendents; and made minor changes in style. Amendment effective April 28, 2009.

Retroactive Applicability: Section 4, Ch. 373, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to a delinquent youth, as defined in 41-5-103, adjudicated for the commission of a sexual offense, as defined in 46-23-502, before [the effective date of this act] [effective April 28, 2009] but for whom no disposition has been ordered pursuant to 41-5-1513."

2005 Amendment: Chapter 423 in (1) at beginning inserted reference to formal youth court records; inserted (3)(d) allowing enforcement of school disciplinary procedures and prohibiting further disclosure; deleted former (5) that read: "(5) The identity of a youth who for the second or subsequent time admits violating or is adjudicated as having violated a statute must be disclosed by youth court officials to the administrative officials of the school in which the youth is a student. The administrative officials may enforce school disciplinary procedures that existed at the time of the admission or adjudication. The information may not be further disclosed and may not be made part of the student's permanent records"; and made minor changes in style. Amendment effective October 1, 2005.

2003 Amendment: Chapter 114 in (2)(i) substituted "reports" for "records"; and made minor changes in style. Amendment effective October 1, 2003.

1999 Amendments — Composite Section: Chapter 106 in (1) at beginning deleted "Except as provided in subsection (2), all youth court records on file with the clerk of court, including" and after "decrees" inserted "on file with the clerk of court are public records and"; deleted former (6) that read: "(6) After youth court and department records, reports of preliminary inquiries, predispositional studies, and supervision records of probationers are sealed, they are not open to inspection except, upon order of the youth court, for good cause to:

(a) those persons and agencies listed in subsection (2); and

(b) adult probation professional staff preparing a presentence report on a youth who has reached the age of majority"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 564 at beginning of (1) substituted "Reports" for "Except as provided in subsection (2), all youth court records on file with the clerk of court, including reports"; inserted (3) requiring youth court to notify school of youth's suspected drug use or criminal activity; inserted (6) allowing school district to disclose personally identifiable information to youth and law enforcement; in (8)(a) inserted reference to subsection (3) (amendment by Ch. 106 rendered the amendment void); and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendments: Chapter 450 inserted (3) concerning information available to victim; inserted (4) concerning disclosure of information to administrative officials of school; and made minor changes in style.

Chapter 480 inserted (2)(j) regarding persons allowed access under 42-3-203; and made minor changes in style.

Chapter 550 in (2) inserted "youth assessment materials" and after "records of probationers" deleted "and any report, charge, or allegation that is not adjudicated pursuant to this chapter"; in (2)(i) inserted "referred to"; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 172, Ch. 480, L. 1997, was a severability clause.

Section 80, Ch. 550, L. 1997, was a severability clause.

Applicability: Section 173, Ch. 480, L. 1997 provided: "(1) [Sections 1 through 156] [Title 42, chapters 1 through 7, and Title 52, chapter 8] apply to proceedings commenced on or after October 1, 1997.

(2) A petition for adoption filed prior to October 1, 1997, is governed by the law in effect at the time the petition was filed.

(3) The putative father registry requirements apply to children born on or after October 1, 1997."

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

1995 Amendments — Composite Section: Chapter 466 in (1), at beginning, inserted exception clause, after "all youth court" deleted "and youth court-related department", after "records" inserted "on file with the clerk of court", after "including" deleted "social, medical, and psychological records", substituted "petitions, motions, other filed pleadings, court findings, verdicts, orders, and decrees" for "predispositional studies, and supervision records of probationers", before "inspection" inserted "public", and substituted "until the records are sealed under 41-5-604 [renumbered 41-5-216]" for "prior to the sealing of the records"; in (2), in introductory clause, inserted "Social, medical, and psychological records, predispositional studies, supervision records of probationers, and any report, charge, or allegation that is not adjudicated pursuant to this chapter are open"; deleted former (3) and (4) that provided restrictions on public inspection (see 1995 Session Law for text); adjusted subsection references; and made minor changes in style. Amendment effective April 14, 1995.

Chapter 481 inserted (2)(i) regarding persons allowed access under 45-5-624(7); and made minor changes in style.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

1991 Amendments: Chapter 510 inserted (1)(g) relating to county interdisciplinary child information team; and made minor changes in style. Amendment effective July 1, 1991.

Chapter 655 inserted (1)(h) relating to local interagency staffing group; and made minor changes in style. Amendment effective July 1, 1991.

1987 Amendments: Chapter 515 at beginning of (3) deleted "All other court records, including docket", substituted "pleadings" for "papers", deleted reference to transcripts of testimony, near middle inserted reference to public inspection, at end substituted "only when related to an offense for which access must be allowed under 41-5-601" for "by those persons and agencies listed in subsection (1) of this section and the parties to the proceedings and their counsel", and made minor changes in phraseology.

Chapter 609 at beginning of (1), after "Youth court", inserted "and youth court-related department"; near middle of (4), after "youth court", inserted "or the department"; and at beginning of (5), after "youth court", inserted "and department".

Case Notes

Permissible Use of Records of Juvenile Crimes — Impeachment: Before his trial on charges of sexual intercourse without consent and sexual assault, the defendant filed a motion to allow his counsel to inspect the Youth Court records of any complaining witnesses on the grounds that the records might have a bearing on the competency and veracity of those witnesses. The motion was denied, and the judge said he would examine the records to determine if any of the girls should be examined by a psychologist before testifying. The Supreme Court found that the judge's ruling denying the defendant's motion to inspect denied him the right to confront the witnesses against him. However, their review of the juvenile records convinced them that the error here was harmless. They declined to adopt a rule allowing evidence of prior juvenile convictions to be used as evidence to attack the general credibility of a witness. The permissible use of those juvenile records was confined to demonstrating, by cross-examination, a witness's bias, prejudice, or motive. It was within the discretion of the trial judge to determine competency, and his findings would not be overturned absent an abuse of discretion. St. v. Camitsch, 192 M 124, 626 P2d 1250, 38 St. Rep. 563 (1981).

Juvenile Court Records Not Criminal: Trial court was not in error in reading into the record in open court prior events of defendant's life as disclosed by his juvenile court record where the juvenile court record was not challenged by defendant or his counsel. (See sections 10-601 through 10-611, R.C.M. 1947 (now repealed).) St. v. Manning, 149 M 517, 429 P2d 625 (1967).

Use of Prior Juvenile Record: The reading into the record in open court of defendant's prior juvenile record was proper where the events contained in the juvenile record were not criminal. The court after reading the written record asked if there was any legal excuse why judgment and sentence of court should not be pronounced, and no challenge to the recited juvenile record was made. (See sections 10-601 through 10-611, R.C.M. 1947 (since repealed).) St. v. Manning, 149 M 517, 429 P2d 625 (1967).

Law Review Articles

Publication of the Names of Juvenile Felons, Geis, 23 Mont. L. Rev. 141 (1962).

41-5-216. Disposition of youth court, law enforcement, and department records — sharing and access to records.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 1, Ch. 551, L. 2023. Amendment effective October 1, 2023.

2021 Amendment: Chapter 576 in (12) substituted reference to the department of revenue for reference to the department of public health and human services, substituted reference to 16-12-503 for reference to 50-46-307, and substituted reference to 16-12-203 for reference to 50-46-308. Amendment effective January 1, 2022.

Severability: Section 113, Ch. 576, L. 2021, was a severability clause.

2017 Amendments — Composite Section: Chapter 45 in (4) after "records referred to in 42-3-203" deleted "reports referred to in 45-5-624(7)"; and made minor changes in style. Amendment effective October 1, 2017.

Chapter 56 in (1) after "Formal" inserted "and informal"; in (5) after "After formal" inserted "and informal" and after "for good cause" deleted "including when a youth commits a new offense"; in (5)(b) substituted "probation and parole staff" for "probation professional staff" and at end substituted "an adult with an existing sealed youth court record" for "a youth who has reached the age of majority"; in (6)(a) near middle substituted "office of court administrator" for "department of public health and human services" and at end after "research and program evaluation" deleted "as provided in subsection (6)(b)"; in (6)(b) after "department of public health and human services" inserted "the office of court administrator"; in (6)(b)(i) near middle substituted "office of court administrator" for "department of public health and human services"; in (7)(b) substituted "are confidential and may be shared only with those persons and agencies listed in 41-5-215(2)" for "may be maintained and inspected only by youth court personnel upon a new offense prior to the youth's 18th birthday"; in (8) after "Nothing in this section prohibits the" deleted "intra-agency use or information", after "juvenile probation management information system" inserted "to a person or agency listed in 41-5-215(2)", and deleted last two sentences that read: "Electronic records of the youth court may not be shared except as provided in 41-5-1524. If a person authorized under 41-5-215 is in need of a copy of a record that is in electronic form, the juvenile probation officer shall make only a physical copy of the record that is authorized and the person receiving the record shall destroy the record after it has fulfilled its purpose or as provided in subsection (2) of this section"; in (9) after "This section does not prohibit the" deleted "intra-agency use or information" and at end substituted "A person or agency receiving the youth court record shall destroy the record after it has fulfilled its purpose" for "If a person authorized under 41-5-215 is in need of a copy of a record that is in electronic form, the department shall make only a physical copy of the record that is authorized and the person receiving the record shall destroy the record after it has fulfilled its purpose or as provided in subsection (2) of this section"; in (11) after "evaluations as required by 41-5-2003" inserted "and studies conducted between individuals and agencies listed in 41-5-215(2)"; and made minor changes in style. Amendment effective March 1, 2017.

Chapter 408 in (12) before "50-46-308" inserted "a license pursuant to". Amendment effective May 19, 2017.

Severability: Section 30, Ch. 408, L. 2017, was a severability clause.

2011 Amendment: Chapter 419 inserted (12) relating to whether an applicant for a registry identification card for medical use of marijuana is under youth court supervision. Amendment effective July 1, 2011.

Severability: Section 39, Ch. 419, L. 2011, was a severability clause.

2009 Amendment: Chapter 54 inserted (11) providing that access to youth court records is not prohibited for purposes of conducting required evaluations. Amendment effective March 23, 2009.

2007 Amendments — Composite Section: Chapter 139 inserted (10) providing that sharing of youth court records with certain facilities is not prohibited upon placement of youth in facility; and made minor changes in style. Amendment effective October 1, 2007.

Chapter 483 in (4) at end after "45-5-624(7)" inserted "or the information referred to in 46-23-508, in any instance in which the youth was required to register as a sexual offender pursuant to Title 46, chapter 23, part 5"; and made minor changes in style. Amendment effective May 11, 2007.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

Retroactive Applicability: Section 31, Ch. 483, L. 2007, provided: "[Sections 2, 3, and 19 through 24] [amending 41-5-216, 41-5-1513, 46-23-502, 46-23-504, 46-23-505, 46-23-506, 46-23-508, and 46-23-509] apply retroactively, within the meaning of 1-2-109, to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989; and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

2005 Amendment: Chapter 423 in (1) at beginning inserted "Formal" and after "sealed" deleted "3 years after supervision for an offense ends" and inserted "on the youth's 18th birthday"; in (4) inserted "medical records"; in (5) near beginning before "youth" inserted "formal"; in (6)(a) near beginning before "youth" inserted "formal" and after "services" inserted "and by the department"; in (6)(b) after "services" inserted "and the department" and before "management" inserted "respective"; in (6)(b)(i) after "services" inserted "or by the department"; inserted (7) regarding disposition of informal youth court records; inserted (8) regarding intra-agency use and information sharing of records within juvenile probation management information system and prohibiting sharing of electronic records; inserted (9) regarding intra-agency use and information sharing of records within department's youth management information system and prohibiting sharing of electronic records; and made minor changes in style. Amendment effective October 1, 2005.

2003 Amendment: Chapter 114 in (4) near end before "45-5-624(7)" inserted "reports referred to in"; and made minor changes in style. Amendment effective October 1, 2003.

1999 Amendment: Chapter 106 in (1) at beginning deleted "Except as provided in subsections (2) and (5)", after "enforcement records" inserted "and department records that are not exempt from sealing under subsections (4) and (6) and that pertain", deleted former second sentence that read: "The records may be unsealed if a new offense is committed", and in second sentence after "records" deleted "and files not exempt from sealing under subsection (5)"; in (2) at beginning substituted exception clause for "Upon the physical sealing of" and near middle after "agency" substituted "other than the department" for "or department"; at beginning of (3) inserted exception clause; inserted (5) regarding sealing of youth court and other records and providing exception for inspection to certain persons or agencies upon showing of good cause or upon commission of new offense; inserted (6) regarding maintenance and use of electronic records of the management information system; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendment: Chapter 480 at end of (5) inserted "42-3-203 or".

Severability: Section 172, Ch. 480, L. 1997, was a severability clause.

Applicability: Section 173, Ch. 480, L. 1997 provided: "(1) [Sections 1 through 156] [Title 42, chapters 1 through 7, and Title 52, chapter 8] apply to proceedings commenced on or after October 1, 1997.

(2) A petition for adoption filed prior to October 1, 1997, is governed by the law in effect at the time the petition was filed.

(3) The putative father registry requirements apply to children born on or after October 1, 1997."

1995 Amendments — Coordination Instruction — Composite Section: Chapter 251 in (1), after "fingerprints", inserted "DNA records"; and made minor changes in style. Amendment effective March 27, 1995. The amendment in (1) was rendered void by sec. 10, Ch. 466.

Section 5, Ch. 466, L. 1995, amended this section. Chapter 466 also contained a coordination instruction in sec. 10 that provided that if both Ch. 466 and House Bill No. 551 are passed and approved and if both include a section that amends 41-5-604, then 41-5-604 (renumbered 41-5-216) is to read as provided in the coordination instruction. House Bill No. 551 was approved as Ch. 251, L. 1995. In accordance with the coordination instruction, the amendments to this section contained in sec. 5, Ch. 466, L. 1995, are therefore void (see 1995 Session Law for text). Section 10, the coordination instruction, amended 41-5-604 (renumbered 41-5-216) as follows: in (1) inserted exception clause and after "law enforcement records" deleted "except fingerprints and photographs"; in (2), after "files", inserted "not exempt from sealing under subsection (5)"; in (5) inserted "fingerprints, DNA records, photographs" and at end substituted "in any case in which the youth did not fulfill all requirements of the court's judgment or disposition" for "directly related to an offense to which access must be allowed under 41-5-601"; and made minor changes in style. Amendment effective April 14, 1995.

Chapter 481 in (5), at end, inserted "or records referred to in 45-5-624(7)"; and made minor changes in style.

Chapter 528 in (1), at end of first sentence, substituted "sealed 3 years after supervision for an offense ends" for "sealed when the youth reaches the age of 18 years" and inserted second sentence allowing records to be unsealed; and made minor changes in style.

Style changes in the chapters were slightly different. In each case, the codifier chose the most appropriate.

1987 Amendment: At beginning of (1) substituted "All youth court records and law enforcement records except fingerprints and photographs" for "All court findings, orders, judgments, and the legal and social files and records of the court, probation services, and law enforcement agencies"; deleted last sentence of (4) that read: "The records of youths who were 28 years old or older on July 1, 1974, may be destroyed with the consent of the youth court judge or county attorney"; and at beginning of (5) inserted "The requirements for sealed records in", substituted "access" for "publicity", and deleted reference to subsection (2) of 41-5-601.

1981 Amendment: Inserted "or to records directly related to an offense to which publicity must be allowed under subsection (2) of 41-5-601" at the end of (5).

Administrative Rules

ARM 20.9.607 Confidentiality, disposition, and dissemination of records and information.

Case Notes

No Youth Court Authority to Expunge DUI Offenses — Elements of Judicial Estoppel Not Met: Following Darrah's completion of a Youth Drug Court program in 2004, the Youth Court ordered that Darrah's prior criminal record be expunged, including a previous minor in possession offense and a 2002 DUI. Darrah was subsequently charged in 2005 with second offense DUI, based on the prior 2002 DUI, and in 2006 Darrah was charged with third offense DUI. Citing the principle of judicial estoppel, Darrah asserted that because the Youth Court record had been expunged, the 2002 DUI should not count against him. The District Court disagreed and Darrah appealed. The Supreme Court applied the elements of judicial estoppel set out in Vogel v. Intercontinental Truck Body, Inc., 2006 MT 131, 332 M 322, 137 P3d 573 (2006), and determined that Darrah had failed to demonstrate that each element was met, so judicial estoppel did not apply. Further, there is no authority under which the Youth Court could order expungement of Darrah's DUI offenses. The District Court was affirmed. St. v. Darrah, 2009 MT 96, 350 M 70, 205 P3d 792 (2009), following St. v. Chesley, 2004 MT 165, 322 M 26, 92 P3d 1212 (2004).

Inclusion of Juvenile Record in Presentence Report: Section 41-3-205 does not support appellant's contention that it was improper to include his juvenile record in a presentence report since that section applies only to dependence and neglect situations and not to proceedings for delinquents under the Montana Youth Court Act. Section 41-5-604 (renumbered 41-5-216) does not support appellant's contention either, because the prevention of public dissemination of a juvenile record once that individual attains an age of majority is accomplished by sealing the presentence report. St. v. Radi, 185 M 38, 604 P2d 318 (1979).

Attorney General's Opinions

Certain Youth Court Records Not Subject to Sealing Requirements: A 1987 amendment to 41-5-601 (now repealed) deleted the bar against disseminating information concerning proceedings to find a youth delinquent; further, the intent of a 1987 amendment to subsection (5) of this section (formerly 41-5-604(5)) was to not seal the records related to delinquency proceedings. The overall effect of the 1987 amendments was that Youth Court records concerning a youth proceeded against as a delinquent youth or found to be a delinquent youth are not confidential and are not subject to sealing requirements of the Montana Youth Court Act. 43 A.G. Op. 7 (1989).

Youth Court Act — Applicability to Alcohol Possession Proceedings in Other Courts: The provisions of the Montana Youth Court Act that apply to a youth charged with a violation of 45-5-624, illegal possession of alcohol, in justice's, municipal, or city court proceedings are 41-5-303 through 41-5-307 (renumbered 41-5-322, 41-5-331, 41-5-341, 41-5-344 (now repealed), and 41-5-1206), 41-5-402 (renumbered 41-5-1303), 41-5-601 (now repealed), 41-5-602 (now repealed), and this section (formerly 41-5-604). A youth charged with a violation of 45-5-624 is further entitled to the following rights in addition to those normally accorded defendants in justice's, municipal, or city court criminal proceedings: (1) service of the criminal summons on both the youth and a custodial parent or guardian; (2) advisement of the right to retained or, if appropriate, appointed counsel; and (3) waiver of the right to counsel only by both the youth and a custodial parent or guardian. 40 A.G. Op. 43 (1984). (Annotator's note: Chapter 105, sec. 1, L. 1985, amended 45-5-624 to remove imprisonment from the list of sentences that can be imposed upon youths convicted of violating the statute.)

41-5-220. Electronic records — formal policies and administrative rules required.

Compiler's Comments

2017 Amendment: Chapter 56 deleted former (3) that read: "(3) After October 1, 2005, any management information system that is developed and that contains formal or informal youth court records or department records must be maintained separately from any adult offender management information system in the criminal justice or corrections system." Amendment effective March 1, 2017.

Effective Date: This section is effective October 1, 2005.

Administrative Rules

Title 20, chapter 9, subchapter 8, ARM Confidentiality of youth records.

41-5-221. Penalty for unauthorized disclosure of or access to records.

Compiler's Comments

Effective Date: This section is effective October 1, 2005.

Part 3
Custody and Detention

Part Case Notes

Holding Youth Without Appearance Until Transfer to District Court: Defendant claims he was not brought to a magistrate "without necessary delay". Defendant surrendered to the authorities and was placed in jail but was not taken before a magistrate until some 20 days later. Although defendant could show no prejudice due to this lapse of time, the Supreme Court strongly disapproved of any deliberate attempt by the State to avoid arraignment "without unnecessary delay" by first arresting and holding a juvenile under the Youth Court Act for a sustained period of time and then later attempting to prosecute the juvenile as an adult. The Supreme Court stated that if a defendant could show prejudice or a deliberate attempt by the prosecution to circumvent a speedy arraignment, they would not hesitate to fashion an appropriate remedy. St. v. Rodriguez, 192 M 411, 628 P2d 280, 38 St. Rep. 578F (1981).

41-5-321. Taking into custody.

Compiler's Comments

2001 Amendment: Chapter 114 deleted former (1)(c) that read: "(c) by a law enforcement officer, agent of the department, county attorney, or a person or physician treating a youth when there is reason to believe the youth is a youth in need of care and that the residence of the youth or the custody by the person legally responsible for the youth presents an imminent danger to the life or health of the youth"; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 326 inserted (1)(d) providing for taking a youth into custody for violation of condition of home arrest placement; and made minor changes in style. Amendment effective July 1, 1999.

Case Notes

Truant Smelling of Alcohol — Particularized Suspicion for Arrest — Motion to Suppress Properly Denied: A 14-year-old boy's mother called his school, reported that he had not returned home the previous night, and requested that he be picked up. The school resource officer notified police and asked that the boy be brought to school if found. An officer later found the boy on the street smelling of alcohol and took the boy to the police station where it was discovered that several town businesses had been burglarized during the night, including a bowling alley where money and liquor had been stolen. Money and liquor were found on the youth, and his shoes were taken as evidence to see if they matched prints found at the bowling alley. The youth moved that all evidence be suppressed, but the motion was denied. On appeal, the Supreme Court affirmed. Based on the fact that the officer smelled alcohol on the youth, the officer's particularized suspicion that the youth had been drinking developed into probable cause to believe that the youth committed the offense of consuming or possessing alcohol. Because the officer had probable cause to make an immediate arrest, including the fact that the boy had been reported missing from home and was truant from school, it was constitutionally permissible to take the boy into custody pursuant to this section and reasonable to conduct a search pursuant to that arrest for the youth's safety. In re Z.M., 2007 MT 122, 337 M 278, 160 P3d 490 (2007).

Illegal Pretrial Process and Procedure — State's Right to Charge and Try Case: Youth Court petition initiating proceedings did not state the facts constituting the offense youth was charged with in ordinary and concise language so as to enable a person of common understanding to know what was intended. The petition did not include a witness list. An arrest warrant was issued out of the Youth Court, although there is no provision in the Youth Court Act for issuance of an arrest warrant. Presumably the warrant was issued under 46-6-201, but there was no showing of probable cause supported by oath or affirmation reduced to writing. The youth had already been arrested in Oklahoma at the time the warrant was issued. By what process and authority he was arrested in Oklahoma was not shown, nor was it shown he was arrested by a law enforcement officer. He was subsequently transferred to the District Court for trial as an adult and convicted of two counts of deliberate homicide. The Youth Court proceedings from issuance of the warrant for arrest onward were patently defective. However, this did not preclude the state from having him transferred to the District Court, proceeding against him, and obtaining a conviction. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

41-5-322. Release from custody — detention — shelter care.

Compiler's Comments

2009 Amendment: Chapter 2 throughout section in four places before "probation officer" inserted "juvenile". Amendment effective October 1, 2009.

1997 Amendment: Chapter 286 near beginning of (1) substituted "released to a responsible person" for "released to a person who has custody of the youth, then"; in (2), in second sentence, inserted reference to 41-5-348; and made minor changes in style.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

1991 Amendment: In (2), at end of first sentence, substituted "detention" for "custody", at end of second sentence deleted "and is completely separated from adult offenders", and in last sentence, after "must be", substituted "placed in a shelter care facility" for "sheltered in a place"; and made minor changes in style. Amendment effective July 1, 1992.

Attorney General's Opinions

Youth Court Act — Applicability to Alcohol Possession Proceedings in Other Courts: The provisions of the Montana Youth Court Act that apply to a youth charged with a violation of 45-5-624, illegal possession of alcohol, in justice's, municipal, or city court proceedings are 41-5-303 through 41-5-307 (renumbered 41-5-322, 41-5-331, 41-5-341, 41-5-344 (now repealed), and 41-5-1206), 41-5-402 (renumbered 41-5-1303), 41-5-601 (now repealed), 41-5-602 (now repealed), and 41-5-604 (renumbered 41-5-216). A youth charged with a violation of 45-5-624 is further entitled to the following rights in addition to those normally accorded defendants in justice's, municipal, or city court criminal proceedings: (1) service of the criminal summons on both the youth and a custodial parent or guardian; (2) advisement of the right to retained or, if appropriate, appointed counsel; and (3) waiver of the right to counsel only by both the youth and a custodial parent or guardian. 40 A.G. Op. 43 (1984). (Annotator's note: Chapter 105, sec. 1, L. 1985, amended 45-5-624 to remove imprisonment from the list of sentences that can be imposed upon youths convicted of violating the statute.)

Circumstances — Read Conjunctively: The factors listed in 41-5-307(2) (renumbered 41-5-322(2) and (3)) that provide the circumstances under which a youth may be detained in adult facilities are to be read conjunctively. A youth may be detained only when detention or care is required to protect the person or property of the youth or others or he may abscond or be removed from the community. 37 A.G. Op. 94 (1977).

41-5-323. Bail.

Compiler's Comments

1991 Amendment: In first sentence, after "care", deleted "facility"; and made minor change in style. Amendment effective July 1, 1992.

41-5-331. Rights of youth taken into custody — questioning — waiver of rights.

Compiler's Comments

2009 Amendments — Composite Section: Chapter 2 in (1)(b) near beginning before "probation officer" inserted "juvenile". Amendment effective October 1, 2009.

Chapter 37 at end of (2)(a) and (2)(b) inserted "subject to the provisions of 41-5-333(2)"; and made minor changes in style. Amendment effective October 1, 2009.

1997 Amendment: Chapter 286 deleted former (1)(b)(i) through (1)(b)(iii) that read: "(b) The youth may waive these rights under the following situations:

(i) when the youth is 16 years of age or older, the youth may make an effective waiver;

(ii) when the youth is under the age of 16 years and the youth and a parent or guardian agree, they may make an effective waiver; and

(iii) when the youth is under the age of 16 years and the youth and his parent or guardian do not agree, the youth may make an effective waiver only with advice of counsel"; inserted (2) establishing when youth may waive rights; deleted former (2) through (8) that read: "(2) Unless a youth has been released, a hearing must be held within 24 hours after the youth is taken into custody, excluding weekends and legal holidays, to determine whether there is probable cause to believe that the youth is a delinquent youth or a youth in need of supervision.

(3) The probable cause hearing required under subsection (2) may be held by the youth court, a justice of the peace, a municipal or city judge, or a magistrate having jurisdiction in the case as provided in 41-5-203. If the probable cause hearing is held by a justice of the peace, a

municipal or city judge, or a magistrate, a record of the hearing must be made by a court reporter or by a tape recording of the hearing.

(4) At the probable cause hearing, the youth must be informed of his constitutional rights and his rights under this chapter.

(5) A parent, guardian, or legal custodian of the youth may be held in contempt of court for failing to be present at or to participate in the probable cause hearing unless he:

(a) cannot be located through diligent efforts of the investigating peace officer or peace officers; or

(b) is excused by the court for good cause.

(6) At the probable cause hearing, a guardian ad litem may be appointed as provided in 41-5-512.

(7) If it is determined that there is probable cause to believe the youth is a delinquent youth or is a youth in need of supervision, the court having jurisdiction in the case shall determine whether the youth should be retained in custody. If the court determines that continued custody of the youth is necessary and if the youth meets the criteria in 41-5-305, the youth may be placed in a detention facility or shelter care facility as provided in 41-5-306 but may not be placed in a jail or other facility used for the confinement of adults accused or convicted of criminal offenses.

(8) If probable cause is not found or if a probable cause hearing is not held within the time specified in subsection (2), the youth must be immediately released from custody"; and made minor changes in style.

The amendments to this section made by sec. 21, Ch. 550, L. 1997, were rendered void by sec. 49(3)(d), Ch. 286, L. 1997, a coordination section.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

Code Commissioner Change: Section 76, Ch. 550, L. 1997, instructed the Code Commissioner, in the Montana Code Annotated or in legislation enacted by the 1997 Legislature, to change references to youth in need of supervision to references to youth in need of intervention. The change has been made in this section.

1991 Amendment: In (1) substituted "a delinquent youth or a youth in need of supervision" for "delinquent or in need of supervision"; in (2), at beginning, inserted "Unless a youth has been released" and deleted requirement that hearing be "held by the court, a justice of the peace, a municipal or city judge, or a magistrate"; in (3) inserted first sentence concerning holding of probable cause hearing; in (5), after "present at", inserted "or participate in"; in (7), after "delinquent", inserted "youth", after "supervision" inserted "the court having jurisdiction in the case shall determine whether the youth should be retained in custody. If the court determines that continued custody of the youth is necessary", and at end substituted "facility used for the confinement of adults accused or convicted of criminal offenses" for "facility for adults"; in (8), after "not found", inserted "or if a probable cause hearing is not held within the time specified in subsection (2)" and at end inserted "from custody"; and made minor changes in style. Amendment effective July 1, 1992.

1989 Amendment: In (2), in first sentence after "court", inserted "a justice of the peace, a municipal or city judge, or a magistrate" and inserted second sentence relating to a record of the hearing; in (3) substituted "the youth shall be informed" for "the court shall inform the youth"; in (5) substituted "a guardian ad litem may be appointed" for "the court may appoint a guardian ad litem"; and in (6), near beginning of first sentence, substituted "it is determined" for "the court determines" and in last sentence substituted "probable cause is not found" for "the court does not find probable cause". Amendment effective July 1, 1989.

1987 Amendments: Chapter 475 near beginning of (1) substituted "taken into custody" for "detained"; inserted (1)(c) requiring investigating officer, probation officer, or assigned person to immediately notify parents, guardian, or legal custodian when youth is taken into custody and reasons for such custody; inserted (2) through (6) regarding rights of youth taken into custody, probable cause hearing, possible parental contempt citation for failure to attend hearing, and detention upon finding of delinquent youth or youth in need of supervision; and in (6), at end of first sentence, inserted "but may not be placed in a jail or other facility for adults", effective July 1, 1989.

Chapter 515 in (1), before "questioning", deleted "investigation or" and after "alleging that the youth" deleted "being detained"; in (1)(a), after "shall be", deleted "immediately and effectively" and changed reference to constitutional rights and rights under this chapter to reference to rights against self-incrimination and counsel; in (1)(b)(i) changed age restriction from under age

12 to age 16 or older and deleted provision that parents may make a waiver; in (1)(b)(ii) changed age restriction from over age 12 to under age 16 and added provision that a guardian as well as a parent may make a waiver; and in (1)(b)(iii) changed age restriction from over age 12 to under age 16 and added provision that if a guardian or a parent does not agree to waiver, the youth may make waiver only with advice of counsel.

Case Notes

Waiver of Miranda Rights by 16-Year-Old Youth — Rights Adequately Explained: Following a report by a father that his 16-year-old son had been found in his sister's bedroom, a deputy took the boy to the Sheriff's office for an interview. The deputy conscientiously explained the Miranda warning to the boy, and the boy said that he understood the rights and waived those rights. The boy then confessed to sexual contact with his sister and was charged with felony sexual assault. The boy moved to suppress the confession but the motion was denied. On appeal, the Supreme Court reviewed the interview and concluded that the boy met the age requirement for providing a valid waiver without his parents' consent or counsel present and that the deputy took appropriate care in explaining the Miranda warning and engaged in no impermissible tactics in seeking to extract a confession. Thus, the boy's waiver of Miranda rights was valid. The Youth Court's findings of facts were not clearly erroneous and the suppression motion was properly denied. In re S.M.S., 2010 MT 18, 355 Mont. 102, 225 P.3d 781.

Custodial Interrogation of Youth Without Consent — Miranda Warning Required — Suppression of Confession and Withdrawal of Guilty Plea Required: A 14-year-old boy's mother called his school, reported that he had not returned home the previous night, and requested that he be picked up. The school resource officer notified police and asked that the boy be brought to school if found. An officer later found the boy on the street smelling of alcohol and took the boy to the police station where it was discovered that several town businesses had been burglarized during the night, including a bowling alley where money and liquor had been stolen. Although there was no record that the youth was advised of his Miranda rights, during interrogation both prior to and after arrival of his parents, the youth confessed to robbing the bowling alley and subsequently pleaded guilty to felony burglary. The Youth Court summarily determined that the confessions were voluntary, denied a motion to suppress, found the youth was delinquent, and ordered 2 years' probation. On appeal, the Supreme Court addressed the voluntariness of the confessions and reversed. Given the absence of a tangible record that the officer read Miranda rights to the youth or that the youth or the parents consented in writing to a waiver of Miranda rights or agreed to the interview, the requirement in this section that a youth be advised of the right against self-incrimination and the right to counsel was violated. Thus, the confessions could not be considered voluntary and should have been suppressed by the Youth Court. The Supreme Court also ordered that on remand, the youth be allowed to withdraw the guilty plea In re Z.M., 2007 MT 122, 337 M 278, 160 P3d 490 (2007).

No Capacity or Actual Authority of Youth to Consent to Search of Parent's Home: While conducting a search for Lowe, officers learned that Lowe was staying at Schwarz's home and drove to Schwarz's residence to initiate an arrest. Schwarz was not home, but Schwarz's 13-year-old daughter answered the door and consented to a search of the residence. Without attempting to contact Schwarz, the officers entered the home without a warrant and discovered drugs. When Schwarz arrived home, she was arrested for possession of dangerous drugs. Following conviction, Schwarz appealed on grounds that the search was illegal because the minor daughter did not have authority to consent to a search of the home. The Supreme Court agreed and reversed, adopting a per se rule that a youth under the age of 16 years has neither the capacity nor the actual authority to relinquish a parent's privacy rights and consent to a search of the parent's home. St. v. Schwarz, 2006 MT 120, 332 M 243, 136 P3d 989 (2006). See also St. v. Melees, 2000 MT 6, 298 M 15, 994 P2d 683 (2000).

Youth's Right to Parental Notification — Suppression of Statements for Failure to Notify Parents: McKee, a youth charged with assault with a weapon, contended that police erred by failing to notify his parents prior to questioning or to inform him of the right to waive notification and that statements made prior to notification should have been suppressed. The trial court denied the suppression motion, reasoning that this section provided the parents, not the youth, with the right to notification, so it was not a right that McKee could waive. The Supreme Court disagreed. The right of parental notification belongs to the youth, not to the parents. McKee did not waive the right, so statements made prior to parental notification should have been suppressed, and failure to do so was reversible error. St. v. McKee, 2006 MT 5, 330 M 249, 127 P3d 445 (2006).

Use of Youth's Voluntary Confession of Drug Use in Subsequent Probation Violation Proceedings Not Error: A youth admitted that she had used methamphetamine, as part of an agreement with the County Attorney and in exchange for a recommendation that the youth be placed in a drug treatment program. When the youth violated the terms of her probation, the confession of prior drug use was admitted into evidence. The youth contended that the self-incriminating statement was inadmissible because the youth was not informed that the statement could later be used against her if she violated probation. The Supreme Court declined to reverse the Youth Court's disposition simply because the youth was not advised that the admission could be used later and instead noted that if the confession was voluntary and not coerced, it could properly be used at a later trial for drug possession. Further, under In re C.L., 2004 MT 71, 320 M 369, 87 P3d 462 (2004), the fact that an admission is voluntary is all that is required for a confession to be admissible in a Youth Court proceeding. In this case, the youth was not placed in a position in which she was coerced into waiving the right against self-incrimination by a threat of penalty, but rather voluntarily admitted drug use as a condition of sentencing to a drug treatment program in a manner similar to a plea bargain agreement. Thus, the Youth Court did not err in allowing the youth's admission into evidence and in taking judicial notice of the youth's waiver of the right against self-incrimination. In re R.L.H., 2005 MT 177, 327 M 520, 116 P3d 791 (2005).

Youth's Waiver of Rights When Parent and Youth in Separate Places — No Specific Topic of Questioning — Admissibility of Confession: After a fire in a clandestine methamphetamine laboratory, police sought to question a youth who was reported to be involved. With the youth's mother present, the officers informed them of the youth's various rights, gave them a written statement of rights, and allowed them to discuss waiver of the rights. In the youth's presence, the mother signed a consent to waive the youth's rights. The youth was then taken to the station without his mother, who declined to go, was informed of his rights again and signed a waiver of rights, and was questioned about the fire and the laboratory. The youth subsequently confessed to involvement in the drug operation, and the District Court declared him delinquent and entered a dispositional order. On appeal, the youth contended that the confession should have been suppressed because he and his mother did not agree together to waive his rights and because his mother was led to believe that the questioning was about the fire and not the laboratory, so she could not effectively waive his rights without accurate knowledge of the basis of the questioning, citing Evans v. District Court, 2000 MT 38, 298 M 279, 995 P2d 455 (2000). The Supreme Court disagreed. Nothing in Evans or in this section requires that a youth and parent agree as to the specific topic of questioning to which a waiver of rights applies in order to make the waiver effective, nor does this section require the agreement of the youth and parent in the same place at the same time. The youth also failed to show that the confession was involuntary through police deceit because he should have known that any interview regarding the fire could involve questions regarding the drug operation. In re C.L., 2004 MT 71, 320 M 369, 87 P3d 462 (2004).

Lack of Advisement of Right to Counsel and Right Against Self-Incrimination for Youth Taken Into Custody for Questioning Reversible Error — When Waiver of Rights Attaches: A youth was questioned at the Sheriff's office regarding a burglary and criminal mischief and was then taken home, where he agreed to relinquish articles of clothing that were not inconsistent with evidence found at the crime scene. The youth's parents were not notified of any of the Sheriff's actions, and no omnibus hearing was held. The youth's clothing was later introduced at trial over the youth's objection. Following conviction, the youth appealed, contending that the clothing was not legally obtained pursuant to a search warrant, that he was not advised of his rights, and that he did not give an informed waiver of his right to have his parents contacted prior to relinquishment of the clothing. The state maintained that the youth voluntarily consented to relinquish the clothing and thus waived his rights. The Supreme Court reversed. Under the Montana Youth Court Act, a youth taken into custody for questioning on a matter that could result in allegations that the youth is delinquent must be advised of the right to counsel and the right against self-incrimination, and the youth's parents must be immediately notified by the investigating officer. A youth who is 16 years of age or older may make an effective waiver of those rights. In determining whether waiver and consent by juveniles are voluntary, the Supreme Court applies the totality of circumstances test set out in Evans v. District Court, 2000 MT 38, 298 M 279, 995 P2d 455 (2000), which provides that a determination of voluntariness takes into account: (1) the defendant's age and level of education; (2) whether the defendant was advised of the defendant's rights; (3) the defendant's prior experience with the criminal justice system; (4) the defendant's background and experience; and (5) the defendant's demeanor, coherence, articulateness, and capacity to make full use of the defendant's faculties. Here, the District Court failed to take the Evans factors into account, and the requirements of this section regarding parental notification were not fulfilled. Failure to follow statutory requirements and to consider the totality of the circumstances was reversible error. In re C.T.P., 2004 MT 63, 320 M 279, 87 P3d 399 (2004).

Plain Error in Allowing Youth's Extrajudicial Statements When Youth Not Advised of Right to Counsel and Right Against Self-Incrimination: A youth asserted for the first time on appeal that the Youth Court improperly admitted extrajudicial statements that the youth made regarding the youth's whereabouts when a burglary and criminal mischief were committed. Despite the state's contention that the arguments should not be considered because they were not raised at trial, the Supreme Court nevertheless considered the argument under the plain error doctrine because the youth was not notified while in custody of the fundamental right to counsel and the right to avoid self-incrimination, nor were the youth's parents notified as required. The youth's rights under the Montana Youth Court Act and the constitution were simply ignored in this case, so in order to avoid a question of the fundamental fairness of the trial by admission of constitutionally infirm extrajudicial statements, the Supreme Court reversed the trial court's decision to admit the statements. In re C.T.P., 2004 MT 63, 320 M 279, 87 P3d 399 (2004).

Youth Considered in Custody — Supervisory Control Appropriate When Lower Court Proceeding Under Mistake of Law: Fourteen-year-old Evans was taken by his mother to the Flathead County Sheriff's office, upon request of the Deputy Sheriff, because he had been observed talking to a child on the day of her disappearance. Evans and his mother were separated upon arrival at the office, and Evans was taken to a 9-by-9-foot windowless interrogation room with a shut door where he was questioned for 2½ hours by two officers wearing badges and weapons. Evans waived his Miranda rights outside the presence and without the consent of his mother and without an opportunity to discuss his rights or the waiver with counsel. The officers did not tell Evans that he could leave the interrogation room or consult with his mother, and during the course of the interview, Evans' mother was denied contact with Evans. Although initially adamantly denying involvement, the officers repeatedly suggested that Evans had "more to tell them" and misled him into believing that the police had fingerprints from the girl's body that could be matched to his. Toward the end of the interrogation, Evans confessed that he drowned the child and was charged with her death, arrested, handcuffed, and escorted to juvenile detention without an opportunity to speak to his mother. Evans filed a motion to suppress the confession on grounds that his waiver of rights while in custody was invalid under this section. The District Court denied the motion, concluding that Evans was not in custody during the interview and that the confession was voluntary. Accepting supervisory control because the District Court was proceeding under a mistake of law, the Supreme Court, finding it difficult to imagine a more "custodial" setting, applied the factors in St. v. Staat, 251 M 1, 822 P2d 643, 48 St. Rep. 1041 (1991), and concluded that Evans was in custody during the interview, that his waiver of rights without the consent of a parent or advice of counsel was invalid under this section, and that the confession was not voluntary under the totality of the circumstances. Although the record on appeal was not sufficient to determine whether the state had other evidence sufficient to charge Evans, the case was nevertheless remanded for consideration of the evidence without the confession. Evans v. District Court, 2000 MT 38, 298 M 279, 995 P2d 455, 57 St. Rep. 175 (2000), followed, with regard to applicability of the totality of circumstances test for determining voluntariness of a juvenile's waiver and consent, in In re C.T.P., 2004 MT 63, 320 M 279, 87 P3d 399 (2004). See also State ex rel. D.M.B. v. District Court, 2004 MT 335, 324 M 190, 103 P3d 514 (2004).

Transfer of Youth Court Case to District Court Not Violative of Minor's Constitutional Rights: Spina argued that the statute allowing transfer of her Youth Court case to the District Court resulted in violation of her rights under Art. II, sec. 15, Mont. Const., which guarantees to minors the same fundamental rights afforded to adults, and under Art. II, sec. 24, Mont. Const., which guarantees the right to a fair trial. The Supreme Court considered alleged violations of the right against self-incrimination, the right to effective assistance of counsel, the right to a fair trial, and the right to a presumption of innocence, finding that Spina's arguments were without merit. The transfer statute did not violate Spina's constitutional rights. St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421, 56 St. Rep. 467 (1999).

Warrantless Entry and Arrest Valid — Subsequent Search Invalid — No Consent: While the officers' initial entry into the apartment and the subsequent arrest and seizure of marijuana on the table were valid, the so-called "consent" search of the rest of the apartment was unlawful. One renter's consent was fraudulently secured and otherwise invalid under this section (formerly 41-5-303). St. v. Allen, 188 M 135, 612 P2d 199 (1980).

Attorney General's Opinions

Youth Court Act — Applicability to Alcohol Possession Proceedings in Other Courts: The provisions of the Montana Youth Court Act that apply to a youth charged with a violation of

45-5-624, illegal possession of alcohol, in justice's, municipal, or city court proceedings are 41-5-303 through 41-5-307 (renumbered 41-5-322, 41-5-331, 41-5-341, 41-5-344 (now repealed), and 41-5-1206), 41-5-402 (renumbered 41-5-1303), 41-5-601 (now repealed), 41-5-602 (now repealed), and 41-5-604 (renumbered 41-5-216). A youth charged with a violation of 45-5-624 is further entitled to the following rights in addition to those normally accorded defendants in justice's, municipal, or city court criminal proceedings: (1) service of the criminal summons on both the youth and a custodial parent or guardian; (2) advisement of the right to retained or, if appropriate, appointed counsel; and (3) waiver of the right to counsel only by both the youth and a custodial parent or guardian. 40 A.G. Op. 43 (1984).

41-5-332. Custody — hearing for probable cause.

Compiler's Comments

2019 Amendment: Chapter 344 in (1) after "youth is taken into custody" deleted "for questioning"; in (5) after "A hearing is" deleted "not" and at end substituted "violation of the terms and conditions of the youth's conditional release agreement" for "parole violation"; and made minor changes in style. Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2001 Amendment: Chapter 159 in (3) in first sentence near beginning after "held" inserted "in person or by videoconference" and in second sentence at end inserted "or by an audio-video tape if the hearing is held by videoconference". Amendment effective October 1, 2001.

1999 Amendments — Composite Section: Chapter 326 inserted (2) providing for a hearing for youth taken into custody for violation of placement under home arrest program; and made minor changes in style. Amendment effective July 1, 1999.

Chapter 532 inserted (5) providing that hearing is not required for detention for alleged parole violation. Amendment effective October 1, 1999.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

Code Commissioner Change: Section 76, Ch. 550, L. 1997, instructed the Code Commissioner, in the Montana Code Annotated or in legislation enacted by the 1997 Legislature, to change references to youth in need of supervision to references to youth in need of intervention. The change has been made in this section.

41-5-333. Custody — hearing for probable cause — procedure.

Compiler's Comments

2009 Amendment: Chapter 37 inserted (2) concerning representation at probable cause hearing; and made minor changes in style. Amendment effective October 1, 2009.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

41-5-334. Custody — hearing for probable cause — determinations — detention — release.

Compiler's Comments

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

41-5-341. Criteria for placement of youth in secure detention facilities.

Compiler's Comments

2019 Amendment: Chapter 344 in (2)(b) substituted "the terms and conditions of the youth's conditional release agreement" for "a parole agreement". Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

1997 Amendment: Chapter 286 deleted former (2) that read: "(2) A youth may not be placed in a shelter care facility unless:

(a) the youth and his family need shelter care to address their problematic situation when it is not possible for the youth to remain at home;

(b) the youth needs to be protected from physical or emotional harm;
(c) the youth needs to be deterred or prevented from immediate repetition of his troubling behavior;
(d) shelter care is necessary to assess the youth and his environment;
(e) shelter care is necessary to provide adequate time for case planning and disposition; or
(f) shelter care is necessary to intervene in a crisis situation and provide intensive services or attention that might alleviate the problem and reunite the family"; and made minor changes in style.

The amendments to this section made by sec. 23, Ch. 550, L. 1997, were rendered void by sec. 49(3)(d), Ch. 286, L. 1997, a coordination section.

Code Commissioner Change: Section 49(3)(i), Ch. 286, L. 1997, instructed the Code Commissioner, in Ch. 286 or in legislation enacted by the 1997 Legislature, to change references to an aftercare agreement to references to a parole agreement. The change has been made in this section.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

1991 Amendment: In three places in (1), before "detention facility", inserted "secure" and at beginning deleted "After a probable cause hearing provided for in 41-5-303"; inserted (1)(b) concerning allegation of delinquent youth; deleted former (1)(e) that read: "(e) there is good reason to believe the youth will not appear for court proceedings as ordered"; inserted (1)(c) concerning awaiting final disposition of case; and made minor changes in style. Amendment effective April 23, 1991.

1987 Amendments — Composite Section: Chapter 475 at beginning of (1) substituted "After a probable cause hearing provided for in 41-5-303, a youth may not be placed in a detention facility" for "A youth taken into custody may not be detained in a jail or other facility for detention purposes"; in (1)(a) substituted "one of the following acts" for "an act" and after "offense" deleted former (1)(a) that read: "(a) the alleged act is one of the following"; inserted (1)(d) and (1)(e) prohibiting placement of a youth in a detention facility unless his detention is required to protect persons or property or there is good reason to believe youth will not appear for court proceedings; at end of (1)(h) inserted "in the judicial district with jurisdiction over the youth"; and near beginning of (2), after "youth", deleted "taken into custody" and substituted "placed in a shelter care facility unless" for "sheltered prior to the hearing on the petition except when".

Chapter 515 at end of (1)(a) substituted "offense is one specified in 41-5-206" for "act is one of the following"; deleted former (1)(a)(i) through (1)(a)(x) that read: "(i) criminal homicide as defined in 45-5-101;
(ii) arson as defined in 45-6-103;
(iii) aggravated or felony assault as defined in 45-5-202;
(iv) robbery as defined in 45-5-401;
(v) burglary or aggravated burglary as defined in 45-6-204;
(vi) sexual intercourse without consent as defined in 45-5-503;
(vii) aggravated kidnapping as defined in 45-5-303;
(viii) possession of explosives as defined in 45-8-335;
(ix) criminal sale of dangerous drugs for profit as included in 45-9-101; or
(x) attempt as defined in 45-4-103 of any of the acts enumerated in subsections (1)(a)(i) through (1)(a)(ix)"; in (1)(b), after "correctional", inserted "or detention"; inserted (1)(d), (1)(f), and (1)(g) citing circumstances under which youth may be placed in detention facility; and in (1)(h), after "meets", inserted "additional" and after "court" inserted "in the judicial district that has current jurisdiction over him".

Chapter 610 in former (1)(a)(i) substituted "homicide as defined in 45-5-102 through 45-5-104" for "criminal homicide as defined in 45-5-101" (not codified as explained below).

In preparation of the composite of the Ch. 475, Ch. 515, and Ch. 610 amendments to this section, the Code Commissioner omitted from the composite the Ch. 475 amendment to subsection (1)(a) that referred to "one of the following acts" because the phrase referred to former (1)(a)(i) through (1)(a)(x), which were deleted by Ch. 515.

The Code Commissioner used the Ch. 515 amendment to subsection (1)(h) rather than the Ch. 475 amendment, which was similar, because the Ch. 515 amendment contained the additional qualifier of "current" jurisdiction. Any inconsistency between the official enrolled bills and the MCA is to be resolved in favor of the official enrolled bills (see 1-11-103).

1985 Amendment: In (1) substituted language relating to circumstances in which youth could be placed in a jail or detention facility for former (1) that read: "A youth taken into custody may not be detained prior to the hearing on the petition except when:

(a) his detention is required to protect the person or the property of others or of the youth;

(b) he has pending court or administrative action or is awaiting a transfer to another jurisdiction and may abscond or be removed from the jurisdiction of the court;

(c) there are not adequate assurances that the youth will appear for court when required; or

(d) an order for his detention has been made by the court".

Administrative Rules

Title 20, chapter 9, subchapter 6, ARM Licensure of youth detention facilities.

Case Notes

Prehearing Detention: The Youth Court did not fail to follow the statutory requirements and procedures of the Montana Youth Court Act in ordering a prehearing detention. In re Marten, 174 M 343, 570 P2d 1122 (1977).

Attorney General's Opinions

Youth Court Act — Applicability to Alcohol Possession Proceedings in Other Courts: The provisions of the Montana Youth Court Act that apply to a youth charged with a violation of 45-5-624, illegal possession of alcohol, in justice's, municipal, or city court proceedings are 41-5-303 through 41-5-307 (renumbered 41-5-322, 41-5-331, 41-5-341, 41-5-344 (now repealed), and 41-5-1206), 41-5-402 (renumbered 41-5-1303), 41-5-601 (now repealed), 41-5-602 (now repealed), and 41-5-604 (renumbered 41-5-216). A youth charged with a violation of 45-5-624 is further entitled to the following rights in addition to those normally accorded defendants in justice's, municipal, or city court criminal proceedings: (1) service of the criminal summons on both the youth and a custodial parent or guardian; (2) advisement of the right to retained or, if appropriate, appointed counsel; and (3) waiver of the right to counsel only by both the youth and a custodial parent or guardian. 40 A.G. Op. 43 (1984). (Annotator's note: Chapter 105, sec. 1, L. 1985, amended 45-5-624 to remove imprisonment from the list of sentences that can be imposed upon youths convicted of violating the statute.)

41-5-342. Criteria for placement of youth in shelter care facilities.

Compiler's Comments

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

41-5-343. Criteria for placement of youth in youth assessment centers.

Compiler's Comments

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

41-5-345. Limitation on placement of youth in need of intervention.

Compiler's Comments

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

Code Commissioner Change: Section 76, Ch. 550, L. 1997, instructed the Code Commissioner, in the Montana Code Annotated or in legislation enacted by the 1997 Legislature, to change references to youth in need of supervision to references to youth in need of intervention. The change has been made in this section.

Case Notes

Absence of Youth Court Procedure to Determine Competency of Youths Not Violative of Equal Protection: Attorneys for a 9-year-old youth charged with arson contended that the youth lacked the capacity to form the requisite mental intent to commit the crime and that the youth was too young to understand the process against him and to effectively assist in his defense. A motion was made to dismiss. The Youth Court determined that the youth understood the charges and his rights and sentenced the youth to 2 years' probation. On appeal, the youth asserted that the Youth Court Act violated the constitutional guarantee of equal protection by not providing a procedure to evaluate the competency of youths similar to the procedure for determining the competency of adults to stand trial. The Supreme Court disagreed. A youth alleging incompetency based on immaturity is not similarly situated to an adult criminal defendant alleging mental disease or defect. All youths experience a period of immaturity, which most youths outgrow, but the same cannot be said for a mental disease or defect. The court noted that the logical extension of the youth's argument would require that immature youths be placed in mental health facilities until they are mature enough to stand trial. Because immature youths are not similarly situated to adult criminal defendants alleging mental disease or defect, equal protection was not implicated. In this case, substantial evidence indicated that the youth could consult with his attorneys and understand the proceedings against him and that the youth could form the requisite criminal intent of purposely and knowingly starting a fire. The youth was fit to proceed and did not suffer from a mental disorder, and the youth's due process rights were protected by hearings at which the youth's competency to proceed was determined. The Youth Court was affirmed. In re G.T.M., 2009 MT 443, 354 M 197, 222 P3d 626 (2009). See also State ex rel. Elliot v. District Court, 211 M 1, 684 P2d 481 (1984), and In re S.M.K.-S.H., 2012 MT 281, 367 Mont. 176, 290 P.3d 718, in which the court determined the youth was not similarly situated to an adult because he faced a different disposition for assault with a weapon as a delinquent youth than an adult would face in District Court.

41-5-346. Limitation on placement of delinquent youth.

Compiler's Comments

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

41-5-347. Place of shelter care.

Compiler's Comments

1999 Amendment: Chapter 51 deleted former (2) that read: "(2) All money in the account, except any amount required to be returned to federal or county sources, is allocated to the department of public health and human services to carry out its duties under 52-1-103"; and made minor changes in style. Amendment effective March 15, 1999.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

41-5-348. Place of detention.

Compiler's Comments

1999 Amendment: Chapter 532 inserted (3) concerning facilities outside Montana or operated by an Indian tribe; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

41-5-349. Youth not to be detained in jail — exceptions — time limitations.

Compiler's Comments

1997 Amendment: Chapter 286 at end of (2)(b) substituted "41-5-332" for "41-5-303".

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

1995 Amendment: Chapter 18 in (3)(a), before "metropolitan", deleted "standard"; and made minor changes in style.

Effective Date: Section 16, Ch. 547, L. 1991, provided that this section is effective July 1, 1992.

41-5-350. Permitted acts — detention of youth in law enforcement facilities — criteria.

Compiler's Comments

Effective Date: Section 9(1), Ch. 548, L. 1991, provided: "[Sections 1 through 4, 6 through 8, and this section] are effective on passage and approval." Approved April 23, 1991.

41-5-355. Confinement of juveniles.

Compiler's Comments

2021 Amendment: Chapter 339 in (1) substituted "capacity of correctional facilities" for "capacity for state youth correctional facilities" and deleted former second sentence that read: "The department shall notify all district courts, sheriffs, and youth courts of the capacity for each state youth correctional facility by sending a report to each annually"; deleted former (2) that read: "If the population of a state youth correctional facility exceeds the capacity established by the department, the director of the department may declare that the capacity has been exceeded and temporarily stop admissions to the facility. The director shall notify each district court, sheriff, and youth court that delinquent or criminally convicted youth will not be accepted by the department for admission into the facility until the population is reduced to less than the capacity determined by the department in subsection (1)"; in (2) substituted current text for former text that read: "If the director of the department declares that the capacity has been exceeded, the department shall place delinquent youth committed to a state youth correctional facility or criminally convicted youth in alternate placements based on the needs of the delinquent youth or criminally convicted youth. If a youth is denied placement in a state youth correctional facility under this section, the department shall inform and seek approval of the district court of the intended alternative placement prior to placing the youth"; in (3) after "youth committed to the department" deleted "either because a state youth correctional facility has exceeded its capacity or because the department has no youth correctional facility that is adequate for certain delinquent youth or criminally convicted youth"; and made minor changes in style. Amendment effective October 1, 2021.

Effective Date: This section is effective October 1, 1999.

Part 12
Preliminary Investigation

41-5-1201. Preliminary inquiry — referral of youth in need of care.

Compiler's Comments

2009 Amendment: Chapter 2 in (1) near end and in (2) near beginning before "probation officer" inserted "juvenile". Amendment effective October 1, 2009.

2001 Amendment: Chapter 114 in middle of (2) inserted "as defined in 41-3-102". Amendment effective October 1, 2001.

1997 Amendments: Chapter 185 in (1), after "person", inserted "including a parent or guardian of a youth"; and made minor changes in style.

Chapter 286 in (1), near middle, substituted "youth in need of intervention" for "youth in need of supervision" and near end inserted "or an assessment officer"; deleted former (2) that read: "(2) The probation officer may:

(a) require the presence of any person relevant to the inquiry;

(b) request subpoenas from the judge to accomplish this purpose;

(c) require investigation of the matter by any law enforcement agency or any other appropriate state or local agency"; in (2) inserted "or assessment officer" and substituted "indicate that the youth is a youth in need of care" for "indicate a youth in need of care"; deleted (4) through (8) that read: "(4) (a) The probation officer in the conduct of the preliminary inquiry shall:

(i) advise the youth of the youth's rights under this chapter and the constitutions of the state of Montana and the United States;

(ii) determine whether the matter is within the jurisdiction of the court;

(iii) determine, if the youth is in detention or shelter care, whether detention or shelter care should be continued based upon criteria set forth in 41-5-305.

(b) Once relevant information is secured, the probation officer shall:

(i) determine whether the interest of the public or the youth requires that further action be taken;

(ii) terminate the inquiry upon the determination that no further action be taken; and

(iii) release the youth immediately upon the determination that the filing of a petition is not authorized.

(5) The probation officer upon determining that further action is required may:

(a) provide counseling, refer the youth and the youth's parents to another agency providing appropriate services, or take any other action or make any informal adjustment that does not involve probation or detention;

(b) provide for treatment or adjustment involving probation or other disposition authorized under 41-5-401 through 41-5-403 if the treatment or adjustment is voluntarily accepted by the youth's parents or guardian and the youth, if the matter is referred immediately to the county attorney for review, and if the probation officer proceeds no further unless authorized by the county attorney; or

(c) refer the matter to the county attorney for filing a petition charging the youth to be a delinquent youth or a youth in need of supervision.

(6) The county attorney may apply to the youth court for permission to file a petition charging a youth to be a delinquent youth or a youth in need of supervision. The application must be supported by evidence that the youth court may require. If it appears that there is probable cause to believe that the allegations of the petition are true, the youth court shall grant leave to file the petition.

(7) A petition charging a youth held in detention must be filed within 7 working days from the date the youth was first taken into custody or the petition must be dismissed and the youth released unless good cause is shown to further detain the youth.

(8) If a petition is not filed under this section, the complainant and victim, if any, must be informed by the probation officer of the action and the reasons for not filing and must be advised of the right to submit the matter to the county attorney for review. The county attorney, upon receiving a request for review, shall consider the facts, consult with the probation officer, and make the final decision as to whether a petition is filed"; and made minor changes in style.

The amendments to this section made by sec. 20, Ch. 550, L. 1997, were rendered void by sec. 49(3)(d), Ch. 286, L. 1997, a coordination section.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

1995 Amendment: Chapter 546 at end of (3), after "department", inserted "of public health and human services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1989 Amendment: In (7) substituted "7 working days" for "5 working days". Amendment effective July 1, 1989.

1987 Amendments: Chapter 515 inserted (6) authorizing County Attorney to apply to Youth Court for permission to file petition charging youth as delinquent youth or youth in need of supervision; and in (7), after "first", substituted "taken into custody" for "detained".

Chapter 609 at end of (3) substituted reference to Department of Family Services for reference to Department of Social and Rehabilitation Services; at end of (8), after "petition shall", deleted "or shall not"; and made minor changes in phraseology.

41-5-1202. Preliminary inquiry — procedure — youth assessment.

Compiler's Comments

2009 Amendment: Chapter 2 in (1) in introductory clause and in (2) in introductory clause before "probation officer" inserted "juvenile". Amendment effective October 1, 2009.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

1997 Subsection Voided: Subsection (3) of this section enacted by secs. 6, 49(3)(f), Ch. 286, L. 1997, was rendered void by sec. 78(5)(a), Ch. 550, L. 1997, a coordination section.

41-5-1203. Preliminary inquiry — youth assessment.

Compiler's Comments

2009 Amendment: Chapter 2 in (1) in introductory clause before "probation officer" inserted "juvenile". Amendment effective October 1, 2009.

1997 Amendment: Chapter 550 inserted (1)(c); and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

41-5-1204. Preliminary inquiry — determinations — release.

Compiler's Comments

2009 Amendment: Chapter 2 in introductory clause before "probation officer" inserted "juvenile". Amendment effective October 1, 2009.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

41-5-1205. Preliminary inquiry — dispositions available to juvenile probation officer.

Compiler's Comments

2009 Amendment: Chapter 2 in introductory clause before "probation officer" inserted "juvenile". Amendment effective October 1, 2009.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

41-5-1206. Investigation, fingerprints, and photographs.

Compiler's Comments

1997 Amendment: Chapter 550 in (1) substituted "youth in need of intervention" for "youth in need of supervision"; and in (2)(c), after "has been filed", deleted "in which the unlawful act alleged is a felony". Amendment effective July 1, 1997.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

1995 Amendment: Chapter 528 at end of (2)(c) substituted "act alleged is a felony" for "act alleged would constitute a felony if the act had been committed by an adult".

1993 Amendment: Chapter 603 in (3), after "used by", inserted "the department of justice or".

1991 Amendment: In (3), near middle, substituted "any law enforcement agency in the judicial district" for "the originating agency".

1987 Amendment: In (1), at beginning, deleted reference to application of Title 46 to investigations, after "relating to" deleted "a complaint alleging", and at end deleted "except that" and inserted "must be conducted in accordance with this chapter and Title 46"; in (2) substituted "A youth" for "no youth" and deleted provision that identification may be done only on order of youth court judge; inserted (2)(a) through (2)(c) describing when youth may be fingerprinted or photographed for criminal identification; deleted former (1)(b) that read: "(b) no fingerprint records or photographs may be filed with the federal bureau of investigation, the Montana department of justice, or any other than the originating agency, except for sending the fingerprints or photographs to any law enforcement agency for comparison purposes in the original investigation"; at beginning of (3), after "photographs", deleted "shall be retained by the originating agency only until the youth reaches the age of majority unless the judge orders the records destroyed at an earlier date. Any such record" and at end, after "investigation", deleted "only when probable cause is established before the youth court judge that the youth is a principal suspect"; and made minor changes in phraseology.

1981 Amendment: Deleted the first sentence of (2) which provided for destruction of fingerprint and photograph records at completion of proceedings; substituted "shall" for "may" before "be retained" in the first sentence of (2); deleted "for a specific period when ordered by the court for good cause shown" after "originating agency" near the middle of (2); added the language concerning retaining records until the youth's majority and use of such records to the end of (2).

Attorney General's Opinions

Youth Court Act — Applicability to Alcohol Possession Proceedings in Other Courts: The provisions of the Montana Youth Court Act that apply to a youth charged with a violation of 45-5-624, illegal possession of alcohol, in justice's, municipal, or city court proceedings are 41-5-303 through 41-5-307 (renumbered 41-5-322, 41-5-331, 41-5-341, 41-5-344 (now repealed), and 41-5-1206), 41-5-402 (renumbered 41-5-1303), 41-5-601 (now repealed), 41-5-602 (now repealed), and 41-5-604 (renumbered 41-5-216). A youth charged with a violation of 45-5-624 is further entitled to the following rights in addition to those normally accorded defendants in justice's, municipal, or city court criminal proceedings: (1) service of the criminal summons on both the youth and a custodial parent or guardian; (2) advisement of the right to retained or, if appropriate, appointed counsel; and (3) waiver of the right to counsel only by both the youth and a custodial parent or guardian. 40 A.G. Op. 43 (1984).

41-5-1210. Information to be collected by juvenile probation officer or assessment officer.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

Part 13
Informal Proceeding

41-5-1301. Informal disposition.

Compiler's Comments

2009 Amendment: Chapter 2 in introductory clause and in (2) near end before "probation officer" inserted "juvenile". Amendment effective October 1, 2009.

1999 Amendment: Chapter 532 deleted former (2) that read: "(2) The juvenile probation officer or assessment officer shall collect the following information regarding a youth if the youth is alleged to be a delinquent youth and if the probation officer or assessment officer determines that the matter should be referred to the county attorney for filing a petition in youth court:

(a) biographical data;
(b) a description of prior and current offenses, including criminal history;
(c) a listing of known or suspected associates;
(d) any gang or drug involvement;
(e) field investigation data;
(f) motor vehicle ownership and offense data, if any;
(g) whether the youth is a suspect in other criminal investigations;
(h) history of any victimization of others by the youth;
(i) the youth's status offense history;
(j) existence of active warrants;
(k) school, employment, and family histories;
(l) social and medical services histories;
(m) prior conduct in a youth detention or correctional facility, if any"; and made minor changes in style. Amendment effective October 1, 1999.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Effective Date: Section 81, Ch. 550, L. 1997, provided that this section is effective July 1, 1997.

41-5-1302. Consent adjustment without petition.

Compiler's Comments

2009 Amendment: Chapter 2 in (1) in introductory clause, in (1)(c) near beginning, in (2)(b) in two places, and in (3)(c) near middle before "probation officer" inserted "juvenile". Amendment effective October 1, 2009.

1999 Amendment: Chapter 532 at beginning of (3)(a) inserted "the youth has admitted commission of or has been adjudicated or sentenced for a prior" and at end deleted "or third or subsequent offense if"; inserted (3)(b) concerning second or subsequent offense that would be a felony; at beginning of (3)(c) inserted "the second or subsequent" and at end inserted "and was committed within 3 years of a prior offense, other than a felony, unless the probation officer notifies the youth court and obtains written approval from the county attorney and the youth court judge"; inserted (4) concerning related offenses as single offense; and made minor changes in style. Amendment effective October 1, 1999.

1997 Amendment: Chapter 550 in (1), at beginning, substituted "Before referring the matter to the county attorney and subject to the limitations in subsection (3)" for "Before a petition is filed", after "the probation officer" inserted "or assessment officer", substituted "a consent adjustment" for "an informal adjustment", and after "advice to the youth" inserted "the youth's family"; in (1)(b), after "child", inserted "the family"; in (1)(c) substituted "youth in need of intervention" for "youth in need of supervision" and after "probation officer" inserted "or assessment officer"; in (2)(b), in two places after "probation officer", inserted "or assessment officer" and substituted "youth in need of intervention" for "youth in need of supervision"; inserted (3) limiting use of consent adjustment to single felony or two misdemeanors; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

1991 Amendment: Inserted (1)(c) and (2)(b) relating to youth in need of supervision; and made minor change in style.

Case Notes

Commitment to Correctional Facility Under Consent Adjustment Improper: The Youth Court's commitment of J.F. to Mountain View School, based on violation of probation imposed pursuant to a consent adjustment, was held improper under provision of 41-5-403(4) (renumbered

41-5-1304), which states "No youth may be placed in a state youth correctional facility under informal adjustment". In re J.F., 219 M 140, 710 P2d 705, 42 St. Rep. 1904 (1985).

When Youth Court Without Jurisdiction: When, pursuant to a consent adjustment, J.F. was placed on probation for 6 months and the period of probation was not continued, the Youth Court was without jurisdiction to commit J.F. to Mountain View School upon petition of the County Attorney filed after the 6-month period charging a violation of probation. In re J.F., 219 M 140, 710 P2d 705, 42 St. Rep. 1904 (1985).

41-5-1303. Communications privileged.

Compiler's Comments

Code Commissioner Instruction — Name Change: Pursuant to sec. 76, Ch. 550, L. 1997, the Code Commissioner has substituted "need of intervention" for "need of supervision". Amendment effective July 1, 1997.

1987 Amendment: Inserted last sentence concerning statements used for impeachment purposes.

Case Notes

Privilege — Applies to Statements of "Participant" Only: Section 41-5-402 (renumbered 41-5-1303) does not render privileged the testimony of defendant's mother concerning alleged acts of sexual abuse committed by defendant when he was a minor. No statement of a "participant" is involved. Thus, the mother may testify about the prior incidents in a criminal prosecution of defendant for incest. St. v. T.W., 220 M 280, 715 P2d 428, 43 St. Rep. 368 (1986).

Attorney General's Opinions

Youth Court Act — Applicability to Alcohol Possession Proceedings in Other Courts: The provisions of the Montana Youth Court Act that apply to a youth charged with a violation of 45-5-624, illegal possession of alcohol, in justice's, municipal, or city court proceedings are 41-5-303 through 41-5-307 (renumbered 41-5-322, 41-5-331, 41-5-341, 41-5-344 (now repealed), and 41-5-1206), 41-5-402 (renumbered 41-5-1303), 41-5-601 (now repealed), 41-5-602 (now repealed), and 41-5-604 (renumbered 41-5-216). A youth charged with a violation of 45-5-624 is further entitled to the following rights in addition to those normally accorded defendants in justice's, municipal, or city court criminal proceedings: (1) service of the criminal summons on both the youth and a custodial parent or guardian; (2) advisement of the right to retained or, if appropriate, appointed counsel; and (3) waiver of the right to counsel only by both the youth and a custodial parent or guardian. 40 A.G. Op. 43 (1984). (Annotator's note: Chapter 105, sec. 1, L. 1985, amended 45-5-624 to remove imprisonment from the list of sentences that can be imposed upon youths convicted of violating the statute.)

41-5-1304. Disposition permitted under consent adjustment.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 8, Ch. 506, L. 2023. Amendment effective October 1, 2023.

2019 Amendment: Chapter 344 deleted former (2) that read: "(2) If the youth violates a parole agreement as provided for in 52-5-126, the youth must be returned to the court for further disposition. A youth may not be placed in a state youth correctional facility under a consent adjustment"; and made minor changes in style. Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2009 Amendment: Chapter 2 in (1)(f) in five places before reference to probation officer inserted "juvenile"; and made minor changes in style. Amendment effective October 1, 2009.

1997 Amendments: Chapter 185 inserted (1)(f) allowing confiscation of a youth's driver's license; and made minor changes in style.

Chapter 550 in (1) substituted "by consent adjustment" for "by informal adjustment"; at end of (1)(b) and (1)(c) substituted "pursuant to a recommendation made under 41-5-525" (renumbered 41-5-121) for "as determined by the department"; in (1)(d) inserted reference to 41-5-1521; inserted (1)(g) through (1)(n) allowing counseling, assessment, detention, community service, victim-offender mediation, contribution for costs, contribution for victim's costs, or any other conditions; deleted former (2) that read: "(2) In determining whether restitution is appropriate in a particular case, the following factors may be considered in addition to any other evidence:

(a) age of the youth;
(b) ability of the youth to pay;

(c) ability of the parents, legal guardian, or persons contributing to the youth's delinquency or need for supervision to pay;

(d) amount of damage to the victim; and

(e) legal remedies of the victim. However, the ability of the victim or the victim's insurer to stand any loss may not be considered in any case"; in (2), in first sentence, substituted "a parole agreement" for "an aftercare agreement" and in second sentence substituted "under consent adjustment" for "under informal adjustment"; in (3) substituted "placed in substitute care, an assessment placement, or detention requiring payment by any state department or local government agency" for "placed in substitute care requiring payment by the department" and after "a contribution covering all or part of the costs for the" inserted "adjudication, disposition, supervision"; deleted (5) through (7) that read: "(5) If the court determines that the youth's parents or guardians are financially able to pay a contribution as provided in subsection (4), the court shall order the youth's parents or guardians to pay an amount based on the uniform child support guidelines adopted by the department of public health and human services pursuant to 40-5-209.

(6) (a) Except as provided in subsection (6)(b), contributions ordered under this section and each modification of an existing order are enforceable by immediate or delinquency income withholding, or both, under Title 40, chapter 5, part 4. An order for contribution that is inconsistent with this section is nevertheless subject to withholding for the payment of the contribution without need for an amendment of the support order or for any further action by the court.

(b) A court-ordered exception from contributions under this section must be in writing and be included in the order. An exception from the immediate income withholding requirement may be granted if the court finds there is:

(i) good cause not to require immediate income withholding; or

(ii) an alternative arrangement between the department and the person who is ordered to pay contributions.

(c) A finding of good cause not to require immediate income withholding must, at a minimum, be based upon:

(i) a written determination and explanation by the court of the reasons why the implementation of immediate income withholding is not in the best interests of the child; and

(ii) proof of timely payment of previously ordered support in cases involving modification of contributions ordered under this section.

(d) An alternative arrangement must:

(i) provide sufficient security to ensure compliance with the arrangement;

(ii) be in writing and be signed by a representative of the department and the person required to make contributions; and

(iii) if approved by the court, be entered into the record of the proceeding.

(7) (a) If the court orders the payment of contributions under this section, the department shall apply to the department of public health and human services for support enforcement services pursuant to Title IV-D of the Social Security Act.

(b) The department of public health and human services may collect and enforce a contribution order under this section by any means available under law, including the remedies provided for in Title 40, chapter 5, parts 2 and 4"; and made minor changes in style. Amendment effective July 1, 1997.

The amendments to this section made by sec. 24, Ch. 286, L. 1997, were rendered void by sec. 49(3)(e), Ch. 286, L. 1997, a coordination section.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

1995 Amendments: Chapter 528 in (2)(c) substituted "ability of the parents, legal guardian, or persons contributing to the youth's delinquency or need for supervision to pay" for "ability of the parents or legal guardian to pay"; and made minor changes in style.

Chapter 546 in (5), (7)(a), and (7)(b) substituted "department of public health and human services" for "department of social and rehabilitation services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Amendments: Chapter 105 inserted (1)(e) providing for placement of youth under home arrest; and made minor changes in style.

Chapter 696 inserted (4) through (7) regarding determination of the financial ability of parents or guardians to contribute to costs for care, placement, and treatment of a youth and regarding methods of contribution for those costs; and made minor changes in style. Amendment effective July 1, 1991.

Severability: Section 14, Ch. 105, L. 1991, was a severability clause.

Applicability: Section 15, Ch. 105, L. 1991, provided: "[This act] applies to sentences imposed after [the effective date of this act] [effective October 1, 1991]."

1987 Amendment: In (1)(b), after "41-3-1102", substituted "and as determined by the department" for "or into a home approved by the court"; at end of (1)(c), after "youth", inserted "as determined by the department"; deleted former (1)(d) that read: "(d) transfer of legal custody to the department of institutions for a period of 6 months, which period may be extended for 6 months upon further order of the court after notice and hearing"; and deleted former (3) that read: "(3) If the court finds that placement in a youth care facility other than a youth group home or youth foster home is necessary and in the best interests of the youth and the community, the court shall determine if the youth can receive appropriate treatment in a youth care facility located in Montana as follows:

(a) If the court finds the youth can receive appropriate treatment in a youth care facility located in Montana that will accept the youth, the court may not place the youth in a youth care facility located outside this state unless an out-of-state facility can provide appropriate treatment that:

(i) can be obtained at a cost less than that offered by any available facility in this state; and

(ii) is available in closer proximity to the youth's place of residence than any facility located in this state.

(b) When the department of social and rehabilitation services is ordered to pay the costs of caring for the child in a youth care facility other than a youth foster home or youth group home, the court shall provide the department with at least 5 days' written notice and opportunity to be heard before ordering the placement of the youth."

1986 Amendment: Deleted in second version language prohibiting commitment of youth in Department custody to youth treatment center unless commitment provisions are followed.

Effective Date: The 1986 amendment will be effective on the date the deed of sale of the Montana Youth Treatment Center from the Board of Land Commissioners is delivered to a buyer. (Deed delivered January 1, 1987.)

Repealer: Section 15, Ch. 14, Sp. L. June 1986, also repeals sections 53-21-164, 53-21-501, 53-21-502, and 53-21-505, effective upon the sale.

1985 Amendment: Inserted (3) allowing court to consider out-of-state placement in youth care facility.

1983 Amendments: Chapter 129 made the following changes: in (1)(d), substituted present language for "transfer of legal custody of the youth to the department of institutions, provided that such commitment does not authorize the department of institutions to place the youth in a state youth correctional facility, and such commitment may not exceed a period of 6 months without a subsequent order of the court, after notice and hearing;" and inserted (3) requiring that a youth in violation of an aftercare agreement be returned to the court for further disposition.

Chapter 363 inserted (4) prohibiting the commitment of a youth in departmental custody to the Montana Youth Treatment Center unless commitment provisions are followed.

Chapter 465 made the following changes: in (1)(b), substituted language after "placement of the youth" for "in a licensed foster home or other home approved by the court"; at end of (1)(c), deleted "including but not limited to a district youth guidance home".

1981 Amendment: Added the provision concerning ability to pay to (2)(e).

Case Notes

Commitment to Correctional Facility Under Consent Adjustment Improper: The Youth Court's commitment of J.F. to Mountain View School, based on violation of probation imposed pursuant to a consent adjustment, was held improper under provision of 41-5-403(4) (renumbered 41-5-1304), which states "No youth may be placed in a state youth correctional facility under informal adjustment". In re J.F., 219 M 140, 710 P2d 705, 42 St. Rep. 1904 (1985).

When Youth Court Without Jurisdiction: When, pursuant to a consent adjustment, J.F. was placed on probation for 6 months and the period of probation was not continued, the Youth Court was without jurisdiction to commit J.F. to Mountain View School upon petition of the County Attorney filed after the 6-month period charging a violation of probation. In re J.F., 219 M 140, 710 P2d 705, 42 St. Rep. 1904 (1985).

Informal Hearing: Sections 10-605 and 10-611, R.C.M. 1947 (since repealed), must be read together, and the informal manner in which a hearing may be conducted as provided in section 10-611 refers to the preliminary inquiry provided for in section 10-605. In re Gonzalez, 139 M 592, 366 P2d 718 (1961).

Part 14
Formal Proceeding — Procedure

41-5-1401. Petition — county attorney — procedure — release from custody.

Compiler's Comments

2009 Amendment: Chapter 2 in (3) in two places before "probation officer" inserted "juvenile". Amendment effective October 1, 2009.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

Case Notes

Prosecutorial Immunity — Initiation of Delinquency Proceedings Not Equivalent to Functioning as Complaining Witness: A minor was charged with sexual intercourse without consent. It was later discovered that the allegations were greatly exaggerated and the charges were dismissed. The minor's parents pursued a malicious prosecution claim. They cited Kalina v. Fletcher, 522 US 118 (1997), in which the U.S. Supreme Court found that a prosecutor acted as a complaining witness and lost prosecutorial immunity by personally vouching for the truth of a set of facts in an affidavit. The Montana Supreme Court affirmed the District Court's finding that the County Attorney's signing a petition to initiate a delinquency proceeding was not analogous to the sort of personal vouching found in Kalina and that the County Attorney was not acting as a complaining witness and was entitled to prosecutorial immunity. Renenger v. St., 2018 MT 228, 392 Mont. 495, 426 P.3d 559.

41-5-1402. Petition — form and content.

Compiler's Comments

1997 Amendments: Chapter 498 inserted (2) allowing County Attorney to designate certain cases as extended jurisdiction juvenile prosecutions and allowing County Attorney to request court to designate other cases as extended jurisdiction juvenile prosecutions; and made minor changes in style. Amendment effective May 2, 1997.

Chapter 550 in (1) substituted "to be a delinquent youth or a youth in need of intervention" for "to be a delinquent or in need of supervision"; in (5), inserted "a youth assessment center" and after "place of detention" inserted "assessment"; and made minor changes in style. Amendment effective July 1, 1997.

Severability: Section 15, Ch. 498, L. 1997, was a severability clause.

Section 80, Ch. 550, L. 1997, was a severability clause.

Applicability: Section 17, Ch. 498, L. 1997, provided: "[This act] applies to all offenses committed on or after [the effective date of this act]." Effective May 2, 1997.

Code Commissioner Change: Section 76, Ch. 550, L. 1997, instructed the Code Commissioner, in the Montana Code Annotated or in legislation enacted by the 1997 Legislature, to change references to youth in need of supervision to references to youth in need of intervention. The change has been made in this section.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Case Notes

Illegal Pretrial Process and Procedure — State's Right to Charge and Try Case: Youth Court petition initiating proceedings did not state the facts constituting the offense youth was charged with in ordinary and concise language so as to enable a person of common understanding to know what was intended. The petition did not include a witness list. An arrest warrant was issued out of the Youth Court, although there is no provision in the Youth Court Act for issuance of an arrest warrant. Presumably the warrant was issued under 46-6-201, but there was no showing of probable cause supported by oath or affirmation reduced to writing. The youth had already been arrested in Oklahoma at the time the warrant was issued. By what process and authority he was arrested in Oklahoma was not shown, nor was it shown he was arrested by a law enforcement officer. He was subsequently transferred to the District Court for trial as an adult and convicted of two counts of deliberate homicide. The Youth Court proceedings from issuance of the warrant for arrest onward were patently defective. However, this did not preclude the state from having him transferred to the District Court, proceeding against him, and obtaining a conviction. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Substance of Petition: The substance of the petition under section 10-605, R.C.M. 1947 (now repealed), must be the facts which bring the child within the provisions of section 10-602, R.C.M. 1947 (now repealed). St. v. Johnson, 141 M 1, 374 P2d 504 (1962).

Insufficiency of Petition: The petition in a proceeding under Ch. 122, L. 1911 (now repealed), for the trial of an alleged juvenile delinquent, which failed to make the parents parties or allege that they were unfit guardians or that they had consented to the proceeding, was insufficient. In re Satterthwaite, 52 M 550, 160 P 346 (1916).

Attorney General's Opinions

Indigent Youth Entitled to Counsel — Reimbursement: When a petition is filed initiating proceedings under the Montana Youth Court Act, a youth is entitled to court-appointed counsel when the youth is indigent and the youth's parents have sufficient financial resources but refuse to employ counsel. A Youth Court may order reimbursement from nonindigent parents for expenses associated with court-appointed counsel. 42 A.G. Op. 88 (1988).

41-5-1403. Summons.

Compiler's Comments

1997 Amendment: Chapter 286 at end of (5) substituted "41-5-332" for "41-5-303"; and made minor changes in style.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

1991 Amendment: Near beginning of (5) substituted "placed in detention or shelter care" for "in shelter care or detained", after "court" deleted "upon petition of the youth, his parents or guardian, or his counsel", and at end substituted "probable cause hearing as provided in 41-5-303" for "hearing in order to determine whether the circumstances of the case require such detention or shelter care and the form the detention or shelter care should take. All mentioned parties shall be notified of such petition process at the time of initial detention or shelter care"; and made minor changes in style. Amendment effective July 1, 1992.

1987 Amendments: Chapter 475 in (4), before "custody of the youth", inserted "legal".

Chapter 515 at beginning of (4), after "appears", deleted "from any sworn statement presented"; and inserted (6) authorizing Youth Court Judge to admit youth to bail.

Case Notes

Illegal Pretrial Process and Procedure — State's Right to Charge and Try Case: Youth Court petition initiating proceedings did not state the facts constituting the offense youth was charged with in ordinary and concise language so as to enable a person of common understanding to know what was intended. The petition did not include a witness list. An arrest warrant was issued out of the Youth Court, although there is no provision in the Youth Court Act for issuance of an arrest warrant. Presumably the warrant was issued under 46-6-201, but there was no showing of probable cause supported by oath or affirmation reduced to writing. The youth had already been arrested in Oklahoma at the time the warrant was issued. By what process and authority he was arrested in Oklahoma was not shown, nor was it shown he was arrested by a law enforcement officer. He was subsequently transferred to the District Court for trial as an adult and convicted of two counts of deliberate homicide. The Youth Court proceedings from issuance of the warrant for arrest onward were patently defective. However, this did not preclude the state from having him transferred to the District Court, proceeding against him, and obtaining a conviction. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Defective Service: The citation served upon the parents of juveniles subsequently declared delinquent and committed to the State Industrial School (now Pine Hills Youth Correctional Facility) was fatally defective in that it failed to recite the substance of the petition charging the juveniles with law violations, as required by section 10-606, R.C.M. 1947 (now repealed). Although juvenile proceedings are not criminal in nature, the statutory authority must be followed. St. v. Johnson, 141 M 1, 374 P2d 504 (1962).

Jurisdiction: The issuance of a citation in a delinquent child proceeding is not jurisdictional if the parties voluntarily appear. In re Gonzalez, 139 M 592, 366 P2d 718 (1961).

41-5-1404. Service of summons.

Compiler's Comments

Code Commissioner Correction: In (2) substituted "Rule 4(c)(2)(C), (c)(2)(D), and (d) through (s)" for "Rule 4D" to reflect revisions adopted by Supreme Court Order No. AF 07-0157 dated April 26, 2011.

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Delay of 391 Days Attributable to State — Speedy Trial Analysis Triggered — Remand for Determination of Whether State Can Prove Lack of Prejudice: A.G., a juvenile charged with felony vehicle theft, being a runaway, and curfew violation, moved to dismiss the charges for lack of a speedy trial 2 months before a scheduled hearing. The District Court subsequently attributed 229 of 392 days of delay to the state, concluded that the right to a speedy trial was not violated, and placed the burden on A.G. to show that the delay was prejudicial. Applying the criteria in Billings v. Bruce, 1998 MT 186, 290 M 148, 965 P2d 866 (1998), the Supreme Court found that the District Court incorrectly calculated the length of delay, which was actually 455 days. As established in Billings v. Bruce, any delay over 200 days triggers further speedy trial analysis. Because of a miscommunication between the juvenile probation office and the County Attorney, the state neglected to diligently move the case toward prosecution, and A.G. was under no obligation to ensure diligent prosecution of the case or to help the state avoid dismissal for failure to timely prosecute. Further, the District Court mistakenly placed the burden of proving prejudice on A.G., when in actuality, the burden was on the state to prove a lack of prejudice. The Supreme Court remanded for a hearing to determine whether A.G. was prejudiced by the 455-day delay. In re A.G., 2002 MT 111, 309 M 491, 47 P3d 831 (2002).

Personal Service: Service of the citation on an adult brother of the child's father at the father's home was not sufficient service on the father. In re Allamaras, 139 M 130, 361 P2d 340 (1961), explained in In re Gonzalez, 139 M 592, 366 P2d 718 (1961).

41-5-1405. Disqualification of judges.

Compiler's Comments

1987 Amendment: Substituted "criminal proceedings" for "civil proceedings".

Case Notes

Juvenile Proceedings — Civil: The statute providing for removal of judges in all civil actions and special proceedings of a civil nature applies to juvenile delinquency proceedings that by legislative intent are to be treated as civil proceedings. State ex rel. Ostoj v. McClernan, 129 M 160, 284 P2d 252 (1955).

What Acts Disqualified Judge May Perform: After an affidavit of disqualification for imputed bias had been filed against a district judge in a juvenile proceeding, the judge was disqualified to sit or act in the pending juvenile proceeding other than to arrange the calendar, regulate the order of business, transfer the proceeding to some other court, or to call another District Judge to sit in such proceeding. State ex rel. Ostoj v. McClernan, 129 M 160, 284 P2d 252 (1955).

41-5-1411. Appointment of guardian ad litem.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

Case Notes

Deputy County Attorney in Nonparty County — Acting as Guardian Ad Litem: Because the guardian ad litem was not an employee or representative of a party to the action, the District Court did not err in refusing to replace the guardian ad litem who, during proceedings, became a Deputy County Attorney in an adjoining county. In re M.A.W. & K.M.W., 256 M 296, 846 P2d 985, 50 St. Rep. 64 (1993).

41-5-1412. Rights and obligations — persons to be advised — contempt.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 9, Ch. 506, L. 2023. Amendment effective October 1, 2023.

1997 Amendment: Chapter 550 inserted (2) requiring persons to be advised of obligations; inserted (3) obligating parents or guardians to assist Youth Court; inserted (4) allowing parent to review results of youth assessment; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Case Notes

"Initial Appearance" for Purposes of Filing Motion to Substitute — Youth's First Appearance — Dismissal of Motion to Substitute Judge as Untimely Reversed: A youth who was charged as a delinquent youth filed a motion to substitute the District Court judge pursuant to 3-1-804, which requires a motion to substitute be filed within 10 days of the youth's "initial appearance". The District Court denied the motion to substitute, ruling that it had not been filed within 10 days of the youth's detention hearing and therefore was untimely. The District Court determined that a youth's detention hearing constitutes the youth's initial appearance. On appeal, the Supreme Court reversed the District Court, concluding that a detention hearing is not a youth's initial appearance because the hearing is to establish whether the state may charge the youth as a delinquent in the first place. Rather, the Supreme Court concluded that a youth's "first appearance," which is referred to in the Montana Youth Court Act and is held after a detention hearing, serves as a youth's "initial appearance" for purposes of filing a motion to substitute the District Court judge. D.H. v. Fourth Judicial District Court, 2012 MT 106, 365 Mont. 82, 278 P.3d 1010.

41-5-1413. Right to counsel — assignment of counsel.

Compiler's Comments

2017 Amendment: Chapter 358 in second sentence substituted "2-15-1029" for "47-1-201". Amendment effective July 1, 2017.

Severability: Section 48, Ch. 358, L. 2017, was a severability clause.

2005 Amendment: (Version effective July 1, 2006) Chapter 449 in second sentence after "retained" inserted "for the youth" and inserted requirement that court order office of state public defender to assign counsel, after "counsel" deleted "must be appointed", after "youth" deleted "if the parents or guardian and the youth are unable to provide counsel" and inserted reference to Montana Public Defender Act, and after "right to" deleted "appointed"; in third sentence after "waive" inserted "the right to"; and made minor changes in style. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

1997 Amendment: Chapter 550 near beginning of first sentence substituted "youth in need of intervention" for "youth in need of supervision" and in second sentence inserted "or guardian"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

1987 Amendment: In last sentence, after "commitment", deleted "to a state correctional facility or" and substituted reference to Department of Family Services (Department now defined as Department of Corrections) for reference to Department of Institutions.

1981 Amendment: Inserted "if the parents and the youth are unable to provide counsel" near the middle of the section.

Case Notes

Minor's Prior DUI in City Court Properly Applied to Felony DUI Charge — No Violation of Constitutional Rights in City Court: Allen was arrested for a felony fourth DUI in 2004. Calculation of the number of DUIs included Allen's first arrest in 1997 as a minor, to which Allen pleaded guilty in City Court. Allen contended that it was improper to include the 1997 conviction in the total because that conviction was constitutionally infirm in that the City Court failed to advise him of his rights, including the right to counsel, and accepted his guilty plea without consent of a parent. Allen further contended that as a minor he was incapable of knowingly, voluntarily, and intelligently waiving the right to counsel. The Supreme Court disagreed. City Court records provided direct evidence that Allen's 1997 conviction was not obtained in violation of Allen's constitutional rights, and Allen failed to rebut the presumption of regularity that attached to the 1997 conviction. With specific regard to the right to counsel argument, the court noted that because the Youth Court does not have concurrent jurisdiction with the City Court over traffic violations, including DUIs, Allen was incorrect in claiming that the right to counsel could only have been waived by Allen and a parent at the 1997 proceedings. Therefore, application of Allen's 1997 conviction in calculating a felony DUI was not error. St. v. Allen, 2009 MT 124, 350 M 204, 206 P3d 951 (2009).

Adjudication and Commitment Improper When Youth Not Represented by Counsel: When youth was not represented by legal counsel at all proceedings following the filing of a petition alleging the youth to be in need of supervision (now intervention) and the right to counsel was not waived, adjudication and commitment to Mountain View School was held improper. In re J.F., 219 M 140, 710 P2d 705, 42 St. Rep. 1904 (1985).

Youth — Waiver of Right to Counsel: To be effective, waiver of right to counsel by a youth in Justice's Court must be accompanied by waiver of right to counsel by the parent or guardian of the youth. Edward v. Collings, 193 M 426, 632 P2d 325, 38 St. Rep. 1240 (1981).

Attorney General's Opinions

County, Not State, Required to Fund Legal Expenses of Indigent Juvenile Under Youth Court Act: Youth Court defense expenses are not included in 3-5-901 as a specific expense that the state is required to fund; thus, the Legislature did not intend the state to be responsible for funding Youth Court expenses. Rather, pursuant to 41-5-104 (now repealed) and 41-5-111, the Board of County Commissioners is required to fund the legal defense expenses of an indigent youth against whom a petition has been filed in Youth Court. (See 2005 amendment.) 48 A.G. Op. 16 (2000).

Indigent Youth Entitled to Counsel — Reimbursement: When a petition is filed initiating proceedings under the Montana Youth Court Act, a youth is entitled to court-appointed counsel when the youth is indigent and the youth's parents have sufficient financial resources but refuse to employ counsel. A Youth Court may order reimbursement from nonindigent parents for expenses associated with court-appointed counsel. (See 2005 amendment.) 42 A.G. Op. 88 (1988).

Requirement of Counsel: This section (formerly 41-5-511) limits the requirement of counsel to those proceedings in which a youth is charged as a delinquent youth because commitment for more than 6 months is possible only as a result of such an adjudication. Because a youth alleged to be in need of supervision (now intervention) cannot be committed for more than 6 months, the requirement of counsel under this section (formerly 41-5-511) does not attach in that situation. (See 2005 amendment.) 40 A.G. Op. 74 (1984).

Law Review Articles

Lawyering in Juvenile Court: Lessons From a Civil Gideon Experiment, Federle, 37 Fordham Urb. L.J. 93 (2010).

41-5-1414. Right to confront witnesses.

Case Notes

Child's Testimony: A child may testify outside the presence of his parents in a case involving allegations of abuse and neglect, subject to cross-examination by the parents' attorney, when the presiding judge determines that it is the most likely method of discovering the whole truth as to the alleged abuse or neglect. In re Declaring T.E.R. Youth in Need of Care, 180 M 340, 590 P2d 1117 (1979).

41-5-1415. Admissibility of confession or illegally seized evidence.

Compiler's Comments

1999 Amendment: Chapter 532 deleted former (4) that read: "(4) upon a finding of an offense related to use of alcohol or illegal drugs, the court may order the youth to undergo urinalysis for the purpose of determining whether the youth is using alcoholic beverages or illegal drugs"; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 528 inserted (4) allowing court to order urinalysis in certain situations; and made minor changes in style.

Case Notes

Custodial Interrogation of Youth Without Consent — Miranda Warning Required — Suppression of Confession and Withdrawal of Guilty Plea Required: A 14-year-old boy's mother called his school, reported that he had not returned home the previous night, and requested that he be picked up. The school resource officer notified police and asked that the boy be brought to school if found. An officer later found the boy on the street smelling of alcohol and took the boy to the police station where it was discovered that several town businesses had been burglarized during the night, including a bowling alley where money and liquor had been stolen. Although there was no record that the youth was advised of his Miranda rights, during interrogation both prior to and after arrival of his parents, the youth confessed to robbing the bowling alley and subsequently pleaded guilty to felony burglary. The Youth Court summarily determined that the confessions were voluntary, denied a motion to suppress, found the youth was delinquent, and ordered 2 years' probation. On appeal, the Supreme Court addressed the voluntariness of the confessions and reversed. Given the absence of a tangible record that the officer read Miranda rights to the youth or that the youth or the parents consented in writing to a waiver of Miranda rights or agreed to the interview, the requirement in 41-5-331 that a youth be advised of the right against self-incrimination and the right to counsel was violated. Thus, the confessions could not be considered voluntary and should have been suppressed by the Youth Court. The Supreme Court also ordered that on remand, the youth be allowed to withdraw the guilty plea In re Z.M., 2007 MT 122, 337 M 278, 160 P3d 490 (2007).

Youth's Waiver of Rights When Parent and Youth in Separate Places — No Specific Topic of Questioning — Admissibility of Confession: After a fire in a clandestine methamphetamine laboratory, police sought to question a youth who was reported to be involved. With the youth's mother present, the officers informed them of the youth's various rights, gave them a written statement of rights, and allowed them to discuss waiver of the rights. In the youth's presence, the mother signed a consent to waive the youth's rights. The youth was then taken to the station without his mother, who declined to go, was informed of his rights again and signed a waiver of rights, and was questioned about the fire and the laboratory. The youth subsequently confessed to involvement in the drug operation, and the District Court declared him delinquent and entered a dispositional order. On appeal, the youth contended that the confession should have been suppressed because he and his mother did not agree together to waive his rights and because his mother was led to believe that the questioning was about the fire and not the laboratory, so she could not effectively waive his rights without accurate knowledge of the basis of the questioning, citing Evans v. District Court, 2000 MT 38, 298 M 279, 995 P2d 455 (2000). The Supreme Court disagreed. Nothing in Evans or in 41-5-331 requires that a youth and parent agree as to the specific topic of questioning to which a waiver of rights applies in order to make the waiver effective, nor does 41-5-331 require the agreement of the youth and parent in the same place at the same time. The youth also failed to show that the confession was involuntary through police deceit because he should have known that any interview regarding the fire could involve questions regarding the drug operation. In re C.L., 2004 MT 71, 320 M 369, 87 P3d 462 (2004).

Lack of Advisement of Right to Counsel and Right Against Self-Incrimination for Youth Taken Into Custody for Questioning Reversible Error — When Waiver of Rights Attaches: A youth was questioned at the Sheriff's office regarding a burglary and criminal mischief and was then taken home, where he agreed to relinquish articles of clothing that were not inconsistent with evidence found at the crime scene. The youth's parents were not notified of any of the Sheriff's actions, and no omnibus hearing was held. The youth's clothing was later introduced at trial over the youth's objection. Following conviction, the youth appealed, contending that the clothing was not legally obtained pursuant to a search warrant, that he was not advised of his rights, and that he did not give an informed waiver of his right to have his parents contacted prior to relinquishment of the clothing. The state maintained that the youth voluntarily consented to relinquish the clothing and thus waived his rights. The Supreme Court reversed. Under the Montana Youth Court Act, a youth taken into custody for questioning on a matter that could result in allegations that the youth is delinquent must be advised of the right to counsel and the right against self-incrimination, and the youth's parents must be immediately notified by the investigating officer. A youth who is 16 years of age or older may make an effective waiver of those rights. In determining whether waiver and consent by juveniles are voluntary, the Supreme Court applies the totality of circumstances test set out in Evans v. District Court, 2000 MT 38, 298 M 279, 995 P2d 455 (2000), which provides that a determination of voluntariness takes into account: (1) the defendant's age and level of education; (2) whether the defendant was advised of the defendant's rights; (3) the defendant's prior experience with the criminal justice system; (4) the defendant's background and experience; and (5) the defendant's demeanor, coherence, articulateness, and capacity to make full use of the defendant's faculties. Here, the District Court failed to take the Evans factors into account, and the requirements of 41-5-331 regarding parental notification were not fulfilled. Failure to follow statutory requirements and to consider the totality of the circumstances was reversible error. In re C.T.P., 2004 MT 63, 320 M 279, 87 P3d 399 (2004).

Plain Error in Allowing Youth's Extrajudicial Statements When Youth Not Advised of Right to Counsel and Right Against Self-Incrimination: A youth asserted for the first time on appeal that the Youth Court improperly admitted extrajudicial statements that the youth made regarding the youth's whereabouts when a burglary and criminal mischief were committed. Despite the state's contention that the arguments should not be considered because they were not raised at trial, the Supreme Court nevertheless considered the argument under the plain error doctrine because the youth was not notified while in custody of the fundamental right to counsel and the right to avoid self-incrimination, nor were the youth's parents notified as required. The youth's rights under the Montana Youth Court Act and the constitution were simply ignored in this case, so in order to avoid a question of the fundamental fairness of the trial by admission of constitutionally infirm extrajudicial statements, the Supreme Court reversed the trial court's decision to admit the statements. In re C.T.P., 2004 MT 63, 320 M 279, 87 P3d 399 (2004).

Corroboration by Testimony of Children: The testimony of a 5-year-old witness and 6-year-old victim was sufficient to corroborate the out-of-court confession of a 14-year-old boy charged with sexual assault. In re J.W.K., 223 M 1, 724 P2d 164, 43 St. Rep. 1483 (1986).

41-5-1416. Victims and witnesses of juvenile felony offenses — consultation — notification of proceedings.

Compiler's Comments

2021 Amendment: Chapter 339 in (3)(a)(iii) before "correctional facility" deleted "youth". Amendment effective October 1, 2021.

2001 Amendment: Chapter 102 in (2)(c) at end of first clause after "hearing" inserted "or pending a probable cause hearing" and inserted second sentence requiring consultation to take place prior to a youth's release unless there is an unsuccessful good faith attempt to contact the victim; and made minor changes in style. Amendment effective October 1, 2001.

1997 Amendments: Chapter 286 in (2) substituted "Title 41, chapter 5, part 14 or 15" for "Title 41, chapter 5, part 5".

Chapter 550 in (1) substituted "under Title 46, chapter 24" for "under this chapter"; in (2), after "victim of a juvenile felony offense", deleted "or, in the case of a minor victim or a homicide victim, with the victim's family"; in (3)(a) substituted "the appropriate agency" for "the youth court"; at end of (3)(b) substituted "must be a victim, as defined in 41-5-103, of a juvenile felony offense" for "must be a victim of a juvenile felony offense, an adult relative of the victim if the victim is a minor, or an adult relative of a homicide victim"; inserted (3)(c) requiring that victim be given opportunity to provide phone number and address and be provided name of agency responsible for youth; and in (3)(d) substituted "The appropriate official or agency shall provide the notification required by this subsection (3) in the same manner as required for offenses committed by adults" for "The court shall provide to the department the list of people entitled to notification under this subsection (3), and the department is responsible to provide the notification". Amendment effective July 1, 1997.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Section 79, Ch. 550, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

1997 Codification Instruction — Implementation: Section 77(2), Ch. 550, L. 1997, instructed the Code Commissioner to renumber and codify this section as part of Title 41, ch. 5, part 5. Because that part was renumbered by sec. 47, Ch. 286, L. 1997, the Code Commissioner has included the renumbered section within the body of the renumbered material in Title 41, ch. 5, part 14, in order to conform to the renumbering instruction and to maintain an orderly and logical arrangement of the laws pursuant to 1-11-204(3)(b).

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

1995 Amendment: Chapter 466 in (1), at beginning, inserted "attorney general shall ensure that the"; substituted (2) concerning consultation on disposition of case for "The attorney general shall assure that a victim or witness of a juvenile felony offense is provided the same services and assistance required under this chapter for the victim or witness of a crime"; inserted (3) regarding advance notification of Youth Court proceedings; and made minor changes in style. Amendment effective April 14, 1995.

Effective Date: Section 3, Ch. 170, L. 1991, provided: "[This act] is effective July 1, 1991."

41-5-1417. Use of restraints on youth — definition.

Compiler's Comments

Effective Date: This section is effective October 1, 2023.

41-5-1422. Modification of court orders — notice to department — hearing.

Compiler's Comments

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Effective Date: Section 81, Ch. 550, L. 1997, provided that this section is effective July 1, 1997.

Case Notes

No Authority of Youth Court to Order Youth to Pay Restitution Past Age of Majority: In 2000, a 12-year-old who admitted sexually assaulting an 8-year-old was adjudicated a delinquent youth by the Youth Court and placed on probation until age 18. Probation conditions included payment of restitution and the costs of the victim's therapy. In 2003, the Youth Court was notified by a restitution officer that a therapist had advised that counseling for the victim and the victim's mother was complete and that the restitution amount owed was $4,507.53; however, no restitution hearing was held. Nevertheless, the state and the youth's parents executed a restitution agreement specifying that the youth was liable for payment of restitution and identifying $4,507.53 as the total restitution due. The Youth Court signed the 2003 agreement, and $4,507.53 was subsequently paid in full. In 2005, the state requested a restitution hearing, noting that the victim's mother had submitted additional restitution claims of $4,352.93 for therapeutic sports activity for the victim and $8,309.25 for university schooling costs for the mother. At a hearing held 2 days before the end of the youth's probation, the Youth Court claimed jurisdiction over the youth for financial purposes until the youth turned 21 and ordered the youth to pay $12,662.18 in additional restitution to cover the mother's claims for sports and school-related costs. The youth appealed on grounds that the Youth Court had no authority to order additional restitution, and the Supreme Court reversed. The Youth Court limited its retention of jurisdiction beyond the youth's 18th birthday to enforcement of financial obligations set forth in the original disposition order and in the 2003 agreement establishing the total restitution to be paid by the youth. Therefore, the Youth Court did not have jurisdiction to impose additional restitution in a stand-alone order after the youth's probation, of which payment of restitution was a condition, expired, and the Supreme Court remanded with instructions to vacate the order for additional restitution. (See 2023 amendment to 41-5-205.) In re K.D.K., 2006 MT 187, 333 M 100, 141 P3d 1212 (2006), distinguished in In re T.M.L., 2012 MT 9, 363 Mont. 304, 268 P.3d 1255, and in In re S.M.K.-S.H., 2012 MT 281, 367 Mont. 176, 290 P.3d 718, in which the Supreme Court upheld a Youth Court order extending the youth's probation period at a revocation hearing when the original probation had not terminated.

41-5-1423. Appeals.

Case Notes

Record Mandatory: The absence of a verbatim record of a dispositional hearing requires reversal. Otherwise, appeal would become an illusory right without substance. In re Geary, 172 M 204, 562 P2d 821 (1977).

Bill of Exceptions: A juvenile who appeals from a commitment has the right to have the evidence presented in the District Court settled in a bill of exceptions and brought before the Supreme Court for a review under section 93-5505, R.C.M. 1947 (now repealed). In re Gonzalez, 139 M 592, 366 P2d 718 (1961).

41-5-1430. Conditional release revocation hearing.

Compiler's Comments

2021 Amendment: Chapter 339 in (3) before "correctional facility" deleted "state youth". Amendment effective October 1, 2021.

Effective Date: Section 38, Ch. 344, L. 2019, provided: "[This act] is effective July 1, 2019."

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

41-5-1431. Probation revocation proceeding — petition — hearing — disposition.

Compiler's Comments

1997 Amendment: Chapter 550 throughout section substituted "youth in need of intervention" for "youth in need of supervision"; and made minor changes in style. Amendment effective July 1, 1997.

1997 Codification Instruction — Implementation: Section 47, Ch. 286, L. 1997, instructed the Code Commissioner to codify this section as part of Title 41, ch. 5, part 15. The Code Commissioner has included the section within the body of renumbered material in Title 41, ch. 5, part 14, to maintain an orderly and logical arrangement of the laws pursuant to 1-11-204(3)(b).

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Case Notes

Erroneous Conclusion by Youth Court That Consent Decree Admission of Guilt Constitutes or Requires Change of Answer — Court-Compelled "True" Answer at Change of Answer Hearing Not Valid Admission — Youth Did Not Waive Adjudicatory Hearing or Trial Rights in Subsequent Reinstatement of Underlying Delinquency Petition. In re D.A.T., 2022 MT 174, 410 Mont. 1, 517 P.3d 157.

Youth Court Authority to Extend Probation Period at Probation Revocation Proceeding — No Violation of Equal Protection: At age 14, the appellant admitted to the charge of assault with a weapon and was placed on probation until his 18th birthday by the Youth Court. Two years later, the appellant admitted to possession of a handgun, in violation of his probation agreement. At the disposition hearing, the Youth Court revoked the appellant's probation, committed him to the Pine Hills Youth Correctional Facility until his 18th birthday, and extended his probation term until his 21st birthday to ensure he would be fully rehabilitated. The appellant appealed the Youth Court order on the grounds that the Youth Court had no authority to impose an additional probationary period beyond the period in the initial order. The appellant also asserted that he was denied equal protection of the law because he was similarly situated to an adult who committed assault with a weapon but was treated differently because the adult could not be subject to an additional probation period upon revocation. The Supreme Court upheld the order of the Youth Court because, under 41-5-1431, the court could have issued an order of commitment to the correctional facility and required the appellant to remain on probation until his 21st birthday at the original hearing. In addition, the Supreme Court determined that the appellant was not similarly situated to an adult who committed assault with a weapon because specific statutory provisions within the Youth Court Act ensure minors are treated differently from adults, including emphasizing rehabilitation, which was the Youth Court's justification for extending the appellant's probation. In re S.M.K.-S.H., 2012 MT 281, 367 Mont. 176, 290 P.3d 718.

Attorney General's Opinions

Disposition for Probation Violation: A youth originally charged as and adjudicated a youth in need of supervision (now youth in need of intervention) who violates probation cannot be committed to the Department of Institutions (now Department of Corrections) for more than 6 months under this section (formerly 41-5-533) because such disposition was unavailable in the original adjudication. However, a youth originally charged as a delinquent youth who is placed on probation as a youth in need of supervision (now youth in need of intervention) (as provided in 41-5-103(13)(d)) may be committed for more than 6 months if adjudged a delinquent youth after violating probation. 40 A.G. Op. 74 (1984).

Alternative to Revocation Proceeding: As an alternative to a revocation proceeding, a youth in need of supervision (now youth in need of intervention) who violates probation could be charged by petition as a delinquent youth under the definition of a delinquent youth, 41-5-103(12)(b), and could then be committed for a period of more than 6 months. 40 A.G. Op. 74 (1984).

41-5-1432. Enforcement of restitution orders.

Compiler's Comments

2019 Amendment: Chapter 344 in (1) after "the request of the victim" deleted "file a petition for violation of probation or" and in three places after "probation" inserted "or commitment to the department". Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2009 Amendment: Chapter 2 throughout section in three places before "probation officer" inserted "juvenile". Amendment effective October 1, 2009.

1997 Codification Instruction — Implementation: The codification instruction of sec. 14, Ch. 498, L. 1997, instructed the codifier to codify this section as part of Title 41, ch. 5, part 5. Because that part was renumbered by sec. 47, Ch. 286, L. 1997, the Code Commissioner has included the newly enacted section within the body of the renumbered material in order to conform to the renumbering instruction.

Severability: Section 15, Ch. 498, L. 1997, was a severability clause.

Effective Date: Section 16, Ch. 498, L. 1997, provided: "[This act] is effective on passage and approval." Approved May 2, 1997.

Applicability: Section 17, Ch. 498, L. 1997, provided: "[This act] applies to all offenses committed on or after [the effective date of this act]." Effective May 2, 1997.

Part 15
Formal Proceeding — Hearing — Disposition

Part Case Notes

Delinquent Youth Placed at Pine Hills Youth Correctional Facility by Youth Court Without Requisite Findings — Statutory Authority Exceeded. In re V.K.B., 2022 MT 94, 408 Mont. 392, 510 P.3d 66.

Prejudicial Delay: When petition to adjudicate J.F., a youth in need of supervision (now youth in need of intervention), was filed August 13 and no further action was taken until October 29, the Youth Court erred either in not dismissing the petition with prejudice after 15 days from service of the petition or in not ordering a continuance. In re J.F., 219 M 140, 710 P2d 705, 42 St. Rep. 1904 (1985).

Hearing Mandate — Reasonable Attempt to Comply Required: A petition charging four youths with conspiracy to commit aggravated assault was filed on June 16, and a hearing date was set for June 27. On June 22, an order issued continuing the hearing date until July 6. While it is not apparent from the record whether the state or trial court requested the continuance, it is clear that the youths did not. On July 6, the court ordered the hearing date continued. On August 2, the state asked that a new hearing date be set. Prior to the hearing, the youths moved to dismiss the petition under this section. The trial court dismissed the petition with prejudice, and the state appealed. On appeal, the Supreme Court affirmed, stating that the first continuance granted for unknown reasons did not meet the "interests of justice" and "due diligence" requirements of 41-5-516(2) (now repealed) and by itself was sufficient for dismissal. The court also stated that even assuming that the trial court had ordered the first two continuances sua sponte (on its own motion), the failure of the state to request a hearing for almost a month after the second order showed a lack of a reasonable attempt to comply with the hearing mandate of 41-5-516(1) (now repealed). In re L.R.T., R.A.C., T.P.V., & M.L.B., 209 M 421, 680 P2d 579, 41 St. Rep. 800 (1984).

Transfer to District Court — Hearing on Youth Court Petition Against Youth Unnecessary: The provision in 41-5-516 (now repealed) that a petition alleging delinquency or need of supervision (now intervention) shall be dismissed with prejudice if a hearing on the petition is not begun within 15 days after service does not apply when the charges are subject to transfer to the District Court and a timely motion to transfer is made. St. v. Woods, 203 M 401, 662 P2d 579, 40 St. Rep. 533 (1983).

Delinquent Youth Conviction Reversal — Inadmissible Hearsay Prejudice — Corroboration of Testimony of Others Responsible or Legally Accountable for Same Offense: After a minor was cited for running a red light and for driving without a license, the County Attorney charged he was a delinquent youth under the Youth Court Act, alleging the minor had taken the car he was found driving without the owner's consent. The minor appealed that the testimony of two police officers concerning the stolen property report was inadmissible hearsay and that his conviction declaring him a delinquent youth was improperly based on the testimony of other individuals who were legally accountable for the offense. The Montana Supreme Court found that the officers' testimony was inadmissible hearsay. The court also found that the corroborating evidence supplied by the officer who stopped the vehicle the minor was driving tended to connect the youth directly with the offense and therefore that the testimony of other minors responsible or legally accountable for the same offense was properly admitted. Despite the fact that the testimony of the other youths in the car, in conjunction with the independent corroborating evidence, could support a conviction in some cases, the reviewing court reversed the conviction. They found that the admission of the hearsay so affected the substantial rights of the accused as to require reversal. In re D.W.L., A Youth, 189 M 267, 615 P2d 887 (1980).

Due Process Required: Statutes regarding juvenile delinquency proceedings contemplate that the formalities of proceedings required by due process be granted and complied with before commitment to the State Industrial School (now Pine Hills Youth Correctional Facility). Proper service and a hearing with representation by counsel, if desired, were not granted in this case, so that commitment was improper. In re Allamaras, 139 M 130, 361 P2d 340 (1961).

Part Law Review Articles

Are Juvenile Courts a Breeding Ground for Wrongful Convictions? (2007 Juvenile Law Issue), Drizin & Luloff, 34 N. Ky. L. Rev. 257 (2007).

Creating an Adolescent Criminal Class: Juvenile Court Jurisdiction Over Status Offenders, Kedia, 5 Cardozo Pub. L., Pol'y & Ethics J. 543 (2007).

Is Immaturity a Legitimate Source of Incompetence to Avoid Standing Trial in Juvenile Court?, Wingrove, 86 Neb. L. Rev. 488 (2007).

41-5-1501. Consent decree with petition.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 10, Ch. 506, L. 2023. Amendment effective October 1, 2023.

2009 Amendment: Chapter 2 in (6) before "probation officer" inserted "juvenile". Amendment effective October 1, 2009.

1999 Amendments — Composite Section: Chapter 523 in (1)(a) in second sentence substituted "youth" for "child"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 532 in (1)(a) in second sentence substituted "youth" for "child"; and at end of (7) inserted "unless it is recommended by the county attorney and accepted by the youth court judge". Amendment effective October 1, 1999.

1997 Amendment: Chapter 550 in (1), at beginning of first sentence, substituted "Subject to the provisions of subsection (2), after the filing of a petition under 41-5-501" (renumbered 41-5-1402) for "At any time after the filing of a petition alleging that a youth is a delinquent youth or a youth in need of supervision" and at beginning of third sentence inserted exception clause; inserted (1)(b) allowing detention for up to 10 days; inserted (2) requiring youth to admit guilt before consent decree can be used; near beginning of (4) substituted "youth in need of intervention" for "youth in need of supervision"; inserted (7) limiting use of consent decree to one felony or two misdemeanors; and made minor changes in style. Amendment effective July 1, 1997.

1997 Codification Instruction — Implementation: Section 47, Ch. 286, L. 1997, instructed the Code Commissioner to codify this section as part of Title 41, ch. 5, part 14. The Code Commissioner has included the section within the body of renumbered material in Title 41, ch. 5, part 15, to maintain an orderly and logical arrangement of the laws pursuant to 1-11-204(3)(b).

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

1991 Amendment: In (1), at end, inserted "and the responsibility of the youth's parents or guardians to pay a contribution for the costs of placement in substitute care"; and made minor changes in style. Amendment effective July 1, 1991.

Case Notes

Erroneous Conclusion by Youth Court That Consent Decree Admission of Guilt Constitutes or Requires Change of Answer — Court-Compelled "True" Answer at Change of Answer Hearing Not Valid Admission — Youth Did Not Waive Adjudicatory Hearing or Trial Rights in Subsequent Reinstatement of Underlying Delinquency Petition. In re D.A.T., 2022 MT 174, 410 Mont. 1, 517 P.3d 157.

Reinstatement of Petition Sole Remedy Available After Violation of Youth's Consent Decree — Consent Decree Distinguished From Consent Adjustment: A youth entered into a consent decree providing that the youth would be on probation for a year, and the petition against the youth for criminal felony mischief was suspended. The state later filed to revoke the youth's probation and asked that the youth be committed to a detention facility without moving to reinstate the original petition. Erroneously relying on In re Appeal of Cascade County District Court, 2009 MT 355, 353 Mont. 194, 219 P.3d 1255, concerning consent adjustments, a statutorily distinct procedure, the Youth Court entered two dispositional orders finding that the youth had violated the terms of his probation and committing him to a detention facility. The Youth Court erred when it denied the youth's motion to dismiss the state's petition to revoke the youth's probation, because reinstatement of the petition under 41-5-1501 is the sole disposition available when a youth violates the terms of a consent decree since an admission to a consent decree is not the same as a valid admission to charges in a formal petition. On appeal, the Supreme Court reversed and vacated the Youth Court's two dispositional orders, holding that the Youth Court did not have the statutory authority to issue them without an admission of guilt and adjudication of the merits of the youth's criminal mischief. In re C.L., 2021 MT 294, 406 Mont. 258, 498 P.3d 758.

41-5-1502. Adjudicatory hearing.

Compiler's Comments

1997 Amendments: Chapter 286 at end of (5) substituted "if the petition alleges that the youth is in need of supervision" (see 1997 Code Commissioner change) for "if the petition does not allege that the youth is delinquent".

Chapter 550 in (2), at end of first sentence, substituted "youth in need of intervention" for "youth in need of supervision"; inserted (3) requiring omnibus hearing before adjudicatory hearing; inserted (4) requiring that jury trial be conducted in accordance with Title 46, chapter

16; in (8) substituted "youth in need of intervention" for "youth in need of supervision"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Section 79, Ch. 550, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

Code Commissioner Change: Section 76, Ch. 550, L. 1997, instructed the Code Commissioner, in the Montana Code Annotated or in legislation enacted by the 1997 Legislature, to change references to youth in need of supervision to references to youth in need of intervention. The change has been made in this section.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

1995 Amendment: Chapter 466 in (5), at end, substituted exception clause for "when the hearing is held on a contested offense to which publicity must be allowed under subsection (2) of 41-5-601"; and made minor changes in style. Amendment effective April 14, 1995.

1981 Amendment: In (5), substituted "when the hearing is held on a contested offense to which publicity must be allowed under subsection (2) of 41-5-601" for "except when the court determines a closed hearing to be in the youth's best interest".

Case Notes

Erroneous Conclusion by Youth Court That Consent Decree Admission of Guilt Constitutes or Requires Change of Answer — Court-Compelled "True" Answer at Change of Answer Hearing Not Valid Admission — Youth Did Not Waive Adjudicatory Hearing or Trial Rights in Subsequent Reinstatement of Underlying Delinquency Petition. In re D.A.T., 2022 MT 174, 410 Mont. 1, 517 P.3d 157.

Jury Instruction on Purpose of Youth Court Act Improper: The Youth Court's act of instructing a deadlocked jury on the legislative purpose of the Youth Court Act was prejudicial because it introduced the positive impact that a guilty verdict would have on the defendant youth and distracted the jurors from weighing only the elements of the criminal charges. St. v. E.M.R., 2013 MT 3, 368 Mont. 179, 292 P.3d 451.

Record Mandatory:

When the record does not indicate any attempt by the Youth Court to comply with the adjudicatory hearing or dispositional hearing provisions of 41-5-521 and 41-5-522 (renumbered 41-5-1502 and 41-5-1511), the proceedings were not sufficient under the Youth Court Act to constitute a proper adjudication that J.F. was a youth in need of supervision (now youth in need of intervention). In re J.F., 219 M 140, 710 P2d 705, 42 St. Rep. 1904 (1985).

The absence of a verbatim record of a dispositional hearing requires reversal. Otherwise, appeal would become an illusory right without substance. In re Geary, 172 M 204, 562 P2d 821 (1977).

"Delinquent Youth"— Felony Basis: The Youth Court's finding that the youth had committed a deliberate homicide, although based entirely on circumstantial evidence, was supported by substantial evidence in the record and therefore was sufficient to support a finding that he was a delinquent youth within the meaning of 41-5-103. St. v. Twoteeth, 219 M 101, 711 P2d 789, 42 St. Rep. 1873 (1985).

Burglary Admission — "Delinquent Youth": The Youth Court's finding that the youth had committed a burglary, a charge which the youth admitted and which was supported by the evidence, was sufficient to support a finding that he was a delinquent youth within the meaning of 41-5-103. In re V.R.B., 201 M 127, 653 P2d 133, 39 St. Rep. 2001 (1982).

Procedure to Be Adhered To: A preliminary hearing to determine whether a child is a juvenile delinquent may be conducted informally. A formal hearing, however, is required on a petition to commit a child as a juvenile delinquent. The procedures provided for civil trials must be adhered to, and there must be a stenographic record of evidence presented in juvenile court. In re Gonzalez, 139 M 592, 366 P2d 718 (1961).

When Judge May Determine Facts: Under section 10-603, R.C.M. 1947 (since repealed), dealing with delinquent children, only when there is no demand for a jury trial or when a jury trial has been waived may a judge determine the facts. Here, where the minor charged with being a delinquent child made a demand for a jury trial at the opening of trial as well as on the day preceding trial, the juvenile court was without jurisdiction to try him without a jury. Application of Banschbach, 133 M 312, 323 P2d 1112 (1958).

41-5-1503. Medical or psychological evaluation of youth — urinalysis.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 11, Ch. 506, L. 2023. Amendment effective October 1, 2023.

2021 Amendment: Chapter 339 in (3) before "correctional facility" deleted "state youth". Amendment effective October 1, 2021.

2007 Amendment: Chapter 398 in (1) substituted second sentence concerning youth court payment for evaluation for former second and third sentences that read: "The county determined by the court as the residence of the youth is responsible for the cost of the evaluation, except as provided in subsection (2). A county may contract with the department or other public or private agencies to obtain evaluation services ordered by the court"; in (4) at end deleted "unless the youth is transferred to the district court under 41-5-208 or 41-5-1605 or the jurisdiction of the youth court is terminated following the filing of an information in district court pursuant to 41-5-206"; and made minor changes in style. Amendment effective June 30, 2007.

2001 Amendment: Chapter 587 in (3) near beginning substituted "41-5-1512(1)(o)(i)" for "41-5-1512(15)(a)". Amendment effective July 1, 2001.

Severability: Section 24, Ch. 587, L. 2001, was a severability clause.

1999 Amendment: Chapter 532 inserted (5) concerning urinalysis. Amendment effective October 1, 1999.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Effective Date: Section 81, Ch. 550, L. 1997, provided that this section is effective July 1, 1997.

Case Notes

Consideration of Juvenile's Prior Offenses Proper in Ordering Psychosexual Evaluation Under Youth Court Act: The Youth Court considered a juvenile's prior record in ordering a psychosexual evaluation prior to disposition. On appeal, the youth contended that under St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), consideration of the prior offenses was error because the prior charges were unrelated to the charges in question. The Supreme Court distinguished Ommundson, a criminal matter, from the present case that was brought under the Montana Youth Court Act and held that Ommundson did not bar the Youth Court from ordering a psychosexual evaluation of the youth that was essential to the youth's appropriate placement. State ex rel. D.M.B. v. District Court, 2004 MT 335, 324 M 190, 103 P3d 514 (2004).

Predispositional Psychosexual Evaluation Without Youth's Consent Authorized Only as Part of Court Disposition — Consideration of Prior Youth Court Offenses Allowed: The Youth Court, over a youth's objection, ordered a psychosexual evaluation for the youth. The specific language of this section controlled over the more general provisions of 41-5-1511. The Supreme Court held that under this section, youths must waive their constitutional rights in order to be subjected to a predispositional medical or psychological evaluation. Thus, the District Court erred in ordering a predispositional psychosexual evaluation over the youth's objection. However, the challenged evaluation was essential to the youth's appropriate placement and to the purposes of the Montana Youth Court Act, so the Supreme Court affirmed. State ex rel. D.M.B. v. District Court, 2004 MT 335, 324 M 190, 103 P3d 514 (2004).

Law Review Articles

Pretrial Self-Incrimination in Juvenile Court: Why a Comprehensive Pretrial Privilege Is Needed to Protect Children and Enhance the Goal of Rehabilitation, Lore, 47 U. Louisville L. Rev. 439 (2009).

41-5-1504. Finding of suffering from mental disorder and meeting other criteria — rights — limitation on placement.

Compiler's Comments

2021 Amendment: Chapter 339 in (2) and (3)(a) before "correctional facility" deleted "state youth". Amendment effective October 1, 2021.

2015 Amendment: Chapter 143 inserted (3)(b) concerning requests for funds from the cost containment pool and recommendations regarding appropriate placement for a youth found to be suffering from a mental disorder; and made minor changes in style. Amendment effective July 1, 2015.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Effective Date: Section 81, Ch. 550, L. 1997, provided that this section is effective July 1, 1997.

41-5-1511. Dispositional hearing — contributions by parents or guardians for expenses.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 12, Ch. 506, L. 2023. Amendment effective October 1, 2023.

2009 Amendment: Chapter 2 in (2) near middle of first sentence before "probation officer" inserted "juvenile". Amendment effective October 1, 2009.

1997 Amendments: Chapter 286 at end of (1) substituted "41-5-1525" for "41-5-523"; and deleted (6) that read: "(6) In determining whether restitution, as authorized by 41-5-523, is appropriate in a particular case, the following factors may be considered in addition to any other evidence:

(a) age of the youth;

(b) ability of the youth to pay;

(c) ability of the parents, legal guardian, or those that contributed to the youth's delinquency or need for supervision to pay;

(d) amount of damage to the victim; and

(e) legal remedies of the victim. However, the ability of the victim or the victim's insurer to stand any loss may not be considered in any case."

Chapter 550 throughout section substituted references to youth assessment or predisposition report for references to social summary or predisposition report; in (1), in first sentence, substituted "youth in need of intervention" for "youth in need of supervision" and in second sentence inserted reference to cost of adjudication, disposition, and supervision and at end substituted "as required in 41-5-1525, including the costs of necessary medical, dental, and other health care" for "as required in 41-5-523"; in (2), in first sentence after "probation officer", inserted "or an assessment officer" and at end inserted "including a statement by the victim or the victim's family"; in (4), in first sentence, substituted "41-5-521(5) through (7)" (renumbered 41-5-1502(5) through (7)) for "subsections (3), (4), and (5) of 41-5-521" and in second sentence inserted "the victim"; in (5) inserted "or the public"; deleted (6) (see Ch. 286 note); and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 50, Ch. 286, L. 1997, was a saving clause.

Section 79, Ch. 550, L. 1997, was a saving clause.

Applicability: Section 51, Ch. 286, L. 1997, provided: "[This act] applies to proceedings commenced after [the effective date of this act]." Effective October 1, 1997.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

1995 Amendment: Chapter 528 in (6)(c) substituted "ability of the parents, legal guardian, or those that contributed to the youth's delinquency or need for supervision to pay" for "ability of the parents or legal guardian to pay"; and made minor changes in style.

1991 Amendment: At end of (1) substituted "ability of the youth's parents or guardians to pay a contribution for the cost of care, commitment, and treatment of the youth as required in 41-5-523" for "liability as provided in 41-3-1123 and 41-3-1124"; and made minor change in style. Amendment effective July 1, 1991.

1987 Amendments: Chapter 515 in third sentence of (2), after "guardian", deleted "who gives his consent and".

Chapters 515 and 609 in (6) deleted reference to subsection (1)(f) of 41-5-523.

1983 Amendment: In (1), changed "41-5-805" to "41-3-1123" and "41-5-806" to "41-3-1124".

1981 Amendment: Added the provision concerning ability to stand any loss to (6)(e).

Case Notes

Consideration of Juvenile's Prior Offenses Proper in Ordering Psychosexual Evaluation Under Youth Court Act: The Youth Court considered a juvenile's prior record in ordering a psychosexual evaluation prior to disposition. On appeal, the youth contended that under St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), consideration of the prior offenses was error because the prior charges were unrelated to the charges in question. The Supreme Court distinguished Ommundson, a criminal matter, from the present case that was brought under the Montana Youth Court Act and held that Ommundson did not bar the Youth Court from ordering a psychosexual evaluation of the youth that was essential to the youth's appropriate placement. State ex rel. D.M.B. v. District Court, 2004 MT 335, 324 M 190, 103 P3d 514 (2004).

Predispositional Psychosexual Evaluation Without Youth's Consent Authorized Only as Part of Court Disposition — Consideration of Prior Youth Court Offenses Allowed: The Youth Court, over a youth's objection, ordered a psychosexual evaluation for the youth. The specific language of 41-5-1503 controlled over the more general provisions of this section. The Supreme Court held that under 41-5-1503, youths must waive their constitutional rights in order to be subjected to a predispositional medical or psychological evaluation. Thus, the District Court erred in ordering a predispositional psychosexual evaluation over the youth's objection. However, the challenged evaluation was essential to the youth's appropriate placement and to the purposes of the Montana Youth Court Act, so the Supreme Court affirmed. State ex rel. D.M.B. v. District Court, 2004 MT 335, 324 M 190, 103 P3d 514 (2004).

Record Mandatory:

When the record does not indicate any attempt by the Youth Court to comply with the adjudicatory hearing or dispositional hearing provisions of 41-5-521 and 41-5-522 (renumbered 41-5-1502 and 41-5-1511), the proceedings were not sufficient under the Youth Court Act to constitute a proper adjudication that J.F. was a youth in need of supervision (now youth in need of intervention). In re J.F., 219 M 140, 710 P2d 705, 42 St. Rep. 1904 (1985).

The absence of a verbatim record of a dispositional hearing requires reversal. Otherwise, appeal would become an illusory right without substance. In re Geary, 172 M 204, 562 P2d 821 (1977).

Transfer of Youth From Treatment Facility to Department: Given the Youth Court's power under 41-5-523 (renumbered 41-5-1512) to place a youth in the custody of the Department of Institutions (now Department of Corrections) and in a youth care facility, the court's order that the youth be transferred automatically from a treatment center to the custody of the Department of Institutions (now Department of Corrections) was a proper disposition. The Youth Court held a dispositional hearing and issued an order directing that temporary custody of the youth be placed in the Department of Social and Rehabilitation Services (now Department of Corrections) for treatment. The court is not required to hold another hearing before the youth is placed in the custody of the Department of Institutions (now Department of Corrections). St. v. Twoteeth, 219 M 101, 711 P2d 789, 42 St. Rep. 1873 (1985).

Dispositional Order to Be Supported by Findings: A youth admitted the commission of a burglary, and the evidence strongly supported his admission. The Youth Court ordered that the youth be committed to the Department of Institutions (now Department of Corrections) but did not enter findings of fact supporting its order of commitment. The Supreme Court remanded to the Youth Court for entry of findings. In re V.R.B., 201 M 127, 653 P2d 133, 39 St. Rep. 2001 (1982).

Dispositional Stage — Fitness of Parents: At the dispositional stage the concern for the best interests of the youth and community is paramount. The court need not, therefore, make specific findings as to the fitness of the parents. In re Geary, 172 M 204, 562 P2d 821 (1977).

Due Process: Even though a hearing may be informal, the requirements of due process must be met; where there was no sworn testimony, no proof, no representation by counsel, no proper citation to the parent, and no hearing in fact, an order of commitment to the State Industrial School (now Pine Hills Youth Correctional Facility) was reversible. In re Allamaras, 139 M 130, 361 P2d 340 (1961), explained in In re Gonzalez, 139 M 592, 366 P2d 718 (1961).

Informal Hearing:

Sections 10-605 and 10-611, R.C.M. 1947 (now repealed), had to be read together, and the informal manner in which a hearing could be conducted as provided in section 10-611 referred to the preliminary inquiry provided for in section 10-605. In re Gonzalez, 139 M 592, 366 P2d 718 (1961).

An informal trial is improper when the hearing is upon a petition of County Attorney charging a minor child, 16 years of age, with being a delinquent child, which could result in commitment. In re Gonzalez, 139 M 592, 366 P2d 718 (1961).

Stenographic Record of Evidence: Proceeding upon a petition of County Attorney charging minor with being a delinquent child, resulting in commitment of child to the State Industrial School (now Pine Hills Youth Correctional Facility), was remanded to District Court where no stenographic record had been made of the evidence presented in the juvenile court. In re Gonzalez, 139 M 592, 366 P2d 718 (1961).

Application of Section: The prohibition in section 10-611, R.C.M. 1947 (now repealed), which prohibited the "disposition of a delinquent child or evidence given in the court" from being used as evidence in any other case or proceeding against the child, applies only where the child is a party in a later proceeding; where the child is a witness in a later case, evidence of contradictory statements made in the juvenile court may be used for the purpose of impeachment. St. v. Searle, 125 M 467, 239 P2d 995 (1952).

41-5-1512. Disposition of youth in need of intervention or youth who violate consent adjustments.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 13, Ch. 506, L. 2023. Amendment effective October 1, 2023.

2021 Amendment: Chapter 339 in (1)(o)(i) before "correctional facility" deleted "youth". Amendment effective October 1, 2021.

2019 Amendment: Chapter 344 in (1)(b) at end inserted "if a committee has been established as provided for in 41-5-121". Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2015 Amendment: Chapter 143 in (3) at end substituted "office of court administrator" for "cost containment review panel"; and made minor changes in style. Amendment effective July 1, 2015.

2009 Amendment: Chapter 2 in (1)(l) in five places before reference to probation officer inserted "juvenile". Amendment effective October 1, 2009.

2007 Amendment: Chapter 398 in (1)(c) in first sentence substituted "youth court for the purposes of placement in a private, out-of-home facility" for "department in jurisdictions that do not participate in the juvenile delinquency intervention program or to the youth court in jurisdictions that participate in the juvenile delinquency intervention program for the purposes of funding a private, out-of-home, residential placement" and in second sentence before "the youth court" deleted "the department or to"; in (1)(o)(ii) at end of first sentence deleted "at the county's expense, which is not reimbursable under part 19 of this chapter" and inserted second sentence concerning court payment from its allocation; in (2) in second sentence after "may" inserted "not"; in (3) near middle substituted "annual allocation" for "account"; and made minor changes in style. Amendment effective June 30, 2007.

2001 Amendment: Chapter 587 in (1)(b) deleted former third sentence that read: "The judge may not place the youth in a residence unless the department informs the judge that resources are available for placement of the youth at that residence"; in (1)(c) in first sentence after "department" inserted "in jurisdictions that do not participate in the juvenile delinquency intervention program or to the youth court in jurisdictions that participate in the juvenile delinquency intervention program" and in second sentence after "department" inserted "or to the youth court"; in (1)(i) after "community" deleted "and that does not obligate funding from the department for services outside the state of Montana without the department's approval, except that a youth may not be placed by a youth court in a residential treatment facility as defined in 50-5-101. Only the department may, pursuant to subsection (3) of this section, place a youth in a residential treatment facility"; inserted (2) prohibiting court from ordering local government entity to pay for care, treatment, intervention, or placement, but allowing order for local government entity to pay for evaluation and in-state transportation of youth; inserted (3) prohibiting court from ordering state government entity from paying for care, treatment, intervention, placement, or evaluation that results in account deficit for district without cost containment review panel approval; and made minor changes in style. Amendment effective July 1, 2001.

Retroactive Applicability: Section 1, Ch. 152, L. 2001, amended sec. 18, Ch. 375, L. 1997, to read: "Section 18. Retroactive applicability. The provisions of Title 46, chapter 23, part 5, and of [this act] relating to registration apply retroactively, within the meaning of 1-2-109, to:

(1) sexual offenders who are sentenced by a state or federal court in any state on or after July 1, 1989, or who as a result of a sentence are under the supervision of a county, state, or federal agency in any state on or after July 1, 1989; and

(2) violent offenders who are sentenced by a state or federal court in any state on or after October 1, 1995, or who as a result of a sentence are under the supervision of a county, state, or federal agency in any state on or after October 1, 1995." Amendment effective March 29, 2001.

Severability: Section 24, Ch. 587, L. 2001, was a severability clause.

Intervention in Delinquency Pilot Program: Section 1, Ch. 161, L. 1999, amended sec. 73, Ch. 505, L. 1997, by extending the pilot program for 2 years, authorizing the department of corrections to create up to 10 additional accounts for judicial districts, and requiring the department to present a proposal to the 57th legislature. Section 1, Ch. 161, L. 1999, was not codified because of its temporary nature. Amendment effective March 24, 1999.

Extension of Termination Date: Section 2, Ch. 161, L. 1999, amended sec. 82, Ch. 550, L. 1997, by extending the termination date for the pilot program imposed by Ch. 550 to December 31, 2000. Effective March 24, 1999.

Retroactive Applicability: Section 4, Ch. 161, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all occurrences after January 1, 1999."

1997 Amendments: Chapter 185 inserted (12) allowing confiscation of a youth's driver's license; in (2)(c), after "execution of", substituted "sentences" for "sentence" (voided by Ch. 550 amendments); and made minor changes in style.

Chapter 375 in (1)(d), after "register as a", substituted "sexual or violent offender under 46-23-504" for "sex offender pursuant to 46-18-254 and 46-23-506" (voided by Ch. 550 amendment).

Chapter 550 in introduction substituted "If a youth is found to be a youth in need of intervention or to have violated a consent adjustment" for "If a youth is found to be a delinquent youth or a youth in need of supervision"; deleted (1)(a) that read: "(a) retain jurisdiction in a disposition provided under subsection (1)(b) or (1)(d)"; in (1) inserted "The youth court shall retain jurisdiction in a disposition under this subsection"; deleted (1)(c) and (1)(d) that read: "(c) subject to subsections (1)(n)(i), (2)(a), (2)(b), and (6), sentence a youth to one of the state youth correctional facilities established under 52-5-101 and, as part of the sentence, deny the youth eligibility for release without the express approval of the sentencing judge until the youth reaches 18 years of age. A youth may not be sentenced to a state youth correctional facility unless the department informs the judge that space is available for the youth at that facility. The sentencing judge may not place limitations on the release unless recommended by the youth placement committee.

(d) require a youth found to be delinquent to register as a sex offender pursuant to 46-18-254 and 46-23-506"; in (2), in first and third sentences, substituted "place the youth in a residence" for "place the youth in an in-state residence"; in (3), in first sentence, inserted "for the purposes of funding a private, out-of-home, residential placement subject to the conditions in 41-5-1522"; deleted (1)(f)(ii) that read: "(ii) in the case of a delinquent youth who is determined by the court to be a serious juvenile offender, the judge may specify that the youth be placed in a state youth correctional facility if the judge finds that the placement is necessary for the protection of the public. The court may order the department to notify the court within 5 working days before the proposed release of a youth from a youth correctional facility. Once a youth is committed to the department for placement in a state youth correctional facility, the department is responsible for determining an appropriate date of release into an appropriate placement"; in (4) substituted "order restitution for damages that result from the offense for which the youth is disposed by the youth or by the person that contributed to the delinquency of the youth" for "order restitution by the youth or the youth's parents"; deleted (1)(h) that read: "(h) impose a fine as authorized by law if the violation alleged would constitute a criminal offense if committed by an adult"; in (9), in last sentence, substituted "subsection (3) of this section" for "subsection (1)(f)"; in (10), at beginning, inserted "subject to the provisions of 41-5-1504" and substituted "finds that the youth is found to be suffering from a mental disorder, as defined in 53-21-102, and who meets the criteria in 53-21-126(1)" for "finds that the youth is seriously mentally ill as defined in 53-21-102" and deleted second sentence that read: "The youth is entitled to all rights provided by 53-21-114 through 53-21-119"; deleted (1)(n)(i) and (1)(n)(ii) that read: "(i) A youth adjudicated mentally ill or seriously mentally ill as defined in 53-21-102 may not be committed or sentenced to a state youth correctional facility.

(ii) A youth adjudicated to be mentally ill or seriously mentally ill after placement in or sentencing to a state youth correctional facility must be moved to a more appropriate placement in response to the youth's mental health needs and consistent with the disposition alternatives available in 53-21-127"; deleted former (2) through (14) that read: "(2) When a youth is committed to the department, the department shall determine the appropriate placement and rehabilitation program for the youth after considering the recommendations made under 41-5-527 by the youth placement committee. Placement is subject to the following limitations:

(a) A youth in need of supervision or adjudicated delinquent for commission of an act that would not be a criminal offense if committed by an adult may not be placed in a state youth correctional facility.

(b) A youth may not be held in a state youth correctional facility for a period of time in excess of the maximum period of imprisonment that could be imposed on an adult convicted of the offense or offenses that brought the youth under the jurisdiction of the youth court. This section does not limit the power of the department to enter into an aftercare agreement with the youth pursuant to 52-5-126.

(c) A youth may not be placed in or transferred to a penal institution or other facility used for the execution of sentence of adults convicted of crimes.

(3) A youth placed in a state youth correctional facility or other facility or program operated by the department or who signs an aftercare agreement under 52-5-126 must be supervised by the department. A youth who is placed in any other placement by the department, the youth court, or the youth court's juvenile probation officer must be supervised by the probation officer of the youth court having jurisdiction over the youth under 41-5-205 whether or not the youth is committed to the department. Supervision by the youth probation officer includes but is not limited to:

(a) submitting information and documentation necessary for the person, committee, or team that is making the placement recommendation to determine an appropriate placement for the youth;

(b) securing approval for payment of special education costs from the youth's school district of residence or the office of public instruction, as required in Title 20, chapter 7, part 4;

(c) submitting an application to a facility in which the youth may be placed; and

(d) case management of the youth.

(4) The youth court may order a youth to receive a medical or psychological evaluation at any time prior to final disposition if the youth waives the youth's constitutional rights in the manner provided for in 41-5-303. The county determined by the court as the residence of the youth is responsible for the cost of the evaluation, except as provided in subsection (5). A county may contract with the department or other public or private agencies to obtain evaluation services ordered by the court.

(5) The youth court shall determine the financial ability of the youth's parents to pay the cost of an evaluation ordered by the court under subsection (4). If they are financially able, the court shall order the youth's parents to pay all or part of the cost of the evaluation.

(6) The youth court may not order placement or evaluation of a youth at a state youth correctional facility unless the youth is found to be a delinquent youth or is alleged to have committed an offense that is transferable to criminal court under 41-5-206.

(7) An evaluation of a youth may not be performed at the Montana state hospital unless the youth is transferred to the district court under 41-5-206, 41-5-208, or 41-5-1105.

(8) An order of the court may be modified at any time. In the case of a youth committed to the department, an order pertaining to the youth may be modified only upon notice to the department and subsequent hearing.

(9) Whenever the court commits a youth to the department, it shall transmit with the dispositional judgment copies of medical reports, social history material, education records, and any other clinical, predisposition, or other reports and information pertinent to the care and treatment of the youth.

(10) If a youth is committed to the department, the court shall examine the financial ability of the youth's parents or guardians to pay a contribution covering all or part of the costs for the care, commitment, and treatment of the youth, including the costs of necessary medical, dental, and other health care.

(11) If the court determines that the youth's parents or guardians are financially able to pay a contribution as provided in subsection (10), the court shall order the youth's parents or guardians to pay an amount based on the uniform child support guidelines adopted by the department of public health and human services pursuant to 40-5-209.

(12) (a) Except as provided in subsection (12)(b), contributions ordered under this section and each modification of an existing order are enforceable by immediate or delinquency income withholding, or both, under Title 40, chapter 5, part 4. An order for contribution that is inconsistent with this section is nevertheless subject to withholding for the payment of the contribution without need for an amendment of the support order or for any further action by the court.

(b) A court-ordered exception from contributions under this section must be in writing and be included in the order. An exception from the immediate income withholding requirement may be granted if the court finds there is:

(i) good cause not to require immediate income withholding; or

(ii) an alternative arrangement between the department and the person who is ordered to pay contributions.

(c) A finding of good cause not to require immediate income withholding must, at a minimum, be based upon:

(i) a written determination and explanation by the court of the reasons why the implementation of immediate income withholding is not in the best interests of the youth; and

(ii) proof of timely payment of previously ordered support in cases involving modification of contributions ordered under this section.

(d) An alternative arrangement must:

(i) provide sufficient security to ensure compliance with the arrangement;

(ii) be in writing and be signed by a representative of the department and the person required to make contributions; and

(iii) if approved by the court, be entered into the record of the proceeding.

(13) Upon a showing of a change in the financial ability of the youth's parents or guardians to pay, the court may modify its order for the payment of contributions required under subsection (11).

(14) (a) If the court orders the payment of contributions under this section, the department shall apply to the department of public health and human services for support enforcement services pursuant to Title IV-D of the Social Security Act.

(b) The department of public health and human services may collect and enforce a contribution order under this section by any means available under law, including the remedies provided for in Title 40, chapter 5, parts 2 and 4"; inserted (13) allowing contribution for costs; inserted (14) allowing contribution for victim's counseling costs; inserted (15) allowing deferment of sentence during placement evaluation; inserted (16) allowing placement in youth assessment center; inserted (17) allowing participation in mediation; and made minor changes in style. Amendment effective July 1, 1997.

The amendments to this section made by sec. 28, Ch. 286, L. 1997, were rendered void by sec. 49(3)(e), Ch. 286, L. 1997, a coordination section.

The amendments to this section made by sec. 11, Ch. 490, L. 1997, were rendered void by sec. 78(1), Ch. 550, L. 1997, a coordination section.

Preamble: The preamble attached to Ch. 375, L. 1997, provided: "WHEREAS, the Legislature finds that the danger of recidivism posed by sexual and violent offenders and the protection of the public from these offenders is of paramount concern to government and the people; and

WHEREAS, the Legislature further finds that law enforcement agencies' efforts to protect their communities, conduct investigations, and apprehend sexual and violent offenders is impaired by the lack of information about offenders who live within their jurisdictions; and

WHEREAS, the system of registering sexual and violent offenders provides law enforcement with information critical to preventing victimization and to resolving incidents of sexual or violent offenses promptly, including notification of the public when necessary to the continued protection of the community; and

WHEREAS, persons who have committed a sexual or violent offense have a reduced expectation of privacy because of the public's interest in safety; and

WHEREAS, the Legislature finds that releasing information about sexual or violent offenders to law enforcement agencies and, under certain circumstances, providing access to limited information about certain sexual offenders to the general public will further the primary governmental interest of protecting specific vulnerable groups and the public in general from potential harm.

THEREFORE, it is the policy of the State of Montana to assist local law enforcement agencies' efforts in protecting their communities by requiring that sexual or violent offenders register and to authorize the release of necessary and relevant information about sex offenders to the public."

1997 Statement of Intent: The statement of intent attached to Ch. 375, L. 1997, provided: "A statement of intent is required for this bill in order to provide guidance for rules adopted under [section 12] [46-23-509] concerning the qualifications of sexual offender evaluators and concerning evaluations of sexual offenders. The legislature intends that sexual offender evaluators possess education and experience similar to the education and experience requirements of therapists certified by the Montana sex offender treatment association. The legislature further intends that rules for evaluating the risk of repeat offenses by sexual offenders include the following factors:

(1) whether the sexual offender has a mental abnormality;

(2) whether the sexual offender's conduct is repetitive and compulsive;

(3) whether drugs or alcohol played a part in the offense or offenses;

(4) whether the sexual offender served the maximum term for the offense or offenses;

(5) whether the offense or offenses involved a child;

(6) the age of the sexual offender at the commission of the offense or offenses;

(7) the relationship between the sexual offender and the victim or victims;

(8) whether the offense or offenses involved use of a weapon;

(9) the number, date, and nature of prior offenses;

(10) conditions of release that minimize risk of another offense, including whether the sexual offender is under supervision or receiving counseling and treatment;

(11) physical conditions that minimize the risk of another offense, such as advanced age or debilitating illness of the sexual offender;

(12) whether psychological or psychiatric profiles of the sexual offender indicate a risk of recidivism;

(13) the sexual offender's response to and participation in treatment;

(14) recent behavior of the sexual offender;

(15) recent threats or gestures by the sexual offender against persons; and

(16) a review of any victim impact statements."

Applicability: Section 18, Ch. 375, L. 1997, provided: "The provisions of [this act] relating to registration apply to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989; and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

Intervention in Delinquency Pilot Program: Section 73, Ch. 505, L. 1997, was not codified in the MCA because of its temporary nature. Under this section, the Department of Corrections is to gather information regarding the placement of youthful offenders and present a proposal to the 56th Legislature.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

1995 Amendments: Chapter 438 in (1), after "making", substituted "one or more" for "any"; inserted (1)(a) authorizing Youth Court to retain jurisdiction in disposition provided under subsection (1)(b) or (1)(d); inserted (1)(c) authorizing Youth Court, subject to certain conditions, to sentence youth to state youth correctional facility and to deny eligibility for release without approval of sentencing judge until age 18, prohibiting sentencing of youth to facility unless space is available, and prohibiting limits on release unless recommended by youth placement committee; inserted (1)(d) authorizing Youth Court to require delinquent youth to register as sex offender; inserted (1)(e) authorizing Youth Court to place youth in in-state residence for accountability, rehabilitation, and public protection; in (1)(f), after "department", substituted "In an order committing a youth to the department" for "if the court determines that the youth is in need of placement in other than the youth's own home, provided that"; in (1)(f)(i), before "home", inserted "youth's own" and deleted last sentence that read: "The court shall include a determination in the order committing the youth to the department"; in (1)(m), after "department", inserted "for services outside the state of Montana"; in (1)(n)(i), after "committed", inserted "or sentenced"; in (1)(n)(ii), after "placement", deleted "by the department" and after "in" inserted "or sentencing to"; at beginning of (3), after "placed", deleted "by the department"; at end of (7) inserted references to 41-5-208 and 41-5-1105; adjusted subsection references; and made minor changes in style. Amendment effective April 14, 1995.

Chapter 546 in (11), (14)(a), and (14)(b) substituted "department of public health and human services" for "department of social and rehabilitation services"; and made minor changes in style. Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1993 Amendment: Chapter 358 at beginning of (1)(b)(i) deleted "in the case of a youth in need of supervision"; inserted second and third sentences of (1)(b)(ii) regarding notification of court of potential release date and clarifying Department's responsibility for determining appropriate release date; in (1)(j) substituted third and fourth sentences regarding placement of mentally ill youths for former third sentence that read: "Upon release or discharge from the mental health facility, the youth must be returned to the court for further disposition in accordance with this section unless the court order has expired or the court no longer retains jurisdiction under 41-5-205"; in (2)(a), after "supervision", inserted "or adjudicated delinquent for commission of an act that would not be a criminal offense if committed by an adult"; in first sentence of (3), after "facility", inserted "or other facility or program operated by the department or who signs an aftercare agreement under 52-2-126" and in second sentence, after "placement", inserted "by the department, the youth court, or the youth court's juvenile probation officer" and near end inserted "under 41-5-205"; in (9) substituted "medical reports, social history material, education records" for "a medical report"; and made minor changes in style. Amendment effective April 16, 1993.

1991 Amendments: Chapter 105 inserted (1)(k) providing for placing youth under home arrest; and made minor changes in style.

Chapter 201 in (1)(a)(ii) (in (1)(b)(ii) of version effective July 1, 1992), (2)(a), (2)(b), and first sentence of (3), before "youth correctional facility", inserted "state"; at end of second sentence of (3) inserted "whether or not the youth is committed to the department"; and inserted (3)(a) through (3)(d) establishing criteria for supervision by a youth probation officer. Amendment effective July 1, 1991.

Chapter 511 throughout section, before "youth correctional facility", inserted "state"; in (4) deleted former first sentence that read: "At any time after the youth has been taken into custody and before final disposition, the court may, with the consent of the youth in the manner provided in 41-5-303 for consent by a youth to a waiver of his constitutional rights or after the youth has been adjudicated delinquent or in need of supervision, order the youth to be evaluated for a period not to exceed 45 days", inserted first sentence relating to medical or psychological evaluation after waiver of rights, in second sentence substituted "The county determined by the court as the residence of the youth is responsible" for "The county commissioners are responsible" and at end inserted exception clause, and at beginning of third sentence inserted "A county" and at end, after "services", inserted "ordered by the court"; inserted (5) relating to payment of evaluation costs by youth's parents; inserted (6) relating to restriction of placement or evaluation of predispositional youth at state youth correctional facility; and made minor changes in style. Amendment effective July 1, 1992.

Chapter 696 in (1)(b)(ii), (2)(a), and (2)(b), before "youth correctional facility", inserted "state"; inserted (8) through (12) ((10) through (14) in version effective July 1, 1992) regarding determination of the financial ability of parents or guardians to contribute to costs for care, commitment, and treatment of a youth and regarding methods of contribution for those costs; and made minor changes in style. Amendment effective July 1, 1991.

Severability: Section 14, Ch. 105, L. 1991, was a severability clause.

Applicability: Section 15, Ch. 105, L. 1991, provided: "[This act] applies to sentences imposed after [the effective date of this act] [effective October 1, 1991]."

1989 Amendments: Chapter 172 in (1)(b) substituted language authorizing Youth Court to commit youth to Department upon court determination for former language requiring Department, after commitment of youth and consideration of committee recommendations, to determine appropriate placement, supervision, and rehabilitation; in (1)(b)(i), after "supervision", deleted language prohibiting placement of youth in state youth correctional facility and in two places substituted "youth" for "child"; in (1)(b)(ii), after "who is", inserted "determined by the court to be", after "placed in" substituted "a youth correctional facility" for "physical confinement in an appropriate facility only", and after "such" substituted "placement" for "confinement"; deleted (1)(b)(iii) prohibiting court from holding youth in confinement longer than sentence imposed on convicted adult; deleted (1)(b)(iv) referring to disposition of youth under supervision of probation officer; deleted (1)(c) concerning Departmental approval for further youth care, treatment, or evaluation; in (1)(i) inserted language authorizing court to order further care, treatment, evaluation, or relief funded upon Departmental approval; in (2) inserted introductory clause requiring Department to determine placement and rehabilitation program for youth committed to Department; inserted (2)(a) through (2)(c) establishing limitation on youth placement; inserted (3) requiring Departmental supervision upon placement; deleted former (4) prohibiting commitment or transfer of youth to penal institution or adult facility; in (7), after "court", substituted "commits a youth to the" for "vests legal custody in an agency, institution, or"; and deleted former (7) describing form for order of commitment to Department. Amendment effective March 20, 1989.

Chapter 210 inserted (1)(j) relating to committing the youth to a mental health facility. Amendment effective July 1, 1989.

Chapter 434 in (4), near beginning after "custody", inserted "and before final disposition", near end of first sentence, after "evaluated", deleted "by the department", and substituted last sentence relating to County Commissioners' responsibility for cost of evaluation and authority to contract for services for "The department shall determine the place and manner of evaluation." Amendment effective July 1, 1991.

Chapter 616 in former (1)(c) (deleted by Ch. 172 but substantively identical to codified part of subsection (1)(i)), at end of first sentence, inserted exception clause providing that youth may not be placed in residential treatment facility by Youth Court but only by Department. Amendment effective July 1, 1989.

1987 Amendments — Composite Section: Chapter 370 in (2), before "waiver", inserted "a".

Chapter 515 in (1) changed "court" to "youth court"; deleted former (1)(e) that read: "(e) such further care and treatment or evaluation that the court considers beneficial to the youth"; in (1)(d), after "youth", inserted "or his parents"; and inserted (1)(e) through (1)(j) relating to disposition of delinquent youth or youth in need of supervision.

Chapter 609 throughout section substituted references to Department of Family Services (Department now defined as Department of Corrections) for references to Department of Institutions; in (1), after "making", inserted "any of"; deleted former (1)(b) and (1)(c) that read: "(b) place the youth for substitute care into a youth care facility as defined in 41-3-1102 or a home approved by the court;

(c) place the youth in a private agency responsible for the care and rehabilitation of such a youth"; in (1)(b) substituted present language, regarding commitment of youth to Department for determination of appropriate placement, supervision, and rehabilitation program, for former text that read: "transfer legal custody to the department of institutions provided, however, that"; in first sentence of (1)(b)(i), after "such", substituted "commitment" for "transfer of custody", after "facility" deleted remainder of sentence that read: "and such custody may not continue for a period of more than 6 months without a subsequent court order after notice and hearing", and inserted last two sentences requiring court to determine whether continuation in home is contrary to best interest of child; inserted (1)(b)(ii) through (1)(b)(iv) placing conditions on Department's treatment of youth committed to Department; at beginning of (1)(c) inserted "order" and after "evaluation" substituted "that does not obligate funding from the department without the department's approval" for "that the court considers beneficial to the youth"; in (2), after "45 days", deleted "of evaluation at a reception and evaluation center for youths" and inserted second sentence requiring Department to determine place and manner of youth evaluation; deleted former (4) that read: "(4) If the court finds that placement in a youth care facility other than a youth group home or youth foster home is necessary and in the best interests of the youth and the community, the court shall determine if the youth can receive appropriate treatment in a youth care facility located in Montana as follows:

(a) If the court finds the youth can receive appropriate treatment in a youth care facility located in Montana that will accept the youth, the court may not place the youth in a youth care facility located outside this state unless an out-of-state facility can provide appropriate treatment that:

(i) can be obtained at a cost less than that offered by any available facility in this state; and

(ii) is available in closer proximity to the youth's place of residence than any facility located in this state.

(b) When the department of social and rehabilitation services is ordered to pay the costs of caring for the child in a youth care facility other than a youth foster home or youth group home, the court shall provide the department at least 5 days' written notice and opportunity to be heard before ordering the placement of the youth"; and made minor changes in phraseology.

In preparation of the composite of the Ch. 515 and Ch. 609 amendments to this section, the Code Commissioner codified the Ch. 609 amendment to subsection (1)(c) (former subsection (1)(e)) despite the fact that Ch. 515 deleted former subsection (1)(e) because the Ch. 609 amendment is a complete substitution of the former language.

1986 Amendment: Deleted in second version language relating to 60-day evaluation period, requiring a determination that the youth is seriously mentally ill, and concerning procedures upon a finding of serious mental illness.

Effective Date: The 1986 amendment will be effective on the date the deed of sale of the Montana Youth Treatment Center from the Board of Land Commissioners is delivered to a buyer. (Deed delivered January 1, 1987.)

Repealer: Section 15, Ch. 14, Sp. L. June 1986, also repealed sections 53-21-164, 53-21-501, 53-21-502, and 53-21-505, effective upon the sale.

1985 Amendments: Chapter 531 inserted (7) relating to placement in out-of-state treatment facility.

Chapter 612 in (2) near end, after "youths", deleted "except that if the evaluation is to be done at the Montana youth treatment center, the commitment provisions of 53-21-505 must be followed and no evaluation of a youth may be done at Montana state hospital"; inserted (3) through (6) relating to an evaluation to determine whether a youth is seriously mentally ill; and deleted former (6) that read: "Except as provided in 53-21-507, if the custody of a youth is transferred to the department of institutions under subsection (1), the youth may not be committed to the Montana youth treatment center unless the commitment provisions of 53-21-505 are followed."

1983 Amendments: Chapter 129, after (1)(e), inserted "or"; and in (4), inserted second sentence relating to modification of court order.

Chapter 233 deleted former (2)(b), which read: "in the case of a delinquent youth 16 years or older whom the court considers a suitable person for placement at a youth forest camp, notify the director of the department of institutions of the finding. The director of the department of institutions shall then designate to the court the facility to which the youth shall be delivered for evaluation. The court may then commit the youth to the department of institutions for a period not to exceed 45 days for the purpose of evaluation as to the youth's suitability for placement and order the youth delivered for evaluation to the youth facility designated by the director. If after the evaluation the department of institutions reports to the court that such child is suitable for placement in a youth forest camp and if there is space available at a camp, the court may then commit such child directly to the youth forest camp under the terms of commitment of this chapter. If the department of institutions reports and states the reasons to the court why the youth is not suitable for placement, the youth shall be returned to the court for such further disposition as the court may consider advisable under the provisions of this chapter. The costs of transporting the youth to the designated youth facility for evaluation and cost of returning the youth to the court shall be borne by the county of residence of the youth."; and at end of (3), deleted "except as provided by subsection (2)(b)".

Chapter 363, at end of (2), inserted exception clause and Ch. 361 substituted "Montana state hospital" for "Warm Springs state hospital" in that clause; Ch. 363 inserted (6).

Chapter 465 made the following changes: in (1)(b), substituted present language for "place in a licensed foster home or a home approved by the court"; at end of (1)(c), deleted "including but not limited to a district youth guidance home"; and at end of (1)(e), deleted "consistent with subsection (1)(d) of this section".

Case Notes

Reinstatement of Petition Sole Remedy Available After Violation of Youth's Consent Decree — Consent Decree Distinguished From Consent Adjustment: A youth entered into a consent decree providing that the youth would be on probation for a year, and the petition against the youth for criminal felony mischief was suspended. The state later filed to revoke the youth's probation and asked that the youth be committed to a detention facility without moving to reinstate the original petition. Erroneously relying on In re Appeal of Cascade County District Court, 2009 MT 355, 353 Mont. 194, 219 P.3d 1255, concerning consent adjustments, a statutorily distinct procedure, the Youth Court entered two dispositional orders finding that the youth had violated the terms of his probation and committing him to a detention facility. The Youth Court erred when it denied the youth's motion to dismiss the state's petition to revoke the youth's probation, because reinstatement of the petition under 41-5-1501 is the sole disposition available when a youth violates the terms of a consent decree since an admission to a consent decree is not the same as a valid admission to charges in a formal petition. On appeal, the Supreme Court reversed and vacated the Youth Court's two dispositional orders, holding that the Youth Court did not have the statutory authority to issue them without an admission of guilt and adjudication of the merits of the youth's criminal mischief. In re C.L., 2021 MT 294, 406 Mont. 258, 498 P.3d 758.

Revocation of Youth Commitment and Commitment to DOC Proper: The Youth Court revoked a youth's commitment to Youth Court for private, out-of-home placement and committed him to the Department of Corrections for placement at a state youth correctional facility. The youth claimed the revocation was illegal because he was not on probation. On appeal, the Supreme Court affirmed the revocation. The court acknowledged that the youth was not technically on probation; however, he was subject to mandatory supervision. The court also noted that the youth was not amenable to supervision even though the Youth Court had provided him with every reasonable opportunity to succeed under his originally imposed court placement and therefore the commitment to the Department of Corrections was warranted. In re K.J.R., 2017 MT 45, 386 Mont. 381, 391 P.3d 71.

District Court's Continued Imposition of House Arrest Upheld After Youth Court Transfer Upheld: The Youth Court and the District Court did not err in imposing house arrest with restrictive conditions on the appellant pending a final disposition of his case. Pursuant to the Youth Court's order, the appellant was no longer under Department of Corrections supervision once he turned 18 years old. However, pursuant to 41-5-203, the Youth Court had jurisdiction over the appellant until he turned 21 or until it transferred jurisdiction to the District Court. Once the appellant's case was transferred to it, the District Court had the authority to impose conditions consistent with the underlying Youth Court disposition, and continuation of the appellant's house arrest in keeping with the Youth Court's order was consistent with the underlying Youth Court disposition order. In re J.W., 2016 MT 330, 386 Mont. 1, 387 P.3d 195.

Youth Offender Jointly and Severally Liable for Restitution Award — Failure to Consider Youth's Ability to Pay — Plain Error Warranting New Restitution Hearing: At his plea hearing, the youth defendant admitted to having committed criminal mischief as part of a common scheme, in violation of 45-6-101 and 45-2-101. The youth admitted his participation in 2 nights of vandalism, causing $16,020.63 in damages, out of 11 total nights of vandalism, worth total damages of $78,702.09. At the restitution hearing, the Youth Court held the youth jointly and severally liable for the entire $78,702.09 without inquiring into the extent of the youth's assets or prospects for future earnings. On appeal, the Supreme Court held that it was plain error for the Youth Court to fail to consider the youth's ability to pay the restitution. The Supreme Court took up the issue sua sponte because the error implicated the youth's fundamental constitutional rights under Article II, sec. 15, Mont. Const., as a youth in the Youth Court system faces a different disposition and therefore is not similarly situated to an adult who commits the same offense. Additionally, the criminal mischief statute at 45-6-101(2) expressly requires the court to impose restitution only after fully considering the convicted person's ability to pay. The Supreme Court held that the Youth Court's failure to consider the youth's ability to pay raised questions of the fundamental fairness of the proceedings against him and remanded for a new restitution hearing to consider the youth's ability to pay the full amount of restitution. In re K.E.G., 2013 MT 82, 369 Mont. 375, 298 P.3d 1151.

Statute Reasonably Related to Purposes of Youth Court Act — Constitutionality Affirmed: A consent adjustment without petition is an informal tool used by a probation officer when a youth is alleged to have violated the law but the officer does not believe it would be in the best interests of the youth, the family, and the public to file a formal petition. In this case, a youth contended that the provision of 41-5-1512 that allows a consent adjustment without petition violated due process by allowing the state and the Youth Court to proceed from an informal consent adjustment to formal revocation and disposition without requiring the filing of formal charges and without assurances that the youth's admission of violation was voluntary, knowing, and intelligent. The Supreme Court disagreed. Permitting the Youth Court to enforce the violation of informal consent adjustments without requiring a petition or finding that the youth is delinquent or in need of intervention has a reasonable and rational relationship to the express purposes of the Youth Court Act. The Act is designed to promote the welfare of the youth, and the disposition of a youth without going through formal proceedings is designed as a consistent, enforceable, and avoidable consequence of the youth's failure to comply with the terms of the agreement, rather than as a punitive measure. The youth failed to prove that 41-5-1512 was unconstitutional beyond a reasonable doubt, and the Supreme Court affirmed the statute's constitutionality. In re Cause No. CDJ 08-0133(A), 2009 MT 355, 353 M 194, 219 P3d 1255 (2009).

Failure to Preserve Question of Constitutionality of Youth Court Procedure — Appeal Dismissed: Two youths who entered an informal consent adjustment without petition later violated the consent adjustments and the state petitioned to revoke the consent adjustments. Following a hearing at which the youths admitted the violations, the Youth Court revoked the consent adjustments and proceeded to formal disposition under 41-5-1512. The youths appealed on grounds that 41-5-1512 was unconstitutional on its face and as applied because it allowed formal revocation and disposition based on admissions made through informal involuntary means and that without a formal charging petition, the informal admissions were effectively equated as formal admissions or as findings that the youths were in need of intervention, which relieved the state of its burden of proof. The Supreme Court declined to reach the constitutionality question because the argument was not properly preserved for appeal through a sufficiently specific objection. In re B.I. & N.G., 2009 MT 350, 353 M 183, 218 P3d 1235 (2009). See also St. v. Benson, 1999 MT 324, 297 M 321, 992 P2d 831 (1999).

Restitution Owing Under Youth Court Act — Market Value Versus Replacement Cost — Deduction of Salvage Value From Restitution Amount: T.M.R., a youth, stole a vehicle from his friend's parents' garage and went for a joyride. The vehicle was destroyed, and the youth was placed on probation and ordered to pay restitution. The parties disagreed on the amount of restitution owed. The Supreme Court noted that prior to the 2003 amendments to adult sentencing statutes, restitution was consistently based on market value if it could be ascertained. Unlike the adult sentencing statutes, the Montana Youth Court Act was not amended in 2003 to include replacement cost as a way to determine restitution. Thus, the court concluded that the more equitable and consistent approach to determine restitution under the Act was to measure damages based on market value. The court noted that the victims received $500 in salvage value for the vehicle and also held that the restitution amount should be reduced by the amount of salvage received. In re T.M.R., 2006 MT 246, 334 M 64, 144 P3d 809 (2006).

No Authority of Youth Court to Order Youth to Pay Restitution Past Age of Majority: In 2000, a 12-year-old who admitted sexually assaulting an 8-year-old was adjudicated a delinquent youth by the Youth Court and placed on probation until age 18. Probation conditions included payment of restitution and the costs of the victim's therapy. In 2003, the Youth Court was notified by a restitution officer that a therapist had advised that counseling for the victim and the victim's mother was complete and that the restitution amount owed was $4,507.53; however, no restitution hearing was held. Nevertheless, the state and the youth's parents executed a restitution agreement specifying that the youth was liable for payment of restitution and identifying $4,507.53 as the total restitution due. The Youth Court signed the 2003 agreement, and $4,507.53 was subsequently paid in full. In 2005, the state requested a restitution hearing, noting that the victim's mother had submitted additional restitution claims of $4,352.93 for therapeutic sports activity for the victim and $8,309.25 for university schooling costs for the mother. At a hearing held 2 days before the end of the youth's probation, the Youth Court claimed jurisdiction over the youth for financial purposes until the youth turned 21 and ordered the youth to pay $12,662.18 in additional restitution to cover the mother's claims for sports and school-related costs. The youth appealed on grounds that the Youth Court had no authority to order additional restitution, and the Supreme Court reversed. The Youth Court limited its retention of jurisdiction beyond the youth's 18th birthday to enforcement of financial obligations set forth in the original disposition order and in the 2003 agreement establishing the total restitution to be paid by the youth. Therefore, the Youth Court did not have jurisdiction to impose additional restitution in a stand-alone order after the youth's probation, of which payment of restitution was a condition, expired, and the Supreme Court remanded with instructions to vacate the order for additional restitution. (See 2023 amendment to 41-5-205.) In re K.D.K., 2006 MT 187, 333 M 100, 141 P3d 1212 (2006), distinguished in In re T.M.L., 2012 MT 9, 363 Mont. 304, 268 P.3d 1255, and in In re S.M.K.-S.H., 2012 MT 281, 367 Mont. 176, 290 P.3d 718, in which the Supreme Court upheld a Youth Court order extending the youth's probation period at a revocation hearing when the original probation had not terminated.

Consideration of Juvenile's Prior Offenses Proper in Ordering Psychosexual Evaluation Under Youth Court Act: The Youth Court considered a juvenile's prior record in ordering a psychosexual evaluation prior to disposition. On appeal, the youth contended that under St. v. Ommundson, 1999 MT 16, 293 M 133, 974 P2d 620 (1999), consideration of the prior offenses was error because the prior charges were unrelated to the charges in question. The Supreme Court distinguished Ommundson, a criminal matter, from the present case that was brought under the Montana Youth Court Act and held that Ommundson did not bar the Youth Court from ordering a psychosexual evaluation of the youth that was essential to the youth's appropriate placement. State ex rel. D.M.B. v. District Court, 2004 MT 335, 324 M 190, 103 P3d 514 (2004).

Predispositional Psychosexual Evaluation Without Youth's Consent Authorized Only as Part of Court Disposition — Consideration of Prior Youth Court Offenses Allowed: The Youth Court, over a youth's objection, ordered a psychosexual evaluation for the youth. The specific language of 41-5-1503 controlled over the more general provisions of 41-5-1511. The Supreme Court held that under 41-5-1503, youths must waive their constitutional rights in order to be subjected to a predispositional medical or psychological evaluation. Thus, the District Court erred in ordering a predispositional psychosexual evaluation over the youth's objection. However, the challenged evaluation was essential to the youth's appropriate placement and to the purposes of the Montana Youth Court Act, so the Supreme Court affirmed. State ex rel. D.M.B. v. District Court, 2004 MT 335, 324 M 190, 103 P3d 514 (2004).

Transfer of Youth Court Case to District Court Not Violative of Minor's Constitutional Rights: Spina argued that the statute allowing transfer of her Youth Court case to the District Court resulted in violation of her rights under Art. II, sec. 15, Mont. Const., which guarantees to minors the same fundamental rights afforded to adults, and under Art. II, sec. 24, Mont. Const., which guarantees the right to a fair trial. The Supreme Court considered alleged violations of the right against self-incrimination, the right to effective assistance of counsel, the right to a fair trial, and the right to a presumption of innocence, finding that Spina's arguments were without merit. The transfer statute did not violate Spina's constitutional rights. St. v. Spina, 1999 MT 113, 294 M 367, 982 P2d 421, 56 St. Rep. 467 (1999).

Placement of Youth With Noncustodial Parent as Condition of Probation Reversed: A.Z.Y. was found by the Youth Court to be a delinquent youth, was placed on probation under the supervision of the Youth Court Probation Department, and, as a condition of probation under this section (formerly 41-5-523), was released to the custody of his father with the condition that he live with his father in Seattle, Washington. The Supreme Court held that A.Z.Y.'s father's home was not A.Z.Y.'s home within the meaning of this section (formerly 41-5-523) and that as a result of 1987 amendments to the Montana Youth Court Act, the Department of Family Services (now Department of Public Health and Human Services) was to control the placement of a delinquent youth placed other than in the youth's home. For these reasons, the Supreme Court held that the Youth Court exceeded its authority in placing A.Z.Y. in his father's home as a condition of probation. In re A.Z.G., 273 M 525, 905 P2d 1098, 52 St. Rep. 1108 (1995).

Statute Not Vague or Unconstitutionally Broad: This section (formerly 41-5-523) is not unconstitutionally broad on its face in giving the power to the Department of Family Services (now Department of Corrections) to make placements of youth committed to its custody and care by a Youth Court. Further, this section (formerly 41-5-523) clearly outlines the options and limitations in disposition available to a Youth Court and clearly places limits on the Department in its placement and rehabilitation of youth committed to its custody and care; therefore, the statute is not vague. In re T.A.S., 244 M 259, 797 P2d 217, 47 St. Rep. 1590 (1990).

Youth Properly Adjudicated Delinquent Improperly Committed to Correctional Facility: H.F. violated the terms of her probation by violating curfew and using alcohol. She was adjudged a delinquent youth and placed in the custody of the Department of Family Services (now Department of Corrections) until age 19. H.F. was also placed in a youth correctional facility on the basis of being a serious juvenile offender. The Supreme Court held that the youth had properly been designated a delinquent youth and placed in the Department's custody. However, the acts that constituted a violation of her probation were not the serious acts set out in the statutory definition of a serious juvenile offender. Therefore, the Youth Court was without authority to place her in a correctional facility. In re H.F., 242 M 381, 791 P2d 53, 47 St. Rep. 826 (1990).

Youth Incorrectly Placed in Correctional Facility: H.F.'s mother filed a complaint charging the youth with ungovernable behavior. H.F. entered into a consent agreement that established 13 rules of probation. The youth subsequently violated several of the rules, was adjudicated a delinquent youth, was committed to the Department of Family Services (now Department of Corrections) until the age of 19, and was ordered placed in a secure correctional facility. The Supreme Court ruled that although the youth was correctly designated delinquent, her only offenses were status offenses. Under this section (formerly 41-5-523), because she could not be imprisoned for the violations, she could not be placed in a correctional facility. In re H.F., 242 M 381, 791 P2d 53, 47 St. Rep. 757 (1990).

Commitment to Pine Hills Remanded — Lack of Alcohol Dependency Treatment Program: Based on curfew violations, the District Court ordered a youth committed to Pine Hills School (now Pine Hills Youth Correctional Facility) for the protection of the public and its property. However, the record showed the youth needed alcohol dependency treatment, which was unavailable at Pine Hills. The Supreme Court reversed the commitment and remanded for consideration of a less restrictive alternative that would allow for treatment. In re J.F., 241 M 434, 787 P2d 364, 47 St. Rep. 420 (1990).

No Absolute Right to Counsel at Placement Hearing — Due Process: A delinquent youth was not denied due process when, pursuant to this section (formerly 41-5-523), he was placed in a youth incarceration facility without an adversarial hearing to decide his placement. Beyond commitment of the youth by the Youth Court, the delinquent youth has no absolute right to counsel at the placement hearing. However, the youth is not without due process rights at the hearing stage. A youth placement committee created by 41-5-525 (renumbered 41-5-121) makes a recommendation to the Department of Family Services (now Department of Corrections), which can accept or reject the recommendation under 41-5-527 (renumbered 41-5-123, now repealed). In addition, the Youth Court can modify that decision if placement is not in the best interests of the child. In re Peterson, 235 M 313, 767 P2d 319, 46 St. Rep. 13 (1989).

Separation of Powers — Commitment by Youth Court: Pursuant to this section (formerly 41-5-523), the Youth Court committed a delinquent youth to the Department of Family Services (now Department of Corrections) for placement in an appropriate facility. The youth appealed the placement, contending that the judiciary is the proper decisionmaking body for the placement of delinquent youths. In response to the youth's allegation that it is a violation of the separation of powers clause of the state constitution for the Department to make the placement decision, the Supreme Court held that there is no violation because the statute provides authority to the Youth Court to decide the commitment of delinquent youths and youths in need of supervision (now youth in need of intervention) and that authority is not diminished through granting the Department placement power. The court has the authority to review the placement decision to determine if it is in the best interests of the minor. In re Peterson, 235 M 313, 767 P2d 319, 46 St. Rep. 13 (1989).

Transfer of Youth From Treatment Facility to Department: Given the Youth Court's power under 41-5-523 (renumbered 41-5-1512) to place a youth in the custody of the Department of Institutions (now Department of Corrections) and in a youth care facility, the court's order that the youth be transferred automatically from a treatment center to the custody of the Department of Institutions (now Department of Corrections) was a proper disposition. The Youth Court held a dispositional hearing and issued an order directing that temporary custody of the youth be placed in the Department of Social and Rehabilitation Services (now Department of Corrections) for treatment. The court is not required to hold another hearing before the youth is placed in the custody of the Department of Institutions (now Department of Corrections). St. v. Twoteeth, 219 M 101, 711 P2d 789, 42 St. Rep. 1873 (1985).

Youth Not Denied Equal Protection by Sentencing System More Severe Than System Imposed on Adults: A youth has not been denied her right to equal protection of the law by imposition of a term of commitment upon her that is longer than the criminal sentence an adult would receive for the same act. Adults and minors are not similarly situated with respect to state sentencing laws because: (1) the purpose of their detention is not the same, that of the adult offender being both retributional and rehabilitational; and (2) the physical liberty interests of minors and adults are qualitatively different. In re C.S., 210 M 144, 687 P2d 57, 41 St. Rep. 970 (1984), followed in In re T.A.S., 244 M 259, 797 P2d 217, 47 St. Rep. 1590 (1990), and In re S.M.K.-S.H., 2012 MT 281, 367 Mont. 176, 290 P.3d 718.

Attorney General's Opinions

Indigent Youth Entitled to Counsel — Reimbursement: When a petition is filed initiating proceedings under the Montana Youth Court Act, a youth is entitled to court-appointed counsel when the youth is indigent and the youth's parents have sufficient financial resources but refuse to employ counsel. A Youth Court may order reimbursement from nonindigent parents for expenses associated with court-appointed counsel. 42 A.G. Op. 88 (1988).

Commitment Procedures to Be Followed in Committing Mentally Ill Youth — Private Mental Health Facilities Not Precluded: This section (formerly 41-5-523) does not authorize the Youth Court or the Department of Family Services (now Department of Corrections) to commit a mentally ill or seriously mentally ill youth to a mental health treatment facility without following the commitment procedures set out in Title 53, ch. 21, part 1. There is, however, no statutory preclusion of commitment of a youth to private mental health facilities. 42 A.G. Op. 59 (1988).

41-5-1513. Disposition — delinquent youth — restrictions.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 14, Ch. 506, L. 2023. Amendment effective October 1, 2023.

2021 Amendment: Chapter 339 in (1)(b) in two places, (1)(b)(ii), (1)(b)(iii), and (1)(e) in first sentence and last sentence before "correctional facility" deleted "state youth"; in (1)(b) deleted former second sentence that read "The provisions of 41-5-355 relating to alternative placements apply to placements under this subsection (1)(b)"; and in (1)(e) in second sentence after "youth from a" deleted "youth". Amendment effective October 1, 2021.

2019 Amendment: Chapter 344 in (1)(b) after "a state youth correctional facility" inserted "or other appropriate program as determined by the department"; in (3) after substituted "probation or conditional release" for "probation or parole". Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2017 Amendment: Chapter 208 in (1)(d) substituted "the youth is exempt from the duty to register as a sexual offender pursuant to Title 46, chapter 23, part 5, unless the court" for "and is required to register as a sexual offender pursuant to Title 46, chapter 23, part 5, exempt the youth from the duty to register if the court"; in (1)(d)(i) after "the youth has" deleted "not" and at end substituted "or" for "and"; in (1)(d)(ii) after "registration is" deleted "not" and after "public and that" deleted "relief from"; and made minor changes in style. Amendment effective October 1, 2017.

Applicability: Section 2, Ch. 208, L. 2017, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective October 1, 2017.

2015 Amendment: Chapter 143 in (5) at end substituted "office of court administrator" for "cost containment review panel"; and made minor changes in style. Amendment effective July 1, 2015.

2009 Amendment: Chapter 373 inserted (2)(d) requiring the imposition of adult restrictions on youth level 3 offenders in certain circumstances; inserted (3) requiring notification to the school superintendent of the district where a youth level 3 offender is enrolled; and made minor changes in style. Amendment effective April 28, 2009.

Retroactive Applicability: Section 4, Ch. 373, L. 2009, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to a delinquent youth, as defined in 41-5-103, adjudicated for the commission of a sexual offense, as defined in 46-23-502, before [the effective date of this act] [effective April 28, 2009] but for whom no disposition has been ordered pursuant to 41-5-1513."

2007 Amendments — Composite Section: Chapter 398 in (3) in second sentence near beginning after "may" inserted "not" and at end inserted exception clause; in (4) near middle substituted "annual allocation" for "account"; and made minor changes in style. Amendment effective June 30, 2007.

Chapter 483 in (1)(c) at beginning of first sentence inserted "subject to the provisions of subsection (5)", after "would be a" deleted "sexual offense or", after "register" inserted "and remain registered", and after "as a" deleted "sexual or" and in second sentence at end inserted "to ensure registration compliance"; inserted (1)(d) allowing a delinquent youth adjudicated for a sexual offense to be exempt from registration under certain circumstances; in (2) in introductory clause after "adjudicated for a" substituted "sexual offense, as defined in 46-23-502" for "sex offense" and after "court" substituted "shall" for "may"; inserted (2)(a) requiring the court to order a psychosexual evaluation prior to disposition; inserted (2)(b) requiring the court to designate the youth's risk level; in (2)(c) after "treatment" deleted "before a youth is discharged"; inserted (5) establishing the duration of registration for a youth; and made minor changes in style. Amendment effective May 11, 2007.

Severability: Section 29, Ch. 483, L. 2007, was a severability clause.

Retroactive Applicability: Section 31, Ch. 483, L. 2007, provided: "[Sections 2, 3, and 19 through 24] [amending 41-5-216, 41-5-1513, 46-23-502, 46-23-504, 46-23-505, 46-23-506, 46-23-508, and 46-23-509] apply retroactively, within the meaning of 1-2-109, to:

(1) sexual offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after July 1, 1989; and

(2) violent offenders who are sentenced or who are in the custody or under the supervision of the department of corrections on or after October 1, 1995."

2003 Amendment: Chapter 157 in (1)(b) deleted former second sentence that read: "The court may not place a youth adjudicated delinquent in a state youth correctional facility for an offense that would be a misdemeanor if committed by an adult unless the court finds that the youth presents a danger to the public safety and that the placement is recommended by a mental health professional after evaluation of the youth"; and inserted introductory clause and (1)(b)(i) through (1)(b)(iii) providing that a delinquent youth may not be placed in a state youth correctional facility for an act that would be a misdemeanor if committed by an adult unless certain conditions exist. Amendment effective October 1, 2003.

2001 Amendment: Chapter 587 in (1)(b) near beginning of first sentence substituted "41-5-1512(1)(o)(i)" for "41-5-1512(15)(a)" and inserted third sentence providing that provisions of 41-5-355 relating to alternative placements apply to placements under subsection (1)(b); inserted (3) prohibiting court from ordering local government entity to pay for care, treatment, intervention, or placement, but allowing order for local government entity to pay for evaluation and in-state transportation of youth; and inserted (4) prohibiting court from ordering state government entity from paying for care, treatment, intervention, placement, or evaluation that results in account deficit for district without cost containment review panel approval. Amendment effective July 1, 2001.

Severability: Section 24, Ch. 587, L. 2001, was a severability clause.

1999 Amendment: Chapter 532 in (1)(b) at beginning of first sentence inserted "subject to 41-5-1504, 41-5-1512(15)(a), and 41-5-1522" and at end substituted "and recommend to the department that the youth not be released until the youth reaches 18 years of age" for "or in a correctional facility or a program operated by the department" and inserted second sentence concerning placement of youth adjudicated delinquent; deleted former (1)(c) that read: "(c) subject to 41-5-1504, 41-5-1512(15)(a), and 41-5-1522, sentence a youth to one of the state youth correctional facilities established under 52-5-101 and, as part of the sentence, deny the youth eligibility for release without the express approval of the sentencing judge until the youth reaches

18 years of age. A youth may not be sentenced to a state youth correctional facility unless the department informs the judge that space is available for the youth at that facility. Except as provided in subsection (2), the sentencing judge may not place limitations on the release unless recommended by the youth placement committee. The court may not place a youth adjudicated delinquent in a state youth correctional facility for an offense that would be a misdemeanor if committed by an adult, unless the court finds that the youth presents a danger to public safety and that the placement is recommended by a mental health professional after evaluation of the youth"; near end of first clause of (1)(c) substituted "sexual or violent offender" for "sex offender"; and made minor changes in style. Amendment effective October 1, 1999.

Intervention in Delinquency Pilot Program: Section 73, Ch. 550, L. 1997, was not codified in the MCA because of its temporary nature. Under this section, the Department of Corrections is to gather information regarding the placement of youthful offenders and present a proposal to the 56th Legislature.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Effective Date: Section 81, Ch. 550, L. 1997, provided that this section is effective July 1, 1997.

Case Notes

Erroneous Conclusion by Youth Court That Consent Decree Admission of Guilt Constitutes or Requires Change of Answer — Court-Compelled "True" Answer at Change of Answer Hearing Not Valid Admission — Youth Did Not Waive Adjudicatory Hearing or Trial Rights in Subsequent Reinstatement of Underlying Delinquency Petition. In re D.A.T., 2022 MT 174, 410 Mont. 1, 517 P.3d 157.

Delinquent Youth Placed at Pine Hills Youth Correctional Facility by Youth Court Without Requisite Findings — Statutory Authority Exceeded. In re V.K.B., 2022 MT 94, 408 Mont. 392, 510 P.3d 66.

Revocation of Youth Commitment and Commitment to DOC Proper: The Youth Court revoked a youth's commitment to Youth Court for private, out-of-home placement and committed him to the Department of Corrections for placement at a state youth correctional facility. The youth claimed the revocation was illegal because he was not on probation. On appeal, the Supreme Court affirmed the revocation. The court acknowledged that the youth was not technically on probation; however, he was subject to mandatory supervision. The court also noted that the youth was not amenable to supervision even though the Youth Court had provided him with every reasonable opportunity to succeed under his originally imposed court placement and therefore the commitment to the Department of Corrections was warranted. In re K.J.R., 2017 MT 45, 386 Mont. 381, 391 P.3d 71.

Youth Offender Jointly and Severally Liable for Restitution Award — Failure to Consider Youth's Ability to Pay — Plain Error Warranting New Restitution Hearing: At his plea hearing, the youth defendant admitted to having committed criminal mischief as part of a common scheme, in violation of 45-6-101 and 45-2-101. The youth admitted his participation in 2 nights of vandalism, causing $16,020.63 in damages, out of 11 total nights of vandalism, worth total damages of $78,702.09. At the restitution hearing, the Youth Court held the youth jointly and severally liable for the entire $78,702.09 without inquiring into the extent of the youth's assets or prospects for future earnings. On appeal, the Supreme Court held that it was plain error for the Youth Court to fail to consider the youth's ability to pay the restitution. The Supreme Court took up the issue sua sponte because the error implicated the youth's fundamental constitutional rights under Article II, sec. 15, Mont. Const., as a youth in the Youth Court system faces a different disposition and therefore is not similarly situated to an adult who commits the same offense. Additionally, the criminal mischief statute at 45-6-101(2) expressly requires the court to impose restitution only after fully considering the convicted person's ability to pay. The Supreme Court held that the Youth Court's failure to consider the youth's ability to pay raised questions of the fundamental fairness of the proceedings against him and remanded for a new restitution hearing to consider the youth's ability to pay the full amount of restitution. In re K.E.G., 2013 MT 82, 369 Mont. 375, 298 P.3d 1151.

Youth Court Authority to Place Youth in Facility Following Fourth and Fifth Misdemeanors Within Twelve Months: K.M.G. appeared before the Youth Court on fourth and fifth misdemeanor charges after violating his conditions of probation. The Youth Court found K.M.G. to be a delinquent youth and sentenced him to placement at a youth correctional facility. K.M.G. contended on appeal that the placement was in error because none of the statutory placement criteria in 41-5-1513 was met. The Supreme Court disagreed, holding that: K.M.G. committed four or more misdemeanors during the prior 12 months; he waived his objection as to the appropriateness of the mental health professional who performed his evaluation; and the Youth Court's order was supported by sufficient evidence adequately demonstrating K.M.G.'s dangerousness to the public, including K.M.G.'s history of noncompliance with parental, school, law enforcement, and probationary rules and authority, as well as criminal and violent behaviors. In re K.M.G., 2010 MT 81, 356 Mont. 91, 229 P.3d 1227.

Registration of Youth Sex Offender in Public Interest: Following a youth's adjudication as a sex offender, the probation officer notified the youth that he was required to register as an offender pursuant to this section. The youth registered but then moved the District Court to delete the registration requirement. The court held two hearings on the issue, allowing the youth to present evidence and witnesses to support the claim, but held that the youth was required to register. On appeal, the Supreme Court affirmed. The youth failed to demonstrate sufficient mitigating factors to establish that the registration requirement imposed by the court would not be in the public's best interest. In re C.D.H., 2009 MT 8, 349 M 1, 201 P3d 126 (2009).

Youth Court Adjudication Not Considered Conviction — No Authority to Require Adjudicated Youth to Register as Sexual or Violent Offender Under Pre-2007 Law: In 1998, 16-year-old Hastings was adjudicated a delinquent youth in Youth Court, admitting one offense of sexual intercourse without consent, and was committed to the Department of Corrections (DOC). When Hastings turned 18 in 2000, his case was transferred to District Court until age 25 based on the parties' stipulation that Hastings had not completed sex offender treatment or paid restitution and was at high risk to reoffend. The District Court then determined that Hastings had violated the conditions of the Youth Court order and committed Hastings to the DOC and also required that Hastings register as a level 2 sex offender. Hastings initially registered as a sex offender, but failed to update registration after moving and was subsequently charged with failure to maintain registration. Hastings moved to dismiss the charge, asserting that he had not been convicted of a sexual offense and that neither the commitment order nor statutes required him to register after discharging his sentence. The motion was denied, and Hastings appealed. The Supreme Court reversed. Although the Youth Court had the authority to require sex offender registration pursuant to this section, no requirement was made in this case. Because the Youth Court adjudication did not constitute a conviction, the District Court could not impose registration requirements under 46-18-201. (Note that the 2007 Legislature amended 46-23-502 to include an adjudicated youth in the definition of a sexual or violent offender.) The District Court's opinion that this section suggests a wholesale incorporation of sexual offender registry into the Montana Youth Court Act was erroneous, and absent statutory authority, a court may not impose a registration requirement. Failure to grant Hastings' motion to dismiss was error, and the case was remanded for dismissal. St. v. Hastings, 2007 MT 294, 340 M 1, 171 P3d 726 (2007), distinguishing St. v. Mount, 2003 MT 275, 317 M 481, 78 P3d 829 (2003), and St. v. Villanueva, 2005 MT 192, 328 M 135, 118 P3d 179 (2005).

Restitution Owing Under Youth Court Act — Market Value Versus Replacement Cost — Deduction of Salvage Value From Restitution Amount: T.M.R., a youth, stole a vehicle from his friend's parents' garage and went for a joyride. The vehicle was destroyed, and the youth was placed on probation and ordered to pay restitution. The parties disagreed on the amount of restitution owed. The Supreme Court noted that prior to the 2003 amendments to adult sentencing statutes, restitution was consistently based on market value if it could be ascertained. Unlike the adult sentencing statutes, the Montana Youth Court Act was not amended in 2003 to include replacement cost as a way to determine restitution. Thus, the court concluded that the more equitable and consistent approach to determine restitution under the Act was to measure damages based on market value. The court noted that the victims received $500 in salvage value for the vehicle and also held that the restitution amount should be reduced by the amount of salvage received. In re T.M.R., 2006 MT 246, 334 M 64, 144 P3d 809 (2006).

Washington Youth Sexual Offender Required to Register as Sexual or Violent Offender if Residing in Montana: At age 15, Villanueva was adjudicated guilty of first degree rape in Washington state and was later required to register for life in that state as a sexual offender. Villanueva subsequently moved to Montana where he resided for 6 weeks. After being arrested for a domestic disturbance, it was discovered that Villanueva had not registered as a sexual or violent offender in Montana, and he was charged with failure to register. Villanueva contended that Montana law did not apply to his Washington registration requirement because he did not meet the definition of sexual or violent offender under 46-23-502 and because a 1989 Attorney General's opinion held that juveniles adjudicated delinquent under the Montana Youth Court Act whose cases have not been transferred to District Court are not required to register. Villanueva moved to dismiss the charge, but the District Court denied the motion. On appeal, the

Supreme Court affirmed. Although the Washington definition of sexual offender may not have been identical to the Montana definition, Villanueva was nevertheless a sexual offender under Washington law and was therefore required to register in Montana under 46-23-504. Further, Villanueva could not rely on the Attorney General's opinion because he was not adjudicated under the Montana Youth Court Act. The Supreme Court noted that the Washington sexual offender registration law also required Villanueva to register in another state if he changed state residency, so under both Washington and Montana law, Villanueva was required to register as a sexual offender. Villanueva's motion to dismiss was properly denied. St. v. Villanueva, 2005 MT 192, 328 M 135, 118 P3d 179 (2005).

Law Review Articles

Rehabilitating Juvenile Sex Offenders With a Life Sentence, Doeringer, 42 J. Marshall L. Rev. 187 (2008).

41-5-1521. Restitution.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 3, Ch. 199, L. 2023. Amendment effective October 1, 2023.

Code Commissioner Change: Section 76, Ch. 550, L. 1997, instructed the Code Commissioner, in the Montana Code Annotated or in legislation enacted by the 1997 Legislature, to change references to youth in need of supervision to references to youth in need of intervention. The change has been made in this section.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Effective Date: Section 81, Ch. 550, L. 1997, provided that this section is effective July 1, 1997.

Case Notes

Calculation of Restitution — No Joint and Several Liability for Restitution for 11-Day Vandalism Spree When Youth Participated Only 2 Days: A youth pleaded guilty to participating in 2 nights of an 11-day vandalism spree. The judge ordered that he was jointly and severally liable for the amount of damage caused throughout the entire spree, which exceeded $70,000. The youth argued he should be ordered to pay restitution for only the damages caused during the 2 days instead because the state did not establish his accountability for the vandalism that occurred during the other 9 days of the spree. The state argued it did not have to establish his accountability under the criminal mischief statutes for each day of the spree. The youth appealed to the Supreme Court, which agreed with the youth that the state was required to prove his accountability for the acts of others. The Supreme Court reversed the District Court's order of restitution and remanded for a recalculation of restitution for the 2 days on which the youth participated in the acts of vandalism. In re B.W., 2014 MT 27, 373 Mont. 409, 318 P.3d 682.

Youth Offender Jointly and Severally Liable for Restitution Award — Failure to Consider Youth's Ability to Pay — Plain Error Warranting New Restitution Hearing: At his plea hearing, the youth defendant admitted to having committed criminal mischief as part of a common scheme, in violation of 45-6-101 and 45-2-101. The youth admitted his participation in 2 nights of vandalism, causing $16,020.63 in damages, out of 11 total nights of vandalism, worth total damages of $78,702.09. At the restitution hearing, the Youth Court held the youth jointly and severally liable for the entire $78,702.09 without inquiring into the extent of the youth's assets or prospects for future earnings. On appeal, the Supreme Court held that it was plain error for the Youth Court to fail to consider the youth's ability to pay the restitution. The Supreme Court took up the issue sua sponte because the error implicated the youth's fundamental constitutional rights under Article II, sec. 15, Mont. Const., as a youth in the Youth Court system faces a different disposition and therefore is not similarly situated to an adult who commits the same offense. Additionally, the criminal mischief statute at 45-6-101(2) expressly requires the court to impose restitution only after fully considering the convicted person's ability to pay. The Supreme Court held that the Youth Court's failure to consider the youth's ability to pay raised questions of the fundamental fairness of the proceedings against him and remanded for a new restitution hearing to consider the youth's ability to pay the full amount of restitution. In re K.E.G., 2013 MT 82, 369 Mont. 375, 298 P.3d 1151.

Restitution Owing Under Youth Court Act — Market Value Versus Replacement Cost — Deduction of Salvage Value From Restitution Amount: T.M.R., a youth, stole a vehicle from his friend's parents' garage and went for a joyride. The vehicle was destroyed, and the youth was placed on probation and ordered to pay restitution. The parties disagreed on the amount of restitution owed. The Supreme Court noted that prior to the 2003 amendments to adult sentencing statutes, restitution was consistently based on market value if it could be ascertained. Unlike the adult sentencing statutes, the Montana Youth Court Act was not amended in 2003 to include replacement cost as a way to determine restitution. Thus, the court concluded that the more equitable and consistent approach to determine restitution under the Act was to measure damages based on market value. The court noted that the victims received $500 in salvage value for the vehicle and also held that the restitution amount should be reduced by the amount of salvage received. In re T.M.R., 2006 MT 246, 334 M 64, 144 P3d 809 (2006).

41-5-1522. Commitment to department — restrictions on placement.

Compiler's Comments

2021 Amendment: Chapter 339 in (1) and (3) before "correctional facility" deleted "state youth"; and in (2) before "correctional facility" deleted "state adult" and at end substituted "that does not provide sight and sound separation from adult offenders as required in 28 CFR 115.14" for "or other facility used for the execution of sentences of adults convicted of crimes". Amendment effective October 1, 2021.

2019 Amendment: Chapter 344 in introductory clause following "program for the youth" inserted "while the youth is in a correctional facility or other program operated by or under contract with the department" and after "youth placement committee" inserted "if a committee has been established as provided for in 41-5-121"; and in (1) at end deleted "This section does not limit the power of the department to enter into a parole agreement with the youth pursuant to 52-5-126". Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2007 Amendment: Chapter 398 in introductory clause in first sentence near end after "made" deleted "under 41-5-123". Amendment effective June 30, 2007.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Effective Date: Section 81, Ch. 550, L. 1997, provided that this section is effective July 1, 1997.

Case Notes

Revocation of Youth Commitment and Commitment to DOC Proper: The Youth Court revoked a youth's commitment to Youth Court for private, out-of-home placement and committed him to the Department of Corrections for placement at a state youth correctional facility. The youth claimed the revocation was illegal because he was not on probation. On appeal, the Supreme Court affirmed the revocation. The court acknowledged that the youth was not technically on probation; however, he was subject to mandatory supervision. The court also noted that the youth was not amenable to supervision even though the Youth Court had provided him with every reasonable opportunity to succeed under his originally imposed court placement and therefore the commitment to the Department of Corrections was warranted. In re K.J.R., 2017 MT 45, 386 Mont. 381, 391 P.3d 71.

No Error in Failure to Specify Length of Youth Commitment: The Youth Court committed K.M.G. to the custody of the Department of Corrections until K.M.G. reached age 18 or was released sooner by the Department. K.M.G. contended that the commitment order was invalid because it failed to limit the maximum time of commitment. The Supreme Court held that the commitment order was valid. Pursuant to 41-5-1522, K.M.G. could be committed only for the maximum period that could be imposed on an adult convicted of the same offenses. Thus, there was nothing illegal in leaving the specific determination of the length of his placement to the Department. In re K.M.G., 2010 MT 81, 356 Mont. 91, 229 P.3d 1227.

Youth Pleading True to Trespass — Motion to Dismiss for Lack of Probable Cause Properly Denied: K.J. received several citations for trespassing on housing authority property after receiving notice that he was not allowed on the property. K.J. argued in Youth Court that the notice should be voided because it was insufficient to alert K.J. of the potentially criminal nature of his conduct and that there was thus insufficient probable cause for conviction of the trespass charges. K.J. subsequently pleaded true to the charges and appealed. The Supreme Court initially declined to address K.J.'s constitutional due process argument because the issue was not raised in the Youth Court. The court then noted that K.J. read and signed the notice and later admitted through a plea agreement that he had trespassed and knew that he was barred from entering the property. The Youth Court correctly determined that probable cause existed to present a question of fact for the jury as to whether K.J. knowingly entered the property at a time when he could be arrested for unlawful entry, and because K.J. chose to plead true to the charges rather than present evidence to a jury, the Youth Court properly denied K.J.'s motion to dismiss for lack of probable cause. In re K.J., 2010 MT 41, 355 Mont. 257, 231 P.3d 75.

41-5-1523. Commitment to department or youth court — supervision.

Compiler's Comments

2021 Amendment: Chapter 339 in (1) before "correctional facility" deleted "state youth"; and made minor changes in style. Amendment effective October 1, 2021.

2019 Amendment: Chapter 344 in (1) substituted first sentence for "A youth placed in a state youth correctional facility or other facility or program operated by the department or who signs a parole agreement under 52-5-126 must be supervised by the department" and inserted last sentence regarding conditional release agreements; inserted (2) regarding supervision by a juvenile probation officer; in (4)(a) inserted "if a youth placement committee has been established as provided for in 41-5-121"; and made minor changes in style. Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2007 Amendment: Chapter 398 in (2) near beginning substituted "facility" for "residential placement", after "court" deleted "or the youth court's juvenile probation officer", before "probation officer" inserted "juvenile", and at end deleted "having jurisdiction over the youth under 41-5-205, whether or not the youth is committed to the department for purposes of funding a private, out-of-home, residential placement"; in (3) at beginning substituted "Responsibilities of the juvenile probation officer relating to placement of the youth include but are" for "Supervision by the youth probation officer includes but is"; in (3)(a) substituted "committee" for "person, committee, or team"; in (3)(d) near middle substituted "facility" for "residential placement" and at end substituted "supervision is terminated by the youth court" for "discharged by the department"; and made minor changes in style. Amendment effective June 30, 2007.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Effective Date: Section 81, Ch. 550, L. 1997, provided that this section is effective July 1, 1997.

41-5-1524. Commitment to department — transfer of records.

Compiler's Comments

2019 Amendment: Chapter 344 in (2) after "committed to the department" deleted "of corrections for custody"; in (3) at beginning deleted "If the department returns the youth back to youth court supervision on the youth's 18th birthday as required by the court order", substituted "probation officer" for "probation office", and at end inserted "if the department"; inserted (3)(a) through (3)(c) regarding placement, discharge, and transfer; and made minor changes in style. Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2017 Amendment: Chapter 56 in (3) substituted "If the department returns the youth back to youth court supervision on the youth's 18th birthday as required by the court order, the department shall transmit to the supervising juvenile probation office any medical reports, youth assessment material, education records, and other clinical or behavioral health information pertinent to the care and treatment of the youth" for "The department shall maintain the records of a youth committed to the department in a separate management information system and may not include any youth records in an adult offender management information system unless the youth has been adjudicated under 41-5-206." Amendment effective March 1, 2017.

2005 Amendment: Chapter 423 in (1) inserted reference to formal and informal youth court records; inserted (2) allowing sharing of informal youth court records with department; inserted (3) requiring youth court information to be maintained separately from adult records; and made minor changes in style. Amendment effective October 1, 2005.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Effective Date: Section 81, Ch. 550, L. 1997, provided that this section is effective July 1, 1997.

Part 16

Extended Jurisdiction Prosecution Act

Part Compiler's Comments

Effective Date: Section 10, Ch. 438, L. 1995, provided: "[This act] [Title 41, ch. 5, part 11, renumbered Title 41, ch. 5, part 16] is effective on passage and approval." Approved April 14, 1995.

Part Case Notes

Unconstitutionality of Act Requires Striking of Adult and Juvenile Dispositions: W.G. pleaded guilty to several felony charges. The District Court adjudicated W.G., a delinquent youth under 45-5-103, and found on its own motion that 41-5-1102, et seq. (renumbered Title 41, ch. 5, part 16), the Extended Jurisdiction Prosecution Act (EJPA), applied to the case of W.G. Accordingly, the District Court sentenced W.G. as a minor to the custody of the Department of Corrections until his 21st birthday under supervised probation, required that he attend a chemical dependency program, and required that he pay one-half the total restitution and that W.G.'s mother pay the other one-half of the restitution. The District Court then sentenced W.G. as an adult to 5 concurrent years on each of two counts and stayed the execution of those sentences on condition of no new offenses. Because the Supreme Court held in In re S.L.M., 287 M 23, 951 P2d 1365 (1997), that the EJPA was unconstitutional, the state argued that both minor and adult adjudications must be vacated and the case remanded for resentencing, while W.G.'s counsel argued that the adult adjudication only must be struck and that the juvenile adjudication must be implemented. The Supreme Court held that, in as much as the juvenile adjudication was made in conjunction with and in contemplation of the adult adjudication, both adjudications must be stricken and that W.G. must be resentenced. In re W.G., 1999 MT 2, 293 M 16, 973 P2d 217, 56 St. Rep. 9 (1999).

Imposition of Both Juvenile and Adult Sentences — Level of Constitutional Scrutiny: Imposition of both juvenile and adult sentences under the Extended Jurisdiction Prosecution Act infringed upon the juvenile's physical liberty. Physical liberty is a fundamental right under the Montana Constitution. Therefore, the court must apply strict scrutiny analysis to the claim that the Act violates the Montana Constitution's equal protection and rights of minors clauses by subjecting the juvenile to a longer period of incarceration than an adult committing the same offense, and there must be a compelling state interest sufficient to justify the Act. In re S.L.M., 287 M 23, 951 P2d 1365, 54 St. Rep. 1480 (1997).

Unconstitutional to Impose Both a Juvenile and an Adult Sentence Upon Youth: The 1995 amendments to the purpose section of the Montana Youth Court Act made the Act espouse much more preventative, if not punitive, goals because the Act was amended to seek to prevent delinquency through imposition of enforceable and immediate consequences upon juveniles and to establish programs of detention and community protection. Obviously, it is no longer accurate to reason, as the Supreme Court did in In re C.H., 210 M 184, 683 P2d 931 (1984), that the Act's infringements upon juveniles' physical liberty are legitimate means of enhancing their protections within the meaning of Art. II, sec. 15, Mont. Const., providing that minors have all the fundamental rights of Art. II unless specifically precluded by laws that enhance the protection of minors. Moreover, it is no longer accurate to state, as the court did in In re C.S., 210 M 144, 687 P2d 57 (1984), that a Youth Court disposition is strictly for rehabilitation, not retribution. Indeed, the Extended Jurisdiction Prosecution Act (EJPA), by requiring the Youth Court to impose an adult sentence in addition to a juvenile sentence, with the adult portion stayed pending successful completion of the juvenile portion, goes beyond mere rehabilitation of a juvenile and injects the specter of retribution. Thus, the EJPA, on its face, violates the equal protection clause of Art. II, sec. 4, Mont. Const., by treating juveniles more harshly than adults. The EJPA also violates Art. II, sec. 15, by reducing, rather than enhancing, juveniles' rights as compared to adults' rights. The state has no compelling state interest in treating a juvenile as an adult and restricting the juvenile's physical liberty beyond the restrictions that are imposed upon an adult who commits the same offense as the juvenile. Furthermore, the paternalistic rationale of *parens patriae* does not apply to distinguish between the treatment of a juvenile and an adult when a juvenile is no longer sentenced solely as a juvenile, but as an adult as well. Although the EJPA is subject to a severability clause, the sentencing portion of the EJPA is necessary to its integrity; thus, the remaining provisions of the EJPA cannot be saved by the severability clause. In re S.L.M., 287 M 23, 951 P2d 1365, 54 St. Rep. 1480 (1997), distinguished in In re S.M.K.-S.H., 2012 MT 281, 367 Mont. 176, 290 P.3d 718. See also, as to the remedy for sentencing pursuant to the unconstitutional Extended Jurisdiction Prosecution Act, In re W.G., 1999 MT 2, 293 M 16, 973 P2d 217, 56 St. Rep. 9 (1999).

Youth's Standing to Challenge Imposition of Both Juvenile and Adult Sentence: Youth given both juvenile and adult sentences under the Extended Jurisdiction Prosecution Act, with the adult portion stayed pending successful completion of the juvenile portion, who were not the subject of a proceeding to revoke the stay, had standing to challenge the Act on the ground that the Act subjected them to a longer period of incarceration than that permitted for an adult who committed the same offense. There was a threatened injury to the youth's civil rights, and they suffered a legitimate and realistic fear that the adult sentence would be carried out if they violated the juvenile sentence. In re S.L.M., 287 M 23, 951 P2d 1365, 54 St. Rep. 1480 (1997).

41-5-1602. Extended jurisdiction juvenile prosecution — designation.

Compiler's Comments

1999 Amendment: Chapter 537 in three places in (1) inserted "except an offense punishable by death or life imprisonment or when a sentence of 100 years could be imposed"; and made minor changes in style. Amendment effective April 30, 1999.

Preamble: The preamble attached to Ch. 537, L. 1999, provided: "WHEREAS, juveniles who are 17 to 18 years of age frequently have difficulty completing their Youth Court sentences, particularly felony offenses, before they reach age 18; and

WHEREAS, extending juvenile jurisdiction with the possibility of an adult sanction for failure to comply with the conditions of a stayed sentence or for additional criminal behavior by the youth has been shown to be an effective incentive in other states to rehabilitate juveniles to keep them out of the adult correctional system and allow them to pay restitution, finish treatment, and complete their education; and

WHEREAS, the maximum extension or period of jurisdiction may not exceed the period of an adult sentence without violating equal protection; and

WHEREAS, limiting section 41-5-208, MCA, supervision transfers after the youth reaches the age of 18 to additional community corrections programs of the Department of Corrections subject to the same adult sentence limit on supervision will also allow juveniles to complete their sentences, to be held accountable, and to avoid an adult conviction, without violating equal protection of the laws."

Severability: Section 7, Ch. 537, L. 1999, was a severability clause.

1997 Amendment: Chapter 498 throughout section substituted "extended jurisdiction juvenile prosecution" for "extended jurisdiction prosecution"; in (1)(a) substituted "county attorney" for "prosecutor"; inserted (1)(b) referring to case designated by County Attorney as extended jurisdiction juvenile prosecution and in which youth is alleged to have committed certain crimes; in (1)(b)(i) substituted "an offense that is listed under 41-5-206" for "the alleged offense is transferable under 41-5-206"; in (1)(b)(ii) substituted "any offense that would be a felony if committed by an adult in which the youth allegedly used a firearm, if the youth was at least 12 years of age at the time of the alleged offense" for "the youth was at least 12 years of age at the time of the alleged offense and allegedly used a weapon"; inserted (1)(c) referring to cases designated by court as extended jurisdiction juvenile prosecutions; in (2) substituted "retain jurisdiction as provided in 41-5-205" for "retain jurisdiction until the case is transferred to district court under this part or jurisdiction is terminated under the provisions of 41-5-205"; and made minor changes in style. Amendment effective May 2, 1997.

Severability: Section 15, Ch. 498, L. 1997, was a severability clause.

Applicability: Section 17, Ch. 498, L. 1997, provided: "[This act] applies to all offenses committed on or after [the effective date of this act]." Effective May 2, 1997.

Case Notes

Revocation of Youth Court Probation and Imposition of Suspended Sentence Proper: When Hinkle was 17 years old, he pleaded true to the charge of negligent homicide. The case was tried in District Court, and Hinkle was committed to the Youth Court for suspended placement in a treatment facility until age 18, placed on formal juvenile probation until age 25, and given a stayed adult sentence of 20 years with the Department of Corrections, pursuant to 22 probation conditions, including requirements that Hinkle not violate the dispositional order, possess or consume alcohol, or commit a new offense. Twelve days after the sentencing hearing, Hinkle was cited for being a minor in possession of alcohol. The Youth Court revoked Hinkle's probation and transferred the case back to District Court for further proceedings. After considering numerous balancing factors, the District Court imposed the 20-year adult sentence that had been stayed, but suspended the sentence subject to 19 conditions, including prohibiting Hinkle from entering casinos and gambling. Hinkle appealed on grounds that his probation was improperly revoked, that the 20-year sentence was improperly imposed, and that the casino and gambling restriction was illegal. The Supreme Court affirmed on all issues. The District Court did not err in concluding that simply continuing Hinkle's youth probation for the probation violations would be no more than a slap on the wrist and would be inappropriate given the seriousness of the underlying homicide offense. Imposing a suspended adult sentence was in fact a further act of grace, in light of the fact that the court could have imposed a 20-year sentence of confinement, but Hinkle ignored the act of grace in asserting that the suspended sentence was unduly harsh. Additionally, Hinkle's personal characteristics made him particularly vulnerable to the pitfalls of irresponsible gambling, so the casino and gambling restriction was appropriate. Thus, the District Court's order was "neither arbitrary nor without conscientious judgment or exceeding the bounds of reason and was an appropriate exercise of discretion". St. v. Hinkle, 2008 MT 217, 344 M 236, 186 P3d 1279 (2008).

Youth Court Jurisdiction Improperly Extended for Youth Charged With Crime Punishable by Life in Prison: In the case of a youth charged with felony sexual intercourse without consent, the Youth Court was without legal basis to extend its jurisdiction beyond the youth's 21st birthday because the youth was charged with a crime punishable by life imprisonment. In re N.V., 2004 MT 80, 320 M 442, 87 P3d 510 (2004).

41-5-1603. Hearing on request.

Compiler's Comments

1997 Amendment: Chapter 498 throughout section substituted "extended jurisdiction juvenile prosecution" for "extended jurisdiction prosecution"; in (2) and (3) substituted "county attorney" for "prosecutor"; in (3) inserted second sentence requiring court to consider certain factors in determining public safety; and deleted (4) that read: "(4) An order designating a case as an extended jurisdiction prosecution is not appealable until after disposition under 41-5-1104." Amendment effective May 2, 1997.

Severability: Section 15, Ch. 498, L. 1997, was a severability clause.

Applicability: Section 17, Ch. 498, L. 1997, provided: "[This act] applies to all offenses committed on or after [the effective date of this act]." Effective May 2, 1997.

41-5-1604. Disposition in extended jurisdiction juvenile prosecutions.

Compiler's Comments

2019 Amendment: Chapter 344 in (1)(b) near end substituted "conditional release agreement" for "parole agreement". Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

1999 Amendment: Chapter 537 in two places in section inserted "except an offense punishable by death or life imprisonment or when a sentence of 100 years could be imposed"; at end of (1) after "shall" inserted "subject to subsection (1)(b), impose a single judgment consisting of"; inserted (1)(b) prohibiting combined time of juvenile disposition plus adult sentence from exceeding maximum period imposed on convicted adult or offenses bringing youth under youth court jurisdiction and clarifying power of department to enter into youth parole agreement; in (3) after "court" deleted "may impose, with the youth's consent, a disposition provided under subsection (1)(b). If the youth does not consent to disposition under subsection (1)(b), the court"; and made minor changes in style. Amendment effective April 30, 1999.

Preamble: The preamble attached to Ch. 537, L. 1999, provided: "WHEREAS, juveniles who are 17 to 18 years of age frequently have difficulty completing their Youth Court sentences, particularly felony offenses, before they reach age 18; and

WHEREAS, extending juvenile jurisdiction with the possibility of an adult sanction for failure to comply with the conditions of a stayed sentence or for additional criminal behavior by the youth has been shown to be an effective incentive in other states to rehabilitate juveniles to keep them out of the adult correctional system and allow them to pay restitution, finish treatment, and complete their education; and

WHEREAS, the maximum extension or period of jurisdiction may not exceed the period of an adult sentence without violating equal protection; and

WHEREAS, limiting section 41-5-208, MCA, supervision transfers after the youth reaches the age of 18 to additional community corrections programs of the Department of Corrections subject to the same adult sentence limit on supervision will also allow juveniles to complete their sentences, to be held accountable, and to avoid an adult conviction, without violating equal protection of the laws."

Severability: Section 7, Ch. 537, L. 1999, was a severability clause.

1997 Amendments: Chapter 498 in (1) and (3) substituted "extended jurisdiction juvenile prosecution" for "extended jurisdiction prosecution"; in (1) inserted first sentence requiring adjudicatory hearing and in second sentence substituted "admits to or is adjudicated to have committed an offense that would be a felony if committed by an adult" for "pleads guilty to or is found guilty of an offense described in 41-5-1102(1)(b)"; in (1)(b) substituted "impose any sentence allowed by the statute that establishes the penalty for the offense of which the youth is convicted and that would be permissible if the offender were an adult" for "impose an adult criminal sentence" and deleted third sentence that read: "If the youth violates the conditions of the stay or commits a new offense, the adult criminal sentence must be executed as provided in 41-5-1105"; at beginning of (2) substituted "If a youth prosecuted as an extended jurisdiction juvenile after designation by the county attorney in the delinquency petition under 41-5-1602(1)(b) admits to or is adjudicated to have committed an offense that would be a felony if committed by an adult that is not an offense described in 41-5-1602(1)(b)" for "Except as provided in subsection (3), if a youth in an extended jurisdiction prosecution is convicted of an offense not described in 41-5-1102(1)(b)"; in first sentence of (3), after "prosecution", substituted "admits to or is adjudicated to have committed an offense that would not be a felony if committed by an adult" for "pleads guilty to an offense not described in 41-5-1102(1)(b)" and at end of second sentence substituted "subsection (1)(a)" for "subsection (2)"; and made minor changes in style. Amendment effective May 2, 1997.

Chapter 550 at end of (1)(a) and (2) inserted reference to 41-5-1513; and made minor changes in style. Amendment effective July 1, 1997.

The amendments to this section made by sec. 42, Ch. 286, L. 1997, were rendered void by sec. 49(3)(e), Ch. 286, L. 1997, a coordination section.

Severability: Section 15, Ch. 498, L. 1997, was a severability clause.

Section 80, Ch. 550, L. 1997, was a severability clause.

Applicability: Section 17, Ch. 498, L. 1997, provided: "[This act] applies to all offenses committed on or after [the effective date of this act]." Effective May 2, 1997.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Case Notes

Revocation of Youth Court Probation and Imposition of Suspended Sentence Proper: When Hinkle was 17 years old, he pleaded true to the charge of negligent homicide. The case was tried in District Court, and Hinkle was committed to the Youth Court for suspended placement in a treatment facility until age 18, placed on formal juvenile probation until age 25, and given a stayed adult sentence of 20 years with the Department of Corrections, pursuant to 22 probation conditions, including requirements that Hinkle not violate the dispositional order, possess or consume alcohol, or commit a new offense. Twelve days after the sentencing hearing, Hinkle was cited for being a minor in possession of alcohol. The Youth Court revoked Hinkle's probation and transferred the case back to District Court for further proceedings. After considering numerous balancing factors, the District Court imposed the 20-year adult sentence that had been stayed, but suspended the sentence subject to 19 conditions, including prohibiting Hinkle from entering casinos and gambling. Hinkle appealed on grounds that his probation was improperly revoked, that the 20-year sentence was improperly imposed, and that the casino and gambling restriction was illegal. The Supreme Court affirmed on all issues. The District Court did not err in concluding that simply continuing Hinkle's youth probation for the probation violations would be no more than a slap on the wrist and would be inappropriate given the seriousness of the underlying homicide offense. Imposing a suspended adult sentence was in fact a further act of grace, in light of the fact that the court could have imposed a 20-year sentence of confinement, but Hinkle ignored the act of grace in asserting that the suspended sentence was unduly harsh. Additionally, Hinkle's personal characteristics made him particularly vulnerable to the pitfalls of irresponsible gambling, so the casino and gambling restriction was appropriate. Thus, the District Court's order was "neither arbitrary nor without conscientious judgment or exceeding the bounds of reason and was an appropriate exercise of discretion". St. v. Hinkle, 2008 MT 217, 344 M 236, 186 P3d 1279 (2008).

41-5-1605. Revocation of stay — disposition.

Compiler's Comments

1999 Amendment: Chapter 537 in first sentence in (1) substituted "41-5-1604(1)(a)(ii)" for "41-5-1604(1)(b)"; at beginning of (2)(a) deleted "If the youth challenges the reasons for the revocation"; in (2)(b)(iii) inserted "41-5-1604(1)(b)" and substituted "41-5-1604(1)(a)(ii)" for

"41-5-1604(1)(b)" and inserted second sentence requiring court to order credit for time served prior to revocation; and made minor changes in style. Amendment effective April 30, 1999.

Preamble: The preamble attached to Ch. 537, L. 1999, provided: "WHEREAS, juveniles who are 17 to 18 years of age frequently have difficulty completing their Youth Court sentences, particularly felony offenses, before they reach age 18; and

WHEREAS, extending juvenile jurisdiction with the possibility of an adult sanction for failure to comply with the conditions of a stayed sentence or for additional criminal behavior by the youth has been shown to be an effective incentive in other states to rehabilitate juveniles to keep them out of the adult correctional system and allow them to pay restitution, finish treatment, and complete their education; and

WHEREAS, the maximum extension or period of jurisdiction may not exceed the period of an adult sentence without violating equal protection; and

WHEREAS, limiting section 41-5-208, MCA, supervision transfers after the youth reaches the age of 18 to additional community corrections programs of the Department of Corrections subject to the same adult sentence limit on supervision will also allow juveniles to complete their sentences, to be held accountable, and to avoid an adult conviction, without violating equal protection of the laws."

Severability: Section 7, Ch. 537, L. 1999, was a severability clause.

1997 Amendments: Chapter 498 in (1), at beginning of first sentence, substituted "imposed on a youth a sentence" for "imposed on a youth an adult criminal sentence" and at end, after "custody", deleted "and revoke the stay" and at end of second sentence substituted "notify the youth, the youth's counsel, and the youth's parents, guardian, or custodian in writing of the reasons alleged to exist for revocation of the stay of execution of the sentence" for "notify the youth in writing of the reasons for the revocation"; at end of (2)(a) substituted "hold a revocation hearing at which the youth is entitled to receive" for "hold a summary hearing at which the youth is entitled to be heard and represented by counsel"; inserted (2)(a)(i) through (2)(a)(v) listing youth's rights at hearing; in (2)(b), before "hearing", inserted "revocation", after "the conditions of the stay have been violated" inserted "or that the youth has committed a new offense", and after "the court shall" inserted "provide the youth with a written statement of the evidence relied on and reasons for revocation and shall"; inserted (2)(b)(i) and (2)(b)(ii) relating to continuance of stay and imposition of dispositions under 41-5-1512 or 41-5-1513; at beginning of (2)(b)(iii) inserted "subject to 41-5-206(6) and (7)"; deleted former (2)(b)(ii) that read: "(ii) continue the stay and make written findings regarding the mitigating factors that justify continuing the stay"; deleted former (3) that read: "(3) If the stay of an adult sentence is revoked under this section, jurisdiction must be transferred to district court for execution of the sentence, subject to 41-5-206(8) and (9)"; and inserted (3) requiring transfer of case to District Court upon revocation and terminating youth court jurisdiction and supervision. Amendment effective May 2, 1997.

Chapter 550 at end of (3) substituted "41-5-206(6) and (7)" for "41-5-206(8) and (9)". Amendment effective July 1, 1997.

Coordination Instruction: Section 13, Ch. 498, L. 1997 provided: "If Senate Bill No. 48 [Ch. 550] and this bill are both passed and approved, then the reference to "41-5-206(8) and (9)" in 41-5-1105 [41-5-1605] in this bill must read "41-5-206(6) and (7)." Both bills were passed and approved, and the Code Commissioner has made the designated change.

Severability: Section 15, Ch. 498, L. 1997, was a severability clause.

Section 80, Ch. 550, L. 1997, was a severability clause.

Applicability: Section 17, Ch. 498, L. 1997, provided: "[This act] applies to all offenses committed on or after [the effective date of this act]." Effective May 2, 1997.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Case Notes

No Automatic Transfer of Youth Court Jurisdiction to District Court Without Express Court Order: A 16-year-old defendant was found to be a serious juvenile offender and delinquent youth under 41-5-103 and received a juvenile sentence of formal probation until age 23 and an adult sentence. The execution of the adult sentence was to be stayed on the condition that the minor satisfied all the provisions of his juvenile sentence. Over the following years, the state filed numerous petitions months apart to revoke the defendant's probation, resulting in the defendant spending some time in the custody of the Department of Corrections and extended time on formal probation. When the defendant was 27 years old and serving the suspended portion of his sentence, the state filed a petition to revoke probation due to several violations. The defendant argued that there was no jurisdiction over his case because the Youth Court had lost jurisdiction when he turned 25 years old and the case had never been formally transferred to District Court.

The District Court found that the case had transferred automatically when the Youth Court imposed the adult sentence in modified form at the conclusion of the defendant's juvenile sentence when he was 23 years old. The District Court then ruled to revoke the suspended portions of the defendant's most recent sentence. On appeal, the Supreme Court reversed, finding that the statutory transfer requirement was not satisfied because no express transfer had ever occurred. Therefore, neither the Youth Court nor the District Court had jurisdiction over the case, and the subsequent sentence was illegal. In re S.G.-H.M., 2021 MT 176, 404 Mont. 531, 490 P.3d 1248.

41-5-1606. Public safety.

Compiler's Comments

1997 Codification Instruction — Implementation: The codification instruction of sec. 14, Ch. 498, L. 1997, instructed the codifier to codify this section as part of Title 41, ch. 5, part 11. Because that part was renumbered by sec. 47, Ch. 286, L. 1997, the Code Commissioner has included the newly enacted section within the body of the renumbered material in order to conform to the renumbering instruction.

Severability: Section 15, Ch. 498, L. 1997, was a severability clause.

Effective Date: Section 16, Ch. 498, L. 1997, provided: "[This act] is effective on passage and approval." Approved May 2, 1997.

Applicability: Section 17, Ch. 498, L. 1997, provided: "[This act] applies to all offenses committed on or after [the effective date of this act]." Effective May 2, 1997.

41-5-1607. Proceedings — rights.

Compiler's Comments

1997 Codification Instruction — Implementation: The codification instruction of sec. 14, Ch. 498, L. 1997, instructed the codifier to codify this section as part of Title 41, ch. 5, part 11. Because that part was renumbered by sec. 47, Ch. 286, L. 1997, the Code Commissioner has included the newly enacted section within the body of the renumbered material in order to conform to the renumbering instruction.

Severability: Section 15, Ch. 498, L. 1997, was a severability clause.

Effective Date: Section 16, Ch. 498, L. 1997, provided: "[This act] is effective on passage and approval." Approved May 2, 1997.

Applicability: Section 17, Ch. 498, L. 1997, provided: "[This act] applies to all offenses committed on or after [the effective date of this act]." Effective May 2, 1997.

Part 17
Juvenile Probation Officers

41-5-1701. Employment of juvenile probation officers and youth court staff.

Compiler's Comments

2009 Amendment: Chapter 2 near beginning of first sentence before "probation officers" inserted "juvenile". Amendment effective October 1, 2009.

2003 Amendment: Chapter 152 deleted former (1) that read: "(1) The youth court judge of each judicial district shall appoint probation officers, deputy probation officers, and part-time probation officers necessary to administer this chapter. The qualifications for part-time probation officers must approximate those required for probation officers insofar as possible. A chief probation officer must be appointed by the judge to supervise the youth division offices in the judicial district. The judge shall also ensure that the youth division offices are staffed with necessary office personnel and that the offices are properly equipped to effectively carry out the purpose and intent of this chapter. A person while serving as a law enforcement officer may not be appointed or perform the duties of a full-time or part-time probation officer"; near middle of first sentence after "youth" substituted "court staff" for "division office staff hired or appointed under subsection (1)"; and made minor changes in style. Amendment effective March 26, 2003.

2001 Amendment: Chapter 585 in (1) in first sentence substituted "shall appoint probation officers, deputy probation officers, and part-time probation officers necessary to administer this chapter" for "shall appoint such necessary probation officers as are required to carry out the purpose and intent of this chapter" and deleted former second sentence that read: "He shall appoint such part-time probation officers as shall be required"; inserted (2) designating probation officers and youth division office staff as state employees; and made minor changes in style. Amendment effective July 1, 2002.

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

41-5-1703. Powers and duties of juvenile probation officers.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 15, Ch. 506, L. 2023. Amendment effective October 1, 2023.

2019 Amendment: Chapter 344 in (1)(c) in two places inserted "or conditional release"; in (2) near end inserted "terms and conditions of the youth's conditional release agreement"; and made minor changes in style. Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2009 Amendment: Chapter 2 throughout section in six places before reference to probation officer inserted "juvenile". Amendment effective October 1, 2009.

2003 Amendment: Chapter 152 inserted (3) providing that the duties of a full-time or part-time probation officer may not be performed by a person serving as a law enforcement officer. Amendment effective March 26, 2003.

1997 Amendment: Chapter 550 in (1)(c) inserted "including enforcement of the terms of probation or intervention"; inserted (1)(d) requiring probation officer to assist public and private community and work projects; and made minor changes in style. Amendment effective July 1, 1997.

Code Commissioner Change: Section 76, Ch. 550, L. 1997, instructed the Code Commissioner, in the Montana Code Annotated or in legislation enacted by the 1997 Legislature, to change references to youth in need of supervision to references to youth in need of intervention. The change has been made in this section.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Case Notes

Immunity of Juvenile Probation Officer for Discretionary Supervisory Acts: Completion of a factsheet by a juvenile probation officer regarding a youth who was on probation was a discretionary, quasi-judicial act. The probation officer was thus entitled to immunity from prosecution for alleged omissions of information from the factsheet, and summary judgment dismissing the probation officer from a suit by the victim of an injury caused by the youth was proper. Eklund v. Trost, 2006 MT 333, 335 M 112, 151 P3d 870 (2006).

41-5-1706. Juvenile probation officer training.

Compiler's Comments

2009 Amendment: Chapter 2 in (3) in three places before reference to probation officer inserted "juvenile". Amendment effective October 1, 2009.

2007 Amendment: Chapter 506 in (1) at beginning substituted "office of court administrator" for "department of justice" and deleted former second and third sentences that read: "A 40-hour juvenile probation officer basic training program and other training programs and courses for juvenile probation officers may be offered by another public agency or by a private entity if the program or course is approved by the board of crime control. If funding is available, the department shall conduct a 40-hour basic training program once a year"; in (2) at end substituted "office of court administrator" for "board"; in (3) at end after "officers" deleted "in a program or course conducted by the department of justice or approved by the board of crime control"; and deleted former (4) that read: "(4) The board may adopt rules to implement this section." Amendment effective July 1, 2007.

Saving Clause: Section 24, Ch. 506, L. 2007, was a saving clause.

2003 Amendment: Chapter 152 substituted (3) concerning officer training requirements for former (3) that read: "(3) A juvenile probation officer is entitled to the officer's salary and expenses, as provided in 2-18-501 through 2-18-503, while attending a program or training course. The court shall also pay any program or course registration fee." Amendment effective March 26, 2003.

2001 Amendment: Chapter 585 in (3) in first sentence substituted "officer's salary and expenses, as provided in 2-18-501 through 2-18-503, while attending a program or training course" for "officer's salary while attending a program or training course and must be paid, by the district court, expenses as provided in 2-18-501". Amendment effective July 1, 2002.

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1995 Statement of Intent: The statement of intent attached to Ch. 205, L. 1995, provided: “Rules adopted under [section 1] should establish standards, procedures, and subject and content requirements for training programs and courses. The rules should also establish attendance, examination, and certification requirements.”

41-5-1707. Assessment officers — duties — access to records.

Compiler’s Comments

2003 Amendment: Chapter 152 deleted former (1) that read: “(1) The youth court judge of each judicial district may appoint and supervise assessment officers necessary to administer this chapter. Assessment officers appointed under this section are employees of the judicial branch of state government. The employees are subject to classification and compensation as determined by the judicial branch personnel plan adopted by the supreme court under 3-1-130 and must receive state employee benefits and expenses as provided in Title 2, chapter 18”; in (1) near beginning after “officer” inserted “employed by the state judicial branch”; and made minor changes in style. Amendment effective March 26, 2003.

2001 Amendment: Chapter 585 in (1) at end of first sentence substituted “supervise assessment officers necessary to administer this chapter” for “supervise the necessary assessment officers as are required to carry out the purpose and intent of this chapter”, deleted former second, third, and fourth sentences that read: “The qualifications for assessment officers must be established by the appointing judge. Assessment officers are county employees, and assessment officers’ salaries must be fixed by the judge. An assessment officer may work out of the local police department or other local law enforcement office”, and inserted second and third sentences designating assessment officers as state employees; and made minor changes in style. Amendment effective July 1, 2002.

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1997 Codification Instruction — Implementation: The codification instruction of sec. 77(3), Ch. 550, L. 1997, instructed the codifier to codify this section as part of Title 41, ch. 5, part 7. Because that part was renumbered by sec. 47, Ch. 286, L. 1997, the Code Commissioner has included the newly enacted section within the body of the renumbered material in order to conform to the renumbering instruction.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Effective Date: Section 81, Ch. 550, L. 1997, provided that this section is effective July 1, 1997.

Part 18
Custodial Care

Part Attorney General’s Opinions

County Reimbursement by Board of Crime Control for Indian Youth Placed in Regional Detention Facility by Tribal Court: Title 18, ch. 11, the State-Tribal Cooperative Agreements Act, includes broad authority for counties to enter into agreements with tribes for the delivery of services to their citizens. Although tribes have jurisdiction over tribal member youth, those youth remain citizens of Montana as well as citizens of the tribes, and if the tribes do not provide services, such as youth detention facilities, those tribal youth are nevertheless entitled to be offered state services in the same manner as any other Montana youth. The fact that a tribal court adjudicates the youth does not necessarily disqualify the youth from the receipt of state services. In the present case, Blaine County entered into an agreement with the Fort Belknap Tribe to allow detention in the Blaine County youth detention facility of youth determined by the tribal court to be in need of detention, and Blaine County included the tribal youth population in its survey of youth to be served. The youth detention services were appropriately covered in the county’s grant application. Thus, when the county applies for reimbursement for each youth served, regardless of whether the youth is a tribal member or not, the Montana Board of Crime Control is required to reimburse the county for detention costs for the youth, including tribal youth served in a regional detention facility pursuant to an order of a tribal court. 49 A.G. Op. 10 (2001).

41-5-1801. Shelter care facilities.

Compiler’s Comments

2003 Amendment: Chapter 61 deleted former (2) that read: “(2) A shelter care facility may be used to provide an appropriately physically restricting setting for youth alleged or adjudicated to be a delinquent youth or a youth in need of intervention”; and made minor changes in style. Amendment effective March 5, 2003.

2001 Amendment: Chapter 114 at end of (2) after "intervention" deleted "or a youth in need of care"; and made minor changes in style. Amendment effective October 1, 2001.

1997 Amendment: Chapter 550 at end of (2) substituted "alleged or adjudicated to be a delinquent youth, a youth in need of intervention, or a youth in need of care" for "alleged or adjudicated delinquent, in need of supervision, or in need of care"; inserted (7) allowing use of shelter care facility by school district as alternative education site and requiring public schools to follow federal law in making education placement decisions for youth with disabilities; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

1995 Amendment: Chapter 528 in (2), after "A shelter care facility", deleted "must be physically unrestricting and" and substituted "provide an appropriately physically restricting setting" for "provide shelter care"; in (3) substituted "must be physically separated" for "must be separate and apart"; and in (5), after "manner", deleted "and be as nearly as possible like a family home".

1991 Amendment: Deleted former (1) through (3) that read: "(1) The county commissioners in each county shall provide for the availability of detention facilities for youths.

(2) (a) The county commissioners may maintain, by purchase, lease, or otherwise, a detention facility, which may not be used for the confinement of adult persons charged with criminal offenses, where delinquent youths may be detained until final disposition.

(b) The county commissioners may appoint necessary personnel who have charge of the facility and of the youths detained therein.

(c) The compensation of the personnel must be fixed by the county commissioners, and the compensation and the maintenance of the facility must be paid out of the county treasury. These funds may be supplemented by state appropriation and federal funds.

(d) The county commissioners shall provide for inspection of any county detention facility every 3 months. Inspection must include but is not limited to health, fire safety, security, rehabilitation programs, recreation, treatment of youths, and personnel training.

(e) The judge of the youth court for the county shall inspect any detention facility at least once a year.

(3) The county commissioners may contract with the department or public or private agencies to purchase detention services"; in (2), (3), (4), (5), and (6), before "facility", inserted "shelter care"; in (3) substituted "accused or convicted of" for "charged with"; in (6), before "detention", inserted "youth"; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendment: Inserted (1) relating to County Commissioners' responsibility to provide youth detention facilities; in (2)(a), at beginning, deleted "In all counties", substituted "maintain" for "provide", before "detention facility" deleted "place to be known as the youth", after "delinquent youths" deleted "and youths in need of supervision", and at end deleted "which place shall be maintained by the county as in other like cases"; in (2)(b), after "appoint", substituted "necessary personnel who have charge of the facility" for "such personnel as required, who shall have charge of said facility"; in (2)(c) substituted "maintenance" for "maintaining"; in (2)(e), before "youth court", deleted "district"; inserted (3) relating to County Commissioners' authority to contract for detention services; in (4)(a), before "a shelter care facility", deleted "a place to be known as"; in (4)(f), before "detention facility", deleted "youth"; and made minor changes in phraseology.

1987 Amendment: In (1)(b) substituted "county commissioners" for "judge having jurisdiction"; in (1)(c) substituted "county commissioners" for "court"; inserted (1)(d) requiring County Commissioners to provide for inspection of county detention facility every 3 months; inserted (1)(e) requiring Youth Court Judge to inspect detention facility once each year; in (2)(a) substituted "Counties, cities, or" for "Youth courts and"; in (2)(d) substituted "counties, cities" for "youth court" and deleted "private" before "nonprofit corporations"; and inserted (2)(f) allowing shelter care facility to be operated in conjunction with youth detention facility.

Administrative Rules

Title 20, chapter 9, subchapter 6, ARM Licensure of youth detention facilities.

Attorney General's Opinions

County Power — "Big Brothers and Big Sisters": Counties may contract with Big Brothers and Big Sisters organizations to furnish adult companionship, guidance, and counseling to needy and troubled children. 37 A.G. Op. 105 (1978).

41-5-1802. Rules.

Compiler's Comments

1999 Amendment: Chapter 536 at end inserted "including the requirement that a youth detention facility provide an educational program for youth in need of that service". Amendment effective April 29, 1999.

1991 Amendment: Deleted (2) that read: "(2) procedures for distributing funds for detention facilities and services as provided in 41-5-315 and 41-5-316"; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendment: In introductory clause substituted "The department shall adopt rules" for "The department of family services shall make rules"; and inserted (2) relating to procedures for distributing funds for detention facilities and services.

1989 Statement of Intent: The statement of intent attached to Ch. 434, L. 1989, provided: "A statement of intent is required for this bill because [sections 12 and 13] [41-5-315 and 41-5-316, both repealed] require the department of family services [now department of corrections] to adopt rules governing procedures for distributing funds to counties for juvenile detention facilities and services. The rules must require a county applying for funds to provide necessary information to enable the department to determine the financial and administrative feasibility of establishing or acquiring the desired detention facility or services. In addition, the rules must require a county to submit information regarding the safety and habitability of the facility and its compliance with state and federal requirements, such as availability of medical and educational services and physical recreation."

1987 Statement of Intent: The statement of intent attached to Ch. 475, L. 1987, provided: "A statement of intent is required for this bill because section 5 [41-5-809, renumbered 41-5-1802] allows the department of institutions [now department of corrections] to adopt rules for the licensing of detention facilities.

Currently, Montana statutes make no provision for the licensing of juvenile detention facilities. There are presently two counties in the process of establishing detention facilities who need assurance that their facilities will meet minimum established standards on program operations and environmental conditions.

It is anticipated that the rules developed under this act will establish minimum standards for juvenile detention facilities. These standards should govern such matters as the capacity of the facility, its location, design, construction, equipment and operation, fire and safety precautions, medical services, qualifications and number of personnel, and the quality of services provided to the juveniles.

The rules should contain a procedure for notifying the appropriate officials of compliance or deficiencies. If the facility is found deficient, a procedure for remedying those deficiencies should be included with specific time limitations.

It is anticipated the state will conduct annual inspections of each facility and may require written reports containing such information as the agency may need to set and enforce its standards."

Coordination Instruction: Section 15, Ch. 475, L. 1987, transferred rulemaking authority under this section from the Department of Institutions to the Department of Family Services (now Department of Corrections) if House Bill No. 325 was passed and approved. House Bill No. 325 passed and was approved as Ch. 609, L. 1987, April 24, 1987.

Administrative Rules

Title 20, chapter 9, subchapter 6, ARM Licensure of youth detention facilities.

41-5-1803. County responsibility to provide youth detention services.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 532 inserted (2)(g) concerning contracts for use of secure detention facilities; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 536 in (1) inserted second sentence defining services; and inserted (4) concerning youth detention facility contracting with a school district for an education program. Amendment effective April 29, 1999.

1991 Statement of Intent: The statement of intent attached to Ch. 799, L. 1991, provided: "A statement of intent is required for this bill because [section 14] [41-5-1008, renumbered 41-5-1908] grants the board of crime control authority to adopt rules necessary to implement provisions of this bill.

It is the intent of the legislature, in enacting this bill, to provide alternatives to the detention of youth in adult jails in order to meet the requirements of Senate Bill No. 38, which prohibits the detention of youth in adult jails.

In order to ensure that alternatives to jail are established, the legislature intends that each county have the primary responsibility to provide youth detention services, as required by [section 2] [41-5-810, renumbered 41-5-1803]. In addition, in order to stimulate the development of needed services, the legislature intends to provide state grants authorized in [section 8] [41-5-1002, renumbered 41-5-1902], using state and federal funds, to assist counties in providing a spectrum of services for the detention and care of youth. These services are intended to include but are not limited to youth detention facilities, short-term detention centers, holdovers, attendant care, home detention, and programs for the transportation of youth to regional detention facilities.

The legislature intends that counties receiving state grants should share in the costs of services in order to prevent excessive utilization of services and to give counties a financial incentive to hold down program costs. For this reason, [section 10] [41-5-1004, renumbered 41-5-1904] requires that state grants be provided on a matching basis or, if in a block grant, based on a percentage of the approved cost of services.

In order to discourage the use of secure detention and to promote the use of less costly, nonsecure community-based programs, the legislature intends to provide state grants to counties at a higher rate of payment for such services, including holdovers, attendant care, and other alternatives to secure detention.

The legislature further intends that, as a condition of receiving state grants under [section 8] [41-5-1002, renumbered 41-5-1902], each county shall develop a written plan for providing youth detention services, including alternatives to secure detention. The development of county plans is required to ensure that formal planning does, in fact, occur and to make certain that state grants are not provided for services that are not well planned in advance.

As a further condition of receiving state grants under [section 8] [41-5-1002, renumbered 41-5-1902], each county shall, within a reasonable period of time, demonstrate compliance or substantial compliance with state law and policies contained in the Montana Youth Court Act relating to the detention and placement of youth. The legislature intends that the board of crime control review and monitor counties receiving grants under [section 8] [41-5-1002, renumbered 41-5-1902] to assure compliance or substantial compliance with the Montana Youth Court Act.

Finally, the legislature intends that the board of crime control adopt rules as authorized in [section 14] [41-5-1008, renumbered 41-5-1908]. In adopting rules, the board may:

(1) establish requirements for approved holdovers consistent with the definition of holdovers provided in 41-5-103(13);

(2) designate geographical areas of the state that are eligible for creation of a youth detention region under [section 4] [41-5-812, renumbered 41-5-1805]. In designating these areas, the board shall use available state data showing the number of youth held in detention in each county of the state.

(3) adopt procedures governing the distribution and allocation of funds in accordance with [sections 10 and 11] [41-5-1004 and 41-5-1005, renumbered 41-5-1904 and 41-5-1905];

(4) provide a system to review and monitor counties under [section 9] [41-5-1003, renumbered 41-5-1903] to assure that counties receiving grants are in compliance or substantial compliance with the Montana Youth Court Act;

(5) provide standards for determining compliance or substantial compliance with the Montana Youth Court Act pursuant to [section 9] [41-5-1003, renumbered 41-5-1903]. These standards should be based upon comparable standards for compliance with sections 223(a)(12) and 223(a)(14) of the federal Juvenile Justice and Delinquency Prevention Act of 1974.

(6) establish a process for providing notice and fair hearings required under [section 9] [41-5-1003, renumbered 41-5-1903] in order to terminate state grants to counties that fail to attain compliance or substantial compliance with the Montana Youth Court Act."

Effective Date: Section 30, Ch. 799, L. 1991, provided that this section is effective July 1, 1991.

Attorney General's Opinions

County Reimbursement by Board of Crime Control for Indian Youth Placed in Regional Detention Facility by Tribal Court: Title 18, ch. 11, the State-Tribal Cooperative Agreements Act, includes broad authority for counties to enter into agreements with tribes for the delivery of services to their citizens. Although tribes have jurisdiction over tribal member youth, those youth remain citizens of Montana as well as citizens of the tribes, and if the tribes do not provide services, such as youth detention facilities, those tribal youth are nevertheless entitled to be offered state services in the same manner as any other Montana youth. The fact that a tribal court adjudicates the youth does not necessarily disqualify the youth from the receipt of state services. In the present case, Blaine County entered into an agreement with the Fort Belknap Tribe to allow detention in the Blaine County youth detention facility of youth determined by the tribal court to be in need of detention, and Blaine County included the tribal youth population in its survey of youth to be served. The youth detention services were appropriately covered in the county's grant application. Thus, when the county applies for reimbursement for each youth served, regardless of whether the youth is a tribal member or not, the Montana Board of Crime Control is required to reimburse the county for detention costs for the youth, including tribal youth served in a regional detention facility pursuant to an order of a tribal court. 49 A.G. Op. 10 (2001).

41-5-1804. Regional detention facilities.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 536 at end of (4)(c) inserted "but excluding the education costs funded by a school district pursuant to 41-5-1807"; inserted (4)(f) concerning educational program for youth in youth detention facility; and made minor changes in style. Amendment effective April 29, 1999.

Chapter 584 in (2)(b) inserted reference to 15-10-420. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

1995 Amendment: Chapter 528 at end of (4), after "facility", deleted "must be for a term of not less than 10 years. In addition, the contracts".

1991 Statement of Intent: The statement of intent attached to Ch. 799, L. 1991, provided: "A statement of intent is required for this bill because [section 14] [41-5-1008, renumbered 41-5-1908] grants the board of crime control authority to adopt rules necessary to implement provisions of this bill.

It is the intent of the legislature, in enacting this bill, to provide alternatives to the detention of youth in adult jails in order to meet the requirements of Senate Bill No. 38, which prohibits the detention of youth in adult jails.

In order to ensure that alternatives to jail are established, the legislature intends that each county have the primary responsibility to provide youth detention services, as required by [section 2] [41-5-810, renumbered 41-5-1803]. In addition, in order to stimulate the development of needed services, the legislature intends to provide state grants authorized in [section 8] [41-5-1002, renumbered 41-5-1902], using state and federal funds, to assist counties in providing a spectrum of services for the detention and care of youth. These services are intended to include but are not limited to youth detention facilities, short-term detention centers, holdovers, attendant care, home detention, and programs for the transportation of youth to regional detention facilities.

The legislature intends that counties receiving state grants should share in the costs of services in order to prevent excessive utilization of services and to give counties a financial incentive to hold down program costs. For this reason, [section 10] [41-5-1004, renumbered 41-5-1904] requires that state grants be provided on a matching basis or, if in a block grant, based on a percentage of the approved cost of services.

In order to discourage the use of secure detention and to promote the use of less costly, nonsecure community-based programs, the legislature intends to provide state grants to counties at a higher rate of payment for such services, including holdovers, attendant care, and other alternatives to secure detention.

The legislature further intends that, as a condition of receiving state grants under [section 8] [41-5-1002, renumbered 41-5-1902], each county shall develop a written plan for providing youth detention services, including alternatives to secure detention. The development of county plans is required to ensure that formal planning does, in fact, occur and to make certain that state grants are not provided for services that are not well planned in advance.

As a further condition of receiving state grants under [section 8] [41-5-1002, renumbered 41-5-1902], each county shall, within a reasonable period of time, demonstrate compliance or substantial compliance with state law and policies contained in the Montana Youth Court Act relating to the detention and placement of youth. The legislature intends that the board of crime control review and monitor counties receiving grants under [section 8] [41-5-1002, renumbered 41-5-1902] to assure compliance or substantial compliance with the Montana Youth Court Act.

Finally, the legislature intends that the board of crime control adopt rules as authorized in [section 14] [41-5-1008, renumbered 41-5-1908]. In adopting rules, the board may:

(1) establish requirements for approved holdovers consistent with the definition of holdovers provided in 41-5-103(13);

(2) designate geographical areas of the state that are eligible for creation of a youth detention region under [section 4] [41-5-812, renumbered 41-5-1805]. In designating these areas, the board shall use available state data showing the number of youth held in detention in each county of the state.

(3) adopt procedures governing the distribution and allocation of funds in accordance with [sections 10 and 11] [41-5-1004 and 41-5-1005, renumbered 41-5-1904 and 41-5-1905];

(4) provide a system to review and monitor counties under [section 9] [41-5-1003, renumbered 41-5-1903] to assure that counties receiving grants are in compliance or substantial compliance with the Montana Youth Court Act;

(5) provide standards for determining compliance or substantial compliance with the Montana Youth Court Act pursuant to [section 9] [41-5-1003, renumbered 41-5-1903]. These standards should be based upon comparable standards for compliance with sections 223(a)(12) and 223(a)(14) of the federal Juvenile Justice and Delinquency Prevention Act of 1974.

(6) establish a process for providing notice and fair hearings required under [section 9] [41-5-1003, renumbered 41-5-1903] in order to terminate state grants to counties that fail to attain compliance or substantial compliance with the Montana Youth Court Act."

Effective Date: Section 30, Ch. 799, L. 1991, provided that this section is effective July 1, 1991.

41-5-1805. Creation of regions — requirements — limitation on number of regions.

Compiler's Comments

1991 Statement of Intent: The statement of intent attached to Ch. 799, L. 1991, provided: "A statement of intent is required for this bill because [section 14] [41-5-1008, renumbered 41-5-1908] grants the board of crime control authority to adopt rules necessary to implement provisions of this bill.

It is the intent of the legislature, in enacting this bill, to provide alternatives to the detention of youth in adult jails in order to meet the requirements of Senate Bill No. 38, which prohibits the detention of youth in adult jails.

In order to ensure that alternatives to jail are established, the legislature intends that each county have the primary responsibility to provide youth detention services, as required by [section 2] [41-5-810, renumbered 41-5-1803]. In addition, in order to stimulate the development of needed services, the legislature intends to provide state grants authorized in [section 8] [41-5-1002, renumbered 41-5-1902], using state and federal funds, to assist counties in providing a spectrum of services for the detention and care of youth. These services are intended to include but are not limited to youth detention facilities, short-term detention centers, holdovers, attendant care, home detention, and programs for the transportation of youth to regional detention facilities.

The legislature intends that counties receiving state grants should share in the costs of services in order to prevent excessive utilization of services and to give counties a financial incentive to hold down program costs. For this reason, [section 10] [41-5-1004, renumbered 41-5-1904] requires that state grants be provided on a matching basis or, if in a block grant, based on a percentage of the approved cost of services.

In order to discourage the use of secure detention and to promote the use of less costly, nonsecure community-based programs, the legislature intends to provide state grants to counties at a higher rate of payment for such services, including holdovers, attendant care, and other alternatives to secure detention.

The legislature further intends that, as a condition of receiving state grants under [section 8] [41-5-1002, renumbered 41-5-1902], each county shall develop a written plan for providing youth detention services, including alternatives to secure detention. The development of county plans is required to ensure that formal planning does, in fact, occur and to make certain that state grants are not provided for services that are not well planned in advance.

As a further condition of receiving state grants under [section 8] [41-5-1002, renumbered 41-5-1902], each county shall, within a reasonable period of time, demonstrate compliance or substantial compliance with state law and policies contained in the Montana Youth Court Act relating to the detention and placement of youth. The legislature intends that the board of crime control review and monitor counties receiving grants under [section 8] [41-5-1002, renumbered 41-5-1902] to assure compliance or substantial compliance with the Montana Youth Court Act.

Finally, the legislature intends that the board of crime control adopt rules as authorized in [section 14] [41-5-1008, renumbered 41-5-1908]. In adopting rules, the board may:

(1) establish requirements for approved holdovers consistent with the definition of holdovers provided in 41-5-103(13);

(2) designate geographical areas of the state that are eligible for creation of a youth detention region under [section 4] [41-5-812, renumbered 41-5-1805]. In designating these areas, the board shall use available state data showing the number of youth held in detention in each county of the state.

(3) adopt procedures governing the distribution and allocation of funds in accordance with [sections 10 and 11] [41-5-1004 and 41-5-1005, renumbered 41-5-1904 and 41-5-1905];

(4) provide a system to review and monitor counties under [section 9] [41-5-1003, renumbered 41-5-1903] to assure that counties receiving grants are in compliance or substantial compliance with the Montana Youth Court Act;

(5) provide standards for determining compliance or substantial compliance with the Montana Youth Court Act pursuant to [section 9] [41-5-1003, renumbered 41-5-1903]. These standards should be based upon comparable standards for compliance with sections 223(a)(12) and 223(a)(14) of the federal Juvenile Justice and Delinquency Prevention Act of 1974.

(6) establish a process for providing notice and fair hearings required under [section 9] [41-5-1003, renumbered 41-5-1903] in order to terminate state grants to counties that fail to attain compliance or substantial compliance with the Montana Youth Court Act."

Effective Date: Section 30, Ch. 799, L. 1991, provided that this section is effective July 1, 1991.

Administrative Rules

Title 23, chapter 14, subchapter 6, ARM Regional youth detention services.

41-5-1806. Contracts with nonparticipating counties.

Compiler's Comments

1991 Statement of Intent: The statement of intent attached to Ch. 799, L. 1991, provided: "A statement of intent is required for this bill because [section 14] [41-5-1008, renumbered 41-5-1908] grants the board of crime control authority to adopt rules necessary to implement provisions of this bill.

It is the intent of the legislature, in enacting this bill, to provide alternatives to the detention of youth in adult jails in order to meet the requirements of Senate Bill No. 38, which prohibits the detention of youth in adult jails.

In order to ensure that alternatives to jail are established, the legislature intends that each county have the primary responsibility to provide youth detention services, as required by [section 2] [41-5-810, renumbered 41-5-1803]. In addition, in order to stimulate the development of needed services, the legislature intends to provide state grants authorized in [section 8] [41-5-1002, renumbered 41-5-1902], using state and federal funds, to assist counties in providing a spectrum of services for the detention and care of youth. These services are intended to include but are not limited to youth detention facilities, short-term detention centers, holdovers, attendant care, home detention, and programs for the transportation of youth to regional detention facilities.

The legislature intends that counties receiving state grants should share in the costs of services in order to prevent excessive utilization of services and to give counties a financial incentive to hold down program costs. For this reason, [section 10] [41-5-1004, renumbered 41-5-1904] requires that state grants be provided on a matching basis or, if in a block grant, based on a percentage of the approved cost of services.

In order to discourage the use of secure detention and to promote the use of less costly, nonsecure community-based programs, the legislature intends to provide state grants to counties at a higher rate of payment for such services, including holdovers, attendant care, and other alternatives to secure detention.

The legislature further intends that, as a condition of receiving state grants under [section 8] [41-5-1002, renumbered 41-5-1902], each county shall develop a written plan for providing youth detention services, including alternatives to secure detention. The development of county plans is required to ensure that formal planning does, in fact, occur and to make certain that state grants are not provided for services that are not well planned in advance.

As a further condition of receiving state grants under [section 8] [41-5-1002, renumbered 41-5-1902], each county shall, within a reasonable period of time, demonstrate compliance or substantial compliance with state law and policies contained in the Montana Youth Court Act relating to the detention and placement of youth. The legislature intends that the board of crime control review and monitor counties receiving grants under [section 8] [41-5-1002, renumbered 41-5-1902] to assure compliance or substantial compliance with the Montana Youth Court Act.

Finally, the legislature intends that the board of crime control adopt rules as authorized in [section 14] [41-5-1008, renumbered 41-5-1908]. In adopting rules, the board may:

(1) establish requirements for approved holdovers consistent with the definition of holdovers provided in 41-5-103(13);

(2) designate geographical areas of the state that are eligible for creation of a youth detention region under [section 4] [41-5-812, renumbered 41-5-1805]. In designating these areas, the board shall use available state data showing the number of youth held in detention in each county of the state.

(3) adopt procedures governing the distribution and allocation of funds in accordance with [sections 10 and 11] [41-5-1004 and 41-5-1005, renumbered 41-5-1904 and 41-5-1905];

(4) provide a system to review and monitor counties under [section 9] [41-5-1003, renumbered 41-5-1903] to assure that counties receiving grants are in compliance or substantial compliance with the Montana Youth Court Act;

(5) provide standards for determining compliance or substantial compliance with the Montana Youth Court Act pursuant to [section 9] [41-5-1003, renumbered 41-5-1903]. These standards should be based upon comparable standards for compliance with sections 223(a)(12) and 223(a)(14) of the federal Juvenile Justice and Delinquency Prevention Act of 1974.

(6) establish a process for providing notice and fair hearings required under [section 9] [41-5-1003, renumbered 41-5-1903] in order to terminate state grants to counties that fail to attain compliance or substantial compliance with the Montana Youth Court Act."

Effective Date: Section 30, Ch. 799, L. 1991, provided that this section is effective July 1, 1991.

41-5-1807. Responsibility for payment of detention costs.

Compiler's Comments

1999 Amendment: Chapter 536 in middle of (1) inserted exception clause; inserted (2) concerning educational program for youth in lawful custody at a detention facility; and made minor changes in style. Amendment effective April 29, 1999.

1991 Statement of Intent: The statement of intent attached to Ch. 799, L. 1991, provided: "A statement of intent is required for this bill because [section 14] [41-5-1008, renumbered 41-5-1908] grants the board of crime control authority to adopt rules necessary to implement provisions of this bill.

It is the intent of the legislature, in enacting this bill, to provide alternatives to the detention of youth in adult jails in order to meet the requirements of Senate Bill No. 38, which prohibits the detention of youth in adult jails.

In order to ensure that alternatives to jail are established, the legislature intends that each county have the primary responsibility to provide youth detention services, as required by [section 2] [41-5-810, renumbered 41-5-1803]. In addition, in order to stimulate the development of needed services, the legislature intends to provide state grants authorized in [section 8] [41-5-1002, renumbered 41-5-1902], using state and federal funds, to assist counties in providing a spectrum of services for the detention and care of youth. These services are intended to include but are not limited to youth detention facilities, short-term detention centers, holdovers, attendant care, home detention, and programs for the transportation of youth to regional detention facilities.

The legislature intends that counties receiving state grants should share in the costs of services in order to prevent excessive utilization of services and to give counties a financial incentive to hold down program costs. For this reason, [section 10] [41-5-1004, renumbered 41-5-1904] requires that state grants be provided on a matching basis or, if in a block grant, based on a percentage of the approved cost of services.

In order to discourage the use of secure detention and to promote the use of less costly, nonsecure community-based programs, the legislature intends to provide state grants to counties at a higher rate of payment for such services, including holdovers, attendant care, and other alternatives to secure detention.

The legislature further intends that, as a condition of receiving state grants under [section 8] [41-5-1002, renumbered 41-5-1902], each county shall develop a written plan for providing youth detention services, including alternatives to secure detention. The development of county plans is required to ensure that formal planning does, in fact, occur and to make certain that state grants are not provided for services that are not well planned in advance.

As a further condition of receiving state grants under [section 8] [41-5-1002, renumbered 41-5-1902], each county shall, within a reasonable period of time, demonstrate compliance or substantial compliance with state law and policies contained in the Montana Youth Court Act relating to the detention and placement of youth. The legislature intends that the board of crime control review and monitor counties receiving grants under [section 8] [41-5-1002, renumbered 41-5-1902] to assure compliance or substantial compliance with the Montana Youth Court Act.

Finally, the legislature intends that the board of crime control adopt rules as authorized in [section 14] [41-5-1008, renumbered 41-5-1908]. In adopting rules, the board may:

(1) establish requirements for approved holdovers consistent with the definition of holdovers provided in 41-5-103(13);

(2) designate geographical areas of the state that are eligible for creation of a youth detention region under [section 4] [41-5-812, renumbered 41-5-1805]. In designating these areas, the board shall use available state data showing the number of youth held in detention in each county of the state.

(3) adopt procedures governing the distribution and allocation of funds in accordance with [sections 10 and 11] [41-5-1004 and 41-5-1005, renumbered 41-5-1904 and 41-5-1905];

(4) provide a system to review and monitor counties under [section 9] [41-5-1003, renumbered 41-5-1903] to assure that counties receiving grants are in compliance or substantial compliance with the Montana Youth Court Act;

(5) provide standards for determining compliance or substantial compliance with the Montana Youth Court Act pursuant to [section 9] [41-5-1003, renumbered 41-5-1903]. These standards should be based upon comparable standards for compliance with sections 223(a)(12) and 223(a)(14) of the federal Juvenile Justice and Delinquency Prevention Act of 1974.

(6) establish a process for providing notice and fair hearings required under [section 9] [41-5-1003, renumbered 41-5-1903] in order to terminate state grants to counties that fail to attain compliance or substantial compliance with the Montana Youth Court Act."

Effective Date: Section 30, Ch. 799, L. 1991, provided that this section is effective July 1, 1991.

41-5-1808. Juvenile detention or juvenile corrections officer training.

Compiler's Comments

2007 Amendment: Chapter 506 in first sentence at end substituted "44-4-403" for "44-4-301". Amendment effective July 1, 2007.

Saving Clause: Section 24, Ch. 506, L. 2007, was a saving clause.

Effective Date: Section 5, Ch. 316, L. 2003, provided that this section is effective July 1, 2003.

Part 19

State Grants for Youth Detention Services

Part Compiler's Comments

1991 Statement of Intent: The statement of intent attached to Ch. 799, L. 1991, provided: "A statement of intent is required for this bill because [section 14] [41-5-1008, renumbered 41-5-1908] grants the board of crime control authority to adopt rules necessary to implement provisions of this bill.

It is the intent of the legislature, in enacting this bill, to provide alternatives to the detention of youth in adult jails in order to meet the requirements of Senate Bill No. 38, which prohibits the detention of youth in adult jails.

In order to ensure that alternatives to jail are established, the legislature intends that each county have the primary responsibility to provide youth detention services, as required by [section 2] [41-5-810, renumbered 41-5-1803]. In addition, in order to stimulate the development of needed services, the legislature intends to provide state grants authorized in [section 8] [41-5-1002, renumbered 41-5-1902], using state and federal funds, to assist counties in providing a spectrum of services for the detention and care of youth. These services are intended to include but are not limited to youth detention facilities, short-term detention centers, holdovers, attendant care, home detention, and programs for the transportation of youth to regional detention facilities.

The legislature intends that counties receiving state grants should share in the costs of services in order to prevent excessive utilization of services and to give counties a financial incentive to hold down program costs. For this reason, [section 10] [41-5-1004, renumbered 41-5-1904] requires that state grants be provided on a matching basis or, if in a block grant, based on a percentage of the approved cost of services.

In order to discourage the use of secure detention and to promote the use of less costly, nonsecure community-based programs, the legislature intends to provide state grants to counties at a higher rate of payment for such services, including holdovers, attendant care, and other alternatives to secure detention.

The legislature further intends that, as a condition of receiving state grants under [section 8] [41-5-1002, renumbered 41-5-1902], each county shall develop a written plan for providing youth detention services, including alternatives to secure detention. The development of county plans is required to ensure that formal planning does, in fact, occur and to make certain that state grants are not provided for services that are not well planned in advance.

As a further condition of receiving state grants under [section 8] [41-5-1002, renumbered 41-5-1902], each county shall, within a reasonable period of time, demonstrate compliance or substantial compliance with state law and policies contained in the Montana Youth Court Act relating to the detention and placement of youth. The legislature intends that the board of crime control review and monitor counties receiving grants under [section 8] [41-5-1002, renumbered 41-5-1902] to assure compliance or substantial compliance with the Montana Youth Court Act.

Finally, the legislature intends that the board of crime control adopt rules as authorized in [section 14] [41-5-1008, renumbered 41-5-1908]. In adopting rules, the board may:

(1) establish requirements for approved holdovers consistent with the definition of holdovers provided in 41-5-103(13);

(2) designate geographical areas of the state that are eligible for creation of a youth detention region under [section 4] [41-5-812, renumbered 41-5-1805]. In designating these areas, the board shall use available state data showing the number of youth held in detention in each county of the state.

(3) adopt procedures governing the distribution and allocation of funds in accordance with [sections 10 and 11] [41-5-1004 and 41-5-1005, renumbered 41-5-1904 and 41-5-1905];

(4) provide a system to review and monitor counties under [section 9] [41-5-1003, renumbered 41-5-1903] to assure that counties receiving grants are in compliance or substantial compliance with the Montana Youth Court Act;

(5) provide standards for determining compliance or substantial compliance with the Montana Youth Court Act pursuant to [section 9] [41-5-1003, renumbered 41-5-1903]. These standards should be based upon comparable standards for compliance with sections 223(a)(12) and 223(a)(14) of the federal Juvenile Justice and Delinquency Prevention Act of 1974.

(6) establish a process for providing notice and fair hearings required under [section 9] [41-5-1003, renumbered 41-5-1903] in order to terminate state grants to counties that fail to attain compliance or substantial compliance with the Montana Youth Court Act."

Effective Date: Section 30, Ch. 799, L. 1991, provided that this part is effective July 1, 1991.

Part Administrative Rules

Title 23, chapter 14, subchapter 6, ARM Regional youth detention services.

Part Attorney General's Opinions

County Reimbursement by Board of Crime Control for Indian Youth Placed in Regional Detention Facility by Tribal Court: Title 18, ch. 11, the State-Tribal Cooperative Agreements Act, includes broad authority for counties to enter into agreements with tribes for the delivery of services to their citizens. Although tribes have jurisdiction over tribal member youth, those youth remain citizens of Montana as well as citizens of the tribes, and if the tribes do not provide services, such as youth detention facilities, those tribal youth are nevertheless entitled to be offered state services in the same manner as any other Montana youth. The fact that a tribal court adjudicates the youth does not necessarily disqualify the youth from the receipt of state services. In the present case, Blaine County entered into an agreement with the Fort Belknap Tribe to allow detention in the Blaine County youth detention facility of youth determined by the tribal court to be in need of detention, and Blaine County included the tribal youth population in its survey of youth to be served. The youth detention services were appropriately covered in the county's grant application. Thus, when the county applies for reimbursement for each youth served, regardless of whether the youth is a tribal member or not, the Montana Board of Crime Control is required to reimburse the county for detention costs for the youth, including tribal youth served in a regional detention facility pursuant to an order of a tribal court. 49 A.G. Op. 10 (2001).

41-5-1901. Definitions.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

41-5-1902. State grants to counties.

Attorney General's Opinions

County Reimbursement by Board of Crime Control for Indian Youth Placed in Regional Detention Facility by Tribal Court: Title 18, ch. 11, the State-Tribal Cooperative Agreements Act, includes broad authority for counties to enter into agreements with tribes for the delivery of services to their citizens. Although tribes have jurisdiction over tribal member youth, those youth remain citizens of Montana as well as citizens of the tribes, and if the tribes do not provide services, such as youth detention facilities, those tribal youth are nevertheless entitled to be offered state services in the same manner as any other Montana youth. The fact that a tribal court adjudicates the youth does not necessarily disqualify the youth from the receipt of state services. In the present case, Blaine County entered into an agreement with the Fort Belknap Tribe to allow detention in the Blaine County youth detention facility of youth determined by the tribal court to be in need of detention, and Blaine County included the tribal youth population in its survey of youth to be served. The youth detention services were appropriately covered in the county's grant application. Thus, when the county applies for reimbursement for each youth served, regardless of whether the youth is a tribal member or not, the Montana Board of Crime Control is required to reimburse the county for detention costs for the youth, including tribal youth served in a regional detention facility pursuant to an order of a tribal court. 49 A.G. Op. 10 (2001).

41-5-1904. Distribution of grants — limitation of funding — restrictions on use.

Compiler's Comments

1997 Amendment: Chapter 550 in (2)(b)(i), in second sentence, inserted "costs"; at end of (4) substituted "provided for in 41-5-1503" for "provided for in 41-5-523"; and made minor changes in style. Amendment effective July 1, 1997.

The amendments to this section made by sec. 41, Ch. 286, L. 1997, were rendered void by sec. 49(3)(e), Ch. 286, L. 1997, a coordination section.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

1995 Amendment: Chapter 8 inserted (3) allowing the award of a grant for youth detention services to an eligible county in a case of extreme hardship. Amendment effective July 1, 1995.

41-5-1908. Rulemaking authority.

Compiler's Comments

1997 Amendments: Chapter 42 substituted "41-5-103(14)" for "41-5-103(13)" (voided by Ch. 550 amendments). Amendment effective March 12, 1997.

Chapter 550 after "implement the provisions of" deleted reference to 41-5-103(13) and at end inserted reference to approved holdovers. Amendment effective July 1, 1997.

Saving Clause: Section 79, Ch. 550, L. 1997, was a saving clause.

Severability: Section 80, Ch. 550, L. 1997, was a severability clause.

Part 20

Juvenile Delinquency Intervention Act

Part Compiler's Comments

Severability: Section 24, Ch. 587, L. 2001, was a severability clause.

Effective Date: Section 25, Ch. 587, L. 2001, provided: "[This act] is effective July 1, 2001."

Part Administrative Rules

Title 20, chapter 9, subchapter 2, ARM Juvenile Delinquency Intervention Act.

41-5-2002. Purpose.

Compiler's Comments

2021 Amendment: Chapter 339 in (7) before "correctional facilities" deleted "state youth". Amendment effective October 1, 2021.

2007 Amendment: Chapter 398 in (1) substituted "out-of-home placements, programs" for "placement"; in (2) and (3) substituted "youth courts" for "local government"; inserted (4) concerning community safety; inserted (5) concerning local resources; inserted (6) concerning reduction of out-of-state placements; inserted (7) concerning youth correctional facilities; and made minor changes in style. Amendment effective June 30, 2007.

41-5-2003. Establishment of program — office of court administrator duties.

Compiler's Comments

2021 Amendment: See 2021 Session Law for amendment made by sec. 74, Ch. 261, L. 2021. Amendment effective April 20, 2021.

2015 Amendment: Chapter 143 in (2) and (3) substituted "office of court administrator" for "department"; in (5)(a) at beginning deleted "Except as provided in subsection (6)" and near beginning substituted "may" for "shall"; in (5)(b) near middle after "subsection (5)(a)" deleted "each year"; deleted former (6) that read: "(6) On or before June 30 in fiscal years 2011 and 2012, the office of court administrator shall transfer $25,000 in each fiscal year from the youth court intervention and prevention account to the general fund in lieu of conducting the evaluation required by subsection (5) for fiscal years 2011 and 2012"; and made minor changes in style. Amendment effective July 1, 2015.

2011 Amendment: Chapter 95 in (5)(a) at beginning inserted exception clause; inserted (6) regarding transfer of money by office of court administrator; and made minor changes in style. Amendment effective March 30, 2011.

2007 Amendment: Chapter 398 in (1) substituted second sentence requiring participation for former (1)(b) that read: "(b) Participation in the juvenile delinquency intervention program is voluntary"; substituted (2) concerning monitoring judicial district's annual allocation for former text that read: "The department and the youth court shall monitor the youth court's account created under 41-5-130 to ensure that the youth court does not exceed its allocated account budget"; deleted former (3) that read: "(3) Account funds not used by the youth court for placements must be distributed to participating youth courts in accordance with rules adopted by the department to be used for placement alternatives and early intervention alternatives"; in (3) substituted "judicial district" for "youth court" and at end substituted "its annual allocation" for "account funds and the evaluation and development of placement alternatives and effective intervention programming"; substituted (4) concerning court administrator assistance and (5) concerning evaluation of programs and report on results of evaluations for former text that read: "The department shall review and monitor each youth court to enable the development of placement alternatives by the youth courts and the development of early intervention alternatives by the youth courts. The department shall report to the legislature on the results of its monitoring"; and made minor changes in style. Amendment effective June 30, 2007.

Allocation of First-Year Funding: Section 19, Ch. 587, L. 2001, provided: "The department of corrections shall use data gathered during the administration of the intervention in delinquency pilot program established under section 73, Chapter 550, Laws of 1997, to assist in determining the allocations to the accounts created under [section 11] [41-5-130] during the first year of operation of the juvenile delinquency intervention program established by [section 14] [41-5-2003]."

Program Progress and Report: Section 19, Ch. 587, L. 2001, provided: "The department of corrections shall develop a system of outcome measures during the first 6 months of the operation of the program established in [section 14] [41-5-2003,] use the system to evaluate the progress of the program, and report to the legislature in the manner provided in 5-11-210."

Severability: Section 24, Ch. 587, L. 2001, was a severability clause.

41-5-2004. Youth court duties.

Compiler's Comments

2015 Amendment: Chapter 143 deleted former (4) that read: "(4) submit quarterly reports to the office of court administrator and the department documenting the use of diversion and prevention programs and the use of placement services"; in (4) at end inserted "as otherwise permitted by law"; and made minor changes in style. Amendment effective July 1, 2015.

2007 Amendment: Chapter 398 in (3) at beginning before "risk" inserted "validated", substituted "office of court administrator" for "department", after "risk" deleted "assessment", and near end substituted "services for youth" for "for youth adjudicated"; in (4) after "reports to the" inserted "office of court administrator and the"; deleted former (5) that read: "(5) participate in the cost containment review panel established under 41-5-131"; in (5) after "provide the" deleted "department and the"; and made minor changes in style. Amendment effective June 30, 2007.

41-5-2005. Youth placement committee recommendation to youth court judge — acceptance or rejection.

Compiler's Comments

2021 Amendment: Chapter 339 in (1)(b) before "correctional facility" deleted "youth". Amendment effective October 1, 2021.

2019 Amendment: Chapter 344 in (1)(a) in first sentence after "41-5-1513" deleted "or to the department under 41-5-1513" and substituted "may be established as provided for in 41-5-121" for "must be convened" and in second sentence inserted "if established"; and made minor changes in style. Amendment effective July 1, 2019.

Applicability: Section 39, Ch. 344, L. 2019, provided: "[This act] applies to youth residing in a state youth correctional facility, in a residential placement approved by the department, or on parole and under community supervision on or after July 1, 2019."

2015 Amendment: Chapter 143 in (6) at end substituted "office of court administrator" for "cost containment review panel"; and in (7) near end substituted "office of court administrator" for "department". Amendment effective July 1, 2015.

2007 Amendment: Chapter 398 in (1)(a) in first sentence before "custody" inserted "legal", after "court" inserted "under 41-5-1512 or 41-5-1513", and after "department" substituted "under 41-5-1513" for "pursuant to 41-5-1512 or 41-5-1513" and in second sentence at beginning inserted exception clause; inserted (1)(b) concerning when alternative recommendation is unnecessary; in (6) near middle substituted "annual allocation" for "account"; in (7) near end substituted "annual allocation" for "budget allocation"; deleted former (8) that read: "(8) This section applies only to those judicial districts that elect to participate in the juvenile delinquency intervention program administered by the department"; and made minor changes in style. Amendment effective June 30, 2007.

41-5-2006. Judicial branch policies and procedures.

Compiler's Comments

2015 Amendment: Chapter 143 deleted former (1) that read: "(1) The department shall adopt rules necessary to perform its duties under this chapter, including but not limited to rules regarding:

(a) monitoring judicial districts' annual allocations provided for in 41-5-130;

(b) processing payments for out-of-home placements, programs, and services on behalf of the youth courts;

(c) determining the amount to be allocated to the cost containment pool as provided for in 41-5-132; and

(d) removing youth with a mental disorder, as defined in 53-21-102, from state youth correctional facilities"; in introductory clause inserted "cost containment review panel" and at end substituted "for" for "regarding"; in (1) at beginning deleted "guidelines for"; inserted (2) concerning monitoring allocations; inserted (3) concerning processing payments; inserted (4) concerning amounts allocated to the cost containment pool; in (5) substituted "submitting judicial district plans to the office of court administrator for expending allocations from" for "administration of"; inserted (6) concerning reviewing judicial district plans; in (8) substituted "providing" for "approval of"; and made minor changes in style. Amendment effective July 1, 2015.

2007 Amendment: Chapter 398 in (1) substituted "to perform its duties under this chapter" for "for the implementation of 41-5-130 through 41-5-132 and this part"; substituted (1)(a) through (1)(d) concerning monitoring, processing payments, determining allocation, and youth with a mental disorder for former (1)(a) through (1)(k) that read: "(a) defining and establishing criteria for early intervention regarding troubled youth and the development of community alternatives;

(b) evaluating each youth court to ensure that the court is using early intervention strategies and community alternatives and is effectively controlling costs for youth placements;

(c) distributing unused account funds to the youth courts;

(d) determining the allocation of funds to the accounts for the youth courts;

(e) determining the amount of funds to be withheld by the department as cost containment funds;

(f) monitoring and auditing each youth court to ensure that account funds are being used as required by law;

(g) distributing cost containment funds to youth courts;

(h) monitoring youth courts to promote consistency and uniformity in the placement of juvenile offenders;

(i) developing procedures for the operation of the cost containment review panel;

(j) developing one or more risk assessment tools; and

(k) developing procedures for removing youth with serious mental illness from the juvenile correctional system"; deleted former (2) that read: "(2) It is the intent of the legislature that rules adopted by the department encourage the use of local, regional, and state resources for the placement of troubled youth"; inserted (2) concerning district court council adoption of policies and procedures; and made minor changes in style. Amendment effective June 30, 2007.

41-5-2011. Youth court intervention and prevention account — statutory appropriation — administration.

Compiler's Comments

2015 Amendment: Chapter 143 in (1) in second sentence after "following funds" deleted "transferred by the department"; deleted former (1)(a) that read: "(a) funds transferred under 41-5-130(2) for evaluations of out-of-home placements, programs, and services"; in (1)(a) substituted "41-5-130" for "41-5-130(8)"; and made minor changes in style. Amendment effective July 1, 2015.

2007 Amendment: Chapter 398 in (1) in first sentence after "youth" inserted "court", deleted former second and third sentences that read: "The money in the account must be used for the youth court intervention and prevention programs authorized in this part. All unexpended funds remaining at the end of a fiscal year in the accounts established under 41-5-130(6) must be transferred to the account established in this subsection", and inserted second sentence and (1)(a) through (1)(c) concerning deposit of designated funds; in (2) in first sentence near beginning after "youth" inserted "court" and at end deleted "for the purposes of 41-5-2003(3)" and in second sentence at end substituted "41-5-2012" for "rules adopted by the department of corrections"; and made minor changes in style. Amendment effective June 30, 2007.

Effective Date: Section 5, Ch. 482, L. 2005, provided that this section is effective April 28, 2005.

Retroactive Applicability: Section 6, Ch. 482, L. 2005, provided "[This act] applies retroactively, within the meaning of 1-2-109, to unexpended funds in the accounts established under 41-5-130(6) on June 30, 2004."

41-5-2012. Allocation to judicial districts from youth court intervention and prevention account — judicial district plans — cost containment review and recommendation.

Compiler's Comments

2015 Amendment: Chapter 143 in (1)(b) in first sentence near end after "cost containment pool" substituted "deposited" for "transferred"; in (2)(a) after "youth" inserted language concerning training; in (5) in first sentence after "review panel" deleted "and department"; in (6)(b) at beginning inserted "The office of court administrator shall deposit in the general fund" and at end deleted "must be transferred to the general fund"; deleted former (7) that read: "(7) (a) Except as provided in subsection (7)(b), the district court council, established in 3-1-1602, shall adopt policies and procedures, subject to review by the supreme court, for administering this section, including procedures for submitting plans to the office of court administrator and criteria to be used by the office in evaluating and approving the plans.

(b) The cost containment review panel shall adopt procedures for reviewing plans submitted to the office of court administrator and making recommendations to the office on plan approval"; and made minor changes in style. Amendment effective July 1, 2015.

Effective Date: Section 25, Ch. 398, L. 2007, provided that this section is effective June 30, 2007.

Part 25
Criminally Convicted Youth Act

Part Compiler's Comments

Effective Date: This part is effective October 1, 1999.

Part Case Notes

Youth Tried, Convicted, and Sentenced Under Transfer Statute Correctly Sentenced as Persistent Felony Offender: In 1999, when Mainwaring was a juvenile, he pleaded guilty to mitigated deliberate homicide and was convicted pursuant to 41-5-206 and sentenced pursuant to 41-5-2503(1)(a). A part of that sentence was later suspended under 41-5-2510. Later, shortly after turning 21, Mainwaring assaulted a child. The state brought assault charges against Mainwaring and then sought to have the court designate Mainwaring as a persistent felony offender (PFO). The District Court approved the designation as a PFO, based on Mainwaring's 1999 felony conviction, and Mainwaring was convicted and sentenced to 20 years in prison. The Supreme Court held that a conviction under 41-5-206(6) was equivalent to any adult felony conviction and that there is nothing in the Montana Youth Court Act or the Criminally Convicted Youth Act that precludes the application of the PFO statutes and designation to an individual previously convicted of a felony when the individual was a youth. Citing St. v. Damon, 2005 MT 218, 328 M 276, 119 P3d 1194 (2005), the Supreme Court held that the District Court therefore had the authority to apply the PFO statutes and designation to Mainwaring. The Supreme Court also overruled Mainwaring's due process objections and affirmed his conviction. St. v. Mainwaring, 2007 MT 14, 335 M 322, 151 P3d 53 (2007).

41-5-2503. Disposition of criminally convicted youth.

Case Notes

Seventeen-Year-Old Defendant Charged in District Court — Denial of Transfer to Youth Court Proper: A 17-year-old defendant was charged directly in District Court with two consolidated counts of sexual intercourse without consent concerning two separate incidents. The District Court subsequently denied the defendant's motions to have the charges moved to Youth Court, concluding that the defendant's age, home environment, conduct while on release, minimization of his alleged conduct, and need for more structured supervision made the District Court a more appropriate forum. The defendant agreed to a nonbinding plea agreement for one of the charges and was sentenced to 50 years in prison with 10 years suspended. On appeal, the Supreme Court affirmed, holding that the District Court correctly denied the motions for transfer to Youth Court. However, the Supreme Court found that the District Court erred by not including the requirements of 41-5-2503 and remanded to modify the judgment. St. v. Talksabout, 2017 MT 79, 387 Mont. 166, 392 P.3d 574, distinguished in St. v. Johnson, 2023 MT 167, 413 Mont. 202, 534 P.3d 676.

No Statutory Indication That Youth Received Illegal Sentence Following Transfer of Case to District Court: At the age of 17, Strong was charged with two counts of felony burglary, and the state moved to transfer the charges to District Court. The state also filed theft charges against Strong in Youth Court. Strong entered a guilty plea on the burglary charges in exchange for dismissal of the theft charges. The District Court sentenced Strong to the Department of Corrections for 8 years, with 2 years suspended on each count. While serving the prison term, Strong challenged the sentence as illegal because the District Court failed to suspend all but 5 years. The state countered that the 5-year limitation in 46-18-201(3)(d) did not apply to a youth who was transferred to District Court under 41-5-206. The District Court affirmed the original sentence and Strong appealed. Applying the criteria in St. v. Ellis, 2007 MT 210, 339 M 14, 167 P3d 896 (2007), the Supreme Court addressed the facial challenge to the exemption in 46-18-201(3)(d)(ii) and affirmed. In order for an adult to receive the less onerous commitment to the Department of Corrections, the sentencing court must be willing to suspend all but 5 years of the commitment, but the statute imposes no similar impediment on a court's ability to commit to the Department a youth transferred to District Court under 41-5-206. This enhanced flexibility with regard to the treatment of youth offenders comports with the goals of the Youth Court Act to ensure rehabilitation of youth offenders rather than solely retribution. Therefore, nothing in 46-18-201(3)(d)(ii) established that Strong received an illegal sentence. St. v. Strong, 2009 MT 65, 349 M 417, 203 P3d 848 (2009). See also In re C.H., 210 M 184, 683 P2d 931 (1984).

41-5-2510. Sentence review hearing.

Compiler's Comments

2005 Amendment: Chapter 423 in (3) before "youth" inserted "formal". Amendment effective October 1, 2005.

CHAPTER 6
INTERSTATE COMPACT ON JUVENILES

Part 1
Text of Compact

41-6-101. Enactment — provisions.

Compiler's Comments

Contingent Effective Date: Section 3, Ch. 194, L. 2003, provided: "[This act] is effective upon receipt of written notification by the secretary of state from the director of the department of corrections that the compact has been legislatively enacted into law by the 35th compacting state." The contingency occurred on December 16, 2008, when the Interstate Compact for Juveniles Commission met and the Compact was ratified by the required 35 states.

2003 Amendment: Chapter 194 substituted new Interstate Compact on Juveniles for former Interstate Compact on Juveniles (see 2003 Session Law for former text); and made minor changes in style. Amendment effective on occurrence of contingency.

1989 Amendment: Inserted Article XVI concerning rendition.

Attorney General's Opinions

Nondelinquent Youth Charged With Crime in Another State: Because Montana has not adopted Art. XVIII of the Interstate Compact on Juveniles, which provides that the Compact applies to juveniles charged with being delinquent by reason of violation of any criminal law, a youth who has not run away, escaped, or been adjudged delinquent is outside the scope of the Interstate Compact on Juveniles in Montana. A juvenile residing in Montana, and charged with a crime in another state, may be extradited under the Uniform Criminal Extradition Act, Title 46, ch. 30. The soundest policy is to extradite any juvenile charged with a crime in another state, regardless of whether a juvenile court or an adult court has final jurisdiction. 41 A.G. Op. 24 (1985).

41-6-105. Responsibilities of courts, state departments, agencies, and officers.

Case Notes

Jurisdiction Over Runaway Juvenile: The broad language of 41-6-105 granting the courts of Montana the authority to "do all things appropriate" to carry out the purposes of the Interstate Compact on Juveniles should include the power to place a runaway youth in a private home on determining that the juvenile should not be returned to the requisitioning state. Here, the juvenile properly filed a petition for protection of the court, as a youth in need of care, and later changed it to request placement with her grandparents, so that the District Court properly had jurisdiction. In re Pierce, 184 M 82, 601 P2d 1179 (1979).

41-6-106. Additional procedures not precluded.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

CHAPTER 7
MONTANA FAMILY POLICY ACT

Part 1
Family Policy Act

Part Compiler's Comments

Preamble: The preamble attached to Ch. 98, L. 1993, provided: "WHEREAS, the family is the basic institution in society through which our children's sense of well-being and self-esteem are developed and nurtured; and

WHEREAS, because our entire society benefits when families function well, it is in society's best interest to ensure that public policies and programs support and strengthen family life; and

WHEREAS, in fiscal year 1992, 3,310 Montana children and youth were removed from their families and placed in foster homes, group homes, and residential treatment facilities at a cost to the state of more than $16 million; and

WHEREAS, because of the high level of expenditures required to provide out-of-home placement, many experts now question whether public revenue spent for room, board, and related costs might be more wisely spent providing services specifically needed to enable a family to continue functioning as a family; and

WHEREAS, mounting evidence demonstrates that efforts that are made to support and strengthen vulnerable families before a crisis occurs can substantially contribute to family health and stability and prevent future long-term governmental costs; and

WHEREAS, because even with a reformed service system for families, some parents will not be available or able to protect or care adequately for their children, a range of out-of-home services should be available for these children and their families; and

WHEREAS, state and local policymakers increasingly are examining entire state systems for serving troubled children and families and are developing a more comprehensive approach to the multifaceted problems they face; and

WHEREAS, just as families nurture and sustain their members, healthy communities do the same for their member children and families; and

WHEREAS, because family services should be rooted in local communities and reflect local needs, characteristics, and resources, services should be provided as close as possible to the home community of the child or family and families should be fully involved in the planning and delivery of those services; and

WHEREAS, promoting family well-being and assuring children's safety must be the concern of all community sectors."

Legislative Oversight Committee: Chapter 301, L. 1993, created a joint legislative oversight committee on children and families.

Part Collateral References

Working Together to Improve the Continuum of Services to Children and Families: A Report to the 54th Legislature, Merrill, Mont. Leg. Council (1994).

TITLE 42
ADOPTION

Title Compiler's Comments

Source: Some of the sections in chapters 1 through 7 of this title are based upon the Uniform Adoption Act, adopted by the National Conference of Commissioners on Uniform State Laws in 1994 and found in 9 U.L.A. 1 (pocket part). The 1994 version of the Uniform Adoption Act has been enacted only in Vermont. In Montana, fewer than two dozen of the 115 sections of the 1994 Uniform Adoption Act have been enacted in whole or in part in this title. For that reason, the Commissioners' prefatory note to the 1994 Uniform Adoption Act has not been included because most of that note is inapplicable to the few 1994 Uniform Adoption Act sections included in this title. For the sections in this title in which all or a large part of the sections of the 1994 Uniform Adoption Act is like the Montana enactment and the comments of the Commissioners, if any, are therefore helpful, the Commissioners' comments accompanying the sections of the 1994 Uniform Adoption Act enacted in Montana are included under the catchline "1994 Commissioners' Comment", the section of the 1994 Uniform Adoption Act from which the Montana language is derived is cited under the heading "Compiler's Comments" as the "Source", and any differences between the 1994 Uniform Adoption Act and the version of the particular section of the 1994 Uniform Act enacted in Montana are explained under the heading "Compiler's Comments" and the catchline "Changes From 1994 Uniform Act". Even for many of those sections of the 1994 Uniform Adoption Act enacted in Montana, the Montana sections contain variations, omissions, and additional matter. For those sections that resemble the 1994 Uniform Adoption Act only in some minor way and for which the comments of the Commissioners, if any, are therefore unhelpful, the 1994 Commissioners' comments to the Uniform Act have not been included and the 1994 Uniform Act is not cited as the source, but similarities between the language of the 1994 Uniform Act and the statutory section are noted under the compiler's comments catchline "Similarities With 1994 Uniform Act".

Some sections of this title are also based upon former Title 40, ch. 8, repealed by Ch. 480, L. 1997. Title 40, ch. 8, enacted part of the 1953 Uniform Adoption Act. Montana never enacted the 1969 Revised Uniform Adoption Act. In those instances in which all or a major part of a section of the 1953 Uniform Adoption Act was enacted in Montana, the appropriate section of the 1953 Uniform Act is cited as the source, with or without changes, and any Commissioners' comments published with the 1953 Uniform Adoption Act have been retained under the catchline "1953 Commissioners' Comment", even though changes to the 1953 Act, as previously adopted in Montana, may have been made by Ch. 480, L. 1997. If no Commissioners' comment, source note, or comparison to the 1994 Uniform Act is provided, the compiler has made the judgment that any resemblance of the Montana statute to either the 1953 Uniform Act or the 1994 Uniform Act is so small that the inclusion of any comparison or source note would not be helpful to the reader and in fact may be misleading.

Some of the sections in this title are also based upon former sections of Title 40, ch. 6, the Montana version of the Uniform Parentage Act, 9B U.L.A. 287, which have been repealed or amended by Ch. 480, L. 1997. When meaningful parts of Title 40, ch. 6, have been retained, although amended, applicable portions of the Commissioners' comments to the Uniform Parentage Act that were originally published for the repealed sections have also been retained under the catchline "Commissioners' Comment" and the appropriate section of the Uniform Parentage Act is cited as the source.

Chapter 8 of this title concerning licensing of adoption agencies succeeded Title 52, ch. 2, part 4, repealed by sec. 171, Ch. 480, L. 1997. When appropriate, annotations formerly published for Title 52, ch. 2, part 4, have been transferred to chapter 8 of this title.

Chapter 10 of this title concerning subsidized adoptions was transferred from Title 52, ch. 2, part 5, by the Code Commissioner pursuant to sec. 174, Ch. 480, L. 1997. Because the MCA sections were transferred as a whole to this title, all annotations previously published for Title 52, ch. 2, part 5, were also transferred as a whole to this title.

Title Administrative Rules

Title 37, chapter 52, ARM Adoptive services.

Title Law Review Articles

Not the Cleavers Anymore: Third-Party Parental Interests in Minor Children and the Evolving American Family, Scott, 73 Mont. L. Rev. 97 (2012).

A Look at Kulstad v. Maniaci in Light of Changing Cultural Norms, Neilson, 71 Mont. L. Rev. 449 (2010).

Recent Developments in Family Law in Montana, Mahan, 39 Mont. L. Rev. 1 (1978).

Adoption: Legislative Summary, 1961, 22 Mont. L. Rev. 114 (1961).

1959 Legislation on Adoption, 20 Mont. L. Rev. 152 (1959).

Uniform Adoption Act, 18 Mont. L. Rev. 121 (1957).

Hearing Children's Voices and Interests in Adoption and Guardianship Proceedings, 41 Fam. L.Q. 365 (2007).

Reviewing Lesbian and Gay Adoption and Foster Care: The Developmental Outcomes for Children, Tasker & Bellamy, 37 Fam. L. 524 (2007).

Marginalizing Adoption Through the Regulation of Assisted Reproduction, Storrow, 35 Cap. U.L. Rev. 479 (2006).

The Role of Adoption in Winning Public Recognition for Adult Partnerships, Carbone, 35 Cap. U.L. Rev. 341 (2006).

A Constitutional Analysis of Grandparents' Custody Rights, Ognibene, 72 U. Chi. L. Rev. 1473 (2005).

Intercountry Adoptions: Instituting Educational Programs in the Adoption Process to Facilitate Awareness of Cultural Identity Issues, Ku, 43 Fam. Ct. Rev. 511 (2005).

Preventing Heartbreak in Adoption: Understanding the Rights of All Parties, Opper, 19 Am. J. Fam. L. 193 (2005).

Title Collateral References

Adoption, https://courts.mt.gov/Forms/Adoption.

Adoption, https://MontanaLawHelp.org, family and youth.

CHAPTER 1
GENERAL ADOPTION PROVISIONS

Chapter Compiler's Comments

1997 Statement of Intent: The statement of intent attached to Ch. 480, L. 1997, provided: "A statement of intent is required for this bill because the bill gives the department of public health and human services authority to adopt administrative rules. The rules must provide procedures for the putative father registry, including methods of notification, filing, and accessing information. The department shall adopt rules for licensing child-placing agencies. To the extent feasible, the rules should incorporate existing procedures. The needs of the child in the adoption proceeding must be the primary focus of the rules."

Severability: Section 172, Ch. 480, L. 1997, was a severability clause.

Applicability: Section 173, Ch. 480, L. 1997 provided: "(1) [Sections 1 through 156] [Title 42, chapters 1 through 7, and Title 52, chapter 8, part 1] apply to proceedings commenced on or after October 1, 1997.

(2) A petition for adoption filed prior to October 1, 1997, is governed by the law in effect at the time the petition was filed.

(3) The putative father registry requirements apply to children born on or after October 1, 1997."

Effective Date: Section 177, Ch. 480, L. 1997, provided: "(1) Except as provided in subsection (2), [this act] is effective October 1, 1997.

(2) [Sections 19 through 26, 28 through 38, 60, 65, 67, 68, and 75] [42-2-202 through 42-2-209, 42-2-214 through 42-2-218, 42-2-222 through 42-2-226, 42-2-230, 42-2-503, 42-2-604, 42-2-605, 42-2-606, and 42-2-611] are effective October 1, 1998."

Part 1
Adoption Policy and Procedures

Part Collateral References

Indian Adoption, 25 U.S.C.A. § 372a.

Indian Child Welfare Act, 25 U.S.C.A. §§ 1901 through 1963.

The Adoption and Safe Families Act of 1997, 42 U.S.C.A. § 670, et seq.

42-1-102. Adoption policy.

Case Notes

DECISIONS AFTER 1997 GENERAL REVISION

Postadoption Visitation Agreement — District Court Responsibilities: The District Court did not err when it modified sua sponte the parties' postadoption visitation agreement to provide weekend visitation and weekly telephone contact with the birth mother because the modification was determined to be in the best interests of the child. The finding was supported by substantial evidence, and the court did not misapprehend the effect of the evidence. Adoptive parents do not have sole discretion in deciding whether a postadoption visitation agreement should be enforced. Rather, the adoptive parents' wishes are but one factor among many to be considered in determining the child's best interests under 40-4-212. Groves v. Clark, 1999 MT 117, 294 M 417, 982 P2d 446, 56 St. Rep. 490 (1999).

Sua Sponte Modification of Postadoption Visitation Agreement Within Discretion of District Court: The rule that in the context of separation agreements made between spouses, parties cannot make binding agreements concerning the support, custody, or visitation of children applies equally to postadoption agreements made between an adopted child's birth parents and adoptive parents. The best interests of the child are paramount, and sua sponte modification of an original visitation agreement in this case was within the discretion of the District Court after determining the best interests of the adopted child. Groves v. Clark, 1999 MT 117, 294 M 417, 982 P2d 446, 56 St. Rep. 490 (1999). See also In re Marriage of Mager, 241 M 78, 785 P2d 198, 47 St. Rep. 97 (1990), and In re Marriage of Widhalm/Miller, 279 M 97, 926 P2d 748, 53 St. Rep. 1067 (1996).

DECISIONS PRIOR TO 1997 GENERAL REVISION

Postadoption Visitation Agreement Between Natural Mother and Adoptive Parents — Responsibilities of District Court: Groves consented to the adoption of her child by the Clarks on the condition that the Clarks sign a visitation agreement allowing Groves to have specified contact with her daughter. After the document was signed and the adoption completed, the Clarks tried to terminate Groves' contact with her daughter. Groves brought an action for specific performance of the visitation agreement, but the District Court held that the agreement was void from its inception under 40-8-125 (now repealed). The Supreme Court reversed, holding that In re C.P., 221 M 180, 717 P2d 1093 (1986), was distinguishable and that the Legislature would not have enacted 40-8-136 (now repealed) if 40-8-125 (now repealed) terminated the interests of the natural parent altogether. The Supreme Court also noted that 40-8-136 (now repealed) also places a burden upon the adoptive parents and, in this case, upon the adoption agency that acted as Groves' agent, to make sure that the visitation agreement was filed in accordance with that statute. The Supreme Court also concluded that under 40-8-114 (now repealed), the District Court has a responsibility to make sure that the enforcement is in the best interests of the child. Groves v. Clark, 277 M 179, 920 P2d 981, 53 St. Rep. 703 (1996).

Procedures to Be Rigorously Followed: While there is some overlap in the various statutory schemes governing the termination of parental rights and the custody of children as to general subject matter, each is used for a distinct purpose and sets forth specific procedures which must be rigorously followed before a valid judgment or order may be issued, to insure that the minors involved receive the full protection of these laws. In re Guardianship of Aschenbrenner, 182 M 540, 597 P2d 1156 (1979).

42-1-103. Definitions.

Compiler's Comments

2003 Amendment: Chapter 504 in definition of agency after "means a" substituted "child placement agency licensed by the state of Montana pursuant to Title 52, chapter 8, that" for "public or nonprofit entity that is licensed by any jurisdiction of the United States and that". Amendment effective October 1, 2003.

Source: Section 1, 1953 Uniform Adoption Act, with changes.

Case Notes

Criteria for Intervention in Adoption Proceeding — Unfounded and Untimely Motion to Intervene Properly Denied: Couple A adopted a child through a judicial decree in the District Court of the Twenty-First Judicial District. Couple B also wanted to adopt the child and filed a motion, in the District Court of the Twelfth Judicial District where they lived, to intervene and set aside the final decree of adoption, despite the fact that some 6 months had passed since the final adoption decree was issued. Initially, neither District Court was aware of the competing adoption petitions. The Department of Public Health and Human Services had been reviewing both couples as potential adoptive resources at the same time and ultimately determined that because the child had formed a strong bond during placement with couple A for nearly 2 years, it would be in the child's best interests to be adopted by couple A. Couple B contended that the child was a member of their extended family and that the Department should have given them priority as adoptive parents. The Twenty-First District Court held that couple B had no standing to intervene as a matter of right pursuant to former Rule 24(a), M.R.Civ.P. (now superseded), and that permissive intervention under former Rule 24(b), M.R.Civ.P. (now superseded), was untimely and would undermine the purpose of adoption to the detriment of the child. Couple B's motion to set aside the final decree pursuant to former Rule 60(b), M.R.Civ.P. (now superseded), was also denied on grounds that as nonparties to couple A's adoption petition, couple B had no standing to make the motion and that, in any case, it was untimely because it was made more than 180 days after the final decree. Couple B appealed the denial of both motions, arguing first that they had a legal interest by virtue of the family placement preference in the Indian Child Welfare Act (ICWA) and legislative and Departmental policies favoring adoptive placement with extended family members. The Supreme Court noted that a mere claim of interest is insufficient to support intervention as a matter of right and that a party seeking intervention must make a prima facie showing of a direct, substantial, legally protectable interest in the proceedings. No such showing was made here because the child was not Indian and therefore not subject to the ICWA, nor did the relationship of second cousins meet the definition of extended family member. Couple B next argued that they should have been allowed to intervene under the permissive standard of former Rule 24(b), M.R.Civ.P., because the competing adoption petitions had common issues of law and fact. Couple B contended that their delay should be excused by their reliance on misrepresentations made by the Department. The Supreme Court agreed that the Department could have taken a more forthright approach and saved all the parties considerable time and expense, but couple B bore the responsibility for ensuring the timely filing of the motion to intervene. The Supreme Court noted that timeliness is a threshold issue when intervention is sought and that, although none of the factors are dispositive, most courts look to four factors in considering whether a motion to intervene is timely filed: (1) the length of time that the intervenor knew or should have known of its interest in the case before moving to intervene; (2) prejudice to the original parties, if intervention is granted, resulting from the intervenor's delay; (3) prejudice to the intervenor if the motion is denied; and (4) any unusual circumstances mitigating for or against a determination that the application is timely. The Supreme Court considered each factor in detail. Although the third factor weighed in favor of couple B, because denial of the motion to intervene effectively precluded any hope of their adoption of the child, the other factors weighed strongly against them. The District Court made a reasoned analysis when it determined that the motion to intervene was untimely and did not abuse its discretion in denying the motion. Last, because couple B did not address the threshold issues of former Rule 60(b), M.R.Civ.P., on appeal, the Supreme Court concluded that denial of the motion to set aside the final adoption decree on grounds of standing and timeliness was proper. In re Adoption of C.C.L.B., 2001 MT 66, 305 M 22, 22 P3d 646 (2001).

42-1-104. Venue.

Compiler's Comments

Source: Section 4, 1953 Uniform Adoption Act, with changes.

Case Notes

DECISIONS AFTER 1997 GENERAL REVISION

Lack of "Venue Jurisdiction" — Petition Dismissed in Error: Shortly after her child was born in Montana, a mother signed an affidavit relinquishing her parental rights and signed a power of attorney allowing the petitioners to make parenting decisions in her stead. The petitioners moved with the child out of state and subsequently filed a consolidated and uncontested petition to terminate the mother's parental rights and to adopt the child in a Montana court. The District Court dismissed the petition because, it concluded, the court lacked "venue jurisdiction" because the child lived out of state. On appeal, the Supreme Court reversed and remanded, holding that the District Court had jurisdiction and that, moreover, 42-4-110 implies that a petition to terminate parental rights and a petition to adopt should be filed in the same District Court. In re Adoption of C.J.L., 2017 MT 19, 386 Mont. 218, 388 P.3d 951.

DECISIONS PRIOR TO 1997 GENERAL REVISION

Jurisdiction Based on Presence of Child in Montana: In a case in which the natural parents were residents of Wyoming but the child was born in Montana and present in Montana, the District Court had jurisdiction in an action to terminate parental rights under the abuse and neglect statutes, based on the presence of the child in Montana. In re Parental Rights of Baby Girl W., 249 M 206, 814 P2d 976, 48 St. Rep. 643 (1991).

No Requirement That Jurisdiction of Dissolution Proceedings Also Be Adoption Venue: A petition for adoption was filed in the same judicial district as the parents' dissolution of marriage but did not come before the same judge. The father argued that only the court having jurisdiction over the dissolution proceedings should be able to consider a petition to terminate his parental rights. The Supreme Court found no such jurisdictional requirement under 40-8-107 (now repealed). In re Adoption of S.E., 232 M 31, 755 P2d 27, 45 St. Rep. 843 (1988).

Venue Determined by Filing of Adoption Petition: Where adoption petition was filed in District Court of Lincoln County, State Welfare Department (now Department of Public Health and Human Services) was ordered to investigate petitioners' home and to file a report, and the Department did file such report to the court after which it filed petition in District Court of Missoula County to have the child, who had been taken from Lincoln County and placed in a foster home in Missoula County, declared dependent and neglected and to award permanent custody to the Department, jurisdiction was in the District Court in Lincoln County, and District Court in Missoula County did not have jurisdiction and would be required to dismiss the petition before it. State ex rel. Habeck v. District Court, 157 M 231, 484 P2d 272 (1971).

Jurisdiction: Section 40-8-107 (now repealed) relates to venue and not jurisdiction; even though only one of joint petitioners in an adoption proceeding was resident of county in which proceeding was held, that was sufficient to confer jurisdiction. In re Adoption of Curtis, 143 M 330, 390 P2d 209 (1964).

42-1-105. Who may be adopted.

Compiler's Comments

1999 Amendment: Chapter 257 in (3) substituted "42-4-304" for "42-4-305". Amendment effective April 5, 1999.

Source: Section 2, 1953 Uniform Adoption Act, with changes.

Case Notes

DECISIONS AFTER 1997 GENERAL REVISION

Stepparent's Petition to Terminate Biological Parent's Parental Rights Granted Given Evidence of Abandonment: A custodial stepparent has standing to petition for termination of a noncustodial parent's parental rights. In this case, the custodial stepmother petitioned for and was granted termination of the noncustodial mother's rights in order to allow for adoption of the child by the stepmother. The mother appealed, but the Supreme Court affirmed. The District Court concluded that the mother abandoned the child and thus was an unfit parent. As evidence of abandonment, the court did not err in considering: (1) the mother's time in prison and residential drug treatment, during which she had no contact with the child; (2) during the mother's periods of absence, the mother's struggle with an abusive relationship, use of illegal drugs, and associations with known criminals; (3) the mother's failure to follow through on commitments to care for and visit the child; and (4) a lack of intent on the mother's part to resume care of the child in the future, regardless of any understanding that an initial parenting plan was temporary. Evidence of abandonment was substantial, and the District Court did not err in granting the petition to terminate the mother's parental rights. In re Adoption of K.P.M., 2009 MT 31, 349 M 170, 201 P3d 833 (2009).

DECISIONS PRIOR TO 1997 GENERAL REVISION

Best Interest of Child: In adoption cases the initial threshold requirement is statutory compliance with consent requirements because of the harshness of terminating parental rights. In re Adoption of Smigaj, 171 M 531, 560 P2d 141 (1977).

42-1-106. Who may adopt.

Compiler's Comments

Source: Section 3, 1953 Uniform Adoption Act, with changes.

Case Notes

DECISIONS AFTER 1997 GENERAL REVISION

Grandfather Considered "Stepparent" in Adoption Proceeding: Following an adoption proceeding in which the District Court granted a mother's and maternal grandfather's joint petition to terminate the father's parental rights and allow the grandfather to adopt the children, the father appealed, arguing that the grandfather was not a stepparent who may bring a petition for termination of parental rights in conjunction with a petition for adoption. Although the Supreme Court reversed and remanded the case back to the District Court on the basis that the father was not properly served by publication, the Supreme Court instructed the District Court that the petition could proceed if the District Court determines that there is good cause for the grandfather to be treated as a stepparent under 42-4-302 and that he meets the qualifications set forth in 42-1-106. In re A.M.S., 2016 MT 22, 382 Mont. 145, 364 P.3d 1261.

DECISIONS PRIOR TO 1997 GENERAL REVISION

Rights and Obligations of Stepfather — Equitable Adoption Not Recognized: Pierce sought custody of his spouse's child in connection with a dissolution of marriage. Pierce never formally adopted the child, but argued that an equitable adoption existed giving him standing to seek custody. The court reaffirmed the law that equitable adoption is not recognized in Montana. To adopt a child, the correct statutory procedures must be followed, and followed rigorously. Pierce had no standing to contest the custody of the child, nor had he any obligation to that child. Pierce v. Pierce, 198 M 255, 645 P2d 1353, 39 St. Rep. 914 (1982).

Res Judicata: Where mother of child born out of wedlock joined in and agreed to petition allowing natural father and his wife to adopt the child, the proceedings and resulting decree were res judicata, and mother could not later attack decree on grounds that father did not fit specifically any of the categories provided by 40-8-106 (now repealed). In re Adoption of Curtis, 143 M 330, 390 P2d 209 (1964).

Law Review Articles

A Look at Kulstad v. Maniaci in Light of Changing Cultural Norms, Neilson, 71 Mont. L. Rev. 449 (2010).

Making a Mountain Out of a Molehill: A Law and Economics Defense of Same-Sex Foster Care Adoptions, Bradley, 45 Fam. Ct. Rev. 133 (2007).

The Immorality of Statutory Restrictions on Adoption by Lesbians and Gay Men, Ball, 38 Loy. U. Chi. L.J. 379 (2007).

42-1-107. Adoption prohibited if child not legally free.

Case Notes

DECISIONS AFTER 1997 GENERAL REVISION

Mistake of Law — Aunt and Uncle Lack Standing to Petition for Termination of Parental Rights: In a case involving termination of parental rights, the Supreme Court assumed supervisory control to determine whether G.R. and P.R., the child's aunt and uncle, had standing to bring the amended petition to terminate parental rights and for adoption. A child's aunt and uncle are not parties authorized by 42-1-107 to place a child for adoption. A child may not be placed for adoption until the parental rights of the birth parents have been terminated by a court as provided in Title 41, chapter 3, or Title 42. G.R. and P.R. did not have standing to file a petition for termination of parental rights under 42-2-603(2). Under Title 41, chapter 3, a petition for the termination of parental right based upon abuse or neglect of a child may only be brought by the County Attorney, the Attorney General, or an attorney hired by the county. Section 40-6-233 refers to the abuse of parental authority for making decisions regarding the support and education of a child and is not the basis for terminating parental rights. Therefore, G.R. and P.R. do not have standing to petition for the termination of parental rights based upon abuse or neglect. J.C. v. Eleventh Judicial District Court, 2008 MT 358, 346 M 357, 197 P3d 907 (2008).

No Standing by Former Parent to Object to Child's Placement or Assert Child's Rights: Once the parent-child relationship is terminated by the District Court, a former parent has no standing to object to the court's subsequent placement of the child with the Department or by adoption. Similarly, a former parent has no standing to assert a violation of the child's rights as guardian ad litem because the former parent no longer represents the child. In re E.A.T. & T.A.T., 1999 MT 281, 296 M 535, 989 P2d 860, 56 St. Rep. 1133 (1999).

DECISIONS PRIOR TO 1997 GENERAL REVISION

Absence of Department Adoption Placement and Written Consent by Department Head — Adoption Order Improper: Under 40-8-108 (now repealed), a court is not included in the list of entities that may place a child for adoption. Therefore, it was improper for a District Court to order a child's placement in the absence of a placement for adoption by the appropriate state agency and the written consent to adoption executed by the executive head of the Department. In re F.H., 272 M 342, 901 P2d 96, 52 St. Rep. 791 (1995). See also In re Adoption of Hall, 173 M 142, 566 P2d 401 (1977).

Award of Permanent Legal Custody — Authority of Court to Award Custody — Best Interests of Child Standard: The Department of Family Services (now Department of Public Health and Human Services) filed a petition requesting the court to terminate parental rights of Mary Ann G. and to grant the Department permanent legal custody of J.J.G., with the right to consent to adoption. Former foster parents of J.J.G. filed a petition seeking permanent custody of the child. The court dismissed the foster parents' petition on grounds that the court could only review the placement actions of the Department but could not make the permanent placement itself. On appeal, the Supreme Court held that the lower court erred when it concluded that the foster parents were without legal authority to seek custody of the child and that the lower court had no option other than to grant custody to the Department. The District Court has discretionary authority to transfer legal custody to any qualified individual, including nonrelatives, in order to protect the welfare of the child. In re J.J.G., 266 M 274, 880 P2d 808, 51 St. Rep. 793 (1994), followed in In re E.A.T. & T.A.T., 1999 MT 281, 296 M 535, 989 P2d 860, 56 St. Rep. 1133 (1999).

Attorney General's Opinions

Placement for Adoption: No person, including a physician or an attorney, may assist in procuring or selecting an adoptive home for a minor child, even if requested by the child's natural parents, unless licensed as a child-placing agency under 53-4-402 (renumbered 52-2-402, now repealed). 42 A.G. Op. 9 (1987).

42-1-108. Rights and responsibilities of parties in adoption proceedings.

Case Notes

Adoption Void When Parental Rights of Minor Without Legal Representation Relinquished: A mother was 17 years old when she sought to have her child adopted, but misrepresented herself as being 18 years old. After the adoption was completed, the mother sought to set it aside. The District Court held that because the mother was a minor when she relinquished her parental rights and was not represented by counsel as required by 42-2-405, the adoption was void. The adoptive parents appealed on various grounds, including a contention that it was in the child's best interests to be returned to them because the child had a right to permanence and stability in the adoptive placement. The Supreme Court affirmed. Section 42-2-405 exists to protect minor parents from making legally binding direct parental placement adoptions without counsel's advice and representation, and the District Court correctly concluded that it had no authority to order relinquishment of the mother's parental rights when she had no legal representation. The adoptive parents' argument that the child should be returned based on the child's best interests also failed because the child had been returned to the mother more than 1 year earlier. In re Adoption of A.L.O., 2006 MT 59, 331 M 334, 132 P3d 543 (2006).

42-1-115. Vaccination status prohibited as evidence or grounds for decision.

Compiler's Comments

Effective Date: Section 7, Ch. 286, L. 2023, provided: "[This act] is effective on passage and approval." Approved April 26, 2023.

Severability: Section 6, Ch. 286, L. 2023, was a severability clause.

CHAPTER 2
ADOPTION OF CHILD

Chapter Official Comments

It is the theory of this act that the adoption proceedings should be based on consent. Only then can the adoption court devote its entire attention to the inquiry whether the adoptive home will serve the best interests of the child and whether the child is properly placed in the adoptive home.

Under this theory controversies respecting the termination of parental rights should be settled in other proceedings in a court with jurisdiction of the parties before the adoption proceedings are brought. Once the parental rights are terminated the adoption court in the adoption proceedings has no other function in this respect except to recognize that the parental rights have been legally terminated by consent or by the order of a court of competent jurisdiction, followed by consent of a person, agency or court having authority to consent.

It has been suggested that a procedure should be provided in the adoption act to terminate parental rights where the consent cannot be obtained. Aside from the jurisdictional and procedural difficulties this would entail, it is subject to a basic policy objection. The issues to be tried in a controversy over the termination of parental rights, i e., the degree of unfitness of a parent, are quite different than the inquiry properly before an adoption court. The two should not be mixed. The trial of controversial issues over parental rights should not cast an influence in the adoption proceedings where the sole inquiry should be the future best interests of the child.

Consequently, the determination of parental rights is left to be settled under the laws of the various states, and until terminated, by consent or by a court order in a court having jurisdiction of the parties under laws providing therefor, there can be no adoption proceedings.

The formalities, other than writing, which should be required in respect to the execution of consents in the instances covered by paragraphs (1) and (2) [42-2-301(1) and (2), 42-2-302, and 42-2-608(1)] are subjects on which opinions differ widely and it does not seem that uniformity is essential. Accordingly, the bracketing in the last paragraph of the section has been used to indicate that the matter is left open and to suggest, without limitation, certain options that may commend themselves to legislative authority.

Chapter Compiler's Comments

1997 Statement of Intent: The statement of intent attached to Ch. 480, L. 1997, provided: "A statement of intent is required for this bill because the bill gives the department of public health and human services authority to adopt administrative rules. The rules must provide procedures for the putative father registry, including methods of notification, filing, and accessing information. The department shall adopt rules for licensing child-placing agencies. To the extent feasible, the rules should incorporate existing procedures. The needs of the child in the adoption proceeding must be the primary focus of the rules."

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Applicability: Section 173, Ch. 480, L. 1997 provided: "(1) [Sections 1 through 156] [Title 42, chapters 1 through 7, and Title 52, chapter 8, part 1] apply to proceedings commenced on or after October 1, 1997.

(2) A petition for adoption filed prior to October 1, 1997, is governed by the law in effect at the time the petition was filed.

(3) The putative father registry requirements apply to children born on or after October 1, 1997."

Effective Date: Section 177, Ch. 480, L. 1997, provided: "(1) Except as provided in subsection (2), [this act] is effective October 1, 1997.

(2) [Sections 19 through 26, 28 through 38, 60, 65, 67, 68, and 75] [42-2-202 through 42-2-209, 42-2-214 through 42-2-218, 42-2-222 through 42-2-226, 42-2-230, 42-2-503, 42-2-604, 42-2-605, 42-2-606, and 42-2-611] are effective October 1, 1998."

Application of 1953 Commissioners' Comment to 1997 General Revision: The 1953 Commissioners' comment was formerly published at 40-8-111, now repealed and divided among several sections of this chapter.

Part 1
Policy and Legislative Intent

42-2-101. Recognition of adoption in another jurisdiction.

Compiler's Comments

Source: Section 16, 1953 Uniform Adoption Act, with changes.

Case Notes

DECISIONS PRIOR TO 1997 GENERAL REVISION

Best Interests Control: Where Missouri court with custody of children granted consent for their adoption, entry of adoption decree rendered that consent irrevocable, absent finding that best interests of children would be served by allowing revocation of consent. In re Adoption of Conley v. Walden, 171 M 58, 555 P2d 960 (1976).

42-2-102. Proceedings subject to Indian Child Welfare Acts.

Official Comments

1994 Commissioners' Comment: The provisions of the Indian Child Welfare Act (ICWA), including the provisions that determine whether a tribal or a state court has exclusive or concurrent jurisdiction, preempt this Act whenever an adoptive placement, a consent or relinquishment, a proceeding to terminate parental rights, or an adoption proceeding pertains to an "Indian child." The ICWA defines "Indian child" as an unmarried individual under 18 who is either a member of an Indian tribe or eligible for membership by virtue of being the biological child of a tribal member; 25 U.S.C. § 1903(3). A parent or guardian executing a consent or relinquishment under this Act must state that the minor adoptee is not within ICWA's definition of Indian child, Section 2-406(d)(5) [not enacted in Montana], and the court, when granting an adoption, has to indicate if ICWA is applicable to the proceeding, and if so, that its requirements were met. See Section 3-703(a)(8) [not enacted in Montana].

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 41, Ch. 716, L. 2023. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

Source: Section 1-107, 1994 Uniform Adoption Act.

Case Notes

DECISIONS AFTER 1997 GENERAL REVISION

Termination of Parental Rights Reversed and Remanded for Final Determination of Children's Tribal Membership: The District Court terminated the mother's parental rights without a final determination of whether the children were subject to the federal Indian Child Welfare Act of 1978 (ICWA). On appeal, the Supreme Court found that the District Court abused its discretion by terminating her rights without a determination of the children's tribal membership status. Accordingly, the Supreme Court reversed and remanded the case to allow the tribe to make a determination and, if applicable, to conduct anew the termination proceedings subject to ICWA. In re M.T., 2020 MT 262, 401 Mont. 518, 474 P.3d 820.

Failure to Apply ICWA Standards at Outset of Proceedings — Cured by Subsequent ICWA-Compliant Adjudication — Termination Proper: After a father's parental rights were terminated by the District Court, he appealed to the Supreme Court, arguing that the District Court's failure to apply the Indian Child Welfare Act of 1978 (ICWA) for the first year of proceedings created a ripple effect that led to the improper termination of his rights. While the Supreme Court agreed that the District Court had erred in not applying the ICWA from the beginning of the proceedings, it found that the subsequent ICWA-compliant adjudication hearing cured the prior violations and affirmed the termination of rights. In re S.B., 2019 MT 279, 398 Mont. 27, 459 P.3d 214.

Filing Certificate of Service of Notice to Tribe — Notice Sufficient Under ICWA: After a father's parental rights were terminated by the District Court, he appealed to the Supreme Court, arguing that the Department of Public Health and Human Services failed to provide proper notice of the proceedings to the tribal entity as required under the Indian Child Welfare Act of 1978 (ICWA). The Supreme Court affirmed, finding that the Department had filed a certificate of service attesting it had provided the petition for termination to the tribe through registered mail, which was sufficient notice under the ICWA. In re S.B., 2019 MT 279, 398 Mont. 27, 459 P.3d 214.

Mother Lacked Standing to Challenge Placement of Indian Child After Parental Rights Terminated: The District Court issued an order terminating the parental rights of the appellant mother and ordering the placement of two children, C.B.D. and P.M.P., in separate placements. On appeal, the mother challenged the placement of P.M.P. only and did not challenge the termination itself. The Supreme Court held that the mother lacked standing to appeal P.M.P.'s placement. Because her appeal came after the District Court terminated her parental rights, she no longer had any legal status relative to P.M.P. and therefore she was alleging an injury to a civil right that she no longer had and made no effort to regain. The appeal of P.M.P.'s placement did not stay the termination of her parental rights, and therefore she lacked standing to maintain her appeal. In re C.B.D. & P.M.P., 2017 MT 108, 387 Mont. 347, 394 P.3d 202.

Termination of Parental Rights Not in Compliance with Requirements of ICWA and Parallel State Law: The District Court terminated the appellant Indian mother's parental rights to her two children. In reversing for a new termination hearing, the Supreme Court found that the termination proceedings did not comply with the mandates of the Indian Child Welfare Act (ICWA) because the mother and the tribe should have received notice of the petition for termination at least 10 days in advance of the termination hearing. At the termination hearing the ICWA expert, pursuant to the ICWA and 41-3-609, was required to testify as to whether the mother's continued custody was likely to result in serious emotional or physical damage to the children, but the ICWA expert failed to provide the required testimony. The termination proceeding record did not establish that the state satisfied ICWA requirements that active efforts be made to provide remedial services and rehabilitation programs that were designed to prevent the breakup of the Indian family. In Re K.B. and T.B., 2013 MT 133, 370 Mont. 254, 301 P.3d 836. However, see In re M.S., 2014 MT 265, 376 Mont. 394, 336 P.3d 930, in which the Supreme Court held that even though the Department of Public Health and Human Services did not provide appropriate proof that the father's tribe had received proper notice of the termination hearing, the Department made "active efforts" as required under the ICWA, and that the error in this case was harmless.

Failure of District Court to Determine Indian Status of Children Prior to Termination of Parental Rights Warranting Reversal: Absent a conclusive determination from the affected tribes, it was reversible error for the District Court to terminate a mother's parental rights without definitely resolving the threshold question of whether the children were Indian children within the meaning of the Indian Child Welfare Act. In this case, the District Court was presented with insufficient evidence regarding the children's status because of the mother's failure to present crucial evidence regarding the children's possible tribal affiliation and the tribe's delay in intervening. However, the tribe's right to intervene was not impaired by the delay, and the court should not have proceeded absent a conclusive determination that the children were not tribal members. In re A.G., W.G., T.A., & J.A., 2005 MT 81, 326 M 403, 109 P3d 756 (2005). See also In re L.D., 2018 MT 60, 391 Mont. 33, 414 P.3d 768, holding that a parent cannot waive application of the Indian Child Welfare Act by stipulation or acquiescence.

Standards Applicable to Termination of Indian Parental Rights — Active Department Efforts to Provide Services Required: The District Court terminated the parental rights of an Indian father after the children were removed from the father's custody a fourth time because of the father's abuse and neglect. The father appealed on grounds that: (1) the state did not make active efforts to provide remedial services; (2) the District Court relied on expert testimony based on the Department file rather than personal interviews; and (3) it was error not to grant the father's request for an extension of temporary legal custody. The Supreme Court affirmed on all issues. The father left no phone number or address with the social worker and moved multiple times. Without any involvement, the father prevented the Department from making active efforts at providing more intensive services. Second, the federal Indian Child Welfare Act requires testimony from a qualified expert witness, but does not require a specific form of that testimonial evidence or personal interviews, and a District Court need not conform its decision to a particular piece of evidence or a particular expert's report or testimony as long as a reasonable person could have found beyond a reasonable doubt that continued custody by an Indian parent or custodian is likely to result in serious emotional or physical damage to the child. Last, the District Court did not abuse its discretion in refusing to extend temporary custody because the Department had already provided active efforts and did not need more time to assist the father in attaining his goals. The District Court had an accurate perspective on the father's parenting abilities, and refusal to extend the temporary placement did not make the court's decision any less reasonable. In re A.N. & M.N., 2005 MT 19, 325 M 379, 106 P3d 556 (2005). See also In re Marriage of McKenna, 2000 MT 58, 299 M 13, 996 P2d 386 (2000), In re D.S.B., 2013 MT 112, 370 Mont. 37, 300 P.3d 702, and In re S.B., 2019 MT 279, 398 Mont. 27, 459 P.3d 214, holding that the Department made active efforts beyond a reasonable doubt.

Sufficient Evidence That ICWA Standards Met in Terminating Parental Rights — Termination Affirmed Absent Abuse of Discretion: An Indian father contended that the state did not present sufficient evidence under the federal Indian Child Welfare Act of 1978 (ICWA) to warrant termination of his parental rights. The Supreme Court determined that: (1) there was sufficient evidence that continued custody of the children was likely to result in serious emotional or physical damage to the children; (2) the evidence was supported by testimony from qualified experts; (3)

active but unsuccessful efforts had been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family; and (4) the children had lived in foster care a sufficient time to create the presumption under 41-3-604 that the children's best interests would be served by terminating parental rights. The ICWA requirements having been followed, parental rights were properly terminated. In re S.R., R.R., & G.R. Jr., 2004 MT 227, 322 M 424, 97 P3d 559 (2004). See also In re S.B., 2019 MT 279, 398 Mont. 27, 459 P.3d 214.

Beyond a Reasonable Doubt Standard Not Cited but Applied in ICWA Parental Rights Termination Case — No Error: In a case subject to the Indian Child Welfare Act (ICWA), the mother contended that the District Court improperly applied a standard of what was likely rather than the beyond a reasonable doubt standard of proof. The Supreme Court disagreed. In making the determination that the mother would likely cause serious emotional or physical damage if the child was returned to her, the District Court was mirroring the language in 25 U.S.C. 1912(f). Further, the federal statute does not require that a state court specifically cite the beyond a reasonable doubt standard of proof, but only that the court's determination be supported by evidence beyond a reasonable doubt, and the court did apply the correct standard of proof in this case. In re M.R.G., 2004 MT 172, 322 M 60, 97 P3d 1085 (2004), following In re M.D.M., 2002 MT 305, 313 M 51, 59 P3d 1142 (2002). But see In re H.T., 2015 MT 41, 378 Mont. 206, 343 P.3d 159, in which the Supreme Court vacated the termination of parental rights to an Indian child because the District Court had applied a "clear and convincing evidence" standard instead of a "beyond a reasonable doubt standard" and remanded the matter to the District Court.

Unsuccessful Treatment Plan, Remedial Services, and Rehabilitative Program — Indian Parental Rights Properly Terminated: The District Court terminated the parental rights of an Indian mother. On appeal, the mother contended that the court's determination that the child would suffer serious emotional or physical damage if the child was returned to her was not proved beyond a reasonable doubt. The Supreme Court noted that state law requires successful completion of a parenting plan and that the federal Indian Child Welfare Act requires that active efforts be made to provide remedial services and rehabilitative programs to prevent the breakup of an Indian family, but that in this case, both the state and federal measures proved unsuccessful. The District Court received substantial testimony from qualified cultural and other experts upon which it could conclude beyond a reasonable doubt that the prospect of the mother providing primary care was likely to subject the child to serious harm, so the mother's parental rights were properly terminated. In re M.R.G., 2004 MT 172, 322 M 60, 97 P3d 1085 (2004).

Insufficient Good Cause to Allow Deviation From Adoption Placement Standards of Indian Child Welfare Act: When the Indian child in this matter was 12 weeks old, she was admitted to the hospital with 16 fractured ribs in various stages of healing and several bruises. The attending physician determined that the injuries were a result of abuse, and the child was placed in foster care with a non-Indian family. The District Court held that the child's extraordinary physical and emotional needs constituted good cause to deviate from the Indian Child Welfare Act of 1978 (ICWA) placement provisions regarding adoptive placement with tribal extended family members. The District Court decided that the federal statutory factors were merely examples rather than an exhaustive list of circumstances of good cause and instead applied the Montana best interests of the child standard, concluding that nine extraordinary physical and emotional needs existed, including the child's strong emotional bond with the non-Indian foster family, that warranted deviation from the ICWA. The Supreme Court reversed, finding that the District Court's conclusion was an incorrect application of the law. The ICWA guidelines in 25 U.S.C. 1915(a) provide that a determination of good cause to avoid the placement preferences must be based on one or more of three stated factors, which are the only circumstances constituting good cause. The ICWA guidelines will be strictly applied and liberally construed in favor of a result that is consistent with the preferences in that Act. The emotional attachment between a non-Indian custodian and an Indian child does not necessarily outweigh the interests of the tribe and the child in having the child raised in an Indian community, nor does the child's emotional attachment to foster parents constitute an extraordinary emotional need sufficient to establish good cause to avoid the ICWA placement preferences. In re C.H., 2000 MT 64, 299 M 62, 997 P2d 776, 57 St. Rep. 300 (2000). See also In re Custody of S.E.G., 521 NW 2d 357 (Minn. 1994).

Waiver of Indian Child Welfare Act by Failure of Tribe to Intervene Prior to Termination of Proceeding: In an action by the state to terminate the parental rights of an Indian parent and to place the child, eligible for tribal enrollment, in foster care, the tribe was notified from the outset of the proposed action and did not intervene for a transfer of jurisdiction until after the proceeding had been completed in the state court. The Supreme Court held that although the state proceeding was required by federal law to be transferred to tribal court upon intervention of the tribe, the tribe, when it had notice of the proceeding, had to intervene while there was still a proceeding pending, otherwise the tribe would be considered to have declined transfer of jurisdiction. In re A.P., 1998 MT 176, 289 M 521, 962 P2d 1186, 55 St. Rep. 715 (1998).

DECISIONS PRIOR TO 1997 GENERAL REVISION

No Waiver of Indian Child Welfare Act by Failure of Tribe to Promptly Intervene in Adoption — "Indian Child" Determinable by Tribal Action Following BIA Determination: The Department of Family Services (now the Department of Public Health and Human Services) notified the Turtle Mountain Band of Chippewa (the tribe) several times that the Department sought to terminate the parental rights to Jessica, a minor of one-eighth Indian blood. However, the tribe took no action. The parental rights were subsequently terminated, and the Department commenced adoption proceedings. Just prior to the District Court's determination of Jessica's custody, the tribe sought to intervene, but the District Court determined that the tribe had waived its right to intervention by the nearly 2-year period of inaction following notice by the state to the tribe. The Supreme Court held that there was no requirement in the Indian Child Welfare Act of 1978 that the tribe intervene promptly and that for this reason, the tribe should be allowed to intervene. The Supreme Court also held that the District Court was incorrect in concluding that it would make no difference what the tribe's position was on the issue of whether Jessica was an "Indian child" because the Bureau of Indian Affairs (BIA) decision could be impeached by action of the tribe either before or after the BIA determination. In re Adoption of Riffle, 273 M 237, 902 P2d 542, 52 St. Rep. 954 (1995). On remand, the District Court concluded that the tribe's determination that Jessica was an Indian child and a member of the tribe was conclusive and that the ICWA applied to Jessica's adoption. On appeal, the Supreme Court held that the tribe is the ultimate authority on eligibility for tribal membership and that enrollment of the child in the tribe was not required as long as the tribe recognized Jessica as a member. Enrollment is a common but not exclusive evidentiary means of determining membership in a tribe, but enrollment and membership are not synonymous. Given the tribe's determination that Jessica was an Indian child, the District Court properly concluded that the tribe's determination was conclusive and that the adoptive placement preferences found at 25 U.S.C. 1915 of the ICWA applied, including the placement preference with Jessica's uncle who met the definition of "extended family member". Jessica's best interests were served by placement with her uncle, and her constitutional rights were not violated through the application of the ICWA. In re Adoption of Riffle, 277 M 388, 922 P2d 510, 53 St. Rep. 723 (1996).

Applicability of Indian Child Welfare Act to Adoption Anonymity Considerations — Conformity With Act Required: Baby Girl Jane Doe was born at the Northern Montana Hospital in Havre. She was of Indian descent and eligible for membership in the Chippewa Cree Tribe on the Rocky Boy's Reservation. After the child's birth, her mother refused to sign the birth certificate, indicated her intent to relinquish the child to the Hill County Department of Family Services, and left the hospital. The Department filed for an order terminating parental rights and giving the Department the right to consent to the child's adoption. The tribe intervened and moved for disclosure of the mother's identity in order to ensure that any child placement conformed to the preferences provided in the federal Indian Child Welfare Act of 1978 (ICWA). The District Court denied the motion based on the mother's stated preference for anonymity. On appeal, the tribe asserted that its right to intervene and advocate enforcement of the ICWA was meaningless when the first preference under the ICWA is for placement with the child's extended family, yet the court would not reveal the identity of the natural parent. The Supreme Court cited Miss. Band of Choctaw Indians v. Holyfield, 490 US 30, 104 L Ed 2d 29, 109 S Ct 1597 (1989), in holding that, absent good cause to the contrary, the ICWA mandates that adoptive placements be made preferentially with: (1) members of the child's extended family; (2) other members of the same tribe; or (3) other Indian families. Permitting individual tribal members to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would to a large extent nullify the purpose of the ICWA. The Supreme Court reversed the District Court and ordered that the tribe be informed of the identity of the mother and her extended family, respecting her right to privacy to the extent possible without interfering with the tribe's rights under the ICWA. In re Baby Girl Jane Doe, 262 M 380, 865 P2d 1090, 50 St. Rep. 1555 (1993).

Exclusive Jurisdiction Over Indian Child Under Indian Child Welfare Act: Provisions of the Indian Child Welfare Act of 1978 (25 U.S.C. 1901, et seq.) concerning jurisdiction over Indian child custody proceedings place exclusive jurisdiction in the Indian tribe if an Indian child is a ward of the tribal court, regardless of the residence or domicile of the child. In this adoption proceeding, it was error on the part of the District Court to determine that Montana had concurrent jurisdiction over the child at issue because the tribal court previously had found her a ward of the tribal court. In re M.R.D.B., 241 M 455, 787 P2d 1219, 47 St. Rep. 303 (1990).

Right to Intervene in Adoption of Indian Child — State Commitment to Indian Child Welfare Act: Prior to birth, Nellie Silk, paternal aunt of M.E.M., expressed an interest in caring for the child because she was aware of the parents' problems with parenting; however, after the child was born he was placed in foster care by the Hill County Department of Social and Rehabilitation Services (SRS). Upon learning of the placement, Silk wrote to SRS requesting custody. SRS responded that placement with Silk would be inappropriate because of SRS efforts to reintegrate the family, but that Silk would be considered if adoption were to occur. After parental rights were terminated (see In re M.E.M., 209 M 192, 679 P2d 1241, 41 St. Rep. 636 (1984)), Silk was not informed of the proceedings, of M.E.M.'s availability for adoption, or of M.E.M.'s preadoptive placement with a non-Indian family. Silk's subsequent petition for adoption and motion to intervene were denied by the District Court. On appeal, the Supreme Court found that Silk had an interest in adoption stemming from the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901, et seq., and that the state had a strong and independent commitment to the principles embodied in the ICWA. Silk also had a right to intervene under former Rule 24(a), M.R.Civ.P. (now superseded), and although the District Court had ruled that her motion was not timely, the Supreme Court held that the motion must be granted in light of the fact that she was kept in ignorance and could not have been more diligent or earlier in her petition or motion. In re M.E.M., 223 M 234, 725 P2d 212, 43 St. Rep. 1684 (1986), followed in In re Adoption of Riffle, 273 M 237, 902 P2d 542, 52 St. Rep. 954 (1995). See also In re K.H. & K.L.E., 1999 MT 128, 294 M 466, 981 P2d 1190, 56 St. Rep. 515 (1999).

Jurisdiction: When the adoptive parents, adopted child, and natural parent were enrolled members of the Northern Cheyenne Tribe and resided on its Reservation, the District Court had jurisdiction notwithstanding ordinance granting tribal court jurisdiction. State ex rel. Firecrow v. District Court, 167 M 139, 536 P2d 190 (1975), reversed in Fisher v. District Court, 424 US 382, 96 S Ct 943, 47 L Ed 2d 106 (1976), wherein it was held that the tribal court has exclusive subject matter jurisdiction over petition for adoption of minor Indian child by two Indian adults living on reservation.

Attorney General's Opinions

Foster Care or Adoption Placement of Indian Children — No Department Payments Under Social Security Act: The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) may not make payments under Title IV-E of the Social Security Act (42 U.S.C. 670 through 676) to Indian children whose foster care or adoption placement is subject to exclusive tribal jurisdiction under the Indian Child Welfare Act (25 U.S.C. 1901, et seq.). 41 A.G. Op. 76 (1986).

Law Review Articles

On Indian Children and the Fifth Amendment, Fletcher, 80 Mont. L. Rev. 99 (2019).

Tribal Nations and Congress's Power to Define Offences Against the Law of Nations, Dossett, 80 Mont. L. Rev. 41 (2019).

State Jurisdiction to Approve Adoption of Indian Children, Lynaugh, 38 Mont. L. Rev. 82 (1977).

A Family Lawyer's Guide to the Indian Child Welfare Act, Tebben, 20 Am. J. Fam. L. 117 (2006).

42-2-105. Fees for services — special revenue account — statutory appropriation.

Compiler's Comments

2001 Amendment: Chapter 574 in (4) in second sentence after "title" deleted "and from the district court filing fee pursuant to 25-1-201(1)(q)". Amendment effective July 1, 2001.

The amendment to this section made by Ch. 585, L. 2001, was rendered void by sec. 255(3), Ch. 574, L. 2001, a coordination section.

Part 2

Putative Father Registration

Part Compiler's Comments

Source: Language used in various sections of this part was patterned after similar language in the state statutes of Indiana and Utah.

Part Law Review Articles

Thwarted Fathers or Pop-Up Pops?: How to Determine When Putative Fathers Can Block the Adoption of Their Newborn Children, Oren, 40 Fam. L.Q. 153 (2006).

42-2-204. Presumed knowledge of pregnancy — duty to register to be afforded notice — putative and presumed fathers.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 21, Ch. 685, L. 2023. Amendment effective October 1, 2023.

Severability: Section 42, Ch. 685, L. 2023, was a severability clause.

42-2-206. When putative father to register — actual knowledge of pregnancy not required.

Compiler's Comments

1999 Amendment: Chapter 257 at end of (1) substituted "72 hours after the child's birth" for "5 days prior to a hearing to terminate parental rights". Amendment effective April 5, 1999.

42-2-216. Storage of data.

Compiler's Comments

2009 Amendment: Chapter 56 made section gender neutral. Amendment effective October 1, 2009.

42-2-217. Registry search — request — affidavit.

Compiler's Comments

1999 Amendment: Chapter 257 substituted (2) concerning departmental affidavit upon request for former text that read: "(2) When a petition to terminate parental rights for purposes of an adoption is filed, the petitioner shall:

(a) request that the department search the registry at least 1 day after the expiration of the period specified under 42-2-206; and

(b) file an affidavit prepared by the department in response to a request under subsection (2)(a) with the court presiding over the termination of parental rights proceeding under 42-2-603. The affidavit must meet the requirements of subsections (4) and (5)"; and in (4) near beginning substituted "for a registry search" for "under subsection (2)(a)". Amendment effective April 5, 1999.

42-2-218. Duties of department upon receipt of request.

Administrative Rules

ARM 37.8.116 Fees for certification, file searches, and other vital records services.

Part 3
Consent for Adoption

42-2-301. Consent required.

Compiler's Comments

Source: Section 5 and 6, 1953 Uniform Adoption Act, with changes.

Case Notes

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Stepgrandmother With Established Parental Interest — Standing to Object to Adoption Petition: The consent of a child's stepgrandmother with a parental interest in the child was not obtained prior to the child's stepmother's adoption petition. The Supreme Court affirmed the District Court in holding that the plain language of statute requires consent of all parties whose parental rights were established by a court before adoption can take place. Since the stepgrandmother's parental interest was established by a court, her consent to the adoption was required. In re N.P.M., 2020 MT 33, 399 Mont. 1, 457 P.3d 962.

Adoption of Children of Parent Whose Parental Rights Terminated Affirmed: The District Court terminated a father's parental rights for nonsupport and granted the stepfather's petition to adopt the children without the father's written permission. The father appealed. Although a child generally may not be adopted without the written consent of both birth parents, written consent is not required of a parent whose parental rights have been terminated, so the Supreme Court addressed whether the termination of parental rights was proper. In this case, the father was able to provide support for his children during an aggregate 1-year period prior to the filing of the adoption petition but failed to do so, rendering him an unfit parent pursuant to 42-2-608. Thus, the District Court did not err in terminating the father's parental rights. In re Adoption of C.W.D. & C.D.D. v. P.K.D., 2005 MT 145, 327 M 301, 114 P3d 214 (2005).

DECISIONS PRIOR TO 1997 GENERAL REVISION

Absence of Department Adoption Placement and Written Consent by Department Head — Adoption Order Improper: Under 40-8-108 (now repealed), a court is not included in the list of entities that may place a child for adoption. Therefore, it was improper for a District Court to order a child's placement in the absence of a placement for adoption by the appropriate state agency and the written consent to adoption executed by the executive head of the Department. In re F.H., 272 M 342, 901 P2d 96, 52 St. Rep. 791 (1995). See also In re Adoption of Hall, 173 M 142, 566 P2d 401 (1977).

Natural Father's Consent to Adoption Not Required When Evidence Clear He Abandoned Child: The father had only visited with his daughter twice and called her on the telephone twice in 8 years and during that time never paid support. The Supreme Court affirmed the lower court's finding that the record contained clear and convincing evidence that the natural father had willfully abandoned his daughter, and therefore his consent to the child's adoption by her grandparents was not required. Adoption of C.R.D., 240 M 106, 782 P2d 1280, 46 St. Rep. 1979 (1989).

Best Interest of Child:

If the statutory requirements for consent to adoption are met, the best interests of the child become the paramount consideration. In re Adoption of S.T.V., 226 M 18, 733 P2d 841, 44 St. Rep. 425 (1987).

In adoption cases the initial threshold requirement is statutory compliance with consent requirements because of the harshness of terminating parental rights. In re Adoption of Smigaj, 171 M 531, 560 P2d 141 (1977).

42-2-302. Persons whose consent not required.

Official Comments

See official comments for this chapter.

Compiler's Comments

Annotator's Note: See compiler's comments for this chapter.

Source: Section 5, 1953 Uniform Adoption Act, with changes.

Case Notes

Adoption of Children of Parent Whose Parental Rights Terminated Affirmed: The District Court terminated a father's parental rights for nonsupport and granted the stepfather's petition to adopt the children without the father's written permission. The father appealed. Although a child generally may not be adopted without the written consent of both birth parents, written consent is not required of a parent whose parental rights have been terminated, so the Supreme Court addressed whether the termination of parental rights was proper. In this case, the father was able to provide support for his children during an aggregate 1-year period prior to the filing of the adoption petition but failed to do so, rendering him an unfit parent pursuant to 42-2-608. Thus, the District Court did not err in terminating the father's parental rights. In re Adoption of C.W.D. & C.D.D. v. P.K.D., 2005 MT 145, 327 M 301, 114 P3d 214 (2005).

42-2-303. Form of consent.

Official Comments

See official comments for this chapter.

Compiler's Comments

Source: Section 5, 1953 Uniform Adoption Act, with changes. Also see compiler's comments for this chapter.

Part 4
Voluntary Relinquishment and Consent to Adopt

Part Official Comments

Subsection (a) [40-6-128, now repealed] provides that a father whose identity is presumed under Section 4 [40-6-105] or whose paternity has been formally ascertained, must be given notice of an adoption proceeding relating to his child.

Subsection (b) [40-6-128, now repealed] deals with the case in which the father has not been formally ascertained and the mother seeks to surrender the child for adoption. In the light of the

U.S. Supreme Court's decisions in Stanley v. Illinois, 92 S.Ct. 1208 (1972); Rothstein v. Lutheran Social Services of Wisconsin and Upper Michigan, 92 S.Ct. 1488 (1972) and Vanderlaan v. Vanderlaan, 92 S.Ct. 1488 (1972) and related state court decisions, it is considered essential that the unknown or unascertained father's potential rights be terminated formally in order to safeguard the subsequent adoption.

Subsections (c) through (f) [40-6-126 through 40-6-129, now repealed] provide a procedure by which the court may ascertain the identity of the father and permit speedy termination of his potential rights *if he shows no interest in the child.* If, on the other hand, the natural father or a man representing himself to be the natural father claims custodial rights, the court is given authority to determine custodial rights. It is contemplated that there may be cases in which the man alleging himself to be the father is so clearly unfit to take custody of the child that the court would proceed to terminate his potential parental rights without deciding whether the man actually is the father of the child. If, on the other hand, the man alleging himself to be the father and claiming custody is *prima facie* fit to have custody of the child, an action to ascertain paternity is indicated, unless a voluntary acknowledgment can be obtained in accordance with Section 4(a) (5) [40-6-105(1) (e)] of this Act.

Subsection (e) [40-6-128, now repealed] raises serious constitutional questions in that it attempts to cut off after a given period *any* claim seeking to reopen a judgment terminating parental rights. While of questionable constitutionality, such a provision is not without precedent. A similar provision is contained in Section 15(b) of the revised Uniform Adoption Act, approved by the Commissioners on Uniform State Laws in 1969, and other similar provisions are contained in the adoption acts of a number of states. Moreover, it must be considered that the case of adoption differs from other situations. The parent's claim to his child can hardly be compared to a person's claim to property. The Supreme Court itself recognized that the interest of the child is heavily involved in these cases when remanding the Rothstein case to the Wisconsin Supreme Court, requiring that the court give "due consideration [to] the completion of the adoption proceedings and the fact that the child has apparently lived with the adoptive family for the intervening period of time." Cf. Armstrong v. Manzo, 380 U.S. 545 (1965).

Subsection (f) seeks to conform to the following footnote in Stanley v. Illinois:

"We note in passing that the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal. If unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings. If they do care, under the scheme here held invalid, Illinois would admittedly at some later time have to afford them a properly focused hearing in a custody or adopting proceeding.

Extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined. The Illinois law governing procedure in juvenile cases . . . provides for personal service, notice by certified mail or for notice by publication when personal or certified mail service cannot be had or when notice is directed to unknown respondents under the style of 'all whom it may concern.' Unwed fathers who do not promptly respond cannot complain if their children are declared wards of the State. Those who do respond retain the burden of proving their fatherhood."

This footnote *might* be interpreted to require publication in all cases in which a child with unascertained paternity is surrendered for adoption. The Committee considered, however, that there will be many such cases in which it will be highly probable that publication will not lead to the identification of the father. In view of that and the fact that in nearly all cases publication will lead to substantial embarrassment for the mother, the Committee thought it appropriate to allow the court to determine whether, in the particular circumstances of each case, publication would be likely to lead to the identification of the father. One serious consequence that might result from an indiscriminate publication requirement is that some mothers may be caused to withhold their children from adoption even where adoption would be in the child's best interest.

Part Compiler's Comments

Application of 1953 Commissioners' Comment to 1997 General Revision — Source: The 1953 Commissioners' comment was formerly published at 40-6-135, now repealed and divided among 42-2-408, 42-2-410, and 42-4-202. The source of 40-6-135 was Section 24 of the Uniform Parentage Act.

Part Case Notes

Motion to Set Aside Relinquishment and Consent to Adoption Properly Denied: The guardians of adopted children moved to set aside their relinquishment and consent to the adoption on the basis that the adoptive parents had provided a fraudulent preplacement evaluation that did not comply with the Montana Adoption Act. The District Court denied the motion, and the Supreme Court affirmed, concluding that because the guardians failed to establish fraud by clear and convincing evidence, no basis existed under 42-2-417 to set aside the relinquishment and consent to adoption. In re Adoption of S. R. T., 2011 MT 219, 362 Mont. 39, 260 P.3d 177.

42-2-402. Voluntary relinquishment — validity.

Case Notes

DECISIONS AFTER 1997 GENERAL REVISION

Preservation and Reunification Efforts Not Required in Involuntary Termination of Parental Rights: If a court involuntarily terminates a parent's rights under 41-3-609, the state may forego reasonable efforts to provide preservation or reunification services to that parent with regard to any future children placed with the state, pursuant to 41-3-423. Voluntary relinquishment is only one of several criteria that a court may consider when ordering termination of parental rights. In this case, the District Court properly terminated a mother's parental rights based in part on adjudication of the child as a youth in need of care. With the exception of minor immaterial misstatements, the court's decision was based on facts supported by substantial testimonial evidence from professionals, so termination of parental rights was not an abuse of discretion, and the decision was affirmed. In re P.S., 2006 MT 4, 330 M 239, 127 P3d 451 (2006).

DECISIONS PRIOR TO 1997 GENERAL REVISION

Inapplicability to Dissolution Proceedings: Former section 40-6-135 (now repealed) related to relinquishment of parental rights in adoption situations and did not apply to marriage dissolution proceedings. In re Marriage of McKinnon, 251 M 347, 825 P2d 551, 49 St. Rep. 69 (1992), overruled in part on other grounds by Green v. Gerber, 2013 MT 35, 369 Mont. 20, 303 P.3d 729.

Constitutionality — Contest of Voluntariness of Release: The natural mother argued that 40-6-124 (now repealed) required her to obtain the consent of the prospective adoptive parents before filing an action to set aside her parental release for involuntariness. This, she argued, effectively precluded her from contesting the validity of the parental release, thereby depriving her of due process of law. The court did not read 40-6-124 as prohibiting an action to contest the voluntariness of the release unless the consent of the person to whom the child has been released was first obtained. The procedure contained in subsection (7) was required only when there was no issue of voluntariness of the parental release. In re Adoption of B.G.B., 183 M 347, 599 P2d 375 (1979).

42-2-404. Who may relinquish — to whom.

Official Comments

1994 Commissioners' Comment: This section helps clarify the distinction between consents and relinquishments and between direct and agency placements. A parent or guardian who makes a direct placement of a minor for adoption must execute a consent for the adoption to go forward. If the parent or guardian prefers, instead, to have an agency place the minor and consent to the minor's adoption, the parent or guardian has to relinquish all rights with respect to the minor to the agency. From then on, the agency acts in lieu of the parent or guardian: it acquires custody of the minor and the authority to place the child for adoption pursuant to the procedures in Sections 2-103 and 2-104 [neither enacted in Montana]. An agency may also acquire the right to place the minor for adoption pursuant to a court order.

Compiler's Comments

Changes From 1994 Uniform Act: In (1) after "is required" omitted reference to Section 2-401 of 1994 Uniform Adoption Act (not enacted in Montana); and inserted (2), concerning parent or guardian whose consent to adoption is required and who has filed notice of parental placement.

Source: Section 2-403, 1994 Uniform Adoption Act.

42-2-405. Relinquishment by minor parent — separate legal counsel in direct parental placement adoption.

Compiler's Comments

2017 Amendment: Chapter 358 in (3) substituted "2-15-1029" for "47-1-201". Amendment effective July 1, 2017.

Severability: Section 48, Ch. 358, L. 2017, was a severability clause.

2005 Amendment: (Version effective July 1, 2006) Chapter 449 inserted (3) authorizing court to order office of state public defender to assign counsel for minor parent. Amendment effective July 1, 2006.

Saving Clause: Section 78, Ch. 449, L. 2005, was a saving clause.

Case Notes

Adoption Void When Parental Rights of Minor Without Legal Representation Relinquished: A mother was 17 years old when she sought to have her child adopted, but misrepresented herself as being 18 years old. After the adoption was completed, the mother sought to set it aside. The District Court held that because the mother was a minor when she relinquished her parental rights and was not represented by counsel as required by this section, the adoption was void. The adoptive parents appealed on various grounds, including a contention that it was in the child's best interests to be returned to them because the child had a right to permanence and stability in the adoptive placement. The Supreme Court affirmed. This section exists to protect minor parents from making legally binding direct parental placement adoptions without counsel's advice and representation, and the District Court correctly concluded that it had no authority to order relinquishment of the mother's parental rights when she had no legal representation. The adoptive parents' argument that the child should be returned based on the child's best interests also failed because the child had been returned to the mother more than 1 year earlier. In re Adoption of A.L.O., 2006 MT 59, 331 M 334, 132 P3d 543 (2006).

42-2-408. Time and prerequisites for execution of relinquishment and consent to adoption — copy of preplacement evaluation — notarization.

Official Comments

See official comments for this chapter.

Compiler's Comments

2021 Amendment: Chapter 175 in (1)(c) substituted "adoptive decision support services" for "counseling". Amendment effective October 1, 2021.

Annotator's Note: See compiler's comments for this chapter.

Source: Section 5, 1953 Uniform Adoption Act, with changes, enacted by 40-6-135, now repealed (see compiler's comments for this part).

42-2-409. Adoptive decision support services.

Compiler's Comments

2021 Amendment: Chapter 175 in (1) substituted current text for former text that read: "Counseling of the birth mother is required in department, agency, and direct parental placement adoptions. If any other parent is involved in an adoptive placement, counseling of that parent is encouraged"; in (2) in first sentence at beginning substituted "Adoptive decision support services must be provided" for "Counseling must be performed" and at end substituted "provide the services" for "provide this type of counseling", in second sentence near beginning before "requirement" deleted "counseling", in middle substituted "adoptive decision support services must be provided" for "counseling must be completed", and in third sentence near end substituted "provision of the required services" for "completion of required counseling"; in (3) at beginning of introductory clause substituted "The person providing adoptive decision support services" for "During counseling, the counselor"; in (3)(g) at end inserted "offered pursuant to 42-4-211"; inserted (3)(h) regarding medically necessary prenatal and postnatal outpatient mental health services; in (4) at beginning of first sentence substituted "The person providing adoptive decision support services" for "The counselor" and in middle of second sentence substituted "person's opinion" for "counselor's opinion"; and made minor changes in style. Amendment effective October 1, 2021.

2015 Amendment: Chapter 162 in (3)(j) inserted last sentence concerning change of request; and made minor changes in style. Amendment effective October 1, 2015.

2009 Amendment: Chapter 151 in (2)(g) at end inserted language concerning postadoptive counseling and support program. Amendment effective October 1, 2009.

Preamble: The preamble attached to Ch. 151, L. 2009, provided: "WHEREAS, child-placing agencies that provide care and placement of children are in a unique position to provide care and support to a birth parent after relinquishment of a child, especially to parents of few means, which would be consistent with the agencies' ministry; and

WHEREAS, there are currently financial and other means of support for parents who choose to keep their children that are compelling parents of little means to keep their children; and

WHEREAS, the ability to provide similar forms of support to a parent who has chosen to relinquish a child in order to give the parent a chance to grieve and to assist the parent with counseling, temporary housing, mentoring services, job training, life skills development, budgeting and financial management, and educational opportunities will provide birth parents with another option that can help provide for their future after their children have been placed with adoptive families; and

WHEREAS, explicit authority for the program is necessary with the caveat that the program must be kept separate from any program for the placement of children and must be paid for by the agency with separate funds."

Case Notes

Failure to Produce Adequate Written Report — Best Interests of Child Override Procedural Error: A mother who claimed she relinquished her rights without receiving adequate counseling also challenged the Department of Public Health and Human Services' compliance in issuing a written report under this section. The mother claimed that the report, which was written in generic and formulaic terms some 18 months after her relinquishment, did not satisfy the provisions of this section. Although the Supreme Court agreed, it concluded that the procedural error did not outweigh the best interests of the children and affirmed the District Court. In re B.J.T.H., 2015 MT 6, 378 Mont. 14, 340 P.3d 557.

Determination of Whether Mother Received Relinquishment Counseling or Whether Good Cause Existed to Waive Requirement — Question for District Court: When a mother denied receiving mandatory relinquishment counseling and her affidavit of relinquishment was silent, the Supreme Court remanded the case to the District Court for determination of whether counseling was received or whether good cause existed to waive the requirement. In re B.J.T.H., 2013 MT 366, 373 Mont. 85, 314 P.3d 911.

In a subsequent proceeding, the District Court held a hearing on whether the mother had received counseling as required under 42-2-409. Although the mother claimed that a counselor spent only 5 to 10 minutes with her, the counselor testified that she had spent at least 3 hours counseling the mother on her options, including relinquishment. The District Court concluded the mother had received the required counseling and the mother appealed. The Supreme Court affirmed, noting that the District Court was in the best position to assess the credibility and weight of the conflicting evidence on the amount of counseling received by the mother and that there was substantial evidence to support the finding the mother had received adequate counseling prior to relinquishing her parental rights. In re B.J.T.H., 2015 MT 6, 378 Mont. 14, 340 P.3d 557.

42-2-410. Revocation of relinquishment and consent.

Compiler's Comments

Source: Section 5, 1953 Uniform Adoption Act, with changes, enacted by 40-6-135, now repealed (see compiler's comments for this part).

Case Notes

DECISIONS AFTER 1997 GENERAL REVISION

Determination of Whether Mother Received Relinquishment Counseling or Whether Good Cause Existed to Waive Requirement — Question for District Court: When a mother denied receiving mandatory relinquishment counseling and her affidavit of relinquishment was silent, the Supreme Court remanded the case to the District Court for determination of whether counseling was received or whether good cause existed to waive the requirement. In re B.J.T.H., 2013 MT 366, 373 Mont. 85, 314 P.3d 911.

In a subsequent proceeding, the District Court held a hearing on whether the mother had received counseling as required under 42-2-409. Although the mother claimed that a counselor spent only 5 to 10 minutes with her, the counselor testified that she had spent at least 3 hours counseling the mother on her options, including relinquishment. The District Court concluded the mother had received the required counseling and the mother appealed. The Supreme Court affirmed, noting that the District Court was in the best position to assess the credibility and weight of the conflicting evidence on the amount of counseling received by the mother and that there was substantial evidence to support the finding the mother had received adequate counseling prior to relinquishing her parental rights. In re B.J.T.H., 2015 MT 6, 378 Mont. 14, 340 P.3d 557.

Motion to Set Aside Relinquishment and Consent to Adoption Properly Denied: The guardians of adopted children moved to set aside their relinquishment and consent to the adoption on the basis that the adoptive parents had provided a fraudulent preplacement evaluation that did not comply with the Montana Adoption Act. The District Court denied the motion, and the Supreme Court affirmed, concluding that because the guardians failed to establish fraud by clear and convincing evidence, no basis existed under 42-2-417 to set aside the relinquishment and consent to adoption. In re Adoption of S. R. T., 2011 MT 219, 362 Mont. 39, 260 P.3d 177.

DECISIONS PRIOR TO 1997 GENERAL REVISION

Jurisdiction After Child Placed for Adoption Out of State: Once a parent voluntarily signed and executed a form relinquishing parental rights to an adoption agency, the adoption agency became the "sending agency" as defined in 41-4-101, Art. II, with the power to place the child for adoption out of state. The only standing the parent then had in Montana courts was to seek a revocation of the relinquishment with the adoption agency as copetitioner. Under 40-6-135(7) (now repealed), the relinquishment became irrevocable once the child was placed for adoption out of state, and Montana lost jurisdiction. In re Male Child Born July 15, 1985, to L.C., 221 M 309, 718 P2d 660, 43 St. Rep. 835 (1986).

Violation of Interstate Compact on Placement of Children — Illegal Placement as a Result — Revocation of Parent's Consent: Failure of prospective adoptive parents to notify the appropriate public authorities in writing before bringing their prospective adoptive child into Montana violated the Interstate Compact on Placement of Children. The prospective adoptive parents' status as custodians did not prevent the operation of the Compact. By virtue of the failure of the prospective adoptive parents to comply with the Compact, the placement of the child with the prospective adoptive parents in Montana constituted illegal placement under the provisions of the Compact, and the failure to comply constitutes full and sufficient grounds for the revocation of the previously executed "parent's consent". In re the Adoption of T.M.M., 186 M 460, 608 P2d 130 (1980).

Revocation of Consent by Court — Exception: Although a Missouri court having custody of children revoked its original consent on the ground it did not have jurisdiction due to a lack of proper notice to natural parents, 40-8-112 (now repealed) made that consent irrevocable. The only exception to 40-8-112 (now repealed) is upon a finding by the court that the best interests of the child would be served by allowing revocation of consent. In re Adoption of Conley v. Walden, 171 M 58, 555 P2d 960 (1976).

Strict Compliance Required for Effective Revocation of Consent: Mother, after executing affidavit of waiver and consent to adoption, could not effectively revoke that consent by letter addressed to County Department of Public Welfare without following the procedure prescribed by 40-8-112 (now repealed). Application of Hendrickson, 159 M 217, 496 P2d 1115 (1972).

42-2-411. Conditional relinquishment and consent.

Case Notes

Conditional Relinquishment in Previously Dismissed Case — No Application in Subsequent Termination Case: The mother signed a conditional relinquishment of parental rights in an earlier abuse and neglect case that was later dismissed. Three years later, when the mother was involved in another abuse and neglect case, the Department of Public Health and Human Services asked the District Court to terminate her rights based on the earlier relinquishment, which it did. The mother appealed and argued to the Supreme Court that the relinquishment from a dismissed case could not be used against her in a subsequent case. The Supreme Court agreed, holding that the application of the relinquishment violated the mother's due process rights. Accordingly, it reversed and remanded the matter to the District Court to proceed without applying her relinquishment. In re K.B., 2019 MT 73, 395 Mont. 213, 437 P.3d 1042.

42-2-412. Content of relinquishment and consent to adopt.

Compiler's Comments

2021 Amendment: Chapter 175 in (3)(c)(iii) near beginning substituted "adoptive decision support services" for "counseling services" and at end inserted "and informing the individual of the option for obtaining medically necessary prenatal and postnatal outpatient services". Amendment effective October 1, 2021.

1999 Amendment: Chapter 257 in (1)(d) near middle after "adoptive parent" deleted "or the lawyer representing the prospective adoptive parent"; in (3)(b) at beginning substituted "relinquishment will result in the extinguishment of" for "adoption will extinguish"; in (3)(c)(iii) after "services" deleted "and information about adoption"; and made minor changes in style. Amendment effective April 5, 1999.

Similarities With 1994 Uniform Act: Subsections (1)(a) through (1)(c), (3)(a), (3)(b), (3)(c)(i), and (3)(d)(i)(A) are similar to language in Section 2-406, 1994 Uniform Adoption Act.

Case Notes

Determination of Whether Mother Received Relinquishment Counseling or Whether Good Cause Existed to Waive Requirement — Question for District Court: When a mother denied receiving mandatory relinquishment counseling and her affidavit of relinquishment was silent, the Supreme Court remanded the case to the District Court for determination of whether counseling was received or whether good cause existed to waive the requirement. In re B.J.T.H., 2013 MT 366, 373 Mont. 85, 314 P.3d 911.

In a subsequent proceeding, the District Court held a hearing on whether the mother had received counseling as required under 42-2-409. Although the mother claimed that a counselor spent only 5 to 10 minutes with her, the counselor testified that she had spent at least 3 hours counseling the mother on her options, including relinquishment. The District Court concluded the mother had received the required counseling and the mother appealed. The Supreme Court affirmed, noting that the District Court was in the best position to assess the credibility and weight of the conflicting evidence on the amount of counseling received by the mother and that there was substantial evidence to support the finding the mother had received adequate counseling prior to relinquishing her parental rights. In re B.J.T.H., 2015 MT 6, 378 Mont. 14, 340 P.3d 557.

42-2-413. Consequences of relinquishment and consent to adopt.

Official Comments

1994 Commissioners' Comment: This section specifies the general legal consequences of a consent or relinquishment and is consistent with the Act's intention to keep track of a minor and assign responsibility for the minor's care and support throughout the adoption process. If executed in substantial compliance with this Part, either document is final and irrevocable except under limited circumstances and entitles the prospective adoptive parents in a direct placement and the agency in an agency placement to the custody of the minor and requires them to provide support and care for the minor. The section also specifies the extent to which further notice of the adoption proceeding is or is not waived by a consent or relinquishment.

Compiler's Comments

Changes From 1994 Uniform Act: In introduction substituted reference to 42-2-411 for reference to Section 2-408 of 1994 Uniform Adoption Act (not enacted in Montana) and omitted reference to Section 2-405 of 1994 Act (not enacted in Montana); in (2) inserted "as provided in 42-2-403"; in (3) substituted (a) and (b) concerning objections to placement and adoption for "object to the minor's adoption by the prospective adoptive parent and any right to notice of the proceeding for adoption unless the adoption is contested, appealed, or denied"; and made minor changes in style.

Source: Section 2-407, 1994 Uniform Adoption Act.

Case Notes

DECISIONS PRIOR TO 1997 GENERAL REVISION

Termination of Parental Rights When Relinquishment Form Executed: A parent argued that under the definition of "placement for adoption" in 40-8-103 (now repealed), placement was improper since the adoption agency had not secured a termination order from District Court prior to placing the child out of state. The Supreme Court disagreed, noting that the definition did not require a judicial termination order but only that parental rights had been terminated. The court held that parental rights were terminated when the relinquishment form was executed. In re Male Child Born July 15, 1985, to L.C., 221 M 309, 718 P2d 660, 43 St. Rep. 835 (1986).

42-2-414. Notification of availability of mental health services.

Compiler's Comments

Effective Date: This section is effective October 1, 2021.

42-2-417. Grounds for court to set aside relinquishment and consent.

Case Notes

Duress Standard — No Wrongful Act or Threat That Overcame Parent's Free Will — Relinquishment Proper: A mother stated that the Department of Health and Human Services (DPHHS) contacted her over a dozen times to discuss relinquishment and told her that she had a better chance of being able to visit her children if she voluntarily relinquished her rights. The mother argued that due to depression caused by the DPHHS's placement of her two children far away from her without adequate visitation rights, she voluntary relinquished her parental rights as a result of duress caused by DPHHS's wrongful conduct. On appeal, the Supreme Court affirmed, holding that the denial of the mother's motion to set aside her relinquishment of parental rights was proper because the mother did not provide clear and convincing evidence that she was subjected to a wrongful act or threat that overcame her free will or compelled her to relinquish and because she did not demonstrate that the District Court's factual determinations were clearly erroneous. In re N.R.A., 2017 MT 253, 389 Mont. 83, 403 P.3d 1256.

Motion to Set Aside Relinquishment and Consent to Adoption Properly Denied: The guardians of adopted children moved to set aside their relinquishment and consent to the adoption on the basis that the adoptive parents had provided a fraudulent preplacement evaluation that did not comply with the Montana Adoption Act. The District Court denied the motion, and the Supreme Court affirmed, concluding that because the guardians failed to establish fraud by clear and convincing evidence, no basis existed under 42-2-417 to set aside the relinquishment and consent to adoption. In re Adoption of S. R. T., 2011 MT 219, 362 Mont. 39, 260 P.3d 177.

Part 5
Involuntary Termination of Parental Rights

Part Law Review Articles

Lessening the Sting of ASFA: The Rehabilitation-Relapse Dilemma Brought About by Drug Addiction and Termination of Parental Rights, Hannett, 45 Fam. Ct. Rev. 524 (2007).

Parental Incarceration: How to Avoid a "Death Sentence" for Families, Conway & Hutson, 41 Clearinghouse Rev. 212 (2007).

Avoiding the Need to "Unscramble the Egg": A Proposal for the Automatic Stay of Subsequent Adoption Proceedings When Parents Appeal a Judgment Terminating Their Parental Rights, Heideman, 24 St. Louis U. Pub. L. Rev. 445 (2005).

Part 6
Petition to Terminate Parental Rights

Part Case Notes

DECISIONS PRIOR TO 1997 GENERAL REVISION

Jurisdiction Based on Presence of Child in Montana: In a case in which the natural parents were residents of Wyoming but the child was born in Montana and present in Montana, the District Court had jurisdiction in an action to terminate parental rights under the abuse and neglect statutes, based on the presence of the child in Montana. In re Parental Rights of Baby Girl W., 249 M 206, 814 P2d 976, 48 St. Rep. 643 (1991).

Procedures to Be Rigorously Followed: While there is some overlap in the various statutory schemes governing the termination of parental rights and the custody of children as to general subject matter, each is used for a distinct purpose and sets forth specific procedures which must be rigorously followed before a valid judgment or order may be issued, to insure that the minors involved receive the full protection of these laws. In re Guardianship of Aschenbrenner, 182 M 540, 597 P2d 1156 (1979).

42-2-603. Petition for termination of parental rights.

Case Notes

Improper Termination of Parental Rights by Default Judgment — Abuse of Discretion — Action to Terminate Other Parent's Rights Inappropriate: A mother filed a petition to terminate the parental rights of her infant daughter's father, who was incarcerated at the time. Despite the father's efforts to respond timely, the District Court, without a hearing, evidence, or findings, entered default judgment. The father appealed the termination to the Supreme Court, which reversed, concluding that parental rights cannot be terminated pursuant to a default judgment. The Supreme Court also emphasized that a natural parent cannot petition to terminate the parental rights of the other natural parent except in the case of a stepparent adoption. In re K.J.B., 2014 MT 327, 377 Mont. 270, 339 P.3d 824, distinguished in In re A.M.S., 2016 MT 22, 382 Mont. 145, 364 P.3d 1261.

Stepparent Adoption Proceedings — Indigent Parent Entitled to Counsel — Improper Termination of Parental Rights: The stepmother filed a petition to terminate the mother's parental rights. At the hearing, the mother represented herself pro se because she could not afford an attorney. Ultimately, the District Court terminated the mother's parental rights and she appealed. The Supreme Court reversed, concluding that the right to equal protection requires that counsel be appointed for indigent parents in termination proceedings under the Adoption Act, and remanded the case to the District Court to appoint the mother counsel and to provide a new hearing. In re Adoption of A.W.S. and K.R.S., 2014 MT 322, 377 Mont. 234, 339 P.3d 414. However, see In re Termination of the Parental Rights & Adoption of J.W.M. & A.K.M, 2015 MT 231, 380 Mont. 282, 354 P.3d 626, holding that there was no error in termination proceedings in which a father did not indicate that he wished to have counsel appointed because he was indigent. See also In re Adoption of L.F.R., 2019 MT 2, 394 Mont. 61, 432 P.3d 1030.

Stepparent's Petition to Terminate Biological Parent's Parental Rights Granted Given Evidence of Abandonment: A custodial stepparent has standing to petition for termination of a noncustodial parent's parental rights. In this case, the custodial stepmother petitioned for and was granted termination of the noncustodial mother's rights in order to allow for adoption of the child by the stepmother. The mother appealed, but the Supreme Court affirmed. The District Court concluded that the mother abandoned the child and thus was an unfit parent. As evidence of abandonment, the court did not err in considering: (1) the mother's time in prison and residential drug treatment, during which she had no contact with the child; (2) during the mother's periods of absence, the mother's struggle with an abusive relationship, use of illegal drugs, and associations with known criminals; (3) the mother's failure to follow through on commitments to care for and visit the child; and (4) a lack of intent on the mother's part to resume care of the child in the future, regardless of any understanding that an initial parenting plan was temporary. Evidence of abandonment was substantial, and the District Court did not err in granting the petition to terminate the mother's parental rights. In re Adoption of K.P.M., 2009 MT 31, 349 M 170, 201 P3d 833 (2009).

Mistake of Law — Aunt and Uncle Lack Standing to Petition for Termination of Parental Rights: In a case involving termination of parental rights, the Supreme Court assumed supervisory control to determine whether G.R. and P.R., the child's aunt and uncle, had standing to bring the amended petition to terminate parental rights and for adoption. A child's aunt and uncle are not parties authorized by 42-1-107 to place a child for adoption. A child may not be placed for adoption until the parental rights of the birth parents have been terminated by a court as provided in Title 41, chapter 3, or Title 42. G.R. and P.R. did not have standing to file a petition for termination of parental rights under 42-2-603(2). Under Title 41, chapter 3, a petition for the termination of parental right based upon abuse or neglect of a child may only be brought by the County Attorney, the Attorney General, or an attorney hired by the county. Section 40-6-233 refers to the abuse of parental authority for making decisions regarding the support and education of a child and is not the basis for terminating parental rights. Therefore, G.R. and P.R. do not have standing to petition for the termination of parental rights based upon abuse or neglect. J.C. v. Eleventh Judicial District Court, 2008 MT 358, 346 M 357, 197 P3d 907 (2008).

42-2-604. Contents of petition for termination of parental rights.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 42, Ch. 716, L. 2023. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

2021 Amendment: Chapter 175 in (2)(e) substituted "the adoptive decision support services report" for "a counseling report". Amendment effective October 1, 2021.

42-2-605. Notice of hearing — service.

Case Notes

Service by Publication in Termination Proceeding: Under 42-2-605, service by publication is proper in an adoption proceeding to terminate parental rights. However, publication must be ordered by the court and may not be ordered by the clerk of court. In addition, the publication must inform the parent that failure to appear at the termination hearing will result in termination of parental rights. Merely informing the parent that failing to appear at the hearing will result in judgment being taken against the parent by default for the relief requested in the petition is insufficient. In re A.M.S., 2016 MT 22, 382 Mont. 145, 364 P.3d 1261.

42-2-606. Hearing on petition to terminate parental rights.

Case Notes

DECISIONS AFTER 1997 GENERAL REVISION

Involuntary Termination Proceeding — No Indication of Wish for Counsel — No Error: At a termination hearing against a father whose counsel previously withdrew from the case, the father represented himself, including offering testimony and questioning witnesses. The District Court did not err in conducting the proceedings in the absence of counsel for the father, because the father did not indicate that he wished to have counsel appointed because he was indigent. In re Termination of the Parental Rights & Adoption of J.W.M. & A.K.M, 2015 MT 231, 380 Mont. 282, 354 P.3d 626.

DECISIONS PRIOR TO 1997 GENERAL REVISION

Finding of Abuse, Neglect, or Dependency Necessary Before Consideration of Best Interests of the Child: M.G.M. was born out of wedlock and had little contact with her natural father until the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) placed M.G.M. in a foster home and terminated her mother's parental rights. The Department then sought to terminate the father's parental rights. To terminate his parental rights, the court must first find that the child is abused, neglected, or dependent. Only when such a finding has been made can the court apply the best interests of the child test. In re M.G.M., 201 M 400, 654 P2d 994, 39 St. Rep. 2191 (1982), followed in In re J.B., 278 M 160, 923 P2d 1096, 53 St. Rep. 901 (1996).

42-2-607. Grounds for termination of parental rights.

Compiler's Comments

1999 Amendment: Chapter 257 inserted (4) concerning determination that putative father has failed to establish and maintain substantial relationship with child; and made minor changes in style. Amendment effective April 5, 1999.

Case Notes

DECISIONS AFTER 1997 GENERAL REVISION

Refusal to Terminate Parental Rights and Grant Petition for Adoption Proper: In an adoption proceeding, the stepfather petitioned to adopt his wife's child and sought to terminate the parental rights of the natural father of the child on the sole basis that the natural father was an unfit parent because he had failed to pay child support during the year prior to the filing of the petition for adoption. The District Court refused to terminate the parental rights of the natural father based on an existing child support order that set the amount of child support due at zero. On appeal, the Supreme Court affirmed, concluding that the natural father could not be declared unfit and have his parental rights terminated and his child adopted after complying with a valid court order specifying a child support obligation, albeit one of "zero". In re Adoption of P.T.H., 2015 MT 316, 381 Mont. 373, 364 P.3d 1235.

Proper Termination of Parental Rights — Refusal to Take Drug Tests Under Interim Parenting Plan: A father's violation of an interim parenting plan by his refusal to take drug tests, his admissions of prolonged illegal drug use, his purchase of drugs in lieu of paying child support, his forgery of drug tests required under a divorce decree, his choice of drugs instead of time with his children, and his acknowledgment that he would not succeed in obtaining permanent sobriety substantially supported the District Court's determination that the father was unfit because his behavior would be detrimental to the children. Thus, the District Court did not abuse its discretion in terminating the father's parental rights. In re Termination of the Parental Rights & Adoption of J.W.M. & A.K.M, 2015 MT 231, 380 Mont. 282, 354 P.3d 626.

No Authority to Terminate Parental Rights of Putative Father When Substantial Parent-Child Relationship Established: Maternal grandparents petitioned to terminate the parental rights of the father of R.A.J., for whom they were guardians. The petition was denied, and on appeal the Supreme Court affirmed. A District Court has authority to terminate a putative father's parental rights upon a determination under 42-2-610 that a putative father failed to establish and maintain a substantial relationship with the child or upon a determination under 42-2-608 that the putative father is unfit. Here, the grandparents made no assertion of unfitness, so the question involved only the issue of substantial relationship. When a petition prays for termination of the parental rights of a putative father, the burden is on the putative father to show that he has established a substantial relationship with the child. In this case, the father met that burden. Although the father had been stationed overseas in the military shortly after the child was born, he provided a fair and reasonable amount of support for the child, considering that the grandparents had obtained guardianship of the child without the father's knowledge and had refused to accept contributions for the child's support. The father had at least monthly contact with the child when he was not overseas, and he manifested an ability and willingness to assume legal and physical custody of the child through continuing and frequent contact, by caring for the child in his home to the extent allowed by the grandparents, and through the pursuit of paternity testing to establish his biological relationship with the child. Having determined that a substantial father-child relationship existed, the District Court correctly concluded as a matter of law that the father's parental rights could not be terminated under 42-2-607(4) or 42-2-610. In re Adoption of R.A.J., 2009 MT 22, 349 M 100, 201 P3d 787 (2009).

Adoption of Children of Parent Whose Parental Rights Terminated Affirmed: The District Court terminated a father's parental rights for nonsupport and granted the stepfather's petition to adopt the children without the father's written permission. The father appealed. Although a child generally may not be adopted without the written consent of both birth parents, written consent is not required of a parent whose parental rights have been terminated, so the Supreme Court addressed whether the termination of parental rights was proper. In this case, the father was able to provide support for his children during an aggregate 1-year period prior to the filing of the adoption petition but failed to do so, rendering him an unfit parent pursuant to 42-2-608. Thus, the District Court did not err in terminating the father's parental rights. In re Adoption of C.W.D. & C.D.D. v. P.K.D., 2005 MT 145, 327 M 301, 114 P3d 214 (2005).

Proper Termination of Parental Rights Based on Conviction for Sexual Assault of Child and Sexual Intercourse Without Consent With Child: Snyder pleaded guilty to sexual assault on a child and sexual intercourse without consent with a child based on his involvement with three young girls. His marriage was dissolved 6 months later and custody was awarded to his former wife, who remarried and then petitioned for termination of Snyder's parental rights so that their son could be adopted by her new husband. The petition was granted, and Snyder appealed. The plain language of 42-2-608 provides that the court may terminate a parent's rights and make the child available for adoption if a parent is convicted of sexual assault on a child or sexual intercourse without consent with a child. There is no statutory requirement that the sexual assault on a child or sexual intercourse without consent with a child has been committed on the adoptee. The trial court did not err when it held that clear and convincing evidence supported the termination of the father's parental rights based on his prior convictions. In re Adoption of Snyder, 2000 MT 61, 299 M 40, 996 P2d 875, 57 St. Rep. 288 (2000), following In re J.N. & A.N., 1999 MT 64, 293 M 524, 977 P2d 317, 56 St. Rep. 269 (1999).

DECISIONS PRIOR TO 1997 GENERAL REVISION

Finding of Abuse, Neglect, or Dependency Necessary Before Consideration of Best Interests of the Child: M.G.M. was born out of wedlock and had little contact with her natural father until the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) placed M.G.M. in a foster home and terminated her mother's parental rights. The Department then sought to terminate the father's parental rights. To terminate his parental rights, the court must first find that the child is abused, neglected, or dependent. Only when such a finding has been made can the court apply the best interests of the child test. In re M.G.M., 201 M 400, 654 P2d 994, 39 St. Rep. 2191 (1982), followed in In re J.B., 278 M 160, 923 P2d 1096, 53 St. Rep. 901 (1996).

42-2-608. Finding of unfitness.

Official Comments

See official comments for this chapter.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 51 in (1)(b) near beginning after "parent has" deleted "in the state of Montana or in any other jurisdiction of the United States" and near middle after "41-3-102" substituted "(9)(f)" for "(7)(e)" (rendered void by Ch. 566); and made minor changes in style. Amendment effective March 15, 1999.

Chapter 566 in (1)(b) substituted "41-3-102" for "41-3-102(7)(e)". Amendment effective October 1, 1999.

See compiler's comments for this chapter.

Case Notes

DECISIONS AFTER 1997 GENERAL REVISION

Termination of Parental Rights — Indigent Father — Waiver of Right to Counsel: The District Court terminated the father's parental rights during an adoption hearing. The indigent father was not represented by counsel at the hearing, and the District Court did not advise the father of his right to counsel during the proceeding. On appeal, the father argued that he was entitled to have an attorney appointed to represent him at the District Court. The Supreme Court reversed the District Court, holding that a parent in a termination proceeding, having received no notice of the right to counsel, does not waive the right through mere silence. The court concluded that the father had not knowingly and voluntarily waived his right to counsel. In re Adoption of L.F.R., 2019 MT 2, 394 Mont. 61, 432 P.3d 1030.

Finding Mother Unfit Supported by Record — No Error by District Court: A District Court terminated a mother's rights after it determined that the mother had had several opportunities to contribute to her children's care but failed to do so over the course of years. It also noted that the mother's husband was a registered violent offender and her oldest son was a registered sex offender and they posed a threat to the children. On appeal, the Supreme Court affirmed, concluding that, based on the record before it, the District Court did not err in finding the mother unfit. In re Adoption of A.W.S., 2016 MT 194, 384 Mont. 278, 377 P.3d 1201.

Refusal to Terminate Parental Rights and Grant Petition for Adoption Proper: In an adoption proceeding, the stepfather petitioned to adopt his wife's child and sought to terminate the parental rights of the natural father of the child on the sole basis that the natural father was an unfit parent because he had failed to pay child support during the year prior to the filing of the petition for adoption. The District Court refused to terminate the parental rights of the natural father based on an existing child support order that set the amount of child support due at zero. On appeal, the Supreme Court affirmed, concluding that the natural father could not be declared unfit and have his parental rights terminated and his child adopted after complying with a valid court order specifying a child support obligation, albeit one of "zero". In re Adoption of P.T.H., 2015 MT 316, 381 Mont. 373, 364 P.3d 1235.

Proper Termination of Parental Rights — Refusal to Take Drug Tests Under Interim Parenting Plan: A father's violation of an interim parenting plan by his refusal to take drug tests, his admissions of prolonged illegal drug use, his purchase of drugs in lieu of paying child support, his forgery of drug tests required under a divorce decree, his choice of drugs instead of time with his children, and his acknowledgment that he would not succeed in obtaining permanent sobriety substantially supported the District Court's determination that the father was unfit because his behavior would be detrimental to the children. Thus, the District Court did not abuse its discretion in terminating the father's parental rights. In re Termination of the Parental Rights & Adoption of J.W.M. & A.K.M, 2015 MT 231, 380 Mont. 282, 354 P.3d 626.

Stepparent Adoption Proceedings — Indigent Parent Entitled to Counsel — Improper Termination of Parental Rights: The stepmother filed a petition to terminate the mother's parental rights. At the hearing, the mother represented herself pro se because she could not afford an attorney. Ultimately, the District Court terminated the mother's parental rights and she appealed. The Supreme Court reversed, concluding that the right to equal protection requires that counsel be appointed for indigent parents in termination proceedings under the Adoption Act, and remanded the case to the District Court to appoint the mother counsel and to provide a new hearing. In re Adoption of A.W.S. and K.R.S., 2014 MT 322, 377 Mont. 234, 339 P.3d 414. However, see In re Termination of the Parental Rights & Adoption of J.W.M. & A.K.M, 2015 MT 231, 380 Mont. 282, 354 P.3d 626, holding that there was no error in termination proceedings in which a father did not indicate that he wished to have counsel appointed because he was indigent. See also In re Adoption of L.F.R., 2019 MT 2, 394 Mont. 61, 432 P.3d 1030.

No Evidence of Willful Parental Abandonment — Termination of Parental Rights Not Warranted: After only sporadic contact between a father and his child over a period of several years and failure of the father to fully comply with child support obligations, the mother petitioned to terminate the father's parental rights on grounds that the father had abandoned the child. The District Court denied the petition and the mother appealed, but the Supreme Court affirmed. Termination of parental rights based on abandonment of a child is not appropriate unless there is clear and convincing evidence that the child was willfully abandoned. In this case, the totality of the circumstances showed that the father's conduct was more in the character of immature, ignorant, uncertain, and lacking in diligent attention to his parenting responsibilities rather than a willful manifestation of intent to abandon the child. The mere fact that the father may have violated a court order within the meaning of 42-2-608 by failing to meet child support obligations in full did not mean that, as a matter of law, his parental rights must be terminated. Thus, although the father was not a model parent, the mother failed to meet the burden of demonstrating by clear and convincing evidence that the father was unfit. Therefore, the District Court properly applied its discretion in denying the petition. In re Stepparent Adoption of B.W.Z.-S., 2009 MT 433, 354 M 116, 222 P3d 613 (2009).

Adoption of Children of Parent Whose Parental Rights Terminated Affirmed: The District Court terminated a father's parental rights for nonsupport and granted the stepfather's petition to adopt the children without the father's written permission. The father appealed. Although a child generally may not be adopted without the written consent of both birth parents, written consent is not required of a parent whose parental rights have been terminated, so the Supreme Court addressed whether the termination of parental rights was proper. In this case, the father was able to provide support for his children during an aggregate 1-year period prior to the filing of the adoption petition but failed to do so, rendering him an unfit parent pursuant to this section. Thus, the District Court did not err in terminating the father's parental rights. In re Adoption of C.W.D. & C.D.D. v. P.K.D., 2005 MT 145, 327 M 301, 114 P3d 214 (2005).

Two-Year Wait to Assert Parental Rights — Failure to Advise Parent of Right to Counsel Harmless Error: A father who was incarcerated waited more than 2 years to file for relief following termination of his parental rights, asserting that he was denied due process by not being provided notice of the right to counsel. The Supreme Court agreed that fairness requires that a parent be represented by counsel at parental termination proceedings, but in this case, the error was harmless because the lack of notice was not prejudicial to the father. There was adequate evidence to terminate the father's parental rights, and even if he had been notified and represented by counsel, there was no way that an attorney would have made a difference under the circumstances and the result would have been the same. Denial of the motion for relief was affirmed. In re P.D.L., 2004 MT 346, 324 M 327, 102 P3d 1225 (2004).

Proper Termination of Parental Rights Based on Conviction for Sexual Assault of Child and Sexual Intercourse Without Consent With Child: Snyder pleaded guilty to sexual assault on a child and sexual intercourse without consent with a child based on his involvement with three young girls. His marriage was dissolved 6 months later and custody was awarded to his former wife, who remarried and then petitioned for termination of Snyder's parental rights so that their son could be adopted by her new husband. The petition was granted, and Snyder appealed. The plain language of this section provides that the court may terminate a parent's rights and make the child available for adoption if a parent is convicted of sexual assault on a child or sexual intercourse without consent with a child. There is no statutory requirement that the sexual assault on a child or sexual intercourse without consent with a child has been committed on the adoptee. The trial court did not err when it held that clear and convincing evidence supported the termination of the father's parental rights based on his prior convictions. In re Adoption of Snyder, 2000 MT 61, 299 M 40, 996 P2d 875, 57 St. Rep. 288 (2000), following In re J.N. & A.N., 1999 MT 64, 293 M 524, 977 P2d 317, 56 St. Rep. 269 (1999).

Factors in Whether Nonconsenting Parent Able to Contribute to Support of Child: In determining whether a parent who does not consent to adoption of a child is able to contribute to support of the child, the District Court shall consider the following factors: (1) the parent's ability to earn income; (2) the parent's willingness to earn an income and support the child; (3) the availability of employment; and (4) the parent's use of funds to provide that parent with only the bare necessities before contributing to child support. In re Adoption of C.R.N., 1999 MT 92, 294 M 202, 979 P2d 210, 56 St. Rep. 388 (1999).

DECISIONS PRIOR TO 1997 GENERAL REVISION

Termination of Parental Rights and Adoption Not to Be Accomplished in Same Action: The District Court entered an order terminating the mother's parental rights and allowing the adoption of her children without her consent based upon the fact that her rights had been terminated. The Supreme Court reversed on the basis that the statute allowing for adoption without a parent's consent contemplated that the parent's rights had been terminated by a separate action at some point in the past. In re Adoption of Jane, John, & Mary Doe, 277 M 251, 921 P2d 875, 53 St. Rep. 631 (1996).

Absence of Department Adoption Placement and Written Consent by Department Head — Adoption Order Improper: Under 40-8-108 (now repealed), a court is not included in the list of entities that may place a child for adoption. Therefore, it was improper for a District Court to order a child's placement in the absence of a placement for adoption by the appropriate state agency and the written consent to adoption executed by the executive head of the Department. In re F.H., 272 M 342, 901 P2d 96, 52 St. Rep. 791 (1995). See also In re Adoption of Hall, 173 M 142, 566 P2d 401 (1977).

Inability to Contribute Financial Support to Child Not Abandonment — No Prior Judicial Termination of Parental Rights — Third-Party Petition to Adopt Properly Dismissed: Parents of S.P.M. were divorced and granted joint custody of the child. After a period of time, the father took sole custody after a Department of Family Services (now Department of Public Health and Human Services) worker filed a report concluding that the mother's new partner was abusing the child. The original joint custody decree was not modified. The father and child moved out of state for 4 years. On their return, the mother petitioned for custody and visitation. In response, the father's new wife petitioned to adopt the child. The District Court dismissed the wife's petition on the grounds that the mother's consent to adoption was required and that the mother had not abandoned the child. The 6-month requirement for abandonment in 41-3-102 applies only to the willful surrender of custody, and even though the mother had not supported the child for 4 years, this did not constitute abandonment when the mother was not capable of providing financial support. Determination of neglect necessitates a proceeding separate from a consent for adoption hearing. Issues in controversy over termination of parental rights are different from inquiry before an adoption court, and the two inquiries should not be mixed. Adoption of S.P.M., 266 M 269, 880 P2d 297, 51 St. Rep. 808 (1994).

Elements of Parent-Child Relationship in Evaluation of Best Interest of Child: A natural parent's rights cannot be terminated under 40-8-111 (now repealed) independent of the determination that adoption is appropriate. Adoption is not appropriate unless it is found to be in the child's best interest. In evaluating the child's best interest, the court should consider benefits of the child's relationship with the natural parent in addition to the benefits derived from financial support. In re Adoption of V.R.O. & V.N.O., 250 M 517, 822 P2d 83, 48 St. Rep. 946 (1991).

Findings Insufficient on Ability to Pay Support — Remand: The order granting a partial summary judgment terminating parental rights based on lack of support during the year prior to filing of the petition listed the following facts in support of the determination that the parent was able to provide support: (1) the parent owned certain assets, including real property, musical equipment, two vehicles, rifles, chain saws, and a truck topper; (2) the parent received a $24,000 lump-sum workers' compensation settlement during the time in question; and (3) the parent did not come into court to attempt to modify the payments but simply chose not to pay support. However, it was not clear whether the assets were convertible to cash that could be used to pay support or whether any of the workers' compensation settlement remained available for this use. Further, the findings did not include discussion on the parent's income or ability to earn income during the relevant period or on the cost of providing himself with the necessities of life and were therefore insufficient as to the issue of the ability to pay child support, warranting remand. In re Adoption of V.R.O. & V.N.O., 250 M 517, 822 P2d 83, 48 St. Rep. 946 (1991). See also In re Adoption of Jane, John, & Mary Doe, 277 M 251, 921 P2d 875, 53 St. Rep. 631 (1996).

De Minimis Support Payments During Year Prior to Petition for Adoption — Parental Rights Terminated: Father maintained his consent was required for adoption of his children by their stepfather because father paid $180 in support during the year preceding stepfather's petition for adoption. Father was obligated to pay $375 a month and to maintain insurance on the children during that year. The Supreme Court noted that any payment of support must first be applied to satisfy the earliest arrearage before it is applied to the support owed during the year before the filing of the petition and that payments made after the filing of the petition may not be applied to the preadoption year. Considering that father's payments were de minimis at best and that he had not maintained insurance, termination of his parental rights was proper. A challenge of the constitutionality of the termination of parental rights based on nonsupport, as authorized by 40-8-111 (now repealed), was dismissed on procedural grounds. In re Adoption of C.J.H., W.L.H., & T.A.H., 246 M 52, 803 P2d 214, 47 St. Rep. 2258 (1990).

Lack of Court Order Requiring Support — Mere Inquiry Insufficient to Toll Statute: The absence of a child support order does not absolve a parent of the legal duty to support a child, nor is mere inquiry regarding child support sufficient to toll the statutory support requirement of 40-8-111 (now repealed). In re Adoption of D.J.V., 244 M 209, 796 P2d 1076, 47 St. Rep. 1522 (1990), followed in In re Adoption of J.M.H. & S.B.H., 264 M 381, 871 P2d 1326, 51 St. Rep. 290 (1994), and In re Adoption of C.R.N., 1999 MT 92, 294 M 202, 979 P2d 210, 56 St. Rep. 388 (1999).

Caring for One of Three Children Constituting Nonsupport: The lower court terminated the natural father's parental rights without his consent on the basis that he had not paid support for more than 1 year. The Supreme Court affirmed the termination, holding that the fact that the father had cared for one of his three children did not constitute compliance with the dissolution order. In re Adoption of R.M., 241 M 111, 785 P2d 709, 47 St. Rep. 124 (1990).

Service on Party's Attorney Sufficient Notice: The trial court terminated the natural father's parental rights without his consent on the basis that he had not paid child support for a period of 1 year. The father argued that he had left the state prior to the finalization of the decree and never learned of his support obligation. The Supreme Court affirmed the termination and ruled that service on the father's attorney was sufficient notice, even though the attorney did not know of the father's whereabouts. In re Adoption of R.M., 241 M 111, 785 P2d 709, 47 St. Rep. 124 (1990), followed in In re Adoption of J.M.H. & S.B.H., 264 M 381, 871 P2d 1326, 51 St. Rep. 290 (1994), holding that natural father, who was notified of the hearing, waived due process claims by failing to attend or send a representative to the "best interest" hearing.

Court Need Find Only One Substitute for Consent to Proceed With Adoption: The Supreme Court held that the lower court had to find only one of the statutorily enumerated substitutes for consent in order to proceed with an adoption. There was clear evidence of abandonment, therefore the court did not have to consider the sufficiency of the evidence concerning nonsupport or the validity of the guardians' consent to the adoption. Adoption of C.R.D., 240 M 106, 782 P2d 1280, 46 St. Rep. 1979 (1989), followed in In re L.E.B., 259 M 492, 856 P2d 1382, 50 St. Rep. 895 (1993).

Natural Father's Consent to Adoption Not Required When Evidence Clear He Abandoned Child: The father had only visited with his daughter twice and called her on the telephone twice in 8 years and during that time never paid support. The Supreme Court affirmed the lower court's finding that the record contained clear and convincing evidence that the natural father had willfully abandoned his daughter, and therefore his consent to the child's adoption by her grandparents was not required. Adoption of C.R.D., 240 M 106, 782 P2d 1280, 46 St. Rep. 1979 (1989).

Question of Abandonment Not Within Subject Matter Jurisdiction Regarding Modification: Husband was served a petition for adoption of his children by wife's new husband. The petition alleged abandonment. The District Court improperly considered the question of abandonment during the postdissolution hearing, which centered around the issues of visitation and unpaid child support. The question was outside the scope of issues included within the original dissolution decree, was to be decided by the court hearing the adoption proceedings, and should have been dismissed under former Rule 12(h)(3), M.R.Civ.P. (now superseded). In re Marriage of Callahan, 233 M 465, 762 P2d 205, 45 St. Rep. 1639 (1988).

Purview of Court to Evaluate Conflicting Testimony — Equitable Estoppel Not Bar to Claim of Failure to Pay Support: Father claimed he had not made support payments because mother told him she wanted to make it on her own, that she was not worried about payments while he was unemployed, that she had refused his offer of money from the sale of property, and that for these reasons she was estopped from consenting to termination of his parental rights. Mother testified she told father that support payments must be made through the Clerk of Court and that she expected payments while he was working. It was entirely within the court's purview to rely on mother's testimony, and the claim of failure to support was not barred by equitable estoppel. In re Adoption of S.E., 232 M 31, 755 P2d 27, 45 St. Rep. 843 (1988).

Standard of Proof — Clear and Convincing Evidence: The natural father erroneously characterized the determination of whether his parental rights should be terminated as a "best interest of the child" question. The "best interest" test is applied after parental rights have been terminated to determine whether the adoption should be allowed. Rather, the standard of proof under 40-8-111 (now repealed) is clear and convincing evidence. In re Adoption of S.E., 232 M 31, 755 P2d 27, 45 St. Rep. 843 (1988), followed in In re Adoption of J.B.T. & W.D.T., 250 M 205, 819 P2d 178, 48 St. Rep. 793 (1991).

Termination of Parental Rights of Joint Custody: Father argued that parental rights of a parent with joint custody could not be terminated under 40-8-111 (now repealed); however, the provisions allowing termination upon failure to support are not limited to a particular type of custodial status. Any parent who is able but does not support a child for 1 year forfeits the right to withhold consent to adoption. In re Adoption of S.E., 232 M 31, 755 P2d 27, 45 St. Rep. 843 (1988).

Adoption Proceeding Not to Be Thwarted by Refusal of Natural Parent to Consent: A putative father argued that 40-8-111 (now repealed) did not apply because it required that a petition for adoption be filed and no petition had been filed at the time he was asked for his consent. He never paid any support for the child, but contended that a formal petition would have put him on notice of the proceeding, thus allowing him to make support payments. The Supreme Court found that this argument was circuitous and that to accept it would allow any natural parent to thwart a legitimate adoption proceeding merely by refusing consent so that no valid petition for adoption could be filed. In re Adoption of R.G.C., 228 M 345, 742 P2d 471, 44 St. Rep. 1586 (1987).

Best Interest Test Properly Applied: A putative father contended that 40-6-130 (now repealed) required a finding as to his fitness as a parent before a determination could be made as to what was best for the child. While proof of abuse or neglect is required to terminate a parent's rights in a proceeding involving a youth in need of care, in adoption proceedings the standard to be applied, as outlined in 40-6-130 (now repealed), is the best interest of the child. In re Adoption of R.G.C., 228 M 345, 742 P2d 471, 44 St. Rep. 1586 (1987).

Measurement of Support Period: In adoption proceedings under 40-8-109 (now repealed), the provisions of 40-8-111 (now repealed) relating to the 1-year period of support should be measured against the commencement of the adoption proceedings rather than against the date of the petition for adoption. In re Adoption of R.G.C., 228 M 345, 742 P2d 471, 44 St. Rep. 1586 (1987).

Adoption Without Consent When No Child Support Paid — Ability to Work: Natural father contended he did not pay child support for over 1 year due to physical and psychological problems. The Supreme Court affirmed adoption without consent upon finding the natural father was able to maintain employment but did not by choice, voluntarily chose a lifestyle to avoid gainful employment while allowing others to support him, and failed to apply some proceeds of a workers' compensation settlement toward his child support obligations. Further, the District Court did not err in allowing evidence concerning events outside of the 1-year period because the events were relevant to the natural father's mental and physical condition during the subject year. In re Adoption of J.M.G., J.J.G., & C.C.G., 226 M 525, 736 P2d 967, 44 St. Rep. 869 (1987).

Best Interests of Child: If the statutory requirements for consent to adoption are met, the best interests of the child become the paramount consideration. In re Adoption of S.T.V., 226 M 18, 733 P2d 841, 44 St. Rep. 425 (1987), followed in In re Adoption of V.R.O. & V.N.O., 250 M 517, 822 P2d 83, 48 St. Rep. 946 (1991).

Providing Articles of Clothing or In-Kind Payments — Support Obligation Not Satisfied: A parent's obligation to contribute to the financial support of a child is not satisfied by provision of articles of clothing or other in-kind payments. In re Adoption of K.L.J.K., 224 M 418, 730 P2d 1135, 43 St. Rep. 2297 (1986), affirming In re Adoption of S.L.R., 196 M 411, 640 P2d 886 (1982), and followed in In re L.E.B., 259 M 492, 856 P2d 1382, 50 St. Rep. 895 (1993). See also In re Adoption of J.B.T. & W.D.T., 250 M 205, 819 P2d 178, 48 St. Rep. 793 (1991), and In re Adoption of C.R.N., 1999 MT 92, 294 M 202, 979 P2d 210, 56 St. Rep. 388 (1999).

Support Other Than as Required by Decree — When Valid: The father was obligated by the decree to pay $125 child support a month for each of two children. The parents later orally agreed that each would totally support one child. The father's conduct of totally supporting one child under the agreement was held to be the equivalent of providing financial support for both children, and therefore his consent was required for adoption of the other child. In re Adoption of E.S.R., 218 M 118, 706 P2d 132, 42 St. Rep. 1448 (1985).

Support During One-Year Period Before Filing Petition: W.A.S. paid child support from the time of his divorce until June 1981, which was shortly after his former spouse remarried. No support payment was made in July 1981, but a payment made in August 1981 was applied to July. No other payment was made until December 1981, when a $450 payment was made. On December 2, 1982, a petition was filed seeking the adoption of R.A.S. by his stepfather. The court determined that the December 1981 payment applied to August, September, and October 1981 and that W.A.S. did not contribute to the support of his child during a period of 1 year before the filing of the petition for adoption. Since no contribution was made, the consent of W.A.S. was not required. In re the Adoption of R.A.S., 208 M 438, 679 P2d 220, 41 St. Rep. 451 (1984), followed in In re Adoption of C.F.B., Jr., 208 M 507, 679 P2d 777, 41 St. Rep. 498 (1984), In re Adoption of B.L.P., 224 M 182, 728 P2d 803, 43 St. Rep. 2116 (1986), In re Adoption of S.E., 232 M 31, 755 P2d 27, 45 St. Rep. 843 (1988), In re Adoption of J.B.T. & W.D.T., 250 M 205, 819 P2d 178, 48 St. Rep. 793 (1991), and in In re L.E.B., 259 M 492, 856 P2d 1382, 50 St. Rep. 895 (1993).

Finding of Abuse, Neglect, or Dependency Necessary Before Consideration of Best Interests of the Child: M.G.M. was born out of wedlock and had little contact with her natural father until the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) placed M.G.M. in a foster home and terminated her mother's parental rights. The Department then sought to terminate the father's parental rights. To terminate his parental rights, the court must first find that the child is abused, neglected, or dependent. Only when such a finding has been made can the court apply the best interests of the child test. In re M.G.M., 201

M 400, 654 P2d 994, 39 St. Rep. 2191 (1982), followed in In re J.B., 278 M 160, 923 P2d 1096, 53 St. Rep. 901 (1996).

Determination of Neglect at Custody Hearing Not Sufficient: After the death of the custodial mother, the maternal grandmother took the children into her home. The natural father petitioned to have the children restored to his custody. The grandmother requested custody and filed a petition for adoption. In a proceeding pursuant to 40-4-221, the grandmother was granted custody because the father had failed to make child support payments for more than a year and had generally neglected the children. The trial court properly dismissed the grandmother's petition for adoption for lack of jurisdiction. The determination of neglect needed to excuse the need for the father's consent to adoption under 40-8-111 (now repealed) must be made in a separate proceeding pursuant to Title 41, ch. 3, part 6. Brost v. Glasgow, 200 M 194, 651 P2d 32, 39 St. Rep. 1679 (1982).

Termination of Parent's Parental Rights for Failure to Support Child: Mother filed petition for termination of father's parental rights and replacement of him as the children's father with her second husband. Father had for the 2 years prior to the petition failed to make court-ordered child support payments, although financially able to do so. Father made two lump-sum payments after filing of the petition but was still several thousand dollars in arrears. Mother's testimony indicated she had received only $670 from father, who was supposed to make the support payments to the court. Father's testimony indicated, at best, that he contributed $2,725 to the children's support during the 2-year period, several thousand dollars less than that due. The District Court erroneously failed to terminate father's parental rights, which were terminated by Supreme Court on appeal by mother. In re Marriage of Burns, 198 M 365, 646 P2d 530, 39 St. Rep. 1059 (1982).

"If Able to Support" — Voluntary Change in Lifestyle: The nonsupporting parent was mentally and physically capable of obtaining full-time employment but refused to do so. His voluntary choice of a lifestyle was inconsistent with his responsibility to contribute to the child's support, and for the purposes of 40-8-111 (now repealed), he was able to support the child. A parent should not be able to enjoy the benefits of parental rights while voluntarily shunning the burden of parental obligation. In re the Adoption of S.L.R., 196 M 411, 640 P2d 886, 39 St. Rep. 156 (1982), followed in In re Adoption of B.L.P., 224 M 182, 728 P2d 803, 43 St. Rep. 2116 (1986), In re Adoption of K.L.J.K., 224 M 418, 730 P2d 1135, 43 St. Rep. 2297 (1986), and in In re Adoption of J.M.H. & S.B.H., 264 M 381, 871 P2d 1326, 51 St. Rep. 290 (1994). See also In re Adoption of J.B.T. & W.D.T., 250 M 205, 819 P2d 178, 48 St. Rep. 793 (1991).

Proof of Nonsupport, Abandonment, Cruelty, and Neglect Insufficient to Excuse Consent of Natural Father: Where the stepfather of two children petitioned the court to adopt those children and the children's natural father filed an objection to the petition, the District Court did not err in its refusal to excuse the requirement that consent of the natural father be obtained. The evidence submitted by the stepfather to prove nonsupport, abandonment, cruelty, and neglect of the children failed to meet the burden of proof required by 40-8-111 (now repealed), and the District Court therefore properly dismissed the petition for adoption for lack of parental consent. Other grounds for excusing consent and allegations of error were not reviewed by the Supreme Court, as they were raised for the first time on appeal. In re the Adoption of T.G.K. & J.P.K., 193 M 139, 630 P2d 740, 38 St. Rep. 1030 (1981).

Absence of Abuse or Neglect: Judgment was reversed and custody of two children taken from their maternal aunt and returned to the natural father since there was no showing that the children were abused or neglected. The District Court improperly deprived the father of custody by means of the subterfuge of a guardianship that had outlived the purpose for which it was created. In re Guardianship of Doney, 174 M 282, 570 P2d 575 (1977).

Invalid Adoption Decree: An adoption decree was invalid for lack of notice to the natural parents and the absence of consent by abandonment since only 24 days elapsed from birth to filing of the adoption petition. That being so, laches and estoppel could not save the nonexistent decree but the best interests of the child justified a permanent custody award to the defendants. In re Adoption of Hall, 173 M 142, 566 P2d 401 (1977).

Burden of Proving That Consent Not Required: When petitioner relies upon the statutory exception to consent based on failure to support, he bears the burden of proving that the parent was able to give support in addition to showing failure to contribute; the court will not waive the consent requirement if the petitioner is attempting to argue abandonment because such allegation was not contained in the petition. In re Adoption of Challeen, 172 M 362, 563 P2d 1120 (1977).

Support as Financial Support: Section 40-8-111 (now repealed) clearly means financial support where it refers to "support". In re Adoption of Smigaj, 171 M 531, 560 P2d 141 (1977), followed by In re the Adoption of S.L.R., 196 M 411, 640 P2d 886, 39 St. Rep. 156 (1982).

Collateral Attack on Adoption Decree — Res Judicata: The res judicata doctrine bars an action to void an adoption decree when the issue of the best interests of the children and the validity of the decree were litigated in a prior habeas corpus action. In re Adoption of Conley v. Walden, 171 M 58, 555 P2d 960 (1976).

In Habeas Corpus Proceeding Welfare of Child as Paramount Factor: Habeas corpus proceeding seeking custody of children is an equitable proceeding, and whether the action is treated as habeas corpus or a petition to set aside an adoption, the welfare of the child is the paramount factor. Application of Conley v. Walden, 166 M 369, 533 P2d 955 (1975).

Reliance Upon Judicial Ruling of Other States: In granting petition for adoption without consent of parents, Montana court was entitled to rely on ruling of Missouri court depriving parents of custody, and even though parents, 5 years later, persuaded the Missouri court to set aside its ruling, the Montana adoption was made in the best interest of the children and would not be set aside. Application of Conley v. Walden, 166 M 369, 533 P2d 955 (1975).

Mother to Consent Lacking Evidence of Her Ability and Failure to Support: Minor child supported during preceding 4 years by its father and aunt and uncle did not warrant order authorizing adoption of child by aunt and uncle after father's death where mother did not give consent and there was no evidence mother was able and failed to give support during that period. In re Adoption of Biery, 164 M 353, 522 P2d 1377 (1974).

Noncompliance With Procedure: Mother, after executing affidavit of waiver and consent to adoption, could not effectively revoke that consent by letter addressed to County Department of Public Welfare without following the procedure prescribed by 40-8-111 (now repealed). Application of Hendrickson, 159 M 217, 496 P2d 1115 (1972).

Estoppel: Where mother of child born out of wedlock joined in and agreed to petition allowing natural father and his wife to adopt child, mother was estopped from attacking the resulting decree of adoption 2 years later. In re Adoption of Curtis, 143 M 330, 390 P2d 209 (1964).

Law Review Articles

Stanley v. Illinois: What It Portends for Adoptions in Montana, Townsend, 36 Mont. L. Rev. 137 (1975).

Unwed Parents, Child Custody Rights, Townsend, 36 Mont. L. Rev. 137 (1975).

42-2-609. Determination that no parent and child relationship exists.

Compiler's Comments

1999 Amendment: Chapter 257 throughout section substituted "individual" for "person"; in (2)(e) after "married" inserted "to the person who is the subject of the termination proceedings"; and made minor changes in style. Amendment effective April 5, 1999.

42-2-610. Putative father — termination based upon failure to establish substantial relationship.

Compiler's Comments

1999 Amendment: Chapter 257 in (4)(a) at end substituted "to adopt" for "for adoption, including registering with the putative father registry"; and made minor changes in style. Amendment effective April 5, 1999.

Case Notes

No Authority to Terminate Parental Rights of Putative Father When Substantial Parent-Child Relationship Established: Maternal grandparents petitioned to terminate the parental rights of the father of R.A.J., for whom they were guardians. The petition was denied, and on appeal the Supreme Court affirmed. A District Court has authority to terminate a putative father's parental rights upon a determination under 42-2-610 that a putative father failed to establish and maintain a substantial relationship with the child or upon a determination under 42-2-608 that the putative father is unfit. Here, the grandparents made no assertion of unfitness, so the question involved only the issue of substantial relationship. When a petition prays for termination of the parental rights of a putative father, the burden is on the putative father to show that he has established a substantial relationship with the child. In this case, the father met that burden. Although the father had been stationed overseas in the military shortly after the child was born, he provided a fair and reasonable amount of support for the child, considering that the grandparents had obtained guardianship of the child without the father's knowledge and had refused to accept contributions for the child's support. The father had at least monthly contact with the child when he was not overseas, and he manifested an ability and willingness to assume legal and physical custody of the child through continuing and frequent contact, by caring for the child in his home to the extent allowed by the grandparents, and through the pursuit of paternity testing to establish his biological relationship with the child. Having determined that a substantial father-child relationship existed, the District Court correctly concluded as a matter of law that the father's parental rights could not be terminated under 42-2-607(4) or 42-2-610. In re Adoption of R.A.J., 2009 MT 22, 349 M 100, 201 P3d 787 (2009).

42-2-617. Effect of order terminating parental rights.

Compiler's Comments

Changes From 1994 Uniform Act: In (1) near beginning substituted "granting the petition for termination of parental rights" for "issued under this [part] granting the petition"; in (1)(a) substituted "the parent and child relationship" for "the relationship of parent and child between the respondent and the minor" and after "except" inserted "for"; inserted (1)(b) relating to termination of jurisdiction of the court; in (1)(c) substituted "parent" for "respondent" and substituted "child" for "minor"; substituted (1)(d) concerning award of custody of the child for "is a final order for purposes of appeal"; inserted (2) concerning responsibility for support of child; and made minor changes in style.

Source: Section 3-505, 1994 Uniform Adoption Act. The compiler has omitted the Commissioners' comment for Section 3-505 of the 1994 Uniform Adoption Act because of its lack of relavancy to the portions enacted in Montana.

42-2-619. Expediency.

Compiler's Comments

1999 Amendment: Chapter 257 near middle of second sentence before "adoption decree" deleted "interlocutory or final". Amendment effective April 5, 1999.

42-2-620. Finality.

Case Notes

Time Limit for Appeal of Termination of Parental Rights Running From Service of Notice of Entry of Judgment — Laches Inapplicable: The District Court determined that a mother abandoned her children and terminated the mother's parental rights; however, the mother was never served with notice of entry of judgment regarding the termination. The mother moved to vacate or void the order and requested a hearing on the termination, but the motion was denied. The state contended that further consideration of the issue was barred by this section or by laches. The Supreme Court disagreed that the mother's appeal was barred by this section because the statute does not alter the filing period for timely appeals but merely sets a 6-month time limit on all other challenges to orders terminating parental rights. Rather, former Rule 77(d), M.R.Civ.P. (now superseded), applied. The rule requires service of notice of entry of judgment, and former Rule 5, M.R.App.P. (now superseded), provided that the 60-day time limit for appeals did not apply until service of notice of entry of judgment, but the mother was never served. The equitable doctrine of laches also did not apply because the state failed to discharge its simple affirmative duty to notify the mother of entry of judgment. Thus, the mother's appeal was timely. In re T.H. & C.D.F., 2005 MT 237, 328 M 428, 121 P3d 541 (2005), clarifying In re P.D.L., 2004 MT 346, 324 M 327, 102 P3d 1225 (2004).

Motion for Relief From Termination of Parental Rights Filed Two Years After Termination Untimely as Matter of Law: Both parents were charged in Idaho with sexual abuse crimes against their children, but the parents eluded authorities for several years. P.D.L. was born while the parents were fugitives. Both parents were eventually captured and convicted, and the father was incarcerated for a 17-year term in Idaho. Following service of a petition in prison, the father's parental rights were terminated. More than 2 years later, the father filed a motion for relief from the termination order under former Rule 60(b), M.R.Civ.P. (now superseded), but the motion was denied. On appeal, the Supreme Court noted the finality provision in this section, which attempts to provide finality to parental rights termination proceedings so that a child may be safely adopted without the threat of the adoption being set aside at some future date. The termination order was immune from collateral attack 6 months after it was entered, and the father's motion for relief filed more than 2 years later was untimely as a matter of law. In re P.D.L., 2004 MT 346, 324 M 327, 102 P3d 1225 (2004).

Criteria for Intervention in Adoption Proceeding — Unfounded and Untimely Motion to Intervene Properly Denied: Couple A adopted a child through a judicial decree in the District Court of the Twenty-First Judicial District. Couple B also wanted to adopt the child and filed a motion, in the District Court of the Twelfth Judicial District where they lived, to intervene and set aside the final decree of adoption, despite the fact that some 6 months had passed since the final adoption decree was issued. Initially, neither District Court was aware of the competing adoption petitions. The Department of Public Health and Human Services had been reviewing both couples as potential adoptive resources at the same time and ultimately determined that because the child had formed a strong bond during placement with couple A for nearly 2 years, it would be in the child's best interests to be adopted by couple A. Couple B contended that the child was a member of their extended family and that the Department should have given them priority as adoptive parents. The Twenty-First District Court held that couple B had no standing to intervene as a matter of right pursuant to former Rule 24(a), M.R.Civ.P. (now superseded), and that permissive intervention under former Rule 24(b), M.R.Civ.P. (now superseded), was untimely and would undermine the purpose of adoption to the detriment of the child. Couple B's motion to set aside the final decree pursuant to former Rule 60(b), M.R.Civ.P. (now superseded), was also denied on grounds that as nonparties to couple A's adoption petition, couple B had no standing to make the motion and that, in any case, it was untimely because it was made more than 180 days after the final decree. Couple B appealed the denial of both motions, arguing first that they had a legal interest by virtue of the family placement preference in the Indian Child Welfare Act (ICWA) and legislative and Departmental policies favoring adoptive placement with extended family members. The Supreme Court noted that a mere claim of interest is insufficient to support intervention as a matter of right and that a party seeking intervention must make a prima facie showing of a direct, substantial, legally protectable interest in the proceedings. No such showing was made here because the child was not Indian and therefore not subject to the ICWA, nor did the relationship of second cousins meet the definition of extended family member. Couple B next argued that they should have been allowed to intervene under the permissive standard of former Rule 24(b), M.R.Civ.P., because the competing adoption petitions had common issues of law and fact. Couple B contended that their delay should be excused by their reliance on misrepresentations made by the Department. The Supreme Court agreed that the Department could have taken a more forthright approach and saved all the parties considerable time and expense, but couple B bore the responsibility for ensuring the timely filing of the motion to intervene. The Supreme Court noted that timeliness is a threshold issue when intervention is sought and that, although none of the factors are dispositive, most courts look to four factors in considering whether a motion to intervene is timely filed: (1) the length of time that the intervenor knew or should have known of its interest in the case before moving to intervene; (2) prejudice to the original parties, if intervention is granted, resulting from the intervenor's delay; (3) prejudice to the intervenor if the motion is denied; and (4) any unusual circumstances mitigating for or against a determination that the application is timely. The Supreme Court considered each factor in detail. Although the third factor weighed in favor of couple B, because denial of the motion to intervene effectively precluded any hope of their adoption of the child, the other factors weighed strongly against them. The District Court made a reasoned analysis when it determined that the motion to intervene was untimely and did not abuse its discretion in denying the motion. Last, because couple B did not address the threshold issues of former Rule 60(b), M.R.Civ.P., on appeal, the Supreme Court concluded that denial of the motion to set aside the final adoption decree on grounds of standing and timeliness was proper. In re Adoption of C.C.L.B., 2001 MT 66, 305 M 22, 22 P3d 646 (2001).

CHAPTER 3
REQUIREMENTS OF PARTIES IN ADOPTION

Chapter Compiler's Comments

1997 Statement of Intent: The statement of intent attached to Ch. 480, L. 1997, provided: "A statement of intent is required for this bill because the bill gives the department of public health and human services authority to adopt administrative rules. The rules must provide procedures for the putative father registry, including methods of notification, filing, and accessing information. The department shall adopt rules for licensing child-placing agencies. To the extent feasible, the rules should incorporate existing procedures. The needs of the child in the adoption proceeding must be the primary focus of the rules."

Severability: Section 172, Ch. 480, L. 1997, was a severability clause.

Applicability: Section 173, Ch. 480, L. 1997 provided: "(1) [Sections 1 through 156] [Title 42, chapters 1 through 7, and Title 52, chapter 8, part 1] apply to proceedings commenced on or after October 1, 1997.

(2) A petition for adoption filed prior to October 1, 1997, is governed by the law in effect at the time the petition was filed.

(3) The putative father registry requirements apply to children born on or after October 1, 1997."

Effective Date: Section 177, Ch. 480, L. 1997, provided: "(1) Except as provided in subsection (2), [this act] is effective October 1, 1997.

(2) [Sections 19 through 26, 28 through 38, 60, 65, 67, 68, and 75] [42-2-202 through 42-2-209, 42-2-214 through 42-2-218, 42-2-222 through 42-2-226, 42-2-230, 42-2-503, 42-2-604, 42-2-605, 42-2-606, and 42-2-611] are effective October 1, 1998."

Part 1
Duty of Placing Party to Disclose Information

42-3-101. Duty to disclose information — form — availability — filing.

Case Notes

DECISIONS AFTER 1997 GENERAL REVISION

Full and Accurate Disclosure of Adoption Information Required: The Jacksons' adoptive son required extensive medical and psychological therapy. The Jacksons sued the state, contending that the state had a legal duty to inform them of the boy's condition and of his parents' medical backgrounds and that failure to do so constituted negligent misrepresentation, negligent nondisclosure, negligence based on lack of informed consent, and negligent supervision. The state contended that the imposition of a common-law or statutory duty to disclose the background information would conflict with its duty to maintain confidentiality of the birth parents' medical records. The District Court dismissed the claims, concluding that the state owed the Jacksons no duty of care upon which the negligence claims could be premised. Citing the opinions of several courts of other states, the Supreme Court held that recognizing a cause of action for negligent misrepresentation in the adoption context would promote public policy and ensure that adoptive parents would assume parenting responsibilities in an informed manner. Anything less than the exercise of due care in the dissemination of information to prospective adoptive parents is unacceptable. Although a slight burden is imposed on the state in providing the information, that burden is justified in light of the compelling need for adoptive parents to receive all available information regarding a child who might soon be a permanent member of the family. Full disclosure of a child's medical and familial background is warranted not only to enable adoptive parents to obtain timely and appropriate medical care for the child but also to enable them to make an intelligent and informed decision to adopt. Summary judgment was reversed. (Note: See this section wherein the 1997 Legislature enacted a statutory requirement that social and medical histories of the birth families must be provided to a prospective adoptive parent.) Jackson v. St., 1998 MT 46, 287 M 473, 956 P2d 35, 55 St. Rep. 183 (1998).

Part 2
Requirements of Prospective Adoptive Parents

Part Case Notes

Motion to Set Aside Relinquishment and Consent to Adoption Properly Denied: The guardians of adopted children moved to set aside their relinquishment and consent to the adoption on the basis that the adoptive parents had provided a fraudulent preplacement evaluation that did not comply with the Montana Adoption Act. The District Court denied the motion, and the Supreme Court affirmed, concluding that because the guardians failed to establish fraud by clear and convincing evidence, no basis existed under 42-2-417 to set aside the relinquishment and consent to adoption. In re Adoption of S. R. T., 2011 MT 219, 362 Mont. 39, 260 P.3d 177.

42-3-202. Initiation of preplacement evaluation — who conducts evaluation — payment of fees.

Compiler's Comments

2001 Amendment: Chapter 311 in (1)(b) inserted reference to a licensed social worker; in (2) substituted "In a direct parental placement adoption, the preplacement evaluation must be conducted by either a licensed social worker or a licensed child-placing agency" for "The department may contract with a licensed social worker or a licensed child-placing agency to conduct the evaluation"; in (3) at end substituted "according to the provisions of this part" for "according to the department's or licensed child placing agency's standards for placement of a child"; and made minor changes in style. Amendment effective October 1, 2001.

42-3-203. Information to be reviewed in conducting preplacement evaluation.

Compiler's Comments

1999 Amendment: Chapter 257 at end of (1)(a) deleted "by any person over the age of 13 living in the prospective home"; near middle of (2)(a) after "give the" substituted "evaluator" for "department or agency"; in (2)(b) in first sentence near beginning after "study" substituted "may" for "must" and substituted "any person" for "each person over the age of 13", near middle of second sentence substituted "evaluator" for "agency or department", and at beginning of third sentence inserted "if applicable"; and made minor changes in style. Amendment effective April 5, 1999.

42-3-204. Contents of preplacement evaluation.

Official Comments

1994 Commissioners' Comment: Subsection (c) [sic] [(1)] lists the information that must be obtained. In addition to basic biographical data, the information sought focuses on items that may raise specific concerns about the individual's suitability to be an adoptive parent, especially items pertaining to drug or alcohol abuse, involvement in incidents of domestic violence or child abuse or neglect, or failure to support other children. Subsection (d) [sic] [not enacted in Montana] requires the individual to be fingerprinted in order to facilitate a criminal records check and subsection (e) [sic] [not enacted in Montana] requires the individual to furnish signed releases to enable the evaluator to obtain other information.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 6, Ch. 12, L. 2023. Amendment effective October 1, 2023.

Changes From 1994 Uniform Act: In (1) after "evaluation" inserted "report" and substituted "if available" for "about the individual being evaluated"; in (1)(g) inserted "or convicted of" and substituted "has been involved in a substantiated charge of child abuse or neglect or elder abuse or neglect" for "a violation of [the State's child protection statute]"; in (1)(j) substituted "child" for "minor"; and made minor changes in style.

Source: Section 2-203(d), 1994 Uniform Adoption Act.

42-3-205. Recommendation.

Official Comments

1994 Commissioners' Comment: This section establishes the minimum requirements for a favorable evaluation. It focuses on factors that may warrant a determination that an individual is not suitable to become an adoptive parent — specific concerns that pose significant risks of harm to the physical or psychological well-being of a minor. A finding of unsuitability has to be supported by a written explanation of precisely how each specific concern poses a risk of harm to the minor. For example, an individual should not be disqualified solely because of low income, or because he or she lives in a small house or apartment, unless the individual's financial status or residence is so inadequate for the needs of a child that it poses a threat to the child's well-being

These provisions are not intended to preclude an agency or an independent evaluator from asking additional questions intended to gauge an individual's capacity to adopt different kinds of children. Nor are evaluators or agencies precluded from offering pre-adoption counseling to prospective adoptive parents. This section should be read in conjunction with other provisions of the Act — e.g., Sections 1-102, 2-104, 2-206 [not enacted in Montana] — that are intended to protect individuals who seek to adopt from being unreasonably or categorically excluded from consideration.

Compiler's Comments

Changes From 1994 Uniform Act: In (1) substituted reference to 42-3-203 for reference to Section 2-203 of 1994 Uniform Adoption Act (not enacted in Montana); and made minor changes in style.

Source: Section 2-204, 1994 Uniform Adoption Act.

42-3-207. Action by department.

Official Comments

1994 Commissioners' Comment: This section requires the Department to take immediate action to protect a minor upon learning that the minor has been placed in a home with an individual who has received an evaluation with a finding of unsuitability that has not been reversed.

Compiler's Comments

Changes From 1994 Uniform Act: Near end substituted "make a determination of whether the department has authority pursuant to Title 41, chapter 3, to intervene" for "investigate the circumstances of the placement and may request that the individual return the minor to the custody of the person who placed the minor or to the department. If the individual refuses to return the minor, the department shall immediately commence an action or proceeding to remove the minor from the home of the individual pursuant to [the State's child protection statute] and, pending a hearing, the court shall make an appropriate order for the care and custody of the minor".

Source: Section 2-207, 1994 Uniform Adoption Act.

42-3-212. Court waiver for relatives.

Compiler's Comments

2003 Amendment: Chapter 504 near middle after "preplacement" inserted "and postplacement"; and deleted former second sentence that read: "A postplacement evaluation must be conducted during the pendency of a proceeding for adoption." Amendment effective October 1, 2003.

1999 Amendment: Chapter 257 at beginning of first sentence inserted "In a direct parental placement adoption, if the court is satisfied that adoption is in the best interests of the child". Amendment effective April 5, 1999.

42-3-213. Filing of evaluation in adoption proceedings.

Compiler's Comments

1999 Amendment: Chapter 257 in (1) and (2) after "evaluation" inserted "report". Amendment effective April 5, 1999.

Part 3

Requirements of Department or Licensed Child-Placing Agency

42-3-301. Requirement for preplacement evaluation.

Compiler's Comments

2001 Amendment: Chapter 311 in (1) at end substituted "part 2 of this chapter" for "42-3-202". Amendment effective October 1, 2001.

CHAPTER 4

PLACEMENTS FOR ADOPTION

Chapter Compiler's Comments

1997 Statement of Intent: The statement of intent attached to Ch. 480, L. 1997, provided: "A statement of intent is required for this bill because the bill gives the department of public health and human services authority to adopt administrative rules. The rules must provide procedures for the putative father registry, including methods of notification, filing, and accessing information. The department shall adopt rules for licensing child-placing agencies. To the extent feasible, the rules should incorporate existing procedures. The needs of the child in the adoption proceeding must be the primary focus of the rules."

Severability: Section 172, Ch. 480, L. 1997, was a severability clause.

Applicability: Section 173, Ch. 480, L. 1997 provided: "(1) [Sections 1 through 156] [Title 42, chapters 1 through 7, and Title 52, chapter 8, part 1] apply to proceedings commenced on or after October 1, 1997.

(2) A petition for adoption filed prior to October 1, 1997, is governed by the law in effect at the time the petition was filed.

(3) The putative father registry requirements apply to children born on or after October 1, 1997."

Effective Date: Section 177, Ch. 480, L. 1997, provided: "(1) Except as provided in subsection (2), [this act] is effective October 1, 1997.

(2) [Sections 19 through 26, 28 through 38, 60, 65, 67, 68, and 75] [42-2-202 through 42-2-209, 42-2-214 through 42-2-218, 42-2-222 through 42-2-226, 42-2-230, 42-2-503, 42-2-604, 42-2-605, 42-2-606, and 42-2-611] are effective October 1, 1998."

Part 1
Direct Parental Placements

42-4-102. Duties of placing parent.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 43, Ch. 716, L. 2023. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

2021 Amendment: Chapter 175 in (1)(a) substituted "adoptive decision support services" for "counseling"; and in (7) near beginning substituted "expenses for adoptive decision support services, postadoptive counseling, outpatient mental health services" for "counseling expenses". Amendment effective October 1, 2021.

Case Notes

DECISIONS AFTER 1997 GENERAL REVISION

Postadoption Visitation Agreement — District Court Responsibilities: The District Court did not err when it modified sua sponte the parties' postadoption visitation agreement to provide weekend visitation and weekly telephone contact with the birth mother because the modification was determined to be in the best interests of the child. The finding was supported by substantial evidence, and the court did not misapprehend the effect of the evidence. Adoptive parents do not have sole discretion in deciding whether a postadoption visitation agreement should be enforced. Rather, the adoptive parents' wishes are but one factor among many to be considered in determining the child's best interests under 40-4-212. Groves v. Clark, 1999 MT 117, 294 M 417, 982 P2d 446, 56 St. Rep. 490 (1999).

Sua Sponte Modification of Postadoption Visitation Agreement Within Discretion of District Court: The rule that in the context of separation agreements made between spouses, parties cannot make binding agreements concerning the support, custody, or visitation of children applies equally to postadoption agreements made between an adopted child's birth parents and adoptive parents. The best interests of the child are paramount, and sua sponte modification of an original visitation agreement in this case was within the discretion of the District Court after determining the best interests of the adopted child. Groves v. Clark, 1999 MT 117, 294 M 417, 982 P2d 446, 56 St. Rep. 490 (1999). See also In re Marriage of Mager, 241 M 78, 785 P2d 198, 47 St. Rep. 97 (1990), and In re Marriage of Widhalm/Miller, 279 M 97, 926 P2d 748, 53 St. Rep. 1067 (1996).

DECISIONS PRIOR TO 1997 GENERAL REVISION

Postadoption Visitation Agreement Between Natural Mother and Adoptive Parents — Responsibilities of District Court: Groves consented to the adoption of her child by the Clarks on the condition that the Clarks sign a visitation agreement allowing Groves to have specified contact with her daughter. After the document was signed and the adoption completed, the Clarks tried to terminate Groves' contact with her daughter. Groves brought an action for specific performance of the visitation agreement, but the District Court held that the agreement was void from its inception under 40-8-125 (now repealed). The Supreme Court reversed, holding that In re C.P., 221 M 180, 717 P2d 1093 (1986), was distinguishable and that the Legislature would not have enacted 40-8-136 (now repealed) if 40-8-125 (now repealed) terminated the interests of the natural parent altogether. The Supreme Court also noted that 40-8-136 (now repealed) also places a burden upon the adoptive parents and, in this case, upon the adoption agency that acted as Groves' agent, to make sure that the visitation agreement was filed in accordance with that statute. The Supreme Court also concluded that under 40-8-114 (now repealed), the District

Court has a responsibility to make sure that the enforcement is in the best interests of the child. Groves v. Clark, 277 M 179, 920 P2d 981, 53 St. Rep. 703 (1996).

Adoption Petition Not Brought in Bad Faith: The mother of a child petitioned to have her child adopted by her ex-husband. The child's father, also an ex-husband of the mother, had the petition dismissed because he had not voluntarily relinquished his parental rights. The biological father asked for sanctions against the mother and her attorney, arguing that the petition had been brought in bad faith and for an improper purpose. He argued that even a cursory reading of 40-8-109 (now repealed) would have shown that the petition could not be properly filed and that the action had only been undertaken to interfere with his visitation rights. The Supreme Court refused to impose sanctions, holding that to avoid sanctions under former Rule 11, M.R.Civ.P. (now superseded), it is not necessary that a party be correct in his view of the law, only that he make a good faith argument in support of his view. In re Adoption of R.D.T., 239 M 33, 778 P2d 416, 46 St. Rep. 1489 (1989).

42-4-103. Direct parental placement — information to be filed.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 44, Ch. 716, L. 2023. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

2021 Amendment: Chapter 175 in (1)(c) substituted "the adoptive decision support services report" for "the counseling report". Amendment effective October 1, 2021.

42-4-110. Duty to promptly petition.

Case Notes

Lack of "Venue Jurisdiction" — Petition Dismissed in Error: Shortly after her child was born in Montana, a mother signed an affidavit relinquishing her parental rights and signed a power of attorney allowing the petitioners to make parenting decisions in her stead. The petitioners moved with the child out of state and subsequently filed a consolidated and uncontested petition to terminate the mother's parental rights and to adopt the child in a Montana court. The District Court dismissed the petition because, it concluded, the court lacked "venue jurisdiction" because the child lived out of state. On appeal, the Supreme Court reversed and remanded, holding that the District Court had jurisdiction and that, moreover, 42-4-110 implies that a petition to terminate parental rights and a petition to adopt should be filed in the same District Court. In re Adoption of C.J.L., 2017 MT 19, 386 Mont. 218, 388 P.3d 951.

42-4-112. Period for postplacement supervision.

Compiler's Comments

2001 Amendment: Chapter 311 in (2) inserted reference to licensed social worker; and made minor changes in style. Amendment effective October 1, 2001.

42-4-115. Motion to enter adoption decree.

Compiler's Comments

Source: Sections 10 and 11, 1953 Uniform Adoption Act.

Part 2
Placements by Department or Licensed Child-Placing Agency

Part Case Notes

DECISIONS PRIOR TO 1997 GENERAL REVISION

Placement Not Prerequisite to Court Determination of Merits of Adoption Petition: Because placement of a child by the Department of Family Services (now Department of Public Health and Human Services), by a licensed child-placing agency, or by the child's parents is not a prerequisite to the filing of a petition for adoption, the District Court has authority to review the merits of a petition for adoption without evidence of placement. In re M.L.M., 278 M 505, 926 P2d 694, 53 St. Rep. 978 (1996).

Part Law Review Articles

Hand Rule, Negligence and Public Adoption Agencies, Oluwole, 32 U. Dayton L. Rev. 255 (2007).

Beyond Wrongful Adoption: Expanding Adoption Agency Liability to Include Duty to Investigate and a Duty to Warn, Emmaneel, 29 Golden Gate U. L. Rev. 181 (1999).

42-4-201. Factors to be considered — best interests of child.

Case Notes

DECISIONS PRIOR TO 1997 GENERAL REVISION

Agency's Right to Refuse Adoption Not Absolute — Jurisdiction: In cases in which agency consent is a prerequisite to adoption, the requirement of agency consent is merely an additional safeguard to the child's welfare and the District Court retains jurisdiction to review the agency's decision to determine whether it arbitrarily, capriciously, or unreasonably ignores the child's best interests. In re M.L.M., 278 M 505, 926 P2d 694, 53 St. Rep. 978 (1996), overruling Lewis v. Catholic Social Serv., 253 M 369, 833 P2d 1023 (1992), and In re F.H., 272 M 342, 901 P2d 96 (1995).

42-4-202. Parties to department or agency placement.

Commission Notes

See official comments for Title 42, ch. 2.

42-4-203. Duties of placing parent.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 45, Ch. 716, L. 2023. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

42-4-205. Waiting period following placement of child.

Compiler's Comments

Source: Section 10, 1953 Uniform Adoption Act, with changes.

42-4-209. Postplacement department or agency evaluation.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 46, Ch. 716, L. 2023. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

42-4-210. Consent to adoption.

Official Comment

See official comments for Title 42, ch. 2.

Compiler's Comments

Source: Sections 5 and 6, 1953 Uniform Adoption Act, with changes. See compiler's comments for Title 42, ch. 2.

42-4-211. Postadoptive counseling and support — intent.

Compiler's Comments

Preamble: The preamble attached to Ch. 151, L. 2009, provided: "WHEREAS, child-placing agencies that provide care and placement of children are in a unique position to provide care and support to a birth parent after relinquishment of a child, especially to parents of few means, which would be consistent with the agencies' ministry; and

WHEREAS, there are currently financial and other means of support for parents who choose to keep their children that are compelling parents of little means to keep their children; and

WHEREAS, the ability to provide similar forms of support to a parent who has chosen to relinquish a child in order to give the parent a chance to grieve and to assist the parent with counseling, temporary housing, mentoring services, job training, life skills development, budgeting and financial management, and educational opportunities will provide birth parents with another option that can help provide for their future after their children have been placed with adoptive families; and

WHEREAS, explicit authority for the program is necessary with the caveat that the program must be kept separate from any program for the placement of children and must be paid for by the agency with separate funds."

Effective Date: This section is effective October 1, 2009.

Part 3

Stepparent Adoption

Part Case Notes

Grandfather Considered "Stepparent" in Adoption Proceeding: Following an adoption proceeding in which the District Court granted a mother's and maternal grandfather's joint petition to terminate the father's parental rights and allow the grandfather to adopt the children, the father appealed, arguing that the grandfather was not a stepparent who may bring a petition for termination of parental rights in conjunction with a petition for adoption. Although the Supreme Court reversed and remanded the case back to the District Court on the basis that the father was not properly served by publication, the Supreme Court instructed the District Court that the petition could proceed if the District Court determines that there is good cause for the grandfather to be treated as a stepparent under 42-4-302 and that he meets the qualifications set forth in 42-1-106. In re A.M.S., 2016 MT 22, 382 Mont. 145, 364 P.3d 1261.

Part Collateral References

Adoption, forms, petition for stepparent adoption packet, https://courts.mt.gov/Forms/Adoption.

42-4-302. Standing to adopt stepchild.

Official Comments

1994 Commissioners' Comment: In addition to permitting individuals who are within the formal definition of "stepparent" to adopt a minor stepchild under this Article, Section 4-102 [42-4-302] allows an individual who is a de facto stepparent, but is not, or is no longer, married to the custodial parent, to adopt as if he or she were a de jure stepparent. To file a petition under this Article, the de facto stepparent or "second parent" has to have the consent of the court and the custodial parent, whose parental rights will not be terminated by an adoption under this Article. In addition, for the court to grant the petition, the other requirements of this Article have to be met, including the court's determination that the adoption is in the minor adoptee's best interests. See, e.g., Adoption of B.L.V.B., 628 A.2d 1271 (Vt. 1993) (de facto stepmother allowed to adopt her unmarried partner's biological children because it "serves no legitimate state interest" to deny the children "the security of a legally recognized relationship with their second parent"). See similar analysis in Matter of Evan, 153 Misc.2d 844, 583 N.Y.S.2d 997 (Surr. 1992).

If a stepchild's noncustodial parent refuses to consent to the proposed stepparent adoption or cannot be located, an adoption petition under this Article may be joined with a petition under Article 3, Part 5 [not enacted in Montana], to terminate the parent-child relationship with the noncustodial parent. In most cases, the termination petition will allege that the noncustodial parent has failed to support and visit or communicate with the child for at least six months before the stepparent files the adoption petition, Section 3-504(c)(2) [not enacted in Montana], or that, even if the noncustodial parent had a compelling reason for failing to pay support and visit in the past, he is unlikely to perform these duties in the future, Section 3-504(d)(2) [not enacted in Montana]. Of course, the stepparent and the custodial parent may also seek to prove any of the other grounds stated in Section 3-504 [not enacted in Montana] for terminating the noncustodial parent's rights.

Compiler's Comments

1999 Amendment: Chapter 257 in (1) substituted "child" for "stepchild"; and in (1)(a) near beginning before "legal" deleted "sole". Amendment effective April 5, 1999.

Changes From 1994 Uniform Act: After (1)(a) omitted "the spouse had joint legal custody of the child with the child's other parent and the child has resided primarily with the spouse and the stepparent during the 12 months next preceding the filing of the petition"; and made minor changes in style.

"This Article", referred to in the first paragraph of the Commissioners' comment, is Article 4 of the 1994 Act, composed of 13 separate sections, not all of which have been enacted in Montana.

"Article 3, Part 5", referred to in the second paragraph of the Commissioners' comment, is entitled "Petition to Terminate Relationship Between Parent and Child" and is composed of six sections, none of which have been enacted in Montana. However, sections somewhat similar to those in Article 3, Part 5, of the 1994 Act are found in Title 42, ch. 2, parts 5 and 6.

Source: Section 4-102, 1994 Uniform Adoption Act.

Case Notes

DECISIONS AFTER 1997 GENERAL REVISION

Grandfather Considered "Stepparent" in Adoption Proceeding: Following an adoption proceeding in which the District Court granted a mother's and maternal grandfather's joint petition to terminate the father's parental rights and allow the grandfather to adopt the children, the father appealed, arguing that the grandfather was not a stepparent who may bring a petition for termination of parental rights in conjunction with a petition for adoption. Although the Supreme Court reversed and remanded the case back to the District Court on the basis that the father was not properly served by publication, the Supreme Court instructed the District Court that the petition could proceed if the District Court determines that there is good cause for the grandfather to be treated as a stepparent under 42-4-302 and that he meets the qualifications set forth in 42-1-106. In re A.M.S., 2016 MT 22, 382 Mont. 145, 364 P.3d 1261.

Stepparent's Petition to Terminate Biological Parent's Parental Rights Granted Given Evidence of Abandonment: A custodial stepparent has standing to petition for termination of a noncustodial parent's parental rights. In this case, the custodial stepmother petitioned for and was granted termination of the noncustodial mother's rights in order to allow for adoption of the child by the stepmother. The mother appealed, but the Supreme Court affirmed. The District Court concluded that the mother abandoned the child and thus was an unfit parent. As evidence of abandonment, the court did not err in considering: (1) the mother's time in prison and residential drug treatment, during which she had no contact with the child; (2) during the mother's periods of absence, the mother's struggle with an abusive relationship, use of illegal drugs, and associations with known criminals; (3) the mother's failure to follow through on commitments to care for and visit the child; and (4) a lack of intent on the mother's part to resume care of the child in the future, regardless of any understanding that an initial parenting plan was temporary. Evidence of abandonment was substantial, and the District Court did not err in granting the petition to terminate the mother's parental rights. In re Adoption of K.P.M., 2009 MT 31, 349 M 170, 201 P3d 833 (2009).

DECISIONS PRIOR TO 1997 GENERAL REVISION

Rights and Obligations of Stepfather — Equitable Adoption Not Recognized: Pierce sought custody of his spouse's child in connection with a dissolution of marriage. Pierce never formally adopted the child, but argued that an equitable adoption existed giving him standing to seek custody. The court reaffirmed the law that equitable adoption is not recognized in Montana. To adopt a child, the correct statutory procedures must be followed, and followed rigorously. Pierce had no standing to contest the custody of the child, nor had he any obligation to that child. Pierce v. Pierce, 198 M 255, 645 P2d 1353, 39 St. Rep. 914 (1982).

42-4-303. Consent to adoption.

Compiler's Comments

1999 Amendment: Chapter 257 in (1) near middle before "parent" inserted "custodial" and at end deleted "or 42-4-305"; and made minor changes in style. Amendment effective April 5, 1999.

42-4-304. Consent to adoption — stepparent's spouse.

Official Comments

1994 Commissioners' Comment: The provisions in this and the next two sections pertaining to the consent of the stepchild's custodial parent (i.e., the stepparent's spouse) and the noncustodial parent are similar to the requirements for consent in a direct placement adoption, Article 2, Part 4 [not enacted in Montana], but are specifically tailored to the context of an adoption by a stepparent.

Compiler's Comments

1999 Amendment: Chapter 257 in (2)(a) after "custody of the" deleted "parent's"; and near middle of (2)(c)(iii) substituted "relinquishment" for "consent". Amendment effective April 5, 1999.

Changes From 1994 Uniform Act: In (1) substituted "signed in the presence of an individual authorized to take acknowledgments" for "signed or confirmed in the presence of an individual specified in Section 2-405" (not enacted in Montana); in (2) near beginning after "writing" omitted requirement that statement contain statements required in Section 2-406(a)(1) through (3) and (d)(3) through (6) of 1994 Uniform Adoption Act and may contain optional statements described in Section 2-406(f) (not enacted in Montana); in (2)(c)(ii) after "approved by the court" omitted "pursuant to Section 4-113" (not enacted in Montana) and at end omitted "the other parent remains liable for arrearages of child support unless released from that obligation by the parent executing the consent and by a government entity providing public assistance to the minor" and omitted final subsection that provided "A consent may not waive further notice of the proceedings for adoption of the minor by the stepparent"; and made minor changes in style.

The "next two sections" referred to in the 1994 Commissioners' comment are Sections 4-106, similar to 42-4-305 (now repealed), and 4-107. Section 4-107, specifying the form for a consent executed by other persons, has not been enacted in Montana.

Source: Section 4-105, 1994 Uniform Adoption Act.

42-4-309. Preplacement and postplacement evaluation period — waiver.

Compiler's Comments

1999 Amendment: Chapter 257 at beginning substituted "In a stepparent adoption, if the court is" for "If the child is a stepchild or a member of the extended family of the petitioner, the court may, if", near middle after "waive" inserted "the requirement of a preplacement evaluation", and near end substituted "evaluation and report" for "evaluation period and the postplacement evaluation". Amendment effective April 5, 1999.

42-4-310. Petition for adoption — notice — hearing.

Compiler's Comments

1999 Amendment: Chapter 257 near beginning substituted "shall obtain an order of termination of parental rights of the child's noncustodial parent prior to or contemporaneously with the petition to adopt. Any necessary consents must be filed with the" for "must file a" and after "adoption" deleted "any necessary consents, any required postplacement evaluation" and in second sentence inserted "stepparent shall"; and made minor changes in style. Amendment effective April 5, 1999.

Case Notes

Stepparent's Petition to Terminate Biological Parent's Parental Rights Granted Given Evidence of Abandonment: A custodial stepparent has standing to petition for termination of a noncustodial parent's parental rights. In this case, the custodial stepmother petitioned for and was granted termination of the noncustodial mother's rights in order to allow for adoption of the child by the stepmother. The mother appealed, but the Supreme Court affirmed. The District Court concluded that the mother abandoned the child and thus was an unfit parent. As evidence of abandonment, the court did not err in considering: (1) the mother's time in prison and residential drug treatment, during which she had no contact with the child; (2) during the mother's periods of absence, the mother's struggle with an abusive relationship, use of illegal drugs, and associations with known criminals; (3) the mother's failure to follow through on commitments to care for and visit the child; and (4) a lack of intent on the mother's part to resume care of the child in the future, regardless of any understanding that an initial parenting plan was temporary. Evidence of abandonment was substantial, and the District Court did not err in granting the petition to terminate the mother's parental rights. In re Adoption of K.P.M., 2009 MT 31, 349 M 170, 201 P3d 833 (2009).

42-4-311. Legal consequences of adoption of stepchild.

Official Comments

1994 Commissioners' Comment: Although the legal consequences of an adoption of a stepchild are generally the same as under Sections 1-104 through 1-106 [not enacted in Montana], this section provides that the rights and duties of the adoptive parent's spouse — i.e., the child's custodial parent — are not terminated by the adoption. The child remains in all respects the child of the adoptive parent's spouse, even if the spouse is deceased, and becomes in all respects the child of the adoptive stepparent. The adopted child, the custodial parent, and the adoptive parent have rights to inheritance and intestate succession by, through, and from each other.

By contrast, except for child support arrearages, the rights and duties of the child's former noncustodial parent are terminated, including the former parent's right to inheritance or intestate succession through or from the adopted child. Nonetheless, the adopted child and the child's descendants retain the right to inheritance or intestate succession through or from the former noncustodial parent. In this respect, the Act is consistent with the provisions of the Uniform Probate Code (UPC) [Title 72, ch. 1 through 5, and ch. 16, part 6] which apply to stepparent adoptions.

Compiler's Comments

Changes From 1994 Uniform Act: In (2)(b) substituted "child" for "minor adoptee", substituted "either" for "the", and after "either parent" omitted "who is the adoptive stepparent's spouse or deceased spouse"; and after (2)(c) omitted subsection that provided "or a court order or agreement for visitation or communication with a minor adoptee which is approved by the court pursuant to Section 4-113" (not enacted in Montana).

Source: Section 4-103, 1994 Uniform Adoption Act.

Part 4

Adoption of Adults and Emancipated Minors

42-4-405. Procedure.

Compiler's Comments

2021 Amendment: Chapter 175 in second sentence near beginning substituted "adoptive decision support services requirement" for "counseling requirement". Amendment effective October 1, 2021.

CHAPTER 5

LEGAL PROCEEDINGS

Chapter Compiler's Comments

1997 Statement of Intent: The statement of intent attached to Ch. 480, L. 1997, provided: "A statement of intent is required for this bill because the bill gives the department of public health and human services authority to adopt administrative rules. The rules must provide procedures for the putative father registry, including methods of notification, filing, and accessing information. The department shall adopt rules for licensing child-placing agencies. To the extent feasible, the rules should incorporate existing procedures. The needs of the child in the adoption proceeding must be the primary focus of the rules."

Severability: Section 172, Ch. 480, L. 1997, was a severability clause.

Applicability: Section 173, Ch. 480, L. 1997 provided: "(1) [Sections 1 through 156] [Title 42, chapters 1 through 7, and Title 52, chapter 8, part 1] apply to proceedings commenced on or after October 1, 1997.

(2) A petition for adoption filed prior to October 1, 1997, is governed by the law in effect at the time the petition was filed.

(3) The putative father registry requirements apply to children born on or after October 1, 1997."

Effective Date: Section 177, Ch. 480, L. 1997, provided: "(1) Except as provided in subsection (2), [this act] is effective October 1, 1997.

(2) [Sections 19 through 26, 28 through 38, 60, 65, 67, 68, and 75] [42-2-202 through 42-2-209, 42-2-214 through 42-2-218, 42-2-222 through 42-2-226, 42-2-230, 42-2-503, 42-2-604, 42-2-605, 42-2-606, and 42-2-611] are effective October 1, 1998."

Part 1

Dispositional Hearing and Adoption Decree

42-5-101. Petition for adoption.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 47, Ch. 716, L. 2023. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

2001 Amendment: Chapter 311 in (1) substituted "verified" for "notarized by the petitioners"; inserted (3)(c) relating to the child's guardian ad litem; inserted (4) relating to the Montana Rules of Civil Procedure; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 257 in (1) after "adoption" deleted "must be filed in triplicate"; in (2)(a) substituted "42-2-301" for "42-4-405 and 42-5-101 through 42-5-109"; and made minor changes in style. Amendment effective April 5, 1999.

Source: Section 8, 1953 Uniform Adoption Act, with changes.

Case Notes

DECISIONS AFTER 1997 GENERAL REVISION

Criteria for Intervention in Adoption Proceeding — Unfounded and Untimely Motion to Intervene Properly Denied: Couple A adopted a child through a judicial decree in the District Court of the Twenty-First Judicial District. Couple B also wanted to adopt the child and filed a motion, in the District Court of the Twelfth Judicial District where they lived, to intervene and set aside the final decree of adoption, despite the fact that some 6 months had passed since the final adoption decree was issued. Initially, neither District Court was aware of the competing adoption petitions. The Department of Public Health and Human Services had been reviewing both couples as potential adoptive resources at the same time and ultimately determined that because the child had formed a strong bond during placement with couple A for nearly 2 years, it would be in the child's best interests to be adopted by couple A. Couple B contended that the child was a member of their extended family and that the Department should have given them priority as adoptive parents. The Twenty-First District Court held that couple B had no standing to intervene as a matter of right pursuant to former Rule 24(a), M.R.Civ.P. (now superseded), and that permissive intervention under former Rule 24(b), M.R.Civ.P. (now superseded), was untimely and would undermine the purpose of adoption to the detriment of the child. Couple B's motion to set aside the final decree pursuant to former Rule 60(b), M.R.Civ.P. (now superseded), was also denied on grounds that as nonparties to couple A's adoption petition, couple B had no standing to make the motion and that, in any case, it was untimely because it was made more than 180 days after the final decree. Couple B appealed the denial of both motions, arguing first that they had a legal interest by virtue of the family placement preference in the Indian Child Welfare Act (ICWA) and legislative and Departmental policies favoring adoptive placement with extended family members. The Supreme Court noted that a mere claim of interest is insufficient to support intervention as a matter of right and that a party seeking intervention must make a prima facie showing of a direct, substantial, legally protectable interest in the proceedings. No such showing was made here because the child was not Indian and therefore not subject to the ICWA, nor did the relationship of second cousins meet the definition of extended family member. Couple B next argued that they should have been allowed to intervene under the permissive standard of former Rule 24(b), M.R.Civ.P., because the competing adoption petitions had common issues of law and fact. Couple B contended that their delay should be excused by their reliance on misrepresentations made by the Department. The Supreme Court agreed that the Department could have taken a more forthright approach and saved all the parties considerable time and expense, but couple B bore the responsibility for ensuring the timely filing of the motion to intervene. The Supreme Court noted that timeliness is a threshold issue when intervention is sought and that, although none of the factors are dispositive, most courts look to four factors in considering whether a motion to intervene is timely filed: (1) the length of time that the intervenor knew or should have known of its interest in the case before moving to intervene; (2) prejudice to the original parties, if intervention is granted, resulting from the intervenor's delay; (3) prejudice to the intervenor if the motion is denied; and (4) any unusual circumstances mitigating for or against a determination that the application is timely. The Supreme Court considered each factor in detail. Although the third factor weighed in favor of couple B, because denial of the motion to intervene effectively precluded any hope of their adoption of the child, the other factors weighed strongly against them. The District Court made a reasoned analysis when it determined that the motion to intervene was untimely and did not abuse its discretion in denying the motion. Last, because couple B did not address the threshold issues of former Rule 60(b), M.R.Civ.P., on appeal, the Supreme Court concluded that denial of the motion to set aside the final adoption decree on grounds of standing and timeliness was proper. In re Adoption of C.C.L.B., 2001 MT 66, 305 M 22, 22 P3d 646 (2001).

DECISIONS PRIOR TO 1997 GENERAL REVISION

Right to Intervene in Adoption of Indian Child — State Commitment to Indian Child Welfare Act: Prior to birth, Nellie Silk, paternal aunt of M.E.M., expressed an interest in caring for the child because she was aware of the parents' problems with parenting; however, after the child was born he was placed in foster care by the Hill County Department of Social and Rehabilitation Services (SRS). Upon learning of the placement, Silk wrote to SRS requesting custody. SRS responded that placement with Silk would be inappropriate because of SRS efforts to reintegrate the family, but that Silk would be considered if adoption were to occur. After parental rights were terminated (see In re M.E.M., 209 M 192, 679 P2d 1241, 41 St. Rep. 636 (1984)), Silk was not informed of the proceedings, of M.E.M.'s availability for adoption, or of M.E.M.'s preadoptive placement with a non-Indian family. Silk's subsequent petition for adoption and motion to intervene were denied by the District Court. On appeal, the Supreme Court found that Silk had an interest in adoption stemming from the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901, et seq., and that the state had a strong and independent commitment to the principles embodied in the ICWA. Silk also had a right to intervene under former Rule 24(a), M.R.Civ.P. (now superseded), and although the District Court had ruled that her motion was not timely, the Supreme Court held that the motion must be granted in light of the fact that she was kept in ignorance and could not have been more diligent or earlier in her petition or motion. In re M.E.M., 223 M 234, 725 P2d 212, 43 St. Rep. 1684 (1986). See also In re K.H. & K.L.E., 1999 MT 128, 294 M 466, 981 P2d 1190, 56 St. Rep. 515 (1999).

Competing Petitions for Adoption: The court did not abuse its discretion by delaying determination of a jurisdictionally perfected adoption petition ready for hearing to consider subsequent petitions since the court cannot be compelled to fragment the case because of different filings and readiness for hearing of competing petitions. The best interest of the child is the paramount consideration. In re Adoption of Redcrow, 172 M 366, 563 P2d 1121 (1977).

42-5-102. Time for action on petition for adoption — waiver.

Compiler's Comments

Source: Section 11, 1953 Uniform Adoption Act, with changes.

42-5-103. Notice of hearing.

Compiler's Comments

2001 Amendment: Chapter 311 inserted (1)(e) relating to the child's guardian ad litem; deleted former (3) that read: "(3) The notice of hearing must be served in a manner appropriate under the Montana Rules of Civil Procedure"; and made minor changes in style. Amendment effective October 1, 2001.

Source: Section 11, 1953 Uniform Adoption Act, with changes.

Case Notes

DECISIONS PRIOR TO 1997 GENERAL REVISION

Invalid Adoption Decree: An adoption decree was invalid for lack of notice to the natural parents and the absence of consent by abandonment since only 24 days elapsed from birth to filing of the adoption petition. That being so, laches and estoppel could not save the nonexistent decree but the best interests of the child justified a permanent custody award to the defendants. In re Adoption of Hall, 173 M 142, 566 P2d 401 (1977).

Service of Process — Waiver: No service of process need be made on parents who have abandoned their children, failed to support them, or lost them to the custody of state agencies through neglect or cruelty. In re Adoption of Conley v. Walden, 171 M 58, 555 P2d 960 (1976).

42-5-104. Content of notice.

Official Comments

1994 Commissioners' Comment: Unless confidentiality has been waived by the petitioner or others named in the petition, pseudonyms should be used in the notice to protect the requested privacy of the individuals involved. The notice must include a conspicuous statement of the method of responding and the consequences of failure to respond.

Compiler's Comments

Changes From 1994 Uniform Act: At beginning before "The notice" omitted "A notice required by Section 3-401 must use a pseudonym for a petitioner or any individual named in the petition for adoption who has not waived confidentiality and"; in (4) substituted "attorney" for "lawyer"; in (5) before "statement" omitted "conspicuous" and near middle after "the notice" omitted "of the proceeding for adoption"; and at end omitted "(6) any statement required by [other applicable law or rule]".

Source: Section 3-402, 1994 Uniform Adoption Act.

42-5-105. Hearing on petition for adoption.

Compiler's Comments

Source: Section 11, 1953 Uniform Adoption Act, with changes.

42-5-107. Best interests of child.

Compiler's Comments

2023 Amendment: See 2023 Session Law for amendment made by sec. 48, Ch. 716, L. 2023. Amendment effective July 1, 2023, and terminates June 30, 2025.

Preamble: The preamble attached to Ch. 716, L. 2023, provided: "WHEREAS, there is, at the present time, a court case before the United States Supreme Court known as Haaland v. Brackeen, No. 21-376, that has the potential to overturn or modify the Indian Child Welfare Act in its current form, and the Legislature seeks to provide guidance for Indian child protection cases in the interim as this case is decided. The Legislature does not expect this to be the final word on how we deal with Indian child welfare issues or how we seek to provide for all of Montana's children within the child protection system."

Case Notes

DECISIONS AFTER 1997 GENERAL REVISION

Criteria for Intervention in Adoption Proceeding — Unfounded and Untimely Motion to Intervene Properly Denied: Couple A adopted a child through a judicial decree in the District Court of the Twenty-First Judicial District. Couple B also wanted to adopt the child and filed a motion, in the District Court of the Twelfth Judicial District where they lived, to intervene and set aside the final decree of adoption, despite the fact that some 6 months had passed since the final adoption decree was issued. Initially, neither District Court was aware of the competing adoption petitions. The Department of Public Health and Human Services had been reviewing both couples as potential adoptive resources at the same time and ultimately determined that because the child had formed a strong bond during placement with couple A for nearly 2 years, it would be in the child's best interests to be adopted by couple A. Couple B contended that the child was a member of their extended family and that the Department should have given them priority as adoptive parents. The Twenty-First District Court held that couple B had no standing to intervene as a matter of right pursuant to former Rule 24(a), M.R.Civ.P. (now superseded), and that permissive intervention under former Rule 24(b), M.R.Civ.P. (now superseded), was untimely and would undermine the purpose of adoption to the detriment of the child. Couple B's motion to set aside the final decree pursuant to former Rule 60(b), M.R.Civ.P. (now superseded), was also denied on grounds that as nonparties to couple A's adoption petition, couple B had no standing to make the motion and that, in any case, it was untimely because it was made more than 180 days after the final decree. Couple B appealed the denial of both motions, arguing first that they had a legal interest by virtue of the family placement preference in the Indian Child Welfare Act (ICWA) and legislative and Departmental policies favoring adoptive placement with extended family members. The Supreme Court noted that a mere claim of interest is insufficient to support intervention as a matter of right and that a party seeking intervention must make a prima facie showing of a direct, substantial, legally protectable interest in the proceedings. No such showing was made here because the child was not Indian and therefore not subject to the ICWA, nor did the relationship of second cousins meet the definition of extended family member. Couple B next argued that they should have been allowed to intervene under the permissive standard of former Rule 24(b), M.R.Civ.P., because the competing adoption petitions had common issues of law and fact. Couple B contended that their delay should be excused by their reliance on misrepresentations made by the Department. The Supreme Court agreed that the Department could have taken a more forthright approach and saved all the parties considerable time and expense, but couple B bore the responsibility for ensuring the timely filing of the motion to intervene. The Supreme Court noted that timeliness is a threshold issue when intervention is sought and that, although none of the factors are dispositive, most courts look to four factors in considering whether a motion to intervene is timely filed: (1) the length of time that the intervenor knew or should have known of its interest in the case before moving to intervene; (2) prejudice to the original parties, if intervention is granted, resulting from the intervenor's delay; (3) prejudice to the intervenor if the motion is denied; and (4) any unusual circumstances mitigating for or against a determination that the application is timely. The Supreme Court considered each factor in detail. Although the third factor weighed in favor of couple B, because denial of the motion to intervene effectively precluded any hope of their adoption of the child, the other factors weighed strongly against them. The District Court made a reasoned analysis when it determined that the motion to intervene was untimely and did not abuse its discretion in denying the motion. Last, because couple B did not address the threshold issues of former Rule 60(b), M.R.Civ.P., on appeal, the Supreme Court concluded that denial of the motion to set aside the final adoption decree on grounds of standing and timeliness was proper. In re Adoption of C.C.L.B., 2001 MT 66, 305 M 22, 22 P3d 646 (2001).

DECISIONS PRIOR TO 1997 GENERAL REVISION

Elements of Parent-Child Relationship in Evaluation of Best Interest of Child: A natural parent's rights cannot be terminated under 40-8-111 (now repealed) independent of the determination that adoption is appropriate. Adoption is not appropriate unless it is found to be in the child's best interest. In evaluating the child's best interest, the court should consider benefits of the child's relationship with the natural parent in addition to the benefits derived from financial support. In re Adoption of V.R.O. & V.N.O., 250 M 517, 822 P2d 83, 48 St. Rep. 946 (1991).

Best Interests of Child: If the statutory requirements for consent to adoption are met, the best interests of the child become the paramount consideration. In re Adoption of S.T.V., 226 M 18, 733 P2d 841, 44 St. Rep. 425 (1987), followed in In re Adoption of V.R.O. & V.N.O., 250 M 517, 822 P2d 83, 48 St. Rep. 946 (1991).

42-5-108. Removal of child from state.

Compiler's Comments

Changes From 1994 Uniform Act: Near middle of introduction substituted "child" for "minor adoptee" and after "from the state" omitted "in which the petitioner resides"; in (2) inserted "the department or"; and made minor changes in style.

Source: Section 3-205, 1994 Uniform Adoption Act.

42-5-109. Decree of adoption.

Compiler's Comments

1999 Amendment: Chapter 257 at beginning of (10) substituted "if known, whether either birth parent objects" for "whether the birth mother objects". Amendment effective April 5, 1999.

Part 2
Legal Effect

42-5-202. Effect of decree.

Compiler's Comments

1999 Amendment: Chapter 257 near middle of (2) substituted "if it is known that either birth parent objects" for "as to the birth mother's consent"; and made minor changes in style. Amendment effective April 5, 1999.

Case Notes

DECISIONS PRIOR TO 1997 GENERAL REVISION

Postadoption Visitation Agreement Between Natural Mother and Adoptive Parents — Responsibilities of District Court: Groves consented to the adoption of her child by the Clarks on the condition that the Clarks sign a visitation agreement allowing Groves to have specified contact with her daughter. After the document was signed and the adoption completed, the Clarks tried to terminate Groves' contact with her daughter. Groves brought an action for specific performance of the visitation agreement, but the District Court held that the agreement was void from its inception under 40-8-125 (now repealed). The Supreme Court reversed, holding that In re C.P., 221 M 180, 717 P2d 1093 (1986), was distinguishable and that the Legislature would not have enacted 40-8-136 (now repealed) if 40-8-125 (now repealed) terminated the interests of the natural parent altogether. The Supreme Court also noted that 40-8-136 (now repealed) also places a burden upon the adoptive parents and, in this case, upon the adoption agency that acted as Groves' agent, to make sure that the visitation agreement was filed in accordance with that statute. The Supreme Court also concluded that under 40-8-114 (now repealed), the District Court has a responsibility to make sure that the enforcement is in the best interests of the child. Groves v. Clark, 277 M 179, 920 P2d 981, 53 St. Rep. 703 (1996).

Adoption by Stepparent — No Mandatory Termination of Grandparents' Visitation: There is no clear legislative intent or public policy that mandates termination of visitation for natural grandparents when a grandchild is adopted by a stepparent. Kanvick v. Reilly, 233 M 324, 760 P2d 743, 45 St. Rep. 1524 (1988).

Termination of Parental Rights While Maintaining Possibility of Parental Contact — Adoption Exception: There is no apparent conflict in terminating parental rights while simultaneously maintaining the possibility of parental contact. It was within the trial judge's discretion to terminate the mother's parental rights, due to her recurring mental problems, while allowing contact with the children if the Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) determined it was in the children's best interests, since the children had a psychological attachment to their mother. However, when parental rights are terminated, continuing contact is allowable only in exceptional cases. In the event of adoption, continuing contact cannot be court-ordered even with Department approval. In re Declaring V.B., T.B., D.B., & B.B. Youths in Need of Care, 229 M 133, 744 P2d 1248, 44 St. Rep. 1838 (1987).

Parents to Have No Visitation Rights After Termination of Parental Rights Proceeding: Neither 40-8-125 (now repealed) nor 41-3-611 provides for a retention of visitation rights by the natural parent in the event of termination of parental rights and later adoption. In re C.P., 221 M 180, 717 P2d 1093, 43 St. Rep. 728 (1986).

Alternative Methods of Inheritance: Where claimant sought distribution of decedent's estate, claiming an acknowledgment in writing as required by section 91-404, R.C.M. 1947 (now repealed), and an adoption as provided under section 61-136, R.C.M. 1947 (now repealed), and offered proof of her right to inherit under both statutes, the claimant was not precluded from prevailing on the ground that she availed herself of both statutes and that they were alternate methods by which a person may become an heir. In re Glick's Estate, 136 M 176, 346 P2d 987 (1959).

Effect of Subsequent Will's Definition of "Issue" on Earlier Trust: Where testatrix included adopted grandchild in her will and therein expressly defined "issue" to include adopted children, this indicated clear intent to include adopted grandchild as "issue" in trust instrument created earlier by testatrix. Holter v. First Nat'l Bank & Trust Co. of Helena, 135 M 27, 336 P2d 701 (1959).

Adopted Child's Right to Inherit From Natural Parent Under Former Law: Adoption of child did not destroy his status as one of the issue of his natural ancestors, nor did adopted child lose his right to inherit from his natural parent. In re Kay's Estate, 127 M 172, 260 P2d 391 (1953).

Stranger Estopped to Collaterally Attack Adoption: Where all parties to adoption proceeding for many years considered it valid and acted on belief that valid adoption had taken place, evidence of such fact was properly admitted on collateral attack by stranger to proceedings who sought to revoke letters of administration granted to deceased's adopted son, and a party thereto or one claiming under him was estopped from attacking the order collaterally some 30 years after it was made. In re Hoermann's Estate, 108 M 386, 91 P2d 394 (1939).

Inheritance Through Adoptive Parents: As against collateral heirs, an adopted child, in absence of a will, succeeds to all the estate of the person adopting. In re Pepin's Estate, 53 M 240, 163 P 104 (1917).

Law Review Articles

Inheritance Rights of Adopted Children, Holland, 14 Mont. L. Rev. 105 (1953).

42-5-205. Foreign adoption decrees.

Case Notes

DECISIONS PRIOR TO 1997 GENERAL REVISION

Best Interests Control: Where Missouri court with custody of children granted consent for their adoption, entry of adoption decree rendered that consent irrevocable, absent finding that best interests of children would be served by allowing revocation of consent. In re Adoption of Conley v. Walden, 171 M 58, 555 P2d 960 (1976).

Part 3
Visitation and Enforceability of Other Agreements

Part Case Notes

DECISIONS PRIOR TO 1997 GENERAL REVISION

Postadoption Visitation Agreement Between Natural Mother and Adoptive Parents — Responsibilities of District Court: Groves consented to the adoption of her child by the Clarks on the condition that the Clarks sign a visitation agreement allowing Groves to have specified contact with her daughter. After the document was signed and the adoption completed, the Clarks tried to terminate Groves' contact with her daughter. Groves brought an action for specific performance of the visitation agreement, but the District Court held that the agreement was void from its inception under 40-8-125 (now repealed). The Supreme Court reversed, holding that In re C.P., 221 M 180, 717 P2d 1093 (1986), was distinguishable and that the Legislature would not have enacted 40-8-136 (now repealed) if 40-8-125 (now repealed) terminated the interests of the natural parent altogether. The Supreme Court also noted that 40-8-136 (now repealed) also places a burden upon the adoptive parents and, in this case, upon the adoption agency that acted as Groves' agent, to make sure that the visitation agreement was filed in accordance with that statute. The Supreme Court also concluded that under 40-8-114 (now repealed), the District Court has a responsibility to make sure that the enforcement is in the best interests of the child. Groves v. Clark, 277 M 179, 920 P2d 981, 53 St. Rep. 703 (1996).

Adoption by Stepparent — No Mandatory Termination of Grandparents' Visitation: There is no clear legislative intent or public policy that mandates termination of visitation for natural grandparents when a grandchild is adopted by a stepparent. Kanvick v. Reilly, 233 M 324, 760 P2d 743, 45 St. Rep. 1524 (1988).

Parents to Have No Visitation Rights After Termination of Parental Rights Proceeding: Neither 40-8-125 (now repealed) nor 41-3-611 provides for a retention of visitation rights by the natural parent in the event of termination of parental rights and later adoption. In re C.P., 221 M 180, 717 P2d 1093, 43 St. Rep. 728 (1986).

CHAPTER 6
RECORDS

Chapter Compiler's Comments

1997 Statement of Intent: The statement of intent attached to Ch. 480, L. 1997, provided: "A statement of intent is required for this bill because the bill gives the department of public health and human services authority to adopt administrative rules. The rules must provide procedures for the putative father registry, including methods of notification, filing, and accessing information. The department shall adopt rules for licensing child-placing agencies. To the extent feasible, the rules should incorporate existing procedures. The needs of the child in the adoption proceeding must be the primary focus of the rules."

Severability: Section 172, Ch. 480, L. 1997, was a severability clause.

Applicability: Section 173, Ch. 480, L. 1997 provided: "(1) [Sections 1 through 156] [Title 42, chapters 1 through 7, and Title 52, chapter 8, part 1] apply to proceedings commenced on or after October 1, 1997.

(2) A petition for adoption filed prior to October 1, 1997, is governed by the law in effect at the time the petition was filed.

(3) The putative father registry requirements apply to children born on or after October 1, 1997."

Effective Date: Section 177, Ch. 480, L. 1997, provided: "(1) Except as provided in subsection (2), [this act] is effective October 1, 1997.

(2) [Sections 19 through 26, 28 through 38, 60, 65, 67, 68, and 75] [42-2-202 through 42-2-209, 42-2-214 through 42-2-218, 42-2-222 through 42-2-226, 42-2-230, 42-2-503, 42-2-604, 42-2-605, 42-2-606, and 42-2-611] are effective October 1, 1998."

Chapter Collateral References

The Adoption and Safe Families Act of 1997, 42 U.S.C.A. § 670, et seq.

Part 1
Confidential Intermediaries

42-6-102. Disclosure of records — nonidentifying and identifying information — consensual release.

Compiler's Comments

2015 Amendment: Chapter 162 inserted (1)(e) concerning original birth certificate; and made minor changes in style. Amendment effective October 1, 2015.

2005 Amendment: Chapter 382 inserted (1)(d) authorizing the disclosure of identifying information; and made minor changes in style. Amendment effective April 25, 2005.

2003 Amendment: Chapter 504 inserted (1)(c) concerning identifying information; and made minor changes in style. Amendment effective October 1, 2003.

42-6-109. Release of original birth certificate — certificate of adoption.

Compiler's Comments

2015 Amendment: Chapter 162 in (1) in introductory clause at beginning deleted "For a person adopted on or before July 1, 1967" and near end after "certificate" deleted "upon the written request"; inserted (1)(a) through (1)(c) concerning furnishment of original birth certificate under certain circumstances; deleted former (2) and (3) that read: "(2) For a person adopted between July 1, 1967, and September 30, 1997, in addition to any copy of an adoptee's original birth certificate authorized for release by a court order issued pursuant to 50-15-121 or 50-15-122, the department shall furnish a copy of the original birth certificate upon a court order.

(3) For a person adopted on or after October 1, 1997, in addition to any copy of an adoptee's original birth certificate authorized for release by a court order issued pursuant to 50-15-121 or 50-15-122, the department shall furnish a copy of the original birth certificate upon:

(a) the written request of an adoptee who has attained 18 years of age unless the birth parent has requested in writing that the original birth certificate not be automatically released; or

(b) a court order"; in (2) at beginning deleted "For a person adopted on or after October 1, 1997, and subject to subsection (5)"; in (3) inserted last sentence concerning change of request; and made minor changes in style. Amendment effective October 1, 2015.

2003 Amendment: Chapter 504 inserted (6) concerning release of adoptee's original birth certificate for tribal enrollment. Amendment effective October 1, 2003.

CHAPTER 7
FEES AND PROHIBITED ACTIVITIES RELATED TO ADOPTION

Chapter Compiler's Comments

1997 Statement of Intent: The statement of intent attached to Ch. 480, L. 1997, provided: "A statement of intent is required for this bill because the bill gives the department of public health and human services authority to adopt administrative rules. The rules must provide procedures for the putative father registry, including methods of notification, filing, and accessing information. The department shall adopt rules for licensing child-placing agencies. To the extent feasible, the rules should incorporate existing procedures. The needs of the child in the adoption proceeding must be the primary focus of the rules."

Severability: Section 172, Ch. 480, L. 1997, was a severability clause.

Applicability: Section 173, Ch. 480, L. 1997 provided: "(1) [Sections 1 through 156] [Title 42, chapters 1 through 7, and Title 52, chapter 8, part 1] apply to proceedings commenced on or after October 1, 1997.

(2) A petition for adoption filed prior to October 1, 1997, is governed by the law in effect at the time the petition was filed.

(3) The putative father registry requirements apply to children born on or after October 1, 1997."

Effective Date: Section 177, Ch. 480, L. 1997, provided: "(1) Except as provided in subsection (2), [this act] is effective October 1, 1997.

(2) [Sections 19 through 26, 28 through 38, 60, 65, 67, 68, and 75] [42-2-202 through 42-2-209, 42-2-214 through 42-2-218, 42-2-222 through 42-2-226, 42-2-230, 42-2-503, 42-2-604, 42-2-605, 42-2-606, and 42-2-611] are effective October 1, 1998."

Part 1
General Fees and Activities

42-7-101. Fees related to placement for adoption by parent.

Compiler's Comments

2021 Amendment: Chapter 175 in (1)(c) at end inserted "including cost-sharing amounts for medically necessary prenatal and postnatal outpatient mental health services"; and made minor changes in style. Amendment effective October 1, 2021.

42-7-102. Limitations on payment of certain fees.

Compiler's Comments

2021 Amendment: Chapter 175 in (1) at end substituted "a combined maximum of 10 hours of adoptive decision support services provided pursuant to 42-2-409 and postadoptive counseling provided pursuant to 42-4-211" for "a maximum of 10 hours of counseling"; inserted (2) allowing payment by a prospective adoptive parent of cost-sharing expenses for prenatal or postnatal outpatient mental health services for a birth mother and providing limits on the expenses; and made minor changes in style. Amendment effective October 1, 2021.

42-7-105. Prohibited activities — violations — penalties.

Compiler's Comments

2021 Amendment: Chapter 528 in (1) in introductory clause after "department" inserted "an attorney or health care provider acting under 52-8-103(2)". Amendment effective May 14, 2021.

2009 Amendment: Chapter 151 inserted (5) concerning postadoptive counseling and support program; and made minor changes in style. Amendment effective October 1, 2009.

Preamble: The preamble attached to Ch. 151, L. 2009, provided: "WHEREAS, child-placing agencies that provide care and placement of children are in a unique position to provide care and support to a birth parent after relinquishment of a child, especially to parents of few means, which would be consistent with the agencies' ministry; and

WHEREAS, there are currently financial and other means of support for parents who choose to keep their children that are compelling parents of little means to keep their children; and

WHEREAS, the ability to provide similar forms of support to a parent who has chosen to relinquish a child in order to give the parent a chance to grieve and to assist the parent with counseling, temporary housing, mentoring services, job training, life skills development, budgeting and financial management, and educational opportunities will provide birth parents with another option that can help provide for their future after their children have been placed with adoptive families; and

WHEREAS, explicit authority for the program is necessary with the caveat that the program must be kept separate from any program for the placement of children and must be paid for by the agency with separate funds."

CHAPTER 10
SUBSIDIZED ADOPTIONS

Chapter Compiler's Comments

Severability Clause: Section 9, Ch. 434, L. 1977, was a severability clause.

Chapter Administrative Rules

Title 37, chapter 52, subchapter 2, ARM Subsidized adoption.

Part 1
Procedures

42-10-101. Short title.

Compiler's Comments

2003 Amendment: Chapter 114 substituted "Sections 42-10-101 through 42-10-109" for "This part". Amendment effective October 1, 2003.

42-10-102. Purpose.

Compiler's Comments

1999 Amendment: Chapter 21 in two places substituted "with special needs" for references to children who are hard to place. Amendment effective October 1, 1999.

42-10-103. Definitions.

Compiler's Comments

1999 Amendment: Chapter 21 inserted definition of child with special needs and deleted definition of hard-to-place child that read: ""Hard-to-place child" means a minor, as defined by 41-1-101, who is a dependent of a public or voluntary licensed child placing agency, legally free for adoption, and is not likely to be adopted because of:

(a) physical or mental disease or disability;

(b) recognized high risk of physical or mental disease or disability; or

(c) sibling relationship to another child who is eligible for adoption"; and made minor changes in style. Amendment effective October 1, 1999.

1995 Amendment: Chapter 546 in definition of Department substituted "department of public health and human services provided for in 2-15-2201" for "department of family services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1987 Amendment: Substituted "department of family services" for "department of social and rehabilitation services".

42-10-104. Power and duties of department.

Administrative Rules

Title 37, chapter 5, subchapter 1, ARM Applicable hearing procedures.

42-10-105. Records to be confidential.

Compiler's Comments

1997 Amendment: Chapter 480 at end substituted "42-6-101" for "40-8-126".

Severability: Section 172, Ch. 480, L. 1997, was a severability clause.

Applicability: Section 173, Ch. 480, L. 1997 provided: "(1) [Sections 1 through 156] [Title 42, chapters 1 through 7, and Title 52, chapter 8, part 1] apply to proceedings commenced on or after October 1, 1997.

(2) A petition for adoption filed prior to October 1, 1997, is governed by the law in effect at the time the petition was filed.

(3) The putative father registry requirements apply to children born on or after October 1, 1997."

1995 Amendment: Chapter 18 at end substituted "40-8-126" for "40-8-122"; and made minor changes in style.

42-10-106. Certification as child with special needs.

Compiler's Comments

1999 Amendment: Chapter 21 throughout section substituted reference to child with special needs for reference to child who is "hard to place"; in first sentence of (3) after "dependent of a" deleted "voluntary" and in second sentence after "subsidy" deleted "such as recruitment of potential parents, use of adoption resource exchanges, and referral to appropriate specialized adoption agencies"; and made minor changes in style. Amendment effective October 1, 1999.

42-10-107. Eligibility for subsidy.

Compiler's Comments

1999 Amendment: Chapter 21 after "department" inserted "or a licensed child placement agency", after "adoptive family" deleted "is or may be financially unable to meet the special needs of a hard-to-place child as determined by the department", and after "adopts a" substituted "child with special needs" for "hard-to-place child"; and made minor changes in style. Amendment effective October 1, 1999.

42-10-108. Subsidy agreement.

Compiler's Comments

1999 Amendment: Chapter 21 in (1) substituted "a child with special needs" for "hard to place" and after "between the family" deleted "entering into the subsidized adoption"; in (2) at end of first sentence substituted "in the case of a child with a mental or physical handicap, until 21 years of age" for "for as long as the adopted child is the legal dependent of the adoptive parents and the child's condition continues"; and made minor changes in style. Amendment effective October 1, 1999.

42-10-109. Amount, duration, and scope of subsidy.

Compiler's Comments

1999 Amendment: Chapter 21 in first sentence of introduction after "other resources" deleted "including those of the adoptive parents"; in (1) at beginning deleted "in the case of a sibling relationship" and after "allowable for" inserted language concerning maintenance costs, child's personal incidentals, and maximum foster care rate; in (2) near beginning inserted "state"; and made minor changes in style. Amendment effective October 1, 1999.

42-10-121. Definitions.

Compiler's Comments

Codification Not Followed: Section 9, Ch. 274, L. 1991, provided that this section was intended to be codified as an integral part of Title 53, ch. 4, part 3. The Code Commissioner has codified this section as part of Title 52, ch. 2, part 5, to reflect the renumbering of former Title 53, ch. 4, part 3, as Title 52, ch. 2, part 5 (renumbered Title 42, ch. 10, part 1).

Effective Date: Section 10, Ch. 274, L. 1991, provided that this section is effective on passage and approval. Approved March 29, 1991.

42-10-122. Authorization.

Compiler's Comments

1995 Amendment: Chapter 546 at beginning substituted "department of public health and human services is" for "department of family services and the department of social and rehabilitation services are". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Source: Based on "Suggested Act Authorizing an Adoption Assistance Compact and Procedures for Interstate Services Payments" of the (American Public Welfare Association providing secretariat services to) Association of Administrators of the Interstate Compact on Adoption and Medical Assistance, Inc.

Preamble: The preamble attached to Ch. 274, L. 1991, provided: "WHEREAS, the Legislature finds that there is a need for more effective administration of adoption assistance for families who have moved to or from the State of Montana; and

WHEREAS, the Legislature finds that the Department of Family Services and the Department of Social and Rehabilitation Services [functions now consolidated in Department of Public Health and Human Services] should provide procedures for administering interstate adoption assistance and that those Departments should enter into interstate compacts on adoption assistance to provide a framework for more effective administration of adoption assistance for these families.

THEREFORE, the Legislature finds it appropriate to pass legislation providing authority for those procedures, interstate compacts, and related adoption agreements."

Codification Not Followed: Section 9, Ch. 274, L. 1991, provided that this section was intended to be codified as an integral part of Title 53, ch. 4, part 3. The Code Commissioner has codified this section as part of Title 52, ch. 2, part 5, to reflect the renumbering of former Title 53, ch. 4, part 3, as Title 52, ch. 2, part 5 (renumbered Title 42, ch. 10, part 1).

Effective Date: Section 10, Ch. 274, L. 1991, provided that this section is effective on passage and approval. Approved March 29, 1991.

42-10-123. Federal participation.

Compiler's Comments

1997 Amendment: Chapter 42 near end substituted "Title IV-E" for "Title IV (e)". Amendment effective March 12, 1997.

1995 Amendment: Chapter 546 near beginning substituted "department of public health and human services" for "department of family services and the department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

Codification Not Followed: Section 9, Ch. 274, L. 1991, provided that this section was intended to be codified as an integral part of Title 53, ch. 4, part 3. The Code Commissioner has codified this section as part of Title 52, ch. 2, part 5, to reflect the renumbering of former Title 53, ch. 4, part 3, as Title 52, ch. 2, part 5 (renumbered Title 42, ch. 10, part 1).

Effective Date: Section 10, Ch. 274, L. 1991, provided that this section is effective on passage and approval. Approved March 29, 1991.

42-10-124. Effect of compacts.

Compiler's Comments

Codification Not Followed: Section 9, Ch. 274, L. 1991, provided that this section was intended to be codified as an integral part of Title 53, ch. 4, part 3. The Code Commissioner has codified this section as part of Title 52, ch. 2, part 5, to reflect the renumbering of former Title 53, ch. 4, part 3, as Title 52, ch. 2, part 5 (renumbered Title 42, ch. 10, part 1).

Effective Date: Section 10, Ch. 274, L. 1991, provided that this section is effective on passage and approval. Approved March 29, 1991.

42-10-125. Compacts — required contents.

Compiler's Comments

Codification Not Followed: Section 9, Ch. 274, L. 1991, provided that this section was intended to be codified as an integral part of Title 53, ch. 4, part 3. The Code Commissioner has codified this section as part of Title 52, ch. 2, part 5, to reflect the renumbering of former Title 53, ch. 4, part 3, as Title 52, ch. 2, part 5 (renumbered Title 42, ch. 10, part 1).

Effective Date: Section 10, Ch. 274, L. 1991, provided that this section is effective on passage and approval. Approved March 29, 1991.

42-10-126. Compacts — optional contents.

Compiler's Comments

Codification Not Followed: Section 9, Ch. 274, L. 1991, provided that this section was intended to be codified as an integral part of Title 53, ch. 4, part 3. The Code Commissioner has codified this section as part of Title 52, ch. 2, part 5, to reflect the renumbering of former Title 53, ch. 4, part 3, as Title 52, ch. 2, part 5 (renumbered Title 42, ch. 10, part 1).

Effective Date: Section 10, Ch. 274, L. 1991, provided that this section is effective on passage and approval. Approved March 29, 1991.

42-10-127. Medical benefits — rules.

Compiler's Comments

1995 Amendment: Chapter 546 in (2) and in (3), in two places, substituted "department of public health and human services" for "department of social and rehabilitation services". Amendment effective July 1, 1995.

Saving Clause: Section 571, Ch. 546, L. 1995, was a saving clause.

1991 Statement of Intent: The statement of intent attached to Ch. 274, L. 1991, provided: "A statement of intent is required for this bill because [section 7(3)] [42-10-127(3)] grants rulemaking authority to the department of social and rehabilitation services [now department of public health and human services] for the purpose of establishing procedures for continuing state medical assistance benefits in addition to federally aided benefits in certain cases. The legislature intends, as a matter of policy, that when the state provides medical assistance benefits in addition to the federal benefits available under an adoption assistance agreement, the benefits must continue when a child relocates to a state that has agreed under a compact to reciprocate by providing additional nonfederal coverage to children moving to Montana. It is intended that the medicaid card may be used as the identification for these services as well as for the true "medicaid" elements of the state program. It is intended that [section 7(3)] [42-10-127(3)] provide a means of improving, as far as possible, the chances for handicapped and other "hard-to-place" children to gain family settings for their development. It is intended that in those instances in which the plan for a particular child is adoption (with assistance) by parents who already live in another state or move there, the department of social and rehabilitation services [now department of public health and human services] may provide the full measure of its services to these special-needs children. It is intended that out-of-state adoptions be an additional resource for Montana children that would not be available if the department of family services [now department of public health and human services] had to rely on finding families for special-needs children on an entirely local basis."

Codification Not Followed: Section 9, Ch. 274, L. 1991, provided that this section was intended to be codified as an integral part of Title 53, ch. 4, part 3. The Code Commissioner has codified this section as part of Title 52, ch. 2, part 5, to reflect the renumbering of former Title 53, ch. 4, part 3, as Title 52, ch. 2, part 5 (renumbered Title 42, ch. 10, part 1).

Effective Date: Section 10, Ch. 274, L. 1991, provided that this section is effective on passage and approval. Approved March 29, 1991.

42-10-128. Fraudulent obtaining of public assistance.

Compiler's Comments

Codification Not Followed: Section 9, Ch. 274, L. 1991, provided that this section was intended to be codified as an integral part of Title 53, ch. 4, part 3. The Code Commissioner has codified this section as part of Title 52, ch. 2, part 5, to reflect the renumbering of former Title 53, ch. 4, part 3, as Title 52, ch. 2, part 5 (renumbered Title 42, ch. 10, part 1).

Effective Date: Section 10, Ch. 274, L. 1991, provided that this section is effective on passage and approval. Approved March 29, 1991.

TITLE 43
RESERVED

42-10-128. Fraudulent obtaining of public assistance.

Compiler's Comments

Codification Not Followed: Section 9, Ch. 274, L. 1991, provided that this section was intended to be codified as an integral part of Title 53, ch. 4, part 3. The Code Commissioner has codified this section as part of Title 52, ch. 2, part 5, to reflect the renumbering of former Title 53, ch. part 3, as Title 52, ch. 2, part 5 (renumbered Title 42, ch. 10, part 1).

Effective Date: Section 10, Ch. 274, L. 1991, provided that this section is effective on passage and approval. Approved March 29, 1991.